The Fourth Amendment Exclusionary Rule: The Desirability of a Good Faith Exception

Donald L. Willits
Notes

THE FOURTH AMENDMENT EXCLUSIONARY RULE: THE DESIRABILITY OF A GOOD FAITH EXCEPTION

The exclusionary rule is a judicially created device designed to ensure a defendant's constitutional right to be free from unreasonable searches and seizures. This Note examines the historical development of the rule with emphasis on its underlying rationales. The Note then examines recent Supreme Court decisions which demonstrate a willingness to allow a good faith exception to the exclusionary rule. A good faith exception would render the exclusionary rule inapplicable when a law officer seizes evidence on an objectively reasonable good faith belief that the search is lawful under the fourth amendment. The Note evaluates the arguments for and against the good faith exception. The author concludes that the good faith exception strikes the proper balance between a defendant's right to be free from unreasonable searches and seizures and society's interest in assuring the safety of its members from criminals released of the exclusionary rule windfall.

INTRODUCTION

Although the fourth amendment was ratified in 1791, its prohibition against unreasonable searches and seizures remained effectively dormant until the twentieth century, and its enforcement was not notably controversial until the 1960's. The enforcement controversy centers on the exclusionary rule—a twentieth century judicial invention1 used as a means to enforce the fourth amendment. The rule provides that upon appropriate motion by the defendant in a criminal prosecution, evidence obtained from the defendant in violation of his or her constitutional right to be free from unreasonable searches and seizures will be suppressed by order of the court.2

Since the adoption of the exclusionary rule in Weeks v. United States,3 three major rationales have been offered to justify it.4 The first justification is that the exclusionary rule is required implicitly by the language of the fourth amendment, and hence is a

4. See infra notes 23–25, 68–75 and accompanying text.
constitutional right of the accused. Secondly, the rule arguably is justified because the exclusion of illegally seized evidence is necessary to preserve judicial integrity. Finally, the rule has been justified on the ground that it deters unlawful police conduct.

All three rationales were evident from the inception of the exclusionary rule; since then, however, they have been treated with varying degrees of emphasis. Initially, the constitutional right rationale was used as the primary justification for the rule. Later, the Supreme Court held that even though the fourth amendment was binding on the states, the exclusionary rule was not, because it could not be considered part and parcel of the fourth amendment. Subsequently the Court reversed itself and made the rule binding on the states in \textit{Mapp v. Ohio}. The \textit{Mapp} decision, however, did not bind the Court to the constitutional right theory as the only justification for the exclusionary rule. Indeed, in the 1970's the Court, without overruling \textit{Mapp} unequivocally rejected the constitutional right theory as the primary justification for the rule. Today, the Court considers the deterrence of police misconduct to be the primary justification for the rule. In situations where the rule is not likely to have a deterrent effect, the Court has not applied it.

The elevation of the deterrence rationale to primary significance?

\begin{itemize}
  \item[5.] See infra note 24.
  \item[6.] See infra notes 25 & 73 and accompanying text.
  \item[7.] See infra notes 53-92 and accompanying text.
  \item[8.] See infra notes 24-98 and accompanying text.
  \item[9.] See infra note 23-24 and accompanying text.
  \item[10.] See infra notes 28-32 and accompanying text.
  \item[12.] On the one hand, the \textit{Mapp} Court refers to the fourth amendment exclusionary rule as a “clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard . . . .” 367 U.S. at 648. In contrast, the \textit{Mapp} Court refers to the exclusionary rule as being of “constitutional origin,” \textit{id.} at 649, which suggests that the rule is not so much constitutionally required as constitutionally inspired. That is, the rule is clearly constitutionally based to the extent it is used as a means to enforce the fourth amendment prohibition against unreasonable searches and seizures, even though there is no specific provision for an exclusionary rule in the Constitution. Moreover, the \textit{Mapp} Court referred to the ban against unreasonable searches and seizures as a “constitutional right” and to the exclusionary rule as a “constitutional privilege.” \textit{id.} at 656. Thus, the \textit{Mapp} Court appeared to recognize a distinction between the right and the remedy: the purpose of the exclusionary rule “is to deter—to compel respect for constitutional guaranty is the only effectively available way —by removing the incentive to disregard it.” \textit{id.} at 656, citing \textit{Elkins v. United States}, 364 U.S. 206 (1960).
  \item[13.] See infra notes 47-52 and accompanying text.
  \item[14.] See infra notes 53-56 and accompanying text.
  \item[15.] See infra notes 57-92 and accompanying text.
\end{itemize}
GOOD FAITH EXCEPTION

...cance has increased greatly the likelihood that a good faith exception to the exclusionary rule will be created. Implementation of the good faith exception would render the exclusionary rule inapplicable when evidence is seized based on an objectively reasonable good faith belief that the search is lawful. The proposed exception, therefore, has both a subjective and an objective element. For the good faith exception to be applicable, the actions of the police officer must not only appear to be reasonable from the standpoint of the reasonable observer, but the police officer must have in fact been acting in good faith.

In order to determine whether a good faith exception to the exclusionary rule is desirable, this Note begins by outlining the history of the rule, focusing particularly on the rationales for the rule and the foundation that has been laid for a good faith exception. Next, the Note examines the strengths and weaknesses of the exclusionary rule and of the good faith exception. This examination demonstrates that the primary argument for the exclusionary rule and against the good faith exception is the constitutional right theory, a theory that has been rejected resoundingly by the present Supreme Court. After evaluating the arguments for and against the exclusionary rule and the good faith exception, this Note concludes that the good faith exception represents a desirable alteration of the exclusionary rule.

