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THE EXCLUSIONARY RULE: IS A GOOD FAITH STANDARD NEEDED TO PRESERVE A LIBERAL INTERPRETATION OF THE FOURTH AMENDMENT?

Frederick A. Bernardi*

In recent years, the United States Supreme Court has frequently tangled with the vitality of the exclusionary rule as a mechanism for protecting substantive fourth amendment rights. During these encounters, the Court has variously moved to restrict the territory covered by the rule, a trend that may peak with adoption of Justice White's good faith formulation. Mr. Bernardi evaluates this trend in three parts: first, by examining the shifting rationales employed by the Court to sustain the rule; second, by considering the present rule's efficacy in protecting fourth amendment rights; and finally, by analyzing and advocating Justice White's good faith standard. He concludes that the current Court's retrenchment is not only justified, but also essential to preserve substantive fourth amendment rights.

INTRODUCTION

The recent case of Michigan v. DeFillippo1 represents the closest example to date of a situation in which the United States Supreme Court has allowed the direct use of unlawfully seized evidence to establish the prosecution's case-in-chief in a criminal trial. In rendering the DeFillippo decision, the Court has taken another significant step toward adoption of a good faith standard to govern application of the exclusionary rule in the realm of fourth amendment violations.

The DeFillippo case has prompted this writer to take a fresh look at the exclusionary rule. It appears that if the rule is not shortly abandoned altogether as a means of enforcing the fourth amendment, it is virtually certain that the Court will adopt some species of a good faith — bad faith calculus to govern the rule's application. The Court has positioned itself to adopt this new standard by gradually reformulating the justificatory rationale given in support of the rule's position in fourth amendment jurisprudence. As will be seen, analytical emphasis has gradually changed from one of rights to one of remedies, the Court now focusing primarily on the rationale of deterrence in exclusionary rule decisions. The first part of this Article studies the jurisprudence of the exclusionary rule as it has developed and changed over the past century.

The second part of this Article reviews and discusses the major criticisms of the rule in its present form. The greater portion of this analysis attempts to establish the thesis that the present rule, instead of protecting privacy interests, actually works the exact opposite effect, perhaps posing the

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greatest, single impediment to a liberal interpretation of the fourth amendment.

Finally, part three of this Article defends Justice White's formulation of the good faith standard as set forth in his dissenting opinion in Stone v. Powell. The argument is made that an explicit adoption of a good faith standard not only will lessen the tension which presently exists between the need for effective law enforcement and the desire to protect fourth amendment rights, but also will help eliminate the plethora of legitimate criticisms which attend the rule in its present form.

I. THE JURISPRUDENCE OF THE EXCLUSIONARY RULE IN THE SUPREME COURT

The development of the exclusionary rule can be understood best by studying the gradual shift over time in the justifications articulated for the rule in Supreme Court opinions. Essentially three jurisprudential considera-

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3. As a matter of constitutional implementation, an exclusionary rule of evidence has been imposed by the Supreme Court in four areas of criminal procedure: (1) to implement the proscription against compelled self-incrimination embodied in the fifth amendment (see, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964)); (2) to protect an accused's right to counsel guaranteed by the sixth amendment (see, e.g., Brewer v. Williams, 430 U.S. 387 (1977); United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964)); (3) to implement the proscription against unreasonable searches and seizures under the fourth amendment (see, e.g., United States v. Chadwick, 433 U.S. 1 (1977); Beck v. Ohio, 379 U.S. 89 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914)); and (4) to redress police intrusions that "shock the conscience" of the court (Rochin v. California, 342 U.S. 165, 172 (1952)). Subsequent to the decision of the Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961), this fourth category has lost much, if not all, of its importance.

Although application of an exclusionary rule of evidence to the products of certain fifth and sixth amendment violations might certainly be questioned, this Article treats only that aspect of the rule which relates to exclusions resulting from illegal searches and seizures under the fourth amendment. The reason for this selection is important to the position this discussion takes; a rule which excludes from the fact-finding process evidence admitted to be of utmost reliability should serve significant and veritable social interests to merit its continued existence. There are usually important considerations of reliability at issue when evidence is derived from violations of the fifth and sixth amendments. A confession derived from the use of physical force has questionable reliability. Brown v. Mississippi, 297 U.S. 278, 286-87 (1936). And the Miranda decision can fairly be seen as one designed to preclude not only the physically coercive techniques, such as those used in Brown, but the psychological ones as well:

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before . . . "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."

384 U.S. at 448 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

Similar questions of reliability have arisen in instances where the Supreme Court has seen the implication of sixth amendment rights. For example, in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), the Court held that testimony in court about an identification made of the accused at a lineup in the absence of appointed counsel violated the accused's sixth amendment right to assistance of counsel and therefore
tions have been enunciated by the Court in support of the rule: (1) that the rule is necessary to give real substance to the privacy interests of those citizens who are the actual victims of unlawful intrusions; (2) that the rule is needed to preserve judicial integrity; and (3) that the rule is required to deter unlawful police conduct. The Court has never definitively ruled that any one rationale, to the exclusion of the others, supports the rule. Yet, recent opinions reveal a shift in emphasis from the individual privacy and judicial integrity rationales to deterrence. By shifting concentration to deterrence, the Court has positioned itself to adopt a good faith standard to govern the exclusionary rule in fourth amendment cases.

Redressing Invasions of Privacy Interests

Prior to 1886, courts almost universally acknowledged that the manner in which evidence was obtained was irrelevant to questions of its admissibility in court. Judges were loath to exclude evidence of unquestioned reliability and probative value. Criminal trials were not to become fettered by the litigation of collateral issues, and how reliable evidence arrived at the courthouse door was regarded as just such an issue.

should have been excluded from use by the prosecuting agencies. Clearly, the Court was concerned with the reliability of such identification procedures: "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." United States v. Wade, 388 U.S. at 228.

Rule 5(a) of the Federal Rules of Criminal Procedure requires that an arrested person be taken "without unnecessary delay" before a committing magistrate. FED. R. CRIM. P. 5(a). In McNabb v. United States, 318 U.S. 332 (1943), and again in Mallory v. United States, 354 U.S. 449 (1957), the Supreme Court held that statements obtained from an accused during a period of unreasonable delay between arrest and presentation before a magistrate were inadmissible in subsequent criminal proceedings. The Court's rulings in these cases, however, were based on an exercise of its supervisory powers over the lower federal courts, not on the Constitution. The exclusionary rule as a device used by the Court in this context is not treated in this Article.

7. See text accompanying notes 33-134 infra.
9. The idea that the litigation of search and seizure issues is in some degree collateral to the criminal proceeding itself has persisted in large part to this very day. For example, rule 12(f) of the Federal Rules of Criminal Procedure requires that "[m]otions to suppress evidence" be raised prior to trial, FED. R. CRIM. P. 12(b), and rule 12(f) provides that "[f]ailure by a party to raise defenses or objections or make requests which must be made prior to trial . . . constitute[s] waiver thereof, but the court for good cause shown may grant relief from the waiver." Id. 12(f).
10. A clear statement of this now archaic judicial posture can be found in the old Massachusetts case of Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841):

[T]hough papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the
In 1886, however, the United States Supreme Court handed down a decision regarded today by many constitutional historians as the genesis of the modern fourth amendment exclusionary rule. In *Boyd v. United States*, the Court had before it a constitutional challenge to a federal customs revenue statute that empowered federal judges to compel production of private business records in civil forfeiture proceedings. The statute provided that the allegations in the forfeiture proceeding would be confessed against the defendant if he failed to produce the document. Alternatively, if he chose to produce the item, it could then be offered by the government as evidence against him. Pursuant to the statute, the defendant had been ordered to produce a certain invoice covering imported goods.

The specific holding of *Boyd*, beyond the declaration itself that certain sections of the statute were unconstitutional, is difficult to determine, as the Court relied upon both the fourth and fifth amendments in its ruling. The importance of the *Boyd* decision for this analysis, however, is not the decision's precise constitutional basis, but rather the direct link found in the Court's logic between the need to protect privacy rights and the exclusion of issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.


11. 116 U.S. 616 (1886). In deciding *Boyd*, the Supreme Court relied heavily on the English case of *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765), where the plaintiff was successful in quashing a warrant whose object was the seizure of the plaintiff's private papers for use in a criminal proceeding against him.


13. 116 U.S. at 619-20. Although *Boyd* was not per se a criminal case (as already indicated, it involved a civil forfeiture proceeding), the Court applied the fourth and fifth amendments, reasoning that suits for penalties and forfeitures were quasi-criminal in nature and consequently fell within the ambit of the amendments' protections. *Id.* at 634.

14. *Id.* at 634-35. In the Court's terms, a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment.

*Id.* It should be noted that Justice Bradley's theory about the relationship between the fourth and fifth amendments has not survived. In Fisher v. United States, 425 U.S. 391 (1976), the Court held that the fifth amendment did not prohibit enforcement of an Internal Revenue Service summons against a taxpayer's attorney ordering him to produce an accountant's work papers transferred to the attorney by the taxpayer. In reaching its decision, the Court agreed that if the work papers had been privileged in the hands of the taxpayer, the privilege would not have been lost merely because the taxpayer transferred them to his attorney. The attorney-client privilege would preclude such a result. The Court therefore had to determine whether the papers would have been privileged against production in the hands of the taxpayer, and resolved the issue in the negative.

A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without a doubt involves substantial compulsion. But it
evidence to vindicate those rights. According to Justice Bradley, mere physical invasion of a defendant's home and personal effects is not the gravamen of the violation, but rather "the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense." The 

Boyd decision thus laid the groundwork for a justificatory rationale for excluding evidence that focused on vindication of a litigant's individual rights. This rationale regards the exclusion of evidence unlawfully obtained as inextricably bound up with the substance of the constitutional guarantees themselves. Focusing on the actual victims of unlawful governmental intrusions, it suggests that these individuals have a personal right under the Constitution to exclude the fruits of privacy invasions from legal proceedings.

The clearest statements espousing the rationale of individual privacy can be found in the seminal cases of Weeks v. United States and Mapp v. Ohio. In the Weeks decision, the Supreme Court clarified the parameters of the privacy right espoused in Boyd when it held for the first time that items seized by federal officers, as a result of unconstitutional searches under the fourth amendment, could not be used as evidence against defendants in federal criminal trials. Justice Day made it unequivocally clear in Weeks that it was precisely to redress the victim's invasion of privacy that the evidence must be excluded. Likewise, in Mapp—the landmark case which mandated application of the exclusionary rule in state court proceedings—the Court's chief concern was to ensure that fourth amendment protections had real substantive import to the actual victims of unlawful police conduct. According to Justice Clark, who wrote the plurality opinion in Mapp,

the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege.

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15. 116 U.S. at 630.
18. 232 U.S. at 393.
19. Id. The Court stated:

If the letters and private documents can thus be seized 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 seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id.
namely, the exclusion of the evidence which an accused had been forced
to give by reason of the unlawful seizure. To hold otherwise is to grant the
right but in reality to withhold its privilege and enjoyment. . . .

. . . .

. . . Our decision . . . gives to the individual no more than that which the
Constitution guarantees him. . . .

Unlike the deterrence rationale, which, as seen below, focuses on the
future, the theory of individual privacy dwells on the present and the im-
mediate past. It posits that the initial intrusive illegality continues to operate
as an invasion of the victim's privacy unless evidential significance is refused
to the objects seized. Indeed, according to the Weeks decision, the improp-
erly seized objects themselves must be returned to the claimant lest he suf-
fer an ongoing abridgement of his constitutional rights.20

The idea that an exclusionary rule of evidence is constitutionally mandated
to vindicate the rights of the victims of privacy invasions reached its apex in
the Mapp decision. As will be seen shortly, however, it has been all but
abandoned by the current Court as a ratio decidendi in exclusionary rule
decisions.

Preserving Judicial Integrity

Unlike the rationale of individual privacy, which focuses directly on the
victims of unlawful governmental intrusions, and unlike the deterrence
rationale, which aims at future encounters between citizens and law enforce-
ment personnel, the rationale of judicial integrity articulates institutional
concerns of the judiciary. Under this theory, the exclusionary rule is seen as
necessary to prevent judicial complicity in unconstitutional official conduct.
The theory insists that for the courts to attach evidentiary significance to the
fruits of constitutional violations is a clear abdication of the judiciary's role as
chief protector and guardian of the Constitution.

Although the Boyd decision intimated that institutional considerations
were relevant in the Court's decision to exclude evidence in that case,21 the
first clear statement of the rationale of judicial integrity came from the opin-
on of Mr. Justice Day in the Weeks case:

[T]he duty of giving [fourth amendment protections] force and effect is
obligatory upon all entrusted under our Federal system with the enforce-

20. 367 U.S. at 656 (citing Wolf v. Colorado, 338 U.S. 25 (1949)). In Wolf, the Court held
for the first time that the guarantees of the fourth amendment were binding on the states by
way of the due process clause of the fourteenth amendment. The Court declined to hold in
Wolf, however, that the exclusionary rule was an "explicit requirement" of the fourth amend-
ment.

21. 367 U.S. at 660. The rationale of individual privacy provides the strongest argument for
those who insist that the exclusionary rule has a stature of constitutional dimension.

22. 232 U.S. at 398.

23. Mr. Justice Bradley stated in Boyd that compelling evidence from a putative defendant
was inimical to the "principles of a free government" and could not be abided in "the pure
atmosphere of political liberty and personal freedom." 116 U.S. at 632.
ment of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution.\textsuperscript{14}

According to this rationale, judicial refusal to condone unlawful conduct serves notice to law enforcement and public alike that a "manifest neglect, if not an open defiance,"\textsuperscript{25} of the Constitution has taken place. Although zealous efforts to bring the guilty to justice are laudable, such efforts must not include encroachments on those constitutional protections "established by years of endeavor and suffering."\textsuperscript{26}

In the wake of Weeks, several of our most distinguished Supreme Court justices have emphasized the importance of judicial integrity as a justification for the exclusionary rule. A notable example is the passionate statement of Mr. Justice Brandeis found in his dissenting opinion in Olmstead \textit{v. United States}: "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."\textsuperscript{27} Mr. Justice Holmes, dissenting in the same case, was equally ardent: "We have to choose, and for my part I think it is a less evil that some criminals should escape than that the government should play an ignoble part."\textsuperscript{28}

Proponents of the judicial integrity rationale insist that embodied within it is more than a mere concern for the appearance of judicial propriety. These theorists insist that by refusing to countenance unlawful official conduct, courts shield the individual from overreaching exertions of power by the executive branch of the government. This belief is rooted in the idea that the Constitution sets societal priorities, not officialdom. Consequently, the more zealously those in authority seek to accomplish their objectives, the more scrupulously must the courts scrutinize their conduct. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent,"\textsuperscript{29} stated Justice Brandeis. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."\textsuperscript{30}

The essence of the rationale of judicial integrity, then, is that the exclusionary rule exists to protect the judicial process from unconstitutionally tainted constituents. This rationale was essential to Justice Clark's plurality opinion in Mapp,\textsuperscript{31} as evidenced by his declaration that applying the exclu-

\textsuperscript{14} 232 U.S. at 392.
\textsuperscript{25} \textit{Id.} at 394.
\textsuperscript{26} \textit{Id.} at 393.
\textsuperscript{27} 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
\textsuperscript{28} \textit{Id.} at 470 (Holmes, J., dissenting).
\textsuperscript{29} \textit{Id.} at 479 (Brandeis, J., dissenting).
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} 367 U.S. 643 (1961).
sionary rule to the states accorded the courts "that judicial integrity so necessary in the true administration of justice." 32 As with the rationale of individual privacy discussed previously, however, the rationale of judicial integrity seems to have been deemphasized in the Court's recent decisions involving the exclusionary rule. 33 The consistency with which this rationale has been voiced by the Court over the history of the exclusionary rule's development, and the question of whether the rationale maintains any current vitality, are concepts which will be treated in conjunction with analysis of the deterrence rationale in the following sections.

