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The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition

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*By H. Richard Uviller***

I. INTRODUCTION

Criminal cases are made of evidence, and this essential raw material is often obtained by reaching across someone's border of privacy. How and when a citizen's personal security yields to social purpose is, of course, the concern of the Constitution's fourth amendment and of those who have tried to give it meaning and stature in our crime-ridden society. Of overriding importance in the continuous effort to find the just way has been the great and original American experiment to enforce the constitutional injunction by an evidentiary penalty known as the exclusionary rule.[1]

Two decades have now passed since the Supreme Court gave new life and vastly broader application to the exclusionary rule by deciding that the fourth amendment demanded that uncommon evidentiary consequence for its violation.[2] The rule of exclusion, of course, had derogated the common law almost fifty years earlier in that optimistic era before World War I when a Justice named Day wrote a case called *Weeks*. That edict, however, applied only to federal prosecutions, and even when the search and seizure stan-

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1. Succinctly put, the "exclusionary rule" decrees that evidence unlawfully acquired either by a state or government officer, or by his civilian deputy or agent, as well as other evidence derived therefrom, is inadmissible in a criminal prosecution against the person aggrieved by the initial illegality.

2. Mapp v. Ohio, 367 U.S. 643 (1961).

dards of the fourth amendment were applied to the states shortly after the Second World War, the Supreme Court stayed its hand, deeming the *Weeks v. United States*[3] exclusionary rule some sort of special federal "remedy" that need not accompany the fourth amendment right of security into state courts.[4] Thus, those jurisdictions that did not choose to follow *Weeks* avoided the sting of mandatory exclusion until that memorable summer solstice in 1961 when *Mapp v. Ohio*[5] came down.

I remember quite clearly that day in June and the month that followed. Consternation was in plentiful supply. Our New York police obviously would have to relearn a lot of basic procedure, both sides of the criminal bar would have to read a passel of federal cases in a hurry, and our judges would need to find phrases to sound knowledgeable and to make supportable discriminations in a wholly unfamiliar area. I cranked out a crude summary of federal search and seizure and suppression law just before the State District Attorney's Association convened for its annual festival of anecdotes. I had an instant runaway best seller. It was as though we had made a belated discovery that the fourth amendment applied in the State of New York, and we were almost as surprised as we were three years later when we discovered that the fifth amendment privilege against self-incrimination had not been applicable in the State all along.[6]

Looking back, that period seems a time of incredible naiveté in law enforcement circles. Despite our general apprehension, we little suspected the variety and complexity of the issue that lay ahead. We knew we stood in the doorway of a new era, but we hardly imagined the years of uncertainty, litigation, more confusion, and more litigation. At nisi prius, pretrial motions and hearings addressed to the admissibility of evidence crowded trial time off the dockets. State appellate judges learned, sometimes to their grief, that constitutional law was a regular—and frequently dispositive—ingredient of the criminal process. And the reluctant federal bench kept one hand busy skimming the cauldron of state law enforcement methods.

During this twenty-year span, the United States Supreme Court took its share of the burden, arduously and conscientiously trying to work out a theoretical construct with which to handle the

3. 232 U.S. 383 (1914).
4. Wolf v. Colorado, 338 U.S. 25 (1949).
5. 367 U.S. 643 (1961).
6. Malloy v. Hogan, 378 U.S. 1 (1964).

dazzling array of disorderly fact situations and conflicting policy demands. Progress has been difficult, and often the drawn lines wavered and blurred before the ink had fairly dried.

The task of construction and reconstruction continues, of course, as one hopes it always will. Over the last two terms, however, some abatement has been discernible in the vigor with which these industrious supreme judicial artisans seize major issues and hammer out new doctrines. In addition, Justice Potter Stewart, a veritable Vulcan of the fourth amendment, has laid his mallet aside. This moment may be an appropriate time for the evolutionist to note some developing doctrinal wrinkles and to attempt to assess their significance to the genus.

For these purposes, this Article isolates only two of the many aspects of the Court's labors affecting the acquisition of evidence for criminal prosecution. The first concerns the allocation of primacy among the values that the exclusionary response to the illegal acquisition of evidence serves: a theoretical choice that may carry some notable practical consequences. The second requires a reexamination of the role of the trial court in supervising the preaccusatory search for evidence in a way that suggests the possible obsolescence of the Supreme Court's ruling credo in the Stewart era.

II. The Purposes of Exclusion

Twenty years ago, the Court articulated a three-fold set of operative purposes demanding the exclusionary response to violations by law enforcement officers of the constitutional rights of suspects and defendants.[7] Without indicating any order or priority, or acknowledging any possibility of incompatibility, the Court decreed that evidence unlawfully acquired must be excluded (1) to restore to the party aggrieved his breached "privilege and enjoyment" of the right of security assured him by the Constitution,[8] (2) to discourage contemplated invasions by depriving the offending agency

7. Mapp v. Ohio, 367 U.S. 643, 655-60 (1961). Although the Court was writing here of fourth amendment violations, the formulation serves as well to explain the evidentiary consequences of violating the sixth amendment right to counsel or the fifth amendment privilege against compulsory self-incrimination. It is interesting to note that Justice Stewart, who figures so prominently in the development of the exclusionary rule, did not join in the majority opinion in *Mapp*, believing with Justice Harlan that the case presented an inopportune occasion for the reconsideration of Wolf v. Colorado, 338 U.S. 25 (1949). 367 U.S. at 672 (Stewart, J., memorandum).

8. 367 U.S. at 655-57.

of the profit of the spoils,[9] and (3) to enhance the dignity of the criminal justice system by withholding the implicit judicial sanction of lawlessness which admission of the evidence implies.[10] Thus, the Court wedded the remedial and deterrent purposes to the interests of judicial integrity to form the inspiring tripod upon which to build the elaborate catechism that the fourth amendment exclusionary rule was to become.

Together, these purposes made a handsome and serviceable group. One might call the remedial purpose traditional or jurisprudential: the illegally injured will have recompense; the wrongfully deprived will be made whole. Preclusion of use accords a belated substitute—if not an equivalent—for the wrongly breached security. Moreover, under this compensatory principle, the remedy belongs only to the wronged, and so it may be cited to explain the Court's continued acceptance of the rule on standing.[11]

The deterrent principle has a more prosaic lineage. It is a pragmatic policy that is behavioristically aimed at improving official investigatory technique. Social engineering is not *infra dignitatem* for the Nine Mentors. To an activist Court, putting "teeth" in the fourth amendment means baring the fang to the would-be trespasser. In the service of this instructive purpose, the Court has allowed the evidentiary use of remote or unforeseen acquisitions of lawless invasion, since such secondary exclusion could produce but a marginal increment in the deterrent effect of the principal refusal.[12] Finally, the whole is bathed in the righteous light of judi-

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9. *Id.* at 657-58.

10. *Id.* at 659.

11. In the past, the Court never insisted that only the aggrieved party could suppress the evidence. States have been free to abolish the requirement of standing, and at least one has done so. *See* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). Moreover, on occasion, the Court itself has broadened the class of persons who may seek suppression. *See, e.g.*, Alderman v. United States, 394 U.S. 165 (1969). Most recently, the Court has come to the view that the matter of standing is not distinct from the merits of the motion to suppress, since exclusion will be granted only on a showing that the moving party's personal and protected expectations of privacy were defeated by the search and seizure. Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978). This obverse-of-the-right reasoning appears to translate what once was the separate and threshold doctrine of standing into an element of the constitutional right itself. Thus, the limitation of the remedy to those aggrieved may now be inherent, though not yet articulated, under the fourth amendment.

