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GOOD FAITH AND THE FOURTH AMENDMENT: THE "REASONABLE" EXCEPTION TO THE EXCLUSIONARY RULE

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INTRODUCTION

As one of the law's more controversial creations, the exclusionary rule has been the target of much criticism.[1] Some critics decry its result — the rule excludes reliable, probative evidence from the fact-finding process and allows the guilty to go free.[2] Others question its effectiveness — there is as yet no compelling proof that suppression achieves its goal of deterrence.[3] The most recent objection, and one which is gaining support, is aimed at the rule's nonselective application. The exclusionary rule is presently applied indiscriminately, without regard to the nature of the underlying violation.[4] Despite the disparity of the situations, both flagrant police misconduct and hapless official error are uniformly subjected to the same stringent sanction.[5] This last objection may have a profound impact upon the future operation of the exclusionary rule. Through a series of opinions issued since 1974, four current members of the United States Supreme Court have urged the adoption of a good faith exception to the exclusionary rule to meet this objection.[6] Such an exception would provide that when an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not operate.[7]

In fourth amendment cases,[8] most good faith violations concern the failure to meet the requirement of probable cause. Two basic types of violation are possible. First, an officer may make a judgmental error concerning the existence of facts sufficient to constitute probable cause. Such cases may be characterized as examples of "good faith mistake."[9] Second, an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court prec-

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[1] The exclusionary rule, or suppression doctrine, discussed in this article provides for the exclusion of evidence obtained in violation of the Constitution. It was first applied by the Supreme Court of the United States in Weeks v. United States, 232 U.S. 383 (1914). Later it was imposed upon the states in Mapp. v. Ohio, 367 U.S. 643 (1961).

Evidence may also be suppressed if it is seized in violation of statutes or regulations. *See, e.g.,* United States v. Mallory, 354 U.S. 449 (1957); United States v. McNabb, 318 U.S. 332 (1943); United States v. McDaniels, 355 F. Supp. 1082 (1973).

For a summary of many criticisms of the rule, see Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives,* 1975 WASH. U.L.Q. 621, 656–84.

[2] *See, e.g.,* Stone v. Powell, 428 U.S. 465, 496–98 (1976) (Burger, C. J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218, 267 (1973) (Powell, J., concurring). *See also* sources cited *id.* at 267 n.24.

[3] *See, e.g.,* 428 U.S. at 499–500. *See also* Wright, *Must the Criminal Go Free If the Constable Blunders?,* 50 TEX. L. REV. 736, 738–41 (1972). Although deterrence is generally accepted as one of the goals of suppression, it has not been universally accepted as its primary goal or underlying rationale. *See* text accompanying notes 157–73 *infra.*

[4] There are some circumstances in which the exclusionary rule is not applied. However, they do not relate to the nature of the offense. *See* United States v. Calandra, 414 U.S. 338 (1974) (grand jury proceedings); Linkletter v. Walker, 381 U.S. 618 (1965) (retroactive application); Walder v. United States, 347 U.S. 62 (1954) (impeachment at trial).

[5] *See* Brown v. Illinois, 422 U.S. 590, 609–12 (1975) (Powell, J., concurring in part).

[6] Justice Powell, Justice Rehnquist, Justice White, and Chief Justice Burger have all expressed their support of the good faith doctrine. *See* text accompanying notes 189–200 *infra.*

[7] *See* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting).

[8] The fourth amendment of the Constitution of the United States 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.

[9] *See, e.g.,* Stone v. Powell, 428 U.S. 465, 538–40 (1976) (White, J., dissenting).

edent which is later overruled. In each of these cases, the officer may be deemed to have committed a "technical violation."[10]

Arguments concerning the good faith doctrine have tended to concentrate upon its relationship to the exclusionary rule. This is understandable since the good faith doctrine makes certain debatable assumptions concerning the rule's rationale, goals and efficacy. Ultimately, however, the proposed good faith exception must be examined and judged in light of the requirements of the fourth amendment.

To that end, the discussion that follows will focus upon the relationship between good faith and the fourth amendment requirement of probable cause. It will explore the extent to which the good faith doctrine is supported by historical and decisional antecedents, and it will assess the effect which the proposed exception would have upon the interpretation of fourth amendment rights.[11] The discussion is principally concerned with the treatment of good faith by the United States Supreme Court and will emphasize Supreme Court opinions.

Civil Law in the 19th Century: Developing Doctrines of Probable Cause and Good Faith

The Doctrine of Probable Cause

When the founding fathers elevated the principle of reasonable search and seizure to "constitutional instead of ... merely legal significance,"[12] they simultaneously engendered an unending constitutional debate over the scope of the restrictions imposed on the government. As Professor Amsterdam has noted, the Bill of Rights is a profoundly anti-government document which must often be seen by those primarily concerned with crime control as thwarting necessary means to legitimate objectives.[13] There is no doubt that this result was intended. The purpose of the Bill of Rights was to place certain "great rights" beyond the power of any branch of government to subvert them for the alleged good of the people.[14] The fourth amendment, in particular, responded to the use in the colonies of general warrants granting unrestricted powers to search.[15] Although by 1789 such warrants had been condemned not only in the new states but also in England,[16] the states were not satisfied with a constitution which lacked specific protection against general warrants and demanded the security of an explicit guarantee in the Bill of Rights.[17]

The fourth amendment prohibits both "unreasonable searches and seizures" and introduces the requirement of probable cause.[18] Although the term "probable cause" has a certain legalistic ring to it, it did not arrive complete with an established definition or explanatory annotation. Since its inherent lack of precision is coupled with the need to apply it to varying factual situations, courts construing this provision must ponder not only what was considered probable cause when the amendment was adopted, but also how that concept may be fairly applied to the circumstances of subsequent generations. Presumably, if Congress were

[10] *See, e.g.,* Brown v. Illinois, 422 U.S. 590, 611–12 (1975) (Powell, J., concurring in part). In this article, the term "technical violation" will always refer to a violation of the fourth amendment resulting from a subsequent determination that a statute, warrant, or previous court decision relied upon by the police does not meet constitutional requirements. It should not be confused with the broader concept of a "procedural violation."

[11] A related issue is the desirability of a good faith exception. It is not the purpose of this article either to explore this question extensively or to resolve it; however, the issue is briefly examined. *See* text at notes 230–36 *infra.*

[12] N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 13 (1937). *See generally* for an excellent history of the early development of the fourth amendment.

[13] Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 353 (1974).

[14] I. Brant, The Bill of Rights 46–59 (1965).

[15] The most famous general warrants used in the colonies were Writs of Assistance used by customs officers to detect smuggled goods. Granting a continuous license to search at will for the life of the issuing sovereign, the Writs usually permitted searches wherever the collector's suspicion directed. N. Lasson, *supra* note 12, at 51–56.

[16] In England, the general warrant was condemned in Entick v. Carrington, XIX State Trials 1029 (1765). In the colonies, general warrants were prohibited by provisions in the state bills of rights. *See* N. Lasson, *supra* note 12, at 79–82.

[17] N. Lasson, *supra* note 12, at 88–89, 89 n.40.

[18] The formulation of the fourth amendment with two clauses separately providing a right against unreasonable searches and seizures and a requirement of probable cause is discussed and persuasively explained by Lasson. N. Lasson, *supra* note 12, at 101–03. Although it was debated whether a search and seizure, as opposed to a warrant, lacking probable cause was per se "unreasonable," the basic principle now established is that a search or seizure without probable cause violates the prohibition in the first clause. *See, e.g.,* Draper v. United States, 358 U.S. 307 (1959) (applying the probable cause standard to a case involving a warrantless search). *But cf.,* Terry v. Ohio, 392 U.S. 1 (1968) (limited intrusion based on less than probable cause, discussed in text of notes 143–49 *infra.*); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (fixed checkpoint border stop without "articulable suspicion").

now to enact legislation authorizing "Writs of Assistance," the Court would have no difficulty holding such legislation unconstitutional. The difficulty lies, now as in the past, with those cases which involve the close judgments of law enforcement officials who must assess the existence of probable cause while in the field.

Looking to the case law of the nineteenth century for the development of the doctrine of probable cause, one is immediately struck by the paucity of cases both in the Supreme Court and the lower federal courts. There are several reasons for this scarcity. First, the right to appeal to the Supreme Court in criminal cases was not granted until 1891.[19] Although this did not preclude Supreme Court consideration of probable cause, it did confine that consideration to civil cases. As will be seen, those civil cases are significant to the development of probable cause and illuminate contemporary thought on the issue. However, the fact remains that the number of early Supreme Court pronouncements on the subject was markedly limited by the lack of criminal appellate jurisdiction.

The slow expansion of general federal criminal jurisdiction limited the handling of cases involving probable cause by the lower federal courts as well. Prior to the late nineteenth century, Congress rarely exercised its power to legislate in criminal areas and most federal criminal cases dealt with maritime crime or crimes directly injurious to the central government.[20] Finally, beginning with the Sherman Antitrust Act in 1890, monopoly, prohibition, kidnapping and narcotics successively became notable targets of Congressional action and federal criminal jurisdiction began its major growth.[21] Because this growth commenced almost simultaneously with the bestowal of federal appellate criminal review, opportunities to construe the fourth amendment were effectively increased. Nonetheless, since the fourth amendment was not held applicable to the states through the fourteenth amendment until 1949, the most extensive development of search and seizure law remained far ahead.[22] It was not until *Mapp v. Ohio*[23] imposed the exclusionary rule upon the states and *Fay v. Noia*[24] opened the floodgates of habeas corpus review, that the doctrine found its fullest use and expression.

There were, of course, some early state cases dealing with probable cause, since many states had a constitution or bill of rights containing language equivalent to that of the fourth amendment.[25] However, even in the state courts there were very few criminal cases which raised the issue. At that time, there was no valid objection to pertinent evidence obtained through illegal search or seizure. If the evidence was otherwise admissible, the courts would not inquire into its acquisition.[26] Consequently, in both state and federal jurisdictions, the

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[19] *See* Act of March 3, 1891, 26 Stat. 827. This act also created the circuit courts of appeals and authorized them to review certain criminal cases.

The Supreme Court was always able to review habeas corpus petitions. *See, e.g.*, Ex parte Bollman and Swartwout, 8 U.S. (4 Cranch) 75 (1807).

[20] *See* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & CONTEMP. PROB. 64, 65–67 (1948).

[21] *See* N. LASSON, *supra* note 12, at 106.

[22] The fourth amendment was declared to be applicable to the states through the due process clause of the fourteenth amendment in Wolf v. Colorado, 338 U.S. 25 (1949). In 1833, the Supreme Court ruled that the Bill of Rights applied only to the federal courts unless otherwise expressly provided. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). Later, the Court explicitly stated that the fourth amendment only restrained the issue of warrants under federal law and was not applicable to state process. Smith v. Maryland, 59 U.S. (18 How.) 71 (1855). Although after the adoption of the fourteenth amendment in 1868, the issue of the application of the amendment to the states through the fourteenth amendment was raised several times before the Supreme Court, the Court managed to side-step the question until *Wolf. See, e.g.*, Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909); Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908); Adams v. New York, 192 U.S. 585 (1904). For a discussion of the incorporation doctrine, see Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 933–40 (1965).

[23] 367 U.S. 643 (1961).