I. BACKGROUND OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

A. The Early Landmark Cases

The chief reason for the adoption of the exclusionary rule in Weeks v. United States appears to be that the rule can be implied logically from the language of the fourth amendment and the amendment's perceived purpose to protect individual pri-
vacy. There were also overtones in *Weeks* of the argument that courts of justice should not be tainted by using illegally seized evidence to convict individuals. This concern for judicial integrity, however, was more clearly expressed by Justices Brandeis and Holmes years later.

The *Weeks* exclusionary rule, except where states adopted the *Weeks* doctrine, was confined solely to conduct involving federal officials.

In *Wolf v. Colorado*, the Supreme Court applied its selective incorporation policy and held that the fourth amendment right to be free from arbitrary intrusions is applicable to the states through the due process clause of the fourteenth amendment. The Court did not hold, however, that the method chosen to effec-

---

24. The *Weeks* Court stated:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.

232 U.S. at 391-92. Furthermore, the Court noted,

If letters and private documents can thus be seized [in violation of the Fourth Amendment] and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

*Id.* at 393. See also Gilday, The Exclusionary Rule: Down and Almost Out, 4 N. Ky. L. REV. 1, 2 (1977) (history of exclusionary rule traced through Warren and Burger Courts).

25. In his dissent in Olmstead v. United States, 277 U.S. 438 (1928), Justice Holmes said, "I think it a less evil that some criminals should escape than that the Government should play an ignoble part." *Id.* at 470. In the same case, Justice Brandeis said, "If the Government becomes a lawbreaker, it breeds contempt for law . . . ." *Id.* at 485 (Brandeis, J., dissenting).


29. Technically, Chief Justice Marshall's opinion in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), contending that the states are not bound by the Bill of Rights, is still good law. Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937), expressed a policy of selectively incorporating certain provisions of the Bill of Rights through the due process clause of the fourteenth amendment. Under selective incorporation the Court first examines the relevant provision of the Bill of Rights and determines if it is "of the very essence of a scheme of ordered liberty." *Id.* at 325. If it is of that "essence," then the due process clause requires that the states be bound by that provision. Thus, the provision is "selectively incorporated" into the due process clause of the fourteenth amendment. Justice Black's view, expressed in *Adamson v. California*, 332 U.S. 46, 68-122 (1947) (Black, J., dissenting), that the fourteenth amendment made *all* of the Bill of Rights' provisions binding on the states was never adhered to by a majority of the Court. The selective incorporation approach, however, has led to virtually the same result which Justice Black desired — today, almost all of the Bill of Rights is binding on the states.

tuate that right—the exclusionary rule—applied to the states. In other words, after Wolf the states had to protect their citizens against unreasonable searches and seizures, but they were free to choose their own method of enforcement.\(^\text{31}\) The Court in Wolf moved away from the idea that the fourth amendment requires the exclusionary rule, stating that it was merely "a matter of judicial implication."\(^\text{32}\)

B. *Extended Application of the Exclusionary Rule: Mapp v. Ohio*

Until *Mapp v. Ohio*\(^\text{33}\) was decided, the exclusionary rule was not applicable to the states.\(^\text{34}\) Moreover, until shortly before the *Mapp* decision, the "silver platter" doctrine severely limited the effect of the rule on the conduct of federal officials.\(^\text{35}\) Under that doctrine state officials could seize evidence in violation of the fourth amendment and immediately turn it over to federal prosecutors on a "silver platter" for use in federal trials.\(^\text{36}\) The Supreme Court invalidated this practice in 1960.\(^\text{37}\) Thus, before the *Mapp* decision, the exclusionary rule was not controversial because of its minimal impact on criminal procedure.\(^\text{38}\)

*Mapp v. Ohio* made the exclusionary rule far more visible to society because *Mapp* reversed *Wolf*, making the exclusionary rule binding on the states.\(^\text{39}\) Moreover, the *Mapp* plurality opinion\(^\text{40}\) reverted to the constitutional justification for the rule.\(^\text{41}\)

---

31. Justice Frankfurter wrote in *Wolf*:

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

*Id.* at 31.

32. *Id.* at 28.


40. Justice Clark wrote the opinion of the Court. Justices Black and Douglas each wrote a separate concurring opinion. Justices Harlan, Frankfurter, and Whittaker dissented. Justice Stewart did not express a view as to the merits of the exclusionary rule.
holding that it is "an essential part of the right to privacy" protected by the due process clause of the fourteenth amendment. The reason why the rule is an essential part of that right, however, has never been made clear, and with increasing frequency individual Justices have come to characterize the rule as simply a matter of remedial detail.

The question of whether the fourth amendment requires the exclusionary rule is a matter of constitutional interpretation that carries with it difficulties central to all constitutional adjudications. The Constitution does not mention an exclusionary rule, but extremely expansive terms such as due process leave significant room for varying interpretations. Thus, whether the rule is constitutionally required only can be determined by looking to standards and values outside the text of the Constitution. The present Supreme Court weighed these standards and values and decided that the fourth amendment does not of necessity require the exclusionary rule.

