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The Good Faith Exception to the Exclusionary Rule in OSHA Proceedings

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NOTE

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN OSHA PROCEEDINGS

INTRODUCTION

The exclusionary rule requires that evidence obtained in violation of the Constitution be excluded at trial.[1] In the fourth amendment[2] context, evidence obtained by a government official through an unreasonable search or seizure will be inadmissible in court.[3] This reasonableness requirement protects individuals from arbitrary invasions of privacy.[4] Generally, a search is considered reasonable only if the official has obtained a warrant based on probable cause.[5]

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1. BLACK'S LAW DICTIONARY 506 (5th ed. 1979). *See* C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 164 (2d ed. 1972).

The exclusionary rule has been applied to evidence obtained in violation of: a defendant's fifth amendment privilege against compelled self-incrimination, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); his fifth and fourteenth amendment rights to due process of law, *e.g.*, Rochin v. California, 342 U.S. 165 (1952); his fourth amendment right to be free from unreasonable searches and seizures, *e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); and his sixth amendment right to counsel, *e.g.*, Gideon v. Wainright, 372 U.S. 335 (1963). The exclusionary sanction has also been applied when state constitutional provisions similar to the federal constitutional provisions mentioned above have been violated. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 1.3(b) (1978). Exclusion will also be required when statutes, court rules, or administrative regulations have been violated and the defendant's substantial rights have been adversely affected. *Id.*

This note will deal solely with the exclusionary rule in the fourth amendment context.

2. 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.

For a discussion of the origin of the fourth amendment, see J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

3. Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained in violation of the fourth amendment is inadmissible in state as well as federal criminal trials); Weeks v. United States, 232 U.S. 383 (1914) (evidence obtained through illegal searches and seizures by federal officials is inadmissible in federal courts).

4. Donovan v. Dewey, 452 U.S. 594, 599 (1981); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (fourth amendment standard of reasonableness for government officials' exercise of discretion safeguards against arbitrary invasions of privacy).

5. *E.g.*, Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967) (except in narrowly defined classes of cases exempt from the warrant requirement, warrantless searches of private property are unreasonable and therefore unconstitutional).

Criminal probable cause exists when the facts and circumstances within the officer's knowledge, and of which he has trustworthy information, are sufficient to justify reasonable belief that seizable objects are located at the place to be searched. Brinegar v. United States, 388 U.S. 160, 175-76 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925). Recently in

Though the exclusionary rule is well established in criminal trials,[6] its application and scope is less settled in administrative hearings.[7]

Congress established the Occupational Safety and Health Administration (OSHA) by enacting the Occupational Safety and Health Act of 1970[8] (O.S.H.A. or the Act). The Act charges OSHA, an executive agency within the Department of Labor,[9] to promulgate and enforce safety and health standards for the workplace.[10] The Occupational Safety and Health Review Commission (OSHRC) was created to review determinations by administrative law judges regarding citations and penalties issued by the Secretary of Labor for nonconformance with OSHA standards.[11] Orders of the OSHRC are reviewable by the federal courts of appeal.[12]

In 1978 the United States Supreme Court declared section 8(a) of O.S.H.A.[13]

Illinois v. Gates, 103 S. Ct. 2317 (1983), the Supreme Court relaxed the standard for finding criminal probable cause. Overruling Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), the Court rejected the traditional two-prong test for determining probable cause for a search warrant when an informant is involved. Under the two-prong test, magistrates were to consider the basis for the informant's knowledge and whether there were enough facts to support the informant's reliability. After *Gates*, magistrates need only consider whether under the "totality of the circumstances" there is a fair probability that evidence of a crime will be found in a particular place. 103 S. Ct. at 2332.

Recognized exceptions to the warrant requirement include: searches incident to a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); automobile searches, Carroll v. United States, 267 U.S. 132 (1925); emergency searches when the needs of effective law enforcement outweigh the protection of privacy afforded by the warrant requirement, Michigan v. Tyler, 436 U.S. 499 (1978); Warden v. Hayden, 387 U.S. 294 (1967) (no warrant required in instances of hot pursuit of a suspected criminal); Schmerber v. California, 384 U.S. 757 (1966) (evidence showing alcohol in defendant's blood); consent searches, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968); plain view searches, Coolidge v. New Hampshire, 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971).

6. C. McCORMICK, *supra* note 1, at § 164.

7. The Court has never applied the exclusionary rule in purely civil adjudications, United States v. Janis, 428 U.S. 433, 447, *reh'g denied*, 429 U.S. 874 (1976); however, it has applied the rule in quasi-criminal proceedings, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

8. 29 U.S.C. §§ 651-678 (1976).

9. *See id.* § 652.

10. *See id.* §§ 655, 659.

11. *See id.* §§ 659(c), 661(i).

12. *Id.* § 660(a). An appeal may be filed with the court of appeals in the circuit in which the alleged violation occurred, in which the employer has its principal office, or in the Court of Appeals for the District of Columbia. *Id.*

13. 29 U.S.C. § 657(a) provides:

> In order to carry out the purposes of the chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
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> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

Id.

unconstitutional insofar as it purported to authorize inspection of businesses without a warrant.[14] Although warrants are now required for OSHA inspections, the Supreme Court has not yet ruled on whether the exclusionary rule applies to evidence obtained in derogation of the warrant requirement.[15] The OSHRC, however, has decided the rule should be applied.[16] Two federal circuit courts have agreed that the exclusionary rule is applicable in OSHA proceedings,[17] but disagree concerning a good faith exception to the rule.[18]

The good faith exception provides that when an official acts with a good faith and reasonable belief that his conduct is legal, the exclusionary rule should not operate.[19] A good faith exception to the exclusionary rule would reduce the quantity of evidence suppressed under the exclusionary rule. Although the Supreme Court has not explicitly recognized the good faith exception, several Justices have suggested its adoption, and a few lower courts have actually adopted it.[20]

This note will examine the rationales for and purposes of the exclusionary rule and the good faith exception in the OSHA context. Such an examination requires a thorough review of how the rule and its good faith exception have developed in criminal procedure. Supreme Court decisions concerning administrative searches will then be analyzed. Finally, this note will consider important differences between OSHA inspections and traditional criminal searches and conclude a good faith exception in the OSHA context would be inappropriate.

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14. Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978).

15. Since the defendant employer in *Barlow's* brought suit to enjoin an OSHA compliance officer from making a warrantless inspection, the Court had no occasion to decide whether the exclusionary rule applied to evidence obtained in violation of the warrant requirement. *See id.* at 310.

16. Secretary of Labor v. Sarasota Concrete Co., 9 O.S.H. Cas. (BNA) 1608 (Rev. Comm'n 1981), *aff'd*, Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

17. The trend is toward accepting the exclusionary rule in OSHA proceedings. *See* Donovan v. Federal Clearing Die Casting Co. & OSHRC, 695 F.2d 1020 (7th Cir. 1982); Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

For an excellent discussion of reasons for applying the exclusionary rule in OSHA proceedings, see Trant, *OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered?*, 1981 DUKE L.J. 667. *See generally* Note, *The Exclusionary Rule in Administrative Proceedings*, 2 CONN. L. REV. 648 (1970) (predicting that the exclusionary rule would be applied in administrative hearings that contemplate imposing fines or penalties for violation of laws or regulations); Note, *The Applicability of the Exclusionary Rule in Administrative Adjudicatory Proceedings*, 66 IOWA L. REV. 343 (1981) (suggesting a balancing of the searched party's fourth amendment rights and governmental interests in administrative proceedings that includes a consideration of the deterrent effect suppression would have on governmental misconduct).

18. *See infra* notes 157-171 and accompanying text.

19. *See* Stone v. Powell, 428 U.S. 465, 538 (White, J., dissenting), *reh'g denied*, 429 U.S. 874 (1976). *See also* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 635 (1978) (providing historical background on the good faith exception doctrine).

20. *See infra* text accompanying notes 58-90. *See also* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (adopting a sweeping good faith exception), *cert. denied*, 449 U.S. 1127 (1981).

THE EXCLUSIONARY RULE AND THE GOOD FAITH EXCEPTION IN THE CRIMINAL SETTING

At common law and during the early development of American constitutional law, the source of evidence was a collateral issue which did not affect its admissibility at trial.[21] In 1914, however, the United States Supreme Court rejected this position in *Weeks v. United States*.[22] *Weeks* held evidence seized in violation of the fourth amendment inadmissible in federal criminal prosecutions.[23]

Weeks had been convicted of using the mail to transport lottery tickets on the basis of evidence seized by a federal marshal in a warrantless search of his home.[24] The Court held admission of this evidence at trial was prejudicial error.[25] The Court offered two rationales for its exclusionary rule. A person's fourth amendment right to be secure from unreasonable searches and seizures embraces the right not to have evidence obtained in an unreasonable search used against him.[26] In addition, the integrity of the courts would suffer if they permitted the use of unconstitutionally obtained evidence.[27]

In 1949, the Supreme Court held the fourth amendment enforceable against

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21. C. MCCORMICK, *supra* note 1, § 165.