12. In refusing to extend the exclusionary rule to grand jury proceedings, for example, the Supreme Court in United States v. Calandra, 414 U.S. 338 (1974), applied this pragmatic calculus and concluded that the costs of suppression outweighed the marginal advancement of the exclusionary rule's prophylactic purpose:

> Any incremental deterrent effect which might be achieved by extending the rule to

cial dignity. The choice of exclusion summons patriotic pride and elevates the American court system above the lawless foraging of the lesser elements of the law enforcement process. By declining a place in the jury's consideration to facts obtained in a less than fully honorable fashion, the law might be an even more highly respected teacher of the best of our heritage.[13]

One of the phenomena this Article addresses is the following: In the last several years, the Court has sorted out these occasionally discordant triple principles and arrived at an important con-

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grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. . . . We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

Id. at 351-52.

The Supreme Court has employed the same analysis in numerous fourth amendment cases. In Stone v. Powell, 428 U.S. 465 (1976), the Court refused to extend collateral review of search-and-seizure claims to state prisoners, concluding that,

[t]o be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. . . . Even if one rationally could assume that some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be out-weighed by the acknowledged costs to other values vital to a rational system of criminal justice.

Id. at 493-94; *see also* United States v. Janis, 428 U.S. 433 (1976) (societal costs of excluding evidence illegally seized by state officers in federal court proceeding sufficiently outweigh any deterrent effect on state police); Linkletter v. Walker, 381 U.S. 618 (1965)(retroactive application of *Mapp* refused because exclusion of evidence at such a late date would not serve deterrent purpose.).

13. The following lines in Justice Brandeis' famous dissent in Olmstead v. United States, 277 U.S. 438 (1928), have themselves become a document in the archives of American cultural history:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 485 (Brandeis, J., dissenting).

clusion of priority. The winner: deterrence.[14] Justice Powell accomplished this resolution through a rather odd, protozoan amalgamation: the deterrent purpose simply absorbed the remedial. Thus, the Justice wrote:

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct . . . . In sum, the rule is 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.[15]

Apart from its obvious significance to the very cases that expressed the primacy of the deterrence value, the emergence of this idea portends a major shift in the operation of the exclusionary rule. Not since the counterrevolutionaries first set up a chant to "repeal" the exclusionary rule has the prospect of the rule's demise seemed so bright. While members of the Court repeatedly have expressed doubt and dissatisfaction over the supposed educational worth of the evidentiary consequence of official transgression,[16] the Court—to the surprise of many jurophiles[17]—has proved stubbornly resistant to discarding outright a doctrine with so much mileage on it. At the same time, the Justices seem to have been quietly paving the way to a vital modification: evidence, though unlawfully obtained, may be admitted if the police officers reasonably believed they were conducting the investigation in compliance with constitutional restraints.[18] The logic is clear and compelling:

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14. The effectiveness of exclusion as a deterrent to unlawful police acquisition has been debated often, but neither demonstrated nor disproved. Indeed, in at least one case, the Supreme Court held that the rule was an ineffective deterrent. *See* Elkins v. United States, 364 U.S. 206, 218 (1960); *accord* United States v. Janis, 428 U.S. 433, 453 (1976). For a recent, scholarly, and thorough—if purposeful—discussion of the deterrence rationale, see Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L. REV. 365, 389 n.116, 394-400, *et passim* (1981).

15. United States v. Calandra, 414 U.S. 338, 347-48 (1974).

16. *See, e.g.*, Robbins v. California, 101 S. Ct. 2841, 2851 (1981) (Rehnquist, J., dissenting); Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting); Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring); *id.* at 492 (Burger, C.J., dissenting); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

17. Among those waiting in vain for the demise of the rule have been Justices Brennan and Marshall. *See* United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., with Marshall, J., dissenting); *see also* Stone v. Powell, 428 U.S. 465, 502 (1976) (Brennan, J., with Marshall, J., dissenting); United States v. Peltier, 422 U.S. 531, 551 (1975) (Brennan, J., with Marshall, J., dissenting).

18. In his dissent in Stone v. Powell, 428 U.S. 465 (1975), Justice White explicitly advocated an exception to the exclusionary rule when an officer seized evidence "in the

it is sheer foolishness to try to deter a police officer from taking an action that he truly believes, with good reason, to be perfectly proper.[19]

As a matter of policy, the "good faith exception"—as it has been dubbed—is more than a sop to the disenchanted. While retaining the sanction of exclusion for the flagrant or willful abuse—the sort normally addressed by punishment—it largely unburdens the system of unwanted acquittals based on less than all the relevant and probative evidence. An actual and reasonable, albeit erroneous, belief that a search and seizure is a proper and legal action probably describes a fairly high proportion of police activity resulting in the acquisition of evidence. Surely, little is gained in terms of enhanced judicial integrity by rejecting some item of probative evidence that an officer obtained, for example, on the reasonable belief that a person of competent authority had

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good-faith belief that his conduct comported with existing law and [he has] reasonable grounds for this belief." *Id.* at 538 (White, J., dissenting).

Chief Justice Burger, concurring in the *Stone* majority opinion, suggested that overruling the exclusionary rule, or "limiting its scope to egregious, bad-faith conduct," would inspire legislatures to develop new remedies for persons injured by police misconduct. *Id.* at 501 (Burger, C.J., concurring). Burger agreed with White's observation that the exclusionary rule constitutes a "senseless obstacle to arriving at the truth in many criminal trials" and noted White's suggestion that the rule should not be applied when an officer acts in good faith. *Id.* (Burger, C.J., concurring).

In United States v. Peltier, 422 U.S. 531 (1974), Justice Rehnquist, writing for the majority, stated that if the exclusionary rule's purpose is to deter unlawful police conduct, it should be applied "only if it can be said that the law enforcement official had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542.

Similarly, in Brown v. Illinois, 422 U.S. 590 (1974), Justice Powell, concurring in part, stated that when the officer has not engaged in willful or negligent conduct depriving the defendant of some right, "the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* at 612. (Powell, J., concurring in part).

Justice Blackmun, in United States v. Janis, 428 U.S. 433 (1976), noted parenthetically that application of the exclusionary rule in that case would have resulted in the "frustration of the Los Angeles police officers' good-faith duties as enforcers of the criminal laws," but he seemed to suggest that if the rule's deterrent value is strong enough, it should be applied. *Id.* at 453.

Justice O'Connor appears to be amenable to some limitation of the exclusionary rule when an officer makes a good faith, "technical error." *Hearings before the Senate Comm. on the Judiciary, Nomination of Sandra Day O'Connor*, 97th Cong., 1st Sess. 143 (Sept. 9, 1981) [hereinafter cited as *Hearings*] *cited in* Mertens & Wasserstrom, *supra* note 14, at 370 n.32 (1981).

19. A government task force based its recommended adoption of a good faith exception in large part upon the strength of this argument. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT (1981).

spontaneously invited him to search premises or seize goods.[20] Moreover, the subsequent discovery that the host in fact lacked the capacity to consent does little, as a matter of ordinary fairness and common sense, retroactively to brand the officer's conduct a transgression.[21] Similarly, one would suppose that police who soundly though mistakenly believe that the perpetrator of a recent and dangerous crime has fled into some enclosure could not be deterred from hot pursuit by the subsequent discovery of their factual error.[22] Therefore, exclusion of such incriminating items as they may stumble upon within would not serve the purpose of the fourth amendment rule. In short, the good faith exception to the rule of exclusion appears to comport well with good sense in service of the prime object of deterrence.