C. Limiting the Exclusionary Rule: The Approach of the Burger Court

The Supreme Court rejected the proposition that the exclusionary rule is constitutionally required in United States v. Calandra. In Calandra, evidence was seized from a place of business in a search that extended beyond the scope of the search warrant. Subsequently, the owner of the business, Calandra, was subpoenaed by a grand jury and questioned about the seized evi-
dence. Calandra refused to answer the inquiries.\textsuperscript{50} The Court, however, held that a witness before a grand jury may not refuse to answer questions about evidence obtained during an unlawful search.\textsuperscript{51} In refusing to apply the exclusionary rule, the Court stated 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."\textsuperscript{52}

*Calandra* calls attention to the third justification for the exclusionary rule—to *deter* police from making illegal searches to obtain evidence. The deterrence rationale was recognized before *Calandra*,\textsuperscript{53} but the significance of this case in shaping subsequent judicial development of the exclusionary rule cannot be overstated.\textsuperscript{54} The *Mapp* assumption—\textsuperscript{55} that the Constitution requires the rule—is no longer legally valid, because *Calandra* states that deterrence is the *primary* rationale for the rule.\textsuperscript{56}

The Court has continued to follow the *Calandra* decision.\textsuperscript{57} Thus, if no deterrent effect is likely to be gained by excluding evidence in a particular case, the evidence should be admitted. The argument for a good faith exception, then, says that since law officers cannot be deterred if they are acting on a good faith belief that a wrongful search is legal, exclusion of evidence obtained in the search is unnecessary and unwise.

*Michigan v. Tucker*,\textsuperscript{58} a fifth amendment case, was the first Supreme Court decision to recognize a relationship between the deterrence rationale for the exclusionary rule and a possible good faith exception to the rule.\textsuperscript{59} The *Tucker* case\textsuperscript{60} involved a rape

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id. at 348. This statement has been repeated on several occasions. *See*, e.g., Peltier, 422 U.S. at 538; Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. CRIM. L. & CRIMINOLOGY, 635, 650 (1978); Monaghan, supra note 41, at 4.

\textsuperscript{53} The *Mapp* decision recognized and emphasized the deterrence rationale. 367 U.S. at 656.

\textsuperscript{54} See Ball, supra note 52, at 650; Monaghan, supra note 41, at 4 (calling *Calandra* a "watershed").

\textsuperscript{55} See supra note 41 and accompanying text.

\textsuperscript{56} See 414 U.S. at 347.

\textsuperscript{57} See infra notes 58–101 and accompanying text.

\textsuperscript{58} 417 U.S. 433 (1974).

\textsuperscript{59} Ball, supra note 52, at 651.

\textsuperscript{60} 417 U.S. at 435. Miranda v. Arizona, 384 U.S. 436 (1966), held that the fifth amendment requires suspects to be informed of their privilege against self-incrimination before any statements made by them may be used against them in a judicial proceeding.
suspect who was questioned before the *Miranda* decision and to whom, therefore, the full *Miranda* warnings were not given. The questioning of the suspect led the police to a friend of the accused who produced incriminating evidence. The issue presented was whether the evidence should be excluded by applying *Miranda* retroactively. The Court did not exclude the evidence and stated that before it would penalize the police by suppressing evidence, it would consider whether exclusion would deter the deprivation of an accused's constitutional rights. Justice Rehnquist, writing for the majority, stated that "[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force."

Recognizing a good faith exception to the application of the fifth amendment exclusionary rule was not the only basis for the decision in the *Tucker* case. Other bases included the voluntariness of the accused's statement and the reliability of the evidence obtained as a result of that statement. Moreover, Justice Brennan stated in his concurring opinion that the decision could have been based upon retroactivity grounds. Regardless of these alternative rationales for the *Tucker* holding, the case showed the Court's willingness to look at the nature of the violation of the accused's rights before excluding the illegally obtained evidence.

In *Peltier v. United States*, the Court found that a good faith exception to the exclusionary rule hinders neither the deterrence nor the judicial integrity rationales for the rule. *Peltier* involved the seizure of marijuana in an automobile search less than one hundred miles from the Mexican border. The search occurred four months before the Court in *Almeida-Sanchez v. United*

---

The analogy between the fourth and fifth amendment exclusionary rules should not be carried to an extreme. The fifth amendment words "nor shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V, give the fifth amendment exclusionary rule a stronger basis in the language of the Constitution. Still, the analogy is valuable because the *Miranda* warning is a judicial invention used to deter law officers from violating an accused's fifth amendment privilege against self-incrimination.

61. 417 U.S. at 436.
62. *Id.* at 435.
63. *Id.* at 446.
64. *Id.* at 447.
65. *Ball,* *supra* note 52, at 651.
66. 417 U.S. at 444–45, 448–49.
67. *Id.* at 453–59 (Brennan, J., concurring).
68. 422 U.S. 531 (1975).
69. *Id.* at 535–38, 542; see *Ball,* *supra* note 52, at 652.
70. 422 U.S. at 532.
States\textsuperscript{71} declared similar searches unconstitutional. In \textit{Peltier} the Court held that Almeida-Sanchez would not be applied retroactively because the searching agents relied on a judicially approved federal statute.\textsuperscript{72} Justice Rehnquist wrote for the majority that "'judicial integrity' is . . . not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law . . ."\textsuperscript{73} even if their conduct is later declared to be unconstitutional.\textsuperscript{74} With respect to the deterrence rationale, Justice Rehnquist stated:

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.\textsuperscript{75}

Thus, the Court has expressed a reluctance to exclude evidence under the fourth amendment, and in some cases the fifth amendment, unless the unlawful police conduct is willful or at least negligent.\textsuperscript{76}

