IS IT TIME FOR A CHANGE IN THE EXCLUSIONARY RULE? *UNITED STATES V. WILLIAMS* AND THE GOOD FAITH EXCEPTION

Over seventy-five years ago in *Weeks v. United States*,[1] the United States Supreme Court created the exclusionary rule by holding that unconstitutionally obtained evidence could not be admitted in criminal trials. Despite the rule's longevity, its justification remains uncertain[2] and its critics abound. Many commentators have suggested that the rule should be sharply limited or even eliminated.[3]

In *United States v. Williams*[4] the United States Court of Appeals for the Fifth Circuit limited the exclusionary rule significantly by creating a good faith mistake exception to its application.[5] Thirteen judges of the en banc court held that evidence seized in contravention of the fourth amendment is admissible in criminal trials if seized by police officers acting under an objectively reasonable, good faith belief that their actions are constitutionally authorized.[6] The *Williams* court, adopting the balancing test used in several recent Supreme Court fourth amendment decisions,[7] found that the harm to society caused by

1. 232 U.S. 383 (1914). *See* notes 11-13 *infra* and accompanying text.

2. *See* notes 21-23 *infra* and accompanying text.

3. For example, Chief Justice Burger recently criticized the exclusionary rule in a speech made at the American Bar Association Convention in Houston. The Chief Justice stated that "our search for justice must not be twisted into an endless quest for technical errors unrelated to guilt or innocence." N.Y. Times, Feb. 9, 1981, at A1, col. 4. President Reagan has also called for reform of the " 'exclusionary rule', which prohibits the use in court of illegally seized evidence, 'no matter how guilty the defendant or how heinious the crime'." *Id.*, Sept. 29, 1981, at A1, col. 4, cont. at A19, col. 1. *See also* note 17 *infra*.

4. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981).

5. The majority opinion was divided into two parts. Part one, joined by 16 judges, held that Williams' arrest and subsequent search were valid. This holding was sufficient in itself to uphold the lower court's decision to admit the fruits of the search. 622 F.2d at 839. *See* notes 101-02 *infra* and accompanying text. Part two, joined by 13 judges, created the good faith exception. 622 F.2d at 840. *See* notes 103-04 *infra* and accompanying text.

6. 622 F.2d at 840.

7. *See, e.g.,* Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979) ("purpose of exclusionary rule is to deter unlawful police conduct"); United States v. Caceres, 440 U.S. 741, 754-55 (1979) (rule rests primarily on judgment that deterring police conduct that may invade the constitutional rights of individuals outweighs importance of securing conviction of specific defendant); United States v. Janis, 428 U.S. 433, 446 (1976) (" 'prime purpose' of the rule, if not the sole one 'is to deter future unlawful police conduct' "); Brown v. Illinois, 422 U.S. 590, 599-600 (1975) (" 'purpose is to deter—to compel respect for the constitutional guarantee' "); United States v. Peltier, 422 U.S. 531, 538-39 (1975) (" 'rule has been restricted to those areas where its remedial objectives

releasing criminals outweighed the limited deterrent effect of applying the exclusionary rule to police officers' good faith mistakes.[8] Therefore, the court held that application of the exclusionary rule, under those circumstances, was unjustified.[9]

This Note examines the *Williams* decision and the developing good faith exception to the exclusionary rule. Section I reviews the precedents and theoretical basis for the exclusionary rule. Section II examines the *Williams* decision itself. Section III explores the merit of a good faith exception. Finally, this Note concludes in Section IV by reviewing early judicial responses to the *Williams* decision and considering how the Supreme Court may react to the good faith exception.

I. DEVELOPMENT OF A BASIS FOR A GOOD FAITH EXCEPTION

A. *Historical Development of the Exclusionary Rule*

In its 1914 decision of *Weeks v. United States*,[10] the Supreme Court created the exclusionary rule by allowing a criminal defendant to petition for return of unconstitutionally seized property.[11] The Court reasoned that the judiciary should not sanction the use of the fruits of unconstitutional police procedures.[12] In contrast to the Supreme Court's current philosophy, deterrence of police misconduct was not an explicit rationale underlying the *Weeks* opinion.

Thirty-five years later, in *Wolf v. Colorado*,[13] the Court ruled that freedom from unreasonable searches and seizures was "implicit in the

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were thought most efficaciously served' ") (quoting United States v. Calandra, 414 U.S. 338, 348 (1974).

8. 622 F.2d at 842-43.

9. *Id.* at 843.

10. 232 U.S. 383 (1914).

11. *Id.* at 398.

12. *Id.* at 392. The *Weeks* Court explained that "[t]he tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution." *Id.* Some commentators have suggested that *Weeks* may have rested on a protection of privacy or property rationale. *See* Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale,* 18 DUQ. L. REV. 225 (1980); 34 VAND. L. REV. 213 (1981).

Weeks did allow the use in federal court of evidence unconstitutionally seized by *state* officers. 232 U.S. at 398. This practice was subsequently outlawed in Elkins v. United States, 255 U.S. 298 (1921), in which the Court held that any evidence seized in violation of the fourth amendment was inadmissible in federal courts. *Id.* at 312-13. *See generally* Stone v. Powell, 428 U.S. 465, 482-93 (1976) (brief history of exclusionary rule).

13. 338 U.S. 25 (1949).

concept of ordered liberty"[14] and therefore was applicable to the states through the fourteenth amendment. The *Wolf* decision also held, however, that states were not required to adopt the exclusionary rule as a means to protect these fourth amendment rights.[15] Three years later the Court retreated partially from *Wolf* by holding that state courts should suppress evidence obtained from searches and seizures that "shock[ed] the conscience."[16] States remained free, however, to fashion their own remedies for less egregious constitutional violations.

By 1961, however, the Supreme Court determined that this protection of fourth amendment rights was inadequate. Consequently, the Court extended the exclusionary rule to the states in *Mapp v. Ohio*.[17]

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14. *Id.* at 27-28.

15. *Id.* at 31. The Court stated:

> 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 minimal standards assumed by the Due Process clause a state's reliance upon other methods which if consistently enforced, would be equally effective.

Id.

16. Rochin v. California, 342 U.S. 165, 172-74 (1952), held that evidence obtained by involuntarily pumping a defendant's stomach was inadmissible because the method used to obtain the evidence was so outrageous that it violated due process.

17. 367 U.S. 643, 645-55 (1961). The Court held that the exclusionary rule was the only effective method of enforcing the fourth amendment. *Id.* at 652-53 (citing Irvine v. California, 347 U.S. 128, 137 (1954)). Recently, however, a number of suggestions have been advanced for replacing the current exclusionary rule with other deterrent devices. *See, e.g.,* Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting) (tort remedy against government); ALI MODEL CODE FOR PRE-ARRAIGNMENT PROCEDURE § 290.2 (Proposed Official Draft 1975) (substantial violation test); Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal,* 4 TEX. TECH. L. REV. 317 (1973) (special ombudsman to receive complaints and investigate violations); Davis, *An Approach to Legal Control of the Police,* 52 TEX. L. REV. 703 (1974) (tort remedy against government and police rulemaking); Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955) (civil tort remedy for violation); Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027 (1974) (rule inapplicable in serious cases and when police departments make valid compliance effort); LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police,* 30 MO. L. REV. 566 (1965) (norm defining by courts and legislatures and training of police); McGowan, *Rule-Making and the Police,* 70 MICH. L. REV. 659 (1972) (police rulemaking); Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights,* 52 J. URB. L. 25 (1974) (same); Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeals Board,* 30 WASH. & LEE L. REV. 223 (1973) (statutory remedy through an administrative board); Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule,* 1 J. POLICE SCI. & AD. 36 (1973) (common-law tort remedy); Comment, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct,* 78 YALE L.J. 143 (1968) (court injunction as remedy to unconstitutional police conduct); 1967 WASH. U.L.Q. 104 (federal courts grant injunction against further police misconduct).

