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The Good Faith Exception: The Seventh Circuit Limits the Exclusion Rule in the Administrative Context

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THE GOOD FAITH EXCEPTION: THE SEVENTH CIRCUIT LIMITS THE EXCLUSIONARY RULE IN THE ADMINISTRATIVE CONTEXT

INTRODUCTION

The purpose of the Occupational Safety and Health Act of 1970 (Act)[1] is to assure employees safe and healthful conditions in the workplace.[2] One method of enforcing the safety standards set forth in the Act is through workplace inspections conducted by Compliance Safety and Health Officers of the Department of Labor.[3] Compliance officers, like other law enforcement officers, are constrained in the scope and mode of their searches by the dictates of the fourth amendment.[4]

One such fourth amendment constraint was announced in *Marshall v. Barlow's, Inc.*,[5] where the United States Supreme Court held that the fourth amendment implicitly requires officers of the Occupational Safety and Health Administration (OSHA) to obtain search warrants prior to a non-consensual inspection of an employer's place of business.[6] Evidence seized in violation of this fourth amendment constraint is generally suppressed pursuant to the exclusionary rule.[7]

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1. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651-678 (1982)). For the legislative history *see generally* S. REP. NO. 1292, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177-5202.

2. 29 U.S.C. § 651(b) (1982) (stated purpose of the Act is to "preserve the country's human resources"); *see also* Cape & Vineyard Div. of New Bedford Gas v. OSHRC, 512 F.2d 1148 (1st Cir. 1975).

3. *See* 29 U.S.C. § 657(a) (1982). This section reads in pertinent part that "the Secretary [of Labor], upon presenting appropriate credentials . . . is authorized—(1) to enter without delay and at reasonable times any . . . workplace . . . and (2) to inspect and investigate . . . and to question privately. . . ." Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) held this section unconstitutional insofar as it purports to authorize inspection of business premises without a warrant or its equivalent. *See also* 29 C.F.R. § 1903.3 (1982).

4. U.S. CONST. amend. IV. For the text of the fourth amendment, *see infra* note 11. *See also* West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950, 957-58 (11th Cir. 1982).

5. 436 U.S. 307 (1978).

6. *Id.* at 324-25.

7. Perhaps the most succinct definition of the exclusionary rule is found in Mapp v. Ohio, 367 U.S. 643 (1961), where the Court, in extending the exclusionary rule to the states held "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.

On July 5, 1984, the United States Supreme Court announced three decisions that will have a profound effect on the exclusionary rule. In United States v. Leon, 52 U.S.L.W. 5155, *rev'g* 701 F.2d 187 (9th Cir. 1983), the Court held that the exclusionary rule should not be applied to bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate but ultimately found to be invalid. In Massachusetts v. Sheppard, 52 U.S.L.W. 5177, *rev'g and remanding* 387 Mass. 488, 441 N.E.2d 725 (1982), the Court held that the exclusionary rule should not apply where the searching officer acts in objectively reasonable reliance on a warrant issued by a neutral magistrate that is subsequently found to be invalid because of a technical mistake. In Immigration and Naturalization Service v. Lopez-Mendoza, 52 U.S.L.W. 5190 (U.S. July 5, 1984), *rev'g* 705 F.2d 1059 (9th Cir. 1983), the Court held that a deportation proceeding is a purely civil action in which the exclusionary rule does not apply.

There are several other situations in which illegally seized evidence will not be suppressed.

The Seventh Circuit Court of Appeals, however, recently reassessed the imposition of the exclusionary rule in cases where evidence is seized pursuant to an invalid warrant. In *Donovan v. Federal Clearing Die Casting Co.*,[8] the Seventh Circuit held that evidence seized pursuant to a search warrant, subsequently found to be invalid, is admissible under the *good faith exception* if the administrative officer acted reasonably and in good faith in conducting the inspection.[9]

In light of the Seventh Circuit's newly created limitation on the scope of the exclusionary rule, this comment analyzes the *Federal* decision first, by briefly outlining the case's relevant legal background; second, by presenting the material facts of the case; third, by synthesizing the reasoning in both majority and dissenting opinions; and finally, by exploring the logic of the decision from constitutional, precedential, and policy perspectives.[10]

I. BACKGROUND

A. *Constitutional Requirements*

The fourth amendment protects an individual's privacy expectation against unlawful government intrusion by requiring that searches be both reasonable and based upon probable cause.[11] Aside from certain exceptional situations,[12] the search warrant is the mechanism intended to assure that these requirements are met.[13] Moreover, fourth amendment protections govern searches not only of individuals but also of commercial enterprises.[14]

In 1925, the Supreme Court indicated that probable cause to conduct a

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See, e.g., United States v. Havens, 446 U.S. 620 (1980) (permitting the use of illegally seized evidence to impeach defendant's testimony); United States v. Ceccolini, 435 U.S. 268 (1978) (permitting use of illegally seized evidence when initial illegality has become attenuated); United States v. Janis, 428 U.S. 433 (1976) (illegally seized evidence excluded from state criminal proceeding not excluded from federal civil proceeding); United States v. Calandra, 414 U.S. 338 (1974) (illegally seized evidence not excluded at federal grand jury proceedings).

8. 695 F.2d 1020 (7th Cir. 1982).

9. *Id.* at 1023.

10. A meaningful discussion of the good faith exception to the exclusion of evidence obtained in an administrative search is possible only in light of the rule's criminal law background; therefore, this comment will also address the background of the exclusionary rule in the criminal context.

11. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

12. *See infra* note 18.

13. The Supreme Court has consistently recognized that nonconsensual warrantless searches are presumptively invalid. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); Stoner v. California, 376 U.S. 483 (1964).

14. See v. City of Seattle, 387 U.S. 541, 543 (1967). In *See* the Court stated:

> [T]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

Id. at 543.

search exists if the facts and circumstances within the officer's knowledge would be sufficient to warrant a man of reasonable caution to believe that the alleged illegal action is occurring in the place he intends to search.[15] More than fifty years later, the *Barlow's* court addressed the issue of probable cause in the administrative context by stating that it may consist of either showing that the inspection was conducted pursuant to current administrative standards or that there existed specific evidence of the alleged violation.[16] The *Barlow's* court also stated that probable cause in the criminal law context is not required for an OSHA inspection, instead a standard less stringent than the criminal standard would suffice.[17]

Apart from the limited exceptional classes of cases,[18] a warrantless search has been considered inherently unreasonable.[19] In determining whether a warrant is a necessary safeguard for the protection of constitutional rights in the administrative search context, the Supreme Court has weighed the public's interest in effective law enforcement against the individual's privacy interest.[20] Hence, given the lesser standard of probable cause, and the magistrate's freedom to apply this balancing of interests, the Supreme Court arguably grants the individual less protection under the fourth amendment in the administrative search context than in the criminal context.

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15. Carroll v. United States, 267 U.S. 132, 162 (1925). A search of an automobile for liquor, subject to seizure under the Prohibition Act, does not violate the fourth amendment if made upon probable cause; that is, "upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction. . . ." *Id.* at 149.

