Confusion Regarding Exclusion: The Evolution of the Fourth Amendment

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The police burst into a room, charge past a dead body, and apprehend the suspected murderer, weapon still in hand. The apparent killer confesses, cursing the misfortune of being caught. The evidence is overwhelming, and a conviction appears assured. But wait—the search was perpetrated in violation of the fourth amendment's command against unreasonable searches and seizures,[1] and the exclusionary rule requires that the tainted evidence be excluded from trial.[2] Without the evidence which would prove guilt, the accused goes free. Two wrongs have been committed—a murder and an unconstitutional police search—but neither is punished.

The unfortunate results set forth above have propogated a host of comments proposing changes in the application of the exclusionary rule.[3] One commentator proposes that the exclusionary rule be deemed inapplicable in serious cases.[4] Another argues for a modification which avoids the exclusionary sanction if the illegal search was conducted in

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1. The fourth amendment to the United States Constitution provides:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. *See generally* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (murder conviction reversed because warrant issued by attorney general rather than impartial magistrate); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926) ("The murderer is to go free because the constable has blundered.").

3. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 536-42 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 611-13 (1975) (Powell, J., concurring in part); United States v. Peltier, 422 U.S. 531, 534-35 (1975); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting). The exclusionary rule has often been criticized. *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964); Burns, *Mapp v. Ohio; An All American Mistake*, 19 DEPAUL L. REV. 80 (1969); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720-57 (1970); Wingo, *Giving Dissolutionment With the Exclusionary Rule*, 25 SW. L.J. 573 (1971); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736 (1972). For a general discussion of trends in the exclusionary rule, see Note, *Fourth Amendment in the Balance—the Exclusionary Rule After Stone v. Powell*, 28 BAYLOR L. REV. 611, 611-13 (1976).

4. *See generally* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

good faith.[5] The criticism has continued even as the exclusionary rule was being gradually eroded by court decree.[6]

This note will examine the exclusionary rule and its development. Next, the good faith and serious cases modifications will be discussed. The costs and benefits of each proposed modification will be explored with specific attention to the frequent conflict between legal protection of an accused's fourth amendment rights and the interests of law enforcement personnel in securing criminal convictions. Finally, a new modification which incorporates aspects of each of those set forth above will be proposed.

THE EXCLUSIONARY RATIONALE

The theoretical raionale behind the exclusionary rule from its inception has been a source of confusion and debate. Nevertheless, a determination of the rule's evolving rationale is crucial to an understanding of its proper scope and application. This section will discuss each theory advanced to justify the exclusionary rule.

A. *The Personal Right Theory*

The earliest rationale upon which the exclusionary rule was based may be characterized as the personal right theory. Under this theory, the victim of an illegal search and seizure is entitled to judicial exclusion of illegally seized evidence as a matter of personal right.[7] In *Weeks v. United States*,[8] the United States Supreme Court apparently followed a personal right theory in first adopting a federal rule of exclusion.[9]

The *Weeks* Court determined at the outset that all persons, innocent or guilty, are entitled to resort to the courts to vindicate their fourth amendment rights.[10] The Court next noted that the Constitution is infringed when illegally seized evidence is not returned to the accused.[11] Finally, the Court stated that if evidence obtained illegally may be used against the accused, the guarantees of the fourth amend-

5. *See generally* Hoopes, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915 (1978).

6. See text & notes 56-78 *infra*.

7. *See* J. LANDYNSKI, SEARCHES AND SEIZURES AND THE SUPREME COURT, A STUDY IN CONSTITUTIONAL INTERPRETATION 78, 79 (1966). *See also* Weeks v. United States, 232 U.S. 383, 397-98 (1914).

8. 232 U.S. 383 (1914).