The *Mapp* opinion advanced two justifications for the exclusionary rule. First, the Court reasoned that the exclusion of unlawfully obtained evidence would remove the incentive for police officers to violate fourth amendment rights.[18] Second, the Court stated that the admission of illegally seized evidence would damage "judicial integrity."[19]

18. 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1959)). This concept of deterrence differs markedly from that maintained by many critics of the exclusionary rule. The critics tend to focus on the rule's punishment of individual police officers rather than its ability to eliminate the police's incentive to violate the fourth amendment. Chief Justice Burger's statement that the rule "does not apply any direct sanction to the individual officer whose illegal conduct results in the exclusion, and so cannot 'deter' him" typifies the individual deterrence view. Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting). *But see* United States v. Peltier, 422 U.S. 531, 556-58 (1975) (Brennan, J., dissenting); Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 431 (1974).

The extent of the rule's deterrent effect is unknown. The Court has stated that "although scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed." United States v. Janis, 428 U.S. 433, 449-50 (1975). The most comprehensive study of the deterrent effect of the exclusionary rule is Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970). Oaks noted: "The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." *Id.* at 709. Despite his lack of persuasive evidence, Oaks concluded that the "exclusionary rule should be abolished." *Id.* at 755.

In contrast to Oaks 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). Professor Canon concluded that "the exclusionary rule is in considerably better health than some of its 'attendant physicians' would have us believe." *Id.* at 729. Canon, however, also admitted the inconclusiveness of his data. *Id.* at 725.

One commentator reviewed the available empirical studies and concluded that after all "factors are considered, there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical' efficacy of the exclusionary rule." 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, 763-64 (1974). *See also* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice,* 69 YALE L.J. 543 (1960); Kamisar, *On the Tactics of Police—Prosecution Oriented Critics of the Courts,* 49 CORNELL L. REV. 436 (1964); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L.C. & P. S. 171 (1962); Katz, *The Supreme Court and the States: An Inquiry into* Mapp v. Ohio *in North Carolina,* 45 N.C.L. REV. 119 (1966); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence,* 1965 WIS. L. REV. 283; Paulsen, *The Exclusionary Rule and Misconduct of the Police,* 52 J. CRIM. L.C. & P. S. 255 (1961); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives,* 2 J. LEGAL STUD. 243 (1973); Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices,* 34 ROCKY MTN. L. REV. 150 (1962); Comment, *Effect of* Mapp v. Ohio *on Police Search and Seizure Practices in Narcotics Cases,* 4 COLUM. J.L. & SOC. PROB. 87 (1968).

19. 367 U.S. at 659. The Court quoted Justice Brandeis' dissenting opinion in a previous case. "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the

The Supreme Court did not identify which of the two rationales was the primary basis for the *Mapp* decision.[20] This omission left both courts and commentators[21] uncertain about the social goals the rule was designed to serve. This confusion has produced a conflict between supporters of the deterrence rationale, who believe the rule is only a deterrent device that can be discarded when it fails to deter,[22] and supporters of the judicial integrity rationale, who believe that the rule is constitutionally compelled and thus may never be disregarded.[23] This dispute is frustrated by a lack of empirical evidence. There is no evidence demonstrating the effectiveness of the exclusionary rule as a deterrent to police misconduct. Similarly, there is a lack of empirical

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whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Mapp may contain a third justification for the exclusionary rule. The Court might have considered the rule a personal constitutional right of the accused. The Court stated that the exclusionary rule is "part and parcel of the fourth amendment's limitations upon [governmental] encroachment of individual privacy." 367 U.S. at 651. In addition, the Court stated that the exclusionary rule is "an essential part of both the fourth and fourteenth amendments." *Id.* at 657. The Supreme Court, however, rejected this interpretation of *Mapp* in United States v. Calandra, 414 U.S. 338 (1974), in which the Court held that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim." *Id.* at 347. *But see id.* at 360 (Brennan, J., dissenting).

20. Oaks, *supra* note 18, at 670. Justice Black's reliance on a self-incrimination theory split the majority, leaving the primary basis for the opinion unresolved. 367 U.S. at 661.

21. *See, e.g.,* Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251, 265 (1974) ("Court persistently relied on an unstable combination of arguments"); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle,* 69 J. CRIM. L. & CRIMONOLOGY 141, 144 (1978) ("not entirely clear what the Court intends as its primary rationale"). *See generally* W. LAFAVE, SEARCH AND SEIZURE 14-20 (1978).

22. *See, e.g.,* United States v. Calandra, 414 U.S. 338, 347-48 (1974); Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 413 (Burger, C.J., dissenting); Oaks, *supra* note 18, at 670-73.

23. Monrad Paulsen is typical of those who support the judicial integrity rationale:

> The moral point not only rests upon an ethical judgment that governmental hypocrisy is an evil to be avoided for its own sake, but also it takes into account the serious undermining of trust in government which is an unavoidable consequence of any scheme permitting the state to benefit from unlawful conduct.

Paulsen, *supra* note 18, at 258. *See also* Monroe, *The Imperative of Judicial Integrity and the Exclusionary Rule,* 4 W. ST. U.L. REV. 1 (1976); Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. REV. 1129 (1973); 1977 WASH. U.L.Q. 127. Detractors of the judicial integrity doctrine question "how we can in good conscience derive satisfaction from the shining purity of our courts where they are surrounded by squalid and frightening crime—crime the government cannot combat because of the court's preoccupation with its own integrity." Shrock & Welsh, *supra* note 21, at 265. Commentators have also noted that the exclusionary rule is not recognized in other common-law jurisdictions whose court systems are regarded as models of "decorum and fairness." Oaks, *supra* note 18, at 669.

evidence as to the efficacy of the rule in diminishing disrespect for government[24] and thus decreasing civil disobedience.[25]

B. *The Emergence of Deterrence as the Primary Justification for the Exclusionary Rule*

The Court adopted the deterrence theory as the primary rationale for the exclusionary rule in *Linkletter v. Walker*.[26] *Linkletter* involved a habeas corpus petition by a state prisoner whose conviction was based on illegally seized evidence.[27] Although Linkletter's conviction predated *Mapp*, he filed his habeas corpus petition after that decision was announced.[28] The Court denied the petition, thereby allowing a conviction obtained with illegally obtained evidence to stand.[29] Commentators have interpreted the *Linkletter* decision to imply that the use of evidence seized in violation of the fourth amendment is neither inherently unconstitutional nor necessarily an infringement of judicial integrity.[30]

The Supreme Court conclusively reaffirmed deterrence as the primary rationale for the exclusionary rule in *Harris v. New York*.[31] The majority opinion in *Harris* upheld the admission into evidence of a criminal defendant's testimony given before he received *Miranda*[32] warnings.[33] The only justification for the exclusionary rule that the

24. *See, e.g.,* United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) ("enabling the judiciary to avoid the taint of partnership in official lawlessness"); Elkins v. United States, 364 U.S. 206, 222 (1921) ("even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold").