The underlying philosophy of the exclusionary rule first surfaced in Boyd v. United States, 116 U.S. 616 (1886). *Boyd* declared unconstitutional a statute authorizing courts to treat failure to produce business papers in revenue cases as a confession. *Id.* The Court found the statute repugnant to the fourth and fifth amendments. *Id.* at 632. For an analysis of *Boyd*, see J. LANDYNSKI, *supra* note 2, at 49-61.

22. 232 U.S. 383 (1914).

23. *Id.* at 398.

24. *Id.* at 386. Actually, two warrantless searches of Weeks' home were made: one by the local police alone and one by the police with a federal marshal. *Id.* Since the fourth amendment was not considered applicable to the states when *Weeks* was decided, the *Weeks* decision dealt only with the evidence obtained in the search in which the federal marshal took part. *Id.* at 398.

25. *Id.* at 398.

26. The Court stated:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id. at 393. Later cases have affirmed the constitutional right rationale for the exclusionary rule. *See, e.g.*, McNabb v. United States, 318 U.S. 332, 339-40 (1943); Olmstead v. United States, 277 U.S. 438, 462 (1928); Byars v. United States, 273 U.S. 28, 29-30 (1927).

27. The Court stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392.

the States,[28] but refused to impose the exclusionary sanction upon state proceedings.[29] The Court characterized exclusion of illegally obtained evidence as a judicially-created remedy rather than a constitutional right.[30] Though the majority conceded that the exclusionary rule might deter unreasonable searches, it concluded that the states should be free to fashion alternative remedies for fourth amendment violations.[31]

For nearly fifty years the exclusionary rule was required only in federal courts.[32] Then, in *Mapp v. Ohio*[33] the Court retreated from its position that the exclusionary rule need not be imposed on the states.[34] *Mapp* held that the due process clause of the fourteenth amendment requires the exclusion of evidence seized in contravention of the fourth amendment.[35] The Court justified extending the exclusionary rule to state proceedings by declaring it an "essential part" of the fourth amendment.[36] As in *Weeks*, the Court declared that judicial integrity required exclusion of evidence obtained in violation of the fourth amendment.[37] The Court also stressed the rule's deterrent purpose and the futility of alternative remedies.[38] Because the Court proposed several justifications for the exclusionary rule, no one rationale emerged as the sole basis for the *Mapp* decision.[39]

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28. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). Justice Frankfurter, writing for the majority stated: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Id.*

29. *Id.* at 33.

30. *Id.* at 30-31.

31. *See id.* at 28, 31-32. *But see id.* at 40 (Douglas, J. dissenting); *id.* at 41 (Murphy, J., dissenting). Both dissents emphasized the futility of alternative remedies.

32. Originally the rule applied in federal trials only to evidence obtained unlawfully by federal officials. *E.g.*, Lustig v. United States, 338 U.S. 74, 78-79 (1949) (exclusionary rule operates only when federal officials are involved in fourth amendment violations); Byars v. United States, 273 U.S. 28, 33 (1927) (evidence excluded only when federal agents participate in the wrongful search and seizure); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (since the federal government had nothing to do with the wrongful seizure by private individuals, the exclusionary rule does not apply); Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence obtained by federal marshal in violation of defendant's fourth amendment right is inadmissible in federal criminal courts).

33. 367 U.S. 643 (1961).

34. *Id.* at 655.

35. *Id.* Justice Clark, for the plurality, wrote: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.*

36. *Id.* at 657.

37. *Id.* at 660.

38. *Id.* at 658-59.

39. *See* Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 264 (1974) (stating the *Mapp* Court "relied on an unstable combination of arguments"); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141, 144-45 (1978) (arguing the lack of "a clear, persuasive, principled rationale in *Mapp*" has aided critics of the exclusionary rule). *See generally* I W. LAFAVE, *supra* note 1, § 1.1(e)-(f).

EMERGENCE OF DETERRENCE AS THE PRIMARY PURPOSE OF THE EXCLUSIONARY RULE

Decisions since *Mapp* have narrowed the scope of the exclusionary rule in criminal proceedings.[40] Only one of the purported goals of the exclusionary rule retains vitality: deterrence of police misconduct.[41] Just four years after *Mapp*, in *Linkletter v. Walker*,[42] the Court adopted the deterrence theory as the primary rationale for the exclusionary sanction.[43]

Linkletter involved the habeas corpus petition of a state prisoner whose conviction rested on evidence illegally seized prior to the *Mapp* decision.[44] The *Linkletter* Court consequently had to decide whether *Mapp* should be applied retroactively.[45] After surveying the history of retroactivity, the Court decided it was "neither required to apply, nor prohibited from applying, a decision retrospectively."[46] The Court suggested that the question of applying the rule retrospectively depended upon whether such application would advance or retard the rule's intended effect.[47] Finding the primary purpose for extending the exclusionary sanction to state courts was deterrence of police misconduct, the Court decided that this purpose would not be furthered by applying the sanction retrospectively.[48] The police misconduct already done would not be corrected by releasing the prisoner involved.[49]

Dissenting Justice Black rejected the majority's proposition that the exclusionary rule was intended to do nothing more than deter illegal police action.[50] *Mapp* described the rule as "implicit in the concept of ordered

40. *See infra* text accompanying notes 41-90.

41. Although the Supreme Court views deterrence of police misconduct as the primary purpose of the exclusionary rule, many commentators disagree. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431-33 (1974) (arguing that the exclusionary sanction is the only effective way of honoring the fourth amendment); Schrock & Welsh, *supra* note 39, at 372 (characterizing the exclusionary rule as a personal constitutional right arising from the fourth amendment and the due process clauses of the fifth and fourteenth amendments); Sunderland, *supra* note 39, at 159 (arguing that due process requires exclusion of illegally seized evidence).

42. 381 U.S. 618 (1965).

43. *Id.* at 636.

44. *Id.* at 621.

45. The Court noted that the *Mapp* rule was applied to reverse defendant Mapp's conviction and had been applied to cases still pending on direct review when *Mapp* was decided. Thus, the Court was faced with a limited question: whether the exclusionary rule should be applied retroactively to state court convictions which had become final before *Mapp* was handed down. *Id.* at 622.

46. *Id.* at 629.

47. *Id.*

48. *Id.* at 636-37.

49. *Id.* The Court also stated that the delicate relationship between state and federal courts would be disrupted by retroactive application of *Mapp*. *Id.*

50. *Id.* at 649 (Black, J., dissenting). Justice Black noted that if the majority were correct, and the exclusionary rule is not a right or privilege, but a remedy, the Court's imposition of the exclusionary rule on the states in *Mapp* was more "like law-making than construing the Constitution." *Id. See also* Ball, *supra* note 19, at 651. Professor Ball states that if the exclusionary sanction is merely a judicially-created remedial device, it may be argued that the states should be left free to fashion their own remedies. *Id.* For further discussion of this view see Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV.

liberty"[51] and an "essential ingredient" of the constitutional guarantee[52] of the fourth amendment. Justice Black vigorously condemned the Court's refusal to give petitioner the new and more expansive interpretation of the fourth amendment in *Mapp*.[53]

The Supreme Court reaffirmed deterrence as the primary rationale for the exclusionary rule in *United States v. Calandra*.[54] The *Calandra* majority refused to apply the exclusionary rule in grand jury proceedings. Describing the rule as a judicially-created remedy designed to protect fourth amendment rights through deterrence, the Court rejected the constitutional right and judicial integrity justifications for the rule.[55] Since it viewed deterrence as the primary purpose for the exclusionary rule, the Court held the rule need not apply unless the deterrent goal would be significantly advanced.[56] Thus, the Court adopted a balancing test requiring the deterrent effect of the exclusionary sanction to be weighed against the societal costs of exclusion.[57]

SUPREME COURT SUPPORT FOR THE GOOD FAITH EXCEPTION DOCTRINE

By establishing deterrence as the primary rationale for the exclusionary rule, the Court opened the door to legitimizing the emerging good faith doctrine and thereby weakening the rule's effectiveness.[58] If the purpose for applying the sanction is to deter official misconduct, the future impact of its application must

L. REV. 1532, 1561 (1972); Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-6 (1975).

51. 381 U.S. at 649.

52. *Id.* at 650.

53. *See id.* at 646. Justice Black pointed out that in the past the Supreme Court had afforded previously convicted defendants the benefits of a new and more liberal reading of the Bill of Rights. *Id. See, e.g.*, Fay v. Nola, 372 U.S. 391 (1963) (defendant granted habeas corpus twenty-one years after his conviction based on a coerced confession).

54. 414 U.S. 338 (1974).

55. *See id.* at 351-52.

56. *See id.* at 349-52.

57. *See id.* at 349. The high price society pays for the application of the exclusionary rule in criminal trials is "the release of countless guilty criminals." Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (Burger, C.J., dissenting). *See also* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035-06 (1974). Professor Kaplan argues that frustration of the public when criminals are freed is a "cost of the exclusionary rule." *Id.*

Societal costs may not be as high as the Chief Justice and Professor Kaplan imply. A study conducted by the Comptroller General of the United States shows that the rule rarely frees federal criminal suspects. Of the 2,804 cases surveyed, only 0.4% were declined by the federal prosecutors because of fourth amendment problems. Evidence was excluded at trial in only 1.3% of the cases and over half of the defendants whose suppression motions were granted were nevertheless convicted. Siegel, *Law Enforcement and Civil Liberties: We Can Have Both*, CIV. LIB., Feb. 1983, at 5, 5-6 (citing Report by the Comptroller General of the United States, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," Apr. 19, 1979). In another survey, the National Institute of Justice found that between 1976 and 1979, only 4.8% of all felony arrests in California were rejected for prosecution because of fourth amendment problems. Seventy-five percent of these felonies were drug related, not crimes of violence. *Id.* at 6 (citing U.S. Department of Justice, National Institute of Justice, "The Effects of the Exclusionary Rule: A Study of California," Dec., 1982).