In Brown \textit{v. Illinois},\textsuperscript{77} another \textit{Miranda} case, Justice Powell, in a concurring opinion joined by Justice Rehnquist, stated that a good faith violation of an accused's constitutional rights is to be determined by using a sliding scale approach. At one end of the scale is the flagrantly abusive violation and at the other end is the technical violation.\textsuperscript{78} For flagrantly abusive violations, such as pretext arrests and blatant, unnecessary personal privacy intrusions, the exclusion of evidence is needed for both deterence and judicial integrity reasons.\textsuperscript{79} Technical violations, such as arrests based in good faith reliance on a warrant later held to be invalid or based on a statute later declared unconstitutional,\textsuperscript{80} do not require the exclusion of evidence because neither the deterrence nor the judicial integrity goals of the exclusionary rule are furthered.\textsuperscript{81}

\textsuperscript{71} 413 U.S. 266 (1973).
\textsuperscript{72} 422 U.S. at 531. The statute, 8 U.S.C. § 1357(a)(3) (1976), had allowed searches for illegally entering aliens within a specified number of miles from a United States border.
\textsuperscript{73} 422 U.S. at 538 (emphasis supplied).
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 542 (emphasis added).
\textsuperscript{76} Ball, \textit{supra} note 52, at 652.
\textsuperscript{77} 422 U.S. 590 (1975).
\textsuperscript{78} Ball, \textit{supra} note 52, at 652.
\textsuperscript{79} 422 U.S. at 611 (Powell, J., concurring in part). \textit{See Peltier}, 422 U.S. at 535-38; \textit{Tucker}, 417 U.S. at 450 n.25.
\textsuperscript{80} 422 U.S. at 611.
\textsuperscript{81} \textit{Id.} at 612.
Justice Powell did not attempt to categorize the numerous situations that fall between the two extremes on his scale, but he did stress that the deterrent purpose of the exclusionary rule should be kept “sharply in focus” in dealing with the “in between” cases.

The Court in *Stone v. Powell* further narrowed the applicability of the fourth amendment exclusionary rule in deciding that fourth amendment claims may not be raised in federal habeas corpus attacks upon convictions where the state has provided an opportunity for “full and fair” litigation of the claim. Although *Powell* did not use a good faith exception to the exclusionary rule as the basis for its decision, Chief Justice Burger expressed his support for a good faith exception in his concurring opinion. He reasoned that a good faith exception is desirable because the cost of exclusion to society is too great when no deterrent effect is shown. Moreover, he referred to the rule as a “Draconian, discredited device in its present absolutist form.”

Justice White disagreed with the Court’s holding in *Powell*, but his dissent significantly contributed to the development of a good faith exception. Justice White proposed that a good faith exception should arise when an officer makes a good faith mistake concerning the existence of probable cause. Justice White stated that an officer must have both a good faith belief that his or her conduct was in accordance with the law and reasonable grounds for that belief. In Justice White’s view, the deterrence rationale of the exclusionary rule would not be served in cases involving a good faith mistake as to probable cause.

The Court in *United States v. Janis* imposed another considerable limitation on the exclusionary rule by holding that it should not bar the use of evidence illegally seized by a criminal law officer of one sovereign, in a civil proceeding of another sovereign.

---

82. *Id.*
84. *Id.* at 481–82.
85. *Id.* at 499–500 (Burger, C.J., concurring).
87. See *Ball, supra* note 52, at 653.
88. 428 U.S. at 538–39 (White, J., dissenting).
89. *Id.*
90. *Id.* at 539–40.
92. In *Janis*, a judge issued a search warrant based on a police officer’s affidavit. The
The Court was not overruling a past decision, but merely preventing a result which the broadness of *Mapp* would have allowed. In reaching its decision the Court in *Janis*, like the Court in *Powell*, applied a balancing test to determine whether the rule's deterrence of police conduct outweighed the cost to society inflicted by its application.

D. Recent Decisions Continue to Limit the Scope of the Exclusionary Rule

In more recent cases the Court has continued to limit the applicability of the exclusionary rule, which indicates that the present Court is receptive to the creation of a good faith exception. In *United States v. Ceccolini*, the Court balanced the exclusionary rule's benefits against its costs and decided that the rule should be applied with reluctance where the constitutional violation leads to the discovery of a witness rather than inanimate evidence. Moreover, the Court held in *Rakas v. Illinois* that fourth amendment rights may not be vicariously asserted by a person incriminated as a result of an illegal search and seizure of a third person's premises or property. Furthermore, in *United States v. Caceres*, the Court held that evidence obtained in violation of Internal Revenue Service (IRS) regulations could be admitted at the

[93. 435 U.S. 268 (1978).]

[94. A police officer observed an envelope with money in it on the cash register in Ceccolini's flower shop. The officer examined the envelope and found money and policy slips in it. An employee of the shop was asked to whom the envelope belonged and she answered that it belonged to Ceccolini. The employee testified against Ceccolini at his trial. The Court held that the relationship between the illegal search of the envelope and the employee's testimony was too tenuous to require exclusion of that testimony. *Id.* at 279-80.]

[95. 439 U.S. 128 (1978).]

