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Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith"

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Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith"

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During the last half century the proper scope of the fourth amendment[1] and its related exclusionary rule has provoked heated discussion among jurists[2] and scholars.[3] The Supreme Court has interpreted the amendment as providing constitutional recognition of the individual's right to privacy.[4] The amendment, therefore,

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1. The fourth amendment guarantees,

> 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.

2. For a sampling of this debate in recent cases, see United States v. Place, 103 S. Ct. 2637 (1983); Illinois v. Gates, 103 S. Ct. 2317 (1983); Florida v. Royer, 103 S. Ct. 1319 (1983); United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981); Michigan v. Summers, 452 U.S. 692 (1981); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Mendenhall, 446 U.S. 544 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

3. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289 (1981); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982); McMillian, *Is there Anything Left of the Fourth Amendment?*, 24 ST. LOUIS U.L.J. 1 (1979); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Miles, *Decline of the Fourth Amendment: Time to Overrule* Mapp v. Ohio?, 27 CATH. U.L. REV. 9 (1977); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That it is a Deterrent to Police?*, 62 JUDICATURE 404 (1979); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

4. *See* Katz v. United States, 389 U.S. 347, 350-51 (1967); *see also id.* at 360-61 (Harlan, J., concurring).

protects the individual from unwarranted governmental intrusion upon his person and domain. This protection is essential to the maintenance of the proper balance between the life of a person as an individual and his life as a member of society.[5] Accordingly, police normally must have probable cause, and often a search warrant, before they lawfully can invade an individual's privacy to search for or seize evidence.[6] Few scholars question the value of so protecting individual privacy. In contrast, however, the wisdom of using the exclusionary rule as a procedural remedy for governmental violations of fourth amendment guarantees has been a topic of extensive debate.

Under the exclusionary rule courts must exclude at trial any evidence seized during searches made in violation of fourth amendment standards.[7] Since its earliest pronouncement,[8] critics have condemned this procedure that keeps relevant and reliable evidence from the trial fact-finder. Justice (then Judge) Cardozo, for example, described the rule as a mechanism permitting "[t]he criminal . . . to go free because the constable has blundered."[9]

More recently the exclusionary rule's detractors have marshalled their forces to reduce the rule's impact by carving out a good faith exception. The exception provides for admission of illegally obtained evidence if the offending officer acted with the reasonable good faith belief that his conduct conformed to the fourth amendment. In their frustration with the exclusionary rule a num-

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5. T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 74 (1966). Justice Felix Frankfurter recognized that the fourth amendment held "a place second to none in the Bill of Rights." Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting). Even the first amendment cannot claim greater importance because "speech activity is [but] a small albeit precious part of the lives of most citizens, and even its fullest protection leaves the police unfettered to deal as they please with most of us most of the time." Amsterdam, *supra* note 3, at 377-78.

6. *See* Katz v. United States, 389 U.S. at 356-58 (1967); United States v. Ventresca, 380 U.S. 102 (1965); *cf.* Camara v. Municipal Court, 387 U.S. 523 (1967). In some situations the search may be sufficiently limited as not to require probable cause. *E.g.*, Terry v. Ohio, 392 U.S. 1 (1968). Exigencies also may prevent an officer from obtaining a warrant. *E.g.*, Carroll v. United States, 267 U.S. 132 (1925).

7. This statement is somewhat too broad. As discussed in part I, *see infra* text accompanying notes 38-42, illegally obtained evidence is admissible in certain types and stages of various proceedings. But, as a general proposition, courts must exclude illegally seized evidence.

8. The Supreme Court first articulated the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914), but imposed the rule only upon federal courts. Nearly fifty years passed before the Court extended the rule's application to encompass state courts as well. Mapp v. Ohio, 367 U.S. 643 (1961).

9. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

ber of courts,[10] jurists,[11] state legislatures,[12] legal associations,[13] and scholars[14] have adopted or supported some form of this good faith exception.[15]

Given this climate, the good faith exception unsurprisingly has gained the attention of the Supreme Court. Four, or perhaps even five, of the Justices publicly have acknowledged their unease with the exclusionary rule's effect and their sympathy with suggested reforms.[16] At the Court's request, the attorneys in *Illinois v. Gates*[17] briefed and argued the issue of a good faith exception during the October 1982 term. The Court, however, sidestepped the issue by deciding the case on other grounds.[18] Nevertheless, within

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10. The Fifth Circuit Court of Appeals specifically has recognized a good faith exception. United States v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). Since the new Eleventh Circuit was carved out of the old Fifth Circuit, *Williams* likely is binding in the Eleventh Circuit as well.

11. *See, e.g.*, Commonwealth v. Sheppard, 387 Mass. 488, ____, 441 N.E.2d 725, 733-34 (1982) (Wilkins, J.), *cert. granted sub nom.* Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983).

12. At least two states have adopted by legislation some form of a good faith exception. *See* ARIZ. REV. STAT. ANN. § 13-3925 (1982); COLO. REV. STAT. § 16-3-308 (1982).

13. The prestigious American Law Institute has recommended the exclusion of evidence only in those cases in which the police violation was "substantial." In determining whether the violation, indeed, was substantial a court should consider all the circumstances, including the willfulness of the violation. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.2(2), (4) (Official Draft 1975).

14. *See, e.g.*, Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DE PAUL L. REV. 51 (1980); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978).

15. In its final report Attorney General William French Smith's bipartisan Task Force on Violent Crime urged the Attorney General to support a good faith exception through court argument and legislative recommendation. ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REP. 55 (Aug. 17, 1981).

16. Four Justices have authored opinions supporting some form of a good faith exception. *See* Illinois v. Gates, 103 S. Ct. 2317, 2340-47 (1983) (White, J., concurring); Stone v. Powell, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (Powell, J., concurring in part); United States v. Peltier, 422 U.S. 531, 542 (1975) (Rehnquist, J.). Furthermore, Justice O'Connor, at her nomination hearings before the Senate Judiciary Committee, testified about her belief that courts do not have to exclude illegally obtained evidence under the fourth amendment if the court takes into account the good faith of police. *Hearings Before the Senate Comm. on the Judiciary, Nomination of Sandra Day O'Connor*, 97th Cong., 1st Sess. 79-80 (1981) (unbound transcripts on file in Senate Document Room).

17. 103 S. Ct. 2317 (1983).

18. In *Gates* the Court reversed the Illinois court's ruling suppressing evidence obtained under a warrant supported predominately by an anonymous tip. Justice Rehnquist, writing for the majority, found sufficient police corroboration of the tipster's information to justify the magistrate's finding of probable cause. The Justice apologized for the Court's avoidance of the good faith argument, but claimed such avoidance appropriate upon a re-

three weeks of the *Gates* decision the Court accepted for argument during the October 1983 term three cases concerning good faith claims.[19] Obviously, the Justices have signaled their readiness to enter the fray.

Opponents of the good faith exception, therefore, now must voice their arguments. This Article presents arguments that are designed to influence the Court's deliberations, to create a basis for critiquing the Court's opinions once rendered, and to provide guidance for state courts, which soon may need to decide whether a good faith exception is consistent with their state constitutions and procedures.[20] To place the subsequent discussion in context, part I

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cord which showed the prosecution never had raised or addressed the question before the state tribunals and that none of the Illinois courts had considered the question. *Id.* at 2323. Justice White, concurring separately, chastised the Court for avoiding the issue under a totally unconvincing rationale. Noting that the Supreme Court's pronouncements bound the Illinois courts regarding the federal exclusionary rule, he found requiring a litigant to request a state court to overrule or modify a United States Supreme Court precedent pointless. *Id.* at 2338 (White, J., concurring). Such a practice would undercut *stare decisis*. "Either the presentation of such issues to the lower courts will be a completely futile gesture or the lower courts are now invited to depart from this Court's decisions whenever they conclude such a modification is in order." *Id.*

19. The *United States Law Week* noted the cases and described their good faith issues as follows:

(1) Colorado v. Quintero, ___ Colo. ___, 657 P.2d 948, *cert. granted,* 103 S. Ct. 3535 (1983). "Did Colorado Supreme Court mistakenly interpret Fourth Amendment's prohibition against unreasonable search and seizure when it applied exclusionary rule to undisputed good-faith seizure of stolen property?" 51 U.S.L.W. 3914 (June 28, 1983).

(2) United States v. Leon, No. 82-1093 (9th Cir. Jan. 19, 1983), *cert. granted,* 103 S. Ct. 3535 (1983). "Should Fourth Amendment exclusionary rule be modified so as not to bar admission of evidence seized in reasonable, good-faith reliance on search warrant that is subsequently held to be defective?" 51 U.S.L.W. 3914 (June 28, 1983).

(3) Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom.* Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983). "Does Fourth Amendment require inflexible application of exclusionary rule when police officer has reasonably and in good faith relied upon search warrant to seize items specified in his application for warrant, but warrant is subsequently invalidated for magistrate's error in failing to specify items in warrant itself?" 51 U.S.L.W. 3913 (June 28, 1983).

Subsequent to the writing of this Article, on December 12, 1983, the Court dismissed the writ of certiorari in *Quintero.* 52 U.S.L.W. 3460 (Dec. 13, 1983). The Court explained that "it appear[ed] that respondent died on November 27, 1983." *Id.* Ironically, *Quintero* could have been the most significant of the three cases since it involved the only search by an officer not acting pursuant to any warrant.

20. Assuming the Supreme Court approves a good faith exception to the federal exclusionary rule, state courts, consistent with the United States Constitution, may interpret their state constitutional provisions as granting broader protections than federal law mandates. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 502 (1977). *See, e.g.,* People v. Sporleder, ___ Colo. ___, 666 P.2d 135 (1983) (warrantless use of a pen register violates the Colorado Constitution even if it is consistent with the federal Constitution under Smith v. Maryland, 442 U.S. 735 (1979)); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981) (New Jersey retains defendant's automatic standing

of the Article briefly sketches the historical development of the exclusionary rule. Part II develops the general arguments against the exclusionary rule and the specific arguments in favor of a good faith exception. Part III exposes the conceptual flaws of the exception by demonstrating its inconsistency with a constitutional concept of right, its disastrous effect on the substance of the fourth amendment, and its interference with a defendant's right to effective counsel. The Article considers practical problems associated with implementation of such an exception in part IV. Finally the Article, in its entirety, demonstrates the hidden agenda behind the movement supporting the good faith exception: minimizing the fourth amendment's significance and substantive protection.

I. The Historical Context

An understanding of the arguments for and against a good faith exception requires some basic familiarity with the evolution of the exclusionary rule and its traditional justifications. In 1914 the Supreme Court decided *Weeks v. United States*,[21] which prohibited the use in federal courts of evidence obtained in violation of the fourth amendment. The Court stated in defense of this position:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . 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.[22]

The Court's concern in *Weeks*, therefore, was not nearly as much with preventing illegal seizures by law enforcement officers as it was both with preventing courts from becoming accomplices in this illegal conduct[23] and with dissipating any impression of judicial imprimatur.[24] The Court viewed exclusion of illegally ob-

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to invoke the exclusionary rule in search and seizure cases in spite of federal court decisions such as Rakas v. Illinois, 439 U.S. 128 (1978)); People v. Bustamante, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981) (California suspects have a right to counsel at pre-indictment lineups even if federal suspects have no comparable right under Kirby v. Illinois, 406 U.S. 682 (1972)). A recent amendment to the Florida Constitution, however, forbids Florida courts from excluding evidence in those circumstances when similarly obtained evidence would be admissible in federal courts. Fla. Const. art. 1, § 12.

21. 232 U.S. 383 (1914).

22. *Id.* at 392.

23. The Court used precisely this language in the much more recent case of Elkins v. United States, 364 U.S. 206, 223 (1960).

24. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968). William Mertens and Silas Wasserstom identify four normative principles underlying the *Weeks* exclusionary rule: first, convicting a

tained evidence as necessary to fulfill its responsibility under the fourth amendment. Thus, the Court considered the substantive scope of the fourth amendment and the procedural remedy of the exclusionary rule inseparably intertwined.

Thirty-five years passed before the Court suggested the exclusionary rule was not essential to enforcement of fourth amendment guarantees. In *Wolf v. Colorado*[25] the Court allowed the admission in state criminal proceedings of evidence that would have been inadmissible in federal proceedings under the exclusionary rule. In so doing, however, the Supreme Court did recognize that the fourth amendment limitations on governmental searches and seizures bound the states,[26] but refused to require exclusion of evidence as a remedy for state violation of the amendment's standards. Consequently, the Court severed the exclusionary rule from its mooring in the substantive amendment and severely restricted the exclusionary rule's range and effect. Therefore, free to develop their own remedies for fourth amendment violations,[27] the states and their law enforcement agencies found the Court's fourth amendment rhetoric unobjectionable. Justice Murphy in dissent, however, impliedly recognized that acknowledgement of a right without provision of a specific remedy for violation likely would result in no right at all: "Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all."[28]

Over time the wedge *Wolf* drove between the fourth amendment and the exclusionary rule became unbearable to the Court.

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defendant on the basis of unlawfully seized evidence is simply unfair; second, admission of such evidence at trial constitutes an additional invasion of privacy; third, government is not to be advantaged by the wrongdoing of its agents; and last, admission of unlawfully seized evidence compromises the integrity of the courts. Mertens & Wasserstrom, *supra* note 3, at 377-78.

25. 338 U.S. 25 (1949).

26. *Id.* at 27-28. Because the Bill of Rights as initially conceived applied only to the federal government, Barron v. Baltimore, 32 U.S. (7 Peters) 242, 246 (1833), from early times the Court interpreted the fourth amendment as inapplicable to the states. *See* Smith v. Maryland, 59 U.S. (18 Howard) 71, 76 (1855). With the advent of the post-Civil War amendments, however, the Court gradually imposed the Bill of Rights upon the states by incorporation into the due process clause of the fourteenth amendment. Accordingly, *Wolf* held that the security of one's privacy against arbitrary government intrusion was "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" of the fourteenth amendment. 338 U.S. at 27-28.

27. *See id.* at 30-33.

28. *Id.* at 41 (Murphy, J., dissenting).

Many states ignored the Court's plea for them to design and implement remedies for fourth amendment violations. Twelve years after *Wolf*, the Court's dissatisfaction with the states' general unresponsiveness culminated in *Mapp v. Ohio*.[29] The Justices no longer were willing to accept the existence of a right without an effective remedy for its violation. All evidence obtained by state officials in violation of the fourth amendment, therefore, became inadmissible at trial.[30]

According to *Mapp*, the exclusionary rule was to perform two functions: first, protection of judicial integrity by avoiding the appearance of impropriety created by permitting use of tainted evidence;[31] and second, deterrence of illegal police searches by compelling "respect for the constitutional gnaranty in the only effectively available way—by removing the incentive to disregard it."[32] Protecting judicial integrity was firmly grounded in exclusionary rule history dating back almost fifty years to the *Weeks* opinion. The purpose of deterring illegal police behavior, however, was of more recent vintage. In fact, the deterrence language that the Court approvingly quoted first had been set forth in a decision that the Court had rendered just one year earlier.[33]

While the *Mapp* decision failed to indicate which of these functions was weightier, later decisions clearly illustrate the Court's view that police deterrence is the preeminent purpose of the exclusionary rule.[34] Although occasionally alluding to the "im-

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29. 367 U.S. 643 (1961).

30. *Id.* at 655.

31. *Id.* at 659; *see* Elkins v. United States, 364 U.S. 206, 222-23 (1960).

32. 367 U.S. at 656.

33. *See* Elkins v. United States, 364 U.S. 206, 217 (1960). *Elkins* marked the demise of the so-called "silver platter" doctrine, whereby federal authorities could use in federal prosecutions evidence unlawfully obtained by state police.

34. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court refused to give retroactive effect to *Mapp's* extension of the exclusionary rule to the states:

> [A]ll of the cases . . . requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved.

Id. at 636-37. In United States v. Calandra, 414 U.S. 338 (1974), the Court held illegally obtained evidence admissible at grand jury proceedings under the theory that forbidding the evidence's use at trial already achieved all possible deterrence. *Id.* at 349-52. But even assuming both *Linkletter* and *Calandra* were correct vis-a-vis deterrence, judicial integrity surely was at stake in both cases. Evidently, the Court considered only police deterrence of sufficient importance to mandate exclusion.

perative of judicial integrity,"[35] the Court has stressed the limited role this justification plays in determining whether the rule should be applied in a particular case.[36] Thus, the exclusionary rule has taken on an instrumental appearance, warranting application only when its consequence is significantly to enhance deterrence of illegal searches and seizures. From this perspective, before a decision to exclude evidence is justifiable a court must answer the following two questions: First, will the suppression of evidence in a specific case enhance deterrence of illegal police behavior? Second, is the deterrence sufficient to outweigh the damage to other goals of the criminal justice system? The decisional process, hence, becomes utilitarian: simply balancing costs against benefits.[37]

Accepting this utilitarian approach to exclusionary rule decisions, the Court has refused to apply the rule to those situations in which its deterrent effect would be minimal. Accordingly, prosecutors may use illegally obtained evidence in grand jury proceedings,[38] in impeaching a criminal defendant's testimony at trial,[39] in civil proceedings brought by a different sovereign than the one that actually seized the evidence,[40] and in the criminal trial of a defendant who lacks standing to invoke the rule's protection because he was not the actual victim of the improper search.[41] Furthermore, a state prisoner no longer may seek federal habeas corpus relief on fourth amendment grounds if he had a "full and fair opportunity" to litigate the issue at the state level because, at least in the Supreme Court's view, the "additional incremental deterrent effect" of exclusion at the habeas stage is insignificant.[42]

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35. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 12 (1968).

36. *See* Stone v. Powell, 428 U.S. 465, 485 (1976). Some scholars now view deterrence as essentially the "sole theory" behind the exclusionary rule. *E.g.*, Wilkey, *supra* note 3, at 220.

37. Utilitarian decisional modes are arguably inappropriate when dealing with constitutional rights rather than with societal gratuities. *See infra* text accompanying notes 103-07.

38. *See* United States v. Calandra, 414 U.S. 338 (1974).

39. *See* United States v. Havens, 446 U.S. 620 (1980).

40. *See* United States v. Janis, 428 U.S. 433 (1976).

41. *See* United States v. Payner, 447 U.S. 727 (1980).

42. *See* Stone v. Powell, 428 U.S. 465, 494 (1976). This consequentialist perspective has become so prevalent in the exclusionary rule context that some of the rule's opponents claim it now influences judicial analysis of the fourth amendment's substantive rights. Professor Steven Schlesinger, for example, insists that the exclusionary rule forces the judiciary to expand dangerously the meaning of a legal search in order to avoid exclusion of evidence the judges are reluctant to suppress. Schlesinger, *supra* note 3, at 405. Professor Schlesinger's perspective may explain the courts' increasing number of refusals to suppress evidence by claiming no, or only a limited, legitimate expectation of privacy existed. *See*

The pervasive deterrent justification for the exclusionary rule, however, makes it highly vulnerable to attack. Whether suppression of improperly obtained evidence actually deters illegal police behavior is subject to question.[43] With its deterrent benefit in doubt then, opponents of the rule argue its costs are too high and its benefits too low. The rule's detractors now use this cost benefit argument to justify a good faith exception to the exclusionary rule.

II. The Case for a Good Faith Exception

Advocates of a good faith exception first focus on the general costs of any exclusionary rule application. They stress that physical evidence is reliable whether or not illegally obtained. The public, consequently, perceives excluding such reliable evidence as merely freeing countless guilty defendants[44] who then are able to commit further offenses.[45] The rule further impairs the truth-find-

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United States v. Payner, 447 U.S. 727 (1980) (bank depositor has no fourth amendment privacy interest in copies of bank checks and deposit slips retained by bank); Smith v. Maryland, 442 U.S. 735 (1979) (no expectation of privacy in phone numbers dialed); Chambers v. Maroney, 399 U.S. 42 (1970) (the expectation of privacy in automobiles is sufficiently reduced to justify a search with probable cause but without warrant).

43. As Professor Francis Allen observed, "the case for the rule as an effective deterrent of police misbehavior has proved, at best, to be an uneasy one." Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. Ill. L.F. 518, 537.

44. The fourth amendment exclusionary rule, therefore, may have significantly more harmful effects than the exclusion of incriminating statements obtained in violation of fifth amendment guarantees. Police tactics violating the fifth amendment purportedly threaten the reliability of the verbal evidence so gathered. In contrast, little doubt exists about the reliability of physical evidence obtained in violation of the fourth amendment. Furthermore, confessions frequently only serve to cement a conviction. *See Interrogations in New Haven: The Impact of Miranda*, 76 Yale L.J. 1519, 1588 (1967). In contrast, judicial suppression of evidence obtained by illegal police searches actually may be determinative in some prosecutions, especially those dealing with consensual offenses. *See* Oaks, *supra* note 3, at 746.

45. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 413-16 (1971) (Burger, C.J., dissenting); Wright, *Must the Criminal Go Free If The Constable Blunders?*, 50 Tex. L. Rev. 736, 741 (1972). Fourth amendment decisions, unlike decisions concerning self-incrimination, are not directed predominately toward police treatment of the poor and ignorant. *See* Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting). Rather, their greatest impact is upon police investigations of activities frequently controlled by organized crime. Physical evidence is most essential in proving the offenses of gambling, prostitution, counterfeiting, and narcotics distribution. *See* Kaplan, *supra* note 3, at 1028; Oaks, *supra* note 3, at 681-89. Furthermore, the consensual nature of many of these offenses, coupled with the fear organized crime can inflict on its members and victims, makes police fulfillment of the traditional demands of probable cause before search unusually difficult. Trickery and deception, often perceived by law enforcement officials as necessary to overcome evidentiary difficulties in dealing with sophisticated crime, are the very seeds from which fourth amendment problems are born. Former New York City Police Commissioner Vincent L. Broderick stated:

> The narcotics agent—local or federal—who seeks evidence against organized criminals

ing function of the trial proceeding, exclusionary rule opponents argue, because the rule's application diverts the trial's focus from ascertaining the guilt or innocence of the defendant to examining police behavior.[46] Additionally, critics assail the suppression remedy as protecting only those against whom police discover incriminating evidence while providing no protection for innocent persons subjected to illegal but fruitless searches.[47] Its opponents, therefore, insist that each application of the exclusionary rule exacts a substantial societal cost for the vindication of fourth amendment rights.[48]

The exclusionary rule's indifference to the seriousness of the defendant's alleged offense or the severity of the police officer's infraction accentuates the appearance of excessive cost. Critics attack as "contrary to the idea of proportionality that is essential to the concept of justice"[49] the universal "capital punishment" that the rule inflicts on all improperly acquired evidence regardless of apparent disparities which at times can exist between the officer's error and the degree of a defendant's likely guilt. These critics, fur-

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necessarily operates undercover, on the street, masquerading as someone he is not. Similarly the Secret Service agent attempting to capture counterfeiters assumes the identity of an underworld purchaser of counterfeit bills. Laws against consensual crimes, such as gambling and vice, can be enforced effectively only if police officers in plainclothes conceal their true identities and adopt other ones. Deception and trickery? Certainly. How else can we cope with sophisticated crime?

Broderick, Book Review, 53 CORNELL L. REV. 737, 741 (1968); *see also A Forum on the Interrogation of the Accused*, 49 CORNELL L. REV. 382, 394 (1964). Clearly, then, exclusion of illegally seized physical evidence can impede law enforcement efforts to convict the guilty more severely than does exclusion of illegally obtained confessions.

46. Oaks, *supra* note 3, at 755.

47. *See* Irvin v. California, 347 U.S. 128, 136 (1954); Oaks, *supra* note 3, at 755.

48. Rakas v. Illinois, 439 U.S. 128, 137 (1978). *See* United States v. Payner, 447 U.S. 727, 734 (1980). The cost of losing inherently trustworthy evidence may tempt courts either to water down the standards for probable cause, Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 66, or to draw unrealistic distinctions in favor of law enforcement, Ashdown, *supra* note 3, at 1315, in order to avoid the exclusionary effects of a potential fourth amendment violation. Justice White, in his *Gates* concurrence, suggested the monetary cost of exclusion also should be considered. Citing the Comptroller General's study of the impact of the exclusionary rule on federal prosecutions, White noted that one-third of federal defendants going to trial file fourth amendment suppression motions; 70% to 90% of such motions included the expense of formal hearings. 103 S. Ct. at 2343 (White, J., concurring) (citing COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 10 (1979)).

49. Stone v. Powell, 428 U.S. 465, 490 (1976). "[S]ociety has . . . [a] right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition." Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting). The sense of the criminal defendant's windfall, of course, is greatest when the officer allegedly made the error in good faith.

thermore, herald the rejection by other nations of a comparable rule excluding evidence illegally obtained[50] as proof that the doctrine is both unwise and unnecessary. Thus, although the exclusionary rule's supporters defend it as a deterrent to unlawful police activity in part through the nurturing of respect for fourth amendment values,[51] others fear that the public perception of a judicial system easy on criminals and unresponsive to the cries for greater security does considerable damage to the reputation of the criminal justice system and generates disrespect for the law generally.[52]

If the exclusionary rule is nothing but a judicially created device chosen from among other devices to enforce fourth amendment guarantees[53] and if this device truly has led to widespread public disfavor with the criminal justice system,[54] then judicial

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50. England, Canada, Germany, and Israel all have refused to exclude evidence obtained through illegal police searches and seizures. *See Bivens,* 403 U.S. at 415 (Burger, C.J., dissenting); Wilkey, *supra* note 3, at 217.

51. The *Mapp* court, for example, justified the exclusionary rule partially upon the need for legal institutions to educate the public through example. "If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." 367 U.S. at 659.

52. *See* Stone v. Powell, 428 U.S. 465, 491 (1976); Paulsen, *The Exclusionary Rule and Misconduct by the Police,* 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 256 (1961); Wilkey, *supra* note 3, at 223; Wright, *supra* note 45, at 737.

Not only the public may react negatively to such a situation, but some jurists may as well, *see* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting), and undoubtedly law enforcement officers also lose respect for a system they perceive as forcing the government to play the game fairly despite the criminal opponent's ruthlessness.

53. The fourth amendment, unlike the fifth, does not explicitly mandate exclusion of evidence as the proper response for violation of its guarantees. This textual distinction between the amendments, coupled with court decisions justifying fourth amendment exclusion on the basis of its deterrent value, has led many critics to view the fourth amendment's exclusionary rule as a judicially created device rather than as an integral aspect of the constitutional right. *See* Stone v. Powell, 428 U.S. 465, 482 (1976); Wilkey, *supra* note 3, at 216; Crovitz, *Exclusionary Rule Lives in a World Apart,* Wall St. J., June 30, 1983, at 28, col. 3. Clearly, this was not the *Weeks* Court's perspective of the importance of the rule in guaranteeing fourth amendment rights. *See supra* text accompanying notes 21-24.

54. The extent and depth of public disapproval in some quarters is clearly apparent in newspaper editorials. *See, e.g.,* Houston Post, Editorial, Nov. 16, 1977, at 2E (The results of the exclusionary rule lead to "an absurdity that would likely be sensibly ordered in a more primitive society."); Washington Star, Editorial, July 7, 1975, at A16 (The exclusionary rule "is sometimes an outrage to common sense."); Wall St. J., Editorial, July 12, 1971, at 8, col. 1 ("Given the . . . need to bolster public confidence that courts do dispense justice, it's scarcely unreasonable to ask that [the fourth amendment's exclusionary rule] be reexamined.") *See also* Crovitz, *supra* note 53, at 28, col. 6 ("The present U.S. exclusionary rule does substantive injustice.")

Professor John Kaplan reports that public opinion polls show a high rate of disapproval for courts seen by the public as coddling criminals. He identifies the exclusionary rule as the prototype judicial doctrine causing this perception. Kaplan, *supra* note 3, at 1035-36.

concern over the rule is justified.[55] The legitimacy of law exists on a foundation of faith. The public must perceive its views of "good" and "right" as prevailing rather than being circumvented by institutional machinations or it may lose its belief in the ultimate moral nature of law. The loss of such a belief can lead to spiritually unstable institutions and a general weakening of governmental legitimacy.[56]

Societal faith thus is essential for effective functioning of any legal system. The criminal justice system, in addition to controlling unacceptable deviance, also serves to control the response by societal enforcers to such deviance.[57] Although vendetta and mob rule could serve to control deviance, only a criminal justice system that also controls the controllers can enhance human dignity. A justice system that limits the enforcers, however, will be able to promote human dignity only if the system fulfills public expectations of societal protection sufficiently to remain legitimate. When legal institutions so limit the enforcers that the community believes its needs for safety and justice are unfulfilled, however, the system may lose its legitimacy and thus its power to control societal responses to deviance. Excessive judicial concern for individual rights in the face of a public outcry for greater safety, consequently, may lead to a popular backlash decreasing rather than enhancing respect and conformity to enforcement limitations.[58]

If utilization of the exclusionary rule leads to lost system legitimacy, the cost is high indeed.[59] But detractors of the exclusionary rule do not rest their position on costs alone; they also stress the

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55. As Chief Justice (then Judge) Warren Burger remarked, "If a majority—or even a substantial minority—of the people in any given community . . . come to believe that law enforcement is being frustrated by what laymen call 'technicalities,' there develops a sour and bitter feeling that is . . . sociologically unhealthy." Burger, *Who will Watch the Watchman?*, 14 AM. U.L. REV. 1, 22 (1964).

56. For a fuller discussion of the legitimation of law, see Ingber, *The Interface of Myth and Practice in Law*, 34 VAND. L. REV. 309, 338-46 (1981).

57. This dual purpose of criminal law is developed in Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTG. L. REV. 861, 863-68 (1975).

58. Fear of such a backlash was the basis of Justice White's dissent in Miranda v. Arizona, 384 U.S. 436 (1966). He expressed concern that the call for human dignity in the name of the defendant had gone too far. If governmental authority was unable to protect the public from crime because of judicially imposed limitations on law enforcement, White feared that "those who rely on the public authority for protection" might revert to the savage techniques generally associated with self-help. *Id.* at 542 (White, J., dissenting). He further asserted that "[w]ithout the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values." *Id.* at 539.

59. *But see infra* text accompanying notes 309-16.

limited benefits of the rule. As developed earlier,[60] the main articulated and recognized benefit of the exclusionary rule is deterrence of illegal police behavior. Scholars[61] and Supreme Court Justices,[62] however, have expressed grave doubts on whether the exclusionary rule actually influences police behavior. Statistics do not support the rule's efficiency in deterring police misbehavior since criminal defendant's make many motions to suppress illegally obtained evidence each year. The abundance of such motions, however, also does not support the conclusion that the rule is ineffective. No way exists to determine whether many more fourth amendment violations would occur without the rule.[63] The statistical battle, therefore, often turns upon who has the burden of proof: the rule's proponents to verify its deterrent value or its opponents to verify its lack of such value.[64] Despite the lack of statistical proof either for or against the rule's deterrent value, at least three factors justify some intuitive doubt as to the rule's ability to influence police behavior: ideology of the police subculture, police goals other than criminal convictions, and lack of meaningful communications between the courts and police.

Police gain their identity from their image as crime fighters.[65]

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60. *See supra* text accompanying notes 34-37.

61. *See, e.g.*, J. SKOLNICK, JUSTICE WITHOUT TRIAL 211-19 (1966); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973); Oaks, *supra* note 3; Wilkey, *supra* note 3.

62. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 n.5 (1974) (Powell, J.) (doubt as to effectiveness of the exclusionary rule); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting) ("the hope that [the objective of control of official activity] could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream . . . [and] the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective").

63. *See* Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 34.

64. The burden of proof issue, always implicit in the exclusionary rule deterrence controversy, recently has become an explicit focus of the conflict. *Compare* Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979) *with* Schlesinger, *supra* note 3.

65. The popular view of the police officer in this society, at least of the urban police officer that predominately has influenced the constitutional developments in criminal investigatory procedures, is one of a committed crime fighter protecting society. This image, largely based on the false belief that police devote most of their time to crime prevention, influences both who choses to join the police force and the self-image of those on the force. *See* Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1124-25 (1967). Thus, although police spend most of their time dealing with family squabbles, noisy disturbances, and requests for various forms of services and information, law enforcement officials gear police agencies primarily to deal with crime, *see* Goldstein, *Police Response to Urban Crisis*, 28 PUBL. AD. REV. 417, 418 (1968), and police

The police force trains its officers to perceive themselves as better equipped for crime fighting work than anyone else. This perceived expertise is a source of status from which police hope to gain societal recognition for their "professional" position.[66] Police, therefore, tend to resent any interference by outsiders that reflects upon their professionalism or inhibits performance of their professional responsibility to control crime. Consequently, police officers are not predisposed to accept and accommodate the court imposed exclusionary rule.[67]

Police officers' increasing isolation from the rest of the community accentuates their lack of appreciation for the rule. While police seek public admiration and support, their working personality which emphasizes danger and authority estranges them from the conventional citizenry[68] as well as from those who represent potential threats.[69] Many civilians are uncomfortable about including police officers among close acquaintances.[70] The extreme moralistic nature of the criminal law that police must enforce only exacerbates this civilian concern about socializing with police officers. Police, in turn, perceive themselves as representing authority.

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see crime fighting as the "real" police work, *see* J. SKOLNICK, *supra* note 61, at 220.

66. Professionalization brings a sense of individual worth through identification with a group publicly recognized as better than others at performing a specific job.

67. "[The police officer's] perception of himself as a crime-fighting craftsman," notes Professor Albert Quick, "is outwardly manifested by a general hostility toward concepts of procedural due process and those institutions that are identified with securing individual rights—the courts and the liberal elements of society." Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25, 26 (1978).

68. *See* J. SKOLNICK, *supra* note 61, at 44.

69. According to Professor Jerome Skolnick,

> The element of danger seems to make the policeman especially attentive to signs indicating a potential for violence and lawbreaking. As a result, the policeman is generally a "suspicious" person.
>
> . . . .
>
> . . . [B]ecause his work requires him to be occupied continually with potential violence, [he] develops a perceptional shorthand to identify certain kinds of people as symbolic assailants, that is, as persons who use gesture, language, and attire that the policeman has come to recognize as a prelude to violence.

Id. at 44-45. *See also* Piliavin & Briar, *Police Encounters with Juveniles*, 70 AM. J. SOC. 206 (1964). Often having to make instantaneous decisions, a police officer is likely to form and to use stereotypes to facilitate his decisionmaking. Police may watch blacks, the poor, and those acting in any way out of the ordinary more warily, not necessarily out of any prejudice, but because these groups represent higher statistical risks of danger to society. *See* Balch, *The Police Personality: Fact or Fiction?*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 106, 111 (1972).

70. Civilians' knowledge that police officially are always on duty and frequently carry guns generally inhibits civilians' speech and actions when in police presence. *See* Hahn, *A Profile of Urban Police*, 36 LAW & CONTEMP. PROBS. 449, 453 (1971).

Thus, they feel unable to shed this pose and act naturally except among other officers and their families. A tendency, therefore, exists for police officers to nearly totally restrict both their professional and social relationships to other members of the police force.[71] This alienation from society and dependence upon other officers for needed support and approval results in the creation of a police subculture, which provides a basis for self-respect somewhat independent of civilian norms.[72]

The prevalent attitudes of this police subculture, consequently, far more than any abstract judicial articulation of right and wrong, determine the pressure police experience to abide by court imposed restrictions on their crime fighting ability.[73] Officers, "engaged in the often competitive enterprise of ferreting out crime,"[74] may gain peer support or even reward for behavior that the courts would not consider legal.[75] The need to respond situationally either to a perceived danger to others or to a threat against his own authority may provoke an officer into action that courts do not approve.[76] As long as the officer strongly identifies with the police subculture, which approves of his behavior, he has immediate and certain reinforcement from his primary peer group. The mere possibility that sometime in the future, at trial or on appeal, some aversive contingency may follow is significantly less effective in controlling his future behavior.[77] In fact, given the ex-

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71. *See* M. BANTON, THE POLICEMAN IN THE COMMUNITY 188-219 (1964).

72. Lipset, *Why Cops Hate Liberals—and Vice Versa*, THE ATLANTIC, Mar. 1969, at 80.

73. The existence of a powerful police subculture results in police officers potentially lacking awareness of the offsetting value positions possessed by individuals who identify with numerous groups. Strong group cohesion among officers reinforces their attitudes and limits needed appreciation and status to that given by the subculture. *See* J. SKOLNICK, *supra* note 61, at 219. Society's evaluation becomes far less important to a police officer than his peer group evaluation. Consequently, the impact of nonpolice criticism is minimal in affecting police esteem and, thus, behavior.

74. Johnson v. United States, 333 U.S. 10, 14 (1948).

75. For example, valued goals of the police subculture include return of stolen goods or confiscation of contraband. *See infra* text accompanying notes 82-83. Furthermore, judges are rule oriented; police are situation oriented. The police officer "approaches incidents that threaten order not in terms of enforcing the law but in terms of 'handling the situation.' " J. WILSON, VARIETIES OF POLICE BEHAVIOR 31 (1968) (emphasis omitted). Consequently, police view many strategies that would be illegal from a judicial standpoint as totally justifiable.

76. Chief Justice Warren recognized the inability of the exclusionary rule to deter police behavior in circumstances that the police officer finds threatening. *See* Terry v. Ohio, 392 U.S. 1, 13-14 (1968).

77. Chief Justice Burger, in a vigorous dissent assailing the exclusionary rule, noted that "the long time lapse—often several years—between the original police action and its

clusionary rule's focus on trial proceedings, it arguably has more effect on the prosecution than on the offending police officer.[78] Whether the prosecutor's inability to gain a conviction will influence the police depends on whether police interests encompass concerns other than successful prosecution.

A review of institutional incentives and pressures affecting police, however, shows that numerous purposes other than obtaining convictions at trial[79] may induce officers to use searches and arrest.[80] For example, law enforcement agencies often rely upon the percentage of reported cases "cleared by arrest" as a measure of police alertness and professionalism.[81] Since an arrest need not result in a conviction to affect favorably the "clearance rate," this institutionalized sign of police success subtly encourages illegal searches and arrests.

The public itself sometimes encourages illegal searches and seizures by vehemently demanding more aggressive law enforcement.[82] In an attempt to gain broader societal acceptance while still fulfilling their subculture's primary objective of fighting crime,

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final judicial evaluation" dilutes any "deterrent impact" on police of evidence suppressions. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 417-18 (1971).

78. The Court may be incapable of using evidentiary decisions as a means of controlling pretrial police behavior. *See* Amsterdam, *supra* note 3, at 350-51.

79. Because a knowing and intelligent guilty plea does not require the defendant's awareness of evidentiary defenses, Edwards v. United States, 256 F.2d 707, 710 (D.C. Cir.), *cert. denied*, 358 U.S. 847 (1958), and because all prior police behavior may be invulnerable to attack once defendant enters such a plea, *see* Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759 (1970), the incriminating evidence illegally gained may sufficiently impress a defendant that he will plead guilty and avoid trial. Illegal searches, consequently, still may aid in gaining convictions.

80. *See* Dworkin, *supra* note 61, at 330; Oaks *supra* note 3, at 721-22; *see also* Terry v. Ohio, 392 U.S. 1, 14 (1968) (exclusionary rule is powerless when police motive is other than successful prosecution).

81. *See* J. GRIFFIN, STATISTICS ESSENTIAL FOR POLICE EFFICIENCY 69 (1958); J. SKOLNICK, *supra* note 61, at 167. Bureaucratic pressures can significantly affect police attitudes. The factors used to evaluate merit and the heirarchy of roles all act as a system of incentives for the officer intent on advancing within the force. The police bureaucracy places value on obedience and efficiency. "Real" police work—work that gains both peer and official acknowledgement—involves catching criminals. An officer rarely gets credit for *not* arresting, searching, or questioning. In addition, "it is relatively easier to measure output reflected by the number of people arrested and the number of crimes solved than it is to measure, for example, the number of people whose rights were protected. In a sense measurement determines goals." Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 472 (1971) (footnote omitted). *See also* Newman, *The Effect of Accommodations in Justice Administration on Criminal Statistics*, 46 SOC. & SOC. RESEARCH 144 (1962).

82. In times of public danger there rarely exists any community demand for increased police self-control.

police frequently respond to such public pressure by making arrests as efficiently and quickly as possible. While such arrests may not gain judicial acceptance, they certainly improve the police's public image. Community dissatisfaction, consequently, shifts from what the public could have perceived as ineffective law enforcement to what now it perceives as an overly technical court. Public support and peer approval also can encourage illegal police behavior if the officer, through an illegal search or seizure, can perform a socially valuable service such as rescuing a kidnap victim, returning stolen goods to their rightful owner, or removing narcotics from the streets. Often police find lost convictions preferable to lost opportunities to fulfill these goals.[83]

Police also believe that substantially increasing the expenses attendant to criminal activity aids in their crime fighting responsibility. Confiscation of criminal paraphenalia, the necessity for repeated bail payments, and the inconvenience and time loss that the criminal experiences in arrest procedures all serve to cripple criminal activity whether or not the corresponding searches and seizures ultimately result in conviction. Incarceration prior to trial can remove a danger[84] or public nuisance[85] from the streets, sometimes dissipating the problem despite the lack of a permanent conviction. Police may view arrest of a delinquent juvenile or a petty hoodlum as necessary to reestablish official authority and reinforce respect for the law. Additionally, arrest and search intimidation greatly facilitates recruitment of informers, allegedly so vital in fighting organized crime, regardless of any police intent to press for prosecution.

Accordingly, the police have many alternative goals to conviction that, at times, serve to encourage illegal behavior.[86] When one or more of these goals is present in a situation, the exclusionary

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83. As the importance of the "pinch" becomes greater, the deterrence value of the exclusionary rule correspondingly increases. Ironically, the public most questions the exclusionary rule precisely when the crime is serious and the rule most likely will deter illegal police behavior. Professor Kaplan, for example, has recommended exempting police misbehavior relating to serious crimes from the rule's coverage. Kaplan, *supra* note 3, at 1046-49.

84. Fearing flare-ups of teenage gang rivalries, for example, police may incarcerate gang leaders until passions have calmed.