58. *See* Ball, *supra* note 19, at 650.

be considered. There is no deterrence potential in suppressing evidence obtained by an official who acted in the reasonable and good faith belief that his conduct was legal.[59] Thus, good faith violations provide a class of cases in which suppression is arguably inappropriate.[60]

Since *Calandra*,[61] the Court has refused to apply the exclusionary rule when it has determined the societal costs of exclusion outweigh the benefits of the rule.[62] Several cases following *Calandra* laid the foundation for the emerging good faith exception.[63] Although these cases were not decided on good faith grounds, they presented the Court opportunities to discuss the good faith doctrine.

In one case, the majority stated that the exclusionary sanction should be applied only when the police have engaged in "willful, or at the very least negligent conduct which had deprived the defendant of some right."[64] By excluding evidence obtained in obvious violation of constitutional guarantees, the majority believed officers would be deterred from such misconduct.[65] However, when the official conduct was undertaken in good faith, the Court concluded the deterrence rationale loses much of its force.[66]

In another decision, the Court abandoned the judicial integrity rationale for the exclusionary rule in cases involving good faith police action. Judicial integrity would not be compromised so long as officers acted under a reasonable belief that a seizure was legal, even though subsequent judicial decisions held the seizure unconstitutional.[67] Courts would not be considered accomplices in the willful disobedience of the Constitution if there was no willful disobedience by the police.[68] The Court concluded that evidence obtained from a search

59. Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting).

60. Ball, *supra* note 19, at 650.

61. *See supra* text accompanying notes 54-57.

62. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

63. Ball, *supra* note 19, at 651.

64. Michigan v. Tucker, 417 U.S. 433, 447 (1974). In *Tucker*, a suspect was arrested for rape and questioned by police without being advised of his right to counsel if he was indigent. *Id.* at 435. He told the police that he had been with a friend at the time of the rape. By questioning his friend the police gained information that incriminated the defendant. *Id.* The defendant moved to suppress his friend's testimony on the basis that he had revealed the friend's identity without receiving full *Miranda* warnings. The interrogation had occurred prior to the *Miranda* decision. The defendant was convicted, but subsequently granted habeas corpus relief. The court of appeals affirmed, but the Supreme Court reversed, finding no reason to exclude relevant testimony by a third-party witness. The Court concluded that the failure of police to give all the warnings had no bearing on the reliability of the friend's testimony. *Id.* at 448-49.

65. *Id.* at 447.

66. *Id.* According to Professor Ball, the *Tucker* opinion is significant because it demonstrated the new willingness of several Justices to consider the "nature of the illegality when determining the applicability of the exclusionary rule." Ball, *supra* note 19, at 652.

67. United States v. Peltier, 422 U.S. 531, 536 (1975) (quoting Elkins v. United States, 364 U.S. 206, 223 (1960)). In *Peltier* the Court permitted the admission of evidence that had been obtained in a warrantless border search under a statutory construction later held unconstitutional in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). 422 U.S. at 541-42.

68. United States v. Peltier, 422 U.S. 531, 536 (1975) (quoting Elkins v. United States, 364 U.S. 206, 223 (1960)).

should be excluded only if the seizing officers knew or had reason to know that the search was unconstitutional.[69]

In a later case, the issue of good faith was addressed by Justice Powell in his concurring opinion.[70] To combat what he considered the overreaching of the exclusionary rule, Justice Powell suggested a sliding scale approach for assessing police misconduct.[71] At one end of the scale he placed flagrant violations, such as pretext arrests and other unnecessarily intrusive invasions of privacy.[72] He urged that evidence obtained in such flagrant disregard for constitutional guarantees should be excluded at trial.[73] At the other end of the scale were technical violations, such as an officer relying on a statute later declared unconstitutional or upon a warrant subsequently invalidated.[74] Justice Powell proposed that technical violations, committed in good faith, should not trigger the exclusion of evidence.[75]

Stone v. Powell[76] provided a forum for further analysis of the good faith doctrine. Although the facts of *Stone* raised the issue of good faith, the majority opinion failed to address it.[77] However, both Chief Justice Burger's concurrence and Justice White's dissent focused on the good faith issue. As had Justice Powell, Justice Burger criticized the overreaching of the exclusionary rule.[78]

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69. 422 U.S. at 542. Thus, *Peltier* provides that the exclusionary rule is not retroactively applied in fourth amendment cases unless the officers involved in the illegal search knew or should have known that their actions were unconstitutional. *Id.*

70. Brown v. Illinois, 422 U.S. 590, 606-16 (1975) (Powell, J., concurring in part). *Brown* involved an illegal arrest made without a warrant or probable cause. After being taken to the police station, petitioner made two incriminating statements concerning a murder. Petitioner later moved to suppress the statements because they had been obtained through illegal arrest and detention. His motion was denied and he was subsequently convicted of murder. The Supreme Court of Illinois affirmed the conviction, stating petitioner's receipt of the *Miranda* warnings made his statements admissible, 56 Ill. 2d 312, 307 N.E.2d 356 (1974). On certiorari, the Supreme Court reversed and remanded, declaring receipt of *Miranda* warnings did not per se make the statements admissible. 422 U.S. at 605.

71. *See* Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring).

72. *Id.* at 610-11.

73. *Id.*

74. *Id.* at 611.

75. *See id.* at 612.

76. 428 U.S. 465 (1976).

77. Petitioner's conviction in part rested on testimony concerning a revolver found on his person when he was arrested for violating a vagrancy ordinance. *Id.* at 469-70. At trial he argued that the testimony should have been excluded because the ordinance in question was unconstitutional, and therefore the arrest was invalid. The trial court rejected his argument and the state appellate court affirmed the conviction finding it unnecessary to rule on the constitutional question because the error, if any, was harmless. *Id.* Petitioner then applied to federal district court for habeas corpus relief. The district court concluded that even if the ordinance was unconstitutional, the exclusionary rule's deterrent purpose does not require exclusion of evidence obtained in a search incident to an otherwise valid arrest. *Id.*

The court of appeals held that the ordinance was unconstitutional, therefore the arrest was illegal, and the exclusionary rule should apply. *Id.* at 571. The Supreme Court reversed, holding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494.

78. *See supra* notes 70-75 and accompanying text.

He suggested that if the "judicially contrived doctrine" was overruled or limited to bad faith violations, legislatures would be encouraged to provide a sufficient remedy for police mistakes or misconduct.[79] Justice Burger also recognized two categories of good faith violations: good faith technical violations and good faith mistakes.[80] In his dissent, Justice White further analyzed these two categories. Previous discussion of good faith violations had focused primarily upon technical violations as defined by Justice Powell.[81] Justice White examined the second category of good faith violations, the good faith mistake.[82] Good faith mistakes involve judgmental errors that may or may not be reasonable.[83] Justice White maintained that police misconduct would not be deterred by excluding evidence obtained through a mistaken but good faith judgment that the procedure followed was legal.[84]

In 1979 the Supreme Court implicitly recognized a good faith exception to the exclusionary rule for technical violations in *Michigan v. DeFillipo*.[85] After arresting the defendant for an ordinance violation, the police searched him and found controlled substances.[86] He was subsequently charged with possession and convicted.[87] In an interlocutory appeal, the Michigan court of appeals held the ordinance was unconstitutionally vague. The court thus found the arrest and search invalid[88] and ordered the evidence suppressed. The United States Supreme Court reversed, stating police must be allowed to enforce laws until and unless they are declared unconstitutional.[89] The Court held that evidence obtained by the police in good faith and reasonable reliance on the statute should not have been suppressed.[90]

THE FIFTH CIRCUIT'S RECOGNITION OF A SWEEPING GOOD FAITH EXCEPTION

In 1980, the Fifth Circuit accepted both the good faith technical violation and the good faith mistake exceptions to the exclusionary rule in *United States*

79. 428 U.S. at 501 (Burger, C.J., concurring).

80. *See id.* at 499.

81. *See supra* note 74 and accompanying text.

82. 428 U.S. at 539 (White, J., dissenting).

83. Ball, *supra* note 19, at 653.

84. 428 U.S. at 540.

85. 443 U.S. 31 (1979). *Accord* United States v. Carden, 529 F.2d 443 (5th Cir. 1976), *cert. denied*, 429 U.S. 848 (1976) (upholding an arrest and search made in good faith reliance on a loitering statute); United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971) (upholding a confession resulting from a good faith arrest based on a statute subsequently declared unconstitutional).

86. 443 U.S. at 34.

87. *Id.*

88. 80 Mich. App. 197, 202-03, 262 N.W.2d 921, 924 (1977), *rev'd*, 443 U.S. 31 (1979).