DETERRING UNLAWFUL POLICE CONDUCT: THE DEMISE OF THE THEORY OF RIGHTS

The decisional history of the exclusionary rule following Mapp must be seen as a gradual, yet inexorable movement towards adoption of a good faith standard to govern application of the rule. To enable it to make what are seemingly becoming ad hoc determinations of when the rule should be applied and when not, the Supreme Court has shifted its jurisprudential focus from one of rights and judicial integrity to one of deterrence. By relegating the other rationales to positions of relative unimportance, the Court has undercut the exclusionary rule's constitutional stature, making its application in particular cases turn on a priori determinations of the rule's efficacy vel non in shaping future official conduct.

As will be seen, the Court's current analytical modus operandi in exclusionary rule cases is really a rather facile one: deterrence is viewed as the rule's primary raison d'être. The need to prevent fourth amendment violations, although still regarded as important by the Court, is deemed to require balancing against the social costs of excluding evidence. Further, the efficacy of the rule in accomplishing its deterrent purpose is seen as suspect, and, consequently, the Court has found insufficient reason in an increasing number of cases to invoke application of the rule.

The seeds of the deterrence rationale were sown by Justice Clark in his plurality opinion in Mapp. 35 But it was in the case of Linkletter v. Walker, 36 decided just four years after Mapp, that the deterrence theory decisively came to the fore. The holding in Linkletter, that the Mapp exclusionary rule was not applicable to "state court convictions which had become

32. Id. at 660.
33. See, e.g., Mr. Justice Powell's opinion for the majority in Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.").
final before rendition" of the *Mapp* decision, was premised upon the conclusion that the rule's primary purpose was deterrence, and "that this purpose would [not] be advanced by making the rule retrospective." Significantly, the *Linkletter* Court failed to mention the rationale of judicial integrity and apparently repudiated outright the rationale of individual privacy. In the Court's view: "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." The logic of *Linkletter* is that the rule focuses directly on the rights of individuals not before the court, and only incidentally on the litigants in whose favor the exclusion of reliable evidence is grudgingly allowed. Even to Justice Clark, the unseemly prospect of the "wholesale release of... guilty victims," was too great a social cost to pay for philosophical symmetry in the rule's application.

In the year preceding his retirement from the Court, Chief Justice Earl Warren, writing for the majority in the seminal case of *Terry v. Ohio,* presaged the judicial posture that developed later under the leadership of Chief Justice Warren Burger. After reiterating the language of *Linkletter* that the major thrust of the rule was deterrence, Chief Justice Warren proceeded to suggest that "in some contexts the rule is ineffective as a deterrent." He noted that confrontations between citizens and law enforcement officials occur in a variety of settings and for diverse purposes,

37. *Id.* at 622. The Court defined the word "final" as follows: "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio.*" *Id.* at 622 n.5.

38. *Id.* at 636-37.

39. The Court did refer to "the administration of justice and the integrity of the judicial process," *Id.* at 63, but its reference was not meant in the conventional sense of those terms when used in referring to justifications for the exclusionary rule. This interpretation is borne out by the Court's immediately succeeding explanation:

To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed.

*Id.*

40. *Id.*

41. *Id.*

42. Justice Black's dissenting opinion in *Linkletter* indicated just how asymmetric the result was:

Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free. This different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961.

*Id.* at 641 (Black, J., dissenting).

43. 392 U.S. 1 (1968).

44. *Id.* at 13.
some of which have little to do with the desire to gather evidence for future prosecution of crime. Furthermore, he questioned whether the exclusionary rule could ever discourage harassment of minority groups, particularly blacks, by certain elements of the police community. In spite of these limitations, however, the Chief Justice reemphasized that the rule constituted the only effective deterrent to police misconduct in the criminal context and that it also served the vital function of "the imperative of judicial integrity." He further reassured the lower courts that they still retained their traditional responsibility to act as guardians against overbearing or harassing police conduct: "When such conduct is identified, [the exclusionary rule requires that] it must be condemned by the judiciary and its fruits . . . excluded from evidence in criminal trials." Clearly, then, Chief Justice Warren did not advocate abandoning the exclusionary rule in the Terry opinion. Nevertheless, the language of the opinion makes it unmistakable that another phase in the rule's history had been inaugurated. Not only had deterrence co-opted both the individual privacy and judicial integrity rationales as the primary jurisprudential justification for the rule, but also the efficacy of the co-opting rationale itself was now being questioned.

Following President Nixon's appointment of Warren E. Burger as Chief Justice in 1969, three major developments can be seen in the Court's exclusionary rule opinions: (1) a growing propensity of the Court to find that the harmful consequences of the rule's application outweigh its deterrent benefits; (2) a de-emphasis of the importance of federal judicial review in the area of fourth amendment rights; and (3) the emergence of the view that only flagrant or willful violations of the fourth amendment should trigger the rule's exclusionary operation.

The Burger Court's assault upon the exclusionary rule began with the Chief Justice's dissenting opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics. Although acknowledging that the "sporting contest" or "judicial integrity" foundation for the rule had been voiced

45. Id. at 13-14.
46. Id. at 14-15.
47. Id. at 12 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).
48. Id. at 15.
52. Id. Ironically, the holding in Bivens from which the Chief Justice dissented gave a civil cause of action to victims of fourth amendment violations perpetrated by federal law enforcement officers, notwithstanding the absence of an explicit damage remedy in either the constitutional or congressional enactments. The Chief Justice has long argued that alternatives to the exclusionary rule should be considered. See Burger, Who Will Watch the Watchman? 14 Am. U.L. Rev. 1 (1964) [hereinafter cited as Watchman]. A tort remedy is certainly one plausible alternative to the rule; yet, the Chief Justice was against implementation of a tort remedy in Bivens because of separation of powers considerations: "We would more surely preserve the important values of the doctrine of separation of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution vested the legislative power." 403 U.S. at 411-12 (Burger, C.J., dissenting).
from time to time in the Court's opinions, the Chief Justice indicated it was clear to him that only the deterrence rationale could be said to undergird the Court's past decisions. It was equally clear to him, however, that the exclusionary rule's history demonstrated that it was "both conceptually sterile and practically ineffective in accomplishing its stated objective." Burger noted that no empirical evidence to support the deterrence justification had been forthcoming since the rule was first implemented in Weeks. Even more alarming, asserted Justice Burger, was that innocent victims of unlawful acts—such as the petitioner claimed to be in Bivens—had been left without an effective remedy in the federal system.

The views of Justice Burger set forth in his now famous Bivens dissent typify those of others who have argued for elimination or modification of the exclusionary rule. It is not that protection of fourth amendment interests is deemed unimportant, or that its importance is considered secondary to efficient and effective law enforcement, but rather, that the exclusionary rule is ineffective in protecting either body of interests. Justice Burger's avowed support in Bivens for a device to protect privacy interests was as strong as his criticism of the exclusionary rule's failure to serve such purpose. He made it quite clear in Bivens that he did not favor abrogating the rule until an alternative was forthcoming.

In addition to seriously questioning the exclusionary rule's effectiveness in deterring unlawful police conduct, Justice Burger articulated another concern, later seized upon and further developed in opinions of the Court, namely, the distinction between intentional conduct and inadvertent errors of judgment as the cause of fourth amendment violations. If the primary mainstay of the exclusionary rule is deterrence, its purpose, Burger con-

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53. 403 U.S. at 413-14. Justice Burger also noted that the rule had once been justified on the basis that suppression of evidence seized in violation of the fourth amendment was required because of the relationship between the fourth amendment and the self-incrimination clause of the fifth. Id. at 414. Unless he meant to include within this theory the whole idea behind the individual privacy rationale (which, as has already been seen, was emphasized in the early opinions of the Court), it must be seen as an oversight on his part that this theory is nowhere mentioned in his opinion.
54. Id. at 415.
55. Id.
57. 403 U.S. at 415-16 (Burger, C.J., dissenting).
58. Id. at 415, 420. Chief Justice Burger explained:
   I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. . . . I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed.
   Id. But see Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring) (wherein Burger indicates that his views in this regard may have changed).
59. 403 U.S. at 418 (Burger, C.J., dissenting).
cluded, is served only indirectly or marginally by excluding evidence derived from the "honest mistakes" and "errors of judgment" which "inevitably occur under the pressure of police work." Accordingly, the rule's lack of effectiveness in curbing unintentional violations followed because law enforcement realities greatly reduced the didactic impact of judicial pronouncements in search and seizure cases. In his judgment, many judicial opinions lacked "helpful clarity." Indeed, if judges and attorneys often differed sharply over what were or were not "reasonable" modes of conduct under the fourth amendment, how could police officers be expected to form such judgments in the pressurized and harried environment of their work? The "clear demonstration of the benefits and effectiveness of the exclusionary rule . . . required to justify it in view of the high price it extract[ed] from society—the release of countless guilty criminals" was, in Burger's view, neither present nor possible with unintentional violations. Disturbed that for over fifty-five years (Bivens was handed down in 1971) the legal system had adhered to the exclusionary rule, had resisted change, and had refused even to acknowledge the need for effective protection of fourth amendment rights, the Chief Justice indicated in Bivens that he would support modifications of the exclusionary rule along either one or both of the following lines: eliminating the rule altogether as soon as a reasonable alternative was developed by proper authorities; and restricting the rule's operation of those circumstances involving intentional or flagrant police misconduct.

Since Bivens, the Court has not yet confronted a situation that meets the requirements of the first approach. Neither the federal nor any state government has yet to present an alternative to the rule as part of a request that the rule not be applied to evidence sought to be used in the case-in-chief of a criminal trial. Concerning the second line of Burger's criticism, however,

60. Id. Of course it can be argued that excluding the fruits of even innocent mistakes will deter future violations, as police will be encouraged to better learn the law. In its extreme, this argument requires that the exclusionary rule be applied in all cases where a violation is found to exist, irrespective of the nature of the violation.
61. Id. at 417.
62. Id.
63. Id.
64. Id. at 416.
65. The Chief Justice also made it quite clear that the "imperative of judicial integrity" did not present an obstacle to making inroads on the rule, so long as a reasonable alternative were forthcoming:

[T]he exclusionary rule does not ineluctably flow from a desire to insure that government plays the "game" according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

Id. at 414. Similar views to those espoused in the Bivens dissent were set forth by the Chief Justice in Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Burger, C.J., concurring in part and dissenting in part).
four cases handed down during the 1974 and 1975 terms have both re-
stricted the proceedings to which the rule is now applicable and curtailed
the available forums for review of search and seizure questions. And with
rendition of Michigan v. DeFillippo in the summer of 1979, it appears that
the Court has taken virtually all but the final step toward adopting a good
faith exclusionary rule standard.

The first of these decisions was United States v. Calandra. In that case,
Justice Powell, speaking for himself and five other members of the Court,
held that "a witness summoned to appear and testify before a grand jury
[could not] refuse to answer questions on the ground that they [were] based
on evidence obtained from an unlawful search and seizure." In reversing
both the federal district and appellate courts, Justice Powell unequivocally
indicated for two-thirds of the Court that the individual privacy rationale
afforded absolutely no justification for imposition of the exclusionary rule.
The Court had already indicated in Linkletter that the primary purpose of
the rule was deterrence, and that the "ruptured privacy of the victims' homes"
could not be restored. But until Calandra, the Court had never
expressly ruled out the individual privacy theory as one of the supporting
rationales of the rule, even if only a secondary one. In the words of Justice
Powell, though, "the rule [was] a judicially created remedy designed to safe-
guard Fourth Amendment rights generally through its deterrent effect,
rather than a personal constitutional right of the party
aggrieved." The Court rejected outright Calandra's argument that "each and every question
[put to the defendant] based on evidence obtained from an illegal search and
seizure constitutes a fresh and independent violation of the witness' constitu-
tional rights." In Justice Powell's view, the wrong was fully accomplished
at the time the unlawful intrusion occurred. Questions propounded by the
grand jury could not in any sense be regarded as independent violations.
According to the majority, the issue presented by the use of evidence de-

erived from the initial unlawful intrusion was one of remedies, not of
rights. Calandra's logic strikingly indicates just how far the Court had
departed from the theory posited by Justice Day in Weeks that a failure to
return unconstitutionally seized items constituted a continuing abridgement
of one's constitutional rights.

69. Justice Powell was joined by Chief Justice Burger and Justices Stewart, White, Black-
mun, and Rehnquist.
70. 414 U.S. at 350.
72. 381 U.S. at 637.
73. 414 U.S. at 348.
74. Id. at 353.
75. Id. at 353-54.
76. 232 U.S. 383, 398 (1914).
Once the Court had excluded all considerations but deterrence, its decision in *Calandra* fell neatly into the analytical construct suggested earlier. Because the rule is regarded as a judicially created remedy and not a personal constitutional right, a balancing process must be applied in which the deterrence goal is weighed against any countervailing considerations in issue—in this case, the uninterrupted investigatory functioning of the grand jury. Further, the institution of the grand jury, deeply rooted in Anglo-American history, is an essential aspect of the fifth amendment, and has traditionally been accorded wide latitude in its inquiries. Justice Powell concluded that "any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best"; therefore, the rule was not to be required in grand jury proceedings.

In his dissenting opinion in *Calandra*, Justice Brennan indicated that the majority's decision left him with the "uneasy feeling" that the Court had positioned itself to reopen still further the door once closed in *Mapp* and perhaps abandon altogether the exclusionary rule in search and seizure cases. According to him, no reason existed to conclude that the deterrence goal was served by applying the rule to trials, but not to grand jury proceedings; empirical data supporting such a conclusion was simply lacking. The prophetic quality of Justice Brennan's dissent in *Calandra* was to be borne out in the Court's next major treatment of the rule—*United States v. Peltier*.

The issue addressed by the Court in *Peltier* was the retroactive effect to be given to the Court's ruling in *Almeida-Sanchez v. United States*. The Court had held in the latter case that a warrantless automobile search, conducted approximately twenty-five air miles from the Mexican border by border patrol agents acting without probable cause, was unconstitutional under the fourth amendment. Four months before this decision, the defendant in *Peltier* was stopped in his automobile. His car was searched almost seventy miles from the Mexican border and without probable cause. There was thus no question that the seizure of Peltier's marijuana was unconstitu-

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77. As in the *Linkletter* case, the *Calandra* decision made short shrift of the rationale of judicial integrity. Nowhere was this institutional concern mentioned in the body of the Court's opinion. In a footnote the Court indicated that it did not see itself as sanctioning illegal conduct by declining to apply the exclusionary rule to an area in which the deterrence rationale would not be significantly advanced. *414 U.S.* at 355-56 n.11.

78. *Id.* at 348-49.

79. *Id.* at 342-43.

80. *Id.* at 351.

81. *Id.* at 350.

82. *Id.* at 365 (Brennan, J., dissenting).

83. *Id.*

84. *422 U.S.* 531 (1975).


86. *Id.*

87. *422 U.S.* at 532.
ational under Almeida-Sanchez. After a motion to suppress evidence was denied by the district court, Peltier stipulated in writing to the facts alleged in the indictment. He was accordingly found guilty, sentence was imposed, and appeal was then taken. The Government conceded that the only issue to be decided on appeal was the retroactive effect of Almeida-Sanchez. The United States Court of Appeals for the Ninth Circuit, sitting en banc, reversed the district court on the ground that the Almeida-Sanchez decision "should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced." Thus, on remand to the trial court, the Ninth Circuit's decision required exclusion of the marijuana seized from Peltier's automobile. Without the drug there obviously could be no prosecution—the possessor of 270 pounds of contraband would go free.