85. For example, police often pick up prostitutes and drunks simply to remove them from the streets.

86. Some critics even have suggested that the exclusionary rule allows corrupt officers to appear to attempt zealous enforcement of the law while, through use of illegal searches, immunizing from effective prosecution those criminals willing to pay the price. Dash, *Cracks in the Foundation of Criminal Justice,* 45 ILL. L. REV. 385, 391-92 (1951); Wilkey, *supra* note 3, at 226.

rule's deterrent value likely is minimal. Furthermore, if the police view the fourth amendment standards as impossible to fulfill, these alternative goals become of primary rather than secondary importance. Difficulties in the court's communications with the police make the amendment's standards at least difficult to understand, if not impossible to fulfill.

Even assuming police desire to gain a conviction in a given case, they must still know and understand what the court requires of them before the exclusionary rule can deter their illegal behavior. The case-by-case method of constitutional adjudication in search and seizure matters often creates decisions no broader in application than the case at hand.[87] Additionally, court opinions, striving to gain and retain a court majority, are rarely models of clarity.[88] Issues that badly divide the Supreme Court, fostering strong dissents, further confuse police understanding of what the Court requires of them.[89] Police, therefore, may receive little guidance for their behavior in the diverse situations that may confront them.[90] Consequently, the deterrent benefit of the rule once again is put in question.[91]

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87. *E.g.*, United States v. Place, 103 S. Ct. 2637 (1983); Florida v. Royer, 103 S. Ct. 1319 (1983); United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

88. Often a dissenting opinion in a Supreme Court decision surpasses the Court's opinion in logic and clarity. This occurs because the dissenter does not need to appease his colleagues to retain a majority or worry about how his opinion actually will affect the law's practical functioning. The majority opinion, on the other hand, must satisfy all the joining Justices and must consider carefully whether the decision will obtain the public support required for legitimacy and peaceful compliance.

89. Prosecutors trying to educate police about court cases face these same obstacles.

90. One scholar argues that the fact orientation of appellate court decisions is the greatest impediment to control of police. Dworkin, *supra* note 61, at 334. Another author recommends that courts draw "bright lines" formulating a clear set of rules that, in most instances, will allow police to quickly reach a correct determination of whether a situation constitutionally justifies an invasion of privacy. LaFave, *supra* note 3, at 320-24. The Supreme Court, in recent years, has made some steps in this direction. *See* United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981).

91. Attempting to limit the costs of the exclusionary rule, the Supreme Court has created the exceptions discussed *supra* in text accompanying notes 38-42. Ironically, these attempts to limit the rule's costs likely have the corresponding impact of reducing its deterrent benefit. For example, because motions to exclude illegally obtained evidence only may be made by a person with the requisite standing, Alderman v. United States, 394 U.S. 165, 174 (1969), such evidence may have great trial utility. The requisite standing exists only when police violate that particular defendant's legitimate expections of privacy. Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978). This standing requirement has encouraged illegal searches, especially illegal wiretapping and electronic eavesdropping. These devices are most useful in attacking organized crime. For example, the information obtained by police through an illegal wiretap may not be used against the owner

The above arguments suggest that from a utilitarian perspective the exclusionary rule has excessive costs and limited benefits. Opponents, thus, advocate total abandonment of the rule,[92] or at least, through judicial recognition of a good faith exception, further restriction of the rule's effects in situations in which its benefits are least likely. The proponents of a good faith exception base their arguments on reason and precedent. If courts exclude evidence in order to deter unlawful police behavior, exclusion arguably has no value when the officer is honestly and reasonably unaware that his behavior is illegal. An officer acting in a manner he believes consistent with fourth amendment mandates has no reason to fear exclusion and, thus, no motivation to alter his conduct.[93] In such circumstances, good faith exception proponents note, exclusion retains its high cost without even the semblance of any deterrent benefit gains. Furthermore, releasing a hardened criminal because of insufficient evidence while "punishing" a diligent police officer for making a reasonable good faith error in a complex area of law seems manifestly unjust.

The Fifth Circuit has extended this logical position. In addition to having no deterrent benefit, argued the court, exclusion of evidence obtained by a good faith error affects police behavior in an undesirable manner. The court insisted that an officer, punished for behavior he honestly believed was legal, would eventually become reluctant to act when his "proper and reasonable instinct tells him that the activity he observes is criminal."[94] The above utilitarian perspective, thus, provides proponents of a good faith

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of the phone or against those participating in the overheard conversation. Alderman v. United States, 394 U.S. 165, 178-79 (1969). For police willing to trade the lower echelon of the criminal world for the higher-ups, however, illegal wiretaps can produce evidence admissible against anyone other than those owning the phone or participating in the discussions because they lack standing to object. *Id.* at 171-72, 174. *See also* United States v. Payner, 447 U.S. 727 (1980). Since fighting organized crime is an important police goal, the standing requirement depletes the rule of much of its deterrent value. While the exclusionary rule's critics approve of the standing requirement because it reduces the rule's costs, they fail to note that it is a primary cause of their second objection to the rule, the limited deterrent value of exclusion.

92. Even staunch critics of the exclusionary rule have sometimes expressed concern over the negative symbolic effect abandoning the rule prior to the development of some meaningful substitute might have upon fourtb amendment interests. Bivins v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting); Kaplan, *supra* note 3, at 1055; Oaks, *supra* note 3, at 756.

93. Kaplan, *supra* note 3, at 1044.

94. United States v. Williams, 622 F.2d 830, 842 (5th Cir. 1980) (en banc) (quoting United States v. Wilhams, 594 F.2d 86, 97-98 (5th Cir. 1979)), *cert. denied*, 449 U.S. 1127 (1981).

exception with a logical and initially appealing argument.

In addition to this utilitarian logic, exception proponents offer precedent to demonstrate that a good faith exception is not inconsistent with fourth amendment doctrine but rather is simply the fruition of a developing trend. The two cases most frequently mentioned by those advocating the exception are *United States v. Peltier*[95] and *Michigan v. DeFillippo*.[96] In *Peltier* the Supreme Court refused to retroactively apply its holding in *Almeida-Sanchez v. United States*.[97] In *Almeida-Sanchez* a roving border patrol seeking illegal aliens discovered contraband during a vehicle search. Neither probable cause nor consent existed for the search; the car was simply in the general vicinity of the Mexican border. The Court found the evidence seized inadmissible. The search in *Peltier* predated the *Almeida-Sanchez* opinion. In finding for the government the Court used language the meaning of which, some insist, extends far beyond the parameters of a retroactivity controversy:

> If the purpose of the exclusionary rule is to deter unlawful police conduct[,] then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had *knowledge, or may properly be charged with knowledge,* that the search was unconstitutional under the Fourth Amendment.[98]

Such language, claim those supporting an exception, siguals the Court's disapproval of applying the exclusionary rule when police act both reasonably and in good faith.

Michigan v. DeFillippo concerns a somewhat more complex factual situation than *Peltier*. Police arrested defendant for violating a Detroit ordinance requiring a person lawfully stopped by police to produce evidence of his identity. During the search incident to this arrest police found drugs on defendant's person. The Michigan Court of Appeals, finding the ordinance under which the arrest occurred unconstitutionally vague, believed that both the related arrest and search, thus, were invalid. The state court, therefore, overturned the defendant's drug offense conviction. The Supreme Court reversed.

The Court accepted the state court finding that the ordinance under which the police made the initial arrest was unconstitutional. The Court, however, held constitutional the police officer's

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95. 422 U.S. 531 (1975).
96. 443 U.S. 31 (1979).
97. 413 U.S. 266 (1973).
98. 422 U.S. at 542 (emphasis added).

behavior and the resulting drug conviction. In upholding the search, the Court insisted that it should not require a prudent police officer to anticipate that a court subsequently will find invalid the ordinance under which he is making an arrest and incidental search.[99]

Exception proponents use *DeFillippo* as precedential support for a good faith exception under the following reasoning: If courts cannot require a prudent officer to anticipate the ultimate constitutionality of an ordinance before a search can be valid, how can the courts require such an officer to anticipate a change in the Supreme Court's interpretation of fourth amendment guarantees? Exception proponents argue it is equally, if not more, inappropriate to punish an officer for resolving a situational crisis in a manner consistent with that recommended by many of the most deliberative legal minds merely because five of the nine sitting Supreme Court Justices reject his actions. The proponents, thus, argue that a general reasonable good faith exception is consistent with the spirit and logic of such precedent.

This Article has now described the historical development of the exclusionary rule, presented the arguments opposing the rule, and presented the logic and precedent supporting a good faith exception. The Article now shall prove that recoguition of a good faith exception would be at best inadvisable; at worst, disastrous.

III. The Conceptual Flaws of the Good Faith Exception

A good faith exception to the exclusionary rule has a number of serious conceptual flaws. The exception would thwart any vindication of recognized fourth amendment rights, and thereby deprecate the constitutional provision itself. Furthermore, the concept of deterrence, which detractors use to attack the exclusionary rule and thus to support the good faith exception, is improperly narrow. Most significantly, adoption of the exception would affect detrimentally the substance and development both of the fourth amendment and of the sixth amendment right to counsel.

A. The Vindication of Right

1. The Concept of Right

At the most conceptual level, the utilitarian perspective surrounding and justifying the exclusionary rule generally and the

99. 443 U.S. at 37-38.

good faith exception specifically is misdirected. For the concept of right in this constitutional system to have any significance, it must embody more than an arithmetic computation of costs and benefits. In a democratic system of government, dominant viewpoints of established groups need no protection. Electoral accountability ensures that public officials who regnlarly dissociate themselves from or interfere with popularly accepted perceptions of public welfare cannot obtain or hold their positions. Only speech, religions, and claims of individual prerogative that the public does not recognize in their situational context[100] as generally advancing societal interests need protection under the auspices of "right." "The institution of rights against the Government," insists Professor Ronald Dworkin, "is not a gift of God, or an ancient ritual or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive . . . ."[101] If rights were cost free they would need no constitutional articulation. The Bill of Rights is inherently antigovernmental. It exists precisely to prohibit government from using certain specified means, whether or not such means are efficient or necessary to reach what the public believes to be legitimate and laudable societal goals.[102]

A utilitarian perspective on rights developed as an outgrowth of the writings of the legal realists who perceived law's authority as stemming from its abihty to affect society beneficially.[103] While the end/means utilitarian justification for law advanced by the realists appears highly appropriate in legislative and administrative policymaking forums and in the development of common law doctrine, the justification denigrates the unique status of claims of constitutional riglits. Such constitutional claims take on an ethical and normative aura that normally must transcend a cost benefit analy-

100. While the public rhetorically may embrace the value of free speech, for example, everyone is not likely to defend the rights of Nazi's to march and demonstrate in the predominantly Jewish community of Skokie, Illinois. *See generally* Goldberger, *Skokie: The First Amendment Under Attack by its Friends*, 29 MERCER L. REV. 761 (1978).

101. R. DWORKIN, TAKING RIGHTS SERIOUSLY 198 (1977).

102. Amsterdam, *supra* note 3, at 353. In a democratic system, the written guaranty of individual rights that judicial institutions are to enforce either may be (1) an act of extreme elitism because the guaranty abrogates policies supported by popularly accountable institutions or, (2) an act of self-imposed paternalism accepted by a polity not always confident of its situational wisdom.

103. *See, e.g.*, R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (rev. ed. 1954). According to Professor Roscoe Pound, a renowned spokesman of the utilitarian perspective, law is concerned with "social engineering" and the lawyer and jurist, at least when fulfilling their most creative roles, are "social engineers." *Id.* at 47.

sis within the specific situational contexts in which the claims arise. The rights' acceptance in light of their cost demands a sense of their transcendental value, their mysticism, rather than merely their instrumental justification.[104] Justice Brennan recognized the uniqueness of claims of right when he wrote, "the efficacy of the Bill of Rights as the bulwark of our national liberty depends precisely upon public appreciation of the special character of constitutional prescriptions."[105]

Certainly, to argue that resource availability and the impact on important societal goals are irrelevant to the recognition and acceptance of a claim of constitutional right would be simplistic and constitutionally naive. When the Justices claim that such considerations are improper,[106] they most often merely are acknowl-

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104. Courts considered and supported the non-pragmatic but symbolic role of law during the Watergate debates over the amenability of the President to judicial process. Judge Wilkey of the District of Columbia Circuit writing in dissent asked the realist's question: "[I]f the court . . . has no physical power to enforce its subpoena should the President refuse to comply . . . [then] what purpose is served by determining whether the President is 'immune' from process?" Nixon v. Sirica, 487 F.2d 700, 792 (D.C. Cir. 1973) (Wilkey, J., dissenting). The majority of the Court, however, disagreed with the implication of Judge Wilkey's rhetorical question. Instead, they upheld the ruling of the trial judge, Judge Sirica, who insisted, "That the Court has not the physical power to enforce its orders to the President is immaterial to . . . resolution of the issues. . . . [T]he Court has a duty to issue appropriate orders. . . . [I]t would tarnish the Court's reputation to fail to do what it could in pursuit of justice." *In re* Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, 360 F. Supp. 1, 9 (D.D.C. 1973). Impact was not the issue; constitutional responsibility was.

105. United States v. Havens, 446 U.S. 620, 634 (1980). Ouly on rare occasions in recent years has the Court recognized the special character of constitutional rights that forbids balancing them against the interest of other societal goals. For example, in New Jersey v. Portash, 440 U.S. 450 (1979), the Court held that testimony given under a grant of legislative immunity could not be used to impeach the witness at his later trial for misconduct in office. Regardless of the societal interest in keeping a defendant from benefiting from a possible perjury, the Court concluded that: "Here . . . we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible." *Id.* at 459.

106. In Mayer v. Chicago, 404 U.S. 189 (1971), the Supreme Court upheld an indigent's right to a free trial record for appeal purposes even though the crime was punishable only by fine. Justice Brennan, writing for the Court, insisted that

> *Griffin [v. Illinois]* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. . . . The state's fiscal interest is, therefore, irrelevant.

Id. at 196-97. In a society more and more conscious that resources are finite, however, decisionmakers (judges and others) are more likely to recognize rights when resources are readily available to effectuate such rights than when recognition would bankrupt other societal goals. Few judges have been as candid as Judge Clement Haynesworth who, in Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974), supported a right to appointed counsel for permissive appellate review by arguing that "[w]hat is requisite today

edging the myths of constitutional continuity and stability, and are using them to bolster their own position even though they are aware that the myths are unattainable. The proper decisional process for courts when determining whether to recognize a right possessing a scope broad enough to encompass the claim of its violation in a specific case, however, is fundamentally different from the decisional process that courts should use once they accept the right and find a violation. Interpretation of the open textual clauses of the Bill of Rights may require an evaluation of whether the interpreted right proffered is worth the societal cost that its acceptance would entail. If courts can define the right in such a way to allow most of its potential benefit while reducing its cost, so much the better.[107] But once courts recognize a right, they no longer should be able to find its enforcement too costly in specific cases. Furthermore, if the concept of right is to have any meaning, once the court acknowledges a violation it must provide a remedy that allows the injured individual to gain vindication for his claim. Courts, therefore, justifiably may consider costs and benefits when determining the meaning and scope of rights. But consideration of such factors is improper when the query is whether courts should grant a remedy to an individual whose constitutional rights acknowledgedly were violated by the state.

Admittedly, the fourth amendment is not cost free. Public safety, indeed, may be more difficult to provide or expensive to obtain when the fourth amendment restricts the types of behavior government can utilize in fighting crime. The existence of the amendment, however, exemplifies a societal belief that, although community safety is a legitimate public concern, the price for such

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may not have been constitutionally requisite ten years ago, or even a few years ago. As our legal resources grow, there is correlative growth in our ability to implement basic notions of fairness." *Id.* at 655.

107. This perspective explains those cases that only permit prospective application of newly articulated criminal process rights. *See, e.g,* Desist v. United States, 394 U.S. 244 (1969); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965). Requiring retroactive application of all such rights might require the release or retrial of numerous convicted criminals. Jurists, thus, may find it difficult to accept that the societal gain from the new interpretations is worth the societal loss that extremely disrupting the criminal justice system would entail. Prospective only application allows for evolution of new interpretations of process rights as ethical perspectives change without requiring the system first to absorb the cost of former misinterpretations. Consequently, nonretroactivity cases such as *Peltier, see supra* text accompanying notes 95-98, encourage constitutional development in the fourth amendment field. This Article later notes that a general good faith exception retards precisely such a development. *See infra* text accompanying notes 200-15. *Peltier,* therefore, is distinguishable and good faith proponents cannot justifiably view it as precedential support for a broad good faith exception.

safety, seen in terms of lost individual privacy, can become too great.[108] The Constitution accomplishes this accommodation of the public's interest in safety and the individual's interest in privacy through a guarantee of individual rights that is not absolute: the amendment's language clearly indicates that government rightfully can invade individual privacy when it acts reasonably, often necessitating the existence of probable cause and the possession of a warrant.[109] An analysis of costs and benefits is built into the amendment itself. What courts must decide in the individual case is whether the government acted reasonably in invading the individual's privacy, not whether protection of such privacy is too costly or of too little benefit to support vindication of the right once they find a violation.

A legal system that attempts simultaneously to control unacceptable deviance and the behavior of the laws' enforcers[110] is understandably complex in its application to individual situations. A result in a specific case may seem inefficient and improper.[111] But

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108. The development and utilization of technology capable of keeping all people under constant surveillance could drastically reduce the threat to societal order. But, in spite of the imminence of the year 1984, the prices of such an Orwellian state are too high.

109. Even under such a qualified right, the Constitution does inhibit somewhat the criminal justice system's quest for truth. The searches prohibited by the fourth amendment, if permitted, likely would expose much evidence of criminality that the courts, in turn, could use to convict the truly guilty and acquit the truly innocent. No question exists that the quest for truth is a fundamental goal of our criminal justice system, but it is not an exclusive goal nor even one superior to all others. The quest for truth rather is an objective that the criminal justice system may obtain only by means consonant with other objectives, most particularly those established in the Constitution. Justice Brennan articulated this view, insisting that,

> The procedural safeguards mandated in the Framers' Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the "guilty" are punished and the "innocent" freed; rather, every guarantee enshrined in the Constitution, our basic charter and the guarantor of our most precious liberties, is by it endowed with an independent vitality and value, and this Court is not free to curtail those constitutional guarantees even to punish the most obviously guilty.

Stone v. Powell, 428 U.S. 465, 524 (1976) (Brennan, J., dissenting).

The community's concern about the effective prosecution of crime is understandable. Society, however, must be wary for "[t]he history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943). Furthermore, the relaxation of those safeguards historically almost always has taken place in the face of plausible governmental claims of threats to good social order. Amsterdam, *supra* note 3, at 354.

110. *See supra* text accompanying notes 57-58.

111. *E.g.*, Ybarra v. Illinois, 444 U.S. 85 (1979). Police operating under a warrant to search a bar for narcotics also searched the several patrons of the bar then present. The state courts held the heroin discovered on one of the customers admissible because a state statute authorized the police when executing a warrant to search all those present. The statute's purpose was to protect the officers from attack and to prevent the disposal or con-

such inefficiency and impropriety may be the cost of having and enforcing controls upon the controllers—the fourth amendment, for example—in the first place.

2. Remedy as Vindication

For constitutionally guaranteed rights to represent something beyond simple platitudes, the remedy provided for their violation must have some measurable consequence that vindicates the right in a manner which "invokes and magnifies the moral and educative force of the law."[112] The exclusionary rule, of course, does provide this needed confirmation of the right of privacy of one's person and domain.[113] During the evolution of exclusionary rule doctrine, however, courts increasingly have ignored the rule's efficacy in vindicating the violated right. Judicial perception of the rule's purpose has become misdirected. The relevant concern has switched from whether the rule vindicates the right violated to whether it serves to deter illegal police behavior by "punishing" a police wrongdoer.[114] The legitimate purpose of exclusion is not to place sanctions upon the specific officer, but to impose them upon the legal system in whose name he is functioning. Exclusion not only vindicates the right violated, but also eliminates the appearance of a system that encourages practically what it condemns rhetorically.

Weeks clearly defended exclusion upon this basis.[115] But courts have interpreted *Mapp* as recognizing the suppression doctrine's utilitarian deterrent function. *Mapp*, however, does not dis-

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cealment of those things described in the warrant. The Supreme Court reversed the convictions concluding that an individual's mere presence at the site of a warranted search does not subject him to a search of his person. Permitting such a search, however, certainly would provide protection of the officer and prevent defeat of the warrant's goal. Despite these efficiency concerns, however, the Court recognized that probable cause to search must be more particularized than the statute dictated if the fourth amendment was to remain relevant to individuals functioning in a mobile society. Rights and symbols took precedence over efficiency.

112. Professor Dallin Oaks, often viewed as an exclusionary rule detractor, recognized that the rule functions in this manner. Oaks, *supra* note 3, at 756.

113. If a court admitted illegally obtained evidence at trial, the propriety of the illegal conduct would appear confirmed rather than the violated right vindicated. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968).

114. This focus on punishing police is very strong among the exclusionary rule's critics. Wilkey, *supra* note 3, at 220. The good faith exception further confuses the issue of the fulfillment of a right with that of the culpability of an officer. Certainly, the law should not punish a nonculpable officer. *See infra* text accompanying notes 142-43, & 175. But a police officer's good faith error should not make the violation of a citizen's reasonable expectations of privacy a matter of inconsequence and system indifference.