89. 443 U.S. at 38. The Court believed that the police relied on the statute. *Id.* at 36. *But see id.* at 41, 42 (Brennan, J., joined by Marshall and Stevens, J.J., dissenting). The dissent suggested that the majority erred in focusing on the good faith of the arresting officers and the reasonableness of their reliance on the ordinance's validity. The dissenters thought the ultimate issue was whether the State had gathered its evidence through unconstitutional means. *Id.* at 43.

90. *Id.* at 40.

v. Williams.[91] While searching the defendant pursuant to her arrest for violating a court order restricting her travel,[92] a drug enforcement agent found heroin in defendant's possession.[93] At trial the defendant challenged the validity of the arrest and the subsequent search.[94] Thirteen of the twenty-four Fifth Circuit judges believed the agent's reasonable and good faith belief that he was authorized to arrest the defendant should be taken into consideration.[95] This bare majority agreed that the purpose of the exclusionary rule is to deter willful or flagrant police misconduct, not action taken in the reasonable and good faith belief it was constitutional.[96] In their view, the exclusionary sanction should not be used when an officer acts in the good faith belief that his conduct is legal and he has a reasonable basis for that belief.[97] The good faith exception recognized in *Williams* included both good faith mistakes and good faith technical violations.[98]

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91. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). Two opinions commanded a majority in *Williams*. Part I found that the agent had been justified in arresting defendant on grounds of statutory interpretation. *Id.* at 839. Part II held that even if the agent had not been authorized to make the arrest, his good faith and reasonable belief that he had been authorized to do so ought to have been considered. *Id.* at 846-47. For a thorough discussion of the *Williams* decision, see Note, *Is It Time For a Change in the Exclusionary Rule?*, United States v. Williams *and the Good Faith Exception*, 60 WASH. U.L.Q. 616 (1982); Comment, *Constitutional Law: The Fifth Circuit's Good Faith Exception to the Exclusionary Rule — Well-reached or Overreached?*, 33 U. FLA. L. REV. 300 (1981).

92. 622 F.2d at 834. The same agent had arrested Williams a year earlier for possession of heroin in Ohio. The trial court sentenced her to three years imprisonment. She then appealed to the Sixth Circuit, which ordered her released pending appeal, provided she remained in Ohio. The agent knew of these court-imposed travel restrictions when he saw her in the Atlanta airport. *Id.* at 833-34. He approached her and asked whether she had received permission to leave Ohio. She responded "No." When asked why she was heading for Kentucky via Atlanta, she answered "I live there now." *Id.* at 834. The agent then arrested her, believing he had the authority to do so. *Id.*

93. *Id.* He then obtained a search warrant for defendant's luggage and found more heroin. *Id.* at 834-35.

94. Williams argued the arrest was invalid because the statute authorizing drug enforcement agents to make warrantless arrests does not grant them the power to arrest individuals for contempt. *Id.* at 835. Agreeing with Williams, the Fifth Circuit panel originally hearing the appeal held "[a] court, not a DEA agent, is empowered by 18 U.S.C. § 401(3) to punish disobedience or contempt of its order by fine or imprisonment." United States v. Williams, 594 F.2d 86, 92 (5th Cir. 1979), *rev'd on reh'g*, 622 F.2d 830 (5th Cir. 1980) (en banc) (emphasis in original). The panel then concluded, "DEA agents, therefore, have no implied arrest power under § 401." *Id.* at 93. On rehearing en banc, the Fifth Circuit reversed the panel's decision. 622 F.2d at 833.

95. 622 F.2d at 840.

96. *Id.*

97. *Id.*

98. *See id.* at 843-47. *See generally* Comment, *Criminal Procedure — Exclusionary Rule — "Good Faith" Exception — The Exclusionary Rule Will Not Operate in Circumstances Where the Officer's Violation Was Committed in the Reasonable, Good Faith Belief that His Actions Were Legal*, 27 VILL. L. REV. 211, 222 (1982) (arguing that the Fifth Circuit's articulation of the good faith exception to the exclusionary rule is a much needed step forward in the area of criminal law). *But see* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 416 (1981) (arguing that the facts of *Williams* did not support the sweeping exception the court

By adopting a sweeping good faith exception to the exclusionary rule, the *Williams* majority claimed to be following the trend set by the Supreme Court.[99] Since *Williams*, however, no other courts have gone so far.[100] Whether the Supreme Court will recognize such a general exception to the exclusionary rule in the criminal context is uncertain.[101] The analysis of whether the good faith exception should be adopted in OSHA proceedings must be preceded by a discussion of administrative search law.

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fashioned). Professors Mertens and Wasserstrom predict that the good faith exception may ultimately alter the definition of fourth amendment rights. *Id.* at 463.

99. *See* 622 F.2d at 841.

100. A few state courts have applied the good faith exception in limited circumstances, but without adopting the broad rule articulated by the Fifth Circuit in *Williams*. *See* People v. Adams, 53 N.Y.2d 1, 9, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881, *cert. denied*, 454 U.S. 854 (1981) (evidence need not be excluded when seized by police officer under the mistaken belief that the person consenting to the search had authority to do so). Other courts have cited *Williams* as the most recent development in exclusionary rule doctrine, but have stopped short of applying it. *See, e.g.*, Robberson Steel Co. v. OSHRC, 645 F.2d 22, 22 (10th Cir. 1980) (decision based on retroactivity principles, but the court expressed approval of the logic of *Williams*); People v. Eichelberger, —— Colo. ——, 620 P.2d 1067, 1071 n.2 (1980) (en banc) (the exclusionary rule is not intended to prevent police from carrying out their duties when police action is reasonable); People v. Smith, — Colo. —, 620 P.2d 232, 235 n.4 (1980) (exclusionary rule exists to deter willful, flagrant actions by police, not reasonable, good faith ones); People v. Pierce, 88 Ill. App. 3d 1095, 1102, 1110, 411 N.E.2d 195, 301, 307 (1980) (the court noted the *Williams* test of "reasonable and good faith belief by the police in propriety of their conduct" was met by the state but decided the case on the "totality of circumstances" present). *But see* Holloman v. Commonwealth, 221 Va. 947, 950, 275 S.E.2d 620, 622 (1981) (although persuaded by *Williams*' logic, the court held the good faith exception inapplicable when police search places that could not reasonably contain objects of the search). Other courts have refused to consider the good faith exception because the highest court within the jurisdiction has not yet given approval. *E.g.*, Pesci v. State, 410 So. 2d 380 (Fla. 3d D.C.A. 1982) (court refused to consider the exception until the Florida Supreme Court has recognized it).

101. The Supreme Court had the opportunity to carve out a good faith exception to the exclusionary rule in Illinois v. Gates, 103 S. Ct. 2317 (1983). In *Gates*, police obtained a warrant to search defendants' car and home. Probable cause for issuance of the warrant was based primarily on an anonymous letter to the police alleging that defendants were planning to go to Florida to purchase marijuana. *Id.* at ——.

When the case was first argued before the Supreme Court last fall, it provided the Justices an opportunity to decide when police may use an anonymous tip to establish probable cause for issuance of a search warrant. Lauter, NAT'L L.J., Mar. 14, 1983, at 6, col. 1. Instead of deciding the case on the question whether there was probable cause to support the warrant, however, the Court rescheduled the case for argument on the issue of the good faith exception. *Id.*

When the Supreme Court again heard arguments it became apparent that *Illinois v. Gates* might not be the right case for re-examining the scope of the exclusionary rule. The Illinois Assistant Attorney General refused to argue for the good faith exception. Instead he urged that the "totality of the circumstances" in the case justified the magistrate's "reasonable belief" that there was probable cause for issuance of the warrant. U.S. Solicitor General Roy E. Lee representing the Reagan administration's views on the case argued, "once a warrant has been issued, execution of it should be considered 'reasonable' and thus evidence obtained by it should be admissible." He went on to add that in the administration's view there was probable cause for the warrant. Justice Stevens summed up the problem with the Solicitor General's argument: if the warrant was issued with probable cause, there was no reason to consider suppression; but if probable cause was lacking, the warrant clearly violated the

THE HISTORY AND DEVELOPMENT OF ADMINISTRATIVE SEARCH LAW

In *Camara v. Municipal Court*,[102] the Supreme Court imposed the warrant requirement on residential inspections made pursuant to city fire, health, and housing codes.[103] Until *Camara*, the Court had considered privacy interests affected by municipal code inspections "peripheral" to interests protected by the Constitution.[104] *Camara* involved a city health inspector's attempt to inspect a private home without a warrant.[105] The Court acknowledged that an inspection for municipal code violations was less intrusive than a typical criminal search; however, the Court refused to endorse its prior characterization of the fourth amendment rights involved as "peripheral."[106] Instead, the majority insisted that, except in certain circumstances, a search of private property without consent is unconstitutional unless authorized by a valid search warrant.[107] Concerned that warrantless administrative searches would subject individuals to the sole discretion of administrative officials, the Court held the warrant requirement applied.[108]

The majority was unwilling, however, to require the same probable cause standard for issuance of administrative search warrants as traditionally required for criminal search warrants.[109] The *Camara* Court recognized that administrative searches are conducted to protect the public and are generally less intrusive than criminal searches.[110] Thus the Court allowed a lower standard for the

Constitution. In either case, the issue of good faith is irrelevant. *Id.* at 6, cal. 3. The case was ultimately decided on the Illinois Assistant Attorney's argument that the "totality of circumstances" justified issuance of the search warrant. 462 U.S. at ——.