16. 436 U.S. at 320-21. For a more detailed discussion of probable cause see Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978).

17. The *Barlow's* Court explained the applicable standard of probable cause as follows:

> Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S., at 538. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

436 U.S. at 320-321 (footnote omitted).

18. *See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972) (permitting warrantless searches of gun dealerships). Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (permitting warrantless searches of liquor dealerships). Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978) (permitting warrantless searches of massage parlors for building code violations).

19. *Barlow's*, 436 U.S. at 312.

20. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 541 (1967). In *Camara* the Court stated:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Id. at 534. *See also* See v. City of Seattle, 387 U.S. 541 (1967).

B. *The Exclusionary Rule and Its Rationale*

The exclusionary rule, or suppression doctrine, is a judicially created remedy designed to safeguard constitutional rights by suppressing evidence obtained in violation of the reasonableness and probable cause requirements of the fourth amendment.[21] This rule was first applied in 1914 to illegal searches conducted by federal officials in *Weeks v. United States*[22] and was applied to the states in 1961 by *Mapp v. Ohio*.[23]

The exclusionary rule has been historically based on one of three rationales: to advance a personal constitutional right,[24] to preserve judicial integrity,[25] and most important, to deter official misconduct.[26] Recently, however, both the personal constitutional right theory and the judicial integrity arguments have failed to persuade the Court to suppress evidence.[27] In *United States v. Calandra*[28] the Court elevated deterrence to prime importance and refused to accept the dissent's assertion that the exclusionary rule inheres in the fourth amendment's limitation on unlawful searches and seizures and is founded upon the imperative of judicial integrity.[29] The *Calandra* decision laid the foundation for the current judicial trend of narrowing the scope of situations in which the exclusionary rule applies.[30]

Two years after *Calandra*, the Court in *United States v. Janis*[31] refused to apply the exclusionary rule in a federal civil tax proceeding where the evidence had been illegally seized by a criminal law enforcement agent of a state government.[32] In the majority opinion, Justice Blackmun embarked

21. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347-48 (1974).

22. 232 U.S. 383 (1914). The exclusionary rule was first recognized by way of dictum in Boyd v. United States, 116 U.S. 616, 638 (1886).

23. 367 U.S. 643 (1961).

24. *Weeks*, 232 U.S. at 398.

25. Elkins v. United States, 364 U.S. 206, 223 (1960); Olmstead v. United States, 277 U.S. 438, 469-485 (1928) (Holmes and Brandeis J.J., dissenting), *overruled on other grounds*, Katz v. United States, 389 U.S. 347, 353 (1967). *See also* Commonwealth v. Sheppard, 387 Mass. 488, 500-03, 441 N.E.2d 725, 737-43 (1982) (Liacos, J., concurring), *rev'd*, 52 U.S.L.W. 5177 (U.S. July 5, 1984).

26. In *Calandra*, Justice Powell observed:

> The rule's primary purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

414 U.S. at 347. *See also* Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

27. *See, e.g.*, United States v. Janis, 428 U.S. 433, 458 n.35 (1976) (considerations of judicial integrity are subordinate to deterrence and do not require exclusion of the evidence). *See also* S. REP. NO. 350, 98th Cong. 2d Sess. 3 n.21 (1983), where the Senate Judiciary Committee expressly rejected the proposition that the exclusionary rule is required by the Constitution.

28. 414 U.S 338 (1974) (exclusionary rule does not extend to grand jury proceedings).

29. *Id.* at 355 (Brennan, J., dissenting). It is the view of Justice Brennan that the exclusionary rule enables "the judiciary to avoid the taint of partnership in official lawlessness" and assures the people "that the government would not profit from the lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *Id.* at 357.

30. *See supra* note 7.

31. 428 U.S. 433 (1976).

32. *Id.* at 454. In Immigration and Naturalization Service v. Lopez-Mendoza, 52 U.S.L.W. 5190 (U.S. July 5, 1984), the Court held that a deportation proceeding is a purely civil action in which the exclusionary rule does not apply. If the exclusionary rule does not

upon an exhaustive discussion of the empirical inconclusiveness surrounding the exclusionary rule's impact on deterrence of unconstitutional police conduct.[33] Justice Blackmun concluded that exclusion in a federal civil proceeding would be unlikely to deter unlawful but good faith conduct of state police.[34] The *Janis* holding, however, stopped short of concluding that deterrence of official abuse will never be advanced by excluding evidence obtained pursuant to a search warrant executed in good faith but subsequently found to be invalid.

C. *The Quasi-Criminal Distinction*

In addition to constitutional considerations, judicial integrity, and deterrence, courts have also considered whether evidence obtained from an illegal search will give rise to a "quasi-criminal" penalty as opposed to a civil penalty in a non-criminal case.[35] Although OSHA rarely has cause to impose criminal penalties,[36] the quasi-criminal penalties it does impose can be severe, as exemplified by the $34,000 in penalties imposed in *Federal*. Generally, courts seem more willing to apply the exclusionary rule in situations where the threatened penalty is "quasi-criminal" instead of civil.[37] Apparently, this distinction is made because "quasi-criminal" penalties may involve punishment which is comparable to or greater than some criminal penalties.[38]

The penalties which may be levied against an employer for violating OSHA requirements are found within the Act itself.[39] The plain language of the Act distinguishes only between civil and criminal penalties[40] and

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apply to deportation proceedings because they are civil actions, it should not, consequently, apply in OSHA proceedings which are no less civil, nor more criminal, in nature than deportation proceedings.

33. *Id.* at 447-60.

34. *Id.* at 454.

35. *See, e.g.*, Savina Home Industries v. Secretary of Labor, 594 F.2d 1358, 1362 n.6 (10th Cir. 1979). The term "quasi-criminal" has been defined as relating to civil laws which, in general, "provide for civil money penalties, forfeitures of property," and the levying of punitive "disabilities such as the loss of a professional license or public employment." Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 381 (1976). *See also* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); Boyd v. United States, 116 U.S. 616, 634 (1886). "[S]uits for penalties and forfeitures incurred by the commission of offences [sic] against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution. . . ."

36. The criminal penalty provided for under the Act states that:

> Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

29 U.S.C. § 666(e) (1982).

37. *See, e.g.*, One 1958 Plymouth Sedan, 380 U.S. at 700-702; *Savina Home Industries*, 594 F.2d at 1362.

38. One 1958 Plymouth Sedan, 380 U.S. at 701.

39. 29 U.S.C. § 666(a)-(e) (1982).