Indeed, scholars may claim that the Supreme Court has already adopted a good faith doctrine in at least two cases,[23] but the

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20. Of course, the matter of operative consent to search and seizure is complex and subtle. What appears to be a voluntary and conscious invitation may be nothing but the inoperative acquiescence to ostensible authority, and uniquely, the prosecution bears the burden of proving otherwise. Bumper v. North Carolina, 391 U.S. 543 (1968). Moreover, on the question of actual voluntariness, the invitor's awareness of his right of refusal, his custodial circumstance, and other factors possibly impairing his freedom of choice are to be considered in "totality," without clear or automatic rules. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The invitor's actual competence to surrender an absent third party's right to protected security is not always clear from the invitor's relationship to the premises, to the seized object, or to the other party. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974); Frazier v. Cupp, 394 U.S. 731 (1969); Stoner v. California, 376 U.S. 483 (1964).

21. The Supreme Court thus far has declined to erode fourth amendment protections by "strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' " Stoner v. California, 376 U.S. at 488. Indeed, in United States v. Matlock, 415 U.S. 164 (1974), the Court expressly avoided the issue, stating:

> Accordingly, we do not reach another major contention of the United States in bringing this case here: that the Government in any event had only to satisfy the District Court that the searching officers reasonably believed that Mrs. Graff had sufficient authority over the premises to consent to the search.

Id. at 177 n.14.

At least one state court, however, has adopted outright the apparent-authority justification. In People v. Adams, 53 N.Y.2d 1, 442 N.E.2d 537, 439 N.Y.S.2d 877 (1981), police were approached, invited, escorted, and admitted to the defendant's apartment by a woman they had reason to believe enjoyed joint residence. The arsenal to which she led them was not suppressed, even though it turned out that the woman had no actual right to authorize the search and seizure.

22. Entry and search were approved as a matter of constitutional law in Warden v. Hayden, 387 U.S. 294 (1967). For a discussion of the possible consequences of "factual error," see *infra* notes 38-43 and accompanying text.

23. In Michigan v. DeFillippo, 443 U.S. 31 (1979), Detroit police arrested the defendant pursuant to a City Code provision that required persons subjected to an investigatory stop to produce identification. An incidental search turned up "controlled substances." Holding the arrest lawful, the Supreme Court refused to require that the "prudent officer"

Court has not yet openly acknowledged it, and most circuits and states have not gotten the message. Recently, the Court had the opportunity and declined to consider the good faith exception directly in a case many thought had been expertly fashioned as a vehicle for rolling out the new doctrinal era with suitable fanfare. With twenty-four judges sitting and the Rebel flags flying, the Court of Appeals for the Fifth Circuit seceded from tbe Circuitry and adopted a good faith exception for themselves.[24] The Supreme Court denied review.[25] The Second and the Ninth Circuits bave flirted with the notion, but neither has yet embraced good faith as a true exception to the exclusionary rule.[26] The Supreme Court, however, need not choose a case in which the lower court bought the good faith exception. From the cases of reluctance and hesitation, as well as from the decisions refusing to allow the exception, the Court at this very moment will be served many juicy grapes ripening on state and federal vines.

This assertion is not intended to suggest that the Court will be unable to resist the temptation, or, even if it plucks one of these

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anticipate the subsequent judicial declaration that the Code provision was unconstitutional. *Id.* at 38-39.

Similarly, in United States v. Peltier, 422 U.S. 531 (1975), a "roving border patrol" unit seized a large quantity of marijuana from a car four months before the Supreme Court in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) ruled that such searches were unconstitutional. Reviewing the Court's decisions dealing with the retroactive application of new constitutional interpretations, Justice Rehnquist for the majority stated:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

Id. at 537.

24. United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc). For a thorough description and discussion of the *Williams* case, see Mertens & Wasserstrom, *supra* note 14, at 411-16; Note, *Good Faith and the Exclusionary Rule: Demise of the Exclusion Illusion*, 30 AM. U.L. REV. 863 (1981).

25. The Court denied certiorari without comment. 449 U.S. 1127 (1981). To some the denial must have seemed a good opportunity lost, but the Court might have been courteously waiting for Justice O'Connor to take her seat before tackling so important an issue. Moreover, *Williams* included an alternative ground which may have detracted from the purity of the issue of principal interest. Thus, a plurality of the court of appeals found it unnecessary to carve out a new exception to the exclusionary rule because the search was permissible as incident to a valid arrest. 622 F.2d at 839.

26. United States v. Wellins, 654 F.2d 550, 556 n.11 (9th Cir. 1981) (for purposes of determining the attenuation of taint, the trial court should consider whether the actions of DEA agents "were indicative of good faith on their part or whether the agents' actions were more egregious"); United States v. Alvarez-Porras, 643 F.2d 54, 60 (2d Cir. 1981) ("[i]n various ways, the [issue] of . . . good faith will undoubtedly enter into the court's handling of the exclusionary rule").

morsels, that the outcome of its digestion is predictable. The good faith exception, however—which Professor Charles A. Wright of Texas endorsed a decade ago[27]—remains an appetizing release in several respects. A majority of the Court doubts the premises of the exclusionary rule, believes that the rule's efficacy remains unproven and unprovable, and regards as dangerously high the consequential cost in societal terms.[28] Nevertheless, these Justices con-

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27. Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

28. At least two of the current justices appear to be willing to discard the exclusionary rule. In California v. Minjares, 443 U.S. 916 (1979), Chief Justice Burger joined witb Justice Rehnquist in dissenting from the Court's denial of stay, stating that the stay should have been granted to permit the parties to brief the issue "whether, and to what extent" the exclusionary rule should be retained. *Id.* at 928 (Rehnquist, J., with Burger, C.J., dissenting).

Justice Rehnquist's dissent in *Minjares* emphasized that the exclusionary rule "imposes tremendous costs on the judicial process at criminal trials and on direct review." *Id.* at 919 (Rehnquist, J., with Burger, C.J., dissenting). He indicated that the costs of applying the exclusionary rule include diverting the focus of the trial from the central issue of the defendant's guilt or innocence and excluding evidence that is typically reliable and "often the most probative information bearing on the guilt or innocence of the defendant." *Id.* at 919 (Rehnquist, J., with Burger, C.J., dissenting) (citing Stone v. Powell, 428 U.S. 465, 489-91 (1976)). He went on to suggest that it would be "quite rational . . . for the criminal trial to take place either without any application of the exclusionary rule in either federal or state cases, or at least without any application in state cases." *Id.* at 927 (Rehnquist, J., with Burger, C.J., dissenting).

In Robbins v. California, 101 S. Ct. 2841, 2851 (1981) (Rehnquist, J., dissenting), Rehnquist emphasized his concern that the law applying the fourth amendment does not articulato clear rules and suggested that federal law enforcement personnel are more highly trained than their state counterparts to "wrestl[e] with this Court's twisting and turning as it makes decisional law applying the Fourth Amendment." *Id.* at 2855. (Rehnquist, J., dissenting). He concluded that "little is lost in the way of the 'core values' of the Fourth Amendment as made applicable to the states by the Fourteenth if *Mapp v. Ohio* is overruled." *Id.* (Rehnquist, J., dissenting).

