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THE GOOD FAITH RESTATEMENT OF THE EXCLUSIONARY RULE

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I. INTRODUCTION

The fourth amendment exclusionary rule has been the subject of debate since its creation by the United States Supreme Court sixty-eight years ago.¹ Simply stated, this rule of evidence holds that contraband or other forms of incriminating evidence obtained by unlawful police activity may not be used to prove guilt in a criminal trial. Defenders of the rule see it as necessary for the preservation of the fourth amendment prohibition against unreasonable searches and seizures,² relying upon the rationale that if the courts will not allow illegally obtained evidence to be used at trial, law enforcement officers will be deterred from gathering evidence through unlawful conduct.³ Critics of the exclusionary rule claim that the case law interpreting the rule has become so confused and contradictory that police cannot know whether or not their conduct is lawful, and that the rule has been expanded by the courts to apply to

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¹ Weeks v. United States, 232 U.S. 383 (1914).

² U.S. CONST. amend. IV 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.

³ For commentary in support of the exclusionary rule, see, e.g., Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5 (1979); Amsterdam, *Perspectives on the Fourth Amendment*, 5 MINN. L. REV. 349 (1974); McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973); Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 65 (1957); Traynor, *Mapp v. Ohio: At Large in the Fifty States*, 3 DUKE L.J. 319 (1962); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"* 53 J. CRIM. L. C. & P.S. 171 (1962).

situations in which the rule cannot possibly serve as a deterrent.⁴

Debate concerning the exclusionary rule has heightened in recent months as Congress examines proposals to modify the rule⁵ or abolish it entirely.⁶ In addition, the Attorney General's Task Force on Violent Crime⁷ (Task Force) has recommended that the courts and legislature adopt the position that otherwise admissible evidence may not be excluded at trial if it has been obtained by a law enforcement officer acting in a "reasonable and good faith belief" that his conduct comports with fourth amendment law.

This article will first discuss the origin and purpose of the exclusionary rule and the problems presented by its application, and will then advocate legislative adoption of the reasonable, good faith statement of the rule enunciated in the Fifth Circuit decision of *United States v. Williams*⁸ and subsequently urged by the Task Force.

II. ORIGIN AND PURPOSE OF THE EXCLUSIONARY RULE

The exclusionary rule was created in 1914, when the United States Supreme Court held in *Weeks v. United States*⁹ that evidence obtained in violation of the fourth amendment is inadmissible in federal criminal prosecutions. Many commentators criticized this doctrine from the start,¹⁰ but the rule became firmly implanted in the federal criminal justice system. The states, however, were divided in their opinion of the rule. In the three decades following *Weeks*, sixteen states adopted the rule while thirty-one states refused to accept it.¹¹

It was not until 1949 that the Supreme Court was squarely confronted with the question of whether the exclusionary rule should be applied to state criminal prosecutions. In *Wolf v. Colorado*,¹² the Court held that although the guarantees of the fourth amendment applied to the states through the due process clause of the fourteenth amendment,¹³ the fourteenth amendment did not forbid the admission of evi-

⁴ See generally Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 74 (1974).

⁵ S. 101, 97th Cong., 1st Sess. (1981).

⁶ S. 751, 97th Cong., 1st Sess. (1981).

⁷ U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT 55-56 (1981) [HEREINAFTER CITED AS TASK FORCE REPORT].

⁸ 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).

⁹ 232 U.S. 383 (1914).

¹⁰ See, e.g., Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A.J. 479, 481 (1922).

¹¹ See discussion in *Wolf v. Colorado*, 338 U.S. 25, 29-30 (1949).

¹² 338 U.S. 25 (1949) (Black, J., concurring; Douglas, J., Murphy, J., and Rutledge, J., dissenting in separate opinions).

¹³ *Id.* at 28. Section one of the fourteenth amendment provides in part: "nor shall any

dence obtained by an unreasonable search and seizure.¹⁴ Twelve years later, in *Mapp v. Ohio*,¹⁵ the Court reversed its decision in *Wolf* and held that because the fourth amendment right of privacy was enforceable against the states through the fourteenth amendment, "it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."¹⁶

It is now clear that the primary rationale for the exclusionary rule is the deterrence of unlawful law enforcement activity. When the rule was first articulated in *Weeks*, the Court justified its holding on two grounds: deterrence of unlawful police conduct and maintenance of judicial integrity. In *Elkins v. United States*,¹⁷ the Court stated the deterrence ground as follows: "Its purpose is to deter—to compel respect for the Constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."¹⁸ The judicial integrity rationale was based on the notion that courts should be prevented from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold."¹⁹ Early exclusionary rule cases mentioned both rationales. However, over time, as the rule has been explicated, the rationale of judicial integrity has been essentially abandoned.

The emergence of the deterrence purpose as the reason for the rule is aptly illustrated by the Court's opinions in fourth amendment retroactivity cases. In *Linkletter v. Walker*,²⁰ the Court, considering the issue for the first time, refused to apply retroactively its decision in *Mapp v. Ohio*.²¹ The *Linkletter* Court observed that the basis for *Mapp's* application of the exclusionary rule to the states was its finding that the rule "was the only effective deterrent to lawless police action."²² Applying that premise to the *Linkletter* case, the Court noted that it "cannot say that this purpose would be advanced by making the rule retrospective.

State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

¹⁴ Writing for the Court, Justice Frankfurter noted: Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.

338 U.S. at 31.

¹⁵ 367 U.S. 643 (1961). One year earlier, in *Elkins v. United States*, 364 U.S. 206 (1960), the Court had ruled that evidence obtained by states' law enforcement officers during a search that would be illegal under the fourth amendment if conducted by federal officers could not be admitted for use in a federal criminal prosecution.

¹⁶ 367 U.S. at 655.

¹⁷ 364 U.S. 206 (1960).

¹⁸ *Id.* at 217.

¹⁹ *Id.* at 223.

²⁰ 381 U.S. 618, 636-39 (1965).

²¹ 367 U.S. 643 (1961).

²² 381 U.S. at 636.