40. 29 U.S.C. § 666(a) (1982) (willful or repeated violations may be assessed a civil penalty of not more than $10,000 for each violation). 29 U.S.C. § 666(e) (1982) (violations causing

makes no reference to "quasi-criminal penalties." Various commentators and judges, however, have concluded that "penalties having both certain penal and civil aspects appear on balance to be 'quasi-criminal'."[41]

D. *The Good Faith Exception*

The *Federal* decision assumes major administrative and constitutional significance because it represents the first time a court has directly applied a good faith exception to the exclusion of evidence in an administrative law context.[42] The good faith exception to the exclusionary rule, if applied at all, may apply only when an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief.[43] Under the good faith exception, if a judge finds that the officer reasonably conducted a search in good faith, the exception to the exclusionary rule is invoked and the fruits of the invalid search are admissible.[44]

The good faith exception was not adopted by an appellate court until 1980 when the Fifth Circuit announced the new rule in *United States v. Williams*.[45] The *Williams* case, however, did not involve an administrative search; rather, it involved heroin seized in a search made incidental to a criminal arrest.[46]

Judges Gee and Vance, in part two of the *Williams* opinion, stated that the evidence seized was valid regardless of whether the defendant's arrest was technically correct.[47] The court found that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized."[48]

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death may be punishable by a fine of up to $10,000 or by imprisonment of not more than six months).

41. Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer has Blundered?*, 1981 DUKE L.J. 667. *See also Savina Home Industries*, 594 F.2d at 1362 n.6 (10th Cir. 1979).

42. The exception was first recognized by way of dicta in *Robberson Steel Co. v. OSHRC*, 645 F.2d 22 (10th Cir. 1980).

43. *See supra* note 7. *See* generally Ball, *supra* note 16, at 635.

44. The Senate Committee on the Judiciary has recently issued a report on Senate Bill 1764, the Exclusionary Rule Limitation Act of 1983, which proposes to enact a good faith exception to the exclusionary rule at section 3505 of title 18, United States Code. The new section would read:

> Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

S. REP. NO. 350, 98th Cong. 2d Sess. 1-2 (1983).

45. 622 F.2d 830 (5th Cir. 1980) (en banc) (alternative holding), *cert. denied*, 449 U.S. 1127 (1980).

46. *Id.* at 833.

47. *Id.* at 840.

48. *Id.* In a footnote, the judges elaborated upon the prerequisites for the invocation of the exception and stated:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon

The *Williams* court based its decision on the deterrence rationale stating that the exclusionary rule exists to deter flagrant abuses of police search power and not reasonable good-faith ones.[49] The majority expounded upon the 1975 Supreme Court case of *Brown v. Illinois*[50] where Justice Powell, in a concurring opinion, distinguished between flagrant police abuses of the fourth amendment and mere "technical violations."[51] Justice Powell conceded that the fruits of an abusive or flagrant fourth amendment violation must be surrendered to demands of judicial integrity and deterrence; however, where mere technical violations exist, neither of these considerations justify the exclusion of reliable and probative evidence.[52] Setting forth examples of technical violations, the *Williams* court specifically included the situation where an agent relies on a warrant, issued by a neutral magistrate, which is later invalidated.[53] Two other examples of technical violations cited by the *Williams* court include reliance on a statute which is later ruled unconstitutional,[54] and reliance on a court precedent which is later overruled.[55]

E. *The Current Confusion*

Only a handful of circuits have addressed the issue of the applicability of the exclusionary rule in administrative searches, and among those that recognize the applicability, even fewer have extended their analysis to include the good faith exception. In 1978, for example, the Ninth Circuit suggested that the exclusionary rule does not apply to OSHA proceedings.[56] The court rejected the idea that the exclusion of evidence is a personal constitutional right, stating that under the particular facts of the case, the exclusionary rule did not apply.[57]

In contrast to the Ninth Circuit, the Tenth Circuit in *Savina Home Industries v. Secretary of Labor*[58] suggested that the exclusionary rule could apply to OSHA inspections violative of the warrant requirements announced in *Bar-*

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articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify.

Id. at 841 n.4a.

49. *Id.* at 840.

50. 422 U.S. 590 (1975).

51. *Id.* at 611-12 (Powell, J., concurring in part).

52. *Id.*

53. *See Williams*, 622 F.2d at 841.

54. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31 (1979).

55. *Williams*, 622 F.2d at 841.

56. Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689 (9th Cir. 1978). The court stated: "that the Supreme Court has never applied the exclusionary rule in a civil proceeding suggests that the rule should not be applied to OSHA proceedings." *Id.* (citing United States v. Janis, 428 U.S. 433 (1976); *see also supra* note 32.

57. The Ninth Circuit specifically held that retroactive application of the exclusionary rule would have no deterrent effect on future unlawful police conduct and therefore imposition of the rule would be purposeless. *Todd*, 586 F.2d at 690. The court specifically stated, however, that it did not decide whether the exclusionary rule would apply "to an OSHA search in a proper case." *Id.* at 691.

58. 594 F.2d 1358 (10th Cir. 1979).

low's.[59] The *Savina* court reasoned that, in the absence of an exclusionary sanction, a conclusion that an inspection violated the fourth amendment would be of no practical significance.[60] In accord with the *Savina* dictum is a 1982 Second Circuit opinion which stated that "the exclusionary rule can be properly and beneficially applied in those civil proceedings where it has a realistic prospect of achieving marginal deterrence."[61]

Adding to this discordance is the inconsistency among the circuits on the issue of whether a good faith exception applies to evidence seized illegally during an OSHA inspection. The Tenth Circuit was the first to recognize the exception, as originally stated by *Williams*[62] in the criminal context, as being applicable to the administrative context. In *Robberson Steel Co. v. OSHRC*[63] the court stated in dictum, that the good faith exception is equally applicable in civil OSHA enforcement cases.[64]

Shortly after *Robberson*, the Eleventh Circuit, in *Donovan v. Sarasota Concrete Co.*,[65] analyzed an Occupational Safety and Health Review Commission (OSHRC) decision which rejected the possibility of applying the good faith exception.[66] The court concluded that the Commission properly rejected the application of the exclusionary rule.[67] The court rejected the good faith argument, at least as applied to the *Sarasota* facts, by distinguishing *Williams* on the basis that it involved a criminal rather than a civil action, and because *Williams* involved a search made incidental to an arrest, not a search conducted pursuant to an invalid warrant.[68]

II. FACTS

Against this highly inconsistent and rapidly developing background, the Seventh Circuit decided *Donovan v. Federal Clearing Die Casting Co.*. The incidents which led up to the Seventh Circuit's decision began on January 7, 1980, when Natalio Alamillo had both hands severed while working on a punch press at the Federal Clearing Die Casting Co. (Federal).[69] Two days later, the *Chicago Sun-Times* printed an article describing a twenty-three hour operation during which surgeons reattached Alamillo's hands. The article stated that Alamillo's family members were uncertain how the injury took place; officials at Federal refused to comment on the cause of the accident.[70]

59. *Id.* at 1363.

60. *Id.* at 1361.

61. Tirado v. Commissioner, 689 F.2d 307, 314 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1256 (1983). The *Tirado* court rejected the civil/criminal distinction as a basis for invoking the rule by stating: "A test for the exclusionary rule that turns on the civil or criminal character of the proceeding does not comport with an objective of achieving substantial deterrence." *Id.* at 313-14.

62. 622 F.2d at 830.

63. 645 F.2d 22 (10th Cir. 1980).