Chief Justice Burger, in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting), focused on the costs that the exclusionary rule imposes on society in the form of "the release of countless guilty criminals." *Id.* at 416 (Burger, C.J., dissenting). He emphasized that this "high price" is not justified in view of the lack of empirical evidence demonstrating the rule's deterrent effect. *Id.* (Burger, C.J., dissenting). In Stone v. Powell, 428 U.S. 465, 496 (1975) (Burger, C.J., concurring), Burger further suggested that an additional problem with the exclusionary rule is that its "continued existence . . . as presently implemented, inhibits the development of rational alternatives." *Id.* at 500 (Burger, C.J., concurring).

In contrast with Chief Justice Burger, Justice Powell, writing for the Court in *Stone* assumed, "[d]espite the absence of supportive empirical evidence . . . that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." *Id.* at 492. Justice Powell, however, has expressed concern about the costs which the exclusionary rule imposes on society, stating that in some circumstances, "strict adherence to the Fourth Amendment exclusionary rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes." Brown v. Illinois, 422 U.S. 590, 609 (1974) (Powell, J.,

tinue to consider rescission an unattractive solution. In their view, a deft incision might be preferable, particularly if the effect would be the preservation of unlawfully acquired evidence without the renunciation of the exclusionary principles. Deterrable, flagrant transgressions would be punished by exclusion of the gains; only the undeterrable, conscientious, good faith, and reasonably founded errors would pass the evidentiary test.

Nevertheless, unknown demons lurk behind these apparent virtues. Let us be wary. At the end of the garden path we may find ourselves in a thornbush—or perhaps back where we started. Indeed, the emphasis of this Article is on the following proposition: The promise of clarity, of reasonable accommodation of conflicting values, of logical obedience to prime values, of sensible appreciation for the realities of police work, and of all the other immensely attractive promises of the good faith modification may conceal new problems at least as ornery as the old. The judicial task may be at

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concurring in part). Justice Powell also has suggested that under some circumstances, the "deterrence rationale of the exclusionary rule does not obtain." *Id.* at 612 (Powell, J., concurring in part). In cases in which the rule's "underlying premise" of willful or negligent police misconduct is lacking, Justice Powell would see "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* (Powell, J., concurring in part).

Justice White's articulation of a good faith exception in his *Stone* dissent reflects his concern that "in many of its applications the exclusionary rule was not advancing [its deterrent aim] in the slightest, and that in this respect it was a senseless obstacle to arriving at the truth in many criminal trials." 428 U.S. at 538 (White, J., dissenting). White suggested that when a police officer acts mistakenly but in good faith, exclusion of the evidence will have "no deterrent effect . . . and the only consequence of the rule as presently administered is that unimpeachable and probative evidence [will be] kept from the trier of fact and the truth-finding function of proceedings [will be] substantially impaired or a trial totally aborted." *Id.* at 540 (White, J., dissenting). White concluded that "[t]he exclusionary rule . . . seriously sbortchanges the public interest as presently applied," and, therefore, he would modify it. *Id.* at 542 (White, J., dissenting).

In United States v. Janis, 428 U.S. 433 (1975), Justice Blackmun, writing for the Court, acknowledged the "substantial cost [that the exclusionary rule imposes] on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." *Id.* at 448-49 (citing Bivens v. Six Unknown Named Agents of Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting)). Blackmun also acknowledged the lack of empirical evidence demonstrating the rule's deterrent effect, stating that the debate within the Court "has been unaided, unhappily, by any convincing empirical evidence on the effects of the rule." *Id.* at 446. He noted the difficulty of attempting an empirical study of the rule, since "[t]he number of variables is substantial, and many cannot be measured or subjected to effective controls." *Id.* at 450-51. Accordingly, Blackmun reached no conclusion on the question whether the exclusionary rule serves a deterrent purpose; rather he based his holding in *Janis* on alternative premises, stating that if the exclusionary rule does promote deterrence, then the marginal effect of applying it in that case "does not outweigh the cost to society of extending the rule to that situation." *Id.* at 453-54. On the other hand, if the exclusionary rule "does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted." *Id.* at 454.

least as artificial, the consumption of calendar space equally as egregious.

The lynchpin of the good faith exception is the officer's soundly premised, though erroneous belief that his action comports with law and the Constitution. More specifically, the policeman acting in good faith believes that thrusting his body or hand or eye or ear into some otherwise private enclosure, large or small, is justified by his sense of urgency, his benevolent purpose, the certainty of his expectation of success, or some other circumstances preceding his entry.

So far, so good. But a court will have to review the policeman's judgment: was the sense of rectitude, however sincere, legally sound? Was the officer's decision framed with sufficient awareness and consideration of the principles protecting the subject against the official inspection? Moreover, what are those principles to which the reasonable police officer must defer in the exercise of "objectively" approved good faith? Are they anything less than or different from the set of standards for lawful warrantless searches and seizures that the Court has been hammering out over the past two decades or more? If the admissibility of the evidence depends on the police officer's actual or supposed knowledge or understanding of finely wrought constitutional decisions of the courts, then the uncertainty and complexity of today's exclusionary determination has not only been perpetuated into the new era, it has been compounded. For, under the good faith standard, the reviewing court must determine not only whether the police search on the landlady's invitation was closer to *Stoner v. California*[29] or to *United States v. Matlock*,[30] but also whether the officer had a reasonable basis for believing that he had competent *Matlockian* consent. Police training programs, regulations, and general intelligence and literacy must be taken into account in judging whether a police officer could have made the sophisticated decision whether the *Chadwick*[31]/*Robbins*[32] line, rather than the *Carroll*[33]/*Chambers*[34]

29. 376 U.S. 483 (1964) (invitation of hotel clerk who voluntarily used room key to open suspect's room for police held inoperative).

30. 415 U.S. 164 (1974) (valid consent to search room tendered by woman who claimed she occupied it "jointly" with defendant).

31. United States v. Chadwick, 433 U.S. 1 (1976).

32. Robbins v. California, 101 S. Ct. 2841 (1981) (closed opaque container found inside a vehicle cannot be searched without a warrant pursuant to the "automobile exception").

33. Carroll v. United States, 26 U.S. 132 (1925).

34. Chambers v. Maroney, 399 U.S. 42 (1970) (a vehicle which could have been searched when first stopped may be searched later after it has been immobilized under pol-

line, controls the search of a paper bag in the back of a van stopped on probable cause.

We can avoid the nightmare of litigating and resolving the incessant questions of whether a patrolman could have *reasonably* believed that he was legally entitled to do what he did. Deliverance comes in this form: Let us not require police officers to know the court-crafted categories of permissible searches without warrant, and let us not interpret "reasonable police belief of propriety" as the equivalent of a correctly anticipated judicial conclusion of legality. By "propriety," rather, let us mean "appropriate restraint." Thus, we shall say that a police officer acted in good faith when, under the particular facts that he knew or reasonably believed to be true he acted without undue haste, without excessive intrusion, and in a manner reasonably calculated to achieve an appropriate result under the circumstances. From this or a similar formulation, the single descriptive word is irresistible: he acted in good faith if his action was "reasonable."