The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved.”²³ Likewise, in *Desist v. United States*,²⁴ the Court observed that “[t]he exclusionary rule ‘has no bearing on guilt’ or the ‘fairness of the trial,’” and it accordingly “decline[d] to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.”²⁵

More recently, in *United States v. Peltier*,²⁶ the Court held that the policy underlying the exclusionary rule did not require the suppression of evidence seized in searches which were clearly unlawful under standards established in *Almeida-Sanchez*,²⁷ but were lawful at the time they were carried out, which was prior to the time that *Almeida-Sanchez* was decided. The Court observed that although Supreme Court decisions applying the exclusionary rule to unconstitutionally seized evidence have referred to “the imperative of judicial integrity,” the Court has relied principally upon the deterrent purpose served by the exclusionary rule.²⁸ The Court further noted that the lesson to be learned from the retroactivity cases is that “the ‘imperative of judicial integrity’ is ... not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution.”²⁹ In the same vein, the Court stated, “[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force.”³⁰ Focusing specifically on the deterrence purpose, the Court concluded that “evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.”³¹

The declaration in the retroactivity cases of the deterrence rationale for the exclusionary rule is also apparent in the Court’s approach to determining whether the rule should be applied in a variety of other circumstances. In *United States v. Calandra*,³² the Court held that a witness before a grand jury could not refuse to answer questions based on

²³ *Id.* at 637.

²⁴ 394 U.S. 244 (1969).

²⁵ 394 U.S. at 254 n.24 (quoting *Linkletter v. Walker*, 381 U.S. 618, 638-39 (1965)).

²⁶ 422 U.S. 531 (1975).

²⁷ 413 U.S. 266 (1973) (Border Patrol’s warrantless automobile search, acting without probable cause, 25 miles from Mexico border held unconstitutional under fourth amendment).

²⁸ 422 U.S. at 536.

²⁹ *Id.* at 537-38 (emphasis omitted).

³⁰ *Id.* at 539 (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)).

³¹ *Id.* at 542.

³² 414 U.S. 338 (1974).

evidence obtained in violation of the fourth amendment. In that case, the Court stated that, "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 and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. . . ." ³³ Similarly, in *United States v. Janis*,³⁴ the Court refused to exclude from a federal civil proceeding evidence seized unconstitutionally but in good faith by state law enforcement officers. The Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion."³⁵ Because the evidence in both *Calandra* and *Janis* had been obtained unlawfully, application of the judicial integrity rationale would have required suppression of the evidence. However, as noted above, the Court considered the deterrent purpose of the exclusionary rule as its primary rationale and concluded that the evidence should not be suppressed.

The deterrence rationale was also used as the basis of exclusionary rule analysis when the Court held that unlawfully seized evidence is admissible to impeach the defendant's testimony at his criminal trial;³⁶ that no person other than the defendant has standing to ask for the invocation of the exclusionary rule;³⁷ and that the rule should not be applied to exclude evidence when it has been seized during an arrest for a violation of a statute which is declared invalid after the arrest has taken place.³⁸ In sum, the judicial integrity rationale has essentially been

³³ *Id.* at 347. Citing *Elkins v. United States*, 364 U.S. 206, 217 (1960), the *Calandra* Court continued: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the Constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 347.

³⁴ 428 U.S. 433 (1976).

³⁵ *Id.* at 454.

³⁶ *United States v. Havens*, 446 U.S. 620 (1980). In an earlier case, *Walder v. United States*, 347 U.S. 62 (1954), the Court had held that if a defendant perjured himself on direct examination, the prosecution could impeach him with evidence illegally seized from him in connection with an entirely different prosecution.

³⁷ See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978) and *United States v. Payner*, 447 U.S. 727 (1980). In *Rakas*, the Court noted that "[d]espite the deterrent aim of the exclusionary rule, we never have held that unlawfully seized evidence is inadmissible in all proceedings or against all persons." 439 U.S. at 134 n.3. In *Payner*, the Court stated:

the decisions of this Court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement. . . . But our cases also show that these unexceptional principles do not command the exclusion of evidence in every case of illegality. Instead they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.

447 U.S. at 734. See also *Alderman v. United States*, 394 U.S. 165 (1969).

³⁸ *Michigan v. DeFillippo*, 443 U.S. 31 (1979). The Court stated:

abandoned by the Court as a factor in its exclusionary rule analysis. Unfortunately, as the analysis in the next section illustrates, many courts have lost sight of the true purpose of the rule and have applied the rule even when the deterrent purpose cannot be served.

III. PROBLEMS WITH THE EXCLUSIONARY RULE

A certain amount of rhetoric seems to arise in any debate concerning the merits of the exclusionary rule as an appropriate part of our criminal justice system. Before beginning an analysis of the problems posed by the present application of the rule, it is important to address some of the misplaced arguments raised in the current debate. Upon proper analysis, the issues contained in these arguments should be characterized as non-issues in that they deal with areas irrelevant to the question of whether or not the rule should be modified or abolished.

One of these non-issues relates to the impact of the rule on the crime rate. Supporters of the rule claim that advocates for reform of the present rule argue incorrectly that modifying the rule will reduce the crime rate.³⁹ The fact, however, is that advocates for reform do not claim that any such change is a panacea for crime rate reduction. Any thoughtful consideration of contemporary crime must recognize, unfortunately, that there are no panaceas, due no doubt to the lamentable fact that we simply do not know the necessary causes of crime itself. On the other hand, advocates for reform do point out that the rule does in fact operate to free known murderers, robbers, drug traffickers and other violent and non-violent offenders and that a rule of evidence which has such a result without a reasonable purpose to support it is intolerable.⁴⁰

Another non-issue relates to the impact of the rule on criminal cases. Supporters of the rule cite a 1979 General Accounting Office (GAO) report which found that evidence was actually suppressed in only 1.3% of a sample of federal criminal cases. They argue that modifi-

The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

Id. at 38 n.3.

³⁹ See, e.g., W. Greenhalgh, Testimony before Attorney General's Task Force on Violent Crime (June, 1981) (available from the ABA).

⁴⁰ See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); M. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE 12-13 (National Legal Center for the Public Interest 1982) [hereinafter cited as M. WILKEY]; *Fourth Amendment Exclusionary Rule Legislation, 1981: Hearings Before the Subcomm. on Criminal Law of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. 9 (1981) (statement of Prof. Steven R. Schlesinger) [hereinafter cited as *Exclusionary Rule Legislation Hearings*].

cation or abolition of the rule is, therefore, not a significant criminal justice issue.⁴¹ Aside from the analytic flaws in the GAO report⁴²—for example, it did not consider cases never presented to United States Attorneys because the law enforcement agency involved felt they presented fourth amendment problems, any common sense perspective on the criminal justice world must take note that the exclusionary rule is a necessary consideration of every police arrest and seizure of physical evidence, that the rule is the overwhelming component of drug case litigation, and that the appellate court overload faced by many judicial districts in this country is due in no small measure to appeals of exclusionary rule issues.⁴³ The argument that, somehow, the exclusionary rule has little impact on the criminal justice process is totally disingenuous.