64. *Id.* at 22.

65. 693 F.2d 1061 (11th Cir. 1982).

66. 9 O.S.H. Cas. (BNA) 1608 (1981), *aff'd sub nom.*, Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

67. 693 F.2d at 1072 (11th Cir. 1982).

68. *Id.*

69. 695 F.2d at 1021.

70. *Id.* at 1026 (Pell, J., dissenting).

On January 10, the *Sun-Times* printed a picture of the victim with the doctor who headed the surgery team. The caption under the picture included a statement from the OSHA area director that referred to past punch press violations found at Federal and expressed OSHA's intent to make an "unannounced" inspection of the plant.[71]

On the same day, an OSHA compliance officer attempted a warrantless search of the Federal premises but was refused entry.[72] Immediately thereafter the agent sought and obtained approval of a warrant application by a United States magistrate.[73] On the following day, OSHA agents, with warrant in hand, again attempted a search of Federal, but were again denied entry on the ground that the warrant had been improperly issued.[74] Federal subsequently filed a motion to quash the warrant in the district court and OSHA filed a civil contempt petition against Federal.[75]

Both matters were decided by the United States District Court for the Northern District of Illinois, which sustained the warrant's validity, found Federal in civil contempt, and ordered the inspection of Federal's premises.[76] Soon thereafter, Federal appealed the district court's decision to the Seventh Circuit which, seventeen months later, dissolved the warrant and reversed the ordered inspection, holding that the initial warrant had been issued without probable cause.[77]

During the interim, however, OSHA conducted a wall-to-wall inspection of Federal's premises pursuant to the district judge's order. The inspection revealed the existence of sixteen serious, five willful, five repeated, and two other-than-serious violations.[78] As a result, OSHA proposed penalties of $35,400.[79] Federal contested these citations and the case was docketed to be heard by an administrative law judge (ALJ).

While this administrative case was pending, the earlier appeal to the Seventh Circuit was decided on the issue of the warrant's validity.[80] In response, Federal filed with the administrative court a motion to suppress evidence, and in the alternative a motion to dismiss. The ALJ granted the motion to suppress, thereby suppressing all evidence seized, and dismissed the citations.[81] In ruling on the motion, the ALJ relied on *Secretary of Labor v.*

71. Brief for the Respondent at 2, Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982).

72. Federal, 695 F.2d at 1021. The *Barlow's* Court discounted Congress' finding that the success of OSHA depends upon surprise inspections, thereby creating an obvious disincentive for businessmen to consent to warrantless inspections 436 U.S. at 319-20.

73. *Federal*, 695 F.2d at 1021.

74. *Id.*

75. Brief for the Respondent at 3.

76. *Id.* at 4.

77. Donovan v. Federal Clearing Die Casting Co., 655 F.2d 793 (7th Cir. 1981).

78. *Id.* at 1021 n.2. For further discussion on the OSHA penalties see 29 U.S.C. § 666 (1982) (types of violations and the amount of penalties attached thereto); 29 C.F.R. 1903.14 (1983) (issuance of citations by the Area Director and de minimus violations). *See also* California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975) (per curiam).

79. 695 F.2d at 1021 n.2. *See* 29 C.F.R. § 1903.15 (1983) (explanation of procedure regarding proposal of penalties).

80. Donovan v. Federal Clearing Die Casting Co., 655 F.2d 793 (7th Cir. 1981).

81. Brief for the Respondent at 4.

Sarasota Concrete Co.[82] which held that an ex-employee's complaint to OSHA of a specific hazard did not establish sufficient probable cause for the issuance of an inspection warrant applicable to the entire workplace; and, therefore, evidence seized pursuant to such a warrant should be suppressed.[83] The Secretary of Labor petitioned for administrative review of the ALJ's decision but was rejected and the decision thereby became final in the administrative process.[84]

The Secretary then appealed directly to the Seventh Circuit.[85] The appeal relied upon *United States v. Williams*.[86] The Secretary principally argued that the ALJ's decision should be reversed because "the Secretary reasonably and in good faith believed the invalid warrant under which he conducted his inspection was proper."[87] In response, Federal argued that the good faith exception announced in *Williams* did not apply in OSHA proceedings.[88]

The Seventh Circuit[89] reversed the ALJ and invoked for the first time, in an administrative law context, the good faith exception to the exclusionary rule. The court held that evidence shall not be suppressed under the exclusionary rule when it is discovered in the course of actions taken in good faith and in the reasonable, though mistaken, belief that the actions are authorized.[90]

III. REASONING

A. *The Majority Opinion*

Chief Judge Cummings' majority opinion held that the evidence obtained pursuant to a warrant upheld by the district court and provisionally upheld by the court of appeals, but invalidated more than one year later, was admissible under the good faith exception to the exclusionary rule.[91] The opinion was primarily premised on the idea that an inspection made pursuant to a district judge's orders amounts to a reasonable and good faith inspection.[92]

From this starting point,[93] the majority relied primarily on two cases to arrive at its conclusion. First, the court cited *Todd Shipyards Corp. v. Secretary of Labor*[94] as authority for the proposition that the exclusionary rule should not

82. 9 O.S.H. Cas. (BNA) 1608.
83. *Id.*
84. 695 F.2d at 1021 n.1. *See* 29 U.S.C. § 661(i) (1982).
85. 695 F.2d at 1021. *See* 29 U.S.C. § 660(b) (1982).
86. 622 F.2d 830 (5th Cir. 1980).
87. Brief for the Petitioner at 6.
88. Brief for the Respondent at 36-38.
89. Chief Judge Cummings wrote the opinion of the court in which Senior District Judge Dumbauld joined.
90. 695 F.2d at 1023.
91. *Id.*
92. *Id.* at 1025.
93. The majority first rejected Federal's preliminary arguments of res judicata and failure to exhaust administrative remedies. 695 F.2d at 1022.
94. 586 F.2d 683 (9th Cir. 1978).

be applied to OSHA proceedings.[95] Second, the court cited *United States v. Williams*[96] for the proposition that a good faith exception already exists in the criminal law arena.[97] The court quoted at length from the *Williams* opinion; the most relevant part stated:

> [T]he exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high. . . .[98]

In further support of its position, the majority cited dicta from the three paragraph opinion in *Robberson Steel Co. v. OSHRC* where the Tenth Circuit noted that the *Williams* reasoning applies to civil OSHA enforcement proceedings.[99] Furthermore, the court reasoned that an application of the exclusionary rule would preclude both the issuance of an order to abate the hazardous working conditions and the possibility of assessing subsequent enhanced penalties[100] for non-compliance with the Act.[101]

The court also reasoned that if the exclusionary rule were applied, OSHA might not be able to obtain a subsequent warrant because "the original probable cause might be too stale or non-existent."[102] Moreover, the additional delay resulting from an application of the exclusionary rule could allow Federal to alter or disguise the violations, thus thwarting the purpose of the Act.[103]