[96. In *Rakas*, the police stopped a suspected getaway car after receiving a robbery report. Rakas and the other petitioners were passengers in the car. The police found a box of rifle shells and a sawed-off rifle in the car. The petitioners were convicted of armed robbery at a trial in which the rifle and shells were admitted as evidence. The Court held that the petitioner's motion to exclude the rifle and shells on fourth amendment grounds should be overruled because the car, as well as the rifle and shells, did not belong to the petitioners. *Id.* at 133-38. For a discussion of *Rakas*, see Note, *Standing Up for Fourth Amendment Rights: Salvucci, Rawlings, and the Reasonable Expectation of Privacy*, 31 CASE W. RES. L. REV. 656, 668-75 (1981).]

[97. 440 U.S. 741 (1979).]
criminal trial of a taxpayer accused of bribing an IRS agent.\textsuperscript{98}

The \textit{Caceres} case is particularly significant because the majority mentioned the good faith rationale: "The agency action, while later found to be in violation of the regulations, nonetheless reflected a reasonable, \textit{good-faith} attempt to comply in a situation in which no one questions that monitoring was appropriate . . . ."\textsuperscript{99} \textit{Caceres} is the first case in which Justice Stevens, writing for the majority, has applied the good faith rationale. Despite the fact that the good faith statement is limited in scope and is dictum, it may indicate that Justice Stevens is inclined to accept a good faith exception to the exclusionary rule.\textsuperscript{100} Such a tendency is important because previous cases indicate that at least four other Justices support a good faith exception to the fourth amendment exclusionary rule—Chief Justice Burger, and Justices Powell, Rehnquist, and White.\textsuperscript{101}

Even more recently, the Court of Appeals for the Fifth Circuit concluded in \textit{United States v. Williams}\textsuperscript{102} that the exclusionary sanction may no longer be used to suppress evidence that is discovered by law officers acting in good faith and under the objectively reasonable, though mistaken, belief that their actions are authorized. The \textit{Williams} exception for reasonable good faith mistakes is analogous to the good faith exception mentioned by Justice White in \textit{Stone v. Powell}.\textsuperscript{103} Unfortunately, however, the good faith exception was only an alternative holding in \textit{Williams} and it is, therefore, effectively insulated from Supreme Court review.\textsuperscript{104}

\textsuperscript{98} \textit{Id.} at 749–57. \textit{Caceres} involved IRS regulations which prohibit "consensual electronic surveillance," \textit{id.} at 744, between taxpayers and IRS agents unless certain specified prior authorization is obtained. The Justice Department had not granted authority for the meetings with Caceres. At the meetings, respondent Caceres, unaware of the surveillance, paid or offered money to the agent for a favorable resolution of the audit. Caceres was later prosecuted for bribing an IRS agent. The Court held that there was no need to exclude the tape recordings because the exclusionary rule does not apply to IRS actions. \textit{Id.} at 749–52. For a discussion of \textit{Caceres}, see Note, \textit{Exclusionary Rule — Recordings Obtained in Violation of IRS Manual Procedures Admissible in Subsequent Criminal Trial}, 85 DICK. L. REV. 183 (1980).

\textsuperscript{99} 440 U.S. at 757 (emphasis added).

\textsuperscript{100} Note, \textit{supra} note 98, at 189–90.

\textsuperscript{101} \textit{See supra} notes 48–104 and accompanying text.


\textsuperscript{103} \textit{See supra} notes 87–90 and accompanying text.

\textsuperscript{104} Judge Rubin, in his concurring opinion, wrote:

The announcement of the rule as an alternative ground for decision in a case where all the court agrees on the result virtually immunizes this case from Supreme Court review. We must, therefore, await another case where the issue is
II. A CRITIQUE OF THE EXCLUSIONARY RULE AND THE GOOD FAITH EXCEPTION

A. The Lurking Constitutional Question

One of the strongest arguments against the exclusionary rule is that it excludes valid, irrefutable evidence from the judicial factfinding process.\(^{105}\) For this reason and others, Judge Malcolm Richard Wilkey\(^ {106}\) believes that the exclusionary rule based on fourth amendment grounds should be abolished.\(^ {107}\) Professor Yale Kamisar, however, believes that the rule should remain fully intact as an indispensable means of enforcing an individual's constitutional right to be free from unreasonable searches and seizures, notwithstanding the fact that the rule by its very definition excludes probative evidence.\(^ {108}\) The good faith exception is a compromise between these two positions. Rather than abolishing the rule completely, its application would be limited to these situations where law officers \textit{fail} to base their searches on a good faith, objectively reasonable belief that their actions do \textit{not} violate the fourth amendment.

The fundamental difference between the Wilkey and Kamisar views lies in their interpretation of the Constitution.\(^ {109}\) Professor Kamisar maintains that the fourth amendment requires the exclusionary rule by implication.\(^ {110}\) In contrast, Judge Wilkey is correct in pointing out that the Supreme Court, the final interpreter of the Constitution,\(^ {111}\) has never clearly held that the exclusionary rule is required constitutionally by the fourth amendment. Five Justices in \textit{Mapp v. Ohio} did suggest a constitutional basis for the rule, but Justice Black did not see the fourth amendment alone as

\(^{105}\) Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).


\(^{107}\) Judge Malcolm Richard Wilkey of the United States Court of Appeals for the District of Columbia Circuit is well-known as a staunch opponent of the exclusionary rule.

\(^{108}\) Wilkey, \textit{supra} note 105, at 232.

\(^{109}\) Kamisar, \textit{Is the Exclusionary Rule an "Illegal" or "Unnatural" Interpretation of the Fourth Amendment?}, 62 \textit{JUDICATURE} 66, 84 (1978).