[24] 372 U.S. 391 (1963). The floodgates were partially closed by *Stone v. Powell*, 428 U.S. 465 (1976), which limited a state prisoner's access to federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

[25] *See, e.g.*, Connor v. Commonwealth, 3 Binn. 38 (Pa. 1810) construing PA. CONST. art. 9, § 8, which provided in pertinent part that:

> ... the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that no warrant to search any place or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

[26] *See, e.g.*, Commonwealth v. Dana, 43 Mass (2 Met.) 329 (1841). The groundwork for the suppression of illegally obtained evidence was laid in Boyd v. United States, 116 U.S. 616 (1886), which equated compulsory production of evidence against oneself in violation of the fifth amendment with an unreasonable search and seizure, and held that the compelled evidence had been unconstitutionally admitted. Weeks v. United States, 232 U.S. 383 (1914), built upon the decision in *Boyd* and

initial interpretations of the doctrine of probable cause are primarily found in civil cases.

Civil suits in which probable cause was an important issue included admiralty cases of seizure and prize, revenue forfeiture cases, and cases claiming malicious prosecution. Cases of capture and prize often involved demands for compensation for wrongful seizure,[27] and if the seizure was based upon probable cause, damages would not be awarded.[28] Similarly, in revenue cases seeking damages for forfeiture or trespass, a showing of probable cause would protect seizing officers from liability.[29] Probable cause issues also arose in cases of malicious prosecution, because its absence was not only a key element of the action,[30] but also raised an inference of malice.[31]

Because probable cause was often dispositive of these claims, the Supreme Court and the lower federal courts were frequently required to define the concept and determine its existence in particular civil situations. Although the contexts were slightly different from those of criminal cases, the relationship to criminal law was clear. Malicious prosecution presupposed the initiation of a criminal proceeding.[32] Capture, prize and forfeiture all involved seizures which deprived the injured party of property as a penalty for alleged misconduct and were thus quasi-criminal in nature.[33] The "probable cause" which was defined in these civil cases was the same probable cause requirement arising in criminal cases.[34] When the Supreme Court finally attained jurisdiction over criminal appeals, it both cited and applied the formulations developed in the earlier civil decisions.[35]

The definition of probable cause arising from these cases reflects the common origin and conceptual overlap of tort and crime.[36] The standard imposed demands "reasonable suspicion" and its ultimate delineation is not unlike the "reasonable man" test of tort law. Somewhat less stringent than the construction of probable cause which subsequently developed, it adheres to rules of reasonable justification which antedate the terminology "probable cause."[37]

One of the earliest cases defining probable cause is *Murray v. Schooner Charming Betsy*,[38] an admiralty case in which one of the appellant's argued that probable cause should excuse him from damages resulting from wrongful capture.[39] Chief Justice Marshall wrote for the court and held that probable cause required "substantial reason for believing" that the vessel could be legally seized,[40] and would be satisfied only by facts furnishing "just cause of suspicion."[41] Later Marshall refined this

established the exclusionary rule by holding that evidence secured in violation of the fourth amendment would not be admissible in federal court.

[27] *See* 1 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT 1789-1918, at 2 (1923). Prize cases here include those involving capture, recapture and forfeiture for violation of revenue and embargo acts. Sometimes the term "prize" is used narrowly to refer only to seizures in time of war. *See, e.g.*, United States v. Reindeer, 27 F. Cas. 758, 768 (C.C.D.R.I. 1844) (No. 16,145).

[28] The Apollon, 22 U.S. (9 Wheat.) 362, 372 (1824); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 122 (1804).

[29] *See, e.g.*, Averill v. Smith, 84 U.S. (17 Wall.) 82, 91 (1872) (trespass); Sixty Pipes of Brandy, 23 U.S. (10 Wheat.) 421, 425-26 (1825) (forfeiture). Often a statute would protect the collector from liability in cases of wrongful seizure where there was reasonable cause for the seizure by requiring the court to issue a certificate of probable cause which would effectively bar claims. *See, e.g.*, Stacey v. Emery, 97 U.S. 642, 643-44 (1878).

[30] The elements of an action for malicious prosecution are: (1) a criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; (4) "malice" or a primary purpose other than that of bringing an offender to justice. W. PROSSER, LAW OF TORTS 835 (4th ed. 1971).

[31] *Id.* at 839.

[32] *See* note 30 *supra*.

[33] *See* Boyd v. United States, 116 U.S. 616, 634 (1886). "[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."

[34] *See* Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753 (1943).

[35] *See, e.g.* Dumbra v. United States, 268 U.S. 435, 441 (1925) (citing Stacey v. Emery, 97 U.S. 642 (1878)); Carroll v. United States, 267 U.S. 132, 159-61 (1925) (citing The Thompson, 70 U.S. (3 Wall.) 155 (1865); The Apollon, 22 U.S. (9 Wheat.) 362 (1824); The George, 10 F. Cas. 201 (C.C.D. Mass. 1815) (No. 5,328); Locke v. United States, 11 U.S. (7 Cranch) 339 (1813)).

[36] *See generally* Hall, *supra* note 34. The A.L.I. *Model Code of Pre-Arraignment Procedure*, §§ 120.1, 210.1 (Proposed Official Draft, 1975) uses the term "reasonable cause to believe" as the equivalent of "probable cause," not in its historic sense.

[37] *Compare* U.S. CONST. amend. IV (probable cause) *with* Samuel v. Payne, 99 Eng. Rep. 230 (1780) (reasonably probable grounds of suspicion) *and* Proposed Amendment 14 of the Committee of 20 of the Constitutional Convention *quoted in* N. LASSON, *supra* note 12, at 95 n.61 (legal and sufficient cause).

[38] 6 U.S. (2 Cranch) 64 (1804).

[39] *Id.* at 122.

[40] *Id.*

[41] *Id.* at 123.

view in *Locke v. United States*[42] where, somewhat overconfidently, he stated that "the term 'probable cause' ... in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under *circumstances which warrant suspicion.*"[43]

The idea of probable cause as a reasonable ground of suspicion was also voiced by Justice Washington's charge to the jury as Circuit Justice in *Munns v. De Nemours.*[44] In response to his own query as to the meaning of the term, Washington did not merely answer "a reasonable ground of suspicion," but went on to define it further as "supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged."[45] This formulation clearly echoes the "reasonable man" standard dominating the law of torts, a standard which emphasizes prudent action under the circumstances.[46] Not confined to use in the federal courts, the definition also was applied by state courts which closely followed the language in *Munns.*[47]

The federal court decisions which construed probable cause used similar words, varying only slightly from "circumstances which warrant suspicion"[48] to "reasonable suspicion"[49] to "reasonable ground of suspicion."[50] The emphasis in all of these opinions is upon reasonable search and seizure based on circumstances which would cause a prudent man to entertain suspicion. That the theory running through them is consistent was confirmed by the Supreme Court in its 1878 decision, *Stacey v. Emery.*[51] Accepting *Munns* and similar federal and state cases, the *Stacey* Court concluded that all of the definitions are essentially the same and equated probable cause with the earlier expression "reasonable cause."[52]

The nineteenth century interpretation of probable cause was thus arguably less exacting than later constructions. It should not, however, be mistaken for the "mere suspicion" test which was consistently rejected. *Reasonable* suspicion had to be grounded in facts and, where a warrant was involved, supported by oath. Suspicion based upon common rumor and report was insufficient.[53] There had to be factual support.[54] The test was not subjective, but rather imposed objective criteria. In situations where the underlying facts were not sufficient to render the suspicion reasonable, the Court condemned the attendant search or seizure.[55]

Good Faith Mistake

The early civil cases also reveal a nascent good faith doctrine. These cases may be conceptually divided into the same subcategories of good faith mistake and technical violation that would be governed by the suggested good faith exception to the exclusionary rule. However, unlike their contemporary counterparts, they do not share a common basis for disposition. Although the early cases involving technical violations, like those defining probable cause, may be directly linked to modern criminal doctrines, they depart from the modern view in both analysis and resolution. On the other hand, the early cases involving good faith mistake are even more analogous to present criminal cases and they will be seen to adhere fairly closely to the theory and result of the proposed good faith exception.

In examining good faith mistake, it is necessary to return again to actions grounded in tort. Under tort law, two types of concessions are generally made to the good faith or proper motivation of a party who causes an injury. First, although he may actually be held liable for his wrongful actions, a well-meaning party is likely to escape the imposition of punitive damages.[56] Second, a well-intentioned party, by definition, will not provide the requisite element of intentional wrongdoing or malice that is required to sustain certain causes of

[42] 11 U.S. (7 Cranch) 339 (1813).
[43] *Id.* at 348 (emphasis added).
[44] *See* 17 F. Cas. 993 (C.C.D. Pa. 1811) (No. 9,926).
[45] *Id.* at 995.
[46] *See* W. PROSSER, *supra* note 30, at 149-51, 157.
[47] *See, e.g.,* McCarthy v. De Armit, 99 Pa. 63, 69 (1881); Foshay v. Ferguson, 2 Denio 616, 619 (N.Y. 1846).
[48] The Thompson, 70 U.S. (3 Wall.) 155, 162 (1865); The George, 10 F. Cas. 201, 202 (C.C.D. Mass. 1815) (No. 5,328).
[49] Sixty Pipes of Brandy, 23 U.S. (10 Wheat.) 421, 427 (1825).
[50] The Thompson, 70 U.S. (3 Wall) 155, 163 (1865); United States v. The Recorder, 27 F. Cas. 723, 724 (C.C.S.D.N.Y. 1849) (No. 16,130).
[51] 97 U.S. 642 (1878).
[52] *Id.* at 645-46.
[53] *See, e.g.,* Connor v. Commonwealth, 3 Binn. 38 (Pa. 1810).
[54] *See, e.g.,* Ex Parte Burford, 7 U.S. (3 Cranch) 448, 451 (1806).
[55] *See, e.g.,* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); *See also* Ex Parte Bollman & Swartwout, 8 U.S. (4 Cranch) 75 (1807) (citing article 10 of the Virginia Bill of Rights).
[56] *See* W. PROSSER, *supra* note 30, at 9-11. Punitive damages have been called an invasion of ideas of criminal law into the field of torts. *Id.* at 9.

action.[57] Both of these concessions to good faith error are illustrated by the civil cases dealing with unintentional mistakes as to the existence of probable cause. In the context of punitive damages, *Murray v. Schooner Charming Betsy*[58] presents an initial treatment of good faith error by Chief Justice Marshall.

In *Charming Betsy*, an errant captain who without probable cause had seized a ship was protected from the imposition of punitive damages by what amounted to good faith. Because the circumstances of the case produced a conviction in the Court that the captain had "acted upon correct motives from a sense of duty," the fact that he trusted suspicions too "light" to constitute probable cause did not result in added damages.[59] Although the Court affirmed compensation for actual damages,[60] the violation of constitutional rights did not in itself command a remedy. In fact, the idea of redress for the unlawful seizure does not appear to have been considered by Marshall. Not unlike modern juries hearing claims against police officers, the Chief Justice was primarily concerned that a public officer attempting to do his duty might be subjected to an oppressive judgment.[61]

An officer who acted in good faith could fare equally well in malicious prosecution cases. Because malice was required in addition to an absence of probable cause, if the officer could establish that he acted upon proper motivation, he could escape liability for his unlawful conduct. Both state and federal courts relied on this principle,[62] and although a lack of probable cause would give rise to an inference of malice, the defendant who could refute that inference would suffer no sanction.[63]

The law governing malicious prosecution can thus be reduced to three equations:

> First, no probable cause plus malice equals sanction; here both elements required to sustain the cause of action are present.
>
> Second, probable cause plus malice equals no sanction; here the existence of probable cause makes the conduct lawful.
>
> Third, no probable cause plus no malice equals no sanction; despite the lack of probable cause, proper motivation precludes liability.

An evidentiary rule to the first equation is that no probable cause will result in an inference of malice and will thus lead to sanction unless the inference is rebutted.