25. *See, e.g.,* United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) ("minimizing the risk of seriously undermining popular trust in government"); Mapp v. Ohio, 367 U.S. 653, 659 (1961) ("[n]othing else can destroy a government more quickly than its failure to observe its own laws").

26. 381 U.S. 618 (1965).

27. *Id.* at 621.

28. *Id.*

29. *Id.* at 640.

30. *See, e.g.,* McGowen, *supra* note 17, at 674 n.46; Oaks, *supra* note 18, at 670-71; Note, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio,* 61 GEO. L.J. 1453, 1457 (1973); Comment, *Standing to Object to an Unreasonable Search and Seizure,* 34 U. CHI. L. REV. 342, 352-56 (1967). Several other early cases recognized exceptions to the exclusionary rule. *See, e.g.,* Desist v. United States, 394 U.S. 244 (1969); Alderman v. United States, 394 U.S. 165 (1969).

31. 401 U.S. 222 (1971).

32. Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* requires that criminal suspects be advised of their constitutional rights before questioning by police. *Id.* at 467-68.

33. 401 U.S. at 226.

Court discussed was deterrence of police misconduct,[34] although a strong dissent contended that "it [was] monstrous that courts should aid or abet a law breaking police officer."[35]

Although *Harris* was concerned only with the exclusionary rule in the fifth amendment context, its reasoning applies to fourth amendment cases as well.[36] Chief Justice Burger used reasoning similar to that in *Harris* in his dissent in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*,[37] in which he contended that the exclusionary rule should be abolished as soon as an effective alternative was found.[38] The Chief Justice premised his dissent upon the contention that deterrence, not judicial integrity, was the only valid justification for the exclusionary rule.[39]

Three years later, in *United States v. Calandra*,[40] the Court indicated once again that deterrence was the "prime purpose" of the exclusionary rule.[41] In *Calandra*, the Court refused to extend the exclusionary rule to grand jury proceedings, because it believed that applying the rule to disallow questions based upon tainted evidence would not deter illegal police activity.[42] The majority opinion did not even mention judicial integrity. In a strong dissent, Justice Brennan argued that the admission of illegally seized evidence would taint the judiciary.[43] Justice Brennan also argued that the exclusionary rule was a right personal to

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34. *Id.* at 225. The Court stated: "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavoidable to the prosecution in its case in chief." *Id.*

35. *Id.* at 232 (Brennan, J., dissenting).

36. *Harris* was cited by the *Williams* court as precedent for its decision. United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980), *cert. denied,* 449 U.S. 1127 (1981).

37. 403 U.S. 388 (1971).

38. 403 U.S. at 411-27 (Burger, C.J., dissenting). Chief Justice Burger had expressed his views on the exclusionary rule nearly seven years earlier in a speech at American University. *See* Burger, *Who Will Watch the Watchman?,* 14 AM. U.L. REV. 1 (1964).

39. 403 U.S. at 413.

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

41. *Id.* at 347.

42. *Id.* at 354. The Court stated: "In the context of a grand jury proceeding, we believe that the damage to that institution from the unprecedented extension of the exclusionary rule urged by respondent outweighs the benefit of any possible incremental deterrent effect." *Id.*

43. 414 U.S. at 357 (Brennan, J., dissenting). Justice Brennan stated:

> The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of undermining popular trust in government.

Id. (Brennan, J., dissenting).

the defendant, not just a societal prophylactic.[44] The *Calandra* majority opinion, however, completely rejected the judicial integrity theory and adopted a balancing test in which the deterrent effect of the exclusionary rule was weighed against the societal costs of exclusion.[45]

Since the adoption of the *Calandra* balancing test, the Court has steadily eroded the exclusionary rule. The Court refused to apply the exclusionary rule in several situations in which it determined that the benefits of exclusion were outweighed by the social costs. For example, *Peltier v. United States*[46] established the technical good faith exception. A year later, in *United States v. Janis*,[47] the Court refused to extend the rule to prevent the use in federal civil proceedings of evidence illegally seized by state agencies. In the same year the Court, in *Stone v. Powell*,[48] eliminated federal habeas corpus review of fourth amendment claims that had been reviewed fully in state courts. In *United States v. Caceres*,[49] the Court refused to apply the exclusionary rule to evidence seized in violation of a voluntarily promulgated administrative regula-

44. 414 U.S. at 360 (Brennan, J., dissenting). Justice Brennan argued that "the exclusionary rule is part and parcel of the fourth amendment's limitation upon governmental encroachments of individual privacy." *Id.* (Brennan, J., dissenting). The majority rejected this theory: "The purpose of the exclusionary rule is not to redress the injury to the privacy of the victim." *Id.* at 347. *See* note 19 *supra*. *See generally* Cann & Egbert, *The Exclusionary Rule: Its Necessity in a Constitutional Democracy,* 23 How. L.J. 299 (1980); Schrock & Welsh, *supra* note 21; Sunderland, *supra* note 21.

45. 414 U.S. at 348 ("the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served").

46. 422 U.S. 531 (1975).

47. 428 U.S. 433 (1976). Although good faith was mentioned several times in the opinion, this was not the basis of the holding. 428 U.S. at 434, 453. One commentator has suggested that the reference to good faith in *Janis* may have been part of the Court's effort to establish a good faith mistake exception. *See* Note, *Impending "Frontal Assault" on the Citadel: The Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard,* 12 TULSA L.J. 337 (1976).

48. 428 U.S. 465 (1976). *See* notes 76-81 *infra* and accompanying text.

49. 440 U.S. 741 (1979). The Court thus created a good faith mistake exception for violation of administrative agency regulations designed to protect the privacy of citizens. In *Caceres*, IRS agents electronically monitored a taxpayer's conversations without securing proper IRS intra-agency approval. *Id.* at 742-43. The defendant argued that the IRS's failure to comply with its own regulations required exclusion of the evidence obtained by the surveillance. *Id.* at 750. The Court held that the IRS rules were not constitutionally mandated and that the monitoring was therefore not a constitutional violation. *Id.* at 756-57. The Court stated in dicta that if there were an exclusionary rule applicable to violations of agency regulations, the defendant's motion for suppression would still not be granted because the IRS officers had attempted to comply with the rules in good faith. *Id.* at 757. This would represent a true good faith mistake exception, although it differs from *Williams* because no violation of constitutional rights occurred.

tion. Most recently, in *Michigan v. DeFillippo*,[50] the Court refused to suppress evidence seized in good faith reliance upon an unconstitutional statute.