\(^{110}\) For further debate between the two commentators see Kamisar, \textit{The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than 'An Empty Blessing,'} 62 \textit{JUDICATURE} 337 (1979); Wilkey, \textit{A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak}, 62 \textit{JUDICATURE} 351 (1979).

\(^{111}\) See Kamisar, \textit{supra} note 108, at 83–84.
providing adequate support for the rule.\textsuperscript{112} A strong majority of the Court, therefore, has not agreed upon the constitutional basis for the exclusionary rule.

It is neither accurate nor realistic to state that the Court has relied on any single rationale for the exclusionary rule. Instead, the history of the rule indicates that the Court has placed varying degrees of emphasis on three rationales.\textsuperscript{113} In light of this inconsistent history, Professor Kamisar's belief that the exclusionary rule is constitutionally required because of the Supreme Court holdings in \textit{Weeks} and \textit{Mapp} is not soundly supported. Indeed, the possible support \textit{Weeks} and \textit{Mapp} gave to the constitutional rationale was clearly undercut by the Court's statements in \textit{Calandra} concerning the deterrence rationale.\textsuperscript{114} In sum, it is more appropriate to say that the exclusionary rule is constitutionally \textit{inspired} rather than constitutionally required.

\textbf{B. Protection of Constitutional Values}

Assuming that the exclusionary rule is a reflection of constitutional values rather than a constitutional absolute in itself, it must be determined whether a good faith exception would adequately protect the constitutional values involved. The exclusionary rule was created as a means to enforce the fourth amendment prohibition of unreasonable searches and seizures\textsuperscript{115}—a prohibition that protects the highly valued right to personal privacy.\textsuperscript{116} The constitutional value which must be guarded, then, is the desire to be free from unwarranted intrusions. It is not the purpose of the fourth amendment to exclude probative evidence from the judicial factfinding process. The exclusion of evidence is not a constitutional end in itself. The exclusionary rule is only a means to safeguard constitutionally valued personal privacy. Since the exclusionary rule is a means of enforcing a constitutional provi-

\begin{itemize}
\item \textsuperscript{112} See supra note 40–41 and accompanying text.
\item \textsuperscript{113} See Gilday, supra note 24, at 2–4; Wilkey, supra note 105, at 220.
\item \textsuperscript{114} The Court stated that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a constitutional right of the party aggrieved." \textit{Calandra}, 414 U.S. at 348.
\item \textsuperscript{115} See U.S. CONST. amend. IV.
\end{itemize}
sion, its effectiveness should be compared with other possible means, including the good faith exception.

Judge Wilkey discusses several possible ramifications of the exclusionary rule\(^1\) one of which is the high crime rate.\(^2\) A number of factors, however, are responsible for the nation's distressing crime problem\(^3\) and Judge Wilkey is undoubtedly exaggerating the impact of the exclusionary rule. On the other hand, freeing guilty individuals for lack of evidence, when the best evidence has been excluded, certainly does not discourage the commission of crimes. Assuming that the exclusionary rule is one contributing factor to the high crime rate, a good faith exception would limit the applicability of the rule and decrease the number of criminals freed.

Judge Wilkey also maintains that the rule needlessly frustrates police and prosecutors in their attempts to capture and convict criminals.\(^4\)

This frustration is not needless, however, when constitutional values are at stake.\(^5\) Arguably, though, it may be needless in situations where police act on the reasonable, good faith belief that their conduct conforms to fourth amendment standards.

Judge Wilkey further argues that the exclusionary rule distorts


\(^2\) See United States Dep't of Justice, Uniform Crime Rep. (March 31, 1981) "The number of Crime Index offenses reported to law enforcement agencies rose 10 percent from 1979 to 1980 according to preliminary annual figures."


\(^4\) See Wilkey, supra note 105, at 218.

\(^5\) Justice Jackson wrote in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943), "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." The fourth amendment prohibits unreasonable searches and seizures, and popular sentiment should not be allowed to overrule that prohibition. The question, however, is whether the fourth amendment should be read as requiring the exclusionary rule as the means of enforcing the prohibition against unreasonable searches. This Note maintains that the exclusionary rule is not constitutionally mandated and could theoretically be replaced without offending the Constitution.
the truth,\textsuperscript{122} fails to recognize different levels of culpability of the officer or degrees of harm to the victim,\textsuperscript{123} discourages the police from disciplining themselves,\textsuperscript{124} and does not allow the states to experiment with other methods of controlling police conduct and protecting individual privacy.\textsuperscript{125} A good faith exception would help alleviate some of these problems. For example, a good faith exception would reduce the instances where truth is suppressed because evidence seized by a police officer acting in good faith would not be excluded. In addition, the exception would allow for the recognition of varying degrees of police culpability by not excluding evidence when the officer was less culpable, that is, when the officer acted in good faith.

