Vanderbilt Law Review

Volume 34
Issue 1 *Issue 1 - January 1981*

Article 6

1-1981

Limiting the Application of the Exclusionary Rule: The Good Faith Exception

Meredith B. Brinegar

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Fourth Amendment Commons

Recommended Citation

Meredith B. Brinegar, Limiting the Application of the Exclusionary Rule: The Good Faith Exception, 34 *Vanderbilt Law Review* 213 (1981)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol34/iss1/6

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

RECENT DEVELOPMENT

Limiting the Application of the Exclusionary Rule: The Good Faith Exception

I. INTRODUCTION

The United States Supreme Court in 1914 adopted the exclusionary rule for federal trials. That rule requires the exclusion of evidence seized in violation of a criminal defendant's fourth amendment[1] right to freedom from unreasonable searches and seizures.[2] Nearly fifty years later, the Court extended the exclusionary rule to the states.[3] During the first sixty years of the rule's existence, the Court advanced several justifications for withholding such improperly seized evidence from the trier of fact.[4] Among these reasons was the need to deter unlawful police conduct by removing the incentive to violate the fourth amendment.[5]

In *United States v. Calandra*[6] six members of the Court agreed that "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."[7] Since *Calandra* the Court, in deciding whether to ex-

1. U.S. CONST. amend. IV. The fourth amendment provides:

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

2. Weeks v. United States, 232 U.S. 383 (1914).
3. Mapp v. Ohio, 367 U.S. 643 (1961).
4. For a discussion of the purposes of the exclusionary rule, see text accompanying notes 14-16, 26-27 *infra*. *See also* Cann & Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 How. L.J. 299 (1980); Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225 (1980). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 1.1 (1978).
5. *See* text accompanying note 26 *infra*.
6. 414 U.S. 338 (1974).
7. *Id.* at 348.

tend the exclusionary rule to a given new context, has balanced the costs to society of suppressing relevant evidence against the possible deterrent value of the rule.[8] When a court engages in such balancing, its view of the exclusionary rule's efficacy as a deterrent necessarily plays a large part in determining the outcome. Recent Supreme Court cases indicate skepticism about the rule's deterrent value, and the Court has declined several opportunities to increase the scope of the rule.[9]

The Fifth Circuit in *United States v. Williams*,[10] recently adopted an exception to the exclusionary rule based in part on the court's view that the rule does not always operate as a deterrent. The *Williams* court held that unconstitutionally seized evidence is admissible at trial provided that the government official who seized the evidence acted pursuant to a reasonable, good faith belief that his conduct was lawful.[11] The Fifth Circuit is thus the first circuit to adopt such a "good faith" exception, and its holding may reflect an implicit determination that the exclusionary rule is never an effective deterrent.

In light of the Fifth Circuit's holding, this Recent Development examines the exclusionary rule balancing test, emphasizing the Supreme Court's treatment of the rule's deterrent value, and suggests an approach to the question whether the exclusionary rule would deter unlawful police conduct in the good faith exception setting. The Recent Development argues that because of inconclusive empirical studies and dangers in administration, courts should not limit the application of the exclusionary rule based solely on doubts about its deterrent value.

---

8. *See* notes 42-49 *infra* and accompanying text.

9. *Id.*

10. 622 F.2d 830 (5th Cir. 1980) (en banc).

11. *Id.* at 846-47. This holding appeared in Part II of the Fifth Circuit's en banc decision. Although a sixteen member majority in Part I of the court's decision found that the evidence was lawfully obtained and did not address the good faith exception, *id.* at 839, Part II (a thirteen member majority) announced:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

Id.

II. Development of the Exclusionary Rule

A. The Purposes of the Rule

Weeks v. United States[12] held that when a criminal defendant makes a timely motion to have unconstitutionally seized evidence returned to him, the evidence must be returned and cannot be used against him in a federal criminal trial.[13] Although the language in *Weeks* suggests that the decision could have been based upon a privacy right,[14] a property right,[15] or the imperative of judicial integrity served by the Court's refusal to sanction unconstitutional police practices,[16] the need to deter such police conduct was not specifically mentioned as a basis for the decision.

In *Wolf v. Colorado*[17] the Court applied the fourth amendment to the states, but refused to extend the exclusionary rule to them.[18] After *Wolf*, however, the Court confronted several cases in which state officers had committed serious fourth amendment violations.[19] One instance of state police conduct that "shock[ed] the conscience" of the Court prompted the exclusion of illegally obtained evidence;[20] other violations, arguably just as shocking, did

---

12. 232 U.S. 383 (1914).

13. *Id.* at 398.

14. In *Weeks* a public official had seized defendant's private papers, but it is unclear whether this fact was necessary to the Court's decision. In the first case that prompted the Court to analyze closely the fourth amendment, Boyd v. United States, 116 U.S. 616 (1886), the Court had asserted that "we have been unable to perceive that the seizure of a man's *private* books and papers to be used in evidence aginst him is substantially different from compelling him to be a witness against himself." *Id.* at 633 (emphasis added). The Court's tendency in the early fourth amendment cases to stress the privacy of a person's belongings indicates that the Court may have been concerned with a privacy right.

15. *See* Schlesinger & Wilson, *supra* note 4. These authors argue that in its inception the exclusionary rule was designed to protect property rights and that the Court should return to that approach.