Although lack of malice is not quite the same as good faith, it is sufficiently analogous to permit a direct comparison of these equations with the principles which govern the imposition of the sanction of exclusion in cases of search and seizure. The formulae governing the relationship between probable cause and good faith in search and seizure cases can be established by substituting a lack of good faith for malice in the original equations:

> First, no probable cause plus no good faith equals sanction; the evidence is excluded.
>
> Second, probable cause plus no good faith equals no sanction; probable cause makes the conduct lawful.
>
> Third, no probable cause plus good faith equals sanction; at present, the exclusionary rule is applied in the absence of probable cause notwithstanding the officer's good faith.

Because this third theorem renders good faith irrelevant where there is no probable cause, an evidentiary rule dealing with inferences likewise becomes inconsequential.

It is only in the third equation that the treatment of motivation in search and seizure cases differs from that in malicious prosecution cases, and it is precisely here that the proposed good faith exception to the exclusionary rule would work a change that would bring them into total conformity. Under the good faith exception, no probable cause plus good faith would equal no sanction, that is, no exclusion of evidence obtained through unlawful search or seizure. As in malicious prosecution cases, proper motive would bar the imposition of sanctions for unlawful acts. While an evidentiary rule related to the first equation was unnecessary when the lack of probable cause alone dictated a sanction, a useful rule could now be established. No probable cause would result in an inference of no good faith and would also lead to sanction unless the inference were rebutted. Thus, quite appropriately, should the state fail to meet its burden of establishing probable cause, supression would continue to be the presumed result and would only be avoided if the state affirmatively established good faith.

[57] *Id.* at 23-25.
[58] 6 U.S. (2 Cranch) 64 (1804).
[59] *Id.* at 124.
[60] *Id.* at 125.
[61] *Id.* at 124.
[62] *See, e.g.*, Munns v. De Nemours, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811) (No. 9,926); Foshay v. Ferguson, 2 Denio 616, 619-20 (N.Y. 1846); Ulmer v. Leland, 1 Me. 135, 137-38 (1820).
[63] *See, e.g.*, Munns v. De Nemours, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811) (No. 9,926).

One may well ask why the teaching of early civil cases is relevant to the development of modern rules of criminal procedure. The question is particularly apt when, as in cases of malicious prosecution, these are doctrines which still possess vitality and could be dismissed as a feature unique to that area of the substantive law. Putting aside the conceptual overlap of tort and crime, perhaps the best answer is that the nineteenth century civil cases dealing with unintentional mistake concerning probable cause gave the early courts their only opportunities to consider the definition of probable cause and the effect that good faith would have on the implementation of that doctrine. Since the Court has been willing to use these decisions to define probable cause in later criminal cases,[64] it is not inappropriate to look to them for guidance in the area of good faith as well. Indeed, the Supreme Court itself continues to cite civil cases on good faith and probable cause for guidance in criminal cases.

For instance, *Director General v. Kastenbaum*,[65] a false imprisonment case, has been cited by the Court for the proposition that good faith does not constitute probable cause.[66] Although this is a fair reading of the case, *Kastenbaum* cannot be read as making good faith irrelevant to probable cause in criminal cases. It is one thing to say that good faith does not equal probable cause; it is quite another to say that where there is no probable cause, good faith will not affect the imposition of a sanction. Likewise, a case such as *Stacey v. Emery*, which holds that malice or good faith is not an element where the question is not motive but probable cause, should not be interpreted to mean that good faith cannot temper the effect of a lack of probable cause.[67] In *Stacey*, probable cause had already been established; however, the petitioner sought damages on the theory that malice negated probable cause. Consequently, the case merely reiterates the principle that probable cause always provides a lawful basis for search and seizure, regardless of motive, a point that was clearly made by the second equation derived from the malicious prosecution and the search and seizure cases.

[64] See cases cited note 35 *supra*. Justice McReynolds also argued that reliance on the civil cases was misplaced. *See* text accompanying notes 106–10 *infra*.

[65] 263 U.S. 25 (1923).

[66] *See* Henry v. United States, 361 U.S. 98, 102 (1959); Carroll v. United States, 267 U.S. 132, 161 (1924).

[67] *See* Stacey v. Emery, 97 U.S. 642 (1878). *See also* Henry v. United States, 361 U.S. 98, 102 (1959).

Rather than being used as a basis for ignoring good faith, the civil cases involving mistaken judgments could better be interpreted as indicating that valid concessions to good faith error may be made. Although the treatment of motive in relation to probable cause under tort law may not be directly applicable to the modern law of criminal procedure, it does demonstrate that, at least on the civil side, there may be violations of constitutional rights which result in neither sanction nor remedy. Whether this approach should be extended to the criminal arena and the application of the exclusionary rule is a question which may depend upon the source of the suppression doctrine no less than upon policy for its answer. If instead of being a deterrent sanction or a remedy, the exclusionary rule is actually part of a constitutional right, it is the constitution which will require a different treatment of the good faith mistake.[68]

Technical Violations

Technical violations result not from an officer's reasonable but mistaken judgment as to facts constituting probable cause, but rather from his reasonable conduct predicated upon apparently valid legal directives.[69] Today, when an officer relies upon a statute or a statutory construction which is later rejected by the court as unconstitutional or incorrect, his action could be considered a technical violation and any challenged evidence could be eligible for the proposed good faith exception to the exclusionary rule.[70]

During the nineteenth century, this situation was analyzed in a theoretically different, but functionally consonant way. Although, as a practical matter, both in the past and under the proposed

[68] *See* text accompanying notes 157–75 *infra*.

[69] As previously defined, technical violations of the fourth amendment are those which occur because an officer acted in reliance upon a statute which is later declared unconstitutional, a warrant which is rejected as insufficient, or an interpretation of the law which is subsequently overruled. *See* Introduction and note 11 *supra*.

[70] *See, e.g.*, Brown v. Illinois, 422 U.S. 591, 611–12 (Powell, J., concurring); Peltier v. United States, 422 U.S. 531 (1975). *Peltier* was a retroactivity case and was decided upon principles established in preceding cases concerning the retroactive application of constitutional rulings. *See id.* at 535. However, the bulk of the majority opinion is devoted to establishing that the policies underlying the exclusionary rule do not require retroactive application in cases where officials acted in good faith reliance upon administrative regulations and judicial opinions. *See id.* at 536–542 and text accompanying notes 76–89 and notes 174–228 *infra*.

good faith exception the official conduct would not be penalized, the reason for this treatment has changed. Where there would now be a determination that a violation of the fourth amendment will not be punished because of the officer's good faith, in the past there was a determination that the existence of probable cause rendered the seizure reasonable.

An illustrative case is *United States v. The Recorder*,[71] which concerned a ship seized for violating federal navigation laws. The forfeiture was based upon a construction of the navigation act which had been adopted by the Secretary of the Treasury in conformity with an opinion of the Attorney General.[72] When the case was heard, the court decided that the official construction was erroneous and that the statute had not been violated.[73] However, despite the fact that the correct construction of the statute did not provide grounds for arrest, the court also held that the officer was entitled to a certificate of probable cause. Because the attorney general's opinion had afforded the seizing officer a fair reason for believing that the law had been violated, the seizure was considered to have been based upon reasonable grounds.[74]

The theory underlying this case[75] is that just as probable cause could be based on facts which furnish a reasonable ground of suspicion, so too it could be based on a statute or statutory construction which does the same. Moreover, a subsequent determination that there was no valid authorization for the seizure did not destroy that reasonable ground or give rise to a sanction. All that was necessary was that a reasonable reading of the statute or construction warranted the officer in his belief that the search or seizure was authorized at the time it was conducted.

Peltier v. United States,[76] which prompted Justice Brennan's most impassioned attack on the good faith doctrine, is factually similar to *The Recorder* and the other early cases.[77] In Peltier, border patrol agents had conducted a warrantless automobile search pursuant to a federal statute authorizing such searches "within a reasonable distance from any external boundary of the United States."[78] Administrative regulations defined a "reasonable distance" as up to one hundred miles, and federal courts repeatedly upheld the constitutionality of searches under the Act.[79] In 1973, the Supreme Court had held in *Almeida-Sanchez v. United States* that the accepted construction of the Act was unconstitutional and that such searches violated the fourth amendment.[80] Peltier's conviction was based on evidence seized during a search conducted pursuant to the Act four months before the decision in *Almeida-Sanchez*.[81] Peltier asserted that the evidence used to convict him should have been suppressed because of the illegality of the search. However the Court ruled that *Almeida-Sanchez* would not be applied retroactively and thus refused to exclude the evidence.[82]

The *Peltier* Court looked to the purposes of the exclusionary rule and concluded that neither judicial integrity nor deterrence required a retroactive application of *Almeida-Sanchez*. The Court believed that the use of evidence seized by officers who acted "in good faith compliance with the then-prevailing constitutional norms" does not offend the "imperative of judicial integrity" even if

[71] 27 F. Cas. 723 (C.C.S.D.N.Y. 1849) (No. 16,130).

[72] *Id.* at 723.

[73] United States v. The Recorder, 27 F. Cas. 718 (C.C.S.D.N.Y. 1849) (No. 16,129).

[74] *Id.*

[75] United States v. The Friendship, 9 F. Cas. 825 (C.C.D. Mass. 1812) (No. 5,125) is similar to *The Recorder*. In *The Friendship*, a ship was seized under a statute which was interpreted differently in different judicial circuits. The disputed construction was of Section 2 of the Act of April 25, 1808, 2 Stat. 499. There was originally some uncertainty as to whether the ship was being detained under Section 11 of the same act, which did not require probable cause but only an opinion of the officer that there was an intent to violate the embargo act. *See* Section 11 of the Act of April 25, 1808, 2 Stat. 501. Although Section 11 probably violated the fourth amendment, cases construing it do not reflect the Court's interpretation of probable cause. *See, e.g.*, Otis v. Watkins, 13 U.S. (9 Cranch) 339 (1815); Crowell v. McFadon, 12 U.S. (8 Cranch) 93 (1814). It has been aptly suggested that the Court was remiss in not declaring Section 11 and similar legislation unconstitutional. *See* Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part Two*, 4 U. RICH. L. REV. 60, 75 (1969). Two years after the seizure of the Friendship, the Supreme Court resolved the conflict in The Paulina v. United States, 11 U.S. (7 Cranch) 52 (1812). The Court rejected the interpretation which allowed the seizure of the Friendship. Based on *The Paulina*, the *Friendship* court certified probable cause since the seizure was supportable under the rejected interpretation.

[76] 422 U.S. 531 (1975).

[77] *See* note 75 *supra*.

[78] *See* 422 U.S. at 539-40 and the Immigration and Nationality Act of 1952, 8 U.S.C. § 1357(a)(3), quoted *id.* at n.6.

[79] Peltier v. United States, 422 U.S. 531, 539-40 & n.8 (1975). *But see id.* at 545-46 (Brennan, J., dissenting).

[80] 413 U.S. 266 (1973).

[81] Peltier v. United States, 422 U.S. 531, 532 (1975).

[82] *Id.* at 542.

a subsequent decision broadens the exclusionary rule to include such evidence.[83] Further, the deterrent purpose of the exclusionary rule would not be served by its application to police conduct undertaken in good faith.[84] Given the agents' justifiable reliance upon a validly enacted statute supported by administrative regulations and judicial approval, the Court held that nothing required that the evidence be suppressed.[85]

The parallels between *Peltier* and the earlier cases are easily drawn. For instance, the officers in both *Peltier* and *The Recorder* acted in reliance upon an erroneous statutory construction promulgated by the Attorney General.[86] Similarly, in both *Peltier* and *United States v. The Friendship*,[87] the rejected construction had received prior judicial approval and the Supreme Court decision which invalidated the construction was announced subsequent to the challenged seizure. Where *Peltier* diverges from the earlier cases is in its underlying premise.