In a 5-4 decision, Justice Rehnquist, writing for the majority, reversed the Ninth Circuit. The majority held that Almeida-Sanchez was not to be applied to searches conducted prior to June 21, 1973, the date on which that case was decided. Critical to the Court's opinion was an assessment of the exclusionary rule's efficacy in deterring fourth amendment violations, an analytical calculus, which, as already seen, was paramount in several preceding exclusionary rule cases. But the most significant development in the Peltier decision was the heavy reliance placed upon the mental state of law enforcement officers in gauging the rule's deterrent effect. In concluding his opinion for the Court, Justice Rehnquist posited in sweeping language that

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

88. Id. at 533.
89. Id. at 532.
90. United States v. Peltier, 500 F.2d 985, 986 (9th Cir. 1974).
91. 422 U.S. at 532.
92. Id. at 534-35.
93. Id. at 539. According to Justice Rehnquist:
Whether or not the exclusionary rule should be applied to the roving Border Patrol search conducted in this case, then, depends on whether considerations of either judicial integrity or deterrence of Fourth Amendment violations are sufficiently weighty to require that the evidence obtained by the Border Patrol in this case be excluded.

Id.
94. See notes 35-83 and accompanying text supra.
95. 422 U.S. at 542. Indeed, the language of Justice Rehnquist was so sweeping, it prompted these words from Justice Brennan in dissent:
True, the Court does not state in so many words that this formulation of the exclusionary rule is to be applied beyond the present retroactivity context. But the proposition is stated generally and ... I have no confidence that the new formulation is to be confined to putative retroactivity cases. Rather, I suspect that when a suitable
Peltier presented a fact situation ideally suited for application of this mental state analysis. Section 287(a)(3) of the Immigration and Nationality Act of 1952, authorized certain officers of the Immigration and Naturalization Division to search vehicles without a warrant within reasonable distances of any external boundary of the United States. Pursuant to the statutory authorization, regulations were enacted fixing the "reasonable distance" criterion of section 287(a)(3) at "100 air miles from any external boundary of the United States." Justice Rehnquist noted that between 1952 and the Court's 1973 decision in Almeida-Sanchez, numerous decisions of the federal courts of appeals had upheld Almeida-Sanchez type searches against constitutional attack, and dicta in decisions of three appellate courts had strongly suggested that the statute and regulations "were acceptable means for policing the immigration laws." In the Court's view, to apply the exclusionary rule to searches conducted before the Almeida-Sanchez decision would in substance mean that law enforcement officers could not confidently rely upon any judicial, legislative, or executive decisions other than those of the Supreme Court. Because the nature of the constitutional violation in Almeida-Sanchez did not implicate the truth-finding function of the trial, and because no deterrent effect could be attributed to a retroactive application of that decision, the exclusionary rule was not to be mechanically applied to preserve doctrinal symmetry alone.

The Calandra and Peltier decisions laid the foundation for a future extension of the good faith exception to issues other than those involving the grand jury and retroactivity. They indicate that the second line of Chief Justice Burger's attack in the Bivens dissent is now firmly grasped and sup-

opportunity arises, today's revision of the exclusionary rule will be pronounced applicable to all search-and-Seizure cases.

Id. at 551-52 (Brennan, J., dissenting).


98. 422 U.S. at 540 n.8.

99. Id. at 535.

100. Id. at 541.

101. Id. at 541-42.

102. Id. at 542.

103. As in Linkletter v. Walker, 381 U.S. 618 (1965), the actual search challenged in Peltier occurred subsequent to the search in the case requested to be retroactively applied. Denying retroactivity thus yields the anomalous result of reversing the earlier decision merely because it happened to be the one selected by the Supreme Court for review. Such a result obviously undercuts any notion that the exclusionary rule serves the purpose of protecting or effectuating the litigant's personal constitutional rights. It also points up the inability of the deterrence rationale to explain why the exclusionary rule was applied to the decided case in the first place (here Almeida-Sanchez). For if the rule cannot be regarded as furthering the deterrence rationale in the Peltier search, a fortiorari, it will not serve to explain its application to searches antedating the search in Peltier. As indicated by Justice Brennan in his dissent in Peltier, strict application of the deterrence rationale means that Almeida-Sanchez itself was wrongly decided. 422 U.S. at 553-54 (Brennan, J., dissenting).
ported by a majority of the current Court—that is, although the rule should not be entirely eliminated until a reasonable substitute is instituted, its application should be restricted to those cases in which its remedial objective—deterrence—is most likely to be served.

**Deterring Unlawful Police Conduct:**
**The Demise of the Theory of Judicial Integrity**

In his dissent in *Peltier*, Justice Brennan issued the following challenge to his fellow justices:

If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. . . . But to attempt covertly the erosion of an important principle over 61 years in the making as applied in federal courts clearly demeans the adjudicatory function, and the institutional integrity of this Court.

Throughout his tenure on the Court, Justice Brennan has remained one of the exclusionary rule's most passionate supporters. Although his somewhat bitter insinuation that the Burger Court has disingenuously tortured precedent merits serious consideration, from its very inception the exclusionary rule has never been applied consistently to support any one of its purported undergirding rationales. The Burger Court, as opposed to compromising

104. Justice Rehnquist was joined in his opinion for the Court by the Chief Justice, and Associate Justices White, Blackmun, and Powell. The Chief Justice's views concerning the relationship between operation of the rule and the mental state of the law enforcement officers has already been discussed in conjunction with his *Bivens* dissent. See notes 52-65 and accompanying text supra. See also *Stone v. Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring) ("I venture to predict that overruling this judicially contrived doctrine—or limiting its scope to egregious, bad-faith conduct—would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistakes or misconduct."). Justice White's inclination toward a "good faith" standard for the exclusionary rule is clearly evidenced in his concurring opinion in *Brown v. Illinois*, 422 U.S. 590 (1975), a decision which held that the giving of *Miranda* warnings did not *ipso facto* render admissible a confession following an unlawful arrest:

Insofar as the Court holds (1) that despite *Miranda* warnings the Fourth and Fourteenth Amendments require the exclusion from evidence of statements obtained as the fruit of an arrest which the arresting officers knew or should have known was without probable cause and unconstitutional, and (2) that the statements obtained in this case were in this category, I am in agreement and therefore concur in the judgment.

*Id.* at 606. Also in the *Brown* decision, Justice Powell rendered a concurring opinion (joined by Justice Rehnquist) advocating a mental state test in analyzing "dissipation of the taint" inquiries under the fruit of the poisonous tree doctrine. *Id.* at 608-12. According to Justice Powell, "the point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of that taint." *Id.* at 609. Flagrantly abusive violations of the fourth amendment call for the clearest indication of attenuation, *id.* at 610, while "technical" violations—such as where officers act in good faith on a warrant later invalidated—should not trigger exclusion of evidence derived as the fruit thereof. *Id.* at 611-12.

105. 422 U.S. at 561-62 (Brennan, J., dissenting).
some historically consistent and inviolate sustaining precedent for the rule, has continued, for the most part, the process of restricting the rule's application to that of excluding evidence in the prosecution's case-in-chief in a criminal trial.

Without question, though, as part of this process, the Burger Court has both clarified and simplified the jurisprudential analysis to be undertaken in exclusionary rule cases. As has been noted already, the current Court has explicitly rejected the rationale of individual privacy as a justification for the rule.\textsuperscript{106} The more interesting jurisprudential development, however, has attended the rationale of judicial integrity—"the core value [of] the exclusionary rule,"\textsuperscript{107} according to Justice Brennan. This section will concern primarily that development.

As noted previously, the \textit{Calandra} decision, which devoted much text to a discussion of the exclusionary rule's justifications, made no mention of the concept of judicial integrity in the main body of the majority opinion. The Court alluded to the idea in a footnote,\textsuperscript{108} but it was never explicitly evaluated as an independent justification for the rule's imposition. This omission seemed to deprive the integrity rationale of independent significance. In three major exclusionary rule decisions following \textit{Calandra}, however, the Court once again specifically addressed the institutional concern of judicial integrity.\textsuperscript{109} The majority opinions in these cases indicate quite clearly that this rationale shadows the deterrence rationale. Absent deterrence, it will not justify application of the exclusionary rule in search and seizure cases.

In \textit{United States v. Janis},\textsuperscript{110} Justice Blackmun held for a 5-3 majority of the Court that the exclusionary rule did not require the exclusion in federal civil proceedings of evidence unlawfully seized by state law enforcement officials. On the day \textit{Janis} was handed down, Justice Powell announced the opinion for a 6-3 majority in \textit{Stone v. Powell},\textsuperscript{111} holding that when a state has provided an opportunity for full and fair litigation of fourth amendment claims, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence introduced at trial was obtained through an unconstitutional search and seizure.\textsuperscript{112} Although these decisions no doubt repre-

\textsuperscript{106} See text accompanying notes 71-103 supra. Indeed, as seen in the recent case of \textit{Stone v. Powell}, 428 U.S. 465 (1976), the Court now seems to deny that the individual rights theory ever was a judicially acknowledged justification for the rule. According to Justice Powell, "[d]ecisions prior to \textit{Mapp} advanced two principal reasons for application of the rule in federal trials—judicial integrity and deterrence." \textit{Id.} at 484.


\textsuperscript{110} 428 U.S. 433 (1976).

\textsuperscript{111} Justice Blackmun was joined in his majority opinion by Chief Justice Burger and Justices White, Powell, and Rehnquist. Justice Stevens abstained.

\textsuperscript{112} 428 U.S. 465 (1976). Justice Powell was joined in his majority opinion by the Chief Justice, and by Justices Stewart, Blackmun, Rehnquist, and Stevens.

\textsuperscript{113} \textit{Id.} at 494. The holding was clarified in a footnote to the Court's opinion to indicate the two-step inquiry required by federal district courts:
sent important developments in the relationship between state and federal courts and for habeas corpus jurisdiction generally, the primary focus here is on the role ascribed to the rationale of judicial integrity in these two decisions, as well as in *Peltier*.114

In *Peltier*,115 Justice Rehnquist noted for the Court that "[d]ecisions . . . applying the exclusionary rule to unconstitutionally seized evidence have referred to 'the imperative of judicial integrity'. . . although the Court has relied principally upon the deterrent purpose served by the exclusionary rule."116 Furthermore, he noted that the rationale of judicial integrity must be considered along with the deterrence rationale in determining whether the exclusionary rule should be applied.117 Similarly, in *Stone*, although acknowledging that prior decisions had alluded to the "imperative of judicial integrity," Justice Powell stressed that the judicial integrity justification had played a "limited role . . . in the determination whether to apply the rule in a particular context."118 Emphasizing this point, he noted that if the judicial integrity rationale were extended to its logical extreme, courts would be required to exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even in the face of his assent.119 In the *Janis* case, however, the Supreme Court indicated precisely how limited a role the judicial integrity rationale played in deciding exclusionary rule questions. Justice Blackmun, the majority spokesman, virtually denuded the "imperative of judicial integrity" of any independent force in deciding exclusionary rule cases. In his words, "[t]he primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution."120 But because the fourth amendment violation has already been fully consummated by the time the evidence is presented to the court, Blackmun reasoned that the court is not participating directly in that particular violation, or in any other violations for that matter. According to the *Janis* logic, judicial involvement in unlawful conduct only

In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation.

*Id.* at 494-95 n.37.

114. In all three decisions the Court ultimately relied upon the *Calandra* cost-benefit analysis in finding in favor of the government. The additional deterrent value of the exclusionary rule was found to be too marginal and tenuous in these cases to take precedence over the competing issues. See *Stone v. Powell*, 428 U.S. 465, 493 (1976); *United States v. Janis*, 428 U.S. 433, 453-54 (1976); *United States v. Peltier*, 422 U.S. 531, 539, 542 (1975).

115. 422 U.S. 531 (1975).

116. *Id.* at 536.

117. *Id.* at 539.

118. 428 U.S. at 485.

119. *Id.*

120. 428 U.S. at 458-59 n.35.
results indirectly; that is, by encouraging future violations of the Constitution by admitting the fruits of past invasions. Application of the judicial integrity rationale thus reduces to an evaluation of the same factors relevant to consideration of the deterrence justification. Consequently, if the deterrence rationale is not regarded as controlling in a particular exclusionary rule analysis, it is unlikely that the imperative of judicial integrity will alter the determination. 121

In the framework of Janis, Stone, and Peltier, current perspectives on the imperative of judicial integrity must be formulated in light of the Court's developing propensity to regard good faith on the part of law enforcement officials as sufficient reason not to apply the exclusionary rule. In all three cases, the Court emphasized that the officers in question had acted in good faith, even though their conduct was ultimately found to violate the Constitution. 122 This theme was established decidedly by Justice Rehnquist's opinion in Peltier which declined to apply Almeida-Sanchez retroactively:

[Introduction of evidence which [has] been seized by law enforcement officials in good-faith compliance with then-prevailing constitutional norms [does] not make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." ... [T]he "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search have broadened the exclusionary rule to encompass evidence seized in that manner. 123]

A consistency pervades the current Court's decisions which its critics, including Justice Brennan, may have been all too willing to overlook. If the exclusionary rule is, after all, a "judicially created remedy" designed to encourage compliance with the fourth amendment, and not "an explicit requirement" of the Constitution, there seems to be nothing inherently contradictory in a process of selective application which includes in its calculus the factor of practical efficacy. 124 The Burger Court's consideration of utility

121. An "analysis [which shows] that exclusion . . . has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment." Id.

122. As indicated previously, Peltier involved a case where officers were relying on regulations promulgated under authority of the Immigration and Nationality Act. Although the Court found the conduct unreasonable under the fourth amendment and the regulations overly broad, the situation was certainly a far cry from intentional or flagrant violations of constitutional rights. In Janis, the state officers were acting pursuant to a warrant later declared invalid, and Justice Blackmun regarded the officers as thus "clearly acting in good faith." 428 U.S. at 458-59 n.35. Likewise, in Stone v. Powell (decided concurrently with Wolf v. Rice) the officers involved were acting in good faith reliance on some kind of prior authorization. In Powell's case, the arrest was pursuant to a statute later declared unconstitutional, but there was no question that the officer had probable cause to believe Powell had violated the statute. 428 U.S. at 469-71. Similarly, in Rice, the officers were acting on a warrant later declared to be invalid because of a defective supporting affidavit. 428 U.S. at 471-74.

123. 422 U.S. at 536, 537.

124. Of course, if the rule is seen as a constitutional right, analogies centered on pragmatism loose much of their relevancy. Constitutional rights must usually be honored even if societal interests are compromised. See Ball, Good Faith and the Fourth Amendment: The "Reasonable"
in exclusionary rule cases, and its insistence that a balancing process be employed in analyzing requested applications of the rule, are not out of line with pre-Burger Court decisions. Throughout the history of the rule, the Court has been called upon to balance the benefits potentially derivable from the rule's application against the attendant compromise of the truth-seeking process, with the decisions often dismissing the rule.

A case in point is the 1954 decision Walder v. United States, where the Court held that illegally seized evidence could be used to impeach a defendant's testimony at trial. Walder was tried for illegal possession of narcotics, and while on the witness stand, he made the claim that he had never in his life possessed narcotics. In rebuttal, the trial court permitted the prosecution to present testimony that on an unrelated prior occasion narcotics had been found in the defendant's possession, even though, admittedly, the impeaching evidence had been unlawfully obtained. Writing for the Court, Justice Frankfurter stated that "it is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn [the exclusionary rule] to his own advantage, and provide himself with a shield against contradiction of his untruths." Similarly, in Burdeau v. McDowell, the Court held that evidence unlawfully obtained from an accused by a private person was admissible in a criminal trial. Because the fourth amendment proscribed official intrusions and not private ones, the exclusionary rule was found to be inapplicable, considerations of judicial integrity notwithstanding. Further, in Frisbie v. Collins, the Court held that an illegal arrest (or, in the case of Collins, an illegal forcible abduction) did not in itself require release of a defendant's person and abatement of judicial proceedings, as long as the defendant was fairly apprised of the pending charge and accorded a fair trial, satisfying all constitutional safeguards. Perhaps the most significant of all exceptions to application of the exclusionary rule is the requirement that the person requesting suppression of evidence have "standing" to do so—that is, "that he himself [be] the victim of an invasion of privacy."
All these exceptions were fully developed long before 1969, and, indeed, before the *Mapp* decision itself. In each, the Court allowed unlawfully seized evidence to be used in a criminal trial (in the *Frisbie* case, an unlawfully seized defendant), notwithstanding institutional concerns of judicial integrity or the constitutional rights of the victims themselves. Neither of these rationales has ever been regarded as sacrosanct. A balancing process has always been at work, with the rule yielding when countervailing considerations were found to outweigh the incremental protection of fourth amendment interests gained by application of the rule.