The majority also noted that there are already alternatives to the exclusionary rule that serve to deter OSHA violations of an employer's constitutional rights. These include: the requirement to secure the approval of a neutral magistrate before OSHA may inspect premises over an employer's objections; the employer's right to move to quash a warrant prior to its execution; and, the ability of an employer to refuse entry pursuant to a warrant unless the Secretary prevails in a civil contempt proceeding.[104]

Finally, the majority rejected as irrelevant the deterrence argument and stated that "good-faith, reasonably based violation[s] of this type cannot be deterred."[105] The majority summed up by stating that the judicially approved inspection warrant, coupled with the delay before its execution, "demonstrates the Secretary's good faith, the reasonableness of his belief that the warrant was proper, and his caution before executing the warrant."[106]

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95. *Federal*, 695 F.2d at 1024.
96. 622 F.2d 830.
97. 695 F.2d at 1023.
98. *Id.* at 1023 (quoting *Williams*, 622 F.2d at 840).
99. *Robberson*, 645 F.2d 22 (10th Cir. 1980) (per curiam).
100. *See* 29 U.S.C. § 666(a) (1982).
101. *Federal*, 695 F.2d at 1024.
102. *Id.*
103. *Id.* (citing *Barlow's*, 436 U.S. 307, 316 (1980)).
104. 695 F.2d at 1024.
105. *Id.* (citing United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973)).
106. 695 F.2d at 1024.

B. *The Dissenting Opinion*

Judge Pell's dissent represents a more detailed analysis of the applicability of the exclusionary rule and good faith exception.[107] His analysis is divided into two general parts. The first part addresses the major principles relevant to the suppression issue,[108] and the second part rebuts specific points raised by the majority.[109]

Judge Pell's first major assertion was that OSHA lacked the requisite probable cause.[110] He noted that neither of the two *Sun-Times* articles concerning the accident made any reference to culpability on anyone's part, or to any particular OSHA violation.[111] Furthermore, he attacked the adequacy of the Department of Labor's Occupational Safety and Health Field Operations Manual which provides for OSHA investigation of "accidents involving significant publicity" as being an unreasonable administratively created basis of probable cause.[112] Judge Pell argued that the only "significant" aspect of the publicity regarded the extraordinary surgical effort and that there was not a "whisper of a basis" for OSHA concluding that the accident resulted from an OSHA violation.[113]

Judge Pell then addressed the relationship between the OSHRC and the non-administrative federal courts. In short, he opted for deference to the OSHRC decisions because it has special competence in the field of occupational safety and health and because a court "must therefore defer to the findings and analysis of the Commission unless such findings are without substantial basis in fact."[114]

Next, the dissent asserted that the evidence seized violated both statutory and constitutional restrictions.[115] Judge Pell, in support of this contention, cited section 658(a) of the Act[116] for the proposition that OSHA citations may only issue "upon inspection or investigation conducted pursuant to law."[117] He qualified the statute by quoting from the legislative history: "In carrying out inspection duties under this Act, the Secretary, of course, would have to act in accordance with applicable constitutional protections."[118] According to Judge Pell, these constitutional protections include vacating any OSHA citation not preceded by a lawfully conducted

107. *Id.* at 1025 (Pell, J., dissenting).

108. *Id.* at 1026-29.

109. *Id.* at 1029-33.

110. Judge Pell preliminarily maintained that the case was barred by res judicata, that the Secretary of Labor did not exhaust his administrative remedies, and that it is not proper for a court of appeals to "relegate the exclusionary rule to dodo status" when the Supreme Court has not chosen to do so. *Id.* at 1025-26. In retrospect, Judge Pell might agree that such status has since been conferred.

111. *Id.* at 1026-27.

112. *Id.* at 1027.

113. *Id.*

114. *Id.*

115. *Id.* at 1028.

116. 29 U.S.C. § 658(a) (1982).

117. 695 F.2d at 1028 (Pell, J., dissenting).

118. 695 F.2d at 1028 (Pell, J., dissenting) (quoting 116 CONG. REC. 38709 (1970) (statement of Rep. Steiger)).

inspection.[119]

Judge Pell also strongly argued for the applicability of the deterrence rationale by stating that exclusion of illegally obtained evidence in cases such as this will "have relatively rapid and widespread effects in ensuring that OSHA inspections are conducted in accordance with the fourth amendment."[120] The Judge then launched into a tirade composed of one-line judicial admonitions of past OSHA misconduct, thereby making clear his belief that OSHA had acted as unreasonably in the instant case as it had in the past.[121] The exclusion of evidence therefore was necessary to deter such abusive conduct. Furthermore, Judge Pell suggested that the compliance officer knew, or should have known, that his actions were unreasonable.[122]

In further support of his contention that OSHA acted unreasonably, Judge Pell noted that the inspection was plant-wide and not targeted exclusively at the operation that caused injury to the victim. He thereby suggested that an OSHA inspection, prompted by a punch press injury, should be restricted to that particular punch press.[123]

The second major part of Judge Pell's dissent responded to specific case law tendered by the majority. For example, the dissent rejected *Todd*[124] as not presenting any substantive authority for the proposition that the exclusionary rule should not be applied to OSHA proceedings, because *Todd* discussed the inapplicability of the exclusionary rule in dictum only.[125]

By advocating use of the exclusionary rule in an OSHA search case, Judge Pell implicitly chose not to recognize *United States v. Janis*[126] as creating a general bar to the exclusion of evidence in all proceedings which are arguably civil in nature. Instead, Judge Pell argued that there is an "absence of clear-cut authority" from the Supreme Court that the exclusionary rule should not be applied to OSHA proceedings.[127] The judge also alluded to the quasi-criminal nature of the OSHA penalties as a further basis for invoking the rule.[128] The *Todd* dicta was ultimately dismissed by Judge Pell as a "gratuitous suggestion" which "carries little weight."[129]

Judge Pell then turned to the keystone of the majority opinion, *United States v. Williams*.[130] He attacked the applicability of *Williams* on two

119. 695 F.2d at 1028 (Pell, J., dissenting).

120. 695 F.2d at 1028 (citing Secretary of Labor v. Sarasota Concrete Co., 9 O.S.H. Cas. (BNA) 1608, 1613 (1981), *aff'd sub. nom.*, Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982)).

121. 695 F.2d at 1028-29 (Pell, J., dissenting).

122. *Id.* at 1029.

123. *Id.* Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982), held that searches prompted by an employee complaint of a specific work area must be confined to that area and evidence obtained from areas other than those specified is subject to exclusion. *Id.* at 1068-70. Sarasota was not decided by the circuit court until after the *Federal* decision.

124. Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683 (9th Cir. 1978).

125. The *Todd* court held that the *Barlow's* decision did not have retroactive application, 586 F.2d at 689.

126. 428 U.S. 433 (1976).

127. 695 F.2d at 1030 (Pell, J., dissenting); *but cf. supra* note 32.

128. *Id.* at 1032.