Peltier is based on the principle that where an officer acts in good faith reliance upon statutes, regulations and federal court decisions, the evidence obtained from his search and seizure should not be excluded if a subsequent court decision renders such searches and seizures unconstitutional. The Court assumes that the challenged search and seizure is unconstitutional under the fourth amendment, but it declares that because of the officer's good faith, the exclusionary sanction should not be applied. In contrast, the premise underlying the nineteenth century cases is that there has been no violation of the fourth amendment because the judicial and administrative constructions of the statutes then in existence gave the officers probable cause to believe that the law had been violated. This theory could not have been applied in *Peltier* because the construction relied upon by the officers merely gave them reason to believe that their searches were valid despite a lack of either warrants or probable cause. The statute was read as authorizing a border search which did not require probable cause.[88] Because of this fundamental difference in *Peltier*, a difference which necessitates a reliance upon retroactivity principles while stressing the good faith doctrine, *Peltier* itself could not be treated like the early cases. This is not true, however, of other cases involving technical violations which raise the issue of good faith.[89]

For instance, in *Stone v. Powell*[90] the court of appeals reversed the defendant's conviction, in part, because it was based on evidence found when he was arrested for violating a vagrancy ordinance later held unconstitutional. Although the arresting officers were enforcing statutes in good faith, the court of appeals felt that excluding the evidence might deter legislators from enacting unconstitutional statutes.[91] Although the good faith issue was briefed and argued before the Supreme Court,[92] the case was decided on the scope of the availability of federal habeas corpus relief to state prisoners.[93] Nonetheless, the argument for a good faith exception is clearly presented in Justice White's dissent which shares the outlook of the majority opinion on limiting the reach of the exclusionary rule.

As stated in White's dissent, when an officer acts on the basis of a statute which is later held unconstitutional, either on its face or as applied, he is merely doing his duty in good faith and on reasonable grounds. Although there has been an invasion of the defendant's privacy, the defendant has no

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[83] *Id.* at 536-37.

[84] *Id.* at 538-39.

[85] *Id.* at 542.

[86] *Compare* Peltier v. United States, 422 U.S. 531 (1975) *with* United States v. The Recorder, 27 F. Cas. 723 (C.C.S.D.N.Y. 1849) (No. 16, 130).

[87] *Compare* Peltier v. United States, 422 U.S. 531 (1975), *with* United States v. The Friendship, 9 F. Cas. 825 (C.C.D. Mass. 1812) (No. 5, 125).

[88] Border searches of anyone are permissible without probable cause based on the sovereign right of the nation to protect its territorial integrity through the exclusion of foreign nationals. Persons entering the country may be required to identify themselves as entitled to enter and their belongings as effects which may lawfully be brought into the country. *See* Carroll v. United States, 267 U.S. 132, 154 (1925); Note, 15 COLUM. J. TRANSNAT'L L. 277, 291 (1976).

[89] *See* note 75 *supra*. On October 2, 1978, the Supreme Court granted certiorari in Michigan v. De Fillippo, 80 Mich. App. 197, 262 N.W.2d 921 (1977), *cert. granted*, 99 S. Ct. 76 (1978), and will consider the question of whether an arrest made in good faith reliance on an ordinance which had not then been declared unconstitutional, is valid without regard to the constitutionality of the statute ordinance. In its petition for certiorari, the state claimed that the application of the exclusionary rule would serve no purpose because it could have no deterrent effect. It cites United States v. Peltier, 422 U.S. 531 (1975), in support of this position. The petition argues that the Court should consider both the existence of probable cause and the application of a good faith exception to the exclusionary rule for a "technical violation."

[90] 507 F.2d 93 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976).

[91] *Id.* at 98.

[92] *See* Brief for Petitioner at 11-38, Stone v. Powell, 428 U.S. 465 (1975); Brief for Petitioner, at 35-38, and Brief for Respondent at 41-57, Wolff v. Rice (companion case).

[93] 428 U.S. at 494-95.

right to civil damages and he should not be entitled to the exclusion of any probative evidence which was seized.[94] Exclusion in such cases could have no deterrent effect and judicial integrity would not be impaired when evidence is admitted after a violation has occurred, particularly when there has been only "mistaken, but unintentional and faultless, conduct by enforcement officers."[95]

Implicit in Justice White's analysis is the assumption that the search was in violation of the fourth amendment. However, the analysis applied to the early admiralty cases could easily be used. Under that theory a reasonable although mistaken reliance upon the validity of a statute or construction of a statute is sufficient to establish probable cause, and that probable cause continues to render the search reasonable even when the statute or construction is subsequently rejected. It would be consistent with that approach to hold that the search in *Stone* was legal and, consequently, that the exclusionary rule was inapplicable.[96] The validity of a search or seizure would be measured against the facts and law known to an officer at the time he acts. The subsequent acquisition of information that proves that a person is innocent of the crime for which he was arrested neither negates probable cause at the time of arrest nor requires that evidence seized incident to that arrest be suppressed. Likewise, the subsequent pronouncement of the misconstruction or unconstitutionality of a statute need not render seizures invalid.

At first glance, this theory seems to go much further than *Peltier* in its effect upon the seizure; however, the practical effects of the two positions are the same, that is, no sanction or remedy results. The good faith exception thus functions consistently with its nineteenth century precursors to the extent that it credits the reasonableness of conduct predicated upon apparent law and shields the official's conduct from sanction. Although according to modern interpretation these searches and seizures may now be considered as violations of the fourth amendment, the early cases at least provide support for acknowledging the importance of the officer's good faith and for not imposing suppression.

[94] *Id.* at 540-42 (White, J., dissenting).

[95] *Id.* at 540 (White, J., dissenting).

[96] Although the statute in *Stone* was invalidated on due process grounds, it is possible for a vagrancy statute to be held unconstitutional because it violates the fourth amendment requirement of probable cause by permitting arrests on mere suspicion. *See* United States v. Hall, 459 F.2d 831 (D.C. Cir. 1972). However, this would not change the officer's reasonable basis for a good faith belief that he was making an arrest based on probable cause.

Criminal Procedure in the 20th Century: Probable Cause and the Exclusionary Rule

The seventy-five years between 1886 and 1961 encompassed a second era of fourth amendment development. Beginning with *Boyd v. United States* and ending with *Mapp v. Ohio*, the period was marked by several significant changes in the realm of criminal justice.[97] Federal criminal jurisdiction began its great expansion,[98] the suppression doctrine was formulated and imposed on the federal courts,[99] and a substantial number of criminal cases construing the fourth amendment were amassed. Although expanded criminal jurisdiction was influential, it was the suppression doctrine which prompted the litigation that led to definitive Supreme Court decisions. Once a violation of the fourth amendment could have a practical effect upon the disposition of cases, the interpretation of its requirements became central to many appeals.

Fourth Amendment Requirements Evolve

The primary evolution of fourth amendment doctrine away from the theory of the nineteenth century coincided with Prohibition and reflected the political and social objectives of the time. The eighteenth amendment became effective on January 16, 1920, and out of twenty-three search and seizure decisions rendered by the Supreme Court between 1921 and 1938,[100] eighteen involved liquor

[97] Boyd v. United States, 116 U.S. 616 (1886), presaged the adoption of the exclusionary rule in an opinion which ruled against the admissibility of evidence which the defendent was compelled to produce against himself in violation of the fifth amendment. The compulsory production in violation of the fifth amendment was considered an unreasonable search and seizure under the fourth amendment. For an analysis of the decision in *Boyd*, see J. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 49-61 (1966).

Mapp v. Ohio, 367 U.S. 643 (1961), applied the exclusionary rule to the states.

[98] *See* text accompanying notes 19-26 *supra*.

[99] *See* Weeks v. United States, 232 U.S. 383 (1914) (evidence obtained by federal officers in violation of the fourth amendment held inadmissible in federal court); Wolf v. Colorado, 338 U.S. 25 (1949) (state courts not required to exclude evidence obtained in violation of the fourth amendment).

[100] *See* Appendix to Harris v. United States, 331 U.S. 145, 175-81 (1947) (Frankfurter, J., dissenting). Olm-

or prohibition.[101] During the 1920's, eight out of twelve cases upheld the admissibility of challenged evidence; however, as prohibition became increasingly unpopular and prosecutions for violations were disfavored, the trend was reversed. After 1930, seizure was upheld in only two cases; in all of the others the evidence was ruled inadmissible.[102] This increased use of the exclusionary rule to soften the enforcement of prohibition also occurred in the states, many of which had adopted their own version of the rule for precisely that purpose.[103]

Prohibition gave the courts their first concerted opportunity to define searches and seizures within the fourth amendment, and if any case can be considered as providing the keynote to this era, it is *Carroll v. United States*.[104] The first prohibition case to reach the Supreme Court, *Carroll* produced both a majority opinion which espoused the nineteenth century view of probable cause and a dissenting opinion which called for the more stringent requirements that soon developed. Significantly, the majority opinion was written by Chief Justice Taft, whose leadership dominated the Court's policies in the 1920's.[105] The dissent was authored by Justice McReynolds, who would join in many of the decisions excluding evidence in the thirties and write several of them.[106]

Although *Carroll* is best known for establishing the moving vehicle exception to the warrant requirement,[107] Chief Justice Taft's opinion also carefully considered the issue of probable cause. Taft's initial premise was that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."[108] Turning to familiar authority such as *Stacey v. Emery*,[109] Taft defined probable cause as facts and circumstances "such as to warrant a man of prudence and caution in believing that an offense has been committed."[110] Cases such as *Locke*, *The George*, *The Thompson* and *Munns v. De Nemours* were also cited, but the approach of the Court was most clearly indicated by its reliance on *McCarthy v. De Armit*. The Court in that case had stated that the substance of all definitions of probable cause is "a reasonable ground for belief in guilt."[111]

In dissent, Justice McReynolds perceived the same facts as establishing an illegal search incident to an arrest based on "mere suspicion."[112] Responding to the majority's use of nineteenth century civil cases for precedent, McReynolds argued that forfeiture and tort cases should not be controlling, particularly cases which turned on express statutory provisions inapplicable to the case at hand.[113] The weakness of this position becomes apparent when it is noted that McReynolds did not directly attack any of the cases actually cited in the majority opinion. Rather, he cited a distinguishable line of cases which not only do not control, but also differ significantly from the cases upon which the majority did rely. The early cases which Justice McReynolds listed involved statutes purporting to authorize arrest or seizure upon opinion or "mere suspicion," and in no way involved a determination of the requirements for probable cause.[114] Conversely, all of the cases cited by the majority, where the issue was raised, did require the establishment of probable cause and thus could serve as precedent for the case at hand.

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stead v. United States, 277 U.S. 438 (1928), is omitted from the Appendix because it held that a wiretap did not constitute a search and seizure. This analysis was later rejected in Katz v. United States, 389 U.S. 347 (1967).

[101] In fact, only one search and seizure case between 1925 and 1938 was not related to liquor: Agnello v. United States, 269 U.S. 20 (1925).

[102] The cases upholding seizure were Husty v. United States, 282 U.S. 694 (1931), and Scher v. United States, 305 U.S. 251 (1938).

[103] *See* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 682 n.11 (1974).

[104] 267 U.S. 132 (1925).

[105] Chief Justice Taft's term ran from 1921 to 1930.

[106] Justice McReynolds wrote the majority opinions in Taylor v. United States, 286 U.S. 1 (1932), and Nathanson v. United States, 290 U.S. 41 (1933).

[107] *Carroll* upheld the warrantless search of a moving vehicle based upon probable cause. 267 U.S. at 153.

[108] *Id.* at 149.

[109] 97 U.S. 642 (1878). *See also* text accompanying notes 44–52 *supra*.