115. *See supra* note 24 and text accompanying notes 23-24.

cuss punishment of culpable officials, but rather in using the language of *Elkins*, it insists that exclusion is necessary to deter by "*compell[ing] respect* for the constitutional guaranty . . . by *removing the incentive* to disregard it."[116] Courts, thus, were to achieve deterrence not by punishing the erring officer, but by nurturing respect for the right through creation of a system that in no way supported or encouraged the right's violation. The Court recoguized that the exclusionary rule would not end all illegal searches or seizures, but it would assure that the judicial system would not approve violations, thus ensuring the right's vindication. *Mapp's* concept of deterrence was inherent in, rather than separate from, its interest in judicial integrity and in law playing a role as educator. The Court did not consider the exclusionary rule to be based upon a shakey utilitarian foundation.[117]

Largely due to this confusion surrounding *Mapp*, Supreme Court opinions considering fourth amendment violations and their appropriate remedies, at times, have appeared to accept inconsistent or contradictory doctrines.[118] Standing cases have required that defendants demonstrate distinctly personal rights or interests in the evidentiary items they seek to suppress before they can press for an exclusionary remedy because "Fourth Amendment rights are personal rights which may not be vicariously asserted."[119] Thus, prosecutors may use illegally obtained evidence at trial against all but those whose particular expectation of privacy the police invaded. At other times, however, the Court has insisted that although the defendant can prove a personal violation, exclusion may not be necessary. These cases view the exclusionary rule as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[120] Under this doctrine the vindication of individual rights becomes

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116. *Mapp*, 367 U.S. at 656 (emphasis added).

117. Ironically, the utilitarian analysis of situationally balancing costs and benefits, apparently accepted by a majority of the Court, may encourage law enforcement agents to do similar balancing when considering whether to search or arrest. Given the police officer's likely bias for ferreting out crime, *see supra* text accompanying notes 65-66, the utilitarian perspective may diminish the exclusionary rule's ability to deter a specific officer from acting illegally.

118. *See generally* Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979).

119. Alderman v. United States, 394 U.S. 164, 174 (1969).

120. United States v. Calandra, 414 U.S. 338, 348 (1974). *See also* Stone v. Powell, 428 U.S. 465, 482 (1976); United States v. Peltier, 422 U.S. 531, 538-39 (1975).

secondary. The primary purpose becomes regulating governmental conduct by assuring *adequate* deterrence of illegality. Thus, a prosecutor may not use unlawfully acquired evidence at trial for his case in chief but may use the evidence for impeachment purposes[121] or before a grand jury.[122]

Professor Anthony Amsterdam suggests that these two lines of cases represent divergent views of the fourth amendment. Under one view the amendment is a "collection of protections of atomistic spheres of interest of individual citizens . . . ." Under the other view the amendment is establishing a regulatory principle requiring police to act in a certain way in order to protect people generally.[123] While the atomistic language used in the standing line of cases does appear inconsistent with the regulation language in the other, two explanations are possible. The first explanation accepts that the rhetoric is inconsistent, but points out that both lines of cases functionally support limitations upon the scope and effect of the exclusionary rule. Under this explanation the Court is merely focused on the unitary goal of reducing the scope and effect of the rule and is willing to be inconsistent in its rhetoric if such inconsistency furthers its goal.

The second, and more palatable explanation, argues that the two perspectives are not inconsistent, rather, they represent two different stages in fourth amendment analysis. The first stage concerns a determination of who may demand vindication of a violated right. Only those who can demonstrate deprivation of personal rights will have the court address their claims at stage two. The second stage concerns choosing an appropriate remedy. Not all defendants whose fourth amendment rights the police have violated may insist upon the same remedy. At this stage, the court may consider the public utility of various remedies. From this perspective, a court legitimately may restrict application of the exclusionary rule "to those areas where its remedial [deterrent] objectives are thought most efficaciously served."[124] The remedial deterrent objective may not be as readily achievable when a police infraction is due to a reasonable good faith error. Thus, under this explanation the good faith exception indeed seems attractive.

An individual whose claim has reached the second stage, however, already has proved violation of his fourth amendment rights.

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121. United States v. Havens, 446 U.S. 620 (1980).
122. United States v. Calandra, 414 U.S. 338 (1974).
123. Amsterdam, *supra* note 3, at 367.
124. *Calandra*, 414 U.S. at 348.

The only question remaining is what remedy device a court should choose to vindicate such rights. A decision against applying the exclusionary rule, therefore, must assume that an alternative remedy exists and is preferable. Otherwise a court, although acknowledging the right's violation, would be treating it as a matter of indifference, and the claim of right would go unvindicated. This argument is essentially the same as that the Court made in *Mapp* itself: "without the [exclusionary] rule the assurance against unreasonable . . . searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties . . . ."[125] An appropriate retort is that all this Article has proved is that a court must vindicate an individual whose fourth amendment rights it recognizes as violated by imposing a remedy of some measurable consequences, but not necessarily with a remedy as costly to the criminal justice system as the exclusionary rule. Chief Justice Burger has championed this contention observing that "[r]easonable and effective substitutes [for the exclusionary rule] can be formulated . . . ."[126] Contrary to the Chief Justice's assertion, however, exclusion provides the only effective remedy for fourth amendment violations, especially those made in good faith.

Although alternative legal remedies for illegal searches and seizures have superficial appeal, all have serious defects.[127] A court likely would not issue injunctions prohibiting illegal police behavior: although they could be useful against violations sanctioned by promulgated state policy,[128] such injunctions likely would be inef-

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125. *Mapp*, 367 U.S. at 655.

126. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting).

127. Oaks, *supra* note 3, at 673.

128. Even such a limited use of injunctions is unlikely. In a recent suit, petitioner, claiming to have been choked illegally by police who were acting consistent with police department policy, sought an injunction against such police behavior. In City of Los Angeles v. Lyons, 103 S. Ct. 1660 (1983), the Supreme Court ruled that federal courts could not grant such injunctions. The Court held that while plaintiff conceivably should receive damages for injuries already suffered, an injunction applies to future behavior. Since the plaintiff could not demonstrate that in the future police again would stop and illegally choke him, his need for an equitable remedy was too speculative. *Id.* at 1669. The plaintiff was unable to show a "personal stake in the outcome" of the case, *id.* at 1665, and thus the Court dismissed plaintiff's appeal for lack of an established case or controversy. Justice Marshall noted in dissent that the ruling virtually removed an entire class of constitutional violations from the courts' equitable powers. "It immunizes from prospective equitable relief," he insisted, "any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future." *Id.* at 1683.

fective against situational violations by individual police officers.[129] Criminal prosecution of police officers for improper searches and seizures also would be ineffective. Police are reluctant to arrest, prosecutors are reluctant to prosecute, and juries are reluctant to convict officers who make illegal searches in an effort to protect society from crime.[130]

Additionally, although improper police behavior is a common-law tort, juries are not likely to find significant damages[131] against police, especially in favor of a plaintiff accused or convicted of crime.[132] Besides, damages may not be collectible if the officer lacks recoverable resources and sovereign immunity protects the officer's employing governmental unit.[133] Although *Monell v. Department of Social Services*[134] held that injured parties could sue cities for violating constitutional rights under 42 U.S.C. § 1983, the Supreme Court specifically cautioned that liability could not exist unless the city's agent was acting in furtherance of official policy.[135] Consequently, most illegal searches and seizures, involving situational use of discretion by police, can not lead to governmental liability. Thus, tort liability also proves an ineffective remedy for these fourth amendment violations. Even assuming such liability were available, however, such a remedy might give the impression that government has the authority to simply buy out of any responsibility it has to comply with constitutional commands. Damages from illegal searches then would become just one more added

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129. The Court often has demonstrated its lack of enthusiasm for granting injunctions that would require active and continuous monitoring by the courts in the situational enterprise of police work. *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

130. Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621, 628-29(1955); *see* Mapp v. Ohio , 367 U.S. at 651-52.

131. Even if juries did find damages, common law torts, such as trespass, focus upon a different kind of damage to the plaintiff than a fourth amendment violation. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense," recognized Justice Clark in *Mapp*, "but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ." 367 U.S. at 641 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). Treating a fourth amendment violation as simply another property tort insufficiently vindicates the claim of right involved.

132. Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); *see generally Symposium—Police Tort Liability*, 16 CLEV.-MAR. L. REV. 397 (1967).

133. *See* Dakin, *Municipal Immunity in Police Torts*, 16 CLEV.-MAR. L. REV. 448 (1967). Of course, the sovereign may waive its immunity.

134. 436 U.S. 658 (1978).

135. *Id.* at 694. *Monell*, therefore, discourages police departments from prescribing rules for police conduct. Such rules would increase the risk of departmental liability.

cost of doing business.[136] Such a response would not vindicate the constitutional right but rather would diminish its luster.[137]

Furthermore, more informal remedies also are impractical. Police solidarity and their intense commitment to values consistent with their view of job requirements and professional skills[138] make internal administrative review and officer discipline of questionable value.[139] Internal review also may exacerbate the concern segments of the community have over the bias they believe is evident when police investigate complaints of police abuse. The appearance of partiality may cause possible complainants to lose all trust in a police-controlled system. The police's intensely negative reaction to outsider control has made civilian review boards with any power of decision and enforcement difficult to establish and maintain.[140]

All alternative remedies to exclusion are even more clearly ineffective when the officer's violation was due to a reasonable good faith error. If the police subculture tolerates and sometimes encourages intentional fourth amendment violations,[141] then good faith violations could not conceivably result in intradepartmental discipline. Criminal conviction for good faith errors is even less conceivable or desirable. Furthermore, the requisite *mens rea* would be extremely difficult, if not impossible, to establish. Impo-

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136. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1562 (1972).

137. Of course this danger assumes police consciously would decide to violate fourth amendment rights if the benefits thus gained justify in their minds the damages that would ensue. Such decisions would not be a simple good faith error. Other problems arise, however, in using tort remedies when dealing with good faith mistakes. *See infra* text accompanying note 142.

138. *See supra* text accompanying notes 65-78.

139. Occupational pressures frequently require police to make instantaneous decisions. The low visibility of the frequent discretionary actions of police limits the ability even of police officials to direct the behavior of their rank and file. *See generally* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960). Police, in fact, represent one of the rare bureaucracies in which discretion increases as one goes *down* the hierarchy. This inability to supervise the police officer on the streets constitutes an unresolved problem for those who recommend an increased effort at rulemaking by police officials. *See, e.g.*, Amsterdam, *supra* note 3, at 416-39; Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500 (1971); Kaplan, *supra* note 3, at 1050-55. Rulemaking efforts may succeed only in alienating police rank and file from their upper echelon.

140. Barton, *Civilian Review Boards and the Handling of Complaints Against the Police*, 20 U. TORONTO L.J. 448 (1970); Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROBS. 515 (1971). Civilian review boards in both New York City and Philadelphia, for example, had exceedingly short lives. Hudson, *supra* at 522-28.

141. *See supra* text accompanying notes 79-86.

sition of tort liability, in addition to all the difficulties heretofore mentioned, is virtually impossible since courts clearly recognize that law enforcement officers possess a common-law immunity to civil liability for good faith errors.[142]

Protecting the individual offending officer from "punishment" for good faith errors is justifiable since, although he is a wrongdoer, he is without culpability. But inherent in the concept of a good faith exception is the admission that the police have violated an individual's right and the courts must vindicate his claim of right. Once a court acknowledges the individual's claim as justified it may choose among remedies. But as Professor Oaks conceded "[i]t would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence."[143] Since all alternative remedies to exclusion are *least* convincing when dealing with good faith police error, the suppression doctrine is the only conceivable device for vindication of the admittedly violated right. In the context of a good faith error Justice Murphy's dissent in *Wolf* is correct: "there is but one alternative to the rule of exclusion. That is no sanction at all."[144] Courts must not treat constitutional violation as a matter of indifference or the public soon will perceive the right itself similarly.

B. The Meaning of Deterrence

The preceding discussion illustrates that the proper justification for the exclusionary rule is not its deterrent value but rather its ability to appropriately remedy fourth amendment violations. Since exclusion is truly the only remedy available when the offending officer has made a good faith error, focusing on the rule's inability to deter such an error ignores that a violated right goes unremedied. Even if, however, the rule's deterrent value were a valid consideration in deciding whether exclusion is a proper remedy for a good faith error, the specific deterrence concept, which the exception's proponents use as their primary justification for the good faith exception, is unnecessarily narrow.

Specific deterrence emphasizes the effect of evidence exclusion upon the specific offending officer. The good faith exception's proponents focus on the exclusionary rule's inability to deter an of-

142. The Supreme Court discussed and extended this common law immunity to § 1983 suits in Pierson v. Ray, 386 U.S. 547 (1967).

143. Oaks, *supra* note 3, at 756. Professor Oak's reputation as one of the most respectod critics of the exclusionary rule makes this admission quito significant.

144. 338 U.S. at 41.

ficer's behavior when he, in good faith, is unaware of his transgression.[145] Certainly, an officer who reasonably and in good faith believes his behavior legal is not likely to avoid that behavior for fear of exclusion. To argue that the system should not punish such a nonculpable officer by exclusion, however, confuses the concepts of deterrence and punishment and iguores the deterrent potential of exclusion with respect to the officer's future behavior.

Admittedly a nonculpable officer does not deserve punishment. The appropriateness of punishment, however, is a separate and distinct concern from the rule's deterrent value. Exclusion of the evidence seized under a reasonable good faith error undoubtedly has the potential to deter the officer from committing the same error in the future.[146] Consequently, while punishing a nonculpable officer may not seem fair, such a concern should not obscure the exclusionary rule's future deterrent potential.

Those urging a good faith exception also argue that the fear of exclusion will not prevent an officer who has had evidence excluded because of a reasonable good faith error from thereafter making a second good faith error in a different context. They, therefore, argue that excluding evidence seized in reasonable good faith has no specific deterrent effect. But this argument proves too much. If the inability of the exclusionary rule to deter specifically justifies a reasonable good faith exception it also justifies an unreasonable good faith exception. Deleting the objective reasonableness component of the good faith exception has no effect on this proposed nondeterrence justification. An officer making an unreasonable, but honestly held, good faith error is no more likely to question his own behavior and is no more likely to have his behavior deterred by the fear of exclusion than is the officer making a reasonable good faith error. As Judge Rubin of the Fifth Circuit aptly observed, "A policeman who is in complete subjective good faith is

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145. Specific deterrence is also the focus of much of the conflict about the exclusionary rule generally. Insisting that the suppression doctrine does not deter illegal police behavior, *see supra* text accompanying notes 60-92, critics argue for its total abolition. The same critics, however, also argue that the exclusionary rule hamstrings police efforts at law enforcement. This argument is paradoxical: how can the rule both fail to specifically deter and yet hamstring the officer? For an attempt to resolve this paradox, see Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U.L. Rev. 266, 305-07 (1976).

146. Arguably each new situation may contribute different complicating factors that allow for new good faith mistakes. See *infra* text accompanying notes 150-53 for a discussion of a method to avoid this danger.

unlikely to stop to ask himself, 'Am I also reasonable?' "[147]

An unreasonable good faith exception is, of course, unacceptable because of the premium it would place on police ignorance.[148] Consequently, the foregoing rationale makes patently obvious that the rule's inability specifically to deter good faith errors by offending officers cannot be the only justification for a good faith exception. If a lack of the rule's deterrent value is, indeed, a justification for the proposed exception, then its proponents must expand their concept of deterrence. Upon such expansion, however, the deterrent value of excluding evidence obtained through a good faith police error becomes obvious.

Judicial suppression of evidence also may deter generally by influencing other officers not to duplicate the offending officer's error. An identification of the conduct causing a constitutional violation (whether committed culpably or not) will communicate to others that a trial court will exclude the fruits of their search if they act similarly. Hopefully such communication will prevent such unconstitutional searches in the future. Viewed in this manner, the suppression remedy does not protect only those against whom police find incriminating evidence. The exclusion of such evidence will have an "overflow effect" upon all individuals by discouraging unwarranted searches whether or not they would be fruitful. Courts then, by removing the incentive to search, would protect the rights of both the innocent and the guilty.[149]

Good faith exception proponents claim that such general deterrence is both unrealistic and often undesirable. They assert, for example, that court decisions are too complex, too vague, and too situational to give police the guidance necessary for general deterrence to function. The inability of police to understand judicially articulated fourth amendment standards, however, is not related to the issue of remedy, but is a product of the fact-orientation of search and seizure litigation and court opinions. Unintelligible rules of conduct will diminish the deterrent potential of any remedy chosen to vindicate fourth amendment rights.

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147. United States v. Williams, 622 F.2d 830, 850 n.4 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981) (Rubin, J., concurring).

148. Kaplan, *supra* note 3, at 1044.

149. Expanding the deterrence beyond a specific infractor exposes one danger of the good faith exception. If an officer knows that an honest and reasonable error excuses his behavior, he willfully may feign a good faith mistake hoping that the court will find his error reasonable without discovering the secret of his willfulness. If the good faith exception has such an effect it would encourage both illegal searches and police perjury.

The negative effect that judicial imprecision has had on the exclusionary rule's general deterrent value does not now justify recognition of a good faith exception. The deterrence problem lies not with the rule, but rather with its judicial administration. Admittedly, the Court has made difficult its responsibility of finding a remedy for fourth amendment violations by erroneously focusing on the rule's deterrent value rather than on its ability to remedy the constitutional violation, and then by negating that deterrent value through unclear opinions. The solution, however, cannot be the abrogation of the Court's solemn responsibility to provide a remedy for a violated fourth amendment right.[150]

The manner in which to avoid decreasing the rule's deterrent potential through court opinions unintelligible to police is not to treat the constitutional violations with indifference, but rather to clarify fourth amendment standards through opinions drawing simple and understandable "bright lines" for police conduct.[151] "Fourth Amendment doctrine, given force and effect by the exclusionary rule," Professor LaFave observes,

> is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[152]

Lack of judicial clarity should not lead to a device for excusing fourth amendment violations, but to a method for simplifying the task of officers truly endeavoring to respect constitutional prerogatives.[153] Consequently, those urging adoption of a good faith excep-

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150. The good faith exception, as already demonstrated, leaves the violated right unremedied. *See supra* text accompanying notes 141-44.

151. In recent years courts have made some attempts to formulate such bright lines. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981).

152. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (footnotes omitted). Of course, while opinions setting out "bright lines" more clearly would communicate search and seizure standards for police, not all bright lines are equally defensible. *See* LaFave, *supra* note 3, at 325-33. Conflicts over where the courts should draw the line—what they should define the standard of conduct to be—would continue. *See id.*

153. Ironically, a court that often has rejected the precision of per se rules for the flexibility (and uncertainty) of "totality of circumstances" analysis, *see* Manson v. Brathwaite, 432 U.S. 98 (1977); *supra* note 87 and accompanying text, also bemoans the inability of law enforcement officials to deduce appropriate constitutional standards. When

tion should not justify the exception on the grounds that lack of judicial clarity creates general deterrence problems.

Exception proponents, however, also argue that general deterrence in a good faith context actually may be undesirable.[154] Justice White, for example, one of the most vociferous advocates of a good faith exception,[155] defended his position by asserting:

> The officers [making a reasonable good faith error], if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administrated is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of the proceedings is substantially impaired or a trial totally aborted.[156]

Consequently, he concludes, that "[m]aking the arrest in such circumstance is precisely what the community expects the police officer to do."[157] According to Justice White, therefore, deterring such behavior is undesirable.

This position reveals the hidden agenda behind the good faith exception. If the police officer truly acted, under the circumstances, in a manner that courts should not deter, why is his behavior anything but reasonable? If, then, the search and arrest is reasonable, it is also constitutional under the fourth amendment.[158] Rather than merely advocating a good faith exception to the exclusionary rule, Justice White is surreptitiously, consciously or unconsciously, disagreeing with the judicial determination that the police action violates fourth amendment standards. If a violation actually did take place, even assuming the officer was only reasonably confused and chose to act erroneously, the community still should have preferred him to have acted otherwise and not to have violated the constitutional mandate. White's argument lies not with the remedy but with the judicial determination that a constitutional violation had taken place. He would have chosen to find that the search was constitutional. Other exception proponents who argue that the general deterrence of the exclusionary rule is undesir-

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the Court then considers correcting the problem by disregarding legitimate claims of right under the auspices of a good faith exception the court magnifies this irony.

154. The Fifth Circuit, for example, asserted that general deterrence in a good faith context in undesirable. United States v. Williams, 622 F.2d 830, 849 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). *See supra* text accompanying note 94.

155. Justice White presents his view most completely in Illinois v. Gates, 103 S. Ct. 2317, 2340-47 (1983) (White, J., concurring).

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

157. *Id.* at 539.

158. Fourth amendment privacy is not an absolute right, but only a qualified one outweighed when governmental intrusion is reasonable. *See supra* text accompanying note 109.

able with respect to good faith errors also actually are saying that the scope of the fourth amendment should be sufficiently narrow as not to prohibit the police behavior at issue.