As seen before, the deterrence rationale—now regarded as the primary justification for the rule—does not require application of the exclusionary rule whenever some incremental deterrent effect might result. On the contrary, balancing takes place, and the above examples apply with equal force in demonstrating that considerations of deterrence have never foreclosed analysis of the rule’s effect on other societal interests. Certainly, refusing to apply the exclusionary rule when its proponent lacks “standing” is not a case in which deterrence would only marginally result. Technical considerations such as standing simply have no place in gauging whether the exclusionary rule will deter fourth amendment violations. Consequently, if the Court has declined to apply the rule because of the absence of standing, factors other than deterrence must be held responsible.\(^{134}\)

**MICHIGAN v. DEFILIPPO**

**A RECENT CASE IN HISTORICAL PERSPECTIVE**

Controversy has been the distinguishing characteristic of the exclusionary rule’s sixty-seven year history. In the earlier exclusionary rule cases, the

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In *Rakas*, Justice Rehnquist indicated that the “standing” rubric should be abandoned, arguing that the principles traditionally treated under the standing requirement could more properly be subsumed under substantive fourth amendment doctrine. The issues, however, were the same: "[F]irst, whether the proponent of a particular legal right has alleged ‘injury in fact,’ and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties." *Id.* at 139. *See also* *Alderman v. United States*, 394 U.S. 165 (1969).


> [W]e think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion. . . . [O]ur cases do not hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment. The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. . . . But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

*Id.* at 174-75.
debate dwelled on the rule's claim to constitutional legitimacy. Recently, however, the polemics have centered on efficacy, with the Court focusing its inquiry on whether the deterrent purpose would be advanced by applying the rule in particular settings. By relegating considerations of judicial integrity to relative unimportance, and by repudiating the individual privacy concept as a justification for the rule, the Court is positioned to refuse application of the rule on a case-by-case basis whenever it determines that other interests outweigh deterrence.

The emergence of a good faith standard to govern the exclusionary rule's application is the logical outgrowth of the jurisprudential shifts discussed at length above. The good faith standard not only accommodates the current Court's emphasis on deterrence, but also affords the Court a decisional framework within which it can avoid application of the rule when its interests balancing requires, while at the same time leaving fourth amendment substantive protections intact.

The reluctance of the Court to require exclusion of evidence when the violation is perpetrated in good faith is illustrated by the recent case of Michigan v. DeFillippo. Indeed, a close examination of the majority's opinion in that case reveals that it was only by both manipulating precedent and employing convoluted logic that the Court could reach its desired result, and yet still not explicitly adopt a good faith standard.

The facts of the case are relatively straightforward. City of Detroit police officers on routine patrol received a radio call to investigate two persons who were reportedly intoxicated in an alley. When they arrived, the officers found the defendant and a lady companion who was in the process of lowering her slacks. An existing City of Detroit ordinance allowed a police officer to stop and question an individual whose behavior, the officer had reasonable cause to believe, warranted further investigation for criminal activity. This ordinance provided that it was unlawful for any person stopped to refuse to identify himself or herself and produce identification. When the defendant failed to identify himself to the officers' satisfaction, he was arrested and then searched. A controlled substance was found on the defendant's person, and he was subsequently prosecuted for its possession. At his preliminary hearing, he moved to suppress the evidence, but the trial court denied the motion. In an interlocutory appeal, the Michigan Court of Appeals reversed, ruling that the ordinance in question was unconstitutionally vague, and that therefore any arrest effected under its authority was

136. Id. at 33.
137. Id.
138. Id.
139. Id.
140. Id. at 34.
141. Id.
142. Id.
unlawful. After the Supreme Court of Michigan denied leave to appeal, the United States Supreme Court granted certiorari to review the holding of the Michigan Court of Appeals.

The Supreme Court assumed, arguendo, the correctness of the lower court’s holding that the ordinance in question was unconstitutional. Nevertheless, it proceeded to rule that an arrest made in good-faith reliance on an ordinance, which at the time had not yet been declared unconstitutional, is valid regardless of a subsequent judicial determination of its unconstitutionality. Consequently, the Court determined that the exclusionary rule was improperly invoked by the Michigan Court of Appeals to suppress the evidence seized from the defendant.

The *DeFillippo* case represents a marked departure from prior holdings of the Court. In a long line of cases beginning with *Berger v. New York*, the Court had consistently declared that searches carried out pursuant to unconstitutional statutes were unlawful irrespective of the fact that the statutes had not yet been declared unconstitutional at the time of the searches. But ignoring for the moment differences in ideological preference and concerns about stare decisis, the *DeFillippo* case remains disturbing in a much more basic sense. The logic of the majority indicates just to what degree the Court is willing to compromise sound reasoning to avoid application of the exclusionary rule in a criminal case. The Court found the arrest in *DeFillippo* to be lawful not because it was executed in accordance with fourth amendment requirements, but rather because it was carried out in good-faith reliance on prior state legislative action. The case represents a notorious example by which two constitutionally infirm actions—one by the governing municipal body in enacting the statute, and the other by the officers in carrying out the arrest pursuant to it—somehow produce a constitutionally permissible result. It was the clear thrust of the Court’s reasoning that had the arrest not been carried out pursuant to the municipal ordinance’s authority, it would have been deemed unlawful. It would then have triggered the exclusionary rule to suppress the fruits of the search.

This questionable, bootstrapping logic must be disturbing to all those who look to our highest court for cogent elaboration of constitutional doctrine. And the real culprit behind decisions such as *DeFillippo* is the exclusionary rule itself—its continuing existence in its present form. In each fourth amendment case, the Court finds itself time and again impaled upon the horns of the same dilemma: whether to abandon or modify the exclusionary rule and thus overturn years of constitutional precedent or whether to exclude from the trier of fact evidence admittedly of palpable reliability. Un-

143. *Id.*
144. *Id.* at 35.
145. *Id.* at 39-40.
146. 388 U.S. 41 (1967).
able to confront this dilemma head-on, the Court has been forced into a series of compromises in which it has either restricted the cases to which the exclusionary rule is applied or redefined the rights that the rule itself is designed to protect. When the former compromise occurs, real problems of stare decisis and logic result: DeFillippo is a prime example. In the latter situations, the results are even more troublesome: the exclusionary rule remains intact, but substantive fourth amendment protections are retrenched. The next part of this Article explores whether this latter phenomenon has played a role in recent fourth amendment decisions. It should be noted at this juncture, however, that the Court’s ambivalent attitude about the efficacy of the deterrence rationale raises serious doubt whether the exclusionary rule has advanced either the enforcement or liberal interpretation of fourth amendment interests.

II. THE CASE AGAINST THE PRESENT RULE

Myriad articles have already discussed the exclusionary rule’s shortcomings. Distilled to their essence, the arguments presented can be grouped into three major categories: (a) that the rule does not significantly deter fourth amendment violations; (b) that it does not adequately repair those violations that have occurred; and (c) that it impedes effective law enforcement and judicial administration. The following sections touch briefly on these major criticisms. If the exclusionary rule in its present form proves to serve any of these three interests adequately, it might well be worth preserving. But, as will be seen, any such demonstration is simply not possible.

A fourth critical area of inquiry, however, is often overlooked by both proponents and opponents of the exclusionary rule alike. This fourth area concerns the threat posed to a liberal interpretation of substantive fourth amendment interests by the exclusionary rule’s very existence. Although the debate surrounding the rule has always been spirited, both sides have unswervingly regarded the protection of privacy interests purportedly vouchedsafed by the fourth amendment as the desideratum. Yet, a necessary question goes unasked: Does the exclusionary rule in actual operation promote the liberal interpretation and enforcement of fourth amendment interests? This part is largely devoted to an evaluation of the rule’s effect on the substantive development of the fourth amendment itself, lest the most insidious result of all be overlooked—the erosion of fourth amendment interests at the very hand of its purported chief protector.

THE FAILURE OF DETERRENCE

All statistical studies conducted to measure the deterrent efficacy of the exclusionary rule have proved inconclusive. The absence of empirical evidence, however, is not fatal in evaluating the deterrent impact of the rule

148. In recent years, attempts have been made to measure empirically whether the deterrent purpose of the rule has any claim to validity. See Oaks, supra note 56, Canon, Is the Exclusion-
because many of the rule's failures (or inadequacies) can be readily discerned through a conceptual analysis of the rule itself.

The exclusionary rule, because it is after all a mere rule of evidence, only operates when gathering evidence for trial motivates police conduct. Because the great majority of police interventions are not for the purpose of gathering evidence, but rather to serve the peace-keeping function, it is difficult to comprehend how the exclusionary rule can appreciably deter fourth amendment violations. Law enforcement officers may ordinarily comply with the fourth amendment in these peace-keeping situations, but if they do so, other factors must be at work.

As already indicated, certain of the current Supreme Court justices have stressed that the alleged deterrent effect of the exclusionary rule can only operate when police officers know the specific rules they must obey. Thus, the argument is made that the exclusionary rule should not be applied when an officer has acted in good faith. If the main purpose of the exclusionary rule is to deter—as the current Court has ruled—the good faith exception has merit, provided that the definition of good faith includes an objective as well as a subjective standard so as to avoid rewarding a state of contrived ignorance on the part of the police. But a more subtle aspect of the mental state-deterrent effect calculus is often overlooked. Even if the officer has full knowledge of both the specific fourth amendment requirements and the consequences flowing from their breach, the deterrent effect will not operate if he or she chooses to break the law and then prevaricate at the suppression hearing to avoid exclusion of evidence unlawfully obtained. And if officers acting in concert decide to gather evidence by violating a specific rule, it strains credibility to suppose that these same officers will later admit their illegal acts and risk untoward civil and disciplinary consequences. Thus, even when police act to gather evidence, the exclusionary rule cannot realistically be expected to effectively deter willful violations of the Constitution.

ary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1974); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Leg. Stud. 243 (1973); Critique, On the Limitations of Empirical Evaluation of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 Nw. U.L. Rev. 740 (1974). The Court in United States v. Janis, 428 U.S. 433 (1976), summarized these studies as follows: "The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." Id. at 452 n.22.


151. See Oaks, supra note 56, at 741-42. For other studies on the subject of police perjury and the exclusionary rule, see J. Skolnick, Justice Without Trial 214-15 (2d ed. 1975) [hereinafter cited as Skolnick]; Younger, Constitutional Protection on Search and Seizure Dead?, 3 Trial No. 5, at 41 (August/September 1967).
A second reason the exclusionary rule fails to deter fourth amendment violations is that it works no direct penalty on the offending officer. The immediate effects of excluding evidence fall upon the criminal defendant and the prosecuting attorney. And even when prosecuting officials attempt to fault the police officers, the result likely will be commiseration among the offending officers and their colleagues, rather than a recognition that a wrong has taken place. The psychology behind police decisions is simply a far cry from that of the courts in interpreting the fourth amendment. This disparity exists because the "norms located within [a] police organization are more powerful than court decisions in shaping police behavior." Policemen and women lack sufficient training to appreciate the jurisprudential considerations behind the exclusionary rule and instead view it—like many citizens—as an impediment to effective enforcement of criminal laws. This commonly held view helps explain why offending officers are seldom disciplined by their departments for failing to observe fourth amendment requirements. A police officer will usually be disciplined only if his or her conduct deviates from departmental as opposed to judicial expectations.

It might be asking too much to expect police officers to grasp and apply the intricate rules of search and seizure in the often unpredictable and pressurized course of everyday police work. As noted above, attorneys and judges themselves often vehemently disagree over what is or is not a reasonable intrusion under the fourth amendment. The established system, with a certain hypocrisy, makes the individual police officer the immediate butt of controversial decisions that delimit the scope of fourth amendment protections. It is not difficult to understand why policemen often resent judicial officials who second guess their firing line decisions from sterile and isolated

152. SKOLNICK, supra note 151, at 219.
153. Additionally, for the exclusionary rule to operate as an effective deterrent, the particular rules the police are expected to follow need to be both explicitly formulated and effectively communicated. Unfortunately, these two prerequisites to effective deterrence are probably nonexistent. As noted by Wayne R. LaFave and Frank J. Remington,

[P]olice [are not] well informed about the trial judge's decision or its legal basis. The trial judge seldom explains his decision in a way likely to be understood by the police officer, and the prosecutor assigned to the case rarely assumes it to be his duty to inform the police department of the meaning of the decision or of its intended impact upon current police practice. The individual officer whose case has been lost is not expected to report the reason for the decision to his superiors. Some decisions, usually those the officer believes to be particularly outrageous, may be passed on to other officers by word of mouth, but they often become distorted in the retelling. If a "court officer" is assigned to the court by the police department, his responsibilities do not include reporting the judge's rulings on police conduct. Obviously, police cannot be affirmatively influenced to change their methods of law enforcement by the exclusion of evidence when there is no communication to them of why the decision was made.

155. See notes 62 & 63 and accompanying text supra.
courtrooms. In short, because the exclusionary rule cannot effectively deter willful violations of the fourth amendment, because it does not reach non-evidence gathering police activities, and because it fails to impose direct penalties on offending officers, its deterrence effect is at least tenuous.

INADEQUATE REMEDIAL IMPACT

Since the exclusionary rule can only operate to suppress evidence, it follows that the rule offers no direct protection to innocent victims of unlawful searches. The rule directly benefits only the guilty. Proponents of the rule have argued that this criticism is shortsighted; they insist that it fails to consider that innocent persons do benefit from the rule in futuro as a result of releasing guilty persons in praesenti. But as one author has correctly noted, this contention is the "deterrent argument all over again." 156

A more sophisticated challenge to the "protects only the guilty" argument is that "at least the rule protects someone"; consequently, if it does have shortcomings, the call must be for supplementation, not abandonment. 157 This second argument is more difficult to dismiss. Premised on the conviction that even the guilty should be afforded due process of law, the argument does not depend for its support upon conjecture or design, as does the deterrence argument. One need only witness the number of cases dismissed after rulings for the defense on motions to suppress to appreciate that the effects are real and palpable. The argument that "at least the rule protects someone" can only be answered by acknowledging from the outset that devising a system of constraints to accommodate all interests—deterrence, reparation, and effective law enforcement—requires that a balance be struck among the interests themselves. Tradeoffs are simply inescapable. The current Court has rejected outright the idea that the exclusionary rule exists to vindicate interests of individual privacy. 158 This same fate has befallen the idea that judicial acceptance of the unconstitutionally seized evidence constitutes a continuation of the initial illegality. The Court made it clear in United States v. Calandra 159 that the violation is complete at the conclusion of the seizure. If the exclusionary rule in its present form is salvageable as part of fourth amendment jurisprudence, its benefits must be shown to outweigh its adverse effects on the criminal justice system. Additionally, it must be demonstrated that a substitute remedy more compatible with law enforcement needs cannot be devised. The final part of this Article discusses the wisdom of excluding evidence to redress good faith violations of individual privacy. First, however, some other asserted shortcomings of the rule must be addressed.

157. See Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, 1975 WASH. U. L.J. 621, 681. Geller suggests that to protect the innocent, an effective tort or other remedy may be required.
158. See notes 68-71 and accompanying text supra.
IS A GOOD FAITH STANDARD NEEDED
ADVERSE EFFECTS ON LAW ENFORCEMENT
AND JUDICIAL ADMINISTRATION

The major systemic criticism of the exclusionary rule is that society pays too exorbitant a price—the release of countless guilty defendants—for the questionable benefits received. This argument has appeared repeatedly during the rule's history and need not be treated further here.\textsuperscript{160} There are other systemic criticisms, however, which deserve mention.