16. The Court in *Weeks* asserted that "[t]he 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." 232 U.S. at 392. *See* text accompanying note 27 *infra* for a discussion of a case in which the Court explicitly termed this purpose "the imperative of judicial integrity."

17. 338 U.S. 25 (1949).

18. The Court in *Wolf* emphasized the fact that since *Weeks* a majority of tbe states had refused to adopt the exclusionary rule for state court proceedings. The *Wolf* Court determined that the states should be allowed to enforce the fourth amendment through their own selected means. *Id.* at 29-33.

19. *See, e.g.*, Breitbaupt v. Abram, 352 U.S. 432 (1957); Rocbin v. California, 342 U.S. 165 (1952).

20. Rochin v. California, 342 U.S. 165 (1952). In *Rochin* tbe state officers forced defendant to submit to having his stomach pumped. *Id.* at 166.

not.[21]

The disparity between state and federal treatment of fourth amendment infringements, exemplified in the "shocking violations" cases,[22] led the Court to reassess the application of the exclusionary rule in the early 1960s. In *Elkins v. United States*[23] the Court discarded the "silver platter doctrine." Under that principle, evidence seized unconstitutionally by state officers was admissible in federal court, provided that federal officials did not take part in the unconstitutional search and seizure—in other words, provided that the evidence was handed to the federal officials on a "silver platter."[24] *Elkins* overruled this doctrine because it frustrated the purposes of the exclusionary rule.[25] According to the *Elkins* Court, one of those purposes is "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[26] A second purpose of the exclusionary rule advanced by the Court in *Elkins* is the "imperative of judicial integrity," which prohibits a court from becoming an accomplice in the disobedience of the Constitution.[27]

The gap between state and federal treatment of fourth amendment violations was narrowed further in *Mapp v. Ohio*,[28] in which the Court held that the exclusionary rule applies to the states through the due process clause of the fourteenth amendment.[29] The exclusionary rule, the Court reasoned, must be binding on the states in order to prevent the fourth amendment from becoming a mere "form of words."[30] Speaking for the Court, Justice Clark asserted that the exclusionary rule is "part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy" and is "an essential part of both the Fourth and Fourteenth Amendments."[31] The two justifications for the exclusionary

---

21. *See* Breithaupt v. Abram, 352 U.S. 432, 433 (1957) (Court admitted evidence obtained from blood test performed on unconscious defendant).

22. *See* note 19 *supra* and accompanying text.

23. 364 U.S. 206 (1960).

24. *Id.* at 208. *See generally* 1 W. LAFAVE, *supra* note 4, at § 1.3(c).

25. 364 U.S. at 221-24.

26. *Id.* at 217.

27. *Id.* at 222-23.

28. 367 U.S. 643 (1961).

29. *Id.* at 655, 660.

30. 367 U.S. at 655.

31. *Id.* at 651, 657. Although in Boyd v. United States, 116 U.S. 616 (1886), the Court had argued that the fourth and fifth amendments taken together required that the unconstitutionally procured evidence be suppressed in order to protect the right against self-incrimination, *id.* at 633, in *Weeks* the Court relied solely on fourth amendment grounds. 232 U.S.

rule that were set forth in *Elkins*—deterrence of unconstitutional police conduct and the imperative of judicial integrity—were also relied upon in *Mapp* to support the extended application of the exclusionary rule.[32]

B. *From* Mapp *to* Calandra: *The Development of the Deterrence Rationale*

After establishing the deterrence rationale for the exclusionary rule in *Elkins* and *Mapp*, the Court began to use that line of reasoning to limit the scope of the rule. For example, in *Linkletter v. Walker*[33] the Court refused to apply the exclusionary rule *retroactively* to reverse a conviction that had become final before the decision in *Mapp*. The Court reasoned, in part, that exclusion of this evidence would not further the deterrent purpose of the rule.[34] Nor did the considerations of privacy recognized in *Mapp* require retroactive application of the exclusionary rule. The Court indicated the primacy of the deterrent, as opposed to the compensatory, function of the rule when it said that "[t]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."[35]

Although the Court continued to cite the imperative of judicial integrity as one basis for the exclusionary rule, by 1968 it had definitely come to perceive the "major thrust" of the exclusionary rule

---

at 389. In *Mapp*, however, the Court indicated that the combination of the fourth and fifth amendments supported the exclusionary rule. 367 U.S. at 657.

32. 367 U.S. at 656, 660.

33. 381 U.S. 618 (1965).

34. *Id.* at 636-37. *Linkletter* illustrates the substantial difference between the analysis used in deciding whether to apply the exclusionary rule retroactively and the analysis employed in deciding whether to apply the rule in the more usual context. The Court explained that in the former case it must look to "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 629. In its retroactivity analysis, the Court emphasized, among other things, that the burden on the administration of justice would be very high because hearings would have to be held on the excludability of evidence long since destroyed. Finally, in the most noteworthy aspect of the *Linkletter* opinion, the Court asserted that the retroactive application of the "coerced confession" cases was not controlling because those cases "went to the fairness of the trial—the very integrity of the fact-finding process," whereas in the exclusionary rule cases "the fairness of the trial is not under attack." *Id.* at 639.

The approach taken by the Court in the retroactivity cases was more recently illustrated in United States v. Peltier, 422 U.S. 531 (1975), discussed in the text accompanying notes 55-57 *infra*. For a discussion of the arguments concerning nonretroactive application of criminal constitutional decisions, see Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the* Linklettar *Doctrine*, 60 J. CRIM. L.C. & P.S. 417 (1969).