Further proof of this observation becomes evident by tracing the application of Justice White's position in the decisions of other courts such as *Colorado v. Quintero*.[159] In *Quintero* the police arrested defendant for theft and possession of a stolen television set. At the time of the arrest, defendant claimed to have no identification and to have purchased the television set from someone in the neighborhood. The police knew that defendant was a stranger to the community and had seen him attempt to cover the set with his shirt. At the time of the arrest, however, no complaints or evidence established that defendant had committed a crime.[160] On the basis of these facts, the Supreme Court of Colorado found that the officer had acted without probable cause in arresting and searching the defendant. According to the court, probable cause to arrest exists only "when the facts and circumstances within an officer's knowledge are sufficient to support a reasonable belief that a crime has been committed by the person arrested."[161]

Justice Rovira dissented. He initially argued that the officer's actions were reasonable and, therefore, constitutional. Only subsequently did he assert that a good faith error should not activate the exclusionary rule, quoting for support Justice White's comment that the officer had acted precisely as the community would expect.[162] Clearly both arguments are the same. According to Justice Rovira, the court's interpretation of the fourth amendment standard is too stringent. If no constitutional violation occurred, then no remedy vindicating the right would be necessary. Justice Rovira is using the good faith exception covertly to undermine the claim of right acknowledged by the majority. The opinions of both Justices White and Rovira illustrate that exception proponents who argue that the general deterrence of the exclusionary rule is undesirable with respect to good faith errors actually are saying that the fourth amendment itself should not prohibit the implicated police behavior. Perhaps the fourth amendment should not. The issue, however, is one of substantive standards that needs de-

159. 657 P.2d 948, *cert. granted*, 103 S. Ct. 3535 (1983), *cert. dismissed*, 52 U.S.L.W. 3460 (Dec. 13, 1983).

160. The police, in fact, did not learn who owned the television set until more than five hours after the arrest. *Id.* at 950.

161. *Id.*

162. *Id.* at 952.

bate and resolution on that level rather than obfuscation and camouflage in the garb of the seemingly innocuous issue of remedy.

The foregoing discussion sets the stage for a reconsideration of whether *DeFillippo* is good precedent for a general good faith exception.[163] The officer in *DeFillippo* arrested and searched defendant for violating a statute later found unconstitutionally vague. Chief Justice Burger, ruling the seized contraband admissible, properly asserted that "[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."[164] The officer in *DeFillippo* acted precisely as the community would wish. He limited his concern about constitutional rights to the sphere of police law enforcement. The fourth amendment, however, asserts that an officer acting unreasonably, without probable cause and a warrant when necessary, clearly is not acting as the Constitution requires. Had such an officer acted otherwise, in accordance with his responsibility under the clause, his choice would be constitutionally preferable and worthy of praise. In *DeFillippo*, the constitutional error was the legislature's not the officer's, and was not of fourth amendment origin. The exclusionary rule's justification is to protect an individual's privacy from unwarranted intrusion; it is not a remedy for all constitutional violations.[165] The Court's holding in *DeFillippo* is distinguishable from one adopting a general good faith exception on the basis of differences in the desirability of general deterrence directed toward police behavior when the constitutional error is that of the legislature rather than of the officer. *DeFillippo's* precedential value for a good faith exception, thus, is questionable.

The foregoing analysis of general and specific deterrence reveals that some advocates of the good faith exception utilize a deterrence rationale which is conceptually flawed. A consideration of systemic deterrence[166] reveals additional shortcomings in the advocates' concept of deterrence. In addition to its specific and general deterrent value, the exclusionary rule also may deter illegal

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163. *See supra* text accompanying notes 96-99.

164. *DeFillippo*, 443 U.S. at 38.

165. When a statute forbids leafletting on public streets the police officer's responsibility is to enforce that law. A court need not exclude the narcotics found on an arrested leafletter because the statute violates first amendment rights. Other remedies are truly available for this claim of right violation such as declaring the statute unconstitutional and reversing any conviction for the statute's breach.

166. "Systemic deterrence" is a construct borrowed from the writings of Mertens and Wasserstrom, *supra* note 3, at 399-401.

police behavior by increasing police officials' awareness of constitutional requirements and their responsibility to abide by them. If police officials realize the importance of complying with fourth amendment dictates, they can encourage individual officers to comply through training and developing departmental guidelines for searches, seizures, and arrests.[167] While individual officers initially may be hostile toward fourth amendment demands, departmental insistence on respect for such demands likely would reduce resistance to restrictions that police officers otherwise may view as illegitimately imposed by authorities external to the police subculture. The increased use of search warrants, the stepped up development of police educational programs, and the creation of ongoing working relationships between police and prosecutors already reflects the exclusionary rule's potential beneficial effects.[168]

The exclusionary rule, however, also has had a less obvious, yet more important, systemic impact. Fourth amendment considerations only became part of the national consciousness when courts, due to the rule, had occasion and incentive to articulate them. The rhetoric of these decisions slowly acclimated the public to the fourth amendment values that the decisions defended.[169] Police departments, of course, recruit their officers from the general public. The police today, therefore, are more likely to be sympathetic to

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167. *Id.* at 399. The low visibility of the discretion exercised by lower echelon police officers may limit the effectiveness of departmental rulemaking. *See supra* note 139.

168. LaFave, *supra* note 3, at 319. One Florida prosecutor noted that within his jurisdiction police are forbidden to seek a warrant before a prosecutor reviews their requesting papers.

169. Rhetoric can be a powerful instrument for change. For years ethnologists studying the relation of language to culture have insisted that any change in language constitutes an influence on both perception and conception. *See, e.g.*, R. BROWN, I. COPI, D. D. DULANEY, W. FRANKENA, P. HENLE & C. STEVENSON, LANGUAGE, THOUGHT & CULTURE 1-24 (1958); E. Sapir, *Language, in* SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE AND PERSONALITY 7-32 (D. Mandelbaum ed. 1949); B. Whorf, *The Relation of Habitual Thought and Behavior to Language, in* LANGUAGE, CULTURE AND PERSONALITY: ESSAYS IN MEMORY OF EDWARD SAPIR 75-93 (L. Spier, A. Hallowell & S. Newman eds. 1941). Edward Sapir, an early leader in ethnology wrote:

> The relation between language and experience is often misunderstood. Language is not merely a more or less systematic inventory of the various items of experience which seem relevant to the individual, as is so often naively assumed, but is also a self-contained, creative symbolic organization, which not only refers to experience largely acquired without its help but actually defines experience for us by reasons of its formal completeness and because of our unconscious projection of its implicit expectation into the field of experience.

E. Sapir, *Conceptual Categories in Primitive Languages, in* LANGUAGE IN CULTURE AND SOCIETY 128 (D. Hymes ed. 1964). Rhetoric thus may grease the wheels of ideological change. *See generally* Ingber, *supra* note 145, at 268-73.

fourth amendment values then were their pre-exclusionary rule predecessors.

Some critics of the exclusionary rule, however, claim that the lack of a good faith exception reduces rather than enhances the potential of systemic deterrence. They argue that departments which attempt to educate their officers but still find evidence excluded due to further development or change in judicial interpretation may adopt an attitude that "the courts cannot be satisfied, that the rules are hopelessly complicated and subject to change, and that the suppression of evidence is [thus] the courts' problem and not the departments'."[170] Such frustration may discourage a department from even trying to educate its officers to avoid fourth amendment violations.

This assertion is similar to the objection of tort defendants that the law does not give sufficient direction as how to avoid liability.[171] A jury determination that the defendant failed to act in a reasonable, prudent manner, indeed, provides little guidance as to what behavior would have been sufficient. Even a finding of no liability leaves the defendant and those in similar situations wondering whether he was more cautious than required.

This vagueness in tort law, however, is socially valuable. While violation of a known or knowable standard of conduct makes moral reproach and punishment more justified,[172] tort law does not focus on individual moral responsibility.[173] Tort law functions not to earmark personal culpability, but to continuously press societal members to make choices that will lower the risk of injury and pain.[174] Legally fixing the duty of an individual in a particular con-

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170. Kaplan, *supra* note 3, at 1050. *See* J. SKOLNICK, *supra* note 61, at 212-29.

171. Justice Holmes enthusiastically supported the movement to define more stably the responsibility of both tort defendants and plaintiffs. Baltimore & O. R.R. Co. v. Goodman, 275 U.S. 66 (1927); Lorenzo v. Wirth, 170 Mass. 596, 49 N.E. 1010 (1897).

172. Consequently, the state must have given the defendant in a criminal trial fair notice at the time of his offense of the standards of criminal liability. Criminal law equates individual moral culpability and accountability. The law justifies punishment only if the wrongdoer deserves some measure of societal approbrium. As the text suggests, violation of a known or knowable standard of conduct makes such a societal response more appropriate.

173. The widespread use of liability insurance, which associates risks with activities rather than with individuals, clearly indicates a concern other than individual accountability. Furthermore, courts hold mentally limited individuals to a standard of care even when they can demonstrate their personal inability to function at the required level. Vaughan v. Menlove, 3 Bing. 468 (N.C. Ct. Comm. Pleas 1837). Clearly, moral responsibility is not the crucial issue.

174. The use of tort law to reduce the costs of accidents is discussed in G. CALABRESI, THE COSTS OF ACCIDENTS 26-28 (1970). *See also* Ingber, *Defamation: A Conflict Between Reason and Decency*. 65 VA. L. REV. 785, 812-33 (1979).

text and steadfastly refusing to change that duty removes the need to strive to develop better ways of avoiding injuries. Legally fixed duties, thus, would retard the valuable evolution of tort law.

The exclusionary rule's application to fourth amendment violations serves the same type of socially valuable function as tort law. The rule's purpose is not to punish culpable officers, but to structure a criminal justice system with incentives for police to strive continuously to respect more fully, rather than to violate, constitutional norms.[175] Yet the desire of police departments that courts fix and do not change fourth amendment standards represents the improper view that the exclusionary rule's purpose is to punish the culpable officer. If the legal system encourages police departments always to improve and more fully to respect constitutional values, then systemic deterrence more likely will result. The articulation by courts of fixed and unchanging constitutional standards, given the pressure of the police role, likely will convert constitutional minimums into institutional maximums. Likewise, a good faith exception will encourage departments not to counsel or advise their officers to give any more consideration for fourth amendment rights than existing case law absolutely mandates.[176] The good faith exception, therefore, is inconsistent with the goal of systemic deterrence.

While the exclusionary rule clearly has deterrent potential, measuring the general and systemic deterrent value of the rule is likely impossible. No statistics reveal the number of unlawful searches that the rule has deterred. But empirical evidence of the rule's deterrent effect is no weaker than evidence of the deterrent effect of laws, for example, against larceny.[177] As Professor Dwor-

175. Professor Amsterdam analogizes the exclusionary rule to police sponsored anti-theft programs that brand personal property. Amsterdam, *supra* note 3, at 431-32. Identification marks diminish the property's value to a prospective thief because he knows it will be more difficult to sell the goods at a worthwhile price. Although these identification programs do not influence those who steal for excitement, revenge, or personal use, diminishing the property's worth correspondingly decreases the motivation to steal it.

176. A tension, of course, exists between the need for "bright line" decisions offering police guidance, *see supra* text accompanying notes 151-53, and the value of ever changeable standards encouraging police departments to review continuously and to strive for improvement in their procedures. Bright lines demand court decisions that are not excessively fact bound. As argued earlier, however, not all bright lines are equally defensible. *See supra* note 152. Conflicts over where the courts should draw the line would continue to assure the flexibility of fourth amendment doctrine necessary to encourage continued systemic deterrence.

177. Some writers suggest the case supporting the exclusionary rule's deterrent effect is the stronger of the two. *E.g.*, Amsterdam, *supra* note 3, at 431.

kin observed: "Deterrence is partly a matter of logic and psychology, largely a matter of faith. The question is never whether laws do deter, but rather whether conduct ought to be deterred. . . ."[178] Certainly, then, the deterrent value of the exclusionary rule deserves as much respect as does the deterrent value of the criminal law generally.

C. *The Good Faith Exception's Effect on the Scope of the Fourth Amendment*

Thus far this Article has shown how the exclusionary rule both offers appropriate vindication for fourth amendment violations and has deterrent value. Its critics, therefore, only can argue that the rule adversely affects the police's ability to fight crime. Accordingly, this section discusses these alleged adverse effects while developing insights into the good faith exception's effect on the scope of the fourth amendment.

A portion of society perceives the exclusionary rule as hamstringing police and allowing guilty defendants to go unpunished. Statistical studies, however, suggest this perception is faulty. First while the exclusionary rule only functions to suppress evidence at trial, our criminal justice system focuses more on obtaining guilty pleas than on securing convictions at trial. Seventy to ninety percent of prosecuted cases result in guilty pleas.[179] The criminal justice system probably will not notice any police misconduct in these cases.[180] One plausible interpretation of such statistics is that they show only that prosecutors screen out and never prosecute a significant number of cases that contain illegal searches and seizures. Another study, however, refutes this interpretation. After monitoring felony case processing in five cities, the study found that due process violations, including but not limited to fourth amendment violations, accounted for one (1) to nine (9) percent of the cases rejected through prosecutor screening.[181] "While it may be that po-

178. Dworkin, *supra* note 61, at 333.

179. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 22 (5th ed. 1980); Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 819 (1977).

180. Police misconduct often may go unnoticed even by defense counsel who may spend only enough time with his client to ask whether or not the client is guilty. One study in which public defenders represented defendants, for example, indicated that 30% of the defendants reported their attorney spent less than 10 minutes with them; 32% stated 10 to 29 minutes; 27% stated one-half hour to 3 hours; and only 14% stated more than 3 hours. J. CASPER, CRIMINAL COURTS: THE DEFENDANTS PERSPECTIVE IV (1978) (abstract).

181. Brosi, *A Cross-City Comparison of Felony Case Processing* 18-19 (1979). Groups

lice do not arrest some suspects because of search and seizure limitations," the report concluded, "these percentages seem to counter the conventional wisdom that Supreme Court decisions cause many arrests to fail because of technicalities . . . . In felony cases other than drugs, less than 2% of the rejections in each city involved abrogation of due process."[182] While the exclusionary rule's effect on the government's decisions to prosecute appears deminimus, its effect upon trial outcomes is even smaller. The same Comptroller General's study that Justice White cited in *Gates* to support a good faith exception[183] noted that of the 2,804 defendants charged in thirty-eight United States attorney offices during a two month period only 30% of the cases included a search or seizure and only 11% of the defendants filed motions to suppress. Courts denied these motions in the overwhelming majority of cases, so that in only 1.3% of the sampled criminal cases did the courts actually exclude evidence.[184] Furthermore, over half of the cases in which the court granted the motion to suppress still resulted in conviction.[185]

Even though these statistics belie the popular impression that the exclusionary rule severely undermines law enforcement, the rule's supporters cannot disregard the existence of popular misperception. Institutional legitimacy is a matter of perception whether or not the perception is correct. If the exclusionary rule's interference with police work even in a small number of cases significantly undermines public confidence in the criminal justice system, the rule is a fitting subject of concern. Consequently, the actual relationship between the exclusionary rule and limitations on police behavior needs exploration.

Soon after *Mapp* extended the exclusionary rule to state criminal proceedings, New York City Police Commissioner Murphy wrote an article complaining:

> I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this . . . . I was immediately caught up in the entire program of reevaluating our procedures . . .

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such as the U.S. Department of Justice and the Law Enforcement Assistance Administration commissioned the study.

182. *Id.* at 19. Prosecutors encounter search and seizure problems most commonly in crimes, such as possession of narcotics, that lack traditional complainants. *See supra* note 45.

183. *See supra* note 48.

184. COMPTROLLER GENERAL, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTION II (Apr. 19, 1979).

185. *Id.* at 13.

> modifying, amending, and creating new polices and new instructions for the implementation of *Mapp* . . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen. . . .[186]

Obviously *Mapp* caused New York police to consider dramatic behavior changes. But why such dramatic changes proved necessary is unclear. Fourth amendment standards should have limited New York police since the *Wolf* decision, which preceded *Mapp* by twelve years.[187] *Mapp* merely changed the remedy for violations; the decision should not have changed the substantive standards of the fourth amendment with which police already were required to comply. Police Commissioner Murphy's statement demonstrates that, prior to the implementation of the exclusionary rule, police departments were indifferent to fourth amendment restrictions on police conduct and that the suppression doctrine does have systemic deterrent value.

The contention that the exclusionary rule "handcuffs" police is simply wrong.[188] Rather than the remedy chosen to vindicate violated fourth amendment rights, the interpreted scope of the fourth amendment itself mandates actual limitations on police conduct.[189] Consequently, the public's perception that the exclusionary rule hamstrings police in fulfilling their crime fighting re-

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186. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966).

187. *See supra* text accompanying note 26.

188. The assertion that the exclusionary rule allows the criminal to go free because the constable has blundered is misleading. Such as assertion implies that had the constable been more careful the court would have convicted the criminal. Mertens & Wasserstrom, *supra* note 3, at 366 n.5. Often, however, this is not the case. If the officer, lacking probable cause to arrest or search, abided by fourth amendment dictates, the criminal still would have gone free because no arrest or search would have taken place. In such contexts the constable *must* have blundered for any prosecution to occur at all.

189. As long also as 1938 Senator Robert Wagner of New York noted before his state's constitutional convention that the right, rather than the remedy, mandates police restraint:

> All the argument [that the exclusionary rule will handicap law enforcement] seems to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the [law of search and seizure] is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.
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> . . . It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform.

1 New York Constitutional Convention, Revised Record 560 (1938), *reprinted in* J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 1191-92 (1940). *See* Oaks, *supra* note 3, at 754.

sponsibility is not only statistically but also conceptually incorrect.[190]

Furthermore, an internal analytical inconsistency exists in condemning the exclusionary rule on the one hand for not deterring police misconduct and on the other for hamstringing police in their crime fighting efforts. If the courts chose an alternative fourth amendment remedy that more effectively deterred illegal searches and seizures, then the same or even a greater number of guilty individuals would go free, because without such arrests and searches police would discover even less evidence upon which prosecutors could base conviction[191] or gain a guilty plea. Presently, for example, a defendant's lack of standing to protest the admission of incriminating evidence obtained in violation of someone else's privacy right allows some use of illegally seized evidence at trial.[192] If a different remedy more effectively had deterred the offending officer, he would not have committed the illegal search, he would not have found the incriminating evidence, and the defendant more likely would have avoided conviction. Consequently, a remedy more efficient at deterring illegal police behavior than the exclusionary rule as presently applied also would restrict more severely the police's ability to gain convictions.[193]

In addition to the loss of evidence that contributes to convictions and guilty pleas, the police no longer would make many searches that presently serve to recover stolen goods and confiscate contraband. Nor could they respond as easily to community demands for increased enforcement. Consequently, replacement of the exclusionary rule with a more effective police deterrent greatly would impede some practices law enforcement officers presently find beneficial in controlling crime.[194]

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190. One critic of the exclusionary rule credits it with the defeat of effective gun control law. *See* Wilkey, *supra* note 3, at 224. But the fourth amendment itself, not the exclusionary rule, prevents police from searching anyone with a hulging pocket. Furthermore, no reason exists to believe that the community's criminal element refrained from carrying guns until the Court decided *Mapp* in 1961.

191. This argument assumes that police could not find alternative means to obtain evidence. If legal alternatives did exist, however, and the police still acted illegally, release of criminals would not be a product of overly restrictive constitutional standards but of police ineptness.

192. *See supra* note 91.

193. Evidence also would not be available for impeachment purposes or for submission to a grand jury. *See supra* text accompanying notes 38-39.

194. Society, in fact, may saddle police with performing tasks that it wants accomplished but not condoned. Professor Paul Chevigny suggests that:

> For legislators and judges the police are a godsend, because all the acts of oppres-

The ramifications of adopting a more effective remedy therefore would be extensive.[195] Because police would make no unlawful searches or arrests, many crimes would appear totally unsolved. Although courts would free fewer defendants on what the public perceives as legal technicalities, a reduction would occur in the overt demonstration of police capability, for example, to solve crime, to protect the public, and to retrieve stolen property. The more effective remedy could result in increased public satisfaction with the visible functioning of the courts and decreased approval of the visible functioning of the police. The courts would appear to be dealing effectively with those prosecuted; by contrast, the police would appear as unequal to the task of apprehending criminals deserving prosecution.

Obviously, public dissatisfaction with the exclusionary rule occurs because the rule functions after an unlawful arrest or search already publicly has unveiled a wrongdoer. The rule, thus, openly flaunts the price of the fourth amendment;[196] in fact, it "rubs our noses in it."[197] Critics of the exclusionary rule, thus, in reality are critics of the fourth amendment itself. They apparently believe that sufficient discredit of the rule could lead to judicial interpretations either further limiting the rule's scope or replacing it with a less, rather than a more, effective remedy.[198] A forthright demand for a less effective remedy clearly would focus the resulting conflict not on the remedy for illegal intrusions of privacy by police, but on whether the law should deem illegal and deter such intrusions at all. This demand thereby would entail a frontal attack on the val-

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sion that must be performed in this society to keep it running smoothly are pushed upon the police. The police get the blame, and the officials stay free of the stigma of approving their highhanded acts. The police have become the repository of all the illiberal impulses in this liberal society; they are under heavy fire because most of us no longer admit so readily to our illiberal impulses as we once did.

P. CHEVIGNY, POLICE POWER 280 (1969).

195. Imagine, for example, an effective tort remedy that required police officers violating the fourth amendment to assume significant individual damage liability. If, as exclusionary rule critics argue, fourth amendment doctrine is intolerably obscure, officers wishing to protect themselves and their families from financial hardship would be fearful of making arrests and searches that even arguably may be improper. Courts, however, upon formal review might find proper many of such chilled searches. An effective tort remedy, consequently, may chill the legally justified searches now occurring under the exclusionary rule.