Many who argue for the present exclusionary rule insist that the use of unlawfully obtained evidence breeds contempt for the judicial system.\textsuperscript{161} The exact opposite is more probably true; the rule itself breeds disrespect.

Because few citizens can be expected to understand and appreciate the rule's jurisprudential underpinnings, the public at large perceives a technicality-ridden judicial system that rewards cleverness and duplicity at the expense of safe streets and criminal justice. Chief Justice Burger has mirrored this perception in his influential criticisms of the rule.

The operation of the Suppression Doctrine unhappily brings to the public gaze a spectacle repugnant to all decent people—the frustration of justice. . . . If a majority—or even a substantial minority—of the people in any given community . . . come to believe that law enforcement is being frustrated by what laymen call "technicalities," there develops a sour and bitter feeling that is psychologically and sociologically unhealthy. . . . [W]e may have come the full circle from the place where Brandeis stood, and . . . a vast number of people . . . [may be] losing respect for law and the administration of justice because they think that the Suppression Doctrine is defeating justice.\textsuperscript{162}

Another systemic drawback of the rule is that it misdirects the focus of a criminal proceeding from the guilt or innocence of the defendant to the

\textsuperscript{160} Judge Friendly has used the disproportionality argument in answer to those who insist that the rationale of individual privacy justifies the existence of the rule. He points out that the rule cannot be regarded as a vindication of rights of individual privacy because the dismissal of a criminal case (the benefit) is totally disproportionate with the wrong suffered. See Friendly, \textit{The Bill of Rights as a Code of Criminal Procedure}, 53 \textit{Calif. L. Rev.} 929, 951 (1965). Another author has utilized the disproportionality argument to answer the judicial integrity challenge. "Indeed, this lack of proportionality demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence." Kaplan, \textit{The Limits of the Exclusionary Rule}, 26 \textit{Stan. L. Rev.} 1027, 1036 (1974).

\textsuperscript{161} See, e.g., Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Paulsen, \textit{The Exclusionary Rule and Misconduct by the Police}, 52 J. Crim. L. C. & P.S. 255 (1961) [hereinafter cited as Paulsen]. Professor Paulsen has placed significant emphasis on this argument.

Few things are more subversive of free institutions than a mistrust of official integrity. When the police themselves break the law and other agencies of government eagerly reach for the benefits which flow from the breach, it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place.

\textit{Id.} at 258.

\textsuperscript{162} \textit{Watchman, supra} note 52, at 12, 22 (emphasis in original) (footnote omitted).
conduct of the police. Some argue that "a criminal prosecution of one person is . . . an indirect and awkward forum for inquiring into the behavior of some other person, a police officer, with a view to punishing him or creating some deterrent against similar conduct in the future." Suppression hearings often become hotly contested adversary proceedings without the benefit of the "time-honored method of direct complaint and trial on a carefully defined issue."

A cognate, although more serious institutional shortcoming of the rule, is its distortion of the fact-finding process. In many criminal trials, the resolution of the motion to suppress is dispositive of the entire case: a decision in favor of the defendant means the state will not be able to make out a prima facie case, while a decision for the state makes plea bargaining a near certainty. In some cases when evidence is suppressed, however, the case is nevertheless tried; but the jury must decide guilt or innocence without the advantage of crucial evidence. Considering the time most juries take to reach verdicts, much mental anguish undoubtedly inheres in the decision-making process. The exclusion of reliable evidence only exacerbates this situation. It seems fundamentally unfair to require juries to discharge society's most crucial decision-making function without the benefit of admittedly reliable evidence.

The rule has also been criticized for its potential to induce or facilitate corrupt police practices. The rule invests unscrupulous police officers with the power to immunize criminals by intentionally violating the law in obtaining evidence. Similarly, even if the initial search and seizure are conducted properly, the exclusionary rule facilitates collusion between police officers and unethical defense lawyers, resulting in the intentional distortion of facts at suppression hearings to obtain exclusion of crucial evidence. Under either scenario, the result is the same—justice is thwarted.

The exclusionary rule can also be cited as a reason why police officers occasionally take the law into their own hands. Frustrated because in their minds the rule unfairly compromises law enforcement, and incensed at the release of criminals despite ample evidence of guilt, police sometimes resort to extra-legal punishments. Suspects may be searched without legal cause for purposes of harassment; and if contraband is found, it is confiscated, although no formal prosecution is ever commenced.

Finally, it is probable that the very existence of the rule itself impedes the development of more salutary alternatives. As Professor Oaks has noted,

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165. Paulsen, supra note 161, at 256.
166. Justice Cardozo made this argument in the case of People v. Defore, 242 N.Y. 13, 23, 150 N.E. 585, 588 (1926): "The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious." See Paulsen, supra note 161, at 257.
[The enormous concentration and reliance upon the exclusionary rule may forestall the development of alternative mechanisms for controlling improper behavior by the police. By a peculiar form of federal preemption, the *Mapp* decision may sap state officials' energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule.]

**Erosion of Fourth Amendment Interests**

In *Terry v. Ohio*, Chief Justice Warren indicated that, for him, consideration of whether police conduct comported with fourth amendment requirements was virtually inseparable from an analysis of the exclusionary rule itself: "[T]he issue is not the abstract propriety of the police conduct, but the admissibility of the evidence uncovered by the search and seizure. . . . [A]dmitting evidence . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." But should decisions made by our highest Court about matters of prodigious importance to the delicate relationship between the state and its citizens depend for their resolution on collateral concerns such as the exclusionary rule? Whether the exclusionary rule is viewed as a constitutional right or as merely a judicially created prophylactic remedy (as seems to be the current view), elaborating substantive fourth amendment doctrine should ideally have nothing to do with the evidentiary results that attend individual rulings. To consider the rule's exclusionary effects at all in deciding substantive fourth amendment questions seems to subvert the very reason for the rule's existence in the first instance. The exclusion of evidence should only follow a dispassionate determination of what the Constitution protects. If, however, the remedy itself is considered in defining the very body of rights it ultimately will be called upon to protect, and if the decision makers view the remedy as both inflexible and undesirable, all dispassion vanishes. In such a judicial atmosphere, courts will certainly lean, consciously or unconsciously, toward manipulation of theory and fact to avoid disfavored results.

The difficulty posed by the exclusionary rule for fourth amendment construction finds an analogue in Blackstone's discussion of the nature of crimes and their punishment. Blackstone noted that unreasonably severe punishments less effectively prevent crimes than punishments tailored to the malignity of the conduct. According to Blackstone, if the punishment for a particular crime is excessively severe, "the public will out of humanity prefer impunity to it." He illustrates this tendency by noting that capital

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169. *Id.* at 12-13 (footnote omitted).
170. 4 W. BLACKSTONE, *COMMENTARIES* 14-17 (Beacon Series 1962).
171. *Id.* at 15.
punishment was once frequently meted out as the penalty for crimes in England. Paradoxically, the result was to increase rather than diminish the number of offenders because

[t]he injured, through compassion, often forbore to prosecute; juries, through compassion, sometimes forgot their oaths, and either acquitted the guilty or mitigated the nature of the offence; and judges, through compassion, respited one half of the convicts, and recommended them to the royal mercy. Among so many chances of escaping, the needy and hardened offender overlooked the multitude that suffered; he boldly engaged in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtook him, he deemed himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity had taught him to contemn.

When decision makers are faced with the prospect of imposing what they feel is an unjust or excessive penalty, they will tend either to find that the facts triggering that penalty do not exist, or to interpret governing law to circumvent the penalty’s applicability. When the end result is automatic and excessive, and the facts are clear, that result can only be avoided by compromising the rules.

When one considers a majority of the current Court maintains an avowed antipathy toward the exclusionary rule, one must seriously consider whether a similar interpretative phenomenon has occurred with respect to the rule. Chief Justice Burger has labeled the exclusionary rule a "Draconian, discredited device" and an "extraordinary remedy." Justice Powell has described it as a "judicially created remedy" whose "[a]pplication . . . deflects the truth-finding process and often frees the guilty." Justice White has referred to it as a "senseless obstacle to arriving at the truth in many criminal trials." Justice Rehnquist has disparagingly dubbed it a mere "court-made" rule. And Justice Blackmun has stressed that the rule hampers the "enforcement of admittedly valid laws, . . . imposing a substantial cost on the societal interest in law enforcement." In light of these judicial utterances, restrictive interpretation of substantive fourth amendment principles to accommodate law enforcement practices and avoid application of the exclusionary rule must be considered a serious possibility.

172. Id. at 17.
175. Id. at 501.
The legitimacy of this concern for substantive principles can be tested in
the following five areas of fourth amendment doctrine: automobile searches;
stop and frisk encounters; consent searches; searches incident to arrest; and
privacy interests. In each area, the same question must be asked: Would
the development likely have been different if the decisional process had not
necessarily required the conferring of a "constitutional imprimatur" on the
police conduct in question to avoid application of the exclusionary rule?
Stated another way, if the Court had been allowed in each of the cases to
consider the abstract propriety of the police conduct, would its decisions
likely have been more deferential to fourth amendment interests? An
affirmative answer to this inquiry would certainly deal a mortal blow to the
argument that the exclusionary rule is needed to protect the fourth amend-
ment.

180. In treating this material it would be remiss not to mention that in two areas of fourth amendment doctrine the Supreme Court has held fast to traditional principles. The Court has refused to excuse the warrant requirement in the area of administrative searches, and has thus adhered to the holding of Camara v. Municipal Court, 387 U.S. 523 (1967). In Camara, it was stated that warrantless searches of buildings to enforce fire, health, and building codes were violations of the fourth amendment. The Court indicated, however, that the "probable cause" requirement to secure a warrant could appropriately be met by reference to traditional administrative rather than criminal standards. Id. at 538-39. Accord, Lee v. City of Seattle, 387 U.S. 541 (1967) (Camara's standards applied to inspections of commercial structures not used as private residences).

Similarly, the Supreme Court recently held that administrative search standards govern subsequent entries to private property to investigate for possible arson after the initial entry to fight the fire and the initial investigation have concluded. See Michigan v. Tyler, 436 U.S. 499 (1978). In addition, in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Court held unconstitutional a provision of the Occupational Safety and Health Act which authorized agents of the Secretary of Labor to inspect work areas for safety hazards and violations of OSHA regulations without a search warrant or comparable process. Cf. Mincey v. Arizona, 437 U.S. 385 (1978) (murder-scene exception to fourth amendment warrant requirements not recognized).

The second area in which the current Court has inclined to adhere to traditional principles relates to border searches. As previously noted, the Court in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), refused to sanction an automobile search conducted 25 miles from the Mexican border by a "roving patrol" absent probable cause or consent. The Court refused to regard the search in Almeida-Sanchez as a routine border search. Accord, United States v. Ortiz, 422 U.S. 891 (1975) (consent or probable cause required for search of private automobiles at traffic checkpoints removed from rational border). Cf. United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (brief stops at permanent checkpoint away from border in absence of "reasonable suspicion" required for roving patrols upheld).

More recently, in United States v. Ramsey, 431 U.S. 606 (1977), the Court applied the border exception to the fourth amendment in upholding a federal statute which authorized customs officials to search incoming international mail upon "reasonable cause to suspect" that it contains illegally imported matter. In sum, these cases indicate that the Court has generally declined to expand the "border exception" to cover official intrusions occurring in non-border like settings. In deciding these cases, however, the Court has not expanded a field of fourth amendment protections which are applicable to the criminal law generally.

182. Id. at 12.
Automobile Searches

Since *Carroll v. United States* was decided in 1925, the Supreme Court has recognized that the mobile nature of the object to be searched sometimes renders it impracticable to secure a warrant. Chief Justice Taft emphasized that a "vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." Consequently, the fourth amendment necessarily required that a difference be recognized "between a search of a store, dwelling house, or other structure . . . and a search of a ship, motor boat, wagon, or automobile." The Court stressed, however, that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used."

The Court's recent decisions have seized upon the exception recognized in the *Carroll* case and have exploded it, thereby allowing warrantless searches of automobiles in a wide variety of contexts. The Court has indicated in these cases that the "reasonableness" of a search, and thus its comportment with fourth amendment requirements, is not always determined by the practicability of first securing a warrant; that citizens have a lesser expectation of privacy in automobiles than in dwellings; and that police "caretaking" functions can outweigh the interest in protecting privacy when vehicular searches are at issue.

The transition in this area of fourth amendment doctrine began in *Chambers v. Maroney*. It was the Court's holding, however, rather than its reasoning, that marked a significant shift in the philosophy behind automobile searches. Writing for the majority, Justice White stated that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." Therefore, under the *Carroll* doctrine, if the search could have been made at the scene of the stop without a warrant, it could likewise be made without prior judicial approval at the police station. Justice White admitted that, arguably, immobilization of the vehicle until a warrant is secured would constitute a lesser intrusion than searching the vehicle without prior judicial approval. Because that question was "debatable," however, he

183. 267 U.S. 132 (1925).
184. Id. at 153.
185. Id.
186. Id. at 156.
188. See, e.g., Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).
189. See, e.g., South Dakota v. Opperman, 428 U.S. 364, 369 (1976). In most of these decisions, it has been Justice White who has joined the four Nixon appointees to form a majority of the Court, and where Justice White has declined to join—such as was the case with inventory searches in *Opperman*—Justice Stevens, the most recent appointment to the Court, has taken his place.
191. Id. at 52.
did not believe the Constitution required it be decided one way or the other. But Justice White did make it clear that the search was sanctioned in \textit{Chambers} only because "exigent circumstances" were present. Resolution of the issue in \textit{Chambers} required a balancing of two separate, although related privacy interests: the interest in not having one's property detained while judicial process is sought and the interest in not having one's property searched in the absence of such process. Justice Harlan's partial dissent chastised the majority for its decision on the search issue. He asserted that the fourth amendment itself resolved the question in favor of requiring prior judicial approval: "I believe it clear that a warrantless search involves the greater sacrifice of Fourth Amendment values." Although Justice Harlan's view might be sounder on this issue, in fairness to Justice White, the Court in \textit{Chambers} did not depart significantly from the logic of \textit{Carroll}. Privacy interests were still critical, even in the realm of automobile searches, and warrants were still required absent exigent circumstances.

The following year, in \textit{Coolidge v. New Hampshire}, Justice Stewart reemphasized that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Searches of automobiles without warrants were held per se unreasonable under the fourth amendment, unless the exigencies of the situation made dispensing with the warrant imperative. True, \textit{Carroll} had recognized the "mobility" of the vehicle as triggering just such an exigent circumstance. According to Justice Stewart, however, the key consideration was whether, in light of all surrounding facts, it was impracticable to first secure a search warrant. Mobility failed to justify a warrantless intrusion in situations where the vehicle probably would not be moved, where the vehicle was under guard, where those who might want access to the vehicle had been placed into custody, or where the police had known for some significant period of time that the automobile had a probable role in the perpetration of the crime.

\begin{footnotes}
\item 192. \textit{Id.} at 51-52.
\item 193. "Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search." \textit{Id.} at 51.
\item 194. \textit{Id.} at 63 (Harlan, J., concurring in part and dissenting in part).
\item 195. Justice Harlan's position seems correct when one analyzes the consequences of a mistake in judgment by the police officers with and without the extension of warrantless searches authorized by \textit{Chambers}. Absent this extension, if the officers are mistaken about their judgment of probable cause, but are required to seek a warrant before searching, the search will be avoided, and only a temporary detention of the automobile will have taken place. With the \textit{Chambers} extension, if the officers are mistaken, two illegalities will result—the unlawful detention and the unlawful search. In this regard, Justice White's analysis seems to break down.
\item 196. 403 U.S. 443 (1971).
\item 197. \textit{Id.} at 461-62. That section of the opinion concerning the mobility doctrine was joined by only three other justices, Douglas, Brennan and Marshall.
\item 198. \textit{Id.} at 454-55.
\item 199. \textit{Id.} at 461-64.
\end{footnotes}
The real assault upon the right of privacy in one's automobile began in 1973 with *Cady v. Dombrowski*. There, the Court upheld the warrantless search of a trunk of a disabled vehicle that had been towed to a private storage garage. The defendant had called the police to the scene of an accident. Upon arrival, the police observed that the defendant appeared intoxicated and arrested him for driving while under the influence. The arresting officers later ascertained that the defendant was an off-duty Chicago police-man. Some two and one-half hours after the arrest, one of the arresting officers traveled to the private storage garage and, without either a search warrant or the defendant's consent, conducted a thorough search of the car. The search was allegedly conducted to find the defendant's service revolver, which had not been found on either the defendant's person or during an initial search of the car at the scene of the accident.