102. 387 U.S. 523 (1967). For an analysis of *Camara* and its companion case, See v. City of Seattle, 387 U.S. 541 (1967) and their effect on fourth amendment rights, see LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1.

103. *See* 387 U.S. at 534.

104. Frank v. Maryland, 359 U.S. 360, 367 (1959). In *Frank* the Supreme Court upheld the conviction of defendant who had refused to permit a municipal health official to conduct a warrantless search of his home. *Id.* at 373. The dissent by Justice Douglas, with whom Chief Justice Warren, and Justices Black and Brennan concurred, argued that rights affected by warrantless inspections were not peripheral and that warrants, therefore, should be required. *Id.* at 375.

105. 387 U.S. at 525.

106. *Id.* at 530. Writing for the Court, Justice White declared: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id.*

107. *Id.* at 528-29.

108. *Id.* at 534. Since the warrant requirement applies to such inspections, the defendant could not be prosecuted for denying the city official access to his home without a warrant. *Id.* at 546.

109. *Id.* at 538. "Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." *Id.* (citing Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)).

In *Camara*, the Court was trying to balance the privacy interests of individuals against the remedial purposes of administrative inspections. *See* LaFave, *supra* note 102, at 19.

110. 387 U.S. at 537-38.

111. *Id.* at 539.

probable cause necessary to issue warrants in an administrative context. In addition, the Court announced that the emergency exception to the warrant requirement recognized in the criminal context would also apply in the administrative area.[111]

The Court extended its *Camara* reasoning to commercial property in a case decided the same day, *See v. City of Seattle*.[112] The defendant was convicted for refusing to permit a city fire department official to inspect his warehouse.[113] The official had no warrant and there was no probable cause to believe any fire code violations existed in the warehouse.[114] Holding the warrant requirement applicable, the Court declared that a businessman has the same constitutional right to be free from unreasonable official invasions of his private commercial property as an individual has regarding his private residential property.[115] The defendant therefore could not be prosecuted for exercising his fourth amendment right to demand a warrant authorizing inspection of his warehouse.[116]

After *Camara* and *See*, the Supreme Court carved out an exception to the warrant requirement when the industry to be inspected has historically been highly regulated. The Court upheld two warrantless searches despite the absence of probable cause or exigent circumstances.[117] The first case in which the Supreme Court applied the exception to the *Camara/See* standard involved a search in the liquor industry;[118] the second case involved a firearms industry search.[119] In each case, the Court noted that the industry under inspection had long been subject to close governmental supervision.[120]

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112. 387 U.S. 541 (1967).

113. *Id.*

114. *Id.*

115. *Id.* The Court stated:

> As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The 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 warrant.

Id. at 543.

116. 387 U.S. at 546.

117. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311 (1972).

118. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970).

119. United States v. Biswell, 406 U.S. 311 (1972).

120. *Id.* at 315; Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970). In addition to echoing the "pervasively regulated" argument of *Colonnade*, the *Biswell* Court said firearms dealers impliedly consent to warrantless searches when they apply for a federal license. United States v. Biswell, 406 U.S. 311, 316 (1972).

After *Colonnade* and *Biswell*, there was some concern that the *Camara/See* doctrine would be swallowed up by exceptions. *See, e.g.*, Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to* Camara *and* See?, 50 WASH. L. REV. 341 (1975); Note, *The Law of Administrative Inspections: Are* Camara *and* See *Still Alive and Well?*, 1972 WASH. U.L.Q. 313. For a discussion questioning the soundness of the "pervasively regulated" industry ex-

Although both decisions involved federal statutory schemes authorizing warrantless inspections,[121] it was not solely deference to congressional inspection schemes that persuaded the Court to create an exception to the *Camara/See* doctrine.[122] The Court apparently intended to make an exception only for "pervasively regulated" industries.[123] Thus in *Marshall v. Barlow's*,[124] the Court declared unconstitutional section 8(a) of O.S.H.A.[125] which purported to authorize warrantless inspections of all businesses subject to the Act.[126] *Barlow's* will be considered more closely following an examination of the relevant provisions of the Act.

THE EXCLUSIONARY RULE AND THE GOOD FAITH EXCEPTION IN THE OSHA SETTING

Congress passed O.S.H.A. to curb industrial accidents and health hazards. Testifying during Senate hearings on the proposed legislation, former Labor Secretary George P. Schultz stated that 14,000 workers died and 22 million were disabled by job-related accidents each year.[127] An estimated 1.5 billion dollars in wages and 8 billion dollars in the gross national product were lost because of these deaths and accidents.[128]

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ception, see Note, *Rationalizing Administrative Searches*, 77 MICH. L. REV. 1291, 1330-31 (1979).

121. The statute in *Colonnade* provided:

> "The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

26 U.S.C. § 5146(b) (1976).

In *Biswell*, the statute was the Gun Control Act of 1968, which provides in part:

> The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provision of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises.

18 U.S.C. § 923(g) (1976).

122. *See infra* notes 123-26 and accompanying texts.

123. *See, e.g.*, Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861, 864-65 (1974) (expressly reaffirming *Camara* and *See* while finding them inapplicable); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973) (reaffrming *Camara* and concluding that roving border searches presented the same "evil" of unabridged discretion as was found in *Camara*).

124. 436 U.S. 307 (1978).

125. 29 U.S.C. § 657(a) (1976).

126. 436 U.S. at 325. For text of section 657(a) see *supra* note 13.

127. THE BUREAU OF NATIONAL AFFAIRS, INC., THE JOB SAFETY AND HEALTH ACT OF 1970 at 13 (1971).

128. *Id.* It had become increasingly apparent that advances in technology were creating

O.S.H.A. mandates a safe working environment for almost every employee in the country.[129] It directs the Secretary of Labor to issue and enforce safety and health regulations for all businesses affecting interstate commerce. The Act requires that an employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[130] In addition, employers must comply with the occupational safety and health standards promulgated under the Act[131] and maintain safety-related records as required by the Secretary of Labor.[132]

To enforce the prescribed safety and health standards, OSHA can conduct inspections either on its own initiative or upon an employee's request.[133] Upon finding a violation, OSHA must issue the employer a citation with "reasonable promptness"[134] and state the proposed penalty.[135] If an employer contests the citation or proposed penalty or if an employee contests the reasonableness of the period for abatement of the violation, an administrative law judge will hear the case.[136] Initial discretionary review is by the OSHRC.[137] OSHRC decisions may be appealed to a circuit court of appeals, whose decisions may be reviewed by the United States Supreme Court.[138]

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additional safety and health hazards in the workplace. Lead and mercury poisoning, asbestosis, and byssinosis affected a substantial number of workers. *Id.* at 13, 14. The Public Health Service estimated that three new, potentially dangerous chemicals were introduced into industry every hour. *Id.* at 14. Like their counterparts in industry, farm workers felt the effects of technology, and suffered from the effects of newly developed pesticides, herbicides, and fungicides. *Id.*

129. The impact of the Act falls directly on those included in its definition of "employer." For the purposes of the Act, employer means "a person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a state." *Id.* at 6. The phrase "affecting commerce" has been given a broad construction. *Id.* If raw materials, power, or communications cross state lines in the production of goods, the business is deemed covered by O.S.H.A. *Id.* at 6-7.

Because the terms of the Act are so broad, it covers almost every commercial establishment in the United States. By one estimate, almost 80% of the nation's work force is covered by the Act. Shaffer, *Job Health and Safety,* 1976 EDITORIAL RESEARCH REPORTS 953, 963 cited in Comment, *OSHA v. The Fourth Amendment: Should Search Warrants be Required for "Spot Check" Inspections?,* 29 BAYLOR L. REV. 283, 283 (1977).

130. 29 U.S.C. § 654(a)(1) (1976).

131. *Id.* § 654(a)(2).

132. *Id.* § 657(c)(1).

133. *Id.* § 657(a).

134. *Id.* § 658(a).

135. *Id.* § 666.

136. *Id.* § 659(c). This hearing must conform with the procedural requirements for adjudicatory hearings set forth in the Administrative Procedure Act (APA), 5 U.S.C. § 554 (1976). *See* 29 U.S.C. § 659(c).

137. The OSHRC has the power to affirm, modify, or vacate the citation or proposed penalty following the initial hearing conducted by the administrative judge. 29 U.S.C. § 659(c).

138. *See* 29 U.S.C. § 660(a) (1976). Any person adversely affected by an order of the OSHRC may obtain judicial review in a United States Court of Appeals by filing within sixty days a petition that the order be modified or set aside. *Id.* The Supreme Court's certiorari jurisdiction is set forth in 28 U.S.C. § 1254 (1976).