129. *Id.*

130. 622 F.2d 830.

grounds. First, there was no factual resemblance between the two searches;[131] one was criminal, the other civil. Second, even if the facts were substantially similar, the instant facts failed to meet the *Williams* two-pronged test of good faith and reasonableness: "Believing in good faith that an accident has occurred is by no means a good faith belief that it was the result of a safety violation."[132] Consequently, Judge Pell asserted that he could not reasonably believe that on the basis of a "meager report of an accident in a newspaper" an agent could objectively and reasonably believe that a violation existed.[133]

Judge Pell then attacked the two Tenth Circuit cases relied upon by the majority:[134] *Robberson Steel Co. v. OSHRC*[135] and *Savina Home Industries, Inc. v. Secretary of Labor*.[136] He argued against the applicability of these cases by pointing out that the controlling issue in both was whether *Barlow's* could apply retroactively and not whether the exclusionary rule applies in non-criminal contexts.[137]

Finally, Judge Pell rejected the argument that OSHA may be unable to obtain another warrant because of staleness or non-existence of the original violations.[138] He reasoned that OSHA is free to conduct future inspections because there is no specific statutory time limit governing a subsequent search other than that the search be conducted "as soon as practicable after receiving a complaint."[139] Therefore, if the hazardous condition has disappeared through the mere passage of time or through affirmative action, OSHA's statutory purpose has been achieved. If, on the other hand, the hazardous conditions have not been abated, OSHA may always conduct another inspection.[140]

III. ANALYSIS

The problem presented by *Federal* is one characteristic of most illegal search cases; it depicts the conflict between the law enforcement agent's perceived need to inspect and the owner's expectation of privacy. In order to determine whether the *Federal* holding is sound, this analysis approaches the decision from constitutional, precedential, and societal (policy) perspectives.

131. 695 F.2d at 1030 (Pell, J., dissenting).
132. *Id.*
133. *Id.* at 1031.
134. *Id.* at 1031-32.
135. 645 F.2d 22 (10th Cir. 1980).
136. 594 F.2d 1358 (10th Cir. 1979).
137. 695 F.2d at 1037 (Pell, J., dissenting).
138. *Id.* at 1032-33.
139. 29 U.S.C. § 657(f) (1982).
140. 695 F.2d at 1037 (Pell, J., dissenting). The dissent does not adequately consider the fact that that a man lost both of his hands, albeit temporarily, and the loss may have been caused by the willful neglect of Federal. During the interim between accident and search, which Judge Pell considers harmless, employers can cover up the hazard thereby avoiding any possible penalty. Therefore, as long as an employer knows that any accident caused by a violation can be quickly covered up or corrected, there is a disincentive to comply with OSHA standards. Hence, worker health and safety is further jeopardized and OSHA's attempt to satisfy its statutory purpose is further inhibited.

The analysis then delineates and responds to some of the major criticisms of establishing a good faith exception to the exclusionary rule.

A. *Constitutional, Precedential and Societal Perspectives*

Prior to *Federal*, evidence obtained pursuant to a nonconsensual administrative search conducted without probable cause was suppressed.[141] Because the Seventh Circuit Court of Appeals had previously determined that objective probable cause was lacking in the search of Federal's premise;[142] the evidence seized pursuant to the warrant was obtained illegally and ought to have been suppressed. However, because the fourth amendment does not itself call for exclusion of evidence, it would follow that a good faith exception to a judicial remedy is not unconstitutional.

The good faith exception realistically, will apply only upon some showing that the inspecting officer believed he acted constitutionally. The state of mind of the investigating officer, therefore, is important when analyzing the applicability of the good faith exception and, hence, the determination of the probable cause the officer believed existed becomes more subjective.[143] In *Barlow's*, the Supreme Court announced two possible grounds for a finding of probable cause: specific evidence of an existing violation, or showing that reasonable legislative or administrative standards for conducting an inspection were satisfied.[144] Whereas *Barlow's* analyzed probable cause from this objective perspective, *Federal* suggests that probable cause exists if the officer acted reasonably in believing it existed given the attendant circumstances, which include both specific facts and administrative standards. In short, *Federal* differs from past analyses of fourth amendment compliance because it considers the officer's state of mind.[145]

If good faith is accepted as the controlling standard, several elements suggest that the OSHA officer in *Federal* acted reasonably and possessed a

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141. *See supra* notes 5-7 and accompanying text.

142. Donovan v. Federal Clearing Die Casting Co., 655 F.2d 793 (7th Cir. 1981) (decided by a different panel of judges than the subsequent *Federal* decision, 695 F.2d 1020).

143. That is, the ostensibly reasonable mind of the reviewing judge must evaluate, to some degree, the mind of the searching officer, as it existed at the time of the search, and the circumstances surrounding the search to determine, objectively, whether the search was reasonable. Based on this test for reasonableness, it is understandable that one might conclude that the creation of a good faith exception "will not dispel any confusion that now exists in Fourth Amendment Jurisprudence." S. REP. NO. 350, 98th Cong. 2d Sess. 37 (1984) (minority view of Senator Mathias on the proposed Exclusionary Rule Limitation Act of 1983).

144. 436 U.S. at 320.

145. The Senate Committee on the Judiciary recently rejected the notion that a good faith exception would promote police ignorance of the fourth amendment, S. REP. NO. 350, 98th Cong., 2d Sess. 18 (1984). In so doing, the committee quoted from *Williams*: "We emphasize the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully." *Williams,* 622 F.2d at 841 n.4a.

In the same report, however, Senator Mathias, expressing the view of the minority, asked: "Assuming we in Congress have the power to relax the requirement of the exclusionary rule, what message would we send to law enforcement by doing so?" S. REP. NO. 350, 98th Cong., 2d Sess. 38 (1984). Answering his own question, Senator Mathias stated: "Our action will invite law enforcement at all levels to regress to the days when some police departments viewed the Fourth Amendment as a statement of principles with no practical effect." *Id.*

good faith belief that his actions were constitutional—that is, he reasonably believed his acts were based on sufficient probable cause and were objectively reasonable.

The first factor supporting the reasonableness of the officer's belief that probable cause existed was the extremely serious character of the victim's injury. The injury consisted of an employee having both hands cut off while operating a punch press.[146] The fact that the victim's hands were subsequently reattached does not mitigate the seriousness of the injury. More important is the severe nature of the accident itself and the fact that such an accident generally would not occur absent extreme carelessness by the victim or a serious violation of safety standards by the employer.[147] In short, based on the gruesome nature of the injury, the officer arguably acted reasonably in believing that there was probable cause to inspect the Federal premises for OSHA violations. It is unlikely, however, that the injury itself would constitute "specific evidence of an existing violation" under the *Barlow's* test for probable cause.[148]

A second factor is that Federal had a history of OSHA violations including punch press safety violations.[149] The inspecting compliance officer was aware of the previous citations and included copies thereof in the application for the inspection warrant.[150] This fact, when coupled with the nature of the publicized injury, further strengthens the argument for sufficient probable cause.[151] An alternative view, as expressed in the dissenting opinion, is that the officer in his "pell-mell rush to the courthouse" violated the agency created requirement that complaints be evaluated prior to inspection.[152]

A third important factor indicating the objective reasonableness of the *Federal* search is that the compliance officer did not act alone but with the approval of a United States magistrate.[153] The magistrate, acting as a neutral third party, issued a warrant after determining that a search was sup-

146. *Federal*, 695 F.2d at 1021.