To press the simple and familiar standard of reasonableness into service to describe the underlying principle of admissibility gives an odd and perhaps disquieting jolt to established doctrine. In a sense, it grants supremacy to a minority faction of the Court which I identify with Justice White, who has long contended that the fourth amendment demands only that a search and seizure without warrant be "reasonable."[35] Justice Stewart's majority generally has prevailed with the view that the first clause of the fourth amendment expresses a preference for the magisterial route, and thus a warrantless search and seizure may be justified only if it falls within certain delineated and recognized exceptional categories.[36] By shifting the exclusionary determinant to the well-founded belief of the searching officer, and by ruling on that determination with the flexible measure of reasonableness, the categorical approach must yield to the ad hoc. And in essence the Frankfurter/Harlan idea of due process will rule the fourth amendment.[37]

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icy custody).

35. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting).

36. As Justice Stewart himself has stated, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967); *see also* Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

37. *E.g.*, Rochin v. California, 342 U.S. 165 (1952).

In this posture, of course, the notion of good faith proves totally superfluous. A simple shift from Stewart's to White's interpretation achieves the same result with considerably less fanfare. The White view, of course, requires courts to make a case-by-case, circumstantial analysis, with a consequent reduction in predictability. But predictability has not been a great boast of the categorical approach, and historically our system has not fared badly on the results of circumstantial jurisprudence and the projection of particularities.

If unadorned and circumstantial reasonableness remains an unattractive standard and the glitter of good faith proves irresistible, we might still save ourselves by some cautious discriminations at the outset. Let us reserve this exception for those comparatively easy cases that fit the good faith model. For this purpose, we must look more closely at the putative violations and attempt some suitable categorization. Notwithstanding eminent views to the contrary, the distinction probably should not be cast in terms of "flagrant" versus "technical" transgressions of protected rights.[38] Most obviously, flagrancy is frequently in the eye of the beholder—in this case, a *post facto* judicial beholder to whom certain protections may seem stronger or clearer than they appear to the deterrable constable on the scene. Rather, constabulary errors should be divided into errors of fact and of law.[39] A police officer who erroneously believes that the infamous "automobile exception"[40] entitles him to look into a paper bag in the rear of a van parked in a police garage has made a mistake of law. The officer who mistakenly thinks that the woman who admits him with a key and leads him

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38. Justice Powell, concurring in Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., with Rehnquist, J., concurring), contended that "flagrantly abusive violation of Fourth Amendment rights, on the one hand, and 'technical' Fourth Amendment violations, on the other . . . call for significantly different judicial responses." *Id.* at 610. Justice O'Connor, too, has indicated an inclination to act differently when the fourth amendment violation alleged is a good faith "technical error." *See Hearings, supra* note 18, at 195.

39. Professor Ball suggested a distinction between errors of fact and of law some four years ago. *See* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978). The Fifth Circuit cited Ball's analysis in United States v. Williams, 622 F.2d 830, 840-41 (5th Cir. 1980) (en banc) and Mertens & Wasserstrom discussed it in their recent article. Mertens & Wasserstrom, *supra* note 14, at 424. Whether Ball's categories are precisely coterminous with the ones expressed in this Article, however, is not altogether clear.

40. The so-called "automobile exception" has had a tortuous career from Carroll v. United States, 267 U.S. 132 (1925), through New York v. Belton, 449 U.S. 1109 (1981). Predicated on the inherent mobility of the vehicle and the reduced expectation of privacy concerning its contents, the exception has tolerated searches and seizures of its interiors in a variety of situations.

to the defendant's bloody boots is a lawful occupant of shared premises has made an error of fact. A reviewing court can determine whether the latter was an objectively good faith misapprehension far more easily than it can assess the appropriate level of legal sophistication that is necessary to understand the guiding law in the first example. Thus, a court could consider whether the facts as known to the officer strongly suggested the factual conclusion he reached, whether he should have inquired further, and whether ambiguities in the perceived situation were resolved in a manner consistent with ordinary police experience. These and the like are questions commonly put to and readily resolved by judges. Upon their resolution, a court can decide whether the subjective belief was objectively warranted, and whether factual good faith may excuse the factual error. Thus, let us reserve the good faith excuse for those cases in which the error was one of fact. A police officer's errors of law are not susceptible to objective good faith appraisal and must be resolved under conventional standards.[41]

The most onerous aspect of this proposed limitation of the good faith exception is the ever-uncertain line between fact and law. And the search and seizure carried out pursuant to a defective warrant provides perhaps the most prominent fact/law puzzle. Is the officer's belief in the validity of the warrant an error of fact or of law? On the one hand, one might argue that it was a factual error because the officer thought the document was something that it was not—a valid order. On the other hand, perhaps it was a mistake of law because his belief in its validity or his ability to recognize its invalidity required some legal sophistication. The argument over this question easily could result in a stalemate. The matter is closely akin to the unconstitutional Detroit ordinance in *Michigan v. DeFillippo*.[42] While approving the "prudent" officer's

41. Mertens and Wasserstrom argue against the adoption of a good faith exception partly because the exception would stifle the development of fourth amendment law. Citing a string of important decisions, they claim that these cases would not be in the literature because they dealt with "police misconduct that could have been excused under a good faith exception." Mertens & Wasserstrom, *supra* note 14, at 371. Since the thesis of this Article is that the police errors in those cases—and in most cases in which a major constitutional point deserves litigation—are mistakes in judgment of legality, rather than simple misapprehensions of fact, the officer's transgressions should not he excused on the ground that he had some basis for his helief in the lawfulness of his action. In some cases the "good faith error of fact" is subsumed in the ordinary finding of probable cause. If a police officer sees what he reasonably but erroneously believes to be the butt of a gun protruding from the pocket of a person in line at tbe bank, his arrest of the person will be lawful on probable cause and the incident search that turns up drugs will be valid.

42. 443 U.S. 31 (1979).

reliance on its presumptive validity, the Supreme Court in *DeFillippo* offered little guidance concerning whether his error was one of law or of fact. One could analyze the decision as a finding that, although an unconstitutional statute is void, the officer's factual error in believing it to be operative was excusable as the product of appropriate good faith reliance on ostensible legality. Or, it might be viewed as a finding that, notwithstanding the officer's legal error, his conduct was not unreasonable in light of the circumstances.

These alternative readings of *DeFillippo* may suggest a satisfactory solution to the defective warrant puzzle in terms of the result of the law/fact election. Regardless of the warrant's legal validity, errors that an executing officer may make concerning the issuance or terms of the warrant are errors of fact.[43] Thus, if a police officer who sincerely believed he was properly conducting his mission relied upon a document nude of the magisterial subscription, or if he seized property not described in the warrant, or searched the wrong premises, or if he executed a daytime warrant at nighttime, he has made an error of fact, and, without undue or unaccustomed burden, a reviewing court can assess whether he had a good faith basis for his mistake.

On the other hand, if the warrant turns out to be legally flawed even though it was faithfully executed according to its terms, the officer's mistaken reliance on it must be termed an error of law. In cases that deal with errors of law, good faith becomes irrelevant, since we should not inquire into the level of legal acumen that is necessary for police officers to misapprehend legal import in bad faith. With this consideration dismissed, the question reverts to the court to determine by conventional methods. Such a determination, of course, may be pursued under White's rather than Stewart's rubric, but in either case it proceeds unencumbered by the good faith shift.