The real issue concerning the exclusionary rule is independent of both the crime rate and any statistics pertaining to the resolution of individual court cases. The heart of the problem lies in the application of the rule: the courts have gradually expanded application to situations in which the rule cannot possibly serve as a deterrent. This expansion has distorted the preeminent purpose of the rule—deterrence of police misconduct—with the result that the truth finding process is impeded, and society is done a grave and unnecessary injustice.

The clearest example of a misapplication of the exclusionary rule arises when courts suppress evidence seized by police in executing a duly authorized search warrant. In such cases a second or third judge, in disagreement with the judge who issued the warrant, invalidates the search despite the absence of any police misconduct. Consider in this regard *United States v. Karathanos*.⁴⁴ In that case, Immigration and Naturalization Service agents obtained a warrant to search certain business

⁴¹ COMPTROLLER GENERAL OF THE U.S., IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, REP. NO. GGD-79-45 (1979). See also *Fourth Amendment Exclusionary Rule Legislation, 1981: Hearings Before the Subcomm. on Criminal Law of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. 31 (1981) (statement of William W. Greenhalgh on behalf of the American Bar Association Criminal Justice Section). The GAO report was also cited in testimony by Stephen H. Sachs, Attorney General of Maryland, to support Mr. Sachs' belief that critics of the rule greatly exaggerate the extent of the rule's impact on the release of federal criminal suspects. *Bills to Limit the Exclusionary Rule in Federal Criminal Proceedings and to Eliminate and Establish a Damage Action Alternative to the Rule: Hearings Before the Subcomm. on Criminal Law of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. 6 (1981) (statement of Stephen H. Sachs, Attorney General of Maryland).

⁴² For example, the GAO study did not consider cases in which law enforcement agencies made an internal decision that a case may have fourth amendment problems and that, therefore, the case should not even be brought to the attention of the United States Attorney. Additionally, the study does not reflect the number of cases resolved before there was any ruling on the suppression motions. Finally, the GAO study ignores the state court system, which handles the bulk of the country's criminal justice work.

⁴³ See, e.g., M. WILKEY, *supra* note 40, at 14-16.

⁴⁴ 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 428 U.S. 910 (1976).

premises. The warrant was issued based on an affidavit that the magistrate found sufficient to establish probable cause that the defendant was involved in the criminal harboring of illegal aliens. The district court judge, however, disagreed with the finding of the magistrate who issued the warrant and held that probable cause had not been stated.⁴⁵ The evidence that had been obtained by the search was suppressed, even though the appellate court acknowledged that there was no suggestion that the agents had acted improperly either by procuring the warrant in bad faith or by making a material misrepresentation in the warrant application.⁴⁶

*United States v. Shorter*⁴⁷ is another example of the exclusionary rule being applied where an authorized search warrant is invalidated by a second judge or court. In that case, local police and agents of the Federal Bureau of Investigation (FBI) arrested a suspected Ohio bank robber at his home. After the arrest, the FBI agent telephoned a federal magistrate and stated his grounds for a search warrant which was then issued by the magistrate as permitted by law.⁴⁸ The subsequent search produced incriminating evidence, including bait bills and a firearm. The trial judge ruled the search lawful, but the conviction was reversed on appeal. The appellate court decided that although the officer had in fact been placed under an oath by the magistrate which incorporated all the testimony already provided in the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the beginning of the telephone conversation violated the law because the applicable Federal Rule requires that the oath be obtained "immediately."⁴⁹

⁴⁵ 399 F.Supp. 185, 191 (E.D.N.Y. 1975), *aff'd*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 428 U.S. 910 (1976).

⁴⁶ 531 F.2d at 35.

⁴⁷ 600 F.2d 585 (6th Cir. 1979).

⁴⁸ FED. R. CRIM. P. 41(c)(2).

⁴⁹ 600 F.2d at 589. See also *United States v. Button*, 653 F.2d 319 (8th Cir. 1981), in which the defendant was charged with possession of the illegal substance phencyclidine, or "angel dust." The indictment was based upon items seized in a search conducted pursuant to a search warrant issued by a state district judge, based upon the affidavit of a Minneapolis police officer. The officer had obtained this information from two unnamed informants. Before trial, the defendant moved to suppress the evidence, claiming that the warrant had been issued without probable cause. The motion was heard by a United States Magistrate, who filed a report and recommendation upholding the validity of the warrant. The report and recommendation was adopted by the United States District Court, which denied the motion to suppress. In the subsequent trial the defendant was convicted of the offence charged. He appealed the conviction on fourth amendment grounds; the Eighth Circuit overturned the conviction. The court held that the policeman's affidavit did not establish probable cause in that some of the information therein was stale, *id.* at 324-25, and that the affidavit did not contain enough information about underlying circumstances to adequately establish credibility or reliability of the informants. *Id.* at 326-27.

Both *Karathanos* and *Shorter* involve disagreements between judges about judicial conduct—there is no police misconduct involved. The police were carrying out their duties as society expects them to do: the officers provided their information fully and honestly to the court and proceeded to carry out the orders of the court once the warrants were issued. Suppression of evidence in instances such as these does not serve the purpose of the exclusionary rule—the deterrence of police misconduct. In fact, it only serves to damage both a community's perception of justice and the morale of law enforcement officers who have followed the rules only to have the evidence suppressed on the premise that they have violated the Constitution.⁵⁰ Proper police conduct is thus falsely labelled as illegal.

The deterrent purpose of the exclusionary rule also is not served when courts apply the rule to situations where the appellate court cases are not at all clear, where the law is thoroughly confused or even where the cases are in flat contradiction. For in these instances, police are confronted with the question of the legality of a warrantless search in the field under circumstances where existing decisions do not clearly state a rule of law.

In its 1980-81 term, the United States Supreme Court decided two cases that aptly illustrate this point, *New York v. Belton*⁵¹ and *Robbins v. California*.⁵² The cases are remarkably similar factually. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in *Robbins*, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found thirty pounds of marijuana. In *Belton*, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required an analysis of the "automobile exception" cases⁵³ which pertain to the validity of warrantless searches of cars and

⁵⁰ Another problem with the application of the exclusionary rule arises in state court cases when law enforcement officers have acted upon an existing statute that is later declared to be unconstitutional, and evidence is suppressed despite the fact that the police conduct was lawful at the time the search was conducted. In all fairness, we cannot expect our law enforcement personnel to anticipate future court decisions that may invalidate a statute as it exists on the books at the time of the search. Yet, that is in essence what courts seem to expect by applying the exclusionary rule in such circumstances. In contrast, federal courts do not apply the exclusionary rule in those situations. See *Michigan v. DiFillippo*, 443 U.S. 31 (1979).