35. 381 U.S. at 637.

as "a deterrent one."[36] With *Alderman v. United States*[37] the Court began to measure the deterrent value of the exclusionary rule, declining to extend the rule to a new class of defendants[38] because of its finding that the additional deterrent value did not outweigh the costs to society of suppressing relevant evidence.[39]

C. *The* Calandra *Balancing Test*

In *United States v. Calandra*[40] the Court abandoned the "imperative of judicial integrity" and "constitutional requirement" rationales for the exclusionary rule. The *Calandra* Court asserted that the exclusionary rule's sole purpose is to deter fourth amendment violations and that the rule is a judicially created remedy rather than a constitutional right.[41] In declining to extend the exclusionary rule to grand jury proceedings, the Court enunciated a balancing test:

> Against [the] potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule. . . .
>
> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. . . . 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

---

36. Terry v. Ohio, 392 U.S. 1, 12 (1968).

37. 394 U.S. 165 (1969).

38. In *Alderman* the Court refused to extend standing to contest a fourth amendment violation to a codefendant whose own fourth amendment rights had not been violated by the officials' conduct. In effect, the *Alderman* Court held that the exclusionary rule cannot be asserted vicariously. *Id.* at 174. For a discussion of the exclusionary rule standing doctrine, see 64 CORNELL L. REV. 752 (1979).

39. 394 U.S. at 174-75. Two years after *Alderman*, in Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971)(Burger, C.J., dissenting), Chief Justice Burger expressed his view that the costs to society of suppressing relevant evidence are far too high to be outweighed by the deterrent value of the exclusionary rule. He argued that the empirical studies do not show that the exclusionary rule deters uncoustitutional police practices. The rule, he therefore concluded, should not be continued. Instead, he urged that a special court he established in which people could bring claims against the government for damages resulting from fourth amendment violations. *Id.* at 422-23. Citing the most exhaustive empirical study of the exclusionary rule's deterrent value as the basis for his assertion that the rule does not deter improper police acts, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970), the Chief Justice stated that "[s]ome clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals." 403 U.S. at 416. It has been argued, however, that Oaks did not conclude that the exclusionary rule does not deter; he simply concluded that the evidence is inconclusive. *See* Cann & Eghert, *supra* note 4, at 300-01.

40. 414 U.S. 338 (1974).

41. *Id.* at 348.

substantially impeding the role of the grand jury.[42]

In the cases that followed *Calandra,* the Court closely examined the deterrent value of the exclusionary rule in deciding whether to extend it to new settings. In *United States v. Janis*[43] and *Stone v. Powell*[44] the Court refrained from extending the rule, finding that the additional deterrence would not outweigh the costs to society of suppressing the evidence.[45] In *Janis* the Court was asked to extend the exclusionary rule to a federal *civil* proceeding in which evidence had been seized by state police officers pursuant to a defective warrant. After examining the empirical studies of the efficacy of the exclusionary rule and finding no concrete evidence concerning whether the rule deters unconstitutional law enforcement practices, the Court applied the *Calandra* balancing test and declined to extend the scope of the rule:

> If the exclusionary rule is the "strong medicine" that its proponents claim it to be, then its use in the situations in which it is now applied . . . must be assumed to be a substantial and efficient deterrent. Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation.[46]

In dissent, Justice Stewart argued that the Court erred in concluding that the additional deterrence was not siguificant enough to justify such an extension of the exclusionary rule.[47] He asserted that the deterrent purpose of the rule would be frustrated by the majority's decision, because state law enforcement officers could circumvent fourth amendment requirements by handing evidence over to federal officials for use in a civil trial.[48]

In *Stone v. Powell* the Court was urged to apply the exclusionary rule to federal habeas corpus review. Rejecting such an extension, the Court reasoned that even assuming the deterrent value of the rule "despite the lack of supportive empirical evidence," the additional deterrent value of applying the rule in federal habeas

---

42. *Id.* at 350-52. In a footnote the Court stated that "[w]e have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials." *Id.* at 348, n.5. The language in *Calandra* indicates that the Court did not have confidence in the remedial value of the exclusionary rule in any context other than that of criminal trials.

43. 428 U.S. 433 (1976).

44. 428 U.S. 465 (1976).

45. 428 U.S. at 453-54; 428 U.S. at 492-94.

46. 428 U.S. at 453-54.

47. *Id.* at 460.

48. *Id.* at 463-64. Justice Stewart based his argument on the same reasoning that led the Court to overrule the "silver platter doctrine" in Elkins v. United States, 364 U.S. 206 (1960). 428 U.S. at 461-64. *See* text accompanying notes 22-27 *supra.*

corpus proceedings would not be appreciable.[49] The Chief Justice concurred in the decision and added that the exclusionary rule should be overruled or limited to cases involving egregious, bad faith conduct.[50] He pointed to the high costs of the rule to society and the fact that "notwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect," as reasons for overruling or limiting the rule.[51] In dissent, Justice White suggested that the exclusionary rule should not be applied when the law enforcement officer held a reasonable, good faith belief that his conduct was lawful.[52]

D. *The Official's State of Mind*

In the wake of *Calandra,* the Court began to scrutinize the deterrent value of the exclusionary rule even in cases that did not involve a proposed extension of the rule. One factor that became relevant was the state of mind of the official at the time of the illegal search and seizure. For example, in *Michigan v. Tucker*[53] the Court pointed out that because the police acted in good faith, the deterrence rationale for the exclusionary rule lost "much of its force."[54] In *United States v. Peltier*[55] the Court cited the lack of deterrent value in refusing to apply the exclusionary rule retroactively to a search later found to be unconstitutional. The *Peltier* Court stated that if the purpose of the exclusionary rule is to deter unconstitutional police conduct, then the rule should be applied only if "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitu-

---

49. 428 U.S. at 492-94.