In a 5-4 decision, Justice Rehnquist, writing for the majority, emphasized that "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness." After deciding that searches such as the one at issue were not unreasonable solely because a warrant had not first been obtained, Justice Rehnquist then determined that the specific search at issue was not unreasonable under the fourth and fourteenth amendments, noting that "the police had exercised a form of custody or control over the 1967 Thunderbird." "[E]lemental reasons of safety" were involved, and "the search of the trunk to retrieve the revolver was 'standard procedure in [that police] department,' to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." In light of these considerations, the search, according to Justice Rehnquist, could not be regarded as unreasonable.

The Court's rationale in *Cady* stands in stark contrast to that found in its prior decisions, a change emphasized by the dissenting opinion of Justice Brennan: "The police knew what they were looking for and had ample opportunity to obtain a warrant. Under those circumstances, our prior decisions make it clear that the Fourth Amendment required the police to obtain a warrant prior to the search."

Curtailment of fourth amendment rights in the realm of automobile searches continued one year later in *Cardwell v. Lewis* when a plurality of the Court ruled that the examination of an automobile's exterior did not significantly implicate privacy interests to trigger fourth amendment protections. Observations made of an automobile tire's tread and the taking of

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201. Id. at 450 (Brennan, J., dissenting).
202. Id. at 439.
203. Id. at 447-48.
204. Id. at 442-43.
205. Id. at 443 (quoting State v. Dombrowski, 319 F. Supp. 530, 531 (E.D. Wis. 1970)) (brackets in original).
206. Id. at 453 (Brennan, J., dissenting).
paint scrapings from the automobile's exterior were not found to be "searches" because, according to Justice Blackmun, "the invasion of privacy, 'if it can be said to exist, is abstract and theoretical.'" 208 The more important aspect of Justice Blackmun's opinion, however, was broad dictum explicitly announcing for the first time that "'[o]ne has a lesser expectation of privacy in a motor vehicle" than one has in respect to his residence or his person.209

The dictum of Cardwell was elevated to the status of law two years later in South Dakota v. Opperman.210 The Opperman decision represents the most serious retrenchment to date of fourth amendment protections in the area of automobile searches. Writing for a bare majority of the Court,211 Chief Justice Burger emphasized that not only was the expectation of privacy in respect to automobiles less than in the case of one's home or office, it was "significantly less."212 In upholding an inventory search of the impounded vehicle in Opperman, the Chief Justice noted that automobiles are subject to pervasive and continuing governmental regulations, controls, inspections, and licensing requirements; that automobile travel is public in nature; and that "community caretaking functions" are frequently necessary to protect the public safety and promote the efficient movement of vehicular traffic.213 Furthermore, the Court observed that the search in Opperman was carried out in accordance with "standard police procedure" to protect the owner's property against claims or disputes over lost or stolen property, and to protect the police from potential danger.214 Such a search, the majority concluded, could not be called unreasonable under the fourth amendment.215

Justice Marshall's dissenting opinion in Opperman succinctly epitomized the drift of the Supreme Court's opinions in the area of automobile searches. According to Justice Marshall, the majority's logic completely shattered the
prior doctrine requiring probable cause even for automobile searches.216 The interests in privacy protected by the fourth amendment, he stressed, were being subordinated to the mere interest of conserving property.217

The decisions in this area clearly indicate a significant abridgment of fourth amendment rights in respect to vehicular searches.218 Not surprisingly, in virtually all these decisions, the same justices who have expressed disdain for the exclusionary rule have voted to circumvent its operation by sanctioning the police conduct under scrutiny. It is of course possible that this pattern of substantive retreat is consistent with hypotheses other than avoidance of the exclusionary rule. Yet, what cogent reasons can be advanced for dispensing with the warrant requirement in the absence of exigent circumstances, other than avoidance of the exclusionary rule's deleterious effects on the criminal justice system? Convenience? Cost savings? No serious doubt can exist that, assuming the exclusionary rule were eliminated as a decisional factor in fourth amendment cases, the standard would be as stated by Chief Justice Taft in Carroll, namely, that "[i]n cases where the securing of a warrant is reasonably practicable, it must be used,"219 regardless of whether the area searched is one's home or one's automobile.

216. Id. at 386 (Marshall, J., dissenting).
217. Id. at 395-96.
218. The Supreme Court's decisions in two recent cases give reason for some hope that the concept of mobility is not altogether dead in analyzing searches connected with automobiles. In United States v. Chadwick, 433 U.S. 1 (1977), the Court held that a warrant was required to search a locked footlocker which the defendants had placed in the trunk of a car immediately before their arrest. The Government, however, did not rely on the mobility doctrine. Instead, it argued that only homes, offices and private communications implicate interests which lie at the core of the fourth amendment. Id. at 7.

The issue not faced in Chadwick has now been squarely faced and decided against the Government in the recent case of Arkansas v. Sanders, 442 U.S. 753 (1974). In the majority opinion, Justice Powell wrote that the mobility exception did not permit a warrantless search of personal luggage seized from an automobile.

A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched—and have it securely within their control. . . . Once police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it is taken.

Id. at 763 (footnotes omitted).

Justices Blackmun and Rehnquist dissented in both Chadwick and Sanders. One need only examine Justice Blackmun's dissent in Chadwick to conclude that the future does not bode well for searches in this area of the law.

I would apply the rationale of these two lines of authority and hold generally that a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place. A person arrested in a public place is likely to have various kinds of property with him: items inside his clothing, a briefcase or suitcase, packages, or a vehicle.

433 U.S. at 19 (Blackmun, J., dissenting).
219. 267 U.S. at 156.
Stop and Frisk Encounters

In the landmark case of *Terry*, the Supreme Court faced for the first time the serious question of the fourth amendment’s role "in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances." More specifically, the Court in *Terry* had to decide whether and under what circumstances law enforcement officers could, invade certain privacy interests protected by the fourth amendment on a showing of less than probable cause.

The facts leading to Terry’s arrest and eventual conviction for carrying a concealed weapon were set forth by the Court in considerable detail. Officer McFadden, a Cleveland police detective with thirty-nine years’ experience, had his attention drawn one afternoon to two men standing at a street corner. After observing these two men (and later a third), Officer McFadden concluded that they were "casing a job" for a robbery and were very likely armed and dangerous. When "the situation was ripe for direct action," the officer approached the suspects, identified himself as a police officer, and asked their names. Receiving only a mumbled response to his request, the officer spun Terry around and patted down the outside of his clothing. A weapon was felt, seized, and ultimately introduced into evidence at Terry’s trial. The officer testified that he made the pat down only to determine whether the suspect was armed, and that he never placed his hands underneath the suspect’s outer garments until the weapon was felt.

In upholding the police conduct, Chief Justice Warren stressed that the situation required “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat.” Because a warrant could not be obtained under these circumstances, the conduct had to be tested by the fourth amendment’s general proscription against unreasonable searches and seizures. In ruling that the conduct was not unreasonable, the Chief Justice laid down a standard requiring the police “to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” "Inarticulate hunches" were simply not sufficient. Central to the Court’s decision in *Terry* were four factors, all of which were present before any police action was taken: (1) that the action was taken as a result of reasoned conclusions based upon personal observations of a police officer of much experience; (2) that in the officer’s opinion swift measures were needed to neutralize the threat of harm to

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221. Id. at 4.
222. Id. at 5-6.
223. Id. at 6-7.
224. Id. at 7.
225. Id. at 20.
226. Id.
227. Id. at 21 (footnote omitted).
228. Id. at 22.
The Burger Court has carried the "stop and frisk" exception announced in *Terry* considerably beyond the circumstances originally posited to justify its use. In *Adams v. Williams*, the Court upheld the seizure of a weapon by a police officer acting on an informant's tip of very questionable reliability. A person known to the officer had supplied information that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. After receiving this information, the officer approached the vehicle and asked the occupant to open the door. When the occupant rolled down the window instead, the officer reached into the car and removed a fully loaded revolver from Williams' waistband. Williams was arrested for illegal possession of a pistol, and a search incident to the arrest yielded narcotics for which the defendant was ultimately prosecuted and convicted.

Evidence adduced at the suppression hearing established that the only information the unnamed informant had ever given to the officer before the incident in question involved homosexual conduct in a local railroad station. No substantiating information had been found to support that alleged activity, and no arrests had ever been made. Furthermore, no facts were presented to establish that the informant had ever seen the gun, that the officer knew either the owner of the car or the identity of the occupant, or that the gun was in fact illegally possessed by the occupant. This last failure in the showing was particularly important because Connecticut law allowed its citizens to carry weapons, concealed or otherwise, provided they first obtained a permit.

Absent from the facts established in *Adams* was the immediate threat to public safety so important in the *Terry* decision. The officer in *Adams* made no personal observations (other than to confirm the informant's statement that a man was in a parked car at a certain location), and there was no indication that crimes (other than perhaps mere possessory ones) were being committed.

It might certainly be argued that *Adams* was nothing more than a natural extension of the doctrine first announced in *Terry*. After all, it does not seem to be constitutionally significant whether the "specific and articulable" facts required by *Terry* come to the officer through his own observations or are supplied by a third party. Nevertheless, the quantum of evidence possessed by the officer in *Adams* was undeniably less than that which was available to Officer McFadden in *Terry*. *Adams* represents another instance where the "powerful hydraulic pressures" of the times have caused a dilu-
tion of constitutional guarantees. As noted by Justice Marshall in his dissenting opinion in *Adams*, ",[t]oday's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct." 236

**Consent Searches**

Recent Supreme Court cases concerning consent searches represent additional examples of situations in which the Court has deferred to law enforcement wishes at the expense of fourth amendment rights, although curtailment here has taken on a more subtle form. The Court has not so much diminished the substantive extent of fourth amendment coverage as it has diluted protections to the exercise of the rights themselves.

In *Johnson v. Zerbst*, 237 a case concerning waiver of counsel in a criminal prosecution, the Supreme Court emphasized that a claimed waiver of constitutional rights must receive exacting scrutiny by the judiciary:

> [C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights . . . and do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. 238

The Court proceeded to conclude that "the guaranty [of right to counsel] would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." 239

The current Court, however, has refused to follow the waiver standard delineated in *Johnson*, at least in respect to the waiver of one's right to be free from unreasonable searches and has ruled that the validity of a consent

236. Adams v. Williams, 407 U.S. 143, 162 (1972) (Marshall, J. dissenting). Just how much further the current Court will expand the doctrine of *Terry* is difficult to predict. Several recent cases, however, indicate that law enforcement does not possess unbridled discretion to stop and detain individuals without articulable suspicion. Investigatory detentions on less than probable cause, which the Court had previously refused to countenance in *Davis v. Missouri*, 394 U.S. 721 (1969), have also been struck down by the current Court. See *Dunaway v. New York*, 442 U.S. 200 (1979) (fourth amendment violated when person is seized and transported to police station for interrogation absent probable cause); *Brown v. Texas*, 443 U.S. 47 (1979) (fourth and fourteenth amendments violated when person is stopped and required to identify himself in absence of reasonable suspicion); *Delaware v. Prouse*, 440 U.S. 648 (1979) (discretionary stops of automobiles disallowed in absence of articulated and reasonable suspicion). *But see Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (the Court held that whenever the driver of an automobile has been lawfully stopped, he may be ordered to get out of the car without violating the fourth amendment, notwithstanding the fact the officers have no reason to suspect foul play prior to the order). *See also United States v. Mendenhall*, 100 S. Ct. 1870 (1980) (DEA agents' request to airline passenger to accompany him to DEA office and subsequent consensual search not violation of the fourth amendment).

237. 304 U.S. 458 (1938).

238. *Id.* at 464 (footnote omitted).

239. *Id.* at 465.
to search depends upon whether it was voluntarily given considering all of the surrounding circumstances. This "voluntariness" standard has been held to apply to custodial as well as noncustodial situations.

In Schneckloth v. Bustamonte—a case involving consent obtained in a noncustodial situation—the Court rejected the notion that a person's knowledge of his right to refuse consent is a sine qua non to an effective waiver. According to Justice Stewart, who wrote the majority opinion, knowledge of one's right to refuse consent is only one factor in the determination, and there is correspondingly no affirmative duty imposed on the prosecution to prove knowledge as a prerequisite to a determination of voluntariness.

Arguably, the majority's holding in Schneckloth did not constitute a marked departure from doctrinal developments in other areas in which the waiver question had arisen. As pointed out by Justice Stewart, "the totality of all the surrounding circumstances" test had long been used to determine the admissibility of confessions. And because the respondent in Schneckloth had not been in custody at the time the consent was procured, the thesis of Miranda—that knowledge of one's rights in a custodial situation is necessary to counteract the inherently coercive nature of such situations—was simply inapposite. Justice Stewart also made short shrift of the standard of waiver set forth in Johnson. There was, according to him, a "vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." A "strict standard of waiver" was applicable to the former, while a "diluted" and more "informal" type of waiver was not necessarily inconsistent with the purposes served by the latter. According to him, the "waiver" concepts of the Johnson case were simply inapplicable to consent searches.

Justice Stewart was not able to point to any text of the Constitution itself which justified the treatment of certain constitutional rights with less solic-
tude than others. Justice Marshall, in dissent, took issue with Justice Stewart, pointing out that a certain difficulty inhered in any standard of waiver or consent in which the existence of a voluntary choice could be construed in the absence of knowledge of available alternatives. But even more perplexing in Justice Stewart's reasoning is the implicit assumption that if individuals were made aware of their constitutional rights—in this case, a right to insist that privacy not be invaded without prior judicial approval—they might in fact exercise them, making it more difficult for police to gather evidence. As a result of the ruling in Schneckloth, law enforcement will have little incentive to inform citizens of their right to refuse consent. Undoubtedly, the consent standard set forth in Schneckloth, and again later in United States v. Watson, which applied the same standard to custodial consents, relegates fourth amendment protections in this area to the few who are privileged or educated enough to have knowledge of their rights.

In deciding these cases, the Court ignored a consensus of federal and state courts which had previously regarded a consent to search as a waiver of a fundamental right, a waiver requiring both freedom of choice and knowledge of alternatives to be effective. Again, the Court has charted a course restricting individuals' protections under the fourth amendment for the sake of avoiding the exclusionary rule.

**Searches Incident to Arrest**

In three cases decided during its 1973 October Term, the Supreme Court ruled, in effect, that a person lawfully subjected to a custodial arrest loses all fourth amendment rights in respect to the privacy of his or her person, irrespective of the reasons supporting the arrest itself. These decisions have expanded greatly a new area in which warrantless searches can be carried out despite the absence of what can be fairly regarded as exigent cir-

249. Id. at 284-85 (Marshall, J., dissenting).

250. Id. at 227. In the words of Justice Stewart, "[i]n situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." Id. (footnote omitted).