The adoption of deterrence as the exclusionary rule's prime rationale laid the groundwork for the development of both a technical and a good faith mistake exception. If the Court had viewed the exclusionary rule as a personal right necessary to maintain judicial integrity, the good faith mistake rule could not have evolved. Because the Court views deterrence as the sole rationale for the exclusionary rule, police officers' good faith errors, which cannot be deterred, fall within a good faith exception.

C. *Supreme Court Adoption of a Technical Violation Exception*

Soon after the Supreme Court adopted the *Calandra* balancing test, the technical violation exception emerged. A technical violation occurs when a police officer conducts a search in reliance on a statute or warrant later declared invalid.[51] The technical violation exception permits evidence discovered during such a search to be admitted at trial.[52] The rule reflects the Court's refusal to apply the exclusionary rule when it would not deter police misconduct. Police relying on a seemingly valid statute or warrant cannot know that their actions are unconstitutional and thus cannot be effectively deterred.[53]

The Supreme Court first mentioned the technical good faith exception in *Michigan v. Tucker*.[54] The constitutional violation in *Tucker* occurred when police took a statement from a criminal suspect without affording the suspect *Miranda*[55] warnings.[56] The suspect's statements led to the discovery of a witness who gave inculpatory testimony.[57] Be-

50. 443 U.S. 31 (1979). *See* notes 67-71 *infra* and accompanying text.

51. United States v. Williams, 622 F.2d 830, 940-44 (1980), *cert. denied*, 449 U.S. 1127 (1981). The distinction between "technical violations" and "good faith mistake violations" was explained in Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978). The *Williams* court extended the technical violation exception to invalid warrants although prior Supreme Court decisions had only extended the exception to searches based on unconstitutional statutes. 622 F.2d at 940-44. *See* notes 54-71 *infra* and accompanying text.

52. See Ball, *supra* note 51, at 565.

53. *Id.*

54. 417 U.S. 433 (1974).

55. Miranda v. Arizona, 384 U.S. 436 (1966).

56. *See* note 32 *supra*.

57. 417 U.S. at 436-37.

cause the interrogation took place before the Court's decision in *Miranda*, the officer acted in compliance with then-existing law.[58] The Court held that the witness could testify despite the tainted way in which the police discovered him.[59] The decision was based, in part, on the police officer's good faith in taking the witness' statement.[60]

The Supreme Court adopted a fourth amendment technical good faith exception in *United States v. Peltier*.[61] Although the opinion concerned the retroactivity of an earlier border search case,[62] the *Peltier* Court weighed heavily the good faith[63] of border guards who relied upon a warrantless search statute that was later declared unconstitutional.[64] After the law authorizing an initial search and arrest was declared unconstitutional, the defendant brought suit to overturn his conviction.[65] The Supreme Court held that the fourth amendment violation, caused by reliance on a statute that had not yet been declared unconstitutional, did not warrant retroactive application of the exclusionary rule.[66]

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58. *Id.* Escobedo v. Illinois, 378 U.S. 478 (1964), was the controlling law at the time of the defendant's questioning. It did not require, as did *Miranda*, that a defendant be apprised of his constitutional rights. 378 U.S. at 492.

59. 417 U.S. at 445-46.

60. *Id.* at 447. The Court stated:

> The 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.

Id. Other factors might have entered into the Court's decision, including the voluntariness of the defendant's statement and the reliability of the evidence. *Id.* at 445-49. A concurring opinion suggests that the decision might have rested on retroactivity principles. *Id.* at 453-59 (Brennan, J., concurring). *See generally* Ball, *supra* note 51, at 651-52.

61. 422 U.S. 531 (1975).

62. The *Peltier* Court refused to retroactively apply its decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). 422 U.S. at 535.

63. 422 U.S. at 537-38. The Court stated: "[T]he introduction of evidence which had been seized by law enforcement officials in good faith compliance with then prevailing constitutional norms did not make the courts 'accomplices in the willful disobedience of the Constitution they are sworn to uphold.'" *Id.* at 536 (quoting Elkins v. United States, 364 U.S. 206, 223 (1959)).

64. 422 U.S. at 532-33. The statute and regulations in question authorized warrantless border searches without probable cause up to 200 miles from the border. *Id.* at 533. The statute and regulations were declared unconstitutional in Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

65. 422 U.S. at 533.

66. *Id.* at 532.

Four years later, in *Michigan v. DeFillippo*,[67] the Supreme Court again recognized a technical good faith exception. The Court sustained a state court decision to admit evidence seized during an arrest made in reliance on an unconstitutional law.[68] Because it believed that the exclusionary rule was an ineffective deterrent under these circumstances, the Supreme Court expressly adopted a good faith technical violation exception to the rule.[69] The opinion, however, also noted that police officers could not consider the constitutionality of laws when making arrests.[70] Because of the Court's reliance on this alternative rationale, *DeFillippo* is not a clear mandate for a good faith mistake exception.[71]

D. *Express Supreme Court Support for a Good Faith Mistake Exception*

The Supreme Court has not yet adopted a good faith mistake exception. Nevertheless, support of such a rule has appeared in two opinions. Although the majority opinion in *Brown v. Illinois*[72] did not discuss the good faith exception,[73] Justice Powell's concurrence argued that the exclusionary rule should not apply to good faith violations.[74]

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67. 443 U.S. 31 (1979).

68. *Id.* at 40 ("subsequently determined invalidity of the Detroit ordinance on vagueness grounds does not undermine the validity of the arrest made for violation of that ordinance").

69. *Id.* at 38 n.3. The Court stated: "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." *Id. See also* 7 OHIO N.U.L. REV. 170, 175-76 (1980); 55 WASH. L. REV. 849, 860-61 (1980).

70. 443 U.S. at 38. The Court stated:

> Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and are not constitutionally entitled to enforcement.

Id. The Court also analogized to Pierson v. Ray, 386 U.S. 547 (1967), in which the Court held that police who relied in good faith on a presumptively valid law could not be found civilly liable for damages resulting from a deprivation of fourth amendment rights. *Id.* at 557.

71. A good faith mistake is an error in judgment by a police officer. The validity of the law under which the search was mistakenly made is irrelevant. *See* note 51 *supra* and accompanying text. In addition, the wider applicability of a good faith mistake exception and other policy considerations limit *DeFillippo's* value as precedent for a good faith mistake exception. *See* notes 127-65 *infra* and accompanying text.

72. 422 U.S. 590 (1975).

73. The majority dealt with whether a *Miranda* warning has the force to break the causal chain between an illegal arrest and a defendant's incriminating statements. *Id.* at 591-605.

74. *Id.* at 612. Justice Powell stated:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have

Justice Powell dismissed any concern for judicial integrity, arguing that a court's integrity is not compromised by admission of evidence obtained by a good faith mistake.[75] Justice White's dissent in *Stone v. Powell*[76] also suggested a good faith mistake exception. Although the facts in *Stone* presented a technical good faith violation,[77] the Court decided the case on other grounds.[78] Justice White dissented, advocating an exception to the exclusionary rule for both "technical" and "good faith mistake" violations.[79] He argued that a police officer who in good faith does not know that his actions are illegal cannot be reasonably expected to conform to fourth amendment requirements.[80] The dissent believed that deterrence was the primary rationale for the exclusionary rule. Citing both technical and good faith mistake situations that result in "recurrent" violations,[81] Justice White concluded that "in these situations and perhaps many others, excluding evidence will not further the ends of the exclusionary rule."[82]

Although the Supreme Court has established the necessary rationale for a good faith mistake exception[83] and has allowed the admission of evidence seized in good faith reliance on an unconstitutional statute,[84] it has not yet allowed the use of evidence seized in violation of fourth

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> engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of probative and reliable evidence.