50. *Id.* at 496, 501.

51. *Id.* at 499. The Chief Justice, however, did not assert that an empirical study has definitely disproved the detorrent value of the exclusionary rule. Numerous commentators have debated the rule's efficacy. *See* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion,* 62 KY. L.J. 681 (1974); Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?,* 62 JUD. 398 (1979); Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?,* 62 JUD. 404 (1979); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. LEGAL STUD. 243 (1973); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740 (1974); 4 COLUM. J.L. & SOC. PROB. 87 (1968). Empirical studies can be cited to support either position, but as a practical matter the data is, at best, inconclusive. *See* Cann & Egbert, *supra* note 4.

52. 428 U.S. at 539-42 (White, J., dissenting).

53. 417 U.S. 433 (1974).

54. *Id.* at 447.

55. 422 U.S. 531 (1975).

tional under the Fourth Amendment."[56] Writing in dissent, Justice Brennan expressed apprehension that the knowledge requirement would he extended beyond the retroactivity question.[57]

In *Brown v. Illinois*[58] the Court again mentioned the state of mind of the police officer as a factor to be weighed in deciding whether to exclude unconstitutionally seized evidence. In *Brown* the Court said that "particularly, the purpose and flagrancy of the official misconduct" are relevant.[59] The *Brown* Court required exclusion of evidence partly because the officer's illegal conduct had a quality of purposefulness.[60] The Court believed that the underlying arrest was obviously illegal,[61] and that it was necessary to exclude the evidence seized pursuant to the arrest in order to deter such conduct.[62] Justice Powell, concurring in *Brown,* contended that the Court should focus on the state of mind of the police officer,[63] and he set forth two categories of fouth amendment violations: "flagrantly abusive violations of fourth amendment rights" and " 'technical' Fourth Amendment violations."[64] Because Justice Powell believed that the deterrent purpose of the rule assumes that the police have acted willfully or negligently, he maintained that the exclusionary rule should be applied only in the first category of cases.[65]

---

56. *Id.* at 542. The facts in *Peltier* revealed that government agents had been conducting border patrol searches, without probable cause, within 100 miles of the border. After the search in *Peltier,* the Court ruled in another case that the 100 mile interpretation of border patrol authorization for unwarranted searches violated the fourth amendment. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Defendant in *Peltier* sought to have the *Almeida-Sanchez* ruling applied retroactively to his case. For a discussion of the Supreme Court's treatment of retroactive application of the exclusionary rule, see note 34 *supra* and accompanying text.

57. 422 U.S. at 544, 551.

58. 422 U.S. 590 (1975).

59. *Id.* at 603-04.

60. *Id.* at 605.

61. *Id.*

62. *Id.* at 602-03. The decision in *Brown* comports with the "fruit of the poisonous tree" doctrine under the exclusionary rule. This doctrine, which was established by the Court in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), requires the exclusion of evidence (fruit) derived from evidence obtained in the underlying illegal search (the poisonous tree). The fruit of the poisonous tree doctrine has been limited by the Court through several exceptions, including the attenuation doctrine, the inevitable discovery rule, and the independent source rule. *See* 3 W. LaFave, *supra* note 4, at § 11.4(a).

The Supreme Court's focus in *Brown* on the state of mind of the police officer illustrates a growing tendency of the Court to consider the nature of the "taint" in determining whether the evidence is the fruit of the poisonous tree. *Id.*

63. 422 U.S. at 610-12.

64. *Id.* at 610.

65. *Id.* at 610-12. The Court's focus on the police officer's state of mind was evident,

Finally, in *Michigan v. DeFillippo*[66] the Court based its decision not to apply the exclusionary rule upon the conclusion that the officer acted in good faith. In *DeFillippo* the Court held that evidence obtained from an arrest made in good faith reliance on an ordinance later declared unconstitutional would not be suppressed.[67] Addressing the deterrence argument in a footnote, the *DeFillippo* Court asserted that "no conceivable purpose of deterrence" would be served by applying the exclusionary rule in this case since not even "the most zealous advocate of the exclusionary rule" would wish to deter police "from enforcing a presumptively valid statute."[68] The *DeFillippo* dissent argued that the Court had erred in focusing on the good faith of the officer.[69] According to the dissent, the issue was whether the *state* had gathered evidence unlawfully.[70] The dissent found that because the state could not constitutionally authorize the arrest, the state should not be allowed to defend the unconstitutional police activity by arguing that the official was "merely executing the laws in good faith."[71]

III. The Good Faith Exception to the Exclusionary Rule: *United States v. Williams*

Although the Supreme Court has declined to apply the exclusionary rule in some instances because it found the deterrent value insufficient, until recently no court has limited the rule by a blanket exception based solely upon lack of deterrent value. In *United States v. Williams*[72] the Fifth Circuit imposed such a blanket limitation, holding that unconstitutionally seized evidence is admissible at trial provided that the officer who seized the evidence acted pursuant to a reasonable, good faith belief that his actions were

although not controlling, in two more recent decisions that declined to apply the exclusionary rule. United States v. Ceccolini, 435 U.S. 268 (1978), suggested that the Court's decision not to require exclusion of evidence was bolstered by the fact that the officer did not intend to violate the defendant's fourth amendment rights. *See* 47 Cin. L. Rev. 487 (1978). In United States v. Caceres, 440 U.S. 741 (1979), the Court again emphasized that the official bad acted in good faith. The Court's tendency to designate certain offical action as heing in good faith, however, could lead to interpretive problems if the good faith exception is adopted. *See* text accompanying notes 124-33 *infra*.