[110] *Id.* at 161 (quoting Stacey v. Emery, 97 U.S. 642, 645 (1878)).

[111] *See* Carroll v. United States, 267 U.S. 132, 161 (1925) (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881)).

[112] 267 U.S. at 163 (McReynolds, J., dissenting).

[113] *Id.* at 163.

[114] The cases dismissed as irrelevant in the dissenting opinion were: Taylor v. United States, 44 U.S. (3 How.) 197 (1845); Wood v. United States, 41 U.S. (16 Pet.) 342 (1842); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818); Otis v. Watkins, 13 U.S. (9 Cranch) 339 (1815); United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814); Crowell v. McFadon, 12 U.S. (8 Cranch) 94 (1814). *See* note 75 *supra* which discusses the statutory provision construed in *Crowell* and *Otis*.

Whether or not McReynolds' dissenting opinion is persuasive, it is of interest because of the way it viewed the facts. While the majority had reviewed the facts of record and had come to the conclusion that they were sufficient to establish probable cause, the dissent labeled the same facts as providing "mere suspicion." Since there were some objective facts upon which the seizing officers relied and the seizure was not based only on rumor or inchoate hunch, the difference between the two assessments must be based upon the different approaches to probable cause. While the majority was satisfied that the facts supplied a reasonable ground for belief as required by previous decisions, the dissent wanted something more and laid a foundation for the coming liberal construction of fourth amendment requirements.

During the 1930's, the stricter construction prevailed and the previously noted increase in cases requiring suppression resulted. Some of these cases imposed stricter requirements to establish probable cause. For instance, the Court in *Sgro v. United States*[115] held that a strict construction of the amendment required new evidence of probable cause to justify reissuance of a lapsed warrant. Similarly, *United States v. Lefkowitz*[116] curbed the scope of a search incident to arrest, and *Taylor v. United States*[117] invalidated a search that had been conducted without a warrant despite ample time to obtain one.

When in 1947 Justice Frankfurter dissented from what he considered the retrogressive decision in *Harris v. United States*,[118] he attached an appendix of search and seizure cases that had been decided between 1914 and 1946. His purpose was to illustrate that "with only an occasional deviation,"[119] a series of Supreme Court decisions had construed the fourth amendment liberally to safeguard the right of privacy. What a survey of the appendix actually reveals is that "deviation" was common prior to *Carroll* and that most of the "liberal" construction followed in its wake.[120]

World War II provided the Court a brief respite from search and seizure cases; however, in the late forties a second siege began. Between 1947 and 1961, a myriad of cases addressing issues such as scope, protected areas and standing began to fill out the contours of the amendment.[121] As many commentators have noted, this fleshing out of fourth amendment theory has never been done with great consistency or logic,[122] and not all of the decisions in this period reflect a liberal approach.[123] However, decisions during this period generally evinced continuing progress in that direction and led the Court toward the criminal law revolution of the sixties.[124]

Good Faith Reposes

A number of cases between *Boyd* and *Mapp* addressed the issue of good faith, although never as the actual basis for a decision and always from a negative perspective. The basic view expressed at the time was that the fourth amendment should be construed to prevent an encroachment on rights "by well-meaning but mistakenly over-zealous executive officers."[125] The usual context in which good faith arose was that of enforcing the warrant requirement against earnest policemen.

For example, when the Court in *Johnson v. United States*[126] affirmed the importance of authorizing searches through an impartial magistrate, it rec-

[115] 287 U.S. 206 (1932). *See e.g.*, Rose v. United States, 45 F.2d. 459 (8th Cir. 1930) (allegations in affidavit must be consistent with the facts later proven to establish probable cause); Grau v. United States, 287 U.S. 124 (1932) (conclusory allegations insufficient).

[116] 285 U.S. 452 (1932). However, the law concerning the proper scope of a search incident to arrest remained unsettled until Chimel v. California, 395 U.S. 752 (1969).

[117] 286 U.S. 1 (1932).

[118] Harris v. United States, 331 U.S. 145, 151–75 (1947) (Frankfurter, J., dissenting).

[119] *Id.* at 159.

[120] *Id.* at 175–81. *See also id.* at 151–75 for Frankfurter's conclusion that this decision is retrogressive.

[121] *See, e.g.*, On Lee v. United States, 343 U.S. 747 (1952) (protected area); United States v. Jeffers, 342 U.S. 48 (1951) (standing); United States v. Di Re, 332 U.S. 581 (1948) (scope).

[122] *See, e.g.*, Amsterdam, *supra* note 13, at 349–52.

[123] *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950) (permitting broad scope for search incident to arrest); Harris v. United States, 331 U.S. 145 (1947). *Harris* and *Rabinowitz* were overruled by Chimel v. California, 395 U.S. 752 (1969). *See also* Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 454 (1976).

[124] *See, e.g.*, Giordenello v. United States, 357 U.S. 480 (1958) (conclusory allegations of probable cause insufficient for warrant); United States v. Di Re, 332 U.S. 581 (1948) (limiting search of persons on premises).

[125] Gouled v. United States, 255 U.S. 298, 304 (1921). In *Gouled*, a liberal construction meant that a warrantless seizure of evidence through stealth was just as unreasonable as one accomplished by force or coercion.

[126] 333 U.S. 10 (1948).

The point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies

ognized the danger of trusting the judgment of officers aggressively fighting crime. Likewise, *Trupiano v. United States*[127] held that law enforcement officers must secure and use search warrants whenever reasonably practicable, warning that "in their understandable zeal to ferret out crime," police officers are less likely to possess the neutrality necessary to protect a suspect's rights. Because these cases involved volitional failures to abide by the warrant requirement, rather than mistaken judgments as to the existence of probable cause, they are not relevant to a discussion of a good faith exception to the exclusionary rule. The good faith exception is designed to apply to situations in which there is a good faith belief that constitutional requirements are being met. It is not meant to encompass situations like *Johnson* or *Trupiano*, where intentional violations are motivated by a desire to achieve salutory law enforcement goals.

Harris v. United States[128] was another case that hinged on the necessity of obtaining a search warrant. Although the Court there validated a broad warrantless search by characterizing it as incident to a valid arrest, in effect it really permitted a general ransacking of the premises without judicial authorization. Dissenting Justice Murphy protested the majority's holding, pointing out that it had substituted the good intentions of the arresting officer for constitutional safeguards.[129] The inadequacy of such a substitute was illustrated not only by history, but also by *Harris* itself which was later overruled in *Chimel v. California*.[130] However, since the good faith exception does not purport to substitute good faith for the warrant requirement, any more than it purports to substitute good faith for probable cause, it does not conflict with either Justice Murphy's position or the ultimate position voiced in *Chimel*.

The only case prior to *Mapp* in which the issue of good faith was considered in relation to probable cause was *Henry v. United States*.[131] Justice Douglas used that case to review the historical and decisional background to the doctrine of probable cause and to reiterate that "good faith on the part of the arresting officers is not enough."[132] Since the facts relied on to arrest the defendant were meager and did not reasonably provide more than "mere suspicion" of guilt, it is doubtful that the good faith exception would even be applicable to the *Henry* decision. Under the exception, a good faith belief must also be reasonable. It is pertinent to note, however, that even this strong opinion by Justice Douglas did not offer any reason to ignore good faith when an officer acts not only in good faith, but reasonably as well.

The Exclusionary Rule Impels

This overview of pre-*Mapp* cases alluding to good faith illustrates that the concept was not then being analyzed from the perspective of the suppression doctrine. This did not change until *Mapp* applied the exclusionary rule to the states and moved the suppression doctrine out into the streets.

Mapp was important not only because it resulted in an increase in the volume of suppression cases, but also because the suppression doctrine had previously been developing in the greenhouse environment of federal prosecution. Although law enforcement at the federal level was not always sophisticated and well-coordinated,[133] it was somewhat isolated from the pressures facing local patrolmen policing high crime districts. Consequently, the doctrine which evolved prior to *Mapp* was influenced by the context in which it arose and was not entirely responsive to the legitimate needs of law enforcement at the local level. The impact of the imposition of the exclusionary rule upon the states was not immediately apparent. However, throughout the sixties it became increasingly evident.

Much of the doctrinal reassessment of the 1970's has been an attempt to alleviate the pressures on the criminal justice system created by coupling a liberal interpretation of the fourth amendment with an expansive application of the exclusionary rule. However, the Warren Court itself began a modest accommodation to the needs of law enforcement as early as the mid-1960's. One of its steps which affected the law concerning probable cause and good faith was its confirmation of the preference to be granted to searches under warrants.

law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.

[127] 334 U.S. 609, 705 (1948).

[128] 33 1 U.S. 145 (1947).

[129] *Id.* at 193 (Murphy, J., dissenting).

[130] 395 U.S. 752 (1969) (limiting scope of warrantless search incident to arrest).

[131] 361 U.S. 98 (1959).

[132] *Id.* at 100-02.

[133] *See, e.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

When a challenged search was based on a warrant, reviewing courts were entitled to accept evidence of a less judicially competent or persuasive character than would have justified a search without a warrant.[134] This preference accorded to warrants was defended as an encouragement to officers to resort to warrants, but the acknowledgment of police good faith is evident.[135] It was explicitly stated in *United States v. Ventresca*[136] that the Court was equally concerned with upholding the actions of law enforcement officers who consistentiy followed the proper constitutional course.

The practical result of this philosophy is to validate seizures under doubtful warrants and to admit evidence which might well have been excluded had there been no warrant. This is conceptually similar to applying a good faith exception to seizures based upon a warrant which is subsequently held invalid, and it is functionally identical. The chief objection to this preference is the one voiced by Justice Douglas in his dissent to *Ventresca*. The Constitution also binds magistrates and their actions are reviewable for violations as well.[137]

The issue raised by Justice Douglas also raises questions about treating police action based upon good faith reliance on a defective warrant as a technical violation of the fourth amendment. In such cases, not merely the good faith of the officer is involved, but also the good faith of the magistrate. Given the preference already granted to warrants under *Ventresca,* it is arguably departing much too far from the spirit of the amendment to permit what amounts to a second indulgence concerning its requirements. Certainly, it may be criticized as ignoring the history of warrants that resulted in an absolute requirement in the Constitution that "no warrants shall issue, but upon probable cause.[11]

In his noted essay on search, seizure and surveillance, Professor Taylor reviewed the eighteenth century history leading to the fourth amendment and concluded that the amendment was prompted not by a general fear of unreasonable searches, but by a specific concern about overreaching warrants.[138] Whether or not one accepts his further conclusions that the framers of the Constitution "were not at all concerned about searches without warrants"[139] or his attendant views regarding the range of reasonable warrantless searches, his assessment that the abuse of warrants was particularly feared must be recognized as sound.[140]

In light of this, to except searches from the exclusionary rule because of an officer's good faith reliance on a defective warrant is to jeopardize a strict tenet of the amendment. In direct violation of the Constitution, warrants could issue without probable cause, and negligent or partial magistrates could rely upon the good faith of executing officers to negate the deficiency.[141] Warrants are already afforded a "good faith test" at the magistrate level since under *Ventresca,* they are reviewed with a generous eye to the reasonableness of the magistrate's factual evaluation. An added good faith exception can be challenged as unnecessary as well as dangerous. The danger alone constitutes sufficient reason to reassess the inclusion of good faith reliance on defective warrants as a technical violation of the amendment.[142]

Another major concession of the Warren Court to the realities of local law enforcement was *Terry v. Ohio.*[143] With *Terry,* the Court partially backtracked from the stringent requirements of probable cause to a more flexible reasonableness standard which balanced the justification against the intrusion.[144] Besides recognizing the limited useful-

[134] *See* United States v. Ventresca, 380 U.S. 102, 109-12 (1965); Aquilar v. Texas, 378 U.S. 108, 111 (1964); Jones v. United States, 362 U.S. 257, 270-71 (1960).