⁵¹ 453 U.S. 454 (1981).

⁵² 453 U.S. 420 (1981).

⁵³ It is established that searches conducted outside the judicial process, without prior approval by a 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*

their contents; the doctrine of "search incident to arrest" as defined by *Chimel v. California*;⁵⁴ and the watershed case of *United States v. Chadwick*,⁵⁵ in which the Court held that police must obtain a warrant to open a closed container in an automobile where the possessor of the container has exhibited a "reasonable expectation of privacy" in that particular container.⁵⁶ Three Supreme Court justices opined that both searches were legal; three justices opined that they were both illegal; and three justices controlled the ultimate decision that *Robbins* was illegal and *Belton* legal. To add to the confusion, these results reversed both decisions at the state level. The *Robbins* search now said to be illegal had been found to be legal by the California Supreme Court,⁵⁷ and the *Belton* search now said to be legal had been found to be illegal by the New York Court of Appeals.⁵⁸ When *Robbins* was decided in 1981, fourteen judges had reviewed the search: seven found it valid; seven invalid.

It is small wonder that after *Robbins* and *Belton* had been decided, Justice Brennan observed that, "[t]he Court does not give the police any 'bright line' answers to these questions. More important, because the Court's new rule abandons the justifications underlying *Chimel*, it offers no guidance to the police officer seeking to work out these answers for himself."⁵⁹ To the same end, Justice Rehnquist, in his dissent in *Robbins*, cited language from Justice Harlan's concurring opinion in *Coolidge v. New Hampshire*:⁶⁰

State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to such an every day question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed

States, 389 U.S. 347, 357 (1967). The "automobile exception" was first enunciated in *Carroll v. United States*, 267 U.S. 132 (1925), in which the Court recognized that the mobility of an automobile created the possibility that the vehicle might be moved out of the locality or jurisdiction in which a warrant must be sought. In a later case, the Court emphasized that the "automobile exception" comes into play only where exigent circumstances exist. There must be some demonstrated need for immediate action: a fleeting opportunity to search; a defendant bent on flight; contraband or stolen goods or weapons that are easily removable; the inconvenience of a special police detail to guard the immobilized automobiles; or confederates waiting to move the evidence. *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971). However, the Court had suggested in a footnote that although a warrantless search of an unoccupied vehicle may be permissible under *Carroll*, there was no precedent for extending *Carroll* to cover searches of closed containers. *Id.* at 461 n.18.

⁵⁴ 395 U.S. 752 (1969).

⁵⁵ 433 U.S. 1 (1977).

⁵⁶ *Id.* at 14.

⁵⁷ *People v. Robbins*, 103 Cal. App. 3d 34, 162 Cal. Rptr. 780 (1980), *rev'd sub nom.*, *Robbins v. California*, 453 U.S. 420, (1981).

⁵⁸ *People v. Belton*, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S. 574 (Ct. App. 1980), *rev'd sub nom.*, *New York v. Belton*, 453 U.S. 454, (1981).

⁵⁹ 453 U.S. at 470 (emphasis omitted).

⁶⁰ 403 U.S. 443, 490-91 (1971).

to have been used during the commission of a crime.⁶¹

It was not surprising that the United States Supreme Court was immediately thereafter faced with some of these same issues last term in *United States v. Ross*,⁶² in which the Court asked both sides to address the question of whether *Robbins* should be reconsidered. Like *Robbins*, the *Ross* case involved an automobile stop, the arrest of the driver and, upon search of a closed container within the car, the discovery of contraband. The *Ross* Court recognized the importance of striving for clarification of the law and acknowledged that judicial disagreement concerning the proper interpretation of *Arkansas v. Sanders*,⁶³ which had followed *Chadwick*, was at least partially responsible for the fact that *Robbins* had been decided the prior term without a Court opinion.⁶⁴ In an attempt to clarify the case law in this area, the Court reversed *Robbins*, distinguished *Chadwick* and *Sanders*, and held that if probable cause justifies search of a lawfully stopped vehicle under the automobile exception to the warrant requirement, it justifies the search of every part of the vehicle and its contents, including all closed containers, that may conceal the object of the search.⁶⁵

Although the *Ross* decision will likely prove helpful in guiding police practices in searches conducted during highway stops, this clarification unfortunately came too late to affect the countless search and seizure cases that followed upon, pondered upon and expanded upon the *Chadwick* and *Sanders* decisions.⁶⁶ In acknowledging that lower courts had differed in their interpretations of those cases and police officers needed more guidance in interpreting the law, the *Ross* Court recognized the great degree of confusion spawned by *Chadwick* in both

⁶¹ 453 U.S. at 436.

⁶² 102 S. Ct. 2157 (1982).

⁶³ 442 U.S. 753 (1979).

⁶⁴ 102 S. Ct. at 2161.

⁶⁵ *Id.* at 2172. The Court stated that its result was not inconsistent with its holdings in *Chadwick* and *Sanders*. The search in *Ross* was based upon probable cause to search the entire vehicle and therefore came within the automobile exception to the warrant requirement. In contrast, in both *Chadwick* and *Sanders* the police had probable cause to search the footlocker and the suitcase respectively before either came near the automobile—it was merely coincidental that those particular containers ended up in a car. *Id.* at 2167.

⁶⁶ The *Robbins* case is an apt illustration of this point. The defendant, Jeffrey Robbins, was arrested and convicted in 1975. The United States Supreme Court overturned the conviction in 1981, concluding that the search was unconstitutional and that the evidence should be suppressed. As a result the California prosecutor dismissed the case.