66. 443 U.S. 31 (1979).

67. *Id.* at 37-40. The Court pointed out that the Fifth Circuit also does not apply the exclusionary rule in this context. *Id.* at 35.

68. *Id.* at 38, n.3.

69. *Id.* at 42 (Brennan, J., dissenting).

70. *Id.* at 43 (Brennan, J., dissenting).

71. *Id.* (Brennan, J., dissenting).

72. 622 F.2d 830 (5th Cir. 1980)(en banc).

lawful.[73]

In *Williams* a narcotics agent arrested defendant for violating a bond condition.[74] In a search pursuant to that arrest, heroin was found and later became the basis for an indictment. Defendant moved to suppress the heroin found during the search. The district court[75] granted the motion and the Fifth Circuit panel affirmed on the grounds that a violation of a bond condition is not a criminal offense justifying a warrantless arrest and on the grounds that the officer did not have the statutory authority to make the arrest.[76] The evidence obtained from a search pursuant to that arrest was therefore excluded as the "fruit of the poisonous tree."[77] Dissenting from the Fifth Circuit panel's decision, Justice Charles Clark argued that the exclusionary rule should not be applied because the officer held a reasonable, good faith belief that his actions were authorized.[78]

On en banc rehearing, the Fifth Circuit found Justice Clark's dissent persuasive and held that even if the arrest were unauthorized, the evidence must be admitted because the agent acted reasonably and in good faith.[79] The *Williams* court began its presentation of the good faith exception by quoting a commentator's description of the exception's proper scope.[80] According to that commentator, good faith violations fall into two categories: "good faith mistakes" and "technical violations."[81] A good faith mistake occurs when an officer makes an error of judgment concerning whether there is probable cause for his actions;[82] a technical violation occurs when an officer relies on a statute that is later declared unconstitutional, a warrant that is later invalidated, or a court precedent that is later overruled.[83] Within this framework, the *Wil-*

73. *Id.* at 840. *See* note 11 *supra.*

74. *Id.* The special agent in *Williams* had previously arrested defendant for "running" drugs. Defendant was convicted of the offense. The agent, who knew that defendant was free on bond with the condition that she remain in Ohio, saw her deplane from a nonstop flight from Los Angeles while he was on duty at the Atlanta airport. *Id.*

75. The prosecution was brought in the United States District Court for the Northern District of Georgia.

76. 594 F.2d 86, 92-95 (5th Cir. 1979).

77. *Id.* at 95-96.

78. *Id.* at 97-98.

79. 622 F.2d at 840.

80. *Id.* at 840-41 (quoting Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule,* 69 J. CRIM. L. & CRIMINOLOGY 635 (1978)).

81. *Id.* at 635-36 (quoted at 622 F.2d at 840-41).

82. 622 F.2d at 841.

83. *Id.* The *Williams* court did not address the case of a warrant later invalidated. It said that "no warrant is involved here, hence nothing that we say applies to factual situa-

liams court examined the precedents for the good faith exception, focusing specifically on the two categories described above and generally on the arguments for limiting the exclusionary rule.[84]

Generally, the court reasoned that the exclusionary rule is no longer coextensive with the fourth amendment, but rather is a judicial rule designed to deter unconstitutional police practices.[85] According to the *Williams* court, because the exclusionary rule prevents the truth from being told and may free guilty criminals, it must not be applied "in those contexts where it does not effectively deter official misconduct."[86] Good faith violations, the court asserted, are not significantly deterred by the exclusionary rule.[87] Moreover, after examining recent cases in which the Supreme Court had refused to extend the scope of the exclusionary rule, the court concluded that the deterrent effect of the rule in the context of good faith violations was no greater than the deterrent value found unconvincing by the Supreme Court.[88] Thus, the court reasoned that since the Supreme Court found the deterrence value too slight to justify applying the rule in those decisions, the deterrence value was also too slight in the good faith context.[89]

The *Williams* court then surveyed the authority for the good faith exception in both the "technical violation" and "good faith mistake" permutations. The court cited *DeFillippo*[90] and *Peltier*[91]

---

tions where one has been obtained." *Id.* at 840 n.1.

84. *Id.* at 840-46.

85. *Id.* at 841.

86. *Id.* at 842.

87. *Id.* The court based this assertion in part on the reasoning presented in Justice Clark's dissent from the panel decision. Clark had said that excluding evidence seized in good faith may deter police officers from acting at all. He explained that police officers frequently need to make quick decisions and often do not know that their actions are wrongful. 594 F.2d at 97-98. The court also cited United States v. Janis, 428 U.S. 433 (1976), for the conclusion that good faith is a factor that significantly reduces deterrence. Finally, the court quoted Justice White's dissent in Stone v. Powell, 428 U.S. 465, 540 (1976), in which he argued that the good faith exception should be adopted because the exclusionary rule does not deter good faith violations.