[135] *Cf.* Franks v. Delaware, 98 S. Ct. 2674, 2685 (1978) (*Franks* reaffirmed the presumption of validity of the affidavit supporting the search warrant and predicated the right to a hearing upon a substantial preliminary showing that a false statement in the affidavit was included deliberately or with reckless disregard for the truth. Allegations of negligence or innocent mistake were held to be insufficient to trigger a hearing).

[136] 380 U.S. at 111-12.

[137] *Id.* at 117 (Douglas, J., dissenting).

[138] *See* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 24-41 (1969).

[139] *Id.* at 43.

[140] For a thoughtful appraisal of Taylor's analysis which accepts his assessment of history, but not his ultimate conclusions concerning the fourth amendment, *see* Amsterdam, *supra* note 13, at 409-15.

[141] Although modern search and seizure law assumes the neutrality of magistrates, historically magistrates were politically influenced and wielded executive as well as judicial power. For "an historical look at magisterial neutrality and the general warrant," see Farrar, *Aspects of Police Search and Seizure Without Warrant in England and the United States,* 29 U. MIAMI L. REV. 491, 550-58 (1975).

[142] A good faith arrest based upon a warrant which is later invalidated is characterized as a "technical violation" by Justice Powell in his concurring opinion to Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J. concurring).

[143] 392 U.S. 1 (1968).

[144] *Id.* at 20-27. For comprehensive discussion of the meaning of *Terry, see* LaFave, *"Street Encounters" and the*

ness of the exclusionary rule,[145] the opinion held that facts which do not meet the modern probable cause test might nonetheless be sufficient to justify a limited search and seizure that would be reasonable under the fourth amendment. Where specific and articulable facts, judged against an objective standard, warranted a reasonable man in the belief that a limited intrusion was appropriate, a stop and frisk was sanctioned.[146] This was not a return to the old standard under which a reasonable suspicion equalled probable cause, but it was a formula delineating reasonable suspicion as a constitutional basis for a limited invasion of privacy.

When the Court abolished the "silver platter doctrine" in *Elkins v. United States*,[147] it surmised that it could not have been forseen that such a rule would engender practical difficulties in an era of expanding federal criminal jurisdiction. Much the same thing could have been said concerning the effects of the suppression doctrine, and *Terry* sought to alleviate some of the practical difficulties of enforcing the law within the Fourth Amendment. However, because *Terry* was restricted to a narrow set of circumstances, it was only partially successful in moderating the double burden of a liberal fourth amendment working in tandem with the exclusionary rule. Reaction against the exclusionary rule continued to mount and, ultimately, it was left to the Burger Court to respond by curbing the applicability of the rule. One method of accomplishing this was by expanding the list of exigent circumstances which would permit warrantless searches.[148] Another method was the establishment of the deterrence rationale as the exclusive justification for suppression.[149] This rationale would require proof that the exclusion of illegally seized evidence would deter future illegal seizures, before evidence would be suppressed. However, a more workable rationale, if adopted, would be the good faith exception to the exclusionary rule.

Good Faith and the Return to "Reasonableness"

It has been shown that since early in the nation's history not every violation of the fourth amendment has resulted in a remedy or sanction. In civil cases, good faith has long had an effect upon the imposition of sanctions for official action taken without probable cause. This effect continues today. A modern example is the federal civil rights section 1983 action which was specifically designed to provide a federal cause of action for violations of constitutional rights by state officers.[150] The section 1983 action has been held applicable to cases concerning illegal searches and seizures.[151] Consistent with early precedent, the action may be defeated by a showing of good faith.[152]

For reasons previously discussed, criminal cases concerned with the relationship between good faith and the fourth amendment did not arise during the nineteeth century.[153] Thereafter, the suppression doctrine and expanded criminal jurisdiction made the issue a logical one; however, there was no serious consideration of the effect of good faith until the 1970's.

There are several possible explanations for this apparent judicial oversight. The first is that whenever the Court contemplated the issue of good faith, it asked the wrong question. The question that it posed was the one that was discussed in *Henry v. United States* and *Beck v. Ohio*: whether good faith on the part of the arresting officer was sufficient to constitute probable cause.[154] The resounding and proper answer to this question is "no".[155] Certainly, good faith is not an acceptable substitute for facts and circumstances warranting an officer's belief. However, the correct question would have been whether, given an absence of probable cause, good faith should affect the decision to suppress.

Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich. L. Rev. 39 (1968).

[145] Terry v. Ohio, 392 U.S. at 13–14.

[146] *Id.* at 20–22.

[147] 364 U.S. 206 (1960).

[148] *See* Lewis, *Justice Stewart and Fourth Amendment Probable Cause: "Swing Voter" or Participant in a "New Majority"?*, 22 Loy. L. Rev. 713, 717 & n.29 (1976).

[149] *See* text accompanying notes 159–73 *infra*. "[T]he 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." United States v. Calandra, 414 U.S. 338, 347 (1974).

[150] 42 U.S.C. § 1983 (1970); Monroe v. Pape, 365 U.S. 167 (1961).

[151] *See* Monroe v. Pape, 365 U.S. 167.

[152] *See* Pierson v. Ray, 386 U.S. 547 (1967); Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 41 (1975). *See also* Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972); Geller, *supra* note 1, at 693–94.

[153] *See* text accompanying notes 19–25 *supra*.

[154] *See* Beck v. Ohio, 379 U.S. 89, 97 (1965); Henry v. United States, 361 U.S. 98, 102 (1959).

[155] "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio, 379 U.S. 89, 97 (1965).

As the review of pre-*Mapp* cases illustrated, this was never discussed.[156]

A second explanation for the oversight is that the Court was not yet motivated to attempt to curtail the exclusionary rule. As a relatively new doctrine and one that was restricted to the federal arena, it had not yet revealed its limitations. On the contrary, particularly during the last years of prohibition, suppression was a useful tool which promoted a popular policy. It was not until the post-*Mapp* era that the doctrine's weaknesses became apparent.

These two explanations were probably responsible for the initial neglect of good faith. A third explanation, though, emerges as the likely reason for continued inattention to the doctrine. The theoretical basis for the exclusionary rule has been mutable and elusive almost since the rule's conception.[157] Constitutional scholars continue to explore its theoretical underpinnings.[158] The viability of a good faith exception is greatly influenced by this theoretical basis. If exclusion is considered a constitutional right, the Court would have a constitutional duty to uphold it and could not dispense with it simply because of good faith. For that reason, it was important for the Court to establish another rationale for exclusion prior to proposing a good faith exception.

In *United States v. Calandra*,[159] the Court established a rationale which has been integral to both curbing the application of the exclusionary rule and legitimizing the emerging good faith doctrine. The *Calandra* Court held that witnesses before a grand jury may not refuse to answer questions based on evidence obtained from unlawful search and seizure.[160] This decision was based on a determination that the exclusionary 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."[161] Selectively gleaning supportive ideas from prior cases while omitting contrary authority,[162] the opinion elevated deterrence to prime importance and refused to accept the dissent's position that the exclusionary rule is that "part and parcel of the Fourth Amendment's limitation" and founded on the imperative of judicial integrity.[163] While the dissent viewed deterrence as "at best only a hoped for effect of the rule" and thus highlighted other historical objectives of exclusion,[164] the majority refused to apply the rule where the deterrent goal would not be significantly furthered.[165]

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 a least potential deterrent effect.[166] Therefore, *Calandra* laid the basis for subsequent curtailment of the exclusionary rule. Since situations involving good faith violations rarely lend themselves to deterrence, they naturally provide a category of cases in which suppression is arguably inappropriate.[167]

Although it is important for the proposed exception to establish deterrence as the basis for the exclusionary rule, doing so raises another constitutional problem. If the exclusionary rule is not a constitutional right, there is some question as to

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[156] *See,* text accompanying notes 126–32.

[157] Among the theories relied upon are deterrence, judicial integrity, a fourth amendment constitutional right and a combined fourth and fifth amendment constitutional right.

[158] *See, e.g.,* Schrock and Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251 (1974). This article argues that there are two personal constitutional rights to exclusion, one based on the fourth amendment and one based on due process. A due process basis for exclusion is also argued in Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle,* 69 J. CRIM. L. & C. 141 (1978).

[159] 414 U.S. 338 (1974).

[160] *Id.* The Supreme Court, however, reached a different result in applying the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–20. In Gelbard v. United States, 408 U.S. 41 (1972), the Supreme Court held that a grand jury witness who has refused to testify about intercepted communications or in response to questions based on intercepted communications may assert the illegality of the wiretap as a defense to a contempt charge. *See also* 68 J. CRIM. L. & C. 505 (1977).

[161] 414 U.S. at 348.

[162] *Compare id.* at 347 *with Elkins,* 364 U.S. at 222.

[163] United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting).

[164] *Id.* at 355–67.

[165] *Id.* at 349–52 (Opinion of the Court).

[166] Empirical studies have failed either to prove or disprove the effectiveness of the exclusionary rule. *See, e.g.,* Nagel, *Testing the Effects of Excluding Illegally Seized Evidence,* 1965 WISC. L. REV. 283; Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970); Spiotto, *An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. LEGAL STUDIES 243 (1973).

[167] Although retroactivity cases involve other considerations as well, deterrence is also a prominent factor in their decision. *See* United States v. Calandra, 414 U.S. 338, 359–60 (1974) (Brennan, J., dissenting); Linkletter v. Walker, 381 U.S. 618, 636–37 (1965).

whether it may be imposed on the states as a remedial rule.[168] In extending the exclusionary rule to the states, *Mapp v. Ohio* held that as a matter of constitutional law, a state court must suppress evidence seized as a result of violation of the fourth and fourteenth amendments.[169] Both deterrence and judicial integrity were used as justifications for the holding[170] however, the authority for imposing the rule on the states was that it was an indispensable part of the fourth amendment.[171] If this is not true and the rule is a judicially-fashioned remedial device, it may be argued that the states should be free to substitute their own remedies.[172]

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. If, however, the rule is not part of a constitutional right, there would be no constitutional obstacle to adding an exception to the judicially-created remedy. There might then be a question as to the authority for imposing the exclusionary rule on the states; however, where the rule is unquestionably validly imposed, as in the federal courts, the good faith exception would be constitutionally sound.[173]

The Modern Good Faith Doctrine

If it is assumed that the exclusion of evidence is not a constitutional right, the policy considerations governing whether or not there should be a good faith exception demand consideration.[174] The basic premises supporting the evolving good faith doctrine have been developed in four Supreme Court decisions issued subsequent to *Calandra*.[175]

The relationship between good faith and the deterrence rationale was initially delineated in *Michigan v. Tucker*,[176] a fifth amendment case that admitted the fruits of a *Miranda* violation. In *Tucker*, the Court stated that prior to penalizing police error by suppression of evidence, it would consider whether exclusion would serve a valid and useful purpose.[177] Since the deterrent goal of the exclusionary rule is to instill a greater degree of care in officers who have violated a defendant's rights through willful or negligent conduct, it was determined that this purpose would not be served where the officers had acted in complete good faith.[178]

The decision to admit the evidence in *Tucker* relied on several factors besides good faith, including the voluntariness of the defendant's statement[179] and the reliability of the derivative evidence.[180] And, as suggested by the concurring opinion, the decision possibly could have rested upon

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[168] *See* Monaghan *supra* note 152 at 2-6.

[169] 367 U.S. 643, 655 (1961). It should be remembered that *Mapp* was a plurality opinion, joined by only four members of the Court. Justice Black concurred in the result, but based upon his unique view of the relationship between the fourth and fifth amendments. *See id.* at 661-62 (Black, J., concurring).