Id. (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)).

75. 422 U.S. at 611.

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

77. *Id.* at 469. The defendant in *Stone* was arrested for violating an unconstitutional vagrancy ordinance. The search incident to the arrest produced incriminating evidence. *Id.*

78. *Id.* at 494-95. The Court refused to extend the exclusionary rule to federal habeas corpus proceedings because of the limited increase in deterrence that would be achieved. *Id.*

79. *Id.* at 538. Justice White cited several circumstances resulting in good faith violations, including searches based on laws later declared unconstitutional and searches based on a reasonable but mistaken judgment of probable cause. *Id.* Justice White concluded: "These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed." *Id.*

80. *Id.* at 537-40. Justice White stated that "it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." *Id.* at 539-40.

81. *Id.* at 537-38.

82. *Id.* at 539.

83. *See* notes 26-51 *supra* and accompanying text.

84. *See* notes 51-71 *supra* and accompanying text.

amendment rights because of a good faith mistake.[85]

II. *UNITED STATES V. WILLIAMS*

United States v. Williams[86] presented a good faith mistake fact situation. A Drug Enforcement Association (DEA)[87] agent on duty in the Atlanta International Airport recognized the defendant, Williams, because the officer had previously arrested her for possession of heroin.[88] The agent knew that Williams was at liberty on bond pending the appeal of a prior conviction. A condition of her bond was that she remain in Ohio.[89]

The agent arrested Williams for violating the travel restrictions of her bond and searched her as an incident to that arrest.[90] He found a packet of heroin in her pocket and arrested her for violation of the Controlled Substances Act.[91] The DEA agent subsequently secured a warrant for the search of her bags. A search of the bags produced a large quantity of heroin.[92]

The defendant moved to suppress all the evidence found in connection with her arrest because the agent had no power to arrest her for violating the travel restriction.[93] This argument found support in the statute defining the arrest powers of DEA agents,[94] which did not au-

85. *See, e.g.,* Franks v. Delaware, 438 U.S. 154 (1978) (good faith mistake in granting search warrant requires suppression); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (error in search warrant requires suppression); Aguiler v. Texas, 378 U.S. 108 (1964) (same). Chief Justice Burger has stated that "the rule has long been applied to wholly good faith mistakes and to purely technical deficiencies in warrants." Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring).

86. 622 F.2d 830 (5th Cir. 1980), *cert. denied,* 449 U.S. 1127 (1981).

87. *Id.* at 834.

88. *Id.* at 833. Williams had been arrested by the DEA agent in Ohio for possession of heroin. After the District Court for the Northern District of Ohio denied her motion to suppress, she pleaded guilty and was sentenced to three years imprisonment. She appealed the denial of her motion to suppress to the Sixth Circuit. The district court ordered Williams released pending appeal, with the condition that she remain in Ohio. *Id.*

89. *Id.* at 834.

90. *Id.*

91. *Id.* Williams was charged with a violation of 21 U.S.C. § 841(a)(1) (1976).

92. 622 F.2d at 835.

93. *Id.* She contended that because her arrest was unlawful, the evidence seized during the search incident to the arrest should be suppressed. She also contended that the warrant authorizing the search of her bags was invalid because it was based on information obtained from the search of her person. *Id.*

94. 21 U.S.C. § 878(3) (1976) provides:

> Any officer or employee of the Bureau of Narcotics and Dangerous Drug [*sic*] designated by the Attorney General may—

thorize arrest for criminal contempt.[95] The district court granted the defendant's motion[96] and a panel of the Court of Appeals for the Fifth Circuit affirmed.[97] The Court of Appeals then reheard the case en banc and reversed the panel.[98]

The en banc court divided its opinion into two parts. The first part held that the DEA agent had the power to arrest Williams for violating her travel restriction[99] and that, therefore, the search was incident to a valid arrest.[100] This holding disposed of the case, but thirteen judges[101] of the twenty-four judge panel joined in a second part of the opinion that announced, as an alternative ground for decision, a good faith mistake exception to the exclusionary rule.[102]

The Fifth Circuit's analysis of the good faith exception resembled that used in previous Supreme Court decisions limiting the exclusionary rule.[103] The court first rejected any argument that the exclusionary rule was a constitutional requirement.[104] Although some commenta-

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. . . .

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the Laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony . . . .

Id.

95. 622 F.2d at 835.

96. *Id.* at 835. The district court held that DEA agents do not have the power to arrest for violation of travel restrictions.

97. United States v. Williams, 594 F.2d 86, 96 (5th Cir. 1979), *cert. denied,* 449 U.S. 1127 (1981). The panel agreed with the district court and held that DEA agents do not have the power to arrest for contempt. *Id.* One judge dissented and argued for a good faith mistake exception. *Id.* at 97-98 (Clark, J., dissenting).

98. 622 F.2d at 833.

99. *Id.* at 839.

100. *Id.*

101. *Id.* at 840.

102. *Id.*

103. *See, e.g.,* Michigan v. DeFillippo, 443 U.S. 31 (1979) (use of evidence obtained by good faith reliance on unconstitutional ordinance); United States v. Caceres, 440 U.S. 741 (1979) (use of evidence obtained through good faith violation of administrative agency regulation); Stone v. Powell, 428 U.S. 465 (1976) (habeas corpus review of state court decisions based on illegally seized evidence); United States v. Janis, 428 U.S. 433 (1976) (use of evidence illegally seized by state agencies in federal civil proceeding); United States v. Peltier, 422 U.S. 531 (1975) (retroactive application of exclusionary rule); United States v Calandra, 414 U.S. 338 (1974) (use of illegally seized evidence in grand jury proceedings); Harris v. New York, 401 U.S. 222 (1971) (use of illegally obtained statements to impeach testimony).

104. 622 F.2d at 841 (citing Stone v. Powell, 428 U.S. 465, 482 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974)).

tors and Justices disagreed on this point,[105] the Supreme Court has now clearly established the proposition.[106] Next, the Fifth Circuit noted that it recognized deterrence as the only justification for the rule.[107] Thus, the court could premise its good faith exception on a finding that a police officer "will not be deterred from an illegal search if he does not know it is illegal."[108]

The *Williams* court justified its adoption of a good faith mistake exception by citing two Supreme Court opinions. Both opinions, however, fail to support the *Williams* decision.[109] The first, *United States v. Janis*,[110] held that in federal civil proceedings the exclusionary rule should not be applied to evidence illegally seized by state officials.[111] Although the Supreme Court framed the issue in *Janis* in terms of good faith,[112] the actual holding did not rely on this concept. As such, the *Janis* opinion provides only limited support for the *Williams* holding. The Court next cited *Michigan v. Tucker*,[113] which referred to good faith mistakes but was decided on "technical" violation grounds.[114]

The court also cited two Fifth Circuit opinions, *United States v. Hill*[115] and *United States v. Wolffs*,[116] both of which failed to support the good faith mistake exception. *Hill* involved a police officer's failure to place information necessary to establish probable cause in an affidavit that was used to obtain a search warrant.[117] The magistrate supplemented the affidavit with oral testimony before issuing the warrant.[118] The defendant argued on appeal that Federal Rule of Criminal Proce-

105. *See* notes 19 & 23-24 *supra* and accompanying text.