88. 622 F.2d at 842-43. The court cited Supreme Court decisions that fall within the following categories: first, a refusal to extend the exclnsionary rule to a new context, United States v. Calandra, 414 U.S. 338 (1974); second, a refusal to apply the rule retroactively, United States v. Peltier, 422 U.S. 531 (1975); third, a refusal to apply the rule to impeachment (coupled with retention of the rule on direct examination), Harris v. New York, 401 U.S. 222 (1971); and last, a holding that the violation in question fit into an exception to the fruit of the poisonous tree doctrine, United States v. Ceccolini, 435 U.S. 268 (1978).

89. 622 F.2d at 842-43.

90. Michigan v. DeFillippo, 443 U.S. 31 (1979); *see* notes 66-71 *supra* and accompanying text.

91. United States v. Peltier, 422 U.S. 531 (1975); *see* notes 55-57 *supra* and accompa-

to support the application of the exception to technical violations.[92] The court stated that *DeFillippo* allowed the use of evidence obtained pursuant to an arrest under a statute later invalidated and that *Peltier* allowed the use of evidence obtained during a search authorized by a statutory construction later held unconstitutional.[93] As precedent for applying the exception to good faith mistakes, the *Williams* court relied on *Janis*[94] and *Tucker*.[95] According to the court, *Janis* and *Tucker* allowed the admission of unconstitutionally seized evidence because in both cases the officers had acted reasonably and in good faith.[96] Concluding, the court emphasized that the good faith exception is appropriate because the exclusionary rule does not deter police conduct that is believed at the time, reasonably and in good faith, to be lawful.[97]

Concurring, Justice Hill stressed the importance of requiring objective good faith in the application of the good faith exception.[98] He explained that an objective standard of reasonableness would require "that law enforcement personnel acquaint themselves with" constitutional requirements "and be disposed towards respecting them."[99] According to Justice Hill, the good faith exception, administered under an objective good faith standard, would not reward ignorance of constitutional limitations on police conduct, but instead would encourage learning.[100]

Justice Rubin, joined by nine other members of the court, wrote a separate opinion criticizing the majority for its adoption of the good faith exception.[101] Asserting that the court based its decision solely on the deterrence rationale, he argued that although deterrence is "an important reason for the rule," it is not its only

---

nying text.

92. 622 F.2d at 843. The *Williams* court also relied on Fifth Circuit decisions that supported the technical violations facet of the good faith exception. *See* note 67 *supra* and accompanying text.

93. 622 F.2d at 843.

94. United States v. Janis, 428 U.S. 433 (1976); *see* notes 45-48 *supra* and accompanying text.

95. Michigan v. Tucker, 417 U.S. 433 (1974); *see* notes 53-54 *supra* and accompanying text. The court also relied on the following Fifth Circuit decisions: United States v. Wolffs, 594 F.2d 77 (5th Cir. 1979); United States v. Hill, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975).

96. 622 F.2d at 844-45.

97. *Id.* at 847.

98. *Id.* at 847-48.

99. *Id.* at 848.

100. *Id.*

101. *Id.*

basis.[102] Relying on *Weeks*,[103] *Mapp*,[104] and Justice Brennan's dissent in *Calandra*,[105] he contended that the "imperative of judicial integrity" is a fundamental justification for the exclusionary rule.[106] He also observed that efforts had been made to justify the rule by pointing to the relationship between the fourth amendment and the self-incrimination clause of the fifth amendment.[107]

IV. Analysis

The Fifth Circuit in *Williams* properly identified the purpose of the exclusionary rule as deterrence. *Calandra* and its progeny demonstrate that deterrence is the only judicially accepted justification for the exclusionary rule.[108] The battle over other purposes for the rule, illustrated in Justice Rubin's concurrence, is now just an academic exercise. The Fifth Circuit also correctly concluded that the Supreme Court's decision in *DeFillippo* laid the groundwork for the good faith exception in cases involving a statute later declared unconstitutional.[109] It is clear that the Court would approve of the good faith exception in such a case. Nevertheless, the Fifth Circuit went beyond current Supreme Court case law in deciding that any reasonable good faith mistake would be excused. Supreme Court cases do focus on the good faith of police officers,[110] but they do not refrain from applying the rule simply because the officer acted in good faith.[111]

Although "deterrence" is an elusive term, it is clear that the

102. *Id.* at 849.

103. Weeks v. United States, 232 U.S. 383 (1914); *see* notes 12-16 *supra* and accompanying text.

104. Mapp v. Ohio, 367 U.S. 643 (1961); *see* notes 28-32 *supra* and accompanying text.

105. United States v. Calandra, 414 U.S. 338, 357 (1974); *see* notes 40-42 *supra* and accompanying text.

106. 622 F.2d at 849 (quoting 367 U.S. at 659).

107. *Id.* at 850.

108. *See* text accompanying notes 40-42 *supra.*

109. *See* text accompanying notes 66-68 *supra.*

110. *See* notes 53-65 *supra* and accompanying text.