253. See Brett v. Wainwright, 439 F.2d 1042 (5th Cir.) (consent to search upheld when suspect was advised that he need not consent), cert. denied, 404 U.S. 943 (1971); Perkins v. Henderson, 418 F.2d 441 (5th Cir. 1969) (consent to search invalid after failure to inform suspect of his right to refuse consent); Tobin v. State, 36 Wyo. 368, 255 P. 788 (1927) (consent to search invalid absent suspect's actual desire to invite the search); Wefing & Miles, Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems, 5 Seton Hall L. Rev. 211, 227-40 (1974).

cumstances. Further, the Court’s focus in these cases on the “reasonableness” of the search under all the circumstances, as opposed to the feasibility of procuring a search warrant in light of the particular facts of each case, marked a significant departure from the limitations set forth in Chimel v. California which had previously governed searches incident to arrest.

Prior to the Chimel decision, the Court had sustained against constitutional attack extensive warrantless searches under the rubric that they were incident to valid arrests. In Harris v. United States, the Court upheld a wide-ranging search of a four-room apartment pursuant to an arrest that took place in the living room. Similarly, in United States v. Rabinowitz, the Court refused to strike down a pervasive search of a one-room business office, citing the principle that law enforcement officials had authority “to search the place where the arrest is made in order to find and seize things connected with the crime.” In Rabinowitz, the Court rejected the rule announced in Trupiano v. United States, which required law enforcement to obtain search warrants whenever reasonably practicable, and instead posited that the true test of the fourth amendment was “not whether it [was] reasonable to procure a search warrant, but whether the search was reasonable.”

The Court overruled Harris and Rabinowitz in Chimel and, in doing so, imposed rather stringent limitations on both the permissible extent of searches incident to valid arrests and the constitutional justifications for the exception itself. Citing Terry, Justice Stewart noted that advance judicial approval of searches and seizures was the rule rather than the exception, and that “the scope of a search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” Applying these

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256. 331 U.S. 145 (1947).
258. Id. at 61.
259. 334 U.S. 699 (1948). In Trupiano, the Court set forth strict standards for warrantless searches and seizures incident to arrest.

It is a cardinal rule that in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement. A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.

Id. at 705, 706.
260. 339 U.S. at 66.
262. Id. at 762 (citing Terry v. Ohio, 392 U.S. 1, 19 (1969)).
same principles to searches made incident to arrest, the Court ruled in *Chimel* that

> [when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.

By relying upon *Terry*, the *Chimel* Court clearly implied that a search incident to arrest had to be justified by a particularized showing that it was reasonably necessary to insure the safety of the officers, to prevent escape, or to prevent destruction of evidence. The Court, by requiring that the search be “strictly tied to and justified by” the circumstances giving rise to it, was certainly not authorizing a full blown search in each case, irrespective of the reasons giving rise to the arrest itself. As was stated in *Sibron v. New York*, decided only one year before *Chimel*, “the constitutional validity of a warrantless search [was] pre-eminently the sort of question which [could] only be decided in the concrete factual context of the individual case.”

Despite the limiting language of *Chimel*, and despite the Court's traditional case-by-case adjudication of reasonableness in fourth amendment cases, the Court held in the companion cases of *United States v. Robinson* and *Gustafson v. Florida* that a lawful arrest makes reasonable a full search of the arrestee's person under the fourth amendment regardless of the circumstances. The officers need not point to specific and articulable facts which justify fear for safety; nor need they suspect that evidence will be found on the arrestee's person. Furthermore, not only is a full blown search of the arrestee's person authorized, but also permitted is a probing examination of any articles thereby found.

The fourth amendment implications of these decisions can be appreciated best by focusing on the facts of the cases themselves. Both cases involved arrests for traffic violations. In *Robinson*, operating a vehicle after one's license had been revoked carried a mandatory jail term, mandatory mini-

263. *Id.* at 762-63.
268. 414 U.S. at 235.
269. In both *Robinson* and *Gustafson*, the officers in question had thoroughly searched cigarette packages that were found on the defendants' persons. *United States v. Robinson*, 414 U.S. at 232; *Gustafson v. Florida*, 414 U.S. at 262-63.
mum fine, or both. In Gustafson, however, the traffic offense was clearly minor—failure to have a license in one's possession. The search of the defendant was not carried out according to standard arrest procedures promulgated by the law enforcement agency in question, as was the case in Robinson, and it was entirely likely that the officer in Gustafson intended to release the arrestee after verifying his story that he had left his license in his room—which, incidentally, proved to be true. Surely Gustafson departed substantially from the requirement of Chimel that the search incident to arrest be "strictly tied to and justified by" the circumstances giving rise to it. Even Robinson, as noted in Justice Marshall's dissent, completely ignored numerous decisions of the lower federal and state courts which had limited searches incident to the arrests of traffic offenders to the need to protect the arresting officers from danger.

In the third case decided during the 1973 October Term, Edwards v. United States, the Supreme Court expanded still further the authority of police officers to make warrantless intrusions by upholding the seizure of a jailed defendant's clothing approximately ten hours after the arrest. Reverting to the doctrine of Rabinowitz, which was thought to have been substantially repudiated in Chimel, the Court stated that the true test of the legality of such intrusions was not whether it was reasonable to obtain a warrant, but whether the search was reasonable under the circumstances. Although the officers in Edwards had reasonable cause to believe the clothing had evidentiary value at the time of the arrest, seizure was delayed because they were not able to procure substitute clothing until the next morning. Because of its unusual facts, Edwards might be regarded as only a minor extension of the Robinson and Gustafson decisions. Yet, it clearly erodes still further the traditional fourth amendment view that searches conducted outside the judicial process are per se unreasonable absent "a few specifically established and well delineated exceptions."

Privacy Interests

The protections of the fourth amendment only obtain in those instances in which one has a justifiable expectation of privacy. The parameters of a

270. See D.C. CODE ANN. § 40-302(d) (1967); United States v. Robinson, 414 U.S. at 220.
271. Id. at 263.
272. Id. at 265 (citing United States v. Robinson, 414 U.S. 218, 223 n.2 (1973)).
273. Id. at 262-63 n.2.
274. 414 U.S. at 244-47 (Marshall, J., dissenting).
276. Id. at 805.
278. Katz v. United States, 389 U.S. 347, 353 (1967). In Justice Harlan's words, "there is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " Id. at 361 (Harlan, J., concurring).
justifiable expectation of privacy under the fourth amendment are, of course, a matter of federal constitutional law. The foregoing has attempted to suggest that the Supreme Court has pursued a number of doctrinal developments in order to avoid the untoward results of the exclusionary rule. For example, in the areas of automobile searches and searches incident to arrest, the Court has upheld warrantless searches which, under traditional analysis, would have required prior judicial approval. In the area of consent searches, the Court has made it less difficult for police to avoid assertion of the rights themselves. But perhaps the most deleterious route taken by the Court to circumvent the exclusionary rule has been the curtailment of the interests themselves which one might have reasonably expected to remain free from governmental intrusion. Controversies in this area have generally reached the Supreme Court in the context of challenges to a litigant's "standing" to raise fourth amendment issues. These standing challenges have been essentially of two types: cases in which the government claims that no intrusion cognizable under the fourth amendment has taken place; and cases in which a fourth amendment intrusion has admittedly occurred, but the particular litigant is claimed not to have suffered a personal "injury in fact." An example of the first type of challenge is United States v. Miller, decided by the Court in 1976. In Miller, a grand jury had subpoenaed the defendant's account records from two separate banks in connection with a tax investigation. Defendant's motion to suppress based upon allegedly defective subpoenas was denied by the trial court. In upholding the defendant's conviction, the Supreme Court did not reach the question of the subpoenas' sufficiency because it concluded that the defendant had no standing to make such a challenge. The Court ruled that the government had not intruded into the realm of defendant's protected fourth amendment interest. Analogizing to several "misplaced confidence" cases, the Court reasoned that Miller had voluntarily chosen to deal with the banks in question and thus could not be heard to complain that the state had invaded an area in which he could reasonably expect privacy. As noted by Justice Brennan in dissent, however, "the disclosure by individuals or business firms of their

279. The Supreme Court has also indicated in the realm of automobile searches that citizens have lesser expectations of privacy. See text accompanying notes 183-219 supra.

280. See notes 282-286 and accompanying text infra.

281. See notes 287-306 and accompanying text infra.


284. 425 U.S. at 441-43.
financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account." In his view, the fourth amendment protects private bank records from government access. Judicial supervision of attempts to gain release of this information was consequently required by the Constitution.

Rakas v. Illinois illustrates the second category of cases. Undoubtedly, a fourth amendment violation was present in Rakas, but the Court refused to acknowledge that the petitioners there were the true victims of it. The facts in Rakas were straightforward. A police officer on routine patrol received a radio bulletin, informing him that a robbery had been committed and describing the getaway car. Shortly thereafter, the officer spotted an automobile that he suspected could be the vehicle in question. After the auto was followed for a period of time, it was forcibly stopped, all occupants were ordered out, and a thorough search of the interior was conducted. (Evidently, the petitioners did not claim at the trial that the stop itself was unlawful for lack of reasonable and articulate suspicion under the Terry doctrine.) During this search, the officers seized a box of rifle shells from the glove compartment (which had been locked) and a sawed-off rifle from underneath the front passenger seat. Petitioners were then arrested and charged with armed robbery.

Before trial, the defendants moved to suppress the rifle and shells, alleging an unconstitutional search and seizure. They conceded they did not own the car, and admitted they were merely passengers. Nor did they contend that they owned either the rifle or the shells. Based upon these facts, the Illinois trial court ruled that it did not need to pass on the legality of the search and seizure because petitioners lacked "standing." The Illinois Appellate Court affirmed, stating that "without a proprietary or other similar interest in an automobile, a mere passenger therein lacks standing to challenge the legality of the search of the vehicle." The United States Supreme Court concurred, acknowledging that a fourth amendment violation was present, but that the petitioners were not the true victims of it. In affirming the decision of the Illinois Appellate Court, Justice Rehnquist, for a bare majority of the Court, substantially curtailed the "expectation of privacy" development which had appeared in the Court's prior decisions.

Previously, in Jones v. United States, the Court concluded that "anyone legitimately on premises where a search occurs may challenge its legality

285. Id. at 451 (Brennan, J., dissenting) (quoting Burrows v. Superior Court, 13 Cal. 3d 238, 247, 529 P.2d 590, 596 (1974)).
287. 439 U.S. 128 (1978). The petitioners did not claim at the trial level that the stop itself was unlawful for lack of reasonable and articulate suspicion under the Terry doctrine. Id. at 160 n.5 (White, J., dissenting). See notes 220-229 and accompanying text supra.
288. Id. at 129-30.
289. Id. at 130-31.
290. Id. at 131. The Illinois Supreme Court refused to grant petitioners leave to appeal. Id. at 132.
. . . when its fruits are proposed to be used against him.”

The petitioner in Jones had been given the use of a friend’s apartment. Jones had a key to the premises, but paid nothing for the use of the apartment. At the time of the search, he had spent “maybe a night” there, and the owner had been away for about five days. Federal officers searched the apartment pursuant to a warrant, later alleged to be defective by the petitioner, and seized narcotics from a bird’s nest located in an awning just outside a window. In holding that Jones had standing to challenge the search, the Court announced the so-called “automatic” standing rule, which confers the status on anyone who contests an allegedly illegal search in a situation where the same possession needed to establish standing is an essential element of the offense charged.

The Court made it clear in Jones, however, that the petitioner’s legitimate presence on the premises would be, in itself, sufficient to confer standing, even if the offense charged was not possessory. Seven years later, in Katz v. United States, the Supreme Court unequivocally settled the question of whether fourth amendment interests depended for their existence on common law property interests, when it stated that “the Fourth Amendment protects people, not places.”

Although the Rakas case does not overrule per se the doctrine of the Jones case which confers standing on litigants who are legitimately on the premises searched, it certainly has curtailed the roles of both Jones and Katz in de-

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292. Id. at 267.
293. Id. at 259.
294. Id.
295. Id. at 264. In the very recent case of United States v. Salvucci, 100 S.Ct. 2547 (1980), the Supreme Court has specifically overruled the so-called “automatic standing” doctrine of Jones. Id. at 2553. Consequently, those now charged with crimes of possession no longer have automatic standing to challenge the methods used to obtain the evidence against them. It was Justice Rehnquist who wrote the majority opinion, and clearly, the disdain for the exclusionary rule again figured prominently.

We are unwilling to tolerate the exclusion of probative evidence under such circumstances since we adhere to the view of Alderman that the values of the Fourth Amendment are preserved by a rule which limits the availability of the exclusionary rule to defendants who have been subjected to a violation of their Fourth Amendment rights.

Id. at 2554.
296. 362 U.S. 265-67. The Jones Court further maintained:

No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him.

Id. at 267.
298. Id. at 351.
299. Id. at 353.
300. After Rakas, it may be that the “standing” rubric will disappear altogether. As Justice Rehnquist noted in the majority opinion of Rakas, the standing requirement “is more properly subsumed under substantive Fourth Amendment doctrine.” 439 U.S. at 139. Rehnquist continued:
ciding whether litigants’ expectations of privacy are reasonable. In *Rakas*,
the Court seems to have resurrected in substantial part the discredited doc-
trine of *Olmstead v. United States*,\(^{301}\) which linked fourth amendment rights
to interests in property.\(^{302}\) According to Justice Rehnquist, “the phrase
’legitimately on premises’ coined in *Jones* create[d] too broad a gauge for mea-
surement of Fourth Amendment rights.”\(^{303}\) The fact that the petitioners were
present in the car with permission of its owner was not, therefore, determina-
tive of whether they had a reasonable expectation of privacy.\(^{304}\) Furth-
more, the majority very nearly stated that the petitioners’ failure to assert either a
property or possessory interest in either the car or the items seized itself con-
trolled the outcome.\(^{305}\) Indeed, even Justice White who had so often joined in
prior decisions narrowly construing fourth amendment rights, was prompted to
say in dissent that “[t]he Court today holds that the Fourth Amendment pro-
jects property, not people.”\(^{306}\)

It is difficult to reconcile *Rakas* with *Jones*. That an auto search was in-
volved in *Rakas*, whereas *Jones* involved the search of a dwelling, was
admitted by Justice Rehnquist to be unimportant to the decision. The Court
made a feeble attempt to distinguish the cases by stressing that *Jones* pos-
sessed a key to the premises, kept possessions in the apartment, and, except
for his friend, had complete dominion and control over the area in
question.\(^{307}\) When one considers, however, that the evidence in *Jones* was
found in a bird’s nest located in an awning outside the premises, these dis-
tinctions lose their persuasiveness. One cannot help but suspect that here,
as in the areas examined previously, the Court’s antipathy toward the exclusion-
ary rule has played a substantial part in the substantive retreat. Indeed,

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\(^{301}\) 277 U.S. 438 (1928).

\(^{302}\) In a footnote, the Court attempted to convince the dissenters it was not upsetting the
holding of *Katz* which stated that property interests are not determinative of fourth amendment
rights. It stressed that the petitioners had not claimed they were entitled to any legitimate
expectation of privacy in the areas of the car searched, but had only insisted that they were
legitimately in the car. But the majority is simply begging the question, here, since its prior
cases—specifically *Jones*—had explicitly held that one who is “legitimately on the premises”
*ipso facto* has a justifiable expectation of privacy and thus standing to contest the intrusion at
issue. 439 U.S. at 149 n.17.

\(^{303}\) 439 U.S. at 142 (footnote omitted).

\(^{304}\) *Id.* at 148.

\(^{305}\) *Id.*

\(^{306}\) *Id.* at 156 (White, J., dissenting).