The Constitutionality of OSHA Inspections

In *Marshall v. Barlow's,* defendants challenged the constitutionality of O.S.H.A. section 8(a),[139] which allows OSHA compliance agents to search the premises of any business within the Act's jurisdiction.[140] No search warrant or other process is expressly required by the Act. Nevertheless, Barlow denied an OSHA inspector admission to the nonpublic areas of his business premises, relying on the fourth amendment as grounds for his refusal.[141] The Secretary of Labor argued that warrantless inspections to enforce the O.S.H.A. were within the "pervasively regulated" industry exception.[142] The Supreme Court, however, held section 8(a) unconstitutional "insofar as it purports to authorize inspections without a warrant or its equivalent."[143] Citing *Camara* and *See,* the majority stressed the fourth amendment rights of businessmen and the need to limit the unbridled discretion that warrantless searches would afford OSHA compliance officers.[144] The Court decided a warrant was necessary so that a neutral magistrate might assure each inspection would be reasonable under the Constitution.[145] A warrant would also describe the scope and objectives of the search.[146]

While recognizing the necessity of warrants to protect against unreasonable searches, the Court nevertheless prescribed a lower standard of probable cause for issuance of search warrants in the OSHA context. For routine OSHA inspections, a showing that the proposed inspection is pursuant to a neutral legislative or administrative plan is sufficient.[147] For nonroutine inspections, probable cause may be based on specific evidence of an existing violation.[148]

139. 29 U.S.C. § 657(a) (1976).

140. *See* 436 U.S. 307, 325 (1978). For a discussion of the administrative search law prior to *Barlow's* and the effect of *Barlow's* on employers' privacy rights, see Note, Marshall v. Barlow's, Inc.: *Are Employers' Fourth Amendment Rights Protected?,* 16 CAL. W.L. REV. 161 (1980); Comment, *Constitutional Law — OSHA Searches: A Fourth Amendment Warrant Requirement,* 30 U. FLA. L. REV. 991 (1978).

141. 436 U.S. at 309-10.

142. *Id.* at 313.

143. *Id.* at 325.

144. *See id.* at 322-23. *See also* Donovan v. Dewey, 452 U.S. 549 (1981) (upholding warrantless inspections required by the Mine Safety and Health Act). In *Dewey,* the Court considered whether the Mine Safety and Health Act's inspection program provided an adequate substitute for a warrant. According to the Court, the certainty and regularity of the Act's inspection program sufficiently checked the discretion of government officers. Unlike O.S.H.A., the Mine Safety and Health Act requires inspection of all mines and specifically defines the frequency of inspection. *See also* Note, *Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement,* 64 CORNELL L. REV. 856 (1979) (proposing that legislation for administrative inspections could be fashioned to provide the safeguards of the warrant requirement without imposing the warrant requirement).

145. 436 U.S. at 323.

146. *Id.*

147. *Id.* at 320-21.

148. *Id.* at 320. The Court made no attempt to define the appropriate level of specificity or certainty required for an OSHA inspection warrant in the nonroutine instance. *See* Note, *Administrative Agency Searches Since* Marshall v. Barlow's, Inc.: *Probable Cause Requirements for Nonroutine Administrative Searches,* 70 GEO. L.J. 1183, 1185 (1982) (arguing that because nonroutine inspections involve high levels of discretion and intrusiveness, they should be issued only if traditional probable cause exists).

The Court did not address whether an employee complaint alleging a specific violation would constitute probable cause for a full scope inspection.[149] Lower courts deciding this issue have reached conflicting results. Some have held that a specific employee complaint should be enough to trigger a full scope inspection.[150] Other courts and the OSHRC have declared that an inspection based on a specific complaint should be limited to finding out whether the alleged violation actually exists.[151]

Since the *Barlow's* decision in 1978, both courts and commentators have speculated whether the exclusionary rule should apply to OSHA proceedings. Two circuit courts have permitted evidence found in pre-*Barlow's* warrantless searches to be introduced in OSHA proceedings.[152] However, their conclusions diverge as to the applicability of the exclusionary rule in post-*Barlow's* cases. One court questioned the applicability of the exclusionary rule in any OSHA proceeding.[153] The other expressly declared that the exclusionary rule would

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149. *Barlow's* involved a routine inspection. 436 U.S. at 310. Thus, the question whether a specific employee complaint presents sufficient probable cause for a full scope inspection was not before the Court. Presumably, an employee complaint establishes administrative probable cause of an existing violation. *See, e.g.*, Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978). However, the complaint should not be considered in the abstract. If a number of identical complaints had been received recently and in each instance an inspection revealed no violations, there would be no probable cause. *See generally* Rothstein, *OSHA Inspections After* Marshall v. Barlow's Inc., 1979 DUKE L.J. 63.

150. *E.g.*, Hern Iron Works, Inc. v. Donovan, 670 F.2d 838 (9th Cir.), *cert. denied*, 103 S. Ct. 69 (1982); Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313 (7th Cir. 1980); Establishment Inspection of Seaward Int'l, Inc. v. Seaward Int'l, Inc., 510 F. Supp. 314 (W.D. Va. 1980), *aff'd*, 644 F.2d 880 (4th Cir. 1981) (without opinion).

151. *E.g.*, Donovan v. Sarasota Concrete Co., 693 F.2d 1061, 1069 (11th Cir. 1982); Marshall v. Horn Seed Co., 647 F.2d 96, 101 (10th Cir. 1981); Marshall v. North Am. Car Co., 626 F.2d 320, 324 (3d Cir. 1980); Marshall v. Central Mine Equip. Co., 608 F.2d 719, 720-21 n.1 (8th Cir. 1979); *In re* Establishment Inspection of ASARCO, Inc., 508 F. Supp. 350, 353 (N.D. Tex. 1981); West Point-Pepperell, Inc. v. Marshall, 496 F. Supp. 1178, 1186 (N.D. Ga. 1980), *rev'd on other grounds*, 689 F.2d 950 (11th Cir. 1982); Marshall v. Pool Offshore Co., 467 F. Supp. 978, 981-82 (W.D. La. 1979).

152. *See* Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979); Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683 (9th Cir. 1978). Both cases were decided on general retroactivity principles concerning the exclusionary rule in the criminal content. *See* United States v. Peltier, 422 U.S. 531 (1975); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965). *See generally* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975) (discussing the Court's unwillingness to apply the fourth amendment retroactively).

153. Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683, 689. The Ninth Circuit concluded that since the Supreme Court in United States v. Janis, 428 U.S. 433, 447 (1976) said it had never applied the exclusionary rule in civil proceedings, the rule should not be used in OSHA proceedings. *Id. But see* Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1362 (10th Cir. 1979) (arguing that *Janis* does not preclude application of the exclusionary rule in noncriminal proceedings). The *Savina* court also noted several instances in which the Supreme Court and circuit courts have approved application of the exclusionary rule in certain civil cases characterized as 'quasi-criminal.' *E.g.*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (where the Court held the exclusionary rule applies to certain forfeiture proceedings); Midwest Growers Coop. Corp. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976) (permanent injunction against the use of materials seized pursuant to an invalid administrative search warrant); Pizzarello v. United States, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S.

apply to OSHA inspections in violation of *Barlow's* holding.[154]

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN OSHA INSPECTIONS

The OSHRC has determined that the exclusionary rule should apply in OSHA actions.[155] The circuit courts that have reviewed OSHRC decisions applying the exclusionary rule have agreed with its position.[156] The circuit courts, however, disagree about recognizing a good faith exception to the exclusionary rule.

Even before the OSHRC applied the exclusionary rule in post-*Barlow's* cases, adopting a good faith exception in OSHA actions had already been suggested.[157] Recently, two circuit courts faced with the applicability of a good faith exception in OSHA proceedings came to opposite conclusions.

In *Donovan v. Federal Clearing Die Casting Co. & OSHRC,*[158] the Seventh Circuit expressly approved using a reasonable good faith exception in OSHA actions.[159] OSHA officials had conducted an inspection pursuant to a warrant that had been upheld by the district court and provisionally upheld by the Seventh Circuit.[160] The warrant, however, was later invalidated for lack of probable cause.[161] At the hearing on citations issued for violations found

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986 (1969) (since illegally seized evidence was used to compute jeopardy assessment, the tax was illegal).

154. Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979). For fuller exploration of the *Todd* and *Savina* opinions on the applicability of the exclusionary rule in the OSHA context, see Trant, *supra* note 17, at 687-89. For analysis of *Savina* and its potential influence on future cases, see Comment, *Applicability of the Exclusionary Rule to Illegal OSHA Inspections*: Savina Home Indus. v. Secretary of Labor, 64 MINN. L. REV. 789 (1980).

155. Secretary of Labor v. Sarasota Concrete Co., 9 O.S.H. Cas. (BNA) 1608 (Rev. Comm'n 1981), *aff'd,* Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982). The Administrative Procedure Act (APA) provides that "[a]ny oral or documentary evidence may be received, but the agency as matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d) (1976).

However, the APA is not the only guideline for determining whether evidence is to be excluded. The fourth amendment guarantee against unreasonable searches and seizures also may cause evidence to be excluded. *See* Knoll Assoc., Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968) (setting aside an FTC order on the grounds that the Commission's acceptance and use of corporate documents, known to be stolen on behalf of the government, violated the fourth amendment). *See* C. MCCORMICK, *supra* note 1, §§ 350-354. *See also* 4 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 30.01 (1982).

156. *See* Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982); Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982).

157. *See* Robberson Steel Co. v. OSHRC, 645 F.2d 22, 22 (10th Cir. 1980). Although *Robberson* was decided on the nonretroactivity analysis applied in *Savina,* the *Robberson* court said the reasoning of the Fifth Circuit in *Williams* was "equally applicable to civil OSHA enforcement proceedings." *Id.*

158. 695 F.2d 1020 (7th Cir. 1982).