This analysis leaves us with the issue of the deterrence pri-

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43. The applicant officer's errors also may he termed errors of fact for these purposes. Thus, the same good faith standard should be employed to assess omissions, falsifications, and misstatements of fact in the application. At this point, good faith crosses the path of another developing idea in the law of warrants. Generally, most courts were reluctant until recently to examine beyond the four corners of both the sworn application for the search warrant and the warrant itself. Errors—even lies—hy affiants did not affect the validity of the facially sufficient warrant. In Franks v. Delaware, 438 U.S. 154 (1978), the Court cited a shifting trend among state courts to allow these challenges, though on a rather strictly limited basis. Some jurisdictions responded by either facilitating challenge or broadening the effects of successful contravention. *See, e.g.*, People v. Cook, 22 Cal. 3d 67, 538 P.2d 130, 148 Cal. Rptr. 605 (1978).

macy in resolving the defective warrant problem. The exclusionary rule exists primarily to teach police to take their hunches to the neutral and detached magistrate; excluding the results of the learned lesson hardly reinforces the message. As long as the beam of deterrence focuses narrowly on police, excluding the product of the well-executed warrant because of defects unknown to the officer seems counterproductive. But if the beam catches in its scope the magistrates as well, exclusion becomes the only means for review and instruction of the offending official. Unreviewable and irreversible judicial errors of this magnitude offend justice. Moreover, local and inferior court judges may well be more readily conditioned by evidentiary consequences in higher courts than are police officers. As more police officers learn to come to magistrates, the magistrates themselves will require more careful control to teach them to pay close attention to the quantum of cause, to the reliability of informants, to precision in describing object and place, and the like.

In sum, the dominance of the value of deterrence, applied broadly to judicial as well as to police officers, should yield a good faith exception to the rule of exclusion for errors of fact made in reasonable good faith. Evidence that is procured in ignorance or disregard of legal restraint or in the legally erroneous belief of rectitude—either by warrantless police or by warrant-issuing judges—should be excluded if the conduct was unreasonable under the circumstances. In weighing the reasonableness of a legal error, of course, the magistrate must be held to a high standard of legal sophistication, while the field officer should be judged by the ordinary considerations of appropriate respect for the citizen's rights of security balanced against the exigency of the situation.

III. The Acquisitory Process

In addition to the impending doctrinal shift toward the flexible, circumstantial assessments of reasonableness and good faith consequent upon the clear emergence of deterrence as the prime purpose of the exclusionary rule, Stewart's categorical analysis may suffer incursions of a different sort: "technological" innovation. Stewart's construction of the single, rather oddly evolved sentence that is the fourth amendment—the reading that has come to dominate search and seizure doctrine over the last twenty years—is founded on the proposition that in the normal course, the decision to breach a citizen's privacy should not be given to field officers. Thus, however sound his reason for believing a probe will be fruit-

ful, and however worthy the purpose of the probe, the eager enforcement officer must take his case first to a detached judicial officer, articulate his reasons for the search under oath, and get advance, *ex parte* permission to puncture the precious veil of security.

No one claims, however, that this warrant mode—important as it is—constitutes the exclusive means of access to evidence lying within protected regions. All agree that exceptional circumstances justify lawful search and seizure without prior warrant. In the difficult business of describing these special categories, a couple of thematic principles have emerged. First is the idea that the entitled party may relinquish or surrender interests in security, and observing officers may gather the item or intelligence sought without constitutional offense. Thus, words spoken either in public[44] or in misplaced reliance on a confederate's loyalty,[45] an undercover agent's disguise,[46] incriminating items discarded with the trash,[47] or things found following a competent and freely tendered invitation to look around,[48] are lawfully acquired as evidence without warrant. Despite the Court's denial, this group of categories more nearly resembles waived rights than exceptional licenses to penetrate intact privacy.[49]

A second theme running through a group of exceptions to the requirement of warrant appears in those cases in which either the police are clearly acting for a purpose other than criminal investigation or they have no reason to expect that a particular item of evidence will be discovered during their otherwise lawful activity. Thus, a police officer going to the aid of a sick or distressed person need not overlook evidence exposed to his view,[50] nor need officers apply for a warrant to perform a routine investigatory inspection of an impounded automobile.[51] The warrant procedure is obviously inappropriate for the incidental and inadvertent discovery of evi-

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44. *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection").

45. *See* Hoffa v. United States, 385 U.S. 293 (1966).

46. *See* Lewis v. United States, 385 U.S. 206 (1966).

47. *See* Abel v. United States, 362 U.S. 217 (1960).

48. *See* Frazier v. Cupp, 394 U.S. 731 (1969).

49. *See,* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

50. *See, e.g.,* United States v. Haley, 581 F.2d 723 (8th Cir. 1978).

51. *See* South Dakota v. Opperman, 428 U.S. 364 (1976); Harris v. United States, 390 U.S. 234 (1968).

dence of a crime.[52]

Putting aside the voluntary surrenders of security and the inadvertent discoveries during otherwise lawful quests or noncriminal investigations, we are left with the heart of the matter and the major theme uniting the true and principal exceptions to the warrant preference rule: exigency. The exigency principle holds that the time-consuming magisterial route may be bypassed only when some defined variety of special urgency necessitates more direct and expeditious access to the evidence. The search of an automobile, which is a "fleeting target" on the highway,[53] the search of "grabbable space" around a person at the time of or moments after his lawful arrest,[54] the search in hot pursuit of a fleeing armed felon,[55] and the pat down of a suspect momentarily detained for preliminary questioning[56] are a few examples of the operation of the exigency principle.

Obviously, the factual premise upon which the principle swings is the normally slow and awkward mechanics of the warrant procedure. As conventionally employed, the warrant application procedure requires a police officer to sit down at a typewriter and laboriously peck out all his reasons for seeking access. Oftentimes, a supervisor or specially assigned officer or member of the prosecutor's staff must review and perhaps revise the document. It then must be physically produced before a judge, specially roused or pried away from his or her calendar, who—one hopes—will read, consider, and perhaps even amplify the application before signing

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52. Coolidge v. New Hampshire, 403 U.S. 443, 482 (1971). The happenstance/plain-view exception, however, will not apply to the chance discovery of crime during a routine or random inspection for health or safety violations. Since overruling Frank v. Maryland, 359 U.S. 360 (1959), the Court has decreed that the warrant procedure must be followed in these situations. Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967).

As Stewart repeatedly has insisted, however, exigency alone will not suffice; the exigency exception must he recognized and delineated as a particular category such as "hot pursuit" or "incident to lawful arrest." *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) (rejection of "murder scene" exception created by the state court); Chimel v. California, 395 U.S. 752, 766 (1969) (search incident to lawful arrest); Warden v. Hayden, 387 U.S. 294, 298-300 (1967) (hot pursuit); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (imminent threat of destruction of evidence).

53. Carroll v. United States, 267 U.S. 132 (1925). Subsequent decisions applying the automobile exception theory to immobilized vehicles have diluted the concept of exigency that is inherent in the mobility of the vehicle. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976); Chambers v. Maroney, 399 U.S. 42 (1970); Cooper v. California, 386 U.S. 58 (1967).

54. Chimel v. California, 395 U.S. 752 (1969).

55. Warden v. Hayden, 387 U.S. 294 (1967).

56. Terry v. Ohio, 392 U.S. 1 (1968).

a carefully drafted warrant. A couple of hours seems pretty expeditious for the operation, but more than the "urgent" situation can afford.