Finally, Judge Wilkey argues that neither the judicial integrity nor the deterrence rationales are served by the exclusionary rule.\textsuperscript{126} Concerning judicial integrity, he states that the exclusion of good evidence "undermines the reputation of and destroys the respect for the entire judicial system."\textsuperscript{127} It is indeed difficult to maintain that courts improve their reputation by freeing criminals when probative, reliable, and incriminating evidence is available. On the other hand, blatant personal intrusions like pumping a person's stomach,\textsuperscript{128} or the thorough ransacking of a private

\begin{footnotesize}
\begin{enumerate}
  \item Wilkey, supra note 105, at 222. Wilkey maintains that the exclusionary rule distorts the truth because it excludes "undeniable facts" and, therefore, prevents the truth from being known to the greatest extent possible.
  \item Id. at 225-26. Wilkey explains: "It does not matter whether the action of the officer was grossly willful and flagrant or whether he was conscientiously using his very best judgment under difficult circumstances; the result is the same: the evidence is out."
  \item Id. at 226.
  \item Id. at 226. Wilkey reasons:
    Even if police officials know that an officer violated Fourth Amendment standards in a particular case, few of them will charge the erring officer with a Fourth Amendment violation: it would sabotage the case for the prosecution before it even begins. The prosecutor hopes the defendant will plea bargain and thus receive some punishment, even if the full rigor of the law cannot be imposed because of the dubious validity of the search. Even after the defendant has been convicted or has pleaded guilty, it would be dangerous to discipline the officer—months or years later—because the offender might come back seeking one of the now popular post conviction remedies.
  \item Id. at 226-27.
  \item Id. at 227. The \textit{Mapp} decision imposed the exclusionary rule on the states. Consequently, the states are not free to try other means to remedy illegal searches and seizures.
  \item Id. at 220, 223.
  \item Id. at 223.
  \item See Rochin v. California, 342 U.S. 165 (1952). \textit{Rochin} involved the conduct of three police officers who suspected that Rochin was selling narcotics, and without probable cause entered his home and forced their way into his bedroom. Upon the officer's arrival, Rochin swallowed two capsules of an unknown substance. After first unsuccessfully trying to extract the capsules by force, the officers took Rochin to a hospital where an emetic solution was forced into his stomach. The resulting morphine capsules were used to con-
\end{enumerate}
\end{footnotesize}
good faith exception would help to solve this judicial integrity dilemma. Assuming police are more likely to commit minor fourth amendment violations when they are acting in good faith, the judicial integrity rationale would be served by a good faith exception because fewer dangerous criminals would be released as a result of relatively minor police misconduct. Moreover, in those cases where the police were not acting in good faith, judicial integrity would be served because the good faith exception would not apply and the evidence obtained would be excluded. Addressing the deterrence rationale for the exclusionary rule, Judge Wilkey argues that the exclusion of evidence does nothing to punish and deter police, but instead it provides a windfall for criminals. In empirical studies, social scientists Bradley Canon and Steven R. Schlesinger attempted to determine whether

vict Rochin of a drug possession charge. The Supreme Court reversed on the grounds that the evidence was obtained in violation of the due process clause of the fourteenth amendment. Id. at 174. It is noteworthy that Rochin was decided before Mapp explicitly incorporated the fourth amendment exclusionary rule into the due process clause and thereby made it binding on the states.

129. See Mapp v. Ohio, 367 U.S. 643 (1961). Mapp questioned the conduct of three police officers who entered Mapp's home forcibly without a valid warrant. The officers thoroughly searched the entire premises—drawers, closets, suitcases—until they finally discovered some pornographic material in a basement trunk. Mapp was subsequently convicted of possession of obscene material. The Supreme Court reversed, holding that all evidence obtained by searches and seizures in violation of the fourth amendment is inadmissible in a state criminal proceeding.

130. Rochin, 342 U.S. at 172.

131. Justice Brennan, however, fears that the police will commit minor fourth amendment infractions in bad faith because they know they are likely to get away with it. Peltier, 422 U.S. at 559 (Brennan, J., dissenting). The good faith exception would require both actual good faith and objective reasonableness. The question of actual good faith would be left for the trier of fact. Justice Brennan is apparently worried that the reasonableness test and the question of actual good faith will become inextricably intertwined—and that a reasonableness test for probable cause will be reestablished. Ball, supra note 52, at 154. See Note, Moving to Suppress the Exclusionary Rule: The Use of Illegally Obtained Evidence as the Basis for Probable Cause, 60 B.U.L. REV. 713 (1980) (discussion of the relationship of probable cause to the exclusionary rule). Despite Brennan's concerns, it is no more difficult for a court to reach a proper conclusion as to whether there was actual good faith in a particular case, than it is for a court to answer other difficult questions that must be faced regularly.

132. Wilkey, supra note 105, at 223.
the exclusion of evidence does in fact deter police.\textsuperscript{133} Professor Canon concluded that the exclusionary rule "has a differential impact depending upon time and place."\textsuperscript{134} Professor Schlesinger, however, confidently asserted that the rule is an \textit{ineffective} deterrent.\textsuperscript{135} Considering that the Supreme Court now considers deterrence to be the primary justification for the rule,\textsuperscript{136} Professor Schlesinger's conclusion seems to indicate that the exclusionary rule should be abandoned.

Regardless of the deterrence rationale's effect on the exclusionary rule, the strength of the deterrence rationale is irrelevant to the question of the propriety of a good faith exception. In fact, even if it could be shown that the exclusionary rule is overwhelmingly effective as a deterrent, the desirability of a good faith exception would not be affected. A police officer cannot be deterred from violating fourth amendment rights while believing in reasonable good faith that those rights are not being violated. Thus, a good faith exception is compatible with the Supreme Court's primary rationale for the exclusionary rule—deterrence of police misconduct.\textsuperscript{137}

### III. Doubts About a Good Faith Exception

There are two major criticisms of the good faith exception: first, that the exception will lead to the destruction of the exclusionary rule; and second, that law enforcers might take less care to respect the constitutional rights of suspects.\textsuperscript{138} The good faith exception, however, would not lead necessarily to the destruction of the exclusionary rule. Its objective is not to eradicate the rule, but rather to prevent its application when the police have acted in rea-

\textsuperscript{133} Schlesinger, \textit{The Exclusionary Rule: Have Proponents Proven that It Is a Deterrent to Police?}, 62 \textit{Judicature} 404 (1979) [hereinafter cited as Schlesinger, \textit{The Exclusionary Rule}]; Canon, \textit{The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?}, 62 \textit{Judicature} 398 (1979) [hereinafter cited as Canon, \textit{The Exclusionary Rule}].