To add to the irony, at the time Robbins was arrested he was on probation for a federal drug offense. His subsequent drug activities in California constituted a probation violation but federal authorities decided not to revoke his probation in light of the fact that the prison term for his California conviction would be five years to life. By the time the *Robbins* Court had overturned the conviction, it was too late to bring federal charges with the result that no action was taken for his violation of probation.

federal and state courts. In California, for example, the watershed car stop-cum-closed container cases were *People v. Minjares*⁶⁷ and *People v. Dalton*.⁶⁸ In the former case, police in hot pursuit arrested an armed robber in a stolen car, lawfully opened the trunk, but were found to be in violation of the Constitution when, without obtaining a search warrant, they unzipped a totebag found in the trunk and removed three handguns and loot from the robbery. In *Dalton*, police lawfully stopped a car, lawfully looked in the trunk, but were said to be unlawful when they opened a metal box found in the trunk and removed a weapon and narcotics. In both these cases the existing law at the time of the search was such that it was clearly reasonable for the officers to believe their conduct was lawful, yet the California court found the searches illegal under cases decided subsequent to the search.⁶⁹ As Justice Rehnquist pointed out in his dissent from a denial of stay in *Minjares*,⁷⁰ the case was not one in which the officers lacked probable cause to arrest and search; rather, the defendant was to go free:

solely because of a good-faith error on the part of the arresting officers, who were not sufficiently prescient to realize that while it was constitutionally permissible for them to search the trunk ... courts would later draw a distinction between searching the trunk and a tote bag in the trunk.⁷¹

Yet the California court found the searches illegal under cases decided subsequent to the search and, in so doing, proved that they were also not "sufficiently prescient" to recognize, as we now learn from the *Ross* decision, that *Chadwick* does not render these searches unconstitutional.

In reflecting upon the rules of law resident somewhere within these decisions, one should also consider an important fact which is often overlooked in exclusionary rule discussions. The search in *Robbins* actually took place on January 5, 1975, long before *Chadwick* was decided on June 21, 1977. Similarly, the *Minjares* and *Dalton* searches took place prior to the court decisions upon which the California Supreme Court based its conclusions that both searches were illegal. At the very least, it

⁶⁷ *People v. Minjares*, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224 (1979), *cert. denied*, 444 U.S. 887 (1979).

⁶⁸ *People v. Dalton*, 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979), *cert. denied sub nom.*, *California v. Dalton*, 445 U.S. 946 (1980).

⁶⁹ Consider *Minjares*, for example. At the time of the search it was clear that under *Chambers v. Maroney*, 399 U.S. 42 (1970), a warrantless search of the automobile, if based on probable cause to believe that the auto contains contraband or evidence of a crime, was permissible when it took place after the auto had been towed to a police station. In *Minjares*, there was probable cause to search both the trunk and the tote bag. It cannot be considered unreasonable for the police to have thought that search of the bag was lawful given that there was probable cause to conduct the search.

⁷⁰ *California v. Minjares*, 443 U.S. 916 (1979) (on application for stay of mandate pending disposition of a petition for a writ of certiorari) (Rehnquist, J., dissenting from denial of stay).

⁷¹ *Id.* at 918-19.

is fair to say that the applicable rule at the time of those searches was more elusive at that time than it is today, yet the courts impose the final definitive sanction of suppression of reliable, trustworthy evidence in such situations on the assumption that this judicial act will deter police misconduct.

With respect to this typical exclusionary rule analysis, it is instructive to note that the standard to which police are held in fourth amendment cases is stricter than that to which attorneys must comply when they are judged under the sixth amendment⁷² guarantee that criminal defendants be represented by competent counsel. Consider, in this regard, *People v. Russell*,⁷³ another car stop and closed container case decided by a California appellate court in 1980. In *Russell*, once again there was a lawful stop, lawful opening of the car trunk, and police discovery of marijuana when they unzipped a flight bag. At trial the search was uncontested, and the defendant convicted. On appeal it was contended that his counsel at trial was incompetent under the standard announced in *People v. Pope*,⁷⁴ which requires that an appellant "show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates."⁷⁵ In support of this position, the defendant argued that counsel had not asserted that opening the flight bag required a search warrant under the requirements of *People v. Dalton*,⁷⁶ a California search and seizure case in which the court had applied the holding in *Chadwick*, despite the fact that the search took place prior to the *Chadwick* decision. The court rejected the defendant's contention that the attorney was incompetent, stating:

It is first noted that the hearing on Russell's motion to suppress evidence occurred February 13, 1979. The opinion of *People v. Dalton* was filed six months later, August 16, 1979. It is doubtful that *Pope* requires, under pain of being held to have furnished constitutionally inadequate representation, such prescience on the part of a lawyer for one criminally accused.⁷⁷

Implicit in that language is a conclusion that the state of the law of search and seizure was such that a criminal defense attorney, when confronted with the issue in the courtroom, was not expected to be aware that there was a fourth amendment violation on those particular facts. Indeed, the court found that a reasonably prepared attorney was not expected to anticipate that a future search and seizure decision, *People v.*

⁷² U.S. CONST. amend. VI.

⁷³ 101 Cal. App. 3d 665, 161 Cal. Rptr. 735 (1980).

⁷⁴ 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979).

⁷⁵ *Id.* at 425, 590 P.2d at 866, 152 Cal. Rptr. at 739.

⁷⁶ 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979), *cert. denied*, 445 U.S. 946 (1980).

⁷⁷ 101 Cal. App. 3d at 668, 161 Cal. Rptr. at 736.

Dalton,⁷⁸ would hold similar police conduct unlawful. Yet, as was illustrated in the *Dalton* and *Robbins* decisions, there is no such hesitation in requiring "such prescience" on the part of police officers faced with precisely the same problem of legal analysis which confronted the attorney in *Russell*.

The consequence of applying the exclusionary rule in the cases discussed above is two-fold. First, the purpose of the exclusionary rule is not served when the officers believe, in good faith, that they are performing a lawful search. When law enforcement officers obtain a warrant in good faith or when they make a reasonable, good faith attempt to predict the decisions that future courts will make, there exists no logical basis for excluding the evidence they have gathered. Applying the rule in these cases fails to further in any degree the rule's deterrent purpose, since good faith conduct reasonably engaged in is by definition not susceptible to being deterred by the imposition of after-the-fact evidentiary sanctions.

Second, application of the exclusionary rule when the police have acted reasonably and in good faith results in attaching a false label to proper police conduct. This adversely affects the criminal justice system by fostering the public perception that police are engaged in lawless, improper conduct when that is simply not the case. The Supreme Court recognized some of these effects in *Stone v. Powell*,⁷⁹ in which it stated:

[t]he disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice.⁸⁰

The unjustified acquittals of guilty defendants due to application of the exclusionary rule have resulted in a growing concern by our citizens that our system of justice is lacking in sense and fairness. Unfortunately, it seems unlikely that any of these conceptions by the public will change as long as the exclusionary rule remains in its present form and courts continue to expand its application to situations where law enforcement conduct has been manifestly reasonable.

⁷⁸ 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979), *cert. denied*, 445 U.S. 946 (1980).

⁷⁹ 428 U.S. 465 (1976).