196. J. KAPLAN, CRIMINAL JUSTICE 215-16 (1978).

197. Kaplan, *supra* note 3, at 1037.

198. Even Professor Oaks recognized that the argument concerning the exclusionary rule's "handcuffing" police put the rule's critics in the "untenable position of urging that the sanction be abolished so that [police] can continue to violate [constitutional] rules with impunity." Oaks, *supra* note 3, at 754.

ues embodied in the fourth amendment itself.

A frontal attack on the fourth amendment, however, is difficult because the Bill of Rights has held an almost mystical position in American heritage. Accepting fourth amendment values in the abstract, while whittling away their importance by developing exceptions to the remedy, avoids the blasphemy of an overt challenge to such values. Avoiding such blasphemy, in turn, increases the chances of societal acceptance of reductions in the fourth amendment's scope and significance.[199]

Avoiding a blatant attack on the fourth amendment while reducing the significance of the rights it embodies would be the effect, if not the purpose, of a good faith exception. The attack is upon the citadel of the fourth amendment rather than simply upon the exclusionary rule. Consequently, when courts entertain adopting a good faith exception, they should consider how the exception actually retards the development and restricts the scope of the fourth amendment rather than the more comfortable issue of whether the rule has any deterrent value in specific situations. In anticipation of this evaluation, this Article now will demonstrate how the proposed exception is a subtle and, consequently, highly dangerous attack on the viability of the fourth amendment.

1. Retarding Fourth Amendment Development

A good faith exception will either slow or freeze fourth amendment development "dead in its tracks."[200] Under such an exception evidence obtained by a police officer when acting upon a reasonable good faith belief that his conduct was lawful is admissible whether or not his behavior was, or was not, constitutional. Consequently, the preliminary issue of judicial concern will be whether the officer acted under such a reasonable good faith belief. When a court finds the existence of such a belief, the actual constitutionality of the officer's behavior, thus, becomes irrelevant. Courts using

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199. A literary example of the procedure's use as a tool of conflict settlement that conceals disagreements of substantive values is Shirley Jackson's short story, *The Lottery*, in THE LOTTERY 291 (1949). The society Jackson describes in her story has no predilection against individual sacrifice for collective goals. In fact, the society prefers such an arrangement. The story describes a communal ceremony wherein lots are drawn to determine whom the community will stone to death for some unspecified community need. Although the eventual winner of the lottery objects, she couches her objection in terms of procedure—that the lots were drawn too quickly—rather than in terms of the substance of the activity. *Id.* at 299.

200. United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting). *See* LaFave, *supra* noto 3, at 354-55.

the good faith exception, therefore, will have no need to further develop or refine fourth amendment doctrine.[201] No articulation of the appropriate rule of conduct that police and courts should follow in future situations will be forthcoming; thus, no general or systemic deterrence will ensue. If, in fact, the officer's behavior was unconstitutional, nothing will prevent that officer or others from continuing to make the same good faith error in the future.

Justice White, in his *Gates* concurrence, rejected the inevitability of this outcome if the Court adopted the good faith exception. He insisted that if a fourth amendment case presented a novel situation in which a court had to decide the constitutionality of an officer's behavior in order to provide guidance for his and others' future actions, the court would have sufficient reason to decide whether a violation had occurred before turning to the good faith question.[202]

Both constitutional precedent and prudential considerations, however, suggest that this advisory opinion procedure advocated by Justice White is not likely to occur.[203] Consider, for example, the Supreme Court's response to the Ninth Circuit's decision in *Bowen v. United States*.[204] While refusing to retroactively apply the standards articulated in *Almeida-Sanchez* for roving border patrol searches,[205] the Ninth Circuit first found the challenged search illegal under those standards.[206] The Supreme Court agreed that retroactive application was not necessary but then warned,

> This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive . . . . This practice is rooted in our reluctance to decide constitutional questions unnecessarily . . . . *Because this reluctance is in turn grounded in the constitutional role of the federal courts* . . . the district courts and courts of appeal should follow our practice, when issues of both retroactivity and application of constitutional doctrine

201. Justice Brennan observed that if, under a general good faith exception, evidence is admissible unless clear precedent, not subject to reasonable misinterpretation, declares the search in question unconstitutional, "the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts." *Peltier*, 422 U.S. at 554.

202. *Gates*, 103 S. Ct. at 2346.

203. Whether Justice White would wish such a procedure actually to develop is not clear. Within the same paragraph discussed in the text, he observes that: "It is not entirely clear to me that the law in this area has benefited from the constant pressure of fully-litigated suppression motions." *Id.*

204. 422 U.S. 916 (1975).

205. For a discussion of *Almeida-Sanchez*, see *supra* text accompanying notes 97-98.

206. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974).

are raised, of deciding the retroactivity issue first.[207]

Even assuming the Court did not mean literally that Article III limitations prohibit a court from addressing such constitutional issues, prudential considerations alone probably would lead most courts first to decide the good faith issue and, thus, avoid unnecessary judicial interference in effective law enforcement.[208]

Even assuming Justice White's position ultimately proves correct, however, recognition of a good faith exception still would restrict severely fourth amendment development. According to the Justice's theory, courts could articulate new fourth amendment standards while refusing to exclude evidence in a particular case because the officer reasonably could not have anticipated the change. But if a good faith error does not lead to suppression of the illegally obtained evidence, a defense attorney would have little incentive to make the new and creative argument that might support recognition of a new standard. Criminal defense counsels try to make arguments that immediately benefit their clients rather than to urge abstract and conceptual points of law for the future benefit of others.[209] Proposing radically new approaches or considerations in search and seizure cases would not further criminal defense strategy. Consequently, defense counsels are not likely to argue cases that raise a good faith exception at a level that would allow Justice White's theory to function.[210]

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207. *Peltier*, 422 U.S. at 920 (emphasis added).

208. Some jurists forthrightly have acknowledged this fact. "It is no sufficient objection that [a good faith exception] would require courts to make still another determination" writes Judge Henry Friendly. "[R]ather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965).

209. Mertens & Wasserstrom, *supra* note 3, at 451. In response to this concern, Justice White proposed allowing application of a new fourth amendment standard to the party in whose case the rule is first announced. Illinois v. Gates, 103 S. Ct. at 2347 n.19. Depending upon the interpretation of the Justice's proposal, one of two flaws is obvious. If the Justice means that newly announced fourth amendment rules will not receive general retroactive application, this is already the case, *see* United States v. Johnson, 457 U.S. 537 (1982), and a good faith exception adds nothing. If he means to motivate attorneys to make new argnments by permitting exclusion of evidence for some but not all good faith errors, determining which errors should lead to suppression becomes a matter of judicial whim rather than fairness to law enforcement authorities. That very fairness to police, however, is the precise rationale allegedly justifying the exception. Thus, under this interpretation Justice White's proposal undercuts the exception's validity.

210. An alternative scenario is possible. A good faith exception might result in endless judicial debate over whether an officer should have anticipated a specific interpretation of the law. What constitutes a "reasonable mistake of law" is exceedingly difficult to deter-

In the past the exclusionary rule has functioned to assure that courts' continually reassess and refine fourth amendment protections.[211] Some procedure must exist that allows courts to review claims of right and articulate constitutional doctrine.[212] A good faith exception severely would reduce the need of courts to consider and adopt new fourth amendment standards. Stripped of this responsibility to develop new standards[213] or subtly refine those already recognized,[214] the courts no longer will offer the guidance necessary for general or systemic deterrence of behavior that violates the fourth amendment.[215] Without systematic deterrence, of course, the importance of and respect for the fourth amendment in this society gradually will diminish.

Previously, this Article presented *United States v. Peltier* as possible precedential support for a general good faith exception.[216] The above discussion, however, provides the analysis necessary to distinguish *Peltier*. The *Peltier* court simply refused to apply ret-

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mine. Kaplan, *supra* note 3, at 1044. *Cf.* Smith v. Lewis, 13 Cal. 3d 349, 357, 530 P.2d 589, 593 (1975) (finding malpractice when attorney failed to perform adequate research to advise his client on an uncertain point of law); Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283 (M.D. La. 1973) (courts uneasy about finding that an attorney has malpracticed when failing to anticipate changes in the law). Instead of a forthright confrontation over what standards should exist, judicial attention would be focused upon the meaning of prior decisions articulating prior standards. This scenario, consequently, also would impede fourth amendment development.

211. *See* Oaks, *supra* note 3, at 756.

212. Although *Wolf* in 1949 declared that the fourth amendment bound the states, no court cases attempted to determine the contour of the states' responsibility under the Constitution until after *Mapp* imposed the exclusionary rule on the states in 1961.

213. If the fourth amendment standard proposed at trial differs dramatically from or fills a gap in prior fourth amendment doctrine, the officer reasonably could claim a good faith error. If evidence is then admissible, the court need not decide whether the officer's conduct is constitutionally improper. Under such an exception the Court would not have had a chance to decide the following landmark decisions, which dramatically deviated from prior case law: Payton v. New York, 445 U.S. 573 (1980); Delaware v. Prouse, 440 U.S. 648 (1979); Cbimel v. California, 395 U.S. 752 (1969); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

214. If the officer's behavior in a specific case is objectionable only if the court makes subtle distinctions from prior case law, the officer again may claim a reasonable good faith error. Doctrinal contours thus will remain unclear if courts have no opportunity or incentive to refine doctrine through the process of repeated application. Yet, scholars traditionally deem this type of development highly appropriate for judicial institutious. Levi, *An Introduction to Legal Reasoning, reprinted in* G. CHRISTIE, JURISPRUDENCE 964 (1963). *But see supra* note 176 and text accompanying notes 151-53.

215. Exposure to flesh and blood cases, which force courts to learn experientially, properly discourage courts from relying on rarefied abstractions. A good faith exception would diminish such valuable exposure. *See* O.W. HOLMES, THE COMMON LAW 5 (Howe ed. 1963) ("The life of the law has not been logic: it has been experience.").

216. *See supra* text accompanying notes 95-98.

roactively a fourth amendment standard newly articulated in *Almeida-Sanchez*. Cases such as *Peltier* that acknowledge the existence of newly articulated constitutional standards, but then refuse to apply them retroactively[217] do not impede the development of constitutional doctrine and do not destroy the general and systemic deterrence provided by the new standards. Rather, such cases encourage novel and creative approaches by reducing the societal cost of judicial acceptance of new constitutional standards. Consequently, the ramifications of non-retroactivity decisions and of a good faith exception are considerably different. Given such different effects, *Peltier* is unconvincing precedential support for a good faith exception.

2. Erosion of Fourth Amendment Doctrine

Besides retarding fourth amendment development and diminishing the general and systemic deterrence of fourth amendment standards, the good faith exception also would erode the fourth amendment's already articulated substantive doctrines. Consider, for example, its effect on the requirement of probable cause. Probable cause is the linchpin of fourth amendment protection for it marks the point at which the qualified individual right to privacy must succumb to the community's need for security and law enforcement. Probable cause to arrest exists when the facts as known would lead a reasonably cautious individual to believe that the person police are to arrest has or is committing an offense.[218] The law requires the same quantum of evidence before it authorizes a full search except the conclusions are somewhat different. Probable cause for a search requires a reasonable belief that the items sought relate to criminal activity and that police will find the items at a specific time in the place the police are to search.[219] A finding of probable cause for purposes of arrest or search, thus, does not require certainty but merely the reasonableness of the officer's or, in the case of a warrant, the magistrate's belief. The concept of probable cause, therefore, already subsumes the possibility of a reasonable error.

Consequently, for a court to find that a police officer or magis-

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217. *See, e.g.*, Desist v. United States, 394 U.S. 244 (1969); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States *ex rel* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

218. *See* Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949).

219. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 179, at 268.

trate lacked probable cause it must believe that the specific arrest or search was unreasonable. If a court applied the reasonable good faith exception under these circumstances, it necessarily would have to determine whether the offending official, who admittedly held an unreasonable belief that probable cause existed, had a reasonable good faith belief that probable cause did exist. The paradox is evident: how can one reasonably believe an unreasonable belief? Applying the reasonable good faith exception to the exclusionary rule in this context clearly requires a determination that the official acted reasonably, with probable cause, in the first place.[220] Thus, courts using such an exception would be imposing covertly a far more permissive interpretation of probable cause. Once again, the exception is reducing the scope of the fourth amendment's already articulated standards rather than merely providing an innocuous exception to the remedy chosen to vindicate fourth amendment rights.

3. Interfering With the Sixth Amendment Right to Counsel

The good faith exception also would subtly and insidiously erode the importance and effectiveness of the sixth amendment right to counsel. Ever since the early 1960's, the Supreme Court has recognized that the aid of counsel in a criminal trial is essential to ensure both a fair trial[221] and proper protection of the individual liberty interests at stake.[222] The defense attorney, then, as well as the prosecution, is crucial to society's adversarial system of criminal justice. In a 1963 report by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice[223] the Committee recognized that,

> The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depend upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the

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220. Consequently, the dissent in *People v. Quintero*, as argued previously, *see supra* text accompanying notes 159-62, is attacking the majority's determination that probable cause for a search did not exist.

221. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

222. Scott v. Illinois, 440 U.S. 367 (1979), held that a court only need grant counsel to a defendant on trial for a misdemeanor if, upon conviction, the court in fact sentenced him to a period of incarceration. The Supreme Court found that defendants only sentenced to fines have no such constitutional right. *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972).

223. Commentators often refer to the report as *The Allen Report*, after the Chairman of the Committee, Professor Francis A. Allen.

prosecuting and adjudicatory functions.[224]

The defense attorney, thus, is valuable not merely because he ensures a fair trial and protects his client's liberty interests, but also because he provides the open criticism and analysis of governmental behavior necessary for a healthy criminal justice system. While defending his client, he also exposes governmental improprieties and, thus, aids in the control of the controllers.[225]

Seemingly, therefore, defendant's sixth amendment right to counsel concerns more than the presence or appointment of someone labeled "defense counsel"; the individual so labeled also must function effectively as counsel. Ineffective counsel may result either from lack of attorney diligence or from a system structured to prevent defendants from benefitting from attorneys' efforts.

Over twenty years ago Justice Douglas spoke of a criminal defendant's right to have and benefit from the efforts of an "imaginative lawyer."[226] A good faith exception would diminish such a right. If an imaginative lawyer has not convinced any prior court that a new fourth amendment standard is necessary, the offending officer in a given case only need claim that he in good faith did not anticipate the proposed perspective in order to deprive defense counsel of any opportunity to bring a creative and imaginative argument to the court's attention.[227] If the officer acted in good faith the evidence would remain admissible. No matter how capable and convincing is defense counsel's presentation, the good faith exception will deprive defendant of the benefit of his attorney's argument unless prior defendants had equally capable counsel.[228] Defendants should not need to rely on anyone other than their own attorney for vindication of their constitutional rights. A system that re-

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224. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963), *reprinted in* Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 179, at 53.

225. Some jurists and scholars reject this system regulation role of defense counsel and advise a more complete focus on the criminal justice system's truth-finding function. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055 (1975). Criminal law, thus, would seek to control only the potential deviant. For a discussion of the law's need also to control the controllers, see *supra* text accompanying notes 57-58.

226. Chewning v. Cunningham, 368 U.S. 443, 447 (1962).

227. As previously asserted, defense counsel will have no incentive to develop or propose new and creative arguments that do not inure to his client's benefit. *See supra* notes 209-10 and accompanying text.

228. In fact a danger exists of an infinite recursion, in which an officer's claim of good faith error defeats defense counsel's arguments, which courts in turn similarly had dismissed on good faith grounds when raised in earlier cases. This process would prevent further development of the law.

quires otherwise interferes with the fundamental right to counsel.

A conceptual critique of the good faith exception, thus, reveals that the exception is premised erroneously on the inability of the exclusionary rule to deter illegal police behavior in good faith error circumstances and ignores that a constitutional violation goes unremedied. Further, as this Article has shown, the very premise of the exception is faulty because it neglects the general and systemic effects of the rule in good faith error contexts. More significantly, however, recognition of the exception severely would restrict the scope of the fourth amendment and potentially would freeze further development of fourth amendment standards. Additionally, while the exception's adverse effect on the sixth amendment right to effective counsel is subtle, the effect is substantial. All these factors make a strong conceptual case against recognition of a good faith exception. The practical problems associated with implementation of the exception, however, also are extensive and require exploration.

IV. The Difficulties Associated with Implementation of a Good Faith Exception

The practical problems associated with implementation of a good faith exception should be sufficient to discourage its adoption. The judicial process used to determine whether a court should apply the exception will diminish the importance and scope of the fourth amendment as well as encourage police to manipulate the criminal justice system.

A. Defining Reasonable Good Faith

The proposed good faith exception has both a subjective and objective component. The subjective component requires an officer honestly to believe his actions lawful. Since the primary justification for the exception is the exclusionary rule's inability to deter an officer who mistakenly regards his behavior as constitutional, the subjective aspect of "good faith" lies at the heart of the exception. The objective component, the requirement that the error be reasonable, attempts to avoid placing a premium on ignorance and poor training. Without the objective aspect, protection from governmental intrusion would be no greater than that observed by the least knowledgeable and least diligent member of the law enforce-

ment team.[229] Both the subjective and objective components, however, pose extensive problems that require discussion.

The following hypothetical provides a basis for illustrating the difficulties associated with the good faith exception's subjective component. Assume the existence of an area of search and seizure law that courts have not defined clearly and that lacks authoritative determination by the Supreme Court.[230] Given the law's uncertain condition, reasonable individuals could disagree whether certain police behavior is legal in a specific context. Assume that an officer confronts a situation within this nebulous area, and that he reasonably and in good faith believes a search would be legal, performs the search, and discovers illegal drugs. Another officer confronts the identical situation. He, in contrast to the first officer, reasonably believes a search would be illegal.[231] He, however, performs the search and also uncovers illegal drugs. A court, reviewing the second officer's behavior and recognizing the officer's bad faith, will eliminate any good faith assertion and find the officer's behavior unconstitutional.[232] Consequently, the court will exclude the drugs at the second defendant's trial. At the first defendant's trial, however, the same court, reviewing the first officer's behavior and recognizing that the officer reasonably believed his behavior was legal, will admit the drugs into evidence. Therefore, although both defendants have had their fourth amendment rights violated in precisely the same manner, under a system recognizing a good faith exception the same court will vindicate one defendant's violated right while allowing the other's to go unremedied.[233]

These incongruent results, mandated by the good faith exception, pose two immediate problems. First the inconsistent treat-

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229. "A proper legal definition of 'good faith' involves not only a lack of malevolence but also a reasonable effort to comply with the law." Commonwealth v. Sheppard, 387 Mass. 488, ____, 441 N.E.2d 725, 738 (1982) (Liacos, J., concurring). *See* Illinois v. Gates, 103 S. Ct. 2317, 2340-47 (White, J., concurring).

230. For example, the extent to which police may use the "drug courier profile" to justify a forcible stop, search, and seizure is an area of law that similarly lacks authoritative determination by the Court. *See* Florida v. Royer, 103 S. Ct. 1319 (1983); Reid v. Georgia, 448 U.S. 438 (1980); United States v. Mendenhall, 446 U.S. 544 (1980).

231. Each officer's respective police department may have trained him: one to view such behavior as lawful, the other to view it as improper. Again, both departments would be interpreting the law reasonably although they disagree.

232. Of course, this assumes the court could overcome the evidentiary difficulty that finding subjective bad faith entails. *See infra* text accompanying notes 242-54.

233. Thus, the argument that the officers' different motivations justify different remedies is untenable. No alternative remedy exists for an individual whose rights police violated while acting on the basis of a good faith error. *See supra* text accompanying notes 141-44.

ment of two identically culpable defendants whose fundamental rights police violated[234] in the same exact way is intuitively discomforting. In such a situation the importance of fourth amendment norms seems unverified and the public's perception of courts acting as defenders of the faith, protectors of constitutional liberties, is severely shaken. Furthermore, a court's failure to follow the principle insisting that it treat like situations alike will violate the public's expectation of proper judicial functioning.[235] Justice Harlan recognized the importance of this principle nearly fifteen years ago in his *Desist v. United States* dissent.[236] In *Desist*, the Court refused to apply the new fourth amendment standard articulated in *Katz v. United States*,[237] which required a warrant for telephone taps, to cases in which police misbehavior occurred prior to the *Katz* decision. The Court's rationale was that the *Katz* ruling conceivably could deter only subsequent searches, thus justifying exclusion only in such later situations. Justice Harlan dissented and insisted that *Katz* should apply to all cases not yet final regardless of the date of police misconduct. "If a 'new' constitutional doctrine is truly right," he asserted

> we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law rather than the commands of a super-legislature.[238]

Although Justice Harlan was unable to convince a majority of the Court at the time, the Court belatedly accepted his dissent in the 1982 decision of *United States v. Johnson*.[239] In *Johnson* the Court applied the newly recognized standard of *Payton v. New York*,[240] which required police to obtain an arrest warrant before entering a suspect's home to make a routine felony arrest, to all cases pending on direct appeal at the time the Court decided *Payton* regardless of the date of police misconduct. Relying heavily on

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234. *See* Alderman v. United States, 394 U.S. 165, 174 (1969) (fourth amendment rights are personal rights); Wolf v. Colorado, 338 U.S. 25, 33 (1949) (fourth amendment expresses a fundamental liberty of individuals binding upon the state through the operation of the due process clause of the fourteenth amendment).