159. *Id.* at 1023.

160. *Id.*

161. *Id.* The warrant was ultimately held invalid in Donovan v. Federal Clearing Die Casting Co., 655 F.2d 793 (7th Cir. 1981). Thus the question here was "whether the evidence gathered through OSHA's reasonable and good-faith inspection pursuant to a warrant upheld

during the inspection, the defendant moved to suppress all evidence obtained through the invalid inspection warrant.[162] Following the dismissal of the proceedings, the Labor Secretary appealed to the United States Court of Appeals for the Seventh Circuit.[163] The Seventh Circuit assessed the societal harm incurred by suppressing relevant and probative evidence and expressed its belief that good faith errors cannot be deterred by the exclusionary rule.[164] Finding that the compliance officers had acted reasonably and in good faith in relying on the warrant, the Seventh Circuit held the fourth amendment did not require excluding the evidence.[165]

In contrast, the Eleventh Circuit in *Donovan v. Sarasota Concrete Co.*[166] rejected the Labor Secretary's argument that evidence obtained under a warrant that is later invalidated should be admissible because the OSHA compliance officer had acted in good faith.[167] The compliance officer had procured a warrant authorizing a full scope inspection.[168] The warrant was subsequently declared invalid for lack of sufficient administrative probable cause.[169] The Eleventh Circuit agreed with OSHRC's assessment that the exclusionary rule has a potential deterrent impact and should be applied in OSHA proceedings.[170] The court therefore upheld the Commission's decision not to lessen that impact by recognizing a good faith exception.[171]

The conflicting results of *Federal Clearing* and *Sarasota Concrete* show the need for further analysis of the good faith exception in the OSHA context. Criminal procedure cases may give some guidance in applying the good faith exception in OSHA proceedings, but the particularities of OSHA procedures must also be considered.

Evaluating the Good Faith Exception to the Exclusionary Rule in OSHA Proceedings

Although the Supreme Court has not yet explicitly recognized the good faith exception doctrine, it implicitly recognized the doctrine in *Michigan v. DeFillipo.*[172] Moreover, five of the present Justices have expressed interest in modifying the scope of the exclusionary rule.[173] If the purpose of the exclusion-

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by the district court and provisionally upheld by this Court must be suppressed under the exclusionary rule because the warrant was invalidated on appeal more than a year thereafter." 695 F.2d at 1023.

162. *Id.* at 1021.

163. *Id.*

164. *Id.* at 1024.

165. *See id.* at 1023.

166. 693 F.2d 1061 (11th Cir. 1982).

167. *Id.* at 1072.

168. *Id.* at 1063.

169. *Id.*

170. *Id.* at 1071.

171. *See id.* at 1072.

172. 443 U.S. 31, 36 (1979). *See supra* text accompanying notes 85-91.

173. Recently, Chief Justice Burger and Justices Rehnquist, White, Powell, and O'Connor indicated their desire to modify the exclusionary rule when they rescheduled *Gates* and asked the parties to address the question "whether the rule requiring the exclusion at a

ary rule is to guarantee a personal constitutional right, as the Supreme Court suggested in *Weeks v. United States* and *Mapp v. Ohio,* the rule should not be undercut by an exception.[174] However, in view of the Court's current acceptance of deterrence as the primary rationale for the rule,[175] the good faith exception appears to be a logical means for limiting the exclusion of probative evidence in criminal trials.[176]

Even if the good faith exception is eventually recognized by the Supreme Court in the criminal setting, it should not be accepted in the OSHA context. The arguments supporting its application in criminal trials are less persuasive in OSHA proceedings. Though it appears to mitigate the seemingly harsh remedy for unintentional violations of fourth amendment rights, the good faith exception could undermine those rights by substituting mere good faith for the probable cause requirement of the fourth amendment.[177]

SUPREME COURT PRECEDENT FOR THE GOOD FAITH EXCEPTION — IS IT APPLICABLE IN THE OSHA CONTEXT?

The sweeping good faith exception recognized by the Fifth Circuit included both good faith mistakes made by officers in assessing probable cause in the field and good faith technical violations made by police in relying on statutes or warrants subsequently declared unconstitutional.[178] The only case where the Supreme Court has arguably recognized a good faith exception to the exclusionary rule is *Michigan v. DeFillipo.* Though *DeFillipo* was not decided explicitly on good faith grounds, the majority did focus on the arresting officers' good faith and reasonableness in enforcing a statute that had not yet been declared unconstitutional.[179]

The *DeFillipo* situation could not occur in the OSHA setting. In *Marshall v. Barlow's,* the Supreme Court held section 8(a) of O.S.H.A. unconstitutional because it purported to authorize warrantless OSHA inspections.[180] Since *Barlow's,* there is no statute upon which compliance officers could reasonably and in good faith rely as there was in *DeFillipo.*[181] Therefore, if the Supreme Court continues to limit the good faith exception to technical violations resulting solely from reliance on subsequently overturned statutes,[182] the good faith exception may have no application in the OSHA context.

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criminal trial of evidence obtained in violation of the fourth amendment . . . should be modified." Lauter, NAT'L L.J. Mar. 14, 1983, at 6, col. 1. However, *Gates* was ultimately decided on other grounds. 103 S. Ct. 2317 (1983). Writing for the majority, Justice Rehnquist said the modification issue would be reserved for another day. 103 S. Ct. at 2325.

174. *See* Ball, *supra* note 19, at 650.

175. *See supra* text accompanying notes 41-56.

176. *See supra* text accompanying notes 58-60.

177. *See id.*

178. *See supra* text accompanying notes 95-99.

179. *See supra* text accompanying notes 85-90.

180. *See supra* text accompanying notes 143-47.

181. There are a few limited exceptions to the warrant requirement in the OSHA setting, see *infra* notes 204-08 and accompanying text.

182. *See* Michigan v. DeFillipo, 443 U.S. at 38. *See supra* notes 85-90 and accompanying text.

In dicta, however, several Justices have suggested that good faith technical violations should encompass reliance not only on statutes subsequently declared unconstitutional but also on search warrants subsequently invalidated.[183] Following *Barlow's,* OSHA inspections generally have been conducted with the employer's consent or with administrative search warrants. To admit evidence obtained through warrants later declared invalid on the theory such evidence was obtained in good faith would seriously undercut employers' fourth amendment rights.[184]

The fourth amendment expressly states that no warrants shall issue except upon probable cause.[185] Acceptance of a good faith exception would, in effect, substitute good faith for the constitutionally mandated probable cause.[186] This substitution would severely weaken the vitality of the exclusionary rule. Because good faith is such an intangible concept, there are numerous possibilities for abuse. If warrants are judged merely by the good faith of those executing them, magistrates relying on the officials' knowledge and integrity could issue warrants without requiring a sufficient showing of probable cause. This procedure would be in direct violation of the fourth amendment, yet the evidence obtained would be admissible in court.[187]

In addition to constitutional considerations, there is a practical reason for not allowing evidence obtained through invalid warrants to be introduced in administrative proceedings. At present, courts disagree as to the proper scope of OSHA inspection warrants based on evidence of specific violations alleged in employee complaints.[188] If good faith is substituted for probable cause, what constitutes probable cause for nonroutine, full scope inspections may never be settled.[189] Perhaps the greatest contribution of the exclusionary rule is that it has forced the Supreme Court to define the standard of probable cause required by the fourth amendment in the criminal context.[190] That function should not be ignored in the developing area of administrative search law.

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183. *See* Stone v. Powell, 428 U.S. at 499 (Burger, C.J., concurring); *id.* at 539 (White, J., dissenting); Brown v. Illinois, 422 U.S. at 611-12 (Powell, J., concurring in part).

184. There are fewer exceptions to the warrant requirement in the OSHA context than in the criminal context. *See infra* text accompanying notes 204-208 (exceptions in the OSHA context include consent, plain view and emergency), and *supra* note 5 (exceptions in the criminal context include consent, plain view, emergency, searches incident to arrest, automobile searches, stop and frisk searches).

185. U.S. CONST. amend IV. *See supra* note 2.

186. In both *Sarasota Concrete* and *Federal Clearing,* the Secretary of Labor asked the respective courts to ignore the question whether or not there was probable cause to issue the warrants and to consider instead the good faith of the OSHA compliance officers in executing the warrants. *See supra* text accompanying notes 158-71.

187. Regardless of the good faith belief of the official executing the warrant, if the warrant is not based on probable cause, it does not conform with the fourth amendment.

188. Some courts take the position that a warrant based on an employee complaint alleging a specific and isolated violation should be limited in scope to the matters described in the complaint. *See supra* note 151. Others insist that a warrant based on a specific complaint should not be limited to the area of the complaint. *See supra* note 150.

189. The exclusion of evidence would not depend upon the validity of the warrant, but on the good faith of those executing it.