⁸⁰ *Id.* at 490-91.

IV. THE REASONABLE, GOOD FAITH EXCEPTION

A. DEVELOPMENT OF THE EXCEPTION

Adopting the construction of the exclusionary rule announced by the Fifth Circuit in *United States v. Williams*⁸¹ would solve many of the problems discussed above. In *Williams*, the court held that otherwise admissible evidence may not be excluded from trial if it has been obtained by an officer acting in a reasonable and good faith belief that he conducted himself in accordance with the fourth amendment.⁸² This concept of a reasonable, good faith exception to application of the exclusionary rule is not new to the United States Supreme Court. On the contrary, the basic premises supporting adoption of such a doctrine have been discussed in several court decisions during the past decade. The initial premise is that the exclusionary rule's primary rationale is the deterrence of illegal police conduct. As this article already has established, the Court has continued to emphasize the deterrence rationale, and it is now considered to be the essential reason behind the rule.⁸³ The Court also has begun to develop a relationship between the rule's deterrence purpose and the concept of a good faith exception. This trend commenced with *Michigan v. Tucker*,⁸⁴ in which the Court stated that:

[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.⁸⁵

Likewise, in *United States v. Peltier*,⁸⁶ the Court explained that:

[i]f the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.⁸⁷

⁸¹ 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

⁸² *Id.* at 847.

⁸³ See *supra* notes 16-37 and accompanying text.

⁸⁴ 417 U.S. 433 (1974).

⁸⁵ *Id.* at 447.

⁸⁶ 422 U.S. 531 (1975).

⁸⁷ *Id.* at 542. The *Peltier* Court also noted that in the cases dealing with retroactivity of the exclusionary rule, it had "recognized that the introduction of evidence which had been seized by law enforcement officers in good-faith compliance with then-prevailing constitutional norms did not make the courts 'accomplices in the willful disobedience of a Constitu-

In a later case, *Stone v. Powell*,⁸⁸ the good faith issue was mentioned prominently in both Chief Justice Burger's concurring decision and Justice White's dissent. The thrust of the Chief Justice's attack on the exclusionary rule was that the "dismal social costs occasioned by the rule"⁸⁹ are too great to justify continued use of the rule when its deterrent effect is merely an unsubstantiated assumption.⁹⁰ He stated that the rule exists as a clumsy, indirect means of imposing sanctions, especially since the issue of whether the policeman did indeed run afoul of the fourth amendment often is not resolved until years after the event.⁹¹ He further stated that the sanction is particularly indirect when the police go before a magistrate, who issues a warrant; once the warrant issues, there is literally nothing more the police can do in seeking to comply with the law.⁹² Noting that the rule was being applied indiscriminately to all types of fourth amendment violations, however slight, inadvertent or technical,⁹³ the Chief Justice suggested that if the rule should be preserved at all, its scope should be limited to egregious, bad faith conduct.⁹⁴

In a dissenting opinion, Justice White observed that prior court decisions had overshot their mark insofar as they aimed to deter unlawful action by law enforcement officers.⁹⁵ He stated that to the extent that in many of its applications the exclusionary rule was not advancing the deterrent aim in the slightest, the rule was "a senseless obstacle to arriving at the truth in many criminal trials."⁹⁶ Although Justice White did not believe that the rule should be wholly abolished, he was nevertheless of the view that the rule should be substantially modified so as to prevent its application in those frequent instances where the evidence at

tion they are sworn to uphold." *Id.* at 536 (citing *Elkins v. United States*, 364 U.S. 205, 223 (1960)).

⁸⁸ 428 U.S. 465 (1976). Defendant Powell was arrested pursuant to a local vagrancy ordinance later found to be unconstitutional. The search incident to his arrest uncovered a revolver that the defendant had used ten hours earlier to kill someone during a liquor store theft. Powell was convicted of second degree murder.

⁸⁹ *Id.* at 501.

⁹⁰ Chief Justice Burger observed that "[n]otwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect." *Id.* at 499.

⁹¹ *Id.* at 498.

⁹² *Id.* The Chief Justice declared that imposing an admittedly indirect sanction on the police officer when he is acting pursuant to a warrant "is nothing less than sophisticated nonsense." *Id.*

⁹³ *Id.* at 501.

⁹⁴ *Id.* Chief Justice Burger expressed irritation at the belief that "[i]ncentives for developing new procedures or remedies will remain minimal or non-existent so long as the exclusionary rule is retained in its present form." *Id.* at 500.

⁹⁵ *Id.* at 538. To this effect, Justice White specifically mentioned *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹⁶ 428 U.S. at 538.

issue was seized by an officer acting in the reasonable, good faith belief that his conduct comported with existing search and seizure law.⁹⁷ In such cases, wrote Justice White, exclusion of seized evidence can have no deterrent effect: "the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth finding function of proceedings is substantially impaired or a trial totally aborted."⁹⁸

Thus, in several different contexts, members of the United States Supreme Court have recognized that the deterrent purpose of the exclusionary rule is not served when the police officers believe, in good faith, that they are complying with fourth amendment law. To date, however, the Court has not addressed directly the question of whether the exclusionary rule should be applied when the government shows that the officer's fourth amendment violation was the result of a reasonable, good faith mistake. The Fifth Circuit answered that very question in *United States v. Williams*⁹⁹ after an exhaustive analysis of the relevant Supreme Court decisions. A majority of the twenty-four judges of that court, sitting *en banc*, concurred in an opinion which concluded that applying the rule in such a situation would serve no deterrent purpose whatsoever.¹⁰⁰ The court held:

[h]enceforth 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.¹⁰¹

In justification of this conclusion, the court first noted that the exclusionary rule is not a constitutional requirement.¹⁰² Rather, the court described it as "a judge-made rule crafted to enforce constitutional requirements, justified in the illegal search context only by its deterrence

⁹⁷ *Id.*

⁹⁸ *Id.* at 540.

⁹⁹ 622 F.2d 830 (5th Cir. 1980) (*en banc*), *cert.denied*, 449 U.S. 1127 (1981).

¹⁰⁰ *Williams* involved a warrantless arrest and a search made incident to that arrest by a Drug Enforcement Administration agent at an airport. The agent observed the defendant disembarking from a non-stop flight from Los Angeles. The agent knew the defendant and was aware that one year before she had pleaded guilty to a federal drug charge and was currently free on bond pending appeal on the condition that she stay within certain boundaries near Cincinnati, Ohio. The agent arrested her for "bail jumping." A search of her jacket produced heroin. After indictment on two drug offenses, the defendant moved to suppress the drugs, arguing that because the penalty provisions of the Bail Reform Act, 18 U.S.C. 3150 (1970), applied only to persons who fail to appear before a court or judicial officer when ordered to do so, and the agent had no information indicating that she had failed to appear in answer to such a request, the agent had no probable cause to arrest her. *Id.* at 833-35.