235. *See* L. FULLER, THE MORALITY OF LAW 33-41 (1964).

236. 394 U.S. 244 (1969).

237. 389 U.S. 347 (1967).

238. 394 U.S. at 259 (Harlan, J., dissenting).

239. 457 U.S. 537 (1982).

240. 435 U.S. 573 (1980).

Justice Harlan's dissent in *Desist*, the Court in *Johnson* recognized the importance of the Court's behaving in a manner giving credence to itself and support to constitutional rights whose scope and violation the Court had acknowledged.[241] The inconsistent judicial reactions to violated fundamental rights generated by the good faith exception jeopardizes the same interests the Court intended *Johnson* to protect.

Conditioning the evidence's admissibility on an officer's nonculpable *subjective* state of mind existing at the time of his search reveals the second problem posed by the earlier hypothesized situation.[242] Under the good faith exception an officer truly must believe his conduct was lawful to avoid suppression of the discovered evidence.[243] The trial court hearing the suppression motion, therefore, seemingly must determine the beliefs of the officer at the time he seized the evidence. If a law enforcement officer's averment of good faith seems reasonable, however, defense counsel will find the claim nearly impossible to refute.[244] Consequently, hearings to ascertain the subjective intent and actual knowledge of the officer will be open invitations to perjury.[245] The officer's adjustment of the facts in order to obtain conviction of a defendant he truly believes guilty is understandable given his engagement "in

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241. If the fourth amendment protected citizens from only malevolent governmental intrusions upon privacy then only one of the two earlier hypothesized defendants, *see supra* text accompanying notes 230-33, would have a justified claim of right violation. Remedy in only that one case then would be proper. But motive is not relevant to the issue of whether police have infringed a citizen's fourth amendment rights. As suggested by Justice Marshall's dissent in Mohile v. Bolden, 446 U.S. 55 (1980), a focus on a tainted motive, while possibly justified when dealing with suspect classification and societal gratuities, is conceptually irrelevant when the issue concerns fundamental rights. *See id.* at 113-16 (Marshall, J., dissenting). Although closing a public swimming pool may be unlawful only if done with racial discriminatory intent, a ban on leafletting would be equally invalid under the first amendment whether desires to prevent littering or to suppress speech motivated the ban. *See* Schneider v. State, 308 U.S. 147 (1939).

242. *See supra* text accompanying notes 230-33.

243. If the officer had any doubt, the exclusionary rule's deterrent potential would justify the rule's application.

244. *See, e.g.*, Footo, *supra* note 132; Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991 (1975).

245. Former Judge Irving Younger, a one-time federal prosecutor, frankly observed that "[e]very lawyer who practices in the criminal courts knows that police perjury is commonplace." Younger, *The Perjury Routine*, 204 THE NATION 596, 596 (1967). Ironically, opponents of the exclusionary rule generally criticize it for encouraging police distortion of facts. *See* Rosenblatt & Rosenblatt, *A Legal House of Cards*, HARPERS, July 1977, at 18, 20 ("While intended to curb abuse of police power, the exclusionary rule has opened up a whole new field of police misconduct: perjury."). *See also* Kaplan, *supra* noto 3, at 1032.

the often competitive enterprise of ferreting out crime."[246] Police likely view allowing a criminal to escape "justice" as a much greater societal danger than a simple reconstruction of facts at a suppression hearing.[247] While the possibility of perjury exists under the exclusionary rule, perjury is even easier under the subjective component of the good faith exception. Consequently, rather than alleviating this exclusionary rule weakness, the proposed exception exacerbates it. The exception, thus, merely adds another layer of potential police perjury to the suppression hearing: a layer most difficult to counteract because only the officer knows with certainty his subjective intent.

A presumption that all officers intentionally will commit perjury is not necessary, however, before the exception's critics can show that its subjective component is impractical. People selectively perceive, interpret, and recall their sensory impulses based upon their interests and experiences.[248] They seldom want to hear, see, or remember that which is contrary to their needs. Furthermore, ideas, opinions, and positions that coincide with an individual's own interests or that appeal to his half-submerged prejudices are difficult for him to reject as untrue.[249] Given the strength of an officer's identification with the interests and needs of the police subculture, if a particular subjective belief is necessary to allow use of the fruits of a search in a criminal trial, an officer will not have difficulty convincing himself of its existence.[250] Whenever a good faith error reasonably explains police misconduct, an officer will seldom engage in such misconduct without simultaneously experiencing a strong, even if erroneous, belief in the lawfulness of his behavior.[251] Consequently, the good faith exception compounds the overt problem of perjury with the covert problem of selective perception.

The Supreme Court is not oblivious to the dangers of baving fourth amendment exclusionary issues revolve around the subjective belief or intent of individual officers. As recently as 1978, when the Court was evaluating police conduct relating to wiretaps, it

246. Johnson v. United States, 333 U.S. 10, 14 (1948).

247. *See* J. SKOLNICK, *supra* note 61, at 215; LaFave, *supra* note 152, at 154; Younger, *supra* note 245, at 596.

248. *See* Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 974 (1978).

249. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979).

250. *See* LaFave, *supra* note 152, at 154.

251. *Cf.* Amsterdam, *supra* note 3, at 437.

stated that the judiciary should use a "standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."[252] Furthermore, ten years earlier, three Justices expressed their uneasiness with courts even attempting to determine police subjective intent and vehemently asserted that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."[253] If most courts feel the same queasiness regarding the propriety of judicial determinations of subjective intent,[254] judicial review of the subjective component of a claimed good faith error will be perfunctory at best.

Courts may avoid the aforementioned pitfalls of the good faith exception's subjective component if they exclusively stress the exception's objective component. If courts emphasize the exception's objective aspect, then the police behavior would be in good faith whenever it is consistent with a reasonable interpretation of prior doctrine. The officer's subjective intent or belief, therefore, becomes irrelevant. Such a purely objective good faith standard, however, also encourages police trickery and system manipulation. For example, if an officer doubts whether he has sufficient evidence to obtain a search warrant, he may proceed without the warrant in the hope that a trial judge will find his misbehavior reasonable in an effort to admit incriminating evidence.

Most unfortunately, whenever the law in an area is unsettled, an objective good faith standard will provide the incentive for officers to choose the perspective that most jeopardizes fourth amendment rights.[255] Police would not protect individual privacy

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252. Scott v. United States, 436 U.S. 128, 138 (1978).

253. Ironically, Justice White, presently the Court's strongest spokesman for a good faith exception, authored this assertion that an effort to determine police subjective intent would misallocate judicial resources. Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., joined by Harlan and Stewart, J.J.) (dissenting from a dismissal of certiorari as improvidently granted).

254. Similar concerns over judicial determinations of subjective beliefs have led criminal courts frequently to reject mistake of law as a defense to criminal prosecution. Professor Lon Fuller discussed the danger of recognizing such a defense:

> The required intent is so little susceptible of definite proof or disproof that the trier of fact is almost inevitably driven to asking, "Does he look like the kind who would stick by the rules or one who would cheat on them when he saw a chance?" This question, unfortunately, leads easily into another, "Does he look like my kind?"

L. FULLER, *supra* note 235, at 72-73. Courts may ask the same questions in suppression hearings with answers biased by the judges' affinity for the police officer's goal of crime control. *See infra* text accompanying notes 267-70.

255. United States v. Peltier, 422 U.S. 531, 559 (1975) (Brennan, J., dissenting); LaFave, *supra* note 3, at 352. Under a good faith exception, the system will encourage foot-

beyond the standards clearly mandated by case law because such protection would seem unwarranted and inconsistent with law enforcement goals.[256] Consequently, judicially articulated constitutional minimums likely would become departmental maximums. A legal system and police culture that encouraged behavior directed predominantly toward crime fighting probably would influence even those officers who otherwise would not consciously decide to avoid doing more than they legally must.[257] In contrast to the good faith exception, the exclusionary rule at least tempers the law enforcement system's tendency to discourage concern over fourth amendment rights by encouraging the police to err on the side of greater protection when the law is ambiguous.[258] Precisely in such cases individuals most need the exclusionary rule.

Consequently, although the subjective component of the good faith exception is fraught with difficulties, under a purely objective standard every legal ambiguity or uncertainty constitutes an avenue for system manipulation and subterfuge by police. Consider, for example, the circumstances in *Brewer v. Williams*.[259] Police were to transport defendant Williams to Des Moines, Iowa after

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dragging as officials will have little incentive, in close cases, to err on the side of respect for constitutional liberties. *See* United States v. Johnson, 457 U.S. 537, 561 (1982).

The Court in *Johnson* rejected the government argument that courts never should apply decisions resolving unsettled fourth amendment questions to cases that involve police conduct which preceded the definitive decision. The Court's concerns, expressed in its decision, are also relevant to the effects of an objectively determined good faith exception: "Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be [admissible until the rendering of an opinion] definitively resolving the unsettled question." *Id. See* Desist v. United States, 394 U.S. 244, 273 (1969) (Fortas, J., dissenting).

256. The exclusionary rule's existence provides an officer who believes present doctrine *insufficiently* protects fourth amendment rights with an opportunity to behave in accordance with his beliefs while justifying his greater concern to fellow officers in crime fighting terms. His behavior merely ensures that a future fickle court ruling will not reject his arrests or searches. If the court recognizes the good faith exception, however, such an officer no longer will be able to support fourth amendment interests in terms his colleagues will accept. Consequently, the proposed exception to the exclusionary rule not only creates an incentive to foot-drag and to interpret ambiguous areas of law so as to infringe upon fourth amendment rights, but also creates a disincentive to decide to act in a fashion supporting such rights by removing any and all legal insulation from peer pressure. *See* Desist v. United States, 394 U.S. 244, 276-77 (1969) (Fortas, J., dissenting) (rejecting court decisions that award "dunce caps" to those officers who try to anticipate future trends in fourth amendment doctrine).

257. This Article earlier discussed the role of selective perception and interpretation of sensory data. *See supra* text accompanying notes 248-51.

258. *See* LaFave, *supra* note 3, at 352.

259. 430 U.S. 387 (1977).

his arraignment for murder charges in Davenport. Police assured defendant's counsel that they would not interrogate defendant during the trip. Nevertheless the detective traveling with Williams made a "christian burial speech," suggesting that due to the worsening weather the murder victim would not receive a proper burial if police could not locate the body quickly. Williams, susceptible to such religious considerations, directed the police to the body. The Supreme Court, in a five to four opinion, found that the detectives had intentionally separated Williams from his attorney for the purpose of playing on his sensitivities and eliciting incriminating statements. Such conduct, concluded the Court, violated the defendant's sixth amendment right to counsel, and, thus, the trial court could not use the defendant's incriminating statements.

Upon retrial, defense counsel argued that the court also should not admit the evidence relating to the murder victim's body. The court should suppress such evidence, he insisted, as "fruit of the poisonous tree" since police discovered the body as the result of unconstitutional behavior. The state responded that the instituted police search of the area would have found the body eventually even without the defendant's assistance and, thus, the court properly had admitted the evidence under an "inevitable discovery doctrine."[260] The Iowa Supreme Court agreed that such evidence was admissible but only if the state could prove that (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that police would have discovered the evidence by lawful means.[261]

For purposes of this Article, the court's evaluation of bad faith is highly informative. The court held,

> While there can be no doubt that the method upon which the police embarked in order to gain William's assistance was both subtly coercive and purposeful, and that its purpose was to discover the victim's body, we cannot find that it was in bad faith. The issue of the propriety of the police conduct in this case . . . has caused the closest possible division of views in every appellate court which has considered the question. In light of the legitimate disagreement among individuals well versed in the law of criminal procedure who were given the opportunity for calm deliberation, it cannot be said that the actions of the police were taken in bad faith.[262]

The Iowa Court resolved the issue of good faith simply by noting that jurists, even Supreme Court Justices, reasonably had dis-

260. State v. Williams, 285 N.W.2d 248, 255-56 (Iowa 1979).

261. *Id.* at 260.

262. *Id.* at 260-61.

agreed on the constitutionality of the police behavior.[263] That the detective clearly tried to manipulate the defendant while out of his counsel's presence and to trick him into incriminating himself was of no significance. Although the *Williams* case does not involve a fourth amendment issue it reveals the likely outcome if courts emphasize the objective component of the good faith exception to avoid the dangers of the exception's subjective component. *Williams* illustrates how the objective component threatens police abuse. In turn, courts can remove this threat of abuse only by determining police intent and once again evaluating police subjectivities.[264] The implementation problems associated with a good faith exception, thus, are insoluble. Whether the courts focus on the exception's objective or subjective aspect, implementation of the good faith exception will result in diminished protection of fourth amendment rights. The institutional setting in which courts will determine the existence of good faith exacerbates this danger.

B. Increased Pro-Police Bias of Suppression Hearings

The good faith exception inevitably would convert suppression hearings into swearing contests. Police would assert that their beliefs are honest while the defense would question their integrity. Trial court judges, thus, would have to make suppression decisions on the basis of the least reliable or determinative kind of evidence. Additionally, the need to define a "reasonable" mistake of law would impose upon suppression judges the responsibility to make exceedingly difficult determinations on a regular basis. The trial court, therefore, would have tremendous discretion in ruling whether or not the police engaged in the objectionable behavior in

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263. If a good faith exception extended beyond the fourth amendment to all motions for evidence suppression, the Iowa court's interpretation of good faith would have ended the need for the Supreme Court's decision in *Brewer* in the first place. The incriminating statements, obtained under a "good faith" error, would have been admissible. Additionally, if the Court decided the issue of good faith first, the Court would not have needed to determine whether the detective's behavior was proper. Sixth amendment doctrine in this area, consequently, would remain unclear and police could repeat identical mistakes in "good faitb."

264. Following a second conviction, Williams sought federal habeus corpus relief. Judge Arnold of the Eighth Circuit rejected the perspective of the Iowa decision:

> The question before us is not whether the Supreme Court's opinion in *Brewer v. Williams* is fairly debatable as a legal matter. Obviously it is. The question is rather what was in [the detective's] mind during [the] ride back to Des Moines . . . . *The relevant question—bad faith—is subjective* . . . . [Here the question is whether] the closeness of a later judicial decision necessarily establish[es] that conduct approved by a minority of judges is not in bad faith? We think not.

Williams v. Nix, 700 F.2d 1164, 1170 (8th Cir. 1983) (emphasis added).

good faith. Given that the lower judiciary "has hardly been very trustworthy in this area" of police credibility and misbehavior,[265] this basically unfettered discretion likely will result, because of the fact finding propensities of state trial courts,[266] in almost automatic admission of illegally obtained evidence whenever the officer claims good faith.

Even critics of the exclusionary rule acknowledge the anti-exclusionary rule bias of trial judges.[267] The judges' continuing relationship with police and prosecutors, their discomfort with refusing to admit relevant and apparently reliable evidence,[268] their interaction with crime victims, and their susceptibility to community pressure to punish the guilty affect their perception leaving them functionally and psychologically allied with police in the prosecution of crime.[269] Since the above factors leave trial courts reluctant to interfere with police crime fighting efforts, under a good faith exception such courts likely will be eager to believe officers claiming an honestly held belief in the lawfulness of the search or seizure in question.[270]

Decisions that reflect this bias rarely are susceptible to appellate review because appellate courts are disinclined to review trial court findings of fact.[271] Furthermore, determinations of credibility, frequently based on factors such as witness appearance or atti-

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265. Kaplan, *supra* note 3, at 1045.

266. Appellate courts arguably have constitutionalized whole areas of criminal procedure precisely because of the trial court's fact finding propensities. For example, Professor Amsterdam insists that the Supreme Court's fear of the trial court's pro-police bias shaped the confession cases. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 803-10 (1970). Lower courts consistently had resolved the "swearing contest" over what took place during police interrogation in favor of the police. *Cf.* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

267. *E.g.*, Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351, 356 (1979). Some argue that the exclusionary rule pressures the courts to water down standards for proper searches and arrests in order to avoid the rule's effect of "freeing obviously guilty defendants." Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 66. *See* Ashdown, *supra* note 3, at 1294, 1315 (courts now use the privacy concept of *Katz*, originally meant to expand the scope of fourth amendment protection, to draw "unrealistic distinctions in favor of law enforcement"); Schlesinger, *supra* note 3, at 405.

268. *See* Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 433, 448-49 (1967); Wilkey, *supra* note 267, at 356.

269. Amsterdam, *supra* note 266, at 792.

270. *See* Kaplan, *supra* note 3, at 1038-39.

271. Appellate judges are better able to confront dispassionately fourth amendment exclusion issues than are trial judges since the drama of trial does not color the appellate deliberation.

tude which cannot be duplicated in a record for appeal, are virtually immune from review. Since the good faith exception's subjective component requires a trial court determination of police credibility, it gives trial judges, already opposed to the exclusionary rule, a virtually unreviewable means of avoiding the rule's impact.[272]

Trial courts' rulings on the objective component of the good faith exception also are likely to reflect an anti-suppression bias. The police error is reasonable if the facts and circumstances of the specific case as found by the trial court reasonably could justify the police action under the then existing case law. Yet reasonableness, arguably, has little more usefulness for analytical purposes than indicating consistency within a given system of values and belief.[273] Given the role of selective perception and the similarity of police and trial judge attitudes about criminal law enforcement, judicial findings of fact that make an officer's error reasonable should not be surprising. If the error's reasonableness, *in the context of the facts found*, is initially for the trial court to determine, in practice appellate courts will defer to the factual findings of trial courts and trial courts will defer to the factual testimony of police.[274]

Under the good faith exception the traditional pro-police bias of suppression hearings not only would be insulated from appellate review, it likely would be aggravated. Under the present exclusionary rule trial judges determine whether an officer's judgment was wrong in a basically amoral, technical and mechanical sense. The good faith exception, however, changes the issue from whether an officer violated a fourth amendment right to whether he deserves moral reproachment. A court will be far more open to finding an officer "wrong" than to finding him "bad."[275] Thus, a good faith exception to the exclusionary rule frames the exclusion issue in terms, and focuses its resolution at judicial levels, least conducive

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272. *See* Mertens & Wasserstrom, *supra* note 3, at 449-50.

273. Weyrauch, *Taboo and Magic in Law*, 25 STAN. L. REV. 782, 800 (1973).

274. Amsterdam, *supra* note 3, at 394.

275. Courts and law enforcement agencies much more calmly accepted the Supreme Court decisions in United States v. Wade, 388 U.S. 218 (1967) (requiring presence of defense attorney at post-indictment lineup), and Massiah v. United States, 377 U.S. 201 (1964) (requiring presence of defense attorney at post-indictment interrogations of defendant), for example, than they did Miranda v. Arizona, 384 U.S. 436 (1966). *Wade* and *Massiah* seemed to revolve around the technical requirement of counsel for all post-indictment evidence producing contacts between government and defendant. *Miranda*, on the other hand, admonished police for trickery, perjury, and actions "destructive of human dignity," 384 U.S. at 457. *Miranda* was harder to accept precisely because it questioned the professionality and integrity of the police. For further discussion, see Ingber, *supra* note 145, at 287-95.

to the sympathetic development of fourth amendment rights.

C. The Unconvincing Nature of the Strongest Case for a Good Faith Exception

Considering the good faith exception in its strongest context illustrates the practical problems of its implementation. Exclusion of evidence seems least fair when law enforcement officers reasonably have relied on a judicially-issued search or arrest warrant later found defective for lack of probable cause. When officers have tested the existence of probable cause by dutifully obtaining a search warrant from a judge or magistrate, and have executed the warrant according to its terms, exception proponents point out that exclusion of evidence can have no conceivable effect upon the officers' behavior.[276] Particularly when the magistrate also made his determination of probable cause, although erroneous, reasonably and in good faith, little justification seems to exist for excluding the discovered evidence. Upon closer examination of this context, however, the argument for a good faith exception remains unconvincing.

The Supreme Court long has manifested a constitutional preference for arrests[277] and searches[278] made pursuant to a warrant. The Court has touted the ability of the warrant process to protect fourth amendment interest because the process ensures that a neutral and detached magistrate[279] makes the probable cause determination in an informed and deliberative manner.[280] Jurists perceive such a process of "judicial impartiality"[281] as clearly preferable to one in which police or prosecutors, engaged in the competitive enterprise of ferreting out crime,[282] reach such decisions hurriedly,[283] and judicial officers review the decisions only after the fact and by hindsight judgment.

The actual existence of neutral and detached magistrates making impartial deliberative determinations, however, is highly

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276. In *Gates*, in which Justice White made his strongest pro-exception argument, police officers, arguably, had so obtained and executed a search warrant. Illinois v. Gates, 103 S. Ct. 2317, 2344-47 (1983).

277. *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 91, 93-96 (1964).

278. *See, e.g.*, United States v. Ventresca, 380 U.S. 102, 106-07 (1965).

279. Johnson v. United States, 333 U.S. 10, 14 (1948).

280. Aguilar v. Texas, 378 U.S. 108, 110 (1964) (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).

281. United States v. Jeffers, 342 U.S. 48, 51 (1951).

282. *See* Johnson v. United States, 333 U.S. 10, 14 (1948).