[170] *Id.* at 658-59.

[171] *Id.* at 655-57.

[172] *See* Monaghan *supra* note 152 at 2-6. *See also* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1561 (1972).

[173] It has been suggested that even if exclusion is not a constitutional right the Court might nonetheless have a common law power to implement federally guaranteed rights. *See* Monaghan, *supra* note 152, at 10-20. Monaghan also sees little reason why there should not be a good faith defense to the exclusionary rule, at least where police conduct is not at issue, particularly since good faith is a recognized defense to § 1983 actions. *Id.* at 41.

[174] It is recognized that all of the Court's decisions are inherently statements of judicial policy, and that determinations of what constitute constitutional rights are equally influenced by policy considerations. As Justice White once observed:

> [T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting) (footnote omitted).

[175] The facts of Whiteley v. Warden, 401 U.S. 560 (1971), which preceded *Calandra*, potentially could have raised the issue of a good faith exception; however, neither Justice Powell nor Justice Rehnquist had as yet been appointed to the court, and the idea was not even suggested.

[176] *See* Michigan v. Tucker, 417 U.S. 433 (1974). Although the application of a good faith exception to violations of the fifth amendment raises issues beyond the scope of this article, this case has contributed to the overall good faith rationale and will be discussed for that limited reason.

The officer's error in *Tucker* was a failure to give a complete *Miranda* warning at an interrogation which took place prior to the *Miranda* decision. For the requirements under *Miranda*, see 384 U.S. 436.

[177] Michigan v. Tucker, 417 U.S. 433, 446 (1974).

[178] *Id.* at 447.

[179] *Id.* at 444-45.

[180] *Id.* at 448-49.

retroactivity principles instead.[181] However, the opinion in *Tucker* was nonetheless significant, because it evidenced the new willingness of some members of the court to consider the nature of the illegality when determining the applicability of the exclusionary rule.[182]

The next major decision highlighting the issue of good faith was *Peltier v. United States.*[183] *Peltier* has already been discussed to some extent,[184] its contributions to the development of the good faith doctrine warrant further exploration. Although the case was decided on retroactivity grounds, the Court did examine good faith in light of both the deterrence rationale and the imperative of judicial integrity. First, the Court looked at prior retroactivity cases and interpreted them as establishing that if officers reasonably believed in good faith that their conduct was in accordance with existing law, the imperative of judicial integrity would not be offended if decisions subsequent to the seizure held that their conduct was unconstitutional.[185] The courts would not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold" where no willful disobedience existed.[186]

Next, turning to the deterrence rationale, the *Peltier* Court maintained that evidence obtained from a search should be suppressed only if the seizing officers "had knowledge or may be properly charged with knowledge that the search was unconstitutional."[187] This was simply a reiteration of *Tucker's* willful or negligent conduct criterion applied to violations of the fourth amendment.[188] *Peltier* thus judged good faith in relation to both deterrence and judicial integrity, and found that neither competing interest was at odds with the good faith rationale.

A limited guide to the kinds of police conduct which may be considered good faith violations, was presented in Justice Powell's concurring opinion to *Brown v. Illinois.*[189] Using a sliding scale, Powell placed flagrantly abusive violations at one extreme and "technical" violations on the other.[190] Flagrant violations included pretext arrests or unnecessarily intrusive invasions of personal privacy.[191] Technical violations included arrests based on good faith reliance on a warrant later invalidated and arrests pursuant to a statute subsequently declared unconstitutional.[192]

In cases of flagrant violation, Powell accepted that both deterrent goals and the mandate to preserve judicial integrity would demand that the fruits of official misconduct be excluded.[193] However, in cases involving technical violations, neither of those factors justified the suppression of reliable and probative evidence.[194]

Taken together, these opinions in *Tucker, Peltier* and *Brown* accept deterrence as the primary reason for exclusion, argue that neither deterrence nor judicial integrity warrant exclusion in cases involving good faith violations, and provide examples of technical violations to which a good faith exception would apply. All of this doctrinal development occurred within the first eighteen months following *Calandra,* and all of it was promulgated in opinions authored by either Justice Powell or Justice Rehnquist.[195] Almost exactly one year later, the next major contributions to the doctrine of good faith were provided in connection with *Stone v. Powell.* However, this time the advocates of the doctrine were Chief Justice Burger and Justice White.

[181] *Id.* at 453–59 (Brennan, J., concurring). *See also* Fuller v. Alaska, 393 U.S. 80 (1968) (exclusionary rule given prospective application based upon good faith reliance on overruled decision).

[182] Prior to *Tucker,* the ALI Model Code of Pre-Arraignment Procedure, § 290.2 (Official Draft, 1975) recommended that there should be suppression only where the violation was "substantial." One factor to be considered in determining whether the violation was substantial was the extent to which the violation was willful.

The Bentsen Bill, proposed in 1972, similarly sought to limit the application of the exclusionary rule to substantial violations. S. 2657, 92d Cong., 2d Sess. (1972).

The American Bar Association went on record as opposed to this bill, and the legislation was never enacted. *See* 12 CRIM. L. REP. (BNA) 2429–31 (1973).

[183] 422 U.S. 531 (1975).

[184] *See* text accompanying notes 76–89.

[185] Peltier v. United States, 422 U.S. 531, 535–38 (1975).

[186] *Id.* at 536 (quoting *Elkins,* 364 U.S. at 223).

[187] *Peltier,* 422 U.S. at 542.

[188] *Id.* at 539 (quoting *Tucker,* 417 U.S. at 447.

[189] 422 U.S. 590, 606–16 (1975) (Powell, J., concurring in part). *Brown* rejected a per se rule that *Miranda* warnings automatically purged the taint of a defendant's illegal arrest and held that two inculpatory statements were inadmissible.

[190] *Id.* at 610. A similar idea was proposed in Wright, *supra* note 3, at 744–45.

[191] *Id.* at 611.

[192] *Id.*

[193] *Id.* "In such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity . . . most clearly demands that the fruits of official misconduct be denied." *Id.* (Citations omitted).

[194] *Id.* at 612.

[195] Justice Rehnquist wrote the majority opinions in both *Tucker* and *Peltier;* Justice Powell wrote the concurring opinion in *Brown.*

The issue of good faith was raised by the facts in *Stone v. Powell*, but it was not a basis for the Court's decision.[196] Instead, the issue appeared prominantly in both Chief Justice Burger's concurring opinion and Justice White's dissent.

Chief Justice Burger's concurring opinion actually added little other than moral support to the proposed good faith exception. Its main theme was that the cost of exclusion is far too high to justify its use when its deterrent effect is unproven.[197] The exclusion of reliable, probative evidence from the fact-finding process, Burger believed to be a "senseless obstacle to arriving at truth in many criminal trials," particularly those involving evidence seized in good faith.[198] He noted that the rule is presently applied indiscriminately to all types of fourth amendment violations[199] and suggested that it would be wiser either to abolish the rule entirely or to limit its scope to egregious bad faith conduct.[200]

Burger's opinion was basically a general attack on the exclusionary rule using good faith violations as an example of the excessive use of the "Draconian, discredited device in its present absolutist form".[201] Burger did, however, make a minor contribution to the good faith doctrine by dividing good faith violations into the two subcategories used throughout this article. Although he did not proceed to analyze the two categories, he did seem to recognize the conceptual difference between good faith mistakes and technical violations.[202] This difference was more clearly illustrated in the dissenting opinion of Justice White.

Prior to Justice White's dissent in *Stone*, opinions discussing good faith had concentrated upon technical violations such as conduct predicated upon an invalid statute.[203] While White's dissent also examined technical violations,[204] he did recognize a second type of good faith violation—good faith mistake. The examples of good faith mistake given by White involved officers making difficult judgments concerning the existence of probable cause based on available facts.[205] Thus, the good faith exception which White proposed imposed two requirements on both technical violations and good faith mistakes: (1) a good faith belief that the conduct was legal, and (2) reasonable grounds for that belief.[206]

Unlike technical violations always involving authoritative pronouncements which establish a reasonable basis for believing that there is probable cause, good faith mistakes involve judgmental error which may or may not have been reasonable. For instance, a policeman may possess undisputed facts concerning a suspect and be convinced by those facts that he has probable cause to arrest. Those facts may indeed overwhelmingly establish probable cause, and if that is so, the arrest will not be vulnerable to challenge. However, they might also be so weak that no reasonable officer would ever view them as establishing probable cause. In such cases, no amount of good faith on the part of the officer would be sufficient to meet the second requirement of the good faith exception.

The cases to which the good faith exception would apply lie somewhere between these two extremes. They include situations where the officer acted as a reasonable officer would and should act in similar circumstances, but where courts have ultimately determined that in their view the officer was mistaken.[207] Justice White argued that in such cases the exclusion of evidence will have no deterrent effect, because officers doing their duty will act the same way in similar future cases.[208] Given that this is so, the only consequence of suppression will be the exclusion of truth from the fact-finding process.[209] This result is posited as no more appropriate in cases of good faith mistake than it is in cases of technical violation.

Interestingly, Justice White also contrasted the treatment of good faith in criminal suppression cases with that in civil damage cases. He pointed out that an officer is excused from civil liability both when he has acted under a statute which he reasonably believed to be valid but which was later

[196] *See* Stone v. Powell, 428 U.S. 465 (1976). Powell was arrested pursuant to an ordinance which was later held unconstitutional. In the companion case of Wolff v. Rice, evidence had been seized pursuant to a warrant which was subsequently invalidated.

[197] *See id.* at 496–502 (Burger, C.J., concurring).

[198] *Id.* at 501-02, (quoting Justice White's dissent, 428 U.S. at 538 (White, J., dissenting)).

[199] 428 U.S. at 499, 501 (Burger, C.J., concurring).

[200] *Id.* at 501. Chief Justice Burger expressed similar ideas when he was still a judge of the United States Court of Appeals for the District of Columbia. *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964).

[201] 428 U.S. at 500 (Burger, C.J., concurring).

[202] *Id.* at 499.

[203] *See, e.g.*, Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring).

[204] *See* text accompanying notes 95–96.

[205] *See* Stone v. Powell, 428 U.S. 465, 538–39 (White, J., dissenting).

[206] *Id.* at 538.

[207] *Id.* at 539–40.

[208] *Id.* at 540.

[209] *Id.*

held unconstitutional, and when he has mistakenly but reasonably believed that he had probable cause for an arrest.[210] In Justice White's view, it makes little sense to exclude reliable and probative evidence when the defendant is not even entitled to compensation for invasion of his privacy.[211] Although he did not harken back to nineteenth century civil precedent, he might very well have done so.

The summarize, the basic position of those who support the good faith doctrine is that the exclusionary rule excludes reliable, probative evidence from the judicial fact-finding process, and thus hampers the determination of truth. Because exclusion is not a constitutional right, it can and should be employed only where its underlying rationales are served. In cases involving good faith violations, neither deterrence nor the imperative of judicial integrity is positively affected by exclusion. Therefore, a good faith exception should apply to all cases involving good faith mistakes or technical violations.[212]

Opponents of the good faith exception need not uniformly assert that the exclusionary rule is a constitutional right. However, those who do may make the obvious threshold argument that the Court cannot ignore a constitutional right simply because it does not advance certain judicial or societal goals. Constitutional rights must usually be respected even where they conflict with other important societal needs. Consequently, a "pragmatic analysis" of the exclusionary rule's usefulness is both inappropriate and unpersuasive given that there are paramount individual claims to enforcement.[213]

For the present, however, the Supreme Court has rejected the theory of constitutional right, and those who would successfully oppose the good faith exception must grapple with it from a position dictated by the deterrence rationale. Justice Brennan, who continues to view the rule as a right,[214] has done this in his dissent to *Peltier v. United States*.[215]

In *Peltier*, Justice Brennan principally argued that the good faith rationale wrongly assumes that the exclusionary rule seeks to deter by punishment or threat of punishment.[216] Instead, according to Brennan, the purpose of the rule is to deter "by removing the incentives to disregard it."[217] Whenever illegal evidence is used in court it creates an incentive in officers to attempt to evade constitutional requirements. 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.[218] Although Justice Brennan did not use, an example of good faith mistake, there would also be incentive to assume probable cause where the supporting facts were marginal. Consequently, he believed that the suppression of evidence seized in good faith could have more than minimal deterrent effect, because it would remove the incentive to take chances with a suspect's rights in the many situations where probable cause is not clear.