\(^{307}\) *Id.* at 149.
Justice White himself expressed such a sentiment in his dissenting opinion in *Rakas*:

Because the majority's conclusion has no support in the Court's controlling decisions, in the logic of the Fourth Amendment, or in common sense, I must respectfully dissent. If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases.308

III. A DEFENSE OF JUSTICE WHITE'S GOOD FAITH EXCLUSIONARY RULE STANDARD

**Revising the Exclusionary Rule**

The foregoing analysis was devoted in significant part to demonstrating that the current Court has haltingly, yet inexorably moved toward adopting a good faith standard for the exclusionary rule in fourth amendment cases. Perhaps the most perspicuous formulation of this standard is that enunciated by Justice White in his dissenting opinion in *Stone v. Powell*:

> [T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief.309

It was suggested previously that the present exclusionary rule, instead of befriending the fourth amendment, may have become the primary hindrance to its liberal interpretation. This threat, standing alone, is serious enough to call for modification of the rule along the lines suggested by Justice White in his *Stone* dissent. The adoption of a good faith approach also might go far toward eliminating the kind of questionable logic that has laced some recent opinions of the Court—*Michigan v. DeFillippo*310 being a notable example. Even if the above considerations are disregarded (to satisfy those empiricists who abhor speculation), adoption of a good faith standard to guide implementation of the present rule, and as opposed to eliminating the rule altogether, remains salutary because numerous systemic advantages would attend its imposition. A few of these advantages deserve mention here.

While eliminating the application of the exclusionary rule in the great majority of cases, a good faith standard would preserve judicial review of fourth amendment questions. In the absence of such a channel, most fourth amendment questions would be relegated to infrequent civil appeals for such review. It is also important to maintain public interest in the rights protected by the fourth amendment, and press coverage of motions to suppress

308. *Id.*
evidence in important cases would provide an effective medium for that purpose. In short, preserving the exclusionary rule for serious violations will help ensure that the limits of social tolerance are regularly tested.

Further, application of a good faith standard would maintain public respect for the judicial system, while at the same time eliminating the criticism that criminal justice turns on the litigation of technicalities. The revised standard will direct contempt away from the judicial system and toward those who rightfully deserve it—police officers who violate the law in bad faith. The revised exclusionary rule will also tend to eliminate those corrupt police practices through which officers immunize criminals by intentionally conducting unlawful searches and seizures. Under the present rule, officers can confer immunity by intrusions which are arguably nothing more than mistakes of judgment. If the unscrupulous officer conducts the type of bad faith violation that will trigger the revised standard, he or she risks the serious possibility of criminal prosecution.

Because Justice White's formulation of the good faith standard requires that the officer in question have "reasonable grounds" for his or her good faith belief, an objective factor is incorporated into the rule. That is, when the Constitution has been violated, the prosecution must cite relevant statutory or case law or extant administrative procedures which reasonably support the conduct under scrutiny. Without this objective criterion, trial judges could circumvent application of the rule in tough cases by making factual findings favorable to the prosecution on the mental state question. Such findings would be practically unreviewable. Because of local pressures, trial judges are currently loath to make exclusionary rulings, but the objective criterion contained in Justice White's formulation helps ensure that appellate review will be meaningful when local pressures have prevailed.

Additionally, the good faith standard will prevent the government from choosing to violate the fourth amendment willfully whenever it is prepared to pay civil damages as the price for securing desired evidence. In this respect, the proposed good faith standard differs markedly from the test formulated by the American Law Institute. Under the ALI approach, the exclusionary rule is applied only if the court finds that a fourth amendment violation is "substantial." Violations which are "gross, willful and prejudicial to the accused" are considered "substantial" as a matter of law. The existence vel non of substantiveity in other instances is determined by applying a balancing approach to six separate considerations:

(i) the extent of deviation from lawful conduct;
(ii) the extent to which the violation was willful;
(iii) the extent to which privacy was invaded;
(iv) the extent to which exclusion will prevent violations of the model code;

311. See text accompanying note 309 supra.
312. Model Code of Pre-Arraignment Procedure § 150.3 (1975).
313. Id.
(v) whether, but for the violation, the things seized would have been
discovered; and
(vi) the extent to which the violation prejudiced the moving party's ability
to support his motion, or to defend himself in the proceeding in
which the things seized are sought to be offered in evidence against
him.\textsuperscript{314}

Under the ALI test, then, gross violations which are not willful, and willful
violations which are not gross, undergo the balancing test under the six-
factor approach, and thus stand a chance of escaping application of the rule
altogether. Justice White's good faith standard precludes such a possibility,
and properly so. The correct normative judgment here must be that if proof
exists of the government's intentional violation of the law, the evidence must
be excluded irrespective of the degree of flagrancy. Government participa-
tion in willful lawlessness should not be countenanced under any
circumstances.\textsuperscript{315} The ALI's failure to make exclusion mandatory whenever a
violation is objectively either gross or willful, however, has a more serious
defect. It affords trial judges broad discretion to avoid the rule whenever it
would be popular to do so. The ALI's balancing process simply provides too
loose a standard to govern adjudication of fourth amendment issues in the
many tough cases that arise in this area.

The revised standard, because it will be limited to bad faith violations,
will hopefully encourage the states to devise alternative procedures to deter
violations of lesser severity. And finally, and perhaps of greatest importance,
the revised rule will eliminate the hypocrisy of the current system which
places blame on underpaid policemen in myriad instances where they are
not fairly deserving of fault. Society expects police officers to react with dis-
patch and often with force. It seems unfair to expect them—or any other
group for that matter—to react with the detachment and reflection of a
neutral magisterial official.

**RESPONDING TO MAJOR CRITICISMS**

Critics of revisions similar to Justice White's good faith standard have mar-
shalled their arguments around four major themes: (1) that a standard geared
primarily to "willfulness" would put a premium on the ignorance of the
police officer;\textsuperscript{316} (2) that a good faith standard would "alter the true extent of
fourth amendment protections;"\textsuperscript{317} (3) that a good faith standard would vitiate

\textsuperscript{314} Id.
\textsuperscript{315} See Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
\textsuperscript{316} One commentator has suggested that the exclusionary rule be held inapplicable where
the constitutional violation by the police officer is inadvertent. The major problem envisioned from
this proposal, however, is that a modification of this nature would put a premium on the ignorance of the
police officer, and, more significantly, on the department which trained him. See
\textsuperscript{317} Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclu-
much of the deterrent efficacy of the present rule; 318 and (4) that a good faith standard would deprive victims of unintentional violations of any effective remedy. Thoughtful analysis reveals that these contentions lack merit.

The First Criticism

The argument that a standard geared primarily to "willfulness" would put a premium on ignorance of the police officer is predicated on the assumption (a false one in the case of Justice White's good faith standard) that there would be no objective limitation on the ability of police to avoid application of the rule by claiming ignorance of the law. It has already been seen that the good faith standard proposed by Justice White in his Stone dissent has two prongs, both of which must be satisfied if the operation of the rule is to be avoided. Not only must the officer have a good-faith belief that his conduct is lawful, but also he must have reasonable grounds to believe that his conduct comports with existing law. 319 Consequently, there is within the ambit of the standard itself a significant, objective limitation on the ability of ignorance, whether genuine or contrived, to shield fourth amendment violations from the exclusionary result. While the first prong will often require trial judges to undertake the difficult evaluation of the officer's subjective state of mind, the second prong will eliminate the need for this evaluation where violations have transgressed certain objective legal limits.

The Second Criticism

The argument that a good faith standard would "alter the true extent of fourth amendment protections" 320 posits that the threshold at which a particular rule imposes its exclusionary result will tend to establish actual police practices near that threshold. This criticism insists that if the threshold is "probable cause," as under the present rule, the police will abide by that standard in executing their duties. If the threshold were changed to "good faith," however, the argument goes that the police would abandon "probable cause" as the gauge for their conduct and would substitute for it a "good faith" standard, thus taking action whenever they determined a "reasonable ground" existed to justify their conduct. According to this criticism, then, although the "probable cause" standard might continue to exist in theory as the touchstone of fourth amendment analysis, the actual standard of police practice will be determined by the tolerance level set by the governing exclusionary rule. The gravamen of this criticism is that the police will attempt

318. The United States Supreme Court, acting as its own critic, has recognized that where official action is pursued in complete good faith, the deterrence rationale underlying the exclusionary rule loses much of its force. Michigan v. Tucker, 417 U.S. 433, 447 (1974). Accord, United States v. Peltier, 422 U.S. 531 (1975); United States v. Williams, 622 F.2d 830 (5th Cir. 1980).
320. See note 317 supra.
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to carry out in practice whatever arguably has a chance of passing judicial scrutiny.

Underlying this argument is an unjustified paranoia that law enforcement officers as a group are law violators in practice, and consequently need penalties, or, as Justice Brennan calls them, "incentives," to secure their compliance with constitutional rules. This reasoning unfairly deprecates both the intentions of law enforcement officers as a whole and their actual performance in the execution of their duties. Whether the exclusionary rule retains its present form or is modified along the lines of the good faith proposal discussed previously, official compliance with the fourth amendment ultimately assumes a willingness on the part of law enforcement to obey the law. To presume that the exclusionary rule in any of its guises will deter bad faith violations of the fourth amendment is naive, especially considering that willful violators can always distort the facts at a suppression hearing to avoid the exclusion of the fruits of their unlawful conduct. 321 Whereas training and education must ultimately constitute the chief facilities through which law-abiding officers are equipped to comply with fourth amendment strictures, only direct means such as criminal sanctions, civil tort remedies, internal departmental investigations, and more circumspect recruiting practices can realistically be expected to deter intentional violations of search and seizure law.

The Third Criticism

The argument that a good faith standard would vitiate much of the deterrent efficacy of the present rule assumes first of all that the current rule appreciably deters fourth amendment violations, and, relatedly, that an exclusionary rule of evidence is the most effective means to encourage law enforcement to keep abreast of search and seizure doctrine. Several conceptual defects that seriously weaken the exclusionary rule's impact in discouraging fourth amendment violations were already discussed: (1) it only operates when gathering evidence is relevant; (2) rules are often arcane and ineffectively communicated; and (3) the penalty operates only indirectly on the violators themselves. 322 Indeed, these shortcomings may explain why empirical studies have failed to demonstrate the deterrent efficacy of the rule. 323 In short, whether the exclusionary rule really does deter unlawful invasions of privacy remains an open question.

321. Many commentators have emphasized that the exclusionary rule fails to effectively deter official lawlessness in securing evidence. See Watchmen, supra note 52; LaFave, Improving Police Performance Through the Exclusionary Rule—Part I, 30 Mo. L. Rev. 391 (1965); Oaks, supra note 52; Comment, The Impeachment Exception: Decline of the Exclusionary Rule?, 8 Ind. L.J. 865 (1975).


323. See notes 148-154 and accompanying text supra.
Even for the great majority of police officers who are naturally inclined to heed legal requirements, however, knowledge of the law will be a prerequisite to compliance over the long term. In evaluating any version of the exclusionary rule, the crucial consideration, then, must be its educative effect. The rule deters at all only if it can be regarded as enhancing the likelihood that law enforcement personnel will keep apprised of fourth amendment developments. The implicit reasoning of those who argue in favor of the rule's deterrent value must be either that the threat of excluding evidence is more efficacious in inducing ongoing education than other means; or, that despite the possibility of other more effective means, the deterrent value of the rule is substantial enough in its own right to justify compromising effective law enforcement. Yet, even if an affirmative nod could be given to either proposition, because Justice White's proposal contains an objective limit on the possibility that ignorance will shield violations from the rule's operation, no reasonable basis appears for concluding that the exclusionary rule's effectiveness in facilitating this educative process would be measurably diminished by changing the threshold at which the rule is triggered from probable cause to good-faith belief. More importantly, it seems highly imprudent to depend primarily upon the speculative assistance of the exclusionary rule to educate police in fourth amendment requirements.

The Fourth Criticism

The fourth criticism—that a good faith standard would deprive victims of unintentional violations of any effective remedy—also fails because of many of the same conceptual weaknesses of the exclusionary rule. For example, no exclusionary rule of evidence can provide any relief for the innocent victims of fourth amendment violations. Nor can such a rule provide redress where no prosecution follows the seizure of incriminating evidence.

Nevertheless, under the present rule victims of good faith violations share and share alike with victims of intentional and otherwise egregious unlawful invasions of their privacy in benefiting from the exclusionary result; while under the revised standard, a whole category of "guilty" victims will no longer be rewarded when a constable blunders in good faith. This fourth criticism, then, differs somewhat from the others. Each of the first three criticisms supposed that some undesirable effect would result from changing the rule. In answering these criticisms, the undesirability of each result was conceded, but it was then suggested that the results themselves were not likely to occur as a consequence of the recommended exclusionary rule change. With the present criticism, however, the result itself—the deprivation of victims of good faith

324. Professor Paulsen has been a major proponent of the argument advancing the educational effect of the exclusionary rule. See Paulsen, Safeguards in the Law of Search and Seizure, 52 Nw. U. L. Rev. 65, 74 (1957). See also Allen, Federalism and the Fourth Amendment: A Requium for Wolf, 1961 Sup. Ct. Rev. 1, 37.
violations of the exclusionary remedy—is more than a prediction; it is definitional. Thus, in approaching this criticism, the pertinent question is not whether the result is probable, but whether it is acceptable. This question cannot be resolved without making value judgments and balancing the interests at issue.

The fact that the fourth amendment has been construed by the courts to require what are sometimes rather technical procedures does not perforce support the conclusion that stringent penalties should be imposed whenever these procedures are violated. In its current form, the exclusionary rule, in veritable meat-ax fashion, imposes its sanction regardless of the seriousness of the infraction or the seriousness of the crime. It totally discounts society's legitimate interest in safety and security, and it unrealistically resolves the tension between the theoretical and practical aspects of fourth amendment strictures. Just as the Supreme Court should free itself of the exclusionary rule in its present form and thereby remove the pressure to "fit" fourth amendment doctrine to accommodate police conduct in individual cases, so too should the legal community discard the idea that society is threatened each time a police officer's conduct happens to fall short of the ideal procedures articulated by the judiciary. Society, of course, must avoid at any cost a system of laws that encourages unreasonable invasions of privacy. Equally true, however, is that regardless of what rules the courts delineate in construing the fourth amendment, numerous instances will still remain in which actual practices will fail to pass strict fourth amendment scrutiny. The ultimate result of any regime of judicial enforcement that imposes inflexible penalties without remembering Blackstone's admonition, "[when a penalty is excessive] the public will out of humanity prefer impunity to it," must be an erosion of respect for both the laws themselves and the institutions interpreting them.

CONCLUSION

In his now famous article "Who Will Watch the Watchman?" Chief Justice Burger suggested that perhaps all those concerned about fourth amendment protections could agree on two basic propositions:

[F]irst, that deterring official misconduct in law enforcement is a vital objective for society; and second, that society and the administration of justice are best served by vastly reducing, and if possible eliminating, the need to exclude relevant and probative evidence from a criminal trial whose very truth-seeking function is necessarily stultified to some degree by such exclusion.

The great majority of those who insist on preserving the exclusionary rule in its present form argue that no workable alternative will encourage the police to obey the law. But as one author has stated, "[i]f this excuse did not come

325. 4 W. BLACKSTONE, COMMENTARIES 14-17 (Beacon Series 1962).
326. Watchman, supra note 52, at 10.
327. Id.
from such respected sources, one would be tempted to term it an expression of intellectual bankruptcy." Indeed, it is an indictment against the entire American legal system that it has entrusted protection of this important body of rights to such a woefully deficient remedy.

This Article has attempted to show not only that the present exclusionary rule can never be expected to effectively deter official misconduct, but also that its continuing existence may have become the greatest, single impediment to a liberal elaboration of fourth amendment doctrine. As has been seen, five justices of the current Court have indicated they are willing to consider a good faith approach to the fourth amendment exclusionary rule. Recently, by a vote of 13-10, judges of the United States Court of Appeals for the Fifth Circuit in a landmark en banc decision have ruled that thenceforth, in their circuit,

when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.329

This case soon will present the United States Supreme Court with an excellent opportunity to consider once again modification of the rule along the lines of the good faith standard suggested by Justice White in his Stone dissent. This time it is hoped the Court will meet the challenge head-on, will avoid questionable sidestepping tactics like those employed in DeFilippo, and will rid the jurisprudence of the fourth amendment of this inflexible rule once and for all.