147. The Eleventh Circuit in Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982), chose not to follow the *Federal* extention of the good faith exception. Neither the Seventh nor Eleventh Circuit Court noted the distinction that the invalid OSHA inspection in *Sarasota* uncovered twelve "non-serious" violations and did not result in monetary penalties, while the safety violations discovered in *Federal* were serious and resulted in penalties of $35,400. This distinction suggests that the magnitude of the violation may be another factor tacitly considered by the courts when deciding whether the good faith exception applies.

148. In National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973), the D.C. Circuit stated that "actual occurrence of hazardous conduct is not, by itself, sufficient evidence of a violation, even if the conduct has led to injury." *Id.* at 1267.

149. 655 F.2d at 797.

150. *Id.*

151. Based on the *Barlow's* standards of sufficient administrative probable cause, one may argue that a newspaper clipping is also not specific evidence of an OSHA violation. This argument, however, is countered by the fact that the second *Barlow's* standard provides that probable cause may derive from reasonable administrative standards. *See infra* note 17 and accompanying text. This standard was arguably satisfied pursuant to the Department of Labor Occupational Safety and Health Field Operations Manual, Ch. VIII (1983), which provides for investigation of accidents involving "significant publicity." For a summary of the Field Operations Manual, see [1982-1983 Transfer Binder] EMPL. SAFETY HEALTH GUIDE (CCH) ¶ 12,808.

152. 695 F.2d at 1031 (Pell, J., dissenting).

153. 695 F.2d at 1021.

ported by probable cause and was not unreasonable.[154]

Justice Powell, in *Brown v. Illinois*,[155] advocated a "sliding scale" approach to determine whether illegally seized evidence should be excluded.[156] On one end of the scale lie flagrantly abusive fourth amendment violations which require the exclusion sanction for deterrent purposes.[157] On the other end lie "technical" violations which describe police conduct in which abuse or negligence is absent.[158] An example of a technical violation is where an officer relies in good faith on a warrant which is subsequently invalidated.[159] The *Federal* search was held invalid, subsequent to the search, because the warrant was issued without probable cause. Therefore, under the *Brown* analysis, the violation in *Federal* was technical and the least serious type of violation under Justice Powell's analysis.

In sum, the elements of probable cause in the mind of the compliance officer, objective reasonableness, and a warrant issued by a neutral magistrate were all present in the Federal inspection. From a perspective which holds the good faith exception to the exclusionary rule to be constitutional, the Seventh Circuit was correct in determining that the exception could apply to the *Federal* facts.

The majority's presumption, that a good faith exception exists, is, however, suspect from a precedential perspective. The *Federal* majority correctly stated that the case was one of first impression.[160] Prior to *Federal*, the good faith exception had been recognized by a non-administrative court, in the civil context, only by way of dicta.[161]

The dissent correctly pointed out[162] that applying the good faith exception to the present set of facts was inconsistent with the OSHRC decision in *Secretary of Labor v. Sarasota Concrete Co.*,[163] affirmed on appeal one week after the *Federal* decision.[164] In *Sarasota* the OSHRC held that a complaint alleging specific violations does not justify an inspection of the entire work area and the compliance officer's good faith in making a wall-to-wall search does not preclude suppression.[165] Affirming the OSHRC decision, the Eleventh Circuit concluded that evidence seized as a result of the wall-to-wall search was subject to suppression and that the good faith exception as promulgated in *Williams* did not apply.[166] The *Sarasota* court chose to reject the *Williams*

154. Regarding the element of a neutral magistrate issuing a warrant, as the issuance relates to probable cause, the Supreme Court in United States v. Ventresca, 380 U.S. 102, 106 (1965), stated: "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." (citing Jones v. United States, 362 U.S. 257, 270 (1960)).

155. 422 U.S. 590, 606 (1975) (Powell, J., concurring).

156. *Id.* at 610-12.

157. *Id.* at 610-11.

158. *Id.* at 611-12.

159. *Id.* at 611.

160. 695 F.2d at 1021.

161. *See Robberson*, 645 F.2d 22.

162. 695 F.2d at 1028 (Pell, J., dissenting).

163. 9 O.S.H. Cas. (BNA) 1608.

164. Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

165. 9 O.S.H. Cas. (BNA) 1608.

166. Donovan v. Sarasota Concrete, 693 F.2d at 1072.

good faith exception,[167] partly because the good faith holding in *Williams* did not apply to situations where a search warrant had been obtained.[168] *Williams* was also distinguished as a criminal proceeding based on evidence obtained pursuant to a search made incident to an arrest. In contrast, the citations issued in *Sarasota*, as in *Federal*, were civil, or at best "quasi-criminal", and the evidence was obtained pursuant to a warrant which the compliance officer initially believed was valid. Thus, the *Sarasota* court concluded that it was not bound to adhere to the analysis set forth in *Williams*.[169]

Because the OSHRC has authority to make constitutional determinations on the act from which it was granted authority,[170] the *Federal* court might have given the OSHRC decision greater deference; however, it was not bound to follow OSHRC's decision.[171]

Ultimately, it must be concluded that the *Federal* decision was based on inadequate precedent. However, the decision may be justified on the larger grounds of promoting greater judicial flexibility so that OSHA may better fulfill its statutory purpose of advancing health and safety in the workplace without infringing unduly on the privacy expectations of employers. If it were not for judicial innovation and flexibility the common law would stagnate hopelessly, unable to correct past mistakes and respond to new problems. By introducing the good faith exception to administrative proceedings, the Seventh Circuit has implemented the legal philosophy espoused by the then Judge Cardozo when he wrote:

> We must learn that all methods are to be viewed not as idols but as tools. We must test one of them by the others, supplementing and reinforcing where there is weakness, so that what is strong and best in each will be at our service in the hour of need.[172]

In short, although the *Federal* decision was not justified by precedent, it may be justified on the basis of responding to a need for greater flexibility in the application of the exclusionary rule in the administrative search context.[173]

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167. *Id.* The official *Sarasota* opinion stated, at 693 F.2d 1072, that twelve members of the *Williams* court advocated a good faith exception. This is incorrect, thirteen members joined in the good faith holding in *Williams*, 622 F.2d at 840.

168. *Williams*, 622 F.2d at 840 n.1.

169. 693 F.2d at 1072.

170. *See id.* at 1067.

171. 29 U.S.C. § 660(a) (1982) (OSHRC determinations subject to review by federal courts of appeal).

172. B. CARDOZO, GROWTH OF THE LAW 103 (1924).

173. Although the privacy interests of individual defendants in the criminal context are generally greater than those of the employer in the OSHA context, the "anti-exclusionary rule" branch of the current court has nevertheless limited its attacks on the exclusionary rule to the criminal context. *See supra* note 7; Oliver v. United States, 52 U.S.L.W. 4425 (U.S. Apr. 17, 1984) (Permitting warrantless searches of "open fields" leading to siezure of marijuana plants); Illinois v. Gates, 103 S. Ct. 217, 2336 (1983) (White, J., concurring); *See also* Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, J., dissenting); *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); Burger, *Who will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964) (suggesting abolishment of the exclusionary rule or a limitation on its scope).