106. *See* cases cited in note 103 *supra*.

107. 622 F.2d at 842. Ten judges entered a special concurrence to the majority opinion. Writing for the group, Judge Rubin argued that the exclusionary rule is both a personal right and necessary to protect judicial integrity. *Id.* at 848-50 (Rubin, J., concurring specially). Judge Rubin also characterized the decision as "hypothetical" and objected to the modification of the exclusionary rule as an alternative ground for decision. *Id.* (Rubin, J., concurring specially).

108. *Id.* at 842.

109. *Id.* at 844-45.

110. 428 U.S. 433 (1976).

111. *Id.* at 454. The *Janis* result rests on the minimal increase in deterrence that could be expected by refusing to allow the use of evidence illegally seized by state officials in federal civil actions. *Id.*

112. *Id.* at 434.

113. 417 U.S. 433 (1974).

114. *See* notes 54-60 *supra* and accompanying text.

115. 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975).

116. 594 F.2d 77 (5th Cir. 1979).

117. 500 F.2d at 319.

118. *Id.* at 320.

dure 41(c)[119] prohibited oral supplementation of an affidavit.[120] Although the court held that oral supplementation was permissible, it also indicated that a technical violation of Rule 41(c) would not justify suppression of the evidence in any case.[121] As a result, *Hill* is, at most, precedent only for the technical violation exception to the exclusionary rule.

In *Wolffs* the Fifth Circuit refused to fashion an exclusionary rule for the violation of a federal statute.[122] The case involved federal officers who, in violation of the Federal Posse Comitatus Act,[123] had participated in the enforcement of a state law. Fourth amendment rights were not at issue,[124] and the court did not rely on fourth amendment precedent as authority for its decision.[125] Moreover, the holding of *Wolffs* rested on the unique nature of the violation, not the federal agents' good faith.[126]

Thus, *Williams* was decided on the basis of precedent that suggested, but did not compel, adoption of a good faith exception to the exclusionary rule. The Supreme Court opinions cited by the *Williams* court clearly hold that the exclusionary rule should not apply in situations in which the social costs of exclusion outweigh its deterrent effect.[127] Nevertheless, it is not certain that the Supreme Court, when it is con-

119. FED. R. CRIM. P. 41(c) provides:

(c) *Issuance and Contents.*

(1) *Warrant Upon Affidavit.* A warrant . . . shall issue only on an affidavit sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched.

120. 500 F.2d at 320.

121. *Id.* at 321-22.

122. 594 F.2d at 85.

123. *Id.* at 84-85 (citing 18 U.S.C. § 1385 (1976)).

124. *Id.* at 84-85.

125. United States v. Walden, 490 F.2d 372, 376-77 (4th Cir. 1974); State v. Danko, 219 Kan. 490, 496-97, 548 P.2d 819, 824-25 (1976) (quoting United States v. Walden, 490 F.2d at 376-77). The *Walden* court identified four factors that distinguished a fourth amendment violation from a violation of the Posse Comitatus Act: (1) the proscription of the use of military personnel to enforce civilian laws is not widely known, (2) the proscription is not designed to protect individuals, (3) the act prohibited is not inherently wrong, and (4) the case is unique. 490 F.2d at 376-77.

126. 490 F.2d at 377 ("this case is the first instance to our knowledge in which military personnel have been used as the principal investigators of civilian crimes in violation of the Instruction").

127. *See* note 103 *supra*.

fronted with the issue, will conclude that a good faith exception is justified.

III. ANALYSIS

Advocates of a good faith exception argue that deterrence is the prime justification for the exclusionary rule.[128] They weigh the harm to society in releasing a suspected criminal against the deterrence of fourth amendment violations achieved by suppression.[129] Because it is impossible for the exclusionary rule to deter a police officer from committing a violation he does not know he is committing,[130] proponents of the good faith exception are not unreasonable in advocating limitations on the rule when police officers commit good faith violations.

Some supporters of a good faith exception also cite proportionality[131] as a justification for a good faith exception. Proportionality concerns the perceived unfairness of a criminal escaping punishment for a possibly serious crime because of a minor infringement of his fourth amendment rights.[132] To the public at large, this is perhaps the most serious indictment of the exclusionary rule.[133]

A related reason for limiting the rule is that it may engender disrespect for the law in its present form. Proponents of limitation argue

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128. *See, e.g.,* Ball, *supra* note 51, at 650. Professor Ball states: "To the extent that this exaltation of the deterrence rationale is accepted, it destroys the reason for suppression whenever the sanction cannot be demonstrated to have at least a potential deterrent effect." *Id. See also* note 18 *supra*.

129. *See* Ball, *supra* note 51, at 650. *See generally* note 7 *supra* and accompanying text.

130. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting) ("excluding the evidence can in no way affect his future conduct"); Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 TEX. L. REV. 736, 740 (1972) ("[a] police officer will not be deterred from an illegal search if he does not know it is illegal").

131. *See* H. HART, LAW, LIBERTY AND MORALITY 37 (1963). Professor Hart states: "[P]rinciples of justice or fairness between different offenders require morally distinguishable offenses to be treated differently and morally similar offenses to be treated alike." *Id.*

132. *See, e.g.,* Stone v. Powell, 428 U.S. 465 (1976) (noted disparity between error committed and windfall received by defendant); H. FRIENDLY, BENCHMARKS 260 (1967) (maximum penalty should not be enforced for mistake in judgment); Kaplan, *supra* note 17, at 1036 (affront to ideas of justice).

133. Professor Kaplan has maintained:

> Popular hostility toward the rule arises from much more than the fact that it interferes with our punishing people we regard as guilty. The disparity in particular cases between the error committed by the police officer and the windfall given by the rule to the criminal is an affront to popular ideas of justice. . . . Proportionality is a major element of our sense of justice.

Kaplan, *supra* note 17, at 1036.

that the spectacle of a criminal being released because of a minor mistake by a police officer makes the law appear inept and insensitive to society's values.[134] Commentators have suggested that considerable reform of the rule may be necessary to insure its continued existence.[135]

Critics of the good faith exception oppose its adoption on constitutional and practical grounds. Some argue that the exclusionary rule enjoys constitutional stature[136] that renders its effectiveness as a deterrent irrelevant. Courts cannot ignore constitutional rights simply to advance other societal goals.[137] Although Justice Brennan has adopted this view,[138] the Supreme Court majority has held 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."[139]

Critics of the good faith exception also try to revive the Court's early concern for judicial integrity.[140] They reiterate the argument that the use of unconstitutionally seized evidence in court diminishes the judiciary's prestige[141] and invites disrespect for the law,[142] possibly with disastrous consequences.[143] In particular, judicial integrity supporters emphasize the incongruity of a judiciary, sworn to uphold the Constitution, that sanctions the use of evidence taken in violation of the Constitution.[144] This argument is unlikely to succeed, however, because the

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134. *Id.*

135. *See* Kaplan, *supra* note 17, at 1050. Professor Kaplan states:

> For those who are wedded to the present rule, and even more for those who would expand it, any restriction would be a retreat in the face of the enemy, a cutting back when it is most necessary to hold firm. A cutting back of the exclusionary rule, however, can also be regarded as a pruning, a method of making it more acceptable and hence more lasting; it is indeed a method of giving more, not less, protection to fourth amendment values.