¹⁰¹ *Id.* at 846-47.

¹⁰² *Id.* at 841.

of future police misconduct.”¹⁰³ The court determined that the deterrent purpose was the preeminent purpose behind the rule and noted that this purpose was not served when the improper police actions were taken in reasonable, good faith.¹⁰⁴ Accordingly, there was no compelling reason to apply the exclusionary rule in such cases.

The good faith exception announced by the Fifth Circuit is the same rule urged by the Attorney General’s Task Force on Violent Crime.¹⁰⁵ In addition, a legislative proposal based on the language in *Williams* was introduced by Senator Strom Thurmond in the Senate Judiciary Committee.¹⁰⁶ The Senate bill, S. 2231, states as follows:

Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.¹⁰⁷

If implemented, this restatement of the exclusionary rule would go a long way towards insuring that the exclusionary rule would be applied only in those situations in which police misconduct logically can be deterred. Law enforcement officers will no longer be penalized for their reasonable, good faith efforts to execute the law. On the other hand, courts would continue to exclude evidence obtained as a result of searches or seizures which were performed in an unreasonable manner or in bad faith, such as by deliberately misrepresenting the facts used to obtain a warrant. Thus, the penalty of exclusion will only be ordered when officers engage in the type of conduct the exclusionary rule was designed to deter—clear, unreasonable violations of our very important fourth amendment rights.

B. OPPOSITION TO ADOPTION OF A REASONABLE, GOOD FAITH EXCEPTION

Various commentators have voiced criticism against the good faith exclusionary rule in recent months. Some of their contentions are the

¹⁰³ *Id.* at 841-42 (citing *Michigan v. DeFillippo*, 440 U.S. 31, 38 n.3 (1979); *United States v. Cruz*, 581 F.2d 535 n.1 (5th Cir. 1978) (en banc)).

¹⁰⁴ 622 F.2d at 843-47. Moreover, the court explained that the rule’s application should be considered in light of its direct effect of preventing the “whole truth” from being told and its by-product of freeing quality criminals and endangering society.

¹⁰⁵ TASK FORCE REPORT, *supra* note 7, at 55.

¹⁰⁶ S. 2231, 99th Cong., 2d Sess. (1982).

¹⁰⁷ *Id.*

result of mischaracterizations of the rule itself. Others are grounded upon incorrect assumptions concerning the nature and motivations of law enforcement personnel. Still other contentions appear to be grounded upon misconceptions pertaining to the exclusionary rule's origin, purpose and effectiveness.

One frequently articulated criticism of the good faith exception is that the new rule would put a premium on police ignorance. For example, Stephen H. Sachs, Attorney General of Maryland, recently stated that "[i]ntroduction of the 'reasonable good faith' test would, I fear, depress Fourth Amendment compliance to the level of our tolerance for the lowest standards of the least informed officer. And there would be no incentive to do better."¹⁰⁸ Other commentators have predicted that if the good faith exception is adopted, "[a]ll internal disciplinary efforts of law enforcement agencies will be totally negated. . . ."¹⁰⁹ In both respects, this is not the case. Such assertions ignore the fact that the good faith exception requires more than an assessment of an officer's subjective state of mind. In fact, the exception further requires a showing that the officer's bona fide good faith belief is grounded in an objective reasonableness. As the *Williams* court explained, the officer's belief in the lawfulness of his action must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully."¹¹⁰ Thus, an arrest or search that clearly violated the fourth amendment under prior court decisions would not be excepted from the rule simply because a police officer was unaware of the pertinent case law. Because the police would still be held to know the law where it is clear and to act reasonably in instances in which the law is not so clear, it still would be in the police officer's best interest to keep abreast of the latest developments in the law. Similarly, law enforcement agencies would still have an incentive to maintain continuing legal education programs for their personnel.

In a similar vein, the good faith exception has been attacked by parties who intimate that police will be able to plead ignorance of the law as an excuse for their allegedly unlawful actions, unlike the case for private citizens who are held to know the law.¹¹¹ That analogy is inapposite. Although a citizen is held to know the law, the criminal law is on the books, spelled out in black and white. In contrast, a police officer's

¹⁰⁸ *Bills to Limit the Exclusionary Rule in Federal Criminal Proceedings and to Eliminate and Establish a Damage Action Alternative to the Rule: Hearings Before the Subcomm. on Criminal Law of the Senate Judiciary Comm.*, *supra* note 41, at 15-16.

¹⁰⁹ M. WILKEY, *supra* note 40, at 35.

¹¹⁰ 622 F.2d at 841, n.4a.

¹¹¹ See, e.g., *More than an Idle Preachment*, L.A. Times, Dec. 31, 1981, § II, at 4, col. 1; *Exclusionary Rule Legislation Hearings*, *supra* note 40, at 22, *United States v. Williams*, 622 F.2d 830, 850 n.4 (5th Cir. 1980) (Rubin, J., concurring), *cert. denied*, 449 U.S. 1127 (1981).

conduct is not so explicitly circumscribed; rather, the law of search and seizure is increasingly complex and one who attempts to comply with the law finds very few bright lines to follow. Yet police officers often must make their decisions in the face of bewildering and contradictory case law, a seemingly unfair burden in light of the difficulty appellate judges have in making those same determinations.

Finally, opponents of the good faith exception have claimed that the necessity of determining good or bad faith will encourage the police to commit perjury.¹¹² Such a conclusion is completely unfounded. This argument is thoroughly unfair, a gratuitous slur upon the integrity of police in this country, based upon no more than the imagination of its proponents.

C. CONSTITUTIONALITY OF CONGRESSIONAL MODIFICATION

There is strong indication that Congressional legislation establishing a reasonable, good faith exception to the exclusionary rule would be held to be constitutional. Congressional action in this area was explicitly invited by Chief Justice Burger in his dissenting opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹¹³ in which he stated that, "the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced."¹¹⁴ As a possible alternative to the rule, the Chief Justice suggested that Congress develop a new statutory remedy for victims of unconstitutional searches and seizures. However, the tort remedy was not offered as the exclusive acceptable substitute; the statement of the Chief Justice left the discussion open for examination of other suitable alternatives.