190. When evidence may be excluded because its acquisition violates constitutional guarantees, the definition of those guarantees becomes extremely important. *See* Mertens &

IMPORTANT DIFFERENCES BETWEEN CRIMINAL AND OSHA SETTINGS

Even if the Supreme Court should decide to admit evidence obtained with subsequently invalidated warrants in criminal trials, significant differences between the criminal and OSHA context must be considered in evaluating the good faith exception in the OSHA setting. The strongest argument for permitting a good faith exception to the exclusionary rule is the cost to society resulting from the exclusion of reliable and probative evidence.[191] In the criminal context, the cost is criminals going free if the constable blunders.[192] In the OSHA context, the consequence might be that unsafe working conditions will continue because the compliance officer blunders. For several reasons, however, the social costs argument does not carry as much weight in the OSHA setting as in the criminal.

O.S.H.A. directs the Secretary of Labor to set and enforce safety and health standards. Regulations covering a myriad of possible violations have been promulgated.[193] If during an inspection an OSHA compliance officer spots a violation that can be remedied immediately, he will give the employer an opportunity to correct it. If the employer does so, the OSHA officer will not issue a citation. This opportunity is permitted because the Act's purpose is to ensure safe working conditions, not to cite and fine employers.[194] Thus, an employer could remedy a violation without the validity of the inspection warrant coming in question.

Criminal and OSHA procedures differ in another respect. Unlike the criminal context, if evidence obtained in an unlawful inspection is excluded in an OSHA proceeding, the Secretary of Labor may reinspect at a later date upon obtaining a proper warrant. Employees and employee representatives are encouraged to notify OSHA when they believe a safety or health standard is being violated.[195] Employers do not want to be bothered with endless inspections and the possibility of fines. Consequently, if employers succeed in having citations or penalties dismissed because the evidence was obtained under an invalid warrant, they will probably rectify the hazard before OSHA compliance officers return. The Act's purpose thus can be achieved with respect to less serious violations even though the exclusionary rule is applied without a good faith exception.

If an inspector finds serious violations of safety and health standards that must be addressed immediately, he may request a court order to close the

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Wasserstrom, *supra* note 98, at 463 ("It is easy to forget that we knew neither what the [fourth] amendment meant nor what standards it set for law enforcement, until courts set out to give it content in the courses of deciding when evidence should or should not be suppressed").

191. *See supra* note 57.

192. *See* People v. Defore, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587-588 (1926) (opinion by Cardozo, J.) (under the exclusionary rule, "[t]he criminal is to go free because the constable has blundered").

193. *See* 29 C.F.R. § 1910.1-.1500 (1982).

194. *See* 29 U.S.C. § 651 (1976).

195. *Id.* § 657(f)(1).

dangerous machine or area to employees.[196] The inspector must notify the employer and employees both of the danger and of his decision to recommend a court injunction.[197] The employer will probably consent to the closing if he agrees that a danger to employees exists. If the employer disagrees, employees may refuse to work with that machine or in that area, and their decision will be protected by the Act.[198] Either way, the Act's goal of ensuring safe working conditions would be attained despite the possibility that the warrant's validity could be questioned at a later hearing.

Not only are the social costs of excluding evidence in OSHA proceedings lower than those in criminal trials, but the potential for deterrence of official misconduct is higher in the OSHA context. Police who apprehend a suspect then deliver him to another governmental body for prosecution. Conversely, OSHA officials are directly involved in the entire process of enforcing the Act, not only through inspections but also through enforcement proceedings.[199] Thus, under the balancing test developed by the Supreme Court in *Calandra*[200] the deterrent effect of the exclusionary sanction would appear to outweigh the societal costs of exclusion.

Application of the exclusionary rule without a good faith exception also encourages compliance officers to learn what is legal and what is not. Unlike their counterparts in the criminal sector who must contend with the many intricacies of fourth amendment law, compliance officers only have to master administrative search warrant law.[201] Efficient enforcement of the Act depends on compliance officers taking this responsibility seriously.

It can be argued that since OSHA searches involve a lesser intrusion than criminal searches the good faith exception should apply in OSHA proceedings. In *Camara*, however, the Supreme Court adjusted for this "lesser intrusion" by requiring a lower standard of probable cause for administrative searches than that required in criminal searches.[202] Adding a good faith exception to

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196. *Id.* § 662(a).

197. *Id.* § 662(c).

198. *See id.* § 660(c)(1); 29 C.F.R. § 1977.12(b)(2) (1979). *See also* Marshall v. N.L. Indus., Inc., 618 F.2d 1220 (7th Cir. 1980) (Secretary of Labor brought action against an employer alleging he had violated O.S.H.A. by firing an employee for refusing to work under allegedly unsafe conditions); Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980) (upholding the Secretary of Labor's regulation granting employees the right to refuse work when confronted with job conditions that threaten serious injury or death).

In addition, some employees are covered by "just cause" firing clauses in union-negotiated contracts. The growing trend is to protect employees who report suspected violations of federal, state, or local law to a public body. Andrews, *When You Whistle Where You Work . . .*, 11 STUDENT LAW. 11, 40 (Mar. 1983).

199. Donovan v. Federal Clearing Die Casting Co., 695 F.2d at 1020 (Pell, J., dissenting) ("The deterrent effect could be significantly greater in the case of a Government agency such as OSHA than it would in the case of an ordinary policeman who may have little to do after the search and seizure other than to be witness in subsequent court proceedings.").

200. United States v. Calandra, 414 U.S. 338, 349 (1979).

201. *See* Trant, *supra* note 17, at 716.

202. *See supra* note 109 and accompanying text.

this lower probable cause standard rationale would be contrary to the *See* Court's concern for protecting the constitutional rights of businessmen.[203]

Finally, since there are already exceptions to the warrant requirement in the OSHA context,[204] the Act's purpose will not be frustrated if the good faith exception is rejected. Most OSHA inspections are conducted with the consent of the employer; thus no warrant is involved at all.[205] The plain view exception permits inspectors to issue citations without a warrant if they discover a violation from a lawful vantage point.[206] The *Camara* Supreme Court explicitly stated that the emergency exception to the warrant requirement will be recognized in the administrative search context.[207] Thus, when dangerous conditions exist, the warrant requirement can be waived and the exclusionary rule is inapplicable.[208] These exceptions provide compliance officers with the flexibility necessary to enforce the Act and support the conclusion that a good faith exception to the exclusionary rule in the OSHA setting is inappropriate.

CONCLUSION

OSHA inspections serve an important function. Without them, regulations promulgated to ensure safe and healthful working conditions would remain unenforced. Because of OSHA compliance officers' broad discretion in deciding which businesses to inspect, the Supreme Court in *Barlow's* held the fourth amendment warrant requirement applies to OSHA inspections. Since *Barlow's,* several circuit courts have faced the question whether evidence obtained from warrantless inspections or inspections made pursuant to faulty warrants should be admissible in OSHA proceedings.

The lower federal courts have agreed with OSHRC that the exclusionary rule may be applied in OSHA proceedings. The courts have divided, however, on OSHRC's refusal to apply a good faith exception to the exclusionary rule. The Seventh Circuit recently applied the good faith exception in an OSHA action to a technical violation resulting from good faith reliance on a warrant that was subsequently invalidated.[209] Despite dicta indicating that several

203. *See supra* note 115.

204. Exceptions to the warrant requirement in the OSHA context include consent, plain view, and emergency. Compare these with the exceptions in the criminal context, *supra* note 5.

205. In the three or four month period after *Barlow's,* fewer than 500 employers requested warrants in approximately 11,000 inspections attempted by OSHA compliance officers. 8 O.S.H. Rep. (BNA) 564 (1978), *cited in,* Rothstein, *supra* note 149, at 84 n.132.

206. Marshall v. Barlow's, Inc., 436 U.S. 307, 315 (1978) ("What is observable by the public is observable, without a warrant, by the government inspector as well."). *See, e.g.,* Marshall v. Western Waterproofing Co., 560 F.2d 947 (8th Cir. 1977) (OSHA inspection of scaffolding hanging from a building is not subject to fourth amendment objections since scaffolding was observable by members of the public).

207. Camara v. Municipal Court, 387 U.S. 523, 534 (1967).

208. *See* Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) (holding that a warrant is not required for an administrative search during an emergency). For OSHA inspections the emergency exception is probably limited to imminent dangers or other exigent circumstances. Rothstein, *supra* note 149, at 86. A warrantless inspection may be justified when an accident or fatality has occurred and a prompt inspection is necessary to prevent a recurrence. *Id.* However, OSHA should try to obtain consent if possible. *Id.*

209. Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982).

Justices support the good faith exception in the criminal context, the Supreme Court has not yet accepted it. Because such an exception effectively substitutes good faith for the probable cause required by the fourth amendment, it is questionable whether an exception for good faith technical violations would be constitutionally permissible.

Even if the Supreme Court ultimately recognizes a good faith exception for criminal cases, such an exception should not be adopted in OSHA proceedings. OSHA and criminal settings differ significantly. The deterrent effect of the exclusionary rule is higher in OSHA proceedings than in criminal trials. In contrast to criminal enforcement where different agencies apprehend and prosecute a suspect, in OSHA proceedings, one agency is responsible for both apprehension and prosecution. Furthermore, the societal costs of exclusion are lower because the Act's purpose can be achieved despite the occasional exclusion of evidence from citation and penalty hearings. Both for constitutional and policy reasons, the exclusionary rule should apply in OSHA proceedings without being vitiated by a good faith exception.

ROSEMARY PERFIT