Id.

136. *See* note 44 *supra* and accompanying text.

137. *See* Ball, *supra* note 51, at 651. Professor Ball comments: "In summary, if the exclusionary rule is constitutionally mandated, it could not be disregarded on occasions when it does not further deterrent goals. Exclusion would be required in any case in which there had been a violation of constitutional rights, including those cases involving good faith violations." *Id.*

138. *See* note 44 *supra* and accompanying text.

139. United States v. Calandra, 414 U.S. 338, 348 (1974).

140. *See* note 24 *supra* and accompanying text.

141. *See* note 24 *supra* and accompanying text.

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

143. *See* notes 24-25 *supra* and accompanying text.

144. *See* United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting). Justice Brennan suggested that limitation of the exclusionary rule "openly invites '[t]he conviction that all

Court probably will not reconsider its holding in *United States v. Peltier* that judicial integrity is not offended by the admission of evidence seized in good faith.[145]

Critics of the good faith exception also attack its workability on the grounds that it will destroy the deterrent effect of the rule, encourage police misconduct, be difficult to administer, and retard development of the fourth amendment. Deterrence will be destroyed, they argue, if there is a good faith exception, because police officers will be tempted to search in questionable or borderline cases in the hope that the courts will admit the evidence. Critics argue that the exclusionary rule is designed to deter police misconduct by removing the incentive to search in violation of a citizen's rights.[146] To the extent that there is any possibility for the admission of illegally seized evidence, officers will be encouraged to violate fourth amendment rights,[147] and the exclusionary rule will have failed in its essential purpose.

There are only two circumstances in which the good faith exception can be expected to undercut the deterrent effect of the exclusionary rule. First, a police officer may decide to search despite his doubts about the validity of the search, although he would not have searched under the current exclusionary rule.[148] Second, a police officer may be willing to lie about his state of mind, thereby fabricating good faith.[149]

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government is staffed by . . . hypocrites, [a conviction] easy to instill and difficult to erase.' " *Id.* (quoting Paulsen, *supra* note 23, at 258).

145. United States v. Peltier, 422 U.S. 531, 537, 541-42 (1975).

146. *See, e.g.,* Amsterdam, *supra* note 18, at 431. *But see* Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

147. *See, e.g.,* United States v. Peltier, 422 U.S. 531, 557 (1975) (Brennan, J., dissenting).

148. *See* Ball, *supra* note 51, at 654. "If a law is ambiguous and could reasonably be read to validate a seizure, officers will be encouraged to opt for the interpretation which may compromise fourth amendment rights." *Id. See generally* United States v. Peltier, 422 U.S. 531, 559 (Brennan, J., dissenting).

149. *See* Ball, *supra* note 51, at 655. One commentator has suggested that the police already have many opportunities to perjure themselves to effect admission of evidence unconstitutionally seized and that one more opportunity will not increase the overall amount of dishonesty. *See* Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court,* 75 MICH. L. REV. 1319, 1414 n.396 (1977). It is impossible to measure the effect of a good faith exception on police behavior, although a police officer can lie about his state of mind more easily than he can lie about the objective facts of an arrest. The *Williams* objective good faith test might control this problem. 622 F.2d at 840. A police officer would not only need to testify convincingly regarding his subjective good faith, but he would have to prove it was also objectively reasonable. The need to satisfy both prongs of the test would limit the number of opportunities for perjury, although police assertions of good faith would be difficult to disprove. *See generally* Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights,* 59 MINN. L. REV. 991 (1975).

In either circumstance *Williams* will require that a court be satisfied that the good faith "mistake" was objectively reasonable.[150] It seems reasonable to assume that there will be some increase in judicially-sanctioned fourth amendment violations.[151] This increase, however, is not a conclusive indictment of the good faith exception. The Supreme Court will have to weigh this danger against the harms of releasing suspected criminals.[152]

The good faith exception also seems to put a premium on police ignorance of citizens' rights. Police departments might train their officers poorly, hoping that the courts will characterize any unlawful searches as good faith mistakes.[153] The objective reasonableness requirement[154] adopted by the *Williams* court appears, however, to preclude such a problem. A mistake made by an officer due to inadequate fourth amendment training would probably be deemed unreasonable by the courts.[155] Therefore, police departments will still have an incentive to train their officers properly.

Commentators have also objected to the addition of a fact finding process that includes the difficult task of probing states of mind. The concern is that this determination will burden the courts[156] and that the risk of inaccurate decisions will increase substantially.[157] This problem is offset partially by a reduction in adjudicating technical fourth amendment questions.[158] In addition, the advantage of obtaining valid

150. *See* note 6 *supra* and accompanying text. One commentator has argued that the difficulty of discerning subjective intent requires that good faith be judged by an objective standard. She asserts that a majority of the current Supreme Court might not find it objectionable for evidence seized in subjective bad faith to be admitted if it objectively appears that the seizure resulted from a good faith mistake. *See* Ball, *supra* note 51, at 654-55.

151. *See* note 18 *supra* and accompanying text.

152. *See* note 7 *supra* and accompanying text.

153. *See* Kaplan, *supra* note 17, at 1044.

> It would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible so that a large percentage of their constitutional violations properly could be labeled as inadvertent.

Id. See generally Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officers Perspective,* 10 PAC. L.J. 33, 51-53 (1978).

154. *See* note 6 *supra* and accompanying text.

155. *See, e.g.,* Israel, *supra* note 149, at 1413. *But see* Kaplan, *supra* note 17, at 1044.

156. *See* Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?,* 62 JUD. 66, 84 n.112 (1978); Kaplan, *supra* note 17, at 1045.

157. Kamisar, *supra* note 156, at 84; Kaplan, *supra* note 17, at 1045.

158. *See* H. FRIENDLY, *supra* note 132, at 262.

criminal convictions probably outweighs the judicial inconvenience of determining the existence of good faith.[159]

The difficulty of probing an officer's subjective beliefs and in disproving an officer's allegations of good faith[160] nevertheless will tax judicial fact finding resources. It is possible that the *Williams* test will become primarily an objective test[161] of police good faith. Courts faced with the impossible task of determining a police officer's state of mind probably will not make individual inquiries in each case. Instead, the court will determine whether it was objectively reasonable for the police officer to believe that his search was legal.