Justice Brennan's argument leads logically to the conclusion that the adoption of a good faith exception will tend to destroy *actual* good faith in those situations where violations are now mainly innocent. Because good faith must ultimately be judged by an objective standard, officers who believe they can meet the objective criteria will be encouraged to attempt the seizure even when they do not believe that there is probable cause. This was distressing to Justice Brennan; however, it may not distress those members of the Court who have retreated from the strict definition of probable cause. Because good faith, either actual or judicially determined, must be coupled with a reasonable basis for believing that there is probable cause, even cases lacking actual good faith will meet the reasonableness test. If the true purpose, or even true result, of good faith exception is to reestablish a reasonableness test for probable cause, an incen-

[210] *Id.* at 541.

[211] *Id.* at 541–42.

[212] Compare the ALI *Model Code of Pre-Arraignment Procedures*, § 290.2 (Proposed Official Draft, 1975) which proposes that factors such as willfulness and deterrent effect be considered in determining whether a violation will be deemed substantial and therefore require the suppression of resultant evidence.

[213] *See* Schrock and Welsh, *supra* note 158, at 272–81. Justice Powell referred to the "pragmatic analysis of the exclusionary rule's usefulness" in Stone v. Powell, 428 U.S. 465, 488 (1976). *But see* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1032–35 (1974).

[214] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 509 (1976) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338, 360 (1974).

[215] Justice Brennan does not here oppose the good faith exception per se, because none was applied in *Peltier*. However, he did see that the good faith rationale in *Peltier* could be expanded beyond retroactivity cases. *See* United States v. Peltier, 422 U.S. 531, 551 (1975) (Brennan, J., dissenting).

[216] *Id.* at 556.

[217] *Id.* at 557, quoting *Elkins*, 364 U.S. at 217.

[218] 422 U.S. at 559.

tive to utilize that reasonableness test will not dissuade its proponents.

General criticisms leveled by Justice Brennan at the good faith exception are that it will end the exclusionary rule as it is now known,[219] that it will stop the judicial development of fourth amendment rights,[220] and that it will require burdensome case by case analysis.[221] In making the first charge, Justice Brennan has accurately assessed the good faith exception as an indirect method of curtailing the exclusionary rule. However, to use this argument seems merely to express a preferred judicial policy. It does not amount to reasoning likely to persuade those who have adopted a different policy, and it does not directly refute that policy.

There is also some merit to Brennan's second concern. Assuredly, a good faith doctrine would affect the development of fourth amendment law. However, it is perhaps overly pessimistic to fear that the law will "stop dead in its tracks." Moreover, a mere lack of clear precedent on identical facts would not automatically require denial of motions to suppress.[222] In the absence of probable cause, an officer would in each case have to establish both a good faith belief and a reasonable basis for that belief. Although reliance on precedent might help establish both the belief and the basis, the absence of precedent "on all fours" would not in itself save unreasonable conduct. As Justice Rehnquist suggested in his response to Justice Brennan's dissent, it is unlikely that good faith will both stop judicial development by promoting wholesale automatic denials of suppression and increase the present burdens on the courts.[223] Although some increased burden is likely, it is impossible to predict its extent in advance.

The final point which Justice Brennan raised is that good faith will require a probing of the subjective knowledge of the seizing officer.[224] Because the good faith doctrine proposes an objective test of good faith which parallels that used in civil cases judging good faith or malice, the questions posed by Justice Brennan are easily answered.[225]

The first question considers what would happen under the good faith doctrine if an officer believed a search to be unconstitutional when it was not. The answer is that the situation would remain as it is now in criminal cases and as it has been historically in malicious prosecution cases. The search would be considered legal because probable cause existed, and no sanction would be applied.[226]

Second, it is asked what would happen if a search was unconstitutional and was believed to be unconstitutional, although it might reasonably have been believed to be based upon probable cause. Under the good faith exception, evidence would be suppressed as illegal unless the officer could establish *both* a good faith belief and a reasonable basis for that belief.[227] Where he could not establish the first requirement, the second alone would not be sufficient. Consequently, in this situation the good faith exception would not be applied.

Justice Brennan's second question assumes that the actual lack of good faith on the part of the searching officer would somehow be known to the court. In most cases where the facts could reasonably support a good faith belief, the court is unlikely to have anything before it other than the officer's assurance that he was convinced he had probable cause.[228] Such testimony, whether truthful or perjured, is almost impossible to refute. Consequently, the most important criterion for use of the good faith test will be the reasonableness of the officer's belief when judged on the objective facts.

The Return to Reasonableness

Proponents of the good faith exception have urged that it is acceptable because it does not conflict with the underlying purposes of the exclusionary rule. Critics have argued not only that it does conflict with the purposes of exclusion, but also that it may lead to the total demise of the rule. Both of these approaches are flawed. They tend to lose sight of the fourth amendment. The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against governmental intrusion. To the extent that probable cause is the key to fourth amendment protections, the good faith exception diminishes

[219] *Id.* at 551.
[220] *Id.* at 554.
[221] *Id.* at 560-61.
[222] Brennan predicts this in his dissent. *See Peltier,* 422 U.S. at 554 (Brennan, J., dissenting).
[223] *Id.* at 542-43 n.13 (Opinion of the Court).
[224] *See id.* at 553, 560-61 (Brennan, J., dissenting).
[225] The questions were posed in Justice Brennan's dissent *Peltier.*
[226] *See* text accompanying note 63.
[227] *See* Stone, 428 U.S. at 538 (White, J., dissenting).
[228] The exclusionary rule already fosters false testimony by police officers. *See* Oaks, *supra* note 166, at 739-42. For additional discussion of the problem of police perjury, see Savilla, *The Exclusionary Rule and Police Perjury,* 11 SAN DIEGO L. REV. 839 (1974).

the liberality of the fourth amendment by reinstituting the reasonableness standard of the nineteenth century.

This happens because the practical result of the good faith exception is no different than the result of a seizure based upon probable cause. Where probable cause supports a search and seizure, there is no imposition of either civil remedy or exclusionary sanction. Likewise, where a good faith exception is applied, there will be neither civil relief nor suppression. Thus, in cases involving good faith, the requirements of the good faith exception replace the requirement of probable cause as the determinative test for admissibility or civil remedy. In other words, what is required is no longer "probable cause" as presently defined, but instead "a reasonable ground for belief."

In cases of technical violation, both good faith and its reasonable basis are provided almost by definition. The officer's conduct is predicated upon a statute, decision or warrant upon which he was expected to rely and in most cases actually did rely. Good faith mistakes require stricter scrutiny under the objective standard. However, once it is determined that the officer's mistaken judgment was grounded in a reasonable basis, it will be the rare case in which the exception will not be applied.[229] In most cases, both technical violations and good faith mistakes will result in the court's proceeding as though probable cause existed whenever it finds a reasonable ground for belief.

The adoption of the good faith exception would correspondingly alter the true extent of fourth amendment protections. Those who oppose the exception might well argue that it unconstitutionally subverts the probable cause requirement in any case in which it is applied. However, as has been shown throughout this article, there is historical and decisional support not only for legally acknowledging good faith, but also for defining the fourth amendment's probable cause requirement in terms of a reasonableness standard. Probable cause has been viewed differently in the past, and with a change in judicial policy, it could be viewed that way again. It would not be surprising to see the present Supreme Court, which has already retreated from an expansive treatment of the fourth amendment, adopt this further measure.

[229] Occasionally, an officer will either demonstrate or admit to bad faith. In those cases, the exception would not be applied. *See* text accompanying notes 224–28 *supra*.

Conclusion

To acknowledge that the good faith exception is historically and conceptually sound is not to advocate its adoption. It may be that the good faith exception demands a policy commitment that should not be made at this point in the twentieth century.

As a partial return to the "crime control" model of criminal process, good faith could increase the efficiency of the process by protecting the use of probative evidence.[230] At the same time, however, it might also offend the notions of due process which have taken root in the national consciousness. Although the public is presently impatient with what it views as excessive solicitude for the rights of criminals, it is likely to react with a "sense of injustice" to doctrines which jeopardize the rights of innocent and guilty alike.[231] Of more direct practical importance is the fact that adoption of the good faith exception might encourage law enforcers to take less care to respect the rights of suspects. One of the exclusionary rule's few conceded accomplishments is that it has increased police training and awareness about their responsibilities.[232] A signal from the Court that it is abating its aggressive enforcement of fourth amendment requirements is apt to evoke a consistent response from the police.[233]

It also may be argued that the twentieth century needs a more demanding definition of probable cause than existed in the nineteenth century. Urbanization, pervasive governmental regulation and modern technology have already combined to jeop-

[230] The "crime control" model was posed by Herbert Packer as an alternative approach to the criminal process. It presumes that the repression of criminal conduct is the most important function to be performed by the criminal process, and it emphasizes the efficient determination of guilt and disposition of criminals. The alternative is the "due process" model, which emphasizes protection of the accused through an adversarial process which places duties and restrictions upon the government. *See* H. Packer, The Limits of the Criminal Sanction 149–246 (1968).

The exclusionary rule is regarded as antithetical to the crime control model. *Id.* at 177–78.

[231] *Id.* at 239–40.

[232] *See, e.g.*, LaFave, *Improving Police Performance Through the Exclusionary Rule* (pt. 1), 30 Mo. L. Rev. 391, 395–96 (1965); (pt. 2) 566 and *passim*; Oaks, *supra* note 166, at 708; Spiotto, *supra* note 166, at 274–75.

[233] *Cf.* Goldberg, *Foreword—The Burger Court 1971 Term: One Step Forward, Two Steps Backward?*, 63 J. Crim. L. C. & P. S. 465 (1972) (effect of Supreme Court action on the moral tone of the country).

ardize what little privacy the average citizen retains. A strict requirement of probable cause may be necessary to continue to protect the privacy which remains.

On the other hand, urbanization, the sophistication of modern crime and our increased reliance upon the government to guarantee our safety have combined to confront modern law enforcers with problems unimagined by their predecessors. No less than in the past, the police now need workable standards which will enable them to act not only responsibly, but effectively.[234]

In 1968, Professor Packer warned that the same decisional process which the Warren Court used to establish the "due process" model of criminal process might one day be used by the Supreme Court to reestablish crime control norms.[235] He suggested that the trend could be reversed by either changes in attitude toward the criminal process or changes in personnel on the Court.[236]

Both of these changes have occurred and the new judicial trend is at odds with the expansive interpretation of the fourth amendment that has evolved since the nineteenth century. A good faith exception to the exclusionary rule is in step with that trend and may be justified by arguing history, precedent and policy. However, it should not be adopted without careful consideration of the requirements of the twentieth century and full cognizance of the effect it will have upon fourth amendment rights as we know them.

[234] The modern conditions which have developed since the enactment of the fourth amendment and which affect its implementation are eloquently described in Amsterdam, *supra* note 13, at 401.

[235] *See* H. PACKER *supra* note 230, at 239–40.

[236] *See id.* at 240.