Supreme Court decisions during the past decade indicate that the Court today would sustain reasonable congressional action limiting the rule without the substitution of a new remedy, so long as the modified rule furthered the Court's articulated purpose of the exclusionary rule. It has already been established that there is a legal precedent for adoption of the reasonable, good faith exception.¹¹⁵ The exception is primar-

¹¹² M. WILKEY, *supra* note 40, at 36.

¹¹³ 403 U.S. 388, 422-24 (1971). The petitioner alleged that agents of the Federal Bureau of Narcotics made a warrantless entry of his apartment, searched the apartment and arrested him on narcotics charges—all acts allegedly done without probable cause. The petitioner filed a complaint seeking damages for injuries resulting from the agents' violation of the fourth amendment. The Court held that a federal agent's fourth amendment violation while acting under color of his authority gives rise to a cause of action for damages consequent upon that unconstitutional conduct.

¹¹⁴ *Id.* at 424.

¹¹⁵ See *supra* notes 72-88 and accompanying text.

ily grounded on Supreme Court cases such as *United States v. Peltier*,¹¹⁶ *Michigan v. DeFillippo*¹¹⁷ and *United States v. Calandra*,¹¹⁸ in which the Court emphasized deterrence as the exclusionary rule's primary basis and refused to apply the rule when the conduct of the law enforcement officer was not capable of being deterred.¹¹⁹ The good faith exception is also consistent with notions of "judicial integrity" to the extent that such a concept remains as a rationale for retaining the rule in some form. As the Supreme Court stated in *Peltier*, "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law. . . ." ¹²⁰

Finally, it is important to remember that the reasonable, good faith exception already has undergone constitutional scrutiny and been upheld in both federal and state jurisdictions. The Fifth Circuit found the exception to be constitutional in *United States v. Williams*¹²¹ in an *en banc* opinion based upon an extensive analysis of relevant Supreme Court cases. In addition, the *Williams* holding has been followed in specific contexts by the highest appellate courts in two states, New York¹²² and Kentucky,¹²³ and has been codified by at least two state legislatures.¹²⁴ Thus, the exception already has established a basis of constitutional and legislative support and, given the trend set by United States Supreme Court cases, it appears that a broader base of support is likely to form

¹¹⁶ 422 U.S. 531 (1975).

¹¹⁷ 443 U.S. 31 (1979).

¹¹⁸ 414 U.S. 338 (1974).

¹¹⁹ See also *Rakas v. Illinois*, 439 U.S. 128 (1978) (no vicarious application of the exclusionary rule); *United States v. Janis*, 428 U.S. 433 (1976) (evidence not excluded from federal civil proceeding when seized unconstitutionally but in good faith by state law enforcement officers).

¹²⁰ 422 U.S. at 537-38 (emphasis omitted).

¹²¹ 622 F.2d 830 (1980), *cert. denied*, 449 U.S. 1127 (1981).

¹²² *People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (N.Y. 1981).

¹²³ *Richmond v. Commonwealth*, 29 CRIM. L. REP. (BNA) 2529 (Ky. Ct. App. 1981).

¹²⁴ Just last year, Colorado passed a statute that provides that "evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer ... as a result of a good faith mistake or of a technical violation." COLO. REV. STAT. § 16-3-308(1) (1981). The term "good faith mistake" is defined as "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause." *Id.* at § 16-3-308(2)(a). In addition, the statute defines a "technical violation" to be a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled." *Id.* at § 16-3-308(2)(b). The Colorado statute, which appears to be based upon the decision in *United States v. Williams*, 622 F.2d 820 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981), could well mark the start of a movement by state legislatures to force the courts to apply the exclusionary rule only when the rule's deterrent purpose will be furthered. See also *Searches or Seizures—Unlawful—Admissibility of Evidence*, 1982 Ariz. Legis. Serv. 435 (West) (amending ARIZ. REV. STAT. ANN. § 13-3911 (1978)).

over time.¹²⁵

V. CONCLUSION

Legislation establishing a reasonable, good faith exception to the exclusionary rule should be viewed as a measure that simply states the true scope of the rule. Given that deterrence is the rationale for the rule, the situations where law enforcement officers have performed a search or seizure reasonably and in the good faith belief that their conduct comports with the law are precisely the ones in which it seems indefensible to exclude the evidence they have gathered. When a court does order suppression of evidence in such circumstances, it imposes a label of police misconduct when in fact there is none. The result is that law enforcement officers must suffer the personal indignity of being branded as lawbreakers, while at the same time the public is misled into thinking that there is widespread police abuse when it does not actually exist.

The present application of the exclusionary rule to situations where the police reasonably and truly believe in the legality of their conduct also results in disrespect for the courts. It is difficult for the public as well as law enforcement personnel to maintain faith in the criminal justice system when it appears that courts are continually abandoning common sense reasoning in favor of an intricate, inflexible procedural structure. When evidence is excluded without regard to the reasonableness of the police conduct or the nature of the criminal offense, an unfortunate result is that the truth-finding process becomes distorted. Indiscriminate application of the exclusionary rule allows the determination of guilt or innocence to be made without assessment of all the probative and trustworthy evidence available, thereby rendering the criminal justice system unreliable and impotent.

Implementation of the reasonable, good faith exception would limit application of the exclusionary rule to furtherance of its original purpose of deterrence. As a result, the focus of criminal proceedings would remain directed to the process of determining the truth in order to convict the guilty and free the innocent. In addition, faith in the criminal jus-

¹²⁵ In a recent opinion, *Taylor v. Alabama*, 55 U.S. L.W. 4783 (U.S. June 23, 1982) (No. 81-5152), Justice Marshall, writing for a 5-4 majority, declined to recognize the good faith exception in the context of a confession made subsequent to an illegal arrest. This opinion, however, appears to have little if any precedential value as an absolute rejection of the good faith exception in that the State merely raised the issue as an alternative argument and Justice Marshall treated it as such, summarily dismissing the argument and focusing instead on case law pertaining to the "fruit of the poisonous tree." In addition, it is unclear whether the Court's two line comment on the good faith exception is a rejection of the exception as a general concept or whether the Court merely declined to recognize it in this particular case. In light of the limited context in which the exception was mentioned, it is unlikely that the Court has precluded a full review of the doctrine in later cases.

tice system should be strengthened because the police and public would no longer be penalized by the unnecessary suppression of reliable evidence. This common sense limitation of the exclusionary rule would return integrity to our judicial system and law enforcement programs and therefore should be adopted on a nationwide basis, in both state and federal courts.