9. *Id.* at 397-98. A United States Marshal, acting without legal authority, gained admission to the defendant's home and seized certain letters which inculpated Weeks in a numbers racket. *Id.* at 387. Weeks asserted that the search violated his constitutional rights and demanded that the letters be returned. *Id.* at 389. The Court suppressed the letters and ordered them returned but did not state that Weeks was personally entitled to them. *Id.* at 392-94.

10. *Id.* at 393.

11. *Id.* at 392.

ment "might as well be stricken from the constitution."[12]

In time, attention was directed away from individual rights as the viability of the *Weeks* premises faded. The *Weeks* rule eventually eroded to the point that an accused had no absolute right to retrieve illegally seized evidence,[13] to seek redress in the courts,[14] or to have illegally seized evidence excluded.[15] Moreover, the exclusionary rule was no longer perceived as a constitutionally mandated remedy but came to be viewed as a mere judicial construct, adopted as a means of effectuating fourth amendment protections.[16] Although the Supreme Court did not expressly disclaim the personal right theory until *Elkins v. United States*,[17] a new justification was required to ensure the continued viability of the exclusionary rule.

B. *The Judicial Integrity Theory*

Some have read the *Weeks* decision not as the Court's creation of an individual right to exclusion but as the Court's refusal to acquiesce in violations of the fourth amendment.[18] The *Weeks* Court alluded to this "judicial integrity" rationale, noting that attempts to seek criminal convictions by unlawful means "should find no sanction in the judgments of the courts" whose supreme duty is to support the Constitution.[19] By excluding illegally obtained evidence, a court avoids legitimizing unconstitutional police conduct.[20] Justice Brandeis, dissenting in *Olmstead v. United States*,[21] insisted that the courts should exclude evidence obtained by the government's "unclean hands" to avoid the "terrible retribution" that would follow if crimes were permitted in order to enforce the law.[22] This rationale for exclusion of illegally seized evidence has been described as the "imperative of judi-

12. *Id.* at 393.

13. *See* Welsh v. United States, 220 F.2d 200, 202 (D.C. Cir. 1975) (money illegally seized in gambling prosecution successfully suppressed by defendant nevertheless retained by court subject to determination of whether defendant owed federal taxes for the undeclared income).

14. See text & notes 56-78 *infra*. Moreover, although a good faith search and seizure subsequently determined illegal would result in application of the exclusionary rule, *see generally* Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the fourth amendment provides no basis for a civil claim in the event that incriminating evidence is not discovered. See text & notes 101-04 *infra*; *see* 42 U.S.C. § 1983 (1976).

15. See text & notes 61-64 *infra*.

16. *See* United States v. Calandra, 414 U.S. 338, 348 (1974).

17. 364 U.S. 206 (1960). "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217.

18. *See* Burger, *supra* note 3, at 5; McKay, *Mapp v. Ohio; The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327, 329, 336 (1973).

19. Weeks v. United States, 232 U.S. 383, 392 (1914).

20. Terry v. Ohio, 392 U.S. 1, 13 (1968); *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1562 (1972).

21. 277 U.S. 438 (1928).

22. *Id.* at 485 (Brandeis, J., dissenting).

cial integrity."[23]

The judicial integrity rationale was not mentioned in *Wolf v. Colorado*,[24] but the Court again alluded to it in *Mapp v. Ohio*.[25] The *Mapp* decision marked a shift in the Court's emphasis, however, from exclusion to protect judicial integrity to exclusion to deter police misconduct.[26] Following *Mapp*, the judicial integrity rationale declined,[27] coinciding with Supreme Court decisions limiting the reach of the exclusionary sanction.[28] Many of these decisions are consistent with another theoretical rationale for the exclusionary rule but repugnant to the judicial integrity rationale because their effect is to allow occasional judicial acquiescence in police misconduct.[29] The Court has, for instance, invoked the standing requirement to restrict a defendant's right to complain that evidence was obtained illegally.[30] The standing requirement distinguishes between the illegal search and the evidence obtained. Accordingly, only those against whom the illegal search was perpetrated who are also incriminated by the illegally obtained evidence have standing to assert the exclusionary rule.[31] Until recently, the standing requirement has allowed courts to avoid exclusion of illegally seized evidence even if the search was conducted in bad faith—thereby acquiescing in the police misconduct.[32]

The viability of the judicial integrity rationale was further diminished by Justice White's *Stone v. Powell* dissent.[33] White argued that because the violation of the defendant's rights has already been com-

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23. Elkins v. United States, 364 U.S. 206, 222 (1960).