Not only time, but also effort and professional dignity, must be factored into the warrant procedure. For the sweaty cop who has just captured the elusive and resistant quarry as he emerged from his hideout, to post a gnard, return to the barracks, shift gears, and sit down to type a warrant application to get permission to do what he knows he should do—go in and scour the hideout—must seem a perverse, unnecessary, and perhaps demeaning effort. To avoid it, the police officer will try to stretch an exception already recognized by Stewart and Co. (perhaps hot pursuit) or else, let's face it, he will stretch a fact or two—for example, by testifying that he captured the villain just inside rather than just outside the lair—to make his action appear lawful. This factor of efforts of compliance consequently accounts for much of the stress that accompanies the task of defining and redefining the categorical exceptions to reach a closer accord with urgency as it is perceived in the field.

When we begin to consider problems of time and effort, we are ripe for the advent of technological solutions. In this instance, the required technology is not very exotic: telephones. The Federal Rules allow it;[57] California[58] likes it; four other states appear to use it, with or without statutory provisions;[59] and a number of other jurisdictions are becoming interested. The fourth amendment says that an officer must swear to the averments. The written affidavit naturally becomes the form. But the Constitution does not say that

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57. FED. R. CRIM. P. 41(c)(2).

58. CAL. PENAL CODE §§ 1526, 1528 (West Supp. 1982). For a preliminary report on its use, see Heisse, *Warrantless Automobile Searches and Telephonic Search Warrants: Should the "Automobile Exception" be Redrawn?*, 7 HASTINGS CONST. L.Q. 1031, 1034 (1980).

59. ARIZ. REV. STAT. ANN. §§ 13-3914, 13-3915 (1978); WASH. SUPER. CT. CRIM. R. 2.3. Louisiana and Minnesota apparently use the procedure without benefit of statute. Louisiana v. Dupris, 378 So. 2d 934 (La. 1979); Minnesota v. Andries, 297 N.W.2d 124 (Minn. 1980). In New York, § 690.35(1) of the Criminal Procedure Law provides: "An application for a search warrant must be in writing and must be made, subscribed and sworn to by a public servant . . . . " N.Y. CRIM. PROC. LAW § 690.35(1) (Consol. 1971). In People v. Brown, 40 N.Y.2d 183, 352 N.E.2d 545, 386 N.Y.S.2d 359 (1976), however, a police officer, after being sworn, orally presented his application for a search warrant to a state supreme court justice, and a court reporter recorded his statements. The New York Court of Appeals found that the officer had substantially complied with § 690.35(1) of the Criminal Procedure Law, since the oral presentation was recorded, and, therefore, a writing existed that was made while the officer was under oath. This case, however, has not been taken as general authority for a remote issuance procedure.

the sworn application must be in writing. Of course, the applicant's recital, as well as the court's responsive order, must be in reviewable form, but this requirement does not present any great problem. With a little common electronic magic, a police officer can call from a car radio or public phone, have a twenty-four hour judge summoned to a recorded line in minutes, and a vocal deposition and oral authorization may be taped and executed before the words have been transcribed.[60] Such instant and virtually on-the-scene availability of the magistrate should undercut substantially the predicate of the urgency exceptions and reduce the necessity of their constant refinement and redefinition. For this development we should all be grateful, even those of us who make our living trying to explain the categorical incrustations.

At the same time, the technical solution provides a much more gratifying alternative to the cries for repeal of the rule of evidentiary exclusion. By turning field officers increasingly to the accelerated warrant mode as a matter of routine, we honor the warrant

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60. Many observers believe that an indispensable component of the search warrant process is the warrant itself. Both Arizona and California have supplied the documentary bona fides in a rather odd—but apparently valid—manner: by authorizing the applicant/executing officer to fill in the blanks and affix the judicial imprimatur to a standard form, all-purpose warrant that is carried in patrol cars. The Arizona statute is quite specific:

> A. If the magistrate is satisfied that probable cause for the issuance of the warrant exists, he shall issue a search warrant commanding a search by any peace officer of the person or place specified, for the items described.
>
> B. The warrant shall be in substantially the following form:
>
> "County of _____, state of Arizona.
>
> To any peace officer in the state of Arizona:
>
> Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken) there is probable cause for believing that (stating the grounds of the application) according to § 13-3912, you are therefore commanded in the daytime (or in the night, as the case may be, according to § 13-3917), to make a search of (naming persons, buildings, premises or vehicles, describing each with reasonable particularity), for the following property or things: (describing such with reasonable particularity), and if you find such or any part thereof, to retain such in your custody subject to § 13-3920.
>
> Given under my hand or direction and dated this ____ day of ____, 19__ (judge, justice of the peace, or magistrate.)"
>
> C. The magistrate may orally authorize a peace officer to sign the magistrate's name on a search warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate. This warrant shall be called a duplicate original search warrant and shall be deemed a search warrant for the purposes of this chapter. In such cases, the magistrate shall cause to be made an original warrant and shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant. Upon the return of the duplicate original warrant, the magistrate shall cause the original warrant and the duplicate original warrant to be filed as provided for in § 13-3923.

ARIZ. REV. STAT. ANN. § 13-3915 (1978).

preference theory, rather than ignore it by judicial tolerance of a wider spectrum of warrantless intrusions. Perhaps most important, in supplying both the means and the encouragement for more commonplace resort to magistrates, we will return our attention to the more appropriate consideration: the proper forms and circumstances for the issuance of judicial process to acquire inculpatory evidence. Thirteen years ago, Professor Telford Taylor told us that the fourth amendment had been stood on its head by cases incessantly poking around to discover the fourth amendment's meaning concerning searches and seizures without warrant, when the provision actually was designed to delimit the warrant itself.[61] Professor Taylor's teaching probably is discussed as often as any scholarly expression on this subject,[62] but until now, scant occasion arose for the courts to journey down the true path of the framer's original concern. That occasion may now be at hand, introducing a period of increasing magisterial responsibility in the supervision of preaccusatory investigation. It is an aspect of the criminal process that should be enlarged, developed, and improved.

IV. CODA

If we are truly at the advent of a shift in judicial participation in the acquisitory phase of the criminal process—from *post facto* to *ante facto*—one would hope that the doctrinal profits will accrue well beyond the *ex parte* telephonic search warrant. In my opinion, pressing issues bearing on court-ordered acquisitions have been treated, at best, sporadically and discursively; real similarities have been ignored and substantial differences blurred and the whole endeavor left floundering without a unified imperative to guide investigators and judges. This part of the Article touches upon only two or three of these matters by way of example.

Particularly since the Supreme Court widened the way,[63] the subpoena duces tecum has become a more likely means for the acquisition of certain kinds of evidence from certain kinds of custodi-

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61. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969).

62. To date, eleven Supreme Court opinions and innumerable scholarly works on the fourth amendment have discussed Professor Taylor's book.