283. *See* Aguilar v. Texas, 378 U.S. 108, 110 (1964).

doubtful. In most states the public elects magistrates to office.[284] Thus, the magistrates are susceptible to public pressure to more effectively fight crime.[285] In many states magistrates need not be, and many rural magistrates are not, lawyers.[286] Such lay magistrates often rely on the advice of the legally educated prosecutor in determining whether to issue a warrant.

Urban magistrates, on the other hand, usually are trained lawyers and, thus, seemingly could avoid dependency on prosecutorial advice. They, however, have such extensive caseloads[287] that normally they have little time to adequately review a warrant application. Consequently, such overworked urban magistrates, as their rural counterparts, often give warrants perfunctorily relying on the judgment of police and prosecutors to evaluate the need and propriety of the request.[288]

When a magistrate's psychological and perceptual allegiance to police crime fighting goals[289] couples with his susceptibility to public pressure and his reliance on police and prosecutor probable cause evaluations, his neutrality and detachment in issuing war-

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284. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 179, at 8.

285. In other states governors or local governmental officials appoint magistrates for a fixed term of office. *Id.* Political considerations make it unlikely that those seen as "easy on crime" will receive appointments.

286. *Id. See also* Shadwick v. City of Tampa, 407 U.S. 345 (1972) (upholding the constitutionality of lay magistrates). Federal magistrates, on the other hand, must be attorneys. Some federal magistrates, however, serve only part time while also practicing law. If a federal magistrate seeks clients in the community where he presides he may feel pressured to portray an image of an official protecting the community from crime rather than one overly sensitive to fourth amendment interests.

287. The responsibilities of these urban judges often include presiding over misdemeanor trials, minor civil cases, and preliminary felony proceedings. In a busy urban court the caseload per judge can reach 2000 per year. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *supra* note 179, at 9. The result is often "assembly line justice." "With their crowded facilities, lack of adequate staffing and routinized procedure, these magistrate courts create an atmosphere . . . that is more appropriate for a supermarket than a court of justice." *Id.*

288. "How can a magistrate be more than a 'rubber stamp' in signing warrants," questioned Professor Barrett,

> unless he devotes at least some minutes in each case to reading the affidavits submitted to him in support of the request for a warrant, and inquiring into the background of the conclusions stated therein? And where is the judicial time going to be found to make such inquiries in the generality of cases? The Los Angeles Municipal Court with annual filings of about 130,000 (excluding parking and traffic) finds itself so pressed that in large areas of its caseload it averages but a minute per case in receiving pleas and imposing sentence. How could it cope with the added burden that would be involved in the issuance of warrants to govern the approximately 200,000 arrests [much less searches] made per year in Los Angeles for offenses other than traffic?

Barrett, *Criminal Justice: The Problem of Mass Production*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 85, 117-18 (H.W. Jones ed. 1965).

289. *See* Amsterdam, *supra* note 266, at 792.

rants are highly questionable. Magistrates with needs and interests similar to law enforcement agents likely will perceive as reasonable those steps that such agents perceive as reasonable.[290] Not surprisingly, therefore, in the context of an *ex parte* review of a warrant application, magistrates rarely fail to find probable cause to issue the warrant.[291]

Even if a magistrate is doubtful whether probable cause exists, his reliance on police and prosecutor evaluations and his belief that defense counsel adequately can test the validity of his probable cause determination by a motion to suppress, make it likely that he will err on the side of greater rather than lesser police authority. Yet, once police obtain a warrant they tend to be less cautious. Furthermore, courts direct suppression hearing judges, whom magistrates rely upon to correct magistrate error, to defer to a magistrate's probable cause determination whenever possible.[292] Additionally, appellate judges are reluctant to overrule two prior judicial determinations.[293] Responsibility for neutral and detached probable cause determinations, thus, passes from hand to hand. The warrant process, therefore, ultimately relies on the initial

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290. *See supra* text accompanying notes 248-51.

291. Scholars widely have recognized the pervasive tendency for magistrates to grant warrant applications without adequate independent evaluation. *See, e.g.*, Amsterdam, *supra* note 3, at 471-72 n.532; *see also* W. LAFAVE, ARREST—THE DECISION TO TAKE A SUSPECT INTO CUSTODY 30-36 (1965); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 48 (1969); LaFave and Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 991-95 (1965). In Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), the Supreme Court castigated a magistrate for becoming a member of the police search party. While few magistrates would cooperate with police quite as overtly as the magistrate did in *Lo-Ji Sales*, institutional comraderie may function covertly, but effectively, in merging the interest of police, prosecutor, and magistrate.

The problems associated with warrant grants do not suggest that warrants are of no value whatsoever. The pre-search affidavit in support of a warrant application ordinarily deprives the officer of the benefit of hindsight coloring the reasonableness of the search and seizure after it has produced evidence in support of itself. *See* United States v. Ross, 456 U.S. 798, 828-29 (1982) (Marshall, J., dissenting); *see also* W. LAFAVE, *supra* at 296-97; J. SKOLNICK, *supra* note 61, at 214-15.

292. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983).

293. A 1981 review of then recent decisions from the District of Columbia Court of Appeals and the United States Court of Appeals for the District of Columbia Circuit, for example, found no decision holding a warrant insufficient. Mertens & Wasserstrom, *supra* note 3, at 456. Judicial questioning of magistrate judgments is much more difficult than questioning police judgments. Magistrates are, of course, members of the same "trade union" as are judges. Judges are unlikely to question one of their own since they themselves are adverse to superior courts' questioning and overruling them.

probable cause determinations of police and prosecutors: the very judgments the legal system's architects designed the process to oversee.[294]

This practical rather than mythical perception of the warrant process belies its neutrality and detachment. Recognition of a good faith exception in this context merely would compound the problem. Under the exception whenever "well trained" officers and magistrates reasonably could differ on whether probable cause exists, evidence seized under the defective warrant remains admissible.[295] Well trained officers, however, also are aware that a substantial disparity exists among magistrates as to the extent of evidence necessary before any given magistrate will issue a warrant.[296] Thus, the good faith exception encourages an officer or prosecutor unsure whether probable cause for an arrest or search exists to "shop around" for a lenient magistrate likely to err only in the direction of effective law enforcement.[297]

Magistrate shopping, however, met with overt judicial disapproval in *United States v. Davis*.[298] In *Davis*, a Treasury agent and an assistant U.S. attorney requested a federal magistrate to issue a warrant on the basis of an affidavit. The magistrate denied this request. The following day the same agent and assistant attorney presented the same affidavit to a second magistrate who issued the warrant. The federal district court found such magistrate shopping highly improper and concluded that the first magistrate's decision was binding and prevented a second magistrate from issuing a warrant on the exact same showing.[299] A good faith exception covertly will encourage the magistrate shopping *Davis* overtly condemns. If the Court recognizes the exception, it merely will lead officers and prosecutors to approach initially those magistrates reputed to be more sympathetic to their needs, as was the second magistrate in *Davis*.[300] Law enforcement officers in the jurisdiction need never repeat the agent's error in *Davis*; they merely can bypass the first

294. *See* Amsterdam, *supra* note 3, at 394.

295. *See* Illinois v. Gates, 103 S. Ct. at 2346 (White, J., concurring).

296. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 204 (1967).

297. *See id.* at 120.

298. 346 F. Supp. 435 (S.D. Ill. 1972).

299. *Id.* at 442.

300. The good faith exception, thus, compounds the magistrate-shopping problem. At least in a *Davis*-type situation the second magistrate is aware of the proceeding before the first magistrate and, thus, likely will act cautiously. Under a good faith exception, however, if police or prosecutors merely choose strategically the first magistrate, that magistrate may remain unaware of the uncertainty of probable cause in the case at hand.

magistrate on questionable cases.

Ironically, although the defective warrant allegedly provides the strongest justification for a good faith exception, the exception is least necessary in this setting. Fourth amendment substantive law already recognizes that in doubtful or marginal cases a court should sustain a search with warrant when it would not without one.[301] Furthermore, the Supreme Court in *Gates* insisted that reviewing courts merely should ensure that there was a " 'substantial basis for . . . conclud[ing] that probable cause existed.' "[302] Courts, therefore, already are to disregard any reasonable deviation by a magistrate from some hypothetically knowable probable cause standard and sustain the resulting search and seizure as *constitutional.*[303] To recognize additionally a good faith exception when a magistrate grants a warrant under circumstances in which even this strong judicial preference is insufficient to sustain it, is to condone and encourage a magistrate's gross insensitivity to fourth amendment values.[304] Thus, even in the context its supporters most frequently use to justify a good faith exception, the exception again merely is a covert attack upon fourth amendment principles.

V. Conclusion: Legitimacy and the Role of the Court

Judicial recognition of a good faith exception to the fourth amendment exclusionary rule would be more than a simple refine-

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301. "[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." United States v. Ventresca, 380 U.S. 102, 106 (1965).

302. Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983) (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). "[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' " *Id.* at 2331 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

303. *Gates* itself, consequently, may encourage magistrate shopping.

304. Some jurists have questioned whether exclusion ever is a proper remedy when a judge or magistrate rather than a police officer committed the constitutional error. *See, e.g.,* Illinois v. Gates, 103 S. Ct. 2317, 2345 (1983) (White, J., concurring); Commonwealth v. Sheppard, 387 Mass. 488, ——, 441 N.E.2d 725, 735 (1982). Yet, the system expects magistrates, even more than police, to understand court decisions and follow their directives. *See* Rose v. Mitchell, 443 U.S. 545, 563 (1979). Although the deterrent value of exclusion upon police confronted with hurried and situational choices may be questionable, *see supra* text accompanying notes 73-86, the potential effect upon magistrates, many of whom are trained in the law, is less open to doubt. The more direct effect of exclusion upon magistrates suggests they are more susceptible to the educational force of judicial actions under the exclusionary rule than are law enforcement agents. Without the possibility of exclusion in close cases, courts never may have the opportunity to identify a magistrate's error and articulate directives for magistrates to follow in future similar situations. Motions to exclude, thus, are more vital when the error is the magistrate's rather than tbe police officer's.

ment of remedy. The exception would serve as a well camouflaged and subtle attack upon the values and substantive meaning of the amendment itself. Courts rarely would articulate new search and seizure standards sensitive to fourth amendment interests because once a court found police good faith the constitutional determination would be irrelevant to the outcome of those very cases in which such articulation might take place.[305] Insulated from the continuing pressure to decide new fourth amendment issues or dramatically review old ones, courts will lose the opportunity or incentive to set standards for future cases. Consequently, the disincentive to review new fourth amendment issues will reduce significantly the exclusionary rule's ability to generally and systemically deter illegal police behavior. Furthermore, the good faith exception greatly will dilute existing substantive fourth amendment protections, such as probable cause, that already factor in the possibility of reasonable error, and, thus, will leave the individual significantly more vulnerable to governmental intrusion. In addition to this clear, but often unrevealed, substantive effect upon the fourth amendment, the exception has the procedural ramification of substituting the trial for the appellate court as the critical institution for exclusion decisions. The good faith exception's focus on officer credibility combined with trial court's notorious pro-police bias likely would lead consistently to decisions sacrificing fourth amendment interests.

Of more subtle, but greater, significance than these erosions of the fourth amendment, would be the denigration of constitutional rights generally arising from a system that responds with indifference to violations of these rights.[306] If constitutional rights were to lose their transcendental aura and the citizenry were to view them as deserving protection only when convenient or socially advantageous, the importance of a written bill of rights in an otherwise democratic society would be subject to grave doubts. The actual existence of the American Bill of Rights sufficiently sanctifies the right of privacy in this culture to justify a different approach for

305. As argued earlier, *see supra* text accompanying notes 226-28, this also may serve to inhibit a creative attorney's ability to defend his client. The good faith exception, thus, also may run afoul of the sixth amendment's right to counsel.

306. A legal system that treats the violation of one constitutional right with indifference may find it increasingly acceptable to treat the violation of other rights similarly. The fourth amendment is not the only constitutional right subject to the criticism of being excessively costly. Consequently, adopting a cost-benefit analytical mode for fourth amendment issues may lead to the use of such analysis to lessen the significance of other constitutional rights as well.

controlling law enforcement than that used by other nations.[307]

The above factors should be the Supreme Court's foremost concerns in evaluating the good faith exception during its October 1983 term.[308] Yet, the Court has indicated its sensitivity to and

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307. Whether the nations with which the United States is compared, *see supra* note 50 and accompanying text, have symbolic counterparts to the fourth amendment is unclear. Additionally, the exclusionary rule may be a valid response to a unique American experience. This country is more ethnically and racially heterogenious than others. It also has a greater tradition of lawlessness, by citizen and official alike, and a more moralistic system of criminal law, which specifically pressures officials to disregard the privacy of citizens. Kaplan, *supra* note 3, at 1031. As suggested by Professor Phillip Johnson: "We can no more [expect to] import our solutions than we can export our problems." Johnson, Book Review, 87 YALE L.J. 406, 414 (1977).

308. Evaluation of the three cases originally scheduled for Supreme Court argument, *see supra* note 19 and accompanying text, is now appropriate:

(1) *Colorado v. Quintero*, ___Colo. ___, 657 P.2d 948, *cert. granted*, 103 S. Ct. 3535 (1983), poses the issue whether a court should exclude evidence obtained by a good faith seizure of stolen property. If the seizure was reasonable in light of the officer's knowledge at the time, the seizure is based on probable cause and, thus, is constitutional. Consequently, for good faith even to be an issue in this appeal by the state prosecutor, the state courts must have found the seizure unreasonable. To allow a good faith exception in this context would constitute either a surreptitious attack upon and dilution of the reasonable ground/probable cause standard applied by the state court, *see supra* text accompanying notes 154-62, or an acceptance of a totally subjective belief standard of good faith. This Article already has described the dangers of such a subjective belief standard. *See supra* text accompanying note 234-54. Although the Court recently dismissed the writ of certiorari in this case, *see supra* note 19, if a similar situation presents itself in the future, the Court should reject both of these alternatives.

(2) *United States v. Leon*, No. 82-1093 (9th Cir. Jan. 19, 1983), *cert, granted*, 103 S. Ct. 3535 (1983), asks whether a court should exclude evidence seized in reasonable, good faith reliance on a search warrant subsequently held defective due to inadequate probable cause for its issuance. Not to exclude such evidence blatantly will encourage magistrate shopping with police and prosecutors presenting their warrant applications to magistrates reputed to be lenient or willing to rubber stamp warrant requests. *See supra* text accompanying notes 295-300. In addition, the presumptive constitutionality of searches and seizures executed under warrant already mandates courts to disregard possible marginal errors by a magistrate. *See supra* text accompanying notes 301-04. This presumption once compounded by a good faith exception again would dilute fourth amendment protections.

(3) *Commonwealth v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom.* Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983), also pertains to seizure of evidence by police relying in good faith upon a warrant. But in this case the warrant is defective due to a magistrate error in failing to specify in the warrant itself items police were to seize. The police search, however, was no more extensive or detailed than a magistrate could have authorized under a properly drawn warrant. This case, therefore, is more equivocal.

The state supreme court held that the failure to describe the items police were to seize was a "serious omission of constitutional significance." 387 Mass. at ___, 441 N.E.2d at 733-34 n.17. The motion judge, in fact, had viewed the warrant as a " 'general warrant' akin to the colonial 'writ of assistance' which led to the enactment of . . . the Fourth Amendment." *Id.* at 738 (Liacos, J., concurring). Although in the specific case the searching officer also was the affiant and, therefore, knew what items the warrant meant to allow police to retrieve, such is not always the case. Required itemization, thus, normally serves both to

empathy with the public's dissatisfaction with the seemingly high cost of the exclusionary rule.[309] Concerns about its own legitimacy and that of the criminal justice system generally, likely will tempt the Court to recognize a good faith exception. Recognition of the exception, however, would not be the preferable response of the Court to the public outcry. The Court should acknowledge that the substance of fourth amendment standards rather than the exclusionary rule causes the alleged interference with police effectiveness. Perhaps as society becomes more complex and individuals and institutions become more interdependent, society must reduce privacy interests to assure sufficient public safety.[310] This nation actually may be so fearful of crime that its citizens are willing to compromise the sanctity of constitutional liberties. The rhetoric of remedy, however, should not mask the decision to make such a compromise.[311] A frontal attack upon the fourth amendment at least would constitute a forthright admission that at issue is the extent to which the society is willing to protect individuals from governmental intrusion.[312] The public and the Court must recognize overtly the values at stake in order to assure that the ensuing decisions reflects an accurate and preferred value choice.

Further, the proposition that the Court would enhance its role

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give notice to an officer of the limits of his authority as well as to inform the party searched of the extent to which the law obliges him to defer to the officer's demands. Without these two ramifications, the warrant process is of little significance. Consequently, excluding such evidence fulfills general and systemic deterrence interests as well as vindication of a constitutional right.

Furthermore, in *Sheppard,* the magistrate's actions were *not* reasonable; they clearly were negligent. As Justice Liacos asserted in his separate concurrence: "The magistrate who utterly fails to describe the things to he seized under the search warrant has not made a reasonable effort to comply with the law." *Id.* Even if a good faith error is arguably appropriate when the exclusion of evidence is unlikely to have a deterrent effect on an innocent official, *Sheppard* is obviously not such a case.

309. *See supra* note 16 and accompanying text.

310. This author remains unconvinced by this allegation.

311. Legal institutions often have masked value choices through use of procedure, ceremony, or rhetoric. *See* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976); Ingber, *supra* note 57, at 332-38; Weyrauch, *Law as Mask—Legal Ritual and Relevance,* 66 CALIF. L. REV. 699 (1978). While this device may avoid societal strife due to ideological confiict, *see* Ingber, *supra* note 145, at 266-73, it also relieves from both institutions and individuals the need to accept responsibility for the value choices in fact made. Ingber, *supra* note 57, at 325-29.

312. Some authors bemoan that the exclusionary rule has led to the narrowing of the fourth amendment's scope. *See supra* note 267. They suggest that abolishing or modifying the rule may lead to greater acceptance of a privacy right. Assuming they are correct, one must question the significance of a right accepted as an abstraction, but which upon violation results in no meaningful vindication of its claim. Narrowing of articulated constitutional protections in fact may be the only honest response to an unwillingness to continue to accept the costs that society must pay for meaningful individual liberties.

in our constitutional system by deferring to the public outcry itself is doubtful. All individual rights when placed into context are laden with societal cost and possible popular disapproval.[313] The heterogeneity of American society and the often irreconcilable tensions between honored values make unanimous approval of any decision impossible. Every decision, by necessity, will result in dissatisfaction by some. Consequently, no decisional institution can afford to concern itself only with increasing its popularity. The legitimacy that allows judicial institutions to be effective is significant only if, at appropriate times, those institutions use the law to educate and direct society rather than conform to and follow it. A court enforcing individual liberties must contribute something beyond what a system of popular fiat could accomplish.[314]

A significant portion of the Supreme Court's legitimacy comes from fulfilling its role as protector of constitutional liberties. Whether situationally comfortable or not, the Court has played a role of moral leadership in our constitutional system.[315] The Court's adoption of a good faith exception because of public displeasure with the costs of fourth amendment rights would constitute an abdication of its leadership responsibilities. Such an abdication, in turn, would diminish the Court's importance and prestige.

Admittedly, the Court can lead society only if society is willing to follow. If, in order to protect individual liberties, the Court too frequently or too severely interferes with broad societal goals, public opinion may threaten substantially its legitimacy. But institutions such as the Court have the luxury of time at their disposal: they can lead gradually. Language and rhetoric are tools that the Court can use to slowly alter public perceptions in order to introduce new or protect old values. As Professor Anthony Amsterdam eloquently observed:

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313. *See supra* text accompanying notes 100-02.

314. Many significant constitutional cases also are those that critics attacked most stridently. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 195-98 (1962) (criticizing Baker v. Carr, 369 U.S. 186 (1962)); H. WECHSLER, *Toward Neutral Principles of Constitutional Law, in* PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 36-48 (1961) (criticizing Brown v. Board of Educ., 347 U.S. 438 (1954)); Baldwin & Nagan, Board of Regents v. Bakke: *The All-American Dilemma Revisited*, 30 U. FLA. L. REV. 843 (1978) (criticizing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (criticizing Roe v. Wade, 410 U.S. 113 (1973)). Of course, at those times when law educates and leads society, it is most open to the accusation of elitism.

315. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 99 (1982).

> Like the Pythias cries, [Supreme Court decisions respecting suspects' and defendants' rights] have vast mystical significance. They state our aspirations. They give a few good priests something to work with. They give some of the faithful the courage to carry on and reasons to improve the priesthood instead of tearing down the temple.[316]

Fourth amendment exclusionary cases may only "state our aspirations," aspirations frequently unfulfilled or unfulfillable in practice. But without such aspirations no transcendental importance to individual rights exists and their recognition slowly may decay into a matter of popular or official appreciation: a matter of costs and benefits.

Observers expect the Supreme Court's responses to the good faith proposal this term.[317] Hopefully, the Court will address the arguments presented in this Article and reject the exception. If not, virtually every state supreme court may refight the battle as defendants' attorneys ask them to interpret their state constitutions' search and seizure provisions. The citadel may yet be saved.

316. Amsterdam, *supra* note 266, at 793.

317. 52 U.S.L.W. 3201 (Sept. 27, 1983); *see supra* text accompanying notes 18-19.