24. 338 U.S. 25 (1949).

25. 367 U.S. 643 (1961). By applying the fourth amendment to the states via the fourteenth amendment, *Mapp* extended the *Weeks* rule of exclusion to state prosecutions. *Id.* at 660.

26. *See id.* at 660. By shifting its emphasis to the deterrence rationale, the Court provided a foundation upon which *Wolf* could be overruled and the exclusionary rule made applicable to the states.

27. *See* Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507, 514 (1975). Ironically, *Mapp* itself signaled the decline. Because no deterrent purpose would be served, the decision was not applied retroactively. Linkletter v. Walker, 381 U.S. 618, 636-37 (1964). Court therefore tacitly ratified police violations occurring prior to its decision.

28. *See, e.g.*, cases cited in notes 56-78 *infra*.

29. J. LANDYNSKI, *supra* note 7, at 76-77; Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 249 (1967).

30. *See, e.g.*, Doyle v. Ohio, 426 U.S. 610, 627 (1976); Alderman v. United States, 394 U.S. 165, 174-75 (1969); Massiah v. United States, 377 U.S. 201, 206-07 (1964).

31. Alderman v. United States, 394 U.S. 165, 174-75 (1969) (although the seized evidence inculpated the accused, the search was perpetuated against another, and the accused was denied standing to assert its illegality).

32. *But see* United States v. Salvucci, 448 U.S. 83 (1980), the Supreme Court determined that the standing issue should no longer be argued in fourth amendment litigation. *Id.* at 85. Instead, the Court held that standing is merely an aspect bearing on the existence of a "legitimate expectation of privacy in the invaded place." *Id.* at 91-92 (quoting Rakas v. Illinois, 439 U.S. 128 (1978)). Whether the court was influenced by the potential for judicial acquiescence in an intentional fourth amendment violation through invocation of the standing requirement is a matter for speculation.

33. *See* 428 U.S. 465, 536-542 (1976) (White, J., dissenting).

mitted by law enforcement officials and cannot be cured by exclusion, the use of illegally obtained evidence at trial could not render judges participants in fourth amendment violations.[34] Furthermore, as courts exclude reliable and probative evidence, rendering an accurate determination of truth less likely, the public's conception of judicial integrity may be weakened rather than enhanced.[35] As the judicial integrity rationale declined, however, the deterrence rationale was being raised in its place.

C. *The Deterrence Theory*

The deterrence theory was espoused by *Wolf v. Colorado*[36] and *Mapp v. Ohio*.[37] Under this theory, illegally obtained evidence is excluded from trial to deter police misconduct.[38] The rationale is that potential exclusion of any evidence produced by an unreasonable search will eliminate the incentive to conduct such searches.[39] Moreover, the theory posits that deterrence will be furthered by the educational effect of judicial exclusion.[40] Law enforcement personnel learn that illegal searches and seizures will not produce admissible evidence, and they are therefore encouraged to pay strict attention to fourth amendment rights.[41] The goal of the deterrence rationale is thus to protect the general public from future police misconduct rather than to redress the accused's constitutional rights or to preserve the integrity of the courts.[42]

The Supreme Court first espoused deterence as the *principal* purpose of the exclusionary rule in *Elkins v. United States*[43] and *Mapp v. Ohio*.[44] In *United States v. Calandra*,[45] the Court characterized deterrence as the rule's *sole* purpose.[46] The *Calandra* Court emphasized that the rule was not a constitutional right but rather a mere remedial device, judicially created to protect fourth amendment rights by deterring unreasonable searches and seizures.[47] The judicial integrity rationale was dismissed in a footnote[48] and, according to the dissent, discounted