63. Fisher v. United States, 425 U.S. 391 (1976). In the past, prosecutors assumed that a subpoena duces tecum addressed to a suspected custodian could be readily quashed on grounds of privilege against the self-incrimination implicit in the production of the evidence. In *Fisher* the Court instructed us that such protected testimonial communication was not necessarily implicit in compliance, particularly when authentication was adduced from another source.

ans, whether or not they be "targets." Nevertheless, the subpoena duces tecum remains an odd duck on the constitutional pond. The Court has recognized the compulsory process to be an instrument of search and seizure—albeit privately conducted—and, therefore, within the proscriptive and prescriptive ambit of the fourth amendment.[64] As a practical matter, and particularly when documents are sought, the subpoena duces tecum often functions precisely as a search warrant, which, upon personal service, immediately produces the desired item. In operation, the devices may differ only in the identity of the person who carries the evidence downtown to court. Despite the common governing authority, however, and despite the occasional functional equivalence, an enormous difference remains both in the showing that the prosecutor must make and in his obligation to make it in advance. In place of the constitutional necessities of probable cause, reliable belief, precise description, and sworn commitment, courts issue subpoenas duces tecum virtually at prosecutorial discretion, and the documents survive fourth amendment challenge if they are not "overbroad," commercially crippling, or mere "fishing expeditions."[65] Far from the exacting criteria for the conventional warrant, these catch phrases cannot even rightly be termed standards; they are nothing but placebos to the fourth amendment.

In light of the relaxed issuance of the subpoena duces tecum, it may be surprising that some repositories claim the right to be "searched" by subpoena before being subjected to a conventional warrant.[66] Though the motion to quash allows some contention before compliance with the subpoena duces tecum—an opportunity that is lacking under the warrant procedure—that value must surely be diminished by the paucity of restrictions on the use of the subpoena. Perhaps what the repository really does not like is the broad and indiscriminate search preceding the seizure when the state executes a warrant either on an uncooperative source or on one who is thought to be only partially forthcoming. If that is a real problem, as it may well be (particularly in the quest for documents from commercial files) it points up another area of incoherence in current search and seizure law. Courts today recognize no

64. *See* Hale v. Henkel, 201 U.S. 43 (1906); Boyd v. United States, 116 U.S. 616 (1886); *see also* Fisher v. United States, 425 U.S. 391 (1976); See v. City of Seattle, 387 U.S. 541, 544 (1967) (dictum).

65. *See, e.g.*, Fisher v. United States, 425 U.S. 391 (1976); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Hale v. Henkel, 201 U.S. 43 (1906).

66. Zurcher v. Stanford Daily, 436 U.S. 547, 553 (1978).

distinction between the ingredients of a warrant for the simple, superficial acquisition and one for the deep and destructive search. One obtains a search warrant for stolen property in precisely the same fashion if its execution entails opening a suitcase in the trunk of a car as if it authorizes the dismantling of a house board by board and plowing the grounds with bulldozers.[67]

This part of the Article concludes with the mystery of the mired amendment proposed to rule 41.1 of the Federal Rules of Criminal Procedure and the resultant gap for judicial filling. *Davis v. Mississippi*[68] probably brought the problem to the attention of most commentators, but the situation is real and not uncommon. Suppose a person or a known group is suspected of a crime for which the only clue is a fingerprint or some other characteristic requiring comparative examination of the suspect's or suspects' person. Since no "testimonial or communicative" data are sought, the fifth amendment privilege is not implicated. Some means should be available to glean the evidentiary fact from the body of the suspected person or persons. The Court has worked out a rather awkward two-tiered analysis.[69] It first considers the seizure of the body to be examined to determine whether the former satisfied fourth amendment strictures. It then considers whether the examination itself dealt with a probe for normally private attributes, such as blood types,[70] or only for those regularly displayed to the public at large, such as voice timbre, handwriting, body size, or facial configuration.[71] If the search was of the private sort, a second fourth amendment inquiry is required to see if an exception to the warrant rule applies, as one does, for example, with fingernail deposits on a suspect about to clean his fingernails.[72] A procedure for

67. In 1977, after the discovery of $17,250 of stolen cash that had been baked into dishes of lasagna and stored in a garage freezer at a Suffolk County, New York home, a court issued a search warrant permitting the Manhattan District Attorney's Office to dismantle the house and plow its grounds with bulldozers. N.Y. Times, Oct. 19, 1977, at 23. These efforts produced only great anger on the part of the couple who occupied the premises and prompted them to consider filing suit against the District Attorney. *Id.* The lawsuit, however, apparently never came to fruition.

68. 394 U.S. 721 (1969).

69. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291 (1973) (fingernail scrapings); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplar); United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplar); Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints); Schmerber v. California, 384 U.S. 757 (1966) (blood sample); Rochin v. California, 342 U.S. 165 (1952) (stomach pumping).

70. *See* Schmerber v. California, 384 U.S. 757 (1966).

71. *See, e.g.*, United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973).

72. *See* Cupp v. Murphy, 412 U.S. 291 (1973).

preexamination process—a nice blend of the subpoena and warrant modes—could well replace this awkward and slightly artificial *post facto* inquiry. Just such a rule was drafted for the Federal Rules in 1971,[73] but it has unaccountably languished on the congressional back burner ever since. Some courts tentatively have experimented with this idea in isolated cases and have experienced good results.[74] With well-drawn legislation, overdue judicial responsibility could be created, based on simple process, to close the gap in the mechanism of acquisition.

V. CONCLUSION

The good faith though mistaken belief of a searching officer that his penetration into protected privacy is a legitimate situational response should save evidence found therein only if his error is an error of fact. Courts should not be assigned tasks that cannot be performed rationally. They should not be required to declare whether a police officer reasonably could have misperceived operative law. Therefore, when the illegality results from the constabulary error of law, the good faith belief of the officer that the search and seizure was lawful should be omitted from the equation. Apart from what the ignorant but virtuous constable thought the law countenanced, the lawfulness of his acquisitory conduct probably should be judged by the standard of circumstantial reasonableness, rather than by the familiar categorical measure. With a flexible standard, courts can—and should—consider a greater variety of factors, including the seriousness of the crime, the need for the evidence sought, the relative intrusiveness of the chosen probe, and the permeability of the privacy barrier upon which the defendant relies.[75]

When feasible, a judicial officer should make the decisions to

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73. FED. R. CRIM. P. 41.1, 52 F.R.D. 409, 462 (Prelim. Draft of Proposed Amendments 1971).

74. Reported decisions are surprisingly scarce. The only reported case directly dealing with serious bodily penetrations appears to be United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), in which the court permitted minor surgery to remove a bullet from defendant's arm, against his wishes, after a hearing that was consistent with Schmerber v. California, 384 U.S. 757 (1966). *See also* United States v. Erwin, 625 F.2d 838 (9th Cir. 1980) (*ex parte* authorization of body cavity search held not violative of due process protections). Unreported examples probably are more numerous.

75. The American Law Institute favored the "flexible standard" in A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3 commentary at 406 (1975). *See also* Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 7 (1975). The proposed considerations are not precisely the same as those mentioned in text but the approach is similar.

search and to seize before the intrusion occurs. General adoption of the telephonic warrant procedure, along with training and the technology of ready and recorded access, should put magistrates on the scene of many events that traditionally have been regarded as specially exigent. As a matter of ordinary warrant routine, early judicial supervision may become a more prominent part of American investigatory procedure. In addition to moving closer to the fulfilment of the promise of the fourth amendment's warrant clause, we may begin in earnest the search for a sensible, judicially controlled, and unified theory for the preaccusatory acquisition of evidence. Unbound by traditional distinctions between warrants and subpoenas, and beyond the fourth amendment's four recited elements of the valid warrant, we should turn our attention to the appropriate degree and circumstances, judicially monitored, for the intrusion of the hand of the state into the privacy of its citizens.