For their responses to each other's studies see Schlesinger, \textit{A Reply to Professor Canon}, 62 \textit{Judicature} 457 (1979); Canon, \textit{A Postscript on Empirical Studies and the Exclusionary Rule}, 62 \textit{Judicature} 455 (1979).

\textsuperscript{134} Canon, \textit{The Exclusionary Rule}, supra note 133, at 400. Professor Cannon suggests that the rule may be a more effective deterrent today than it was in the first few years after \textit{Mapp}. Id. at 401. Professor Canon bases this belief on his own study, the results of which are reported in Canon, \textit{Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion}, 62 Ky. L.J. 681 (1974).

\textsuperscript{135} Schlesinger, \textit{The Exclusionary Rule}, supra note 133, at 405.

\textsuperscript{136} See supra note 56 and accompanying text.

\textsuperscript{137} See supra notes 48–103 and accompanying text.

\textsuperscript{138} Peltier, 422 U.S. at 551, 554 (Brennan, J., dissenting); Ball, supra note 52, at 655.
reasonable good faith. Certain Justices on the Supreme Court have expressed a desire to abolish the rule,139 but the constitutional underpinning is such that total obliteration is unlikely.

The concern about law enforcers who ignore the rights of suspects relates to the deterrence effect of the exclusionary rule.140 Judge Wilkey argues that the rule does nothing to "punish" police officers, that it only hinders the work of prosecutors and frees criminals.141 On the other hand, as Justice Brennan pointed out in Peltier,142 the rule may have a broader deterrent purpose—a general "educative" effect.143 This educative effect could enhance police morale and cause police to have greater respect for individual rights. In any event, the good faith exception should not hinder the positive effects Justice Brennan believes the rule could have, because police officers acting on a good faith belief that their conduct is lawful are not deterred by the exclusionary rule.

Nevertheless, Justice Brennan fears that when police are forced to make on-the-spot decisions about the existence of probable cause,144 they will be tempted to search and seize simply because they believe their actions will appear objectively reasonable.145 Justice Brennan, however, is merely calling attention to a difficulty with the reasonable person standard, which the

---


140. See supra note 133.

141. Wilkey, supra note 105, at 218. Dean Wigmore presented the following scenario to illustrate the result of the exclusionary rule:

Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Titus to behave, and incidently of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.

Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A.J. 479, 484 (1922).

142. 422 U.S. 531 (1975).

143. Id. at 555 (Brennan, J., dissenting).

144. See, e.g., United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977), discussed in Wilkey, supra note 105, at 218-19. In Montgomery, two police officers saw Montgomery driving his car in a way that suggested he was "sizing up" the neighborhood. After the police had stopped Montgomery, they learned that an arrest warrant was outstanding against him. The officers searched him and found two guns and ammunition. The court of appeals later reversed Montgomery's conviction for possession of firearms, by holding that no probable cause existed for the arrest in the first place, and that all of the evidence discovered thereafter was the product of an illegal search and seizure.

145. 422 U.S. at 560–61 (Brennan, J., dissenting).
courts have had experience applying in tort cases. Under the good faith exception, the court first determines if the officer’s conduct was objectively reasonable—the reasonable person standard. The court then determines if the act actually was performed in good faith. This subjective determination merely requires an answer to a question of fact; something which courts and juries do every day. If this straightforward test is applied, it is unlikely that many police officers will be able to abuse the good faith exception.

IV. CONCLUSION

Ultimately, the decision of whether to implement a good faith exception to the exclusionary rule should be reached only after balancing the constitutional value of privacy with our society’s serious crime problem. The exclusionary rule was created as a means of enforcing the fourth amendment, but that does not mean it should be accepted unquestionably as part and parcel of that amendment. Constitutional rights are dearly purchased when the price paid is that guilty criminals are set free. As Chief Justice Burger recently stated, echoing Justice Jackson, the Constitution is not intended to be a “suicide pact.”147 The good faith exception may well strike the best possible balance.

In a society with an alarmingly high crime rate, the good faith exception would considerably lessen the number of criminals who are set free as a result of the exclusionary rule windfall.148 At the same time, with a good faith exception the exclusionary rule remains intact, preventing evidence from being used which is obtained in an unreasonable manner.149 When the appropriate case comes before it, the Supreme Court should follow the lead of the Fifth Circuit and create a good faith exception to the exclusionary rule.150 The good faith exception appears to be in the best interests of society and the Constitution.

DONALD L. WILLITS

146. It is true that the good faith exception would allow some officers to illegally search in bad faith because their actions appear objectively reasonable. The possibility of abuse, however, is outweighed by the costs of the exclusionary rule. See supra notes 55–119 and accompanying text.


148. See Wilkey, supra note 105, at 223.

149. See supra notes 77–81 and accompanying text.