If it is accepted that one has a greater expectation of privacy in the home and person than in the workplace, *see Donovan v. Dewey*, 452 U.S. 594, 598 (1981), then it follows that creation of a good faith exception ought to be tested first in the OSHA context. The Supreme Court, how-

The court in *United States v. Janis*[174] recognized that the determination of whether the exclusionary rule should apply in a criminal proceeding depends upon whether the deterrent effect of the remedy outweighs the cost to society of suppressing relevant evidence.[175] The *Federal* majority did not explicitly engage in this balancing test; however, the holding implicitly indicates the belief that any possible deterrent effect would not outweigh the cost to society of excluding reliable and probative evidence of serious OSHA violations. Similar past violations, severed hands, and $35,400 worth of current violations undoubtedly tipped the scale in favor of the societal interests in effective enforcement of OSHA safety standards.

Although the social implications are likely to be minimal, OSHA officers in the Seventh Circuit will probably enjoy greater success in having evidence that conforms to the good faith requirements admitted. In turn, this may put more pressure on employers to provide safer working conditions for their employees and, at least in theory, the employees should enjoy safer working conditions.

B. *Criticism and Response*

Despite the *Federal* decision, the good faith exception is still the subject of much criticism. Critics maintain that the good faith exception effectively bypasses the only remedy available to a defendant aggrieved by a fourth amendment violation.[176] As the Eleventh Circuit recognized: "if Fourth Amendment rights are to be recognized in an OSHA context, it seems reasonable that the only enforcement mechanism developed to date should likewise be recognized."[177]

Justice Brennan argued in his dissent to *United States v. Peltier*[178] that the adoption of a good faith exception will destroy the deterrent purpose of the exclusionary rule.[179] Justice Brennan maintained that the purpose of the exclusionary rule is to deter "by removing the incentives to disregard it."[180] Critics of the exception also argue that the courts are provoking a relaxation

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ever, seems destined to create the exception in the criminal context where privacy expectations are arguably greater. Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom.* Massachusettes v. Sheppard, 103 S. Ct. 3534 (1983) (arguments heard January 17, 1984), may prove to be the case in which the good faith exception is recognized by the Supreme Court in the criminal context.

174. 428 U.S. 433 (1976).

175. *Id.* at 448-49. Chief Justice Warren described this same conflict in Spano v. New York, 360 U.S. 315, 315 (1959): "we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and in its interest in preventing the rights of the individual members from being abridged by unconstitutional methods of law enforcement."

176. *See, e.g.*, United States v. Leon, 52 U.S.L.W. 5155, 5163-71 (U.S. July 5, 1984) (Brennan, J., dissenting); United States v. Peltier, 422 U.S. 531, 544-62 (1975) (Brennan, J., dissenting); Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725, 731-36 (1982), *rev'd sub nom.* Massachusetts v. Sheppard, 52 U.S.L.W. 5177 (U.S. July 5, 1984); S. REP. NO. 350, 98th Cong. 30-40 (1984) (minority view of Senator Mathias on the proposed Exclusionary Rule Limitation Act of 1983).

177. *Sarasota*, 693 F.2d at 1071.

178. 422 U.S. 531 (1975).

179. *Id.* at 544 (Brennan, J., dissenting).

180. *Id.* at 557 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

of police awareness of fourth amendment rights.[181] And the legitimate governmental interest in enforcing the Act would not be forfeited by tenaciously requiring OSHA agents to maintain a high level of constitutional awareness in their limited area of fourth amendment concerns.[182]

At least one commentator has criticized the establishment of a broad good faith exception to technical violations of the kind involved in *Federal* because it may encourage magistrate shopping in order to find the magistrate most likely to issue a warrant on weak probable cause; and also that "good-faith" is based largely on the officer's subjective state of mind "which is determined from his self-serving and generally uncontradicted testimony."[183]

Proponents of the exception have also advanced alternatives to the suppression remedy, which, if implemented, could more effectively attain the goal of deterrence. The alternative remedies include: taking civil action against the offending officer personally or against the government; taking criminal action against the offending officer; establishing departmental disciplinary proceedings and external review boards; and granting injunctive relief.[184] None of these alternatives, however, has yet been institutionalized to any substantial degree. Nor does it seem likely that they will become readily available in the foreseeable future.

The adoption of a good faith exception, however, does not spell doom for employers' fourth amendment rights primarily because the reasonableness and good faith requirements provide built in definitional protections which necessarily guard against flagrant constitutional violations.

In short, the good faith exception, when applied in the OSHA context, on a case by case basis, and combined with reliable alternative remedies to exclusion, may create the desirable effect of allowing into evidence reliable and probative evidence of OSHA safety violations. While making the evidence admissible, the exception will simultaneously deter flagrant abuses of the inspection power, and preserve the privacy interests of employers. The administrative arena seems best suited to test a good faith exception because the privacy expectation is arguably less substantial than that at stake in criminal searches. The Supreme Court, however, disagrees.[185]

IV. CONCLUSION

The Seventh Circuit's holding in *Federal* established for the first time the good faith exception to the exclusion of evidence obtained by an OSHA compliance officer in violation of the fourth amendment. In order for the

181. *See* Ball, *supra* note 16, at 656.

182. *See* Trant, *supra* note 41, at 716.

183. *Id.* at 708-09.

184. *See id.* at 710-15 (criticisms of alternatives also presented). *See also* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621; Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 89; Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board*, 30 WASH. & LEE L. REV. 223 (1973); Wilkey, *Constitutional Alternatives to the Exclusionary Rule, Exclusionary Rule Symposium*, 23 S. TEX. L.J. 531 (1982); Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

185. *See supra* note 7.

exception to apply, the officer must conduct the inspection in good faith and in the reasonable belief that his actions are authorized.[186] The *Federal* holding, however, conflicts with a factually similar Eleventh Circuit case where the court chose not to adopt the good faith exception given the record before it, and instead suppressed the illegally obtained evidence.[187] Although the *Federal* case is representative of the current judicial trend of narrowing the exclusionary rule's applicability,[188] the decision's impact will remain uncertain outside the Seventh Circuit until the Supreme Court first decides whether the exclusionary rule applies as a remedy in cases where OSHA commits fourth amendment infractions.[189] Given the recent emasculation of the exclusionary rule,[190] it would be logical for the Court to create a general bar to the exclusion of evidence in OSHA proceedings; however, it seems unlikely that the Court will be as willing to admit probative evidence against employers as it is against criminal defendants and illegal aliens.

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186. *Federal*, 695 F.2d at 1023.
187. *Sarasota*, 693 F.2d 1061.
188. *See supra* note 7.
189. *See supra* note 32.
190. *See supra* note 7.