111. For example, in Brown v. Illinois, 422 U.S. 590 (1975), the majority stated that the purpose and flagrancy of the official misconduct were relevant in the determination whether to apply the exclusionary rule. The Court, however, did not consider the nature of the violation solely. This fact prompted Justice Powell to file a concurrence in which he argued that the Court should base the exclusionary rule decision entirely on the nature of the violation. *See* notes 58-65 *supra* and accompanying text. Similarly, in Stone v. Powell, 428 U.S. 465 (1976), the Court did not base its decision not to extend the exclusionary rule solely on the official's good faith. This was evidenced by the fact that Justice White asserted in his dissent that the Court should adopt a good faith exception to the exclusionary rule. *Id.* at 538.

deterrence rationale for the exclusionary rule cannot be served by excluding evidence obtained in reliance on a statute later declared unconstitutional. Police reasonably rely on authority granted by statute. Exclusion of evidence because it was gathered pursuant to a statute that was later held unconstitutional would not deter police from gathering evidence pursuant to other statutes that might later be invalidated. This reasoning led the *DeFillippo* Court, and the Fifth Circuit in *Williams,* to conclude that the exclusionary rule should not apply in that context.[112]

The *Williams* court placed the *DeFillippo* exception in the category of "technical violations," which also included the obtaining of evidence in reliance on a statutory interpretation later held invalid.[113] The court relied on *Peltier* in asserting that the Supreme Court would support the good faith exception in such a situation.[114] In *Peltier,* however, the Supreme Court based its decision upon retroactivity concerns.[115] *Peltier* is therefore not direct authority for the extension of the good faith exception to the statutory construction setting. More careful consideration is necessary in deciding whether an arrest made pursuant to an invalid statutory construction should be excepted from the exclusionary rule. A serious problem could arise if the exception were so applied. Although it is relatively simple to determine that an officer acted reasonably in relying on a currently valid statute as in *DeFillippo,* it would not be so simple to determine whether a particular statutory construction was reasonable. When courts have interpreted a statute in the same way many times,[116] and the officer's conduct comported with that interpretation, the reasonableness of his actions is clear. In a case like *Williams,* however, there may be no court precedent that would help determine whether the officer's interpretation of a statute was reasonable.[117] If the good faith exception were

112. Michigan v. DeFillippo, 443 U.S. at 38, n.3; United States v. Williams, 622 F.2d at 843. *See* text accompanying notes 67-68 *supra.* The Fifth Circuit recognized that *DeFillippo* authorized the good faith exception in the case of an arrest made in good faith reliance on a statute later held unconstitutional. United States v. Williams, 622 F.2d at 843.

113. *Id.* at 843. *See* text accompanying notes 83, 91-93 *supra.* The Court, however, did not address the "warrant later invalidated" facet of the technical violation exception. *See* note 83 *supra.*

114. 622 F.2d at 843.

115. 422 U.S. at 536-39. *See* notes 55-57 *supra* and accompanying text. *See* note 34 *supra* for an explanation of the Court's approach to the question whether to apply the exclusionary rule retroactively.

116. *See, e.g.,* Almeida-Sanchez v. United States, 413 U.S. 266 (1973), discussed in note 56 *supra.*

117. In *Williams* the Court demonstrated this problem when it stated that "[t]his cir-

applied to the statutory construction cases, it would need to be limited to cases in which there is clear judicial precedent supporting the officer's conduct. The exception in that instance would not frustrate the exclusionary rule's deterrent value. Future police officers would not be deterred from complying with one well-established statutory interpretation simply because another statutory construction was held unconstitutional.

The "good faith mistake" category of the *Williams* good faith exception, by contrast, would frustrate the deterrent purpose of the exclusionary rule. The *Williams* court described a good faith mistake as an error of judgment concerning whether sufficient facts exist to constitute probable cause for a given police measure, such as a warrantless arrest.[118] The court based that facet of the good faith exception on a determination that police cannot be deterred from making reasonable mistakes.[119] This conclusion tacitly assumes that police cannot learn the requirements of the fourth amendment from the mistakes of others. The deterrence rationale for the exclusionary rule, however, necessarily assumes that future police will learn of the exclusion of evidence because of specific police practices and, consequently, will not engage in those practices themselves.[120] By contrast, if an officer were allowed to show that he made a reasonable good faith mistake, a court, applying the good faith exception, would not exclude the evidence.[121] Future police officers then would not learn that the conduct in question did not satisfy constitutional requirements. If they learned anything, they would learn that reasonable mistakes do not violate the

---

cuit at the time of the arrest had not ruled that a person violating bail requirements, but not a court appearance date, could or could not be arrested on that basis, and the only circuit that had inferentially done so had sustained the conviction." 622 F.2d at 841 (footnote omitted). Although the *Williams* court made this statement in support of the good faith exception, it would seem that if so little authority were available, it would be difficult to determine that the officer's actions were reasonable.

118. *Id.*

119. *Id.* at 842. *See* text accompanying note 97 *supra.*

120. *See* text accompanying note 26 *supra.*

121. In fact, under the Fifth Circuit's holding it appears that a court applying the good faith exception would not necessarily have to rule on the question whether the conduct in question violated the fourth amendment. The *Williams* court's language regarding the procedure for establishing a good faith mistake seems to require that the court first rule on the fourth amendment issue and then rule on the question of good faith. 622 F.2d at 846-47. The language, however, is not sufficiently clear to compel such an approach. *See* note 11 *supra.* This procedural problem is particularly troublesome when one considers that the development of a body of law concerning the requirements of the fourth amendment would be retarded if a court did not have to rule on the fourth amendment question before ruling on the good faith question.

fourth amendment. On the other hand, if evidence were excluded because a police officer's judgment was incorrect, other officers would be deterred from making the same error. Assuming that the exclusionary rule deters unconstitutional practices in its current form,[122] there would eventually be a decrease in such mistakes. This analysis contradicts Justice Hill's remark that the good faith exception would encourage learning;[123] indeed, the exception would significantly reduce the opportunity to learn.