Justice Brennan has expressed the fear that a good faith exception will retard development of the fourth amendment.[162] He asserts that motions to suppress will be denied if precedent does not clearly establish the illegality of particular conduct. This would eliminate opportunities to litigate novel fourth amendment claims.[163] One commentator has responded that "it is perhaps overly pessimistic to fear that the law will stop dead in its tracks."[164] Moreover, a mere lack of clear precedent on identical facts would not automatically require denial of motions to suppress.[165] Although the good faith exception will, if adopted, profoundly alter the operation of the exclusionary rule, it is doubtful

159. *Id.* Judge Friendly contends: "Even if there were an added burden, most judges would prefer to discharge it than have to perform the distasteful duty of allowing a dangerous criminal to go free because of a slight and unintentional miscalculation by the police." *Id.*

160. *See, e.g.,* Foote, *supra* note 17, at 493; Kamisar, *supra* note 156, at 84 n.112; Kaplan, *supra* note 17, at 1045; Theis, *supra* note 149, at 1024.

161. *See* note 149 *supra*. *See generally* Comment, *Fourth Amendment in the Balance—The Exclusionary Rule After Stone v. Powell,* 28 BAYLOR L. REV. 611, 626-28 (1975) (discussion of a good faith standard the Supreme Court might adopt).

162. United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting). Justice Brennan contends:

> [T]his new doctrine could stop dead in its tracks judicial development of Fourth Amendment rights. For if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts.

Id.

163. *Id.*

164. Ball, *supra* note 51, at 655.

165. *See* Israel, *supra* note 149, at 1415. The *Williams* court did not, however, specify whether a court confronted with a suppression question must first rule on the fourth amendment's application before finding whether the police acted in good faith. If courts do not first rule on the fourth amendment's application there is at least some doubt whether the fourth amendment can continue to develop. *See* 622 F.2d at 846-47.

that the courts will give up their commitment to developing the fourth amendment.

Ultimately, the Supreme Court must decide whether the potential increase in convictions resulting from the good faith violation rule outweighs the potential increase in fourth amendment violations caused by police officers searching in questionable situations or fraudulently claiming good faith. The Court's dismissal of the judicial integrity[166] and personal rights[167] arguments leaves only the tension inherent in this balancing process.[168] The Court's decision would be easier if these concerns could be quantified. Even after numerous studies, though, the effectiveness of the exclusionary rule has not been established.[169] It is therefore unlikely that the effectiveness of the exclusionary rule in the context of good faith violations can be quantified. The Supreme Court's eventual decision of the issue therefore must rest on an intuitive weighing of constitutional protections and societal good.

IV. CONCLUSION

As the dissent in *Williams* predicted, the Supreme Court did refuse to review the case because of the separate ground for decision presented in the majority opinion.[170] Nevertheless, the Court will likely have an opportunity soon to consider specifically the good faith mistake exception to the exclusionary rule.

The *Williams* decision has already provoked comment from several courts, and it is likely that other federal circuit courts and some state courts will adopt its reasoning.[171] The Tenth Circuit cited the *Williams* opinion as precedent in refusing to give retroactive effect to a Supreme Court opinion applying the exclusionary rule to warrantless administrative inspections.[172] The Eighth Circuit has also cited the *Williams*

166. *See* note 44 *supra* and accompanying text.

167. *See* note 45 *supra* and accompanying text.

168. *See* notes 148-52 *supra* and accompanying text.

169. *See* note 18 *supra* and accompanying text.

170. 622 F.2d at 851 (Rubin, J., concurring specially). The specially concurring judge stated that "the announcement of the rule as an alternative ground for decision in a case where all the court agrees on the result virtually immunizes this case from Supreme Court review." *Id.* (Rubin, J., concurring specially). The Supreme Court denied the defendant's petition for certiorari. Williams v. United States, 449 U.S. 127 (1981).

171. *Williams* has also provoked extensive comment from commentators. *See, e.g.,* 15 GA. L. REV. 487 (1981); 32 MERCER L. REV. 1329 (1981); 13 ST. MARY'S L.J. 179 (1981); 34 VAND. L. REV. 213 (1981).

172. Robberson v. Marshall, 645 F.2d 22, 22 (10th Cir. 1980).

opinion.[173] Neither circuit, however, has yet adopted a good faith mistake exception. The Supreme Court of Colorado has twice endorsed the *Williams* opinion in dicta,[174] and New York trial courts have cited *Williams* in technical good faith violation cases.[175]

The Second Circuit, however, refused to adopt the *Williams* good faith exception, stating that even though the issue of good faith "will undoubtedly enter into the Court's handling of the exclusionary rule," the courts should not "endorse vague headings which add little to our understanding of the problems and which, because of their symbolic impact, may lead inadvertently to a weakening of the fourth amendment protection."[176] The Supreme Court of Virginia has also refused to create a good faith exception,[177] although it admits to being "persuaded by the logic in *Williams*."[178] In addition, a federal district court in Illinois has refused to apply the good faith exception to a United States Attorney's good faith abuse of grand jury subpoena powers.[179] As more courts endorse or reject *Williams*, the likelihood of the Supreme Court being confronted with the issue increases.

Justice White has claimed that four or more Justices on the current Court would like to alter the exclusionary rule.[180] As long as the Court views deterrence as the main justification for the exclusionary rule, a good faith mistake exception is a logical alteration.

The Court must, of course, weigh the likelihood of increased fourth amendment violations, fraud, and overburdening of the courts. These problems would be unique to the good faith mistake exception.[181] This task is made even more difficult by the lack of reliable empirical data available to the Court.[182] Nevertheless, the Court has addressed exclu-

173. United States v. Barnes, 634 F.2d 387, 389 (8th Cir. 1980). Several district courts have also noted *Williams* in dicta. *See, e.g.,* United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980); United States v. Wayne, 499 F. Supp. 664 (S.D. Fla. 1980).

174. *See* People v. Smith, 620 P.2d 232, 235 n.4 (Colo. 1981); People v. Eichelberger, 620 P.2d 1067, 1071 n.2 (Colo. 1980).

175. *See* People v. Arnow, 108 Misc.2d 128, __, 436 N.Y.S.2d 950, 953 (Sup. Ct. 1981); People v. Lent, 105 Misc.2d 831, 835, 433 N.Y.S.2d 538, 540 (Sup. Ct. 1980).

176. United States v. Alvarez-Porras, 643 F.2d 54, 60 (2d Cir. 1981).

177. Abell v. Commonwealth, 221 Va. 607, —, 272 S.E.2d 204, 210 (Va. 1980).

178. Holloman v. Commonwealth, 221 Va. 947, —, 275 S.E.2d 620, 622 (Va. 1981).

179. United States v. Santucci, 509 F. Supp. 177, 182-83 (N.D. Ill. 1981).

180. *See* Stone v. Powell, 428 U.S. 465, 537 (1976) (White, J., dissenting). *But see* Abell v. Commonwealth, 221 Va. 607, —, 272 S.E.2d 204, 210 (Va. 1980) ("[w]e can find no disposition on the part of the Supreme Court to permit a good-faith exception").

181. *See* notes 128-69 *supra* and accompanying text.

182. *See* note 18 *supra*.

sionary rule problems before without the aid of empirical data, and the current interest of the Burger Court in crime control suggests that the Supreme Court will rule on the issue in the near future.

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