Finally, the good faith exception presents dangers in administration. Supreme Court cases that have termed certain police acts "good faith" conduct illustrate the potential problems. In *Brown v. Illinois*[124] the majority found that the officer's conduct evidenced a quality of purposefulness and was obviously illegal,[125] but Justice Powell in dissent suggested that the officer might have had a reasonable good faith belief that his actions were lawful.[126] In *United States v. Ceccolini*[127] the majority emphasized that the police officer did not intend to violate the fourth amendment;[128] dissenting, Justice Marshall asserted that the search was clearly illegal.[129] The most disturbing example of the dangers of the good faith approach, however, appears in *United States v. Carceres.*[130] In that case an Internal Revenue Service agent applied for authorization that he knew was required before he could monitor a conversation. He arranged a meeting with defendant and monitored the conversation before the required authorization came through.[131] The *Carceres* majority called this action a good faith violation.[132] The dissent disagreed, pointing out that the agent had control over the timing

122. Because the empirical evidence does not establish that the exclusionary rule does *or* does not deter police misconduct, *see* note 51 *supra*, it is as reasonable to assume that the rule does deter as to assume that it does not.

123. United States v. Williams, 622 F.2d 830, 848 (5th Cir. 1980) (Hill, J., concurring).

124. 422 U.S. 590 (1975).

125. *Id.* at 605. The officer in *Brown* made an illegal arrest without probable cause or a warrant, but read the defendant his *Miranda* rights. *Id.* at 591.

126. *Id.* at 612.

127. 435 U.S. 268 (1978).

128. *Id.* at 279-80.

129. *Id.* at 289-90. The police officer in *Ceccolini*, while off duty, saw an envelope behind the counter at a friend's store. Without permission he looked inside it, found incriminating evidence, and asked his friend who owned the envelope. This discovery led to an indictment of the person whom the officer's friend had identified. *Id.* at 269-70. The testimony of the officer's friend was found to be admissible under the attenuation exception to the fruit of the poisonous tree doctrine. *Id.* at 279.

130. 440 U.S. 741 (1979).

131. *Id.* at 748.

132. *Id.* at 757.

of the conversation but nevertheless failed to comply with agency regulations.[133] This Recent Development submits that the determination whether an officer acted in good faith does not lend itself to an objective standard and hence could be subject to considerable abuse. Thus, adoption of a good faith exception to the exclusionary rule could result in an inconsistent application of the rule.

V. Conclusion

The Supreme Court does not believe that the deterrent value of the exclusionary rule is sufficiently well established to merit broadening the rule's scope.[134] The Court nonetheless has not yet carved out a blanket exception to the rule based solely on a lack of deterrent value. The Fifth Circuit decided in *Williams* that the exclusionary rule is not an effective deterrent in the good faith mistake or technical violations cases. It therefore removed these fourth amendment violations from exclusionary rule doctrine. Although the Fifth Circuit correctly reasoned that the Supreme Court would support the exception in the case of police reliance on a statute later declared unconstitutional, the Fifith Circuit went too far in holding that deterrence considerations and Supreme Court precedent supported inclusion of good faith mistakes within the ambit of the exception.

The empirical studies regarding the efficacy of the exclusionary rule as a deterrent are inconclusive.[135] Nevertheless, the Supreme Court assumes that the exclusionary rule does deter at least some unconstitutional police conduct in its present application.[136] Because it has not been determined whether the exclusionary rule deters such practices, and because the foregoing analysis has shown that the exclusionary rule *could* deter good faith mistakes,[137] this Recent Development urges that future courts should

---

133. *Id.* at 766 (Marshall, J., dissenting). The dissent presented a forceful criticism of the good faith exception:

> Restricting application of the exclusionary rule to instances of bad faith would invite law enforcement officials to gamble that courts would grant absolution for all but the most egregious conduct. Since judges do not lightly cast aspersions on the motives of government officials, the suppression doctrine would be relegated to those rare circumstances where a litigant can prove insolent or calculated indifference to agency regulations.

Id. at 766.

134. *See* text accompanying notes 42, 45-46 *supra.*

135. *See* note 51 *supra.*

136. *See* United States v. Janis, 428 U.S. 433, 453-54 (1976); text accompanying note 46 *supra.*

137. *See* text accompanying notes 121-23 *supra.*

not adopt the good faith mistake aspect of the Fifth Circuit's good faith exception to the exclusionary rule. The administrative problems inherent in applying the exception to good faith mistakes reinforce this conclusion. Of course, it would still be open to the prosecution to argue that the harm to society from extending the exclusionary rule to a new setting would outweigh the deterrent effect on fourth amendment violations. Nevertheless, the categorical exception carved out in *Williams* is much too sweeping and indiscriminate and should not replace the balancing process that determines the scope of the rule.

MEREDITH B. BRINEGAR