34. *Id.* at 540.
35. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036 n.53 (1974).
36. 338 U.S. 25, 31 (1949).
37. 367 U.S. 643, 660 (1961).
38. *See* Burger, *supra* note 3, at 5.
39. *See generally* Peltier v. United States, 422 U.S. 351 (1975); United States v. Calandra, 414 U.S. 338 (1974); Elkins v. United States, 364 U.S. 206 (1960).
40. *See* Oaks, *supra* note 3, at 668.
41. *Id.*
42. *See* Elkins v. United States, 364 U.S. 206, 217 (1960).
43. 364 U.S. 206, 217 (1960).
44. 367 U.S. 643, 656 (1961).
45. 414 U.S. 338 (1974).
46. *Id.* at 348.
47. *Id.*
48. *Id.* at 355-56 n.11.

to the point of extinction.[49] After *Calandra*, exclusion can be justified only under the deterrence rationale—absent a deterrent benefit, there is no reason for exclusion.[50]

In applying the exclusionary rule, deterrence is the narrowest of the three rationales. The personal right theory attempts to restore one to the status occupied prior to the constitutional violation.[51] The judicial integrity theory demands exclusion of any evidence illegally obtained because admission of such evidence would involve the court in the alleged police misconduct.[52] Under the deterrence theory, however, relevant evidence must be excluded only when exclusion would provide a positive fourth amendment benefit.[53] Consequently, by focusing on the deterrence rationale, the Court has narrowed application of the exclusionary sanction.[54]

D. *Limitations on the Exclusionary Sanction*

In a series of Supreme Court decisions, the exclusionary rule has been held inapplicable when exclusion would not appreciably advance

49. *Id.* at 360 (Brennan, J., dissenting). The judicial integrity rationale was arguably revived about a year later in *United States v. Peltier*. *See* 422 U.S. 531, 536-37 (1975). Though the *Peltier* Court considered deterrence the primary purpose of exclusion, *id.* at 536, the Court noted that refusing to hold search and seizure decisions retroactive would not offend judicial integrity. *Id.* at 537.

50. United States v. Calandra, 414 U.S. 338, 349-50 (1974).

51. *See* Dodge v. United States, 272 U.S. 530, 532 (1926); Verdungo v. United States, 402 F.2d 599, 616 (9th Cir. 1968) (Browning, J., separate opinion), *cert. denied*, 397 U.S. 925 (1970).

52. *See* Olmstead v. United States, 277 U.S. 438, 485 (1928) (*Butler*, J., dissenting); Weeks v. United States, 232 U.S. 383, 392 (1914).

53. *See* United States v. Calandra, 414 U.S. 338, 349 (1974); Desist v. United States, 394 U.S. 244, 254 n.24 (1969) (Court "declines to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.").

54. Reliance on the deterrence rationale could conceivably result in the complete demise of the exclusionary rule because some courts and commentators consider application of the rule under any circumstances an ineffective deterrent to police misconduct. Dissenting in Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971), Chief Justice Burger stated that "the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective." *Id.* at 415; *see* Irvine v. California, 347 U.S. 128, 135 (1954). The deterrence rationale assumes that police officers knew that a given illegal search and seizure resulted in the exclusion of probative evidence. This assumption may be incorrect. Kaplan, *supra* note 4, at 1032-33.

In some emergency situations, police officers may be unable to accurately interpret complex fourth amendment issues and thus would be unaware of any illegality in their conduct. *See* Glasson v. City of Louisville, 518 F.2d 899, 908 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975) (dictum); Burger, *supra* note 3, at 11. *See also* Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951). Dissenting in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), Chief Justice Burger observed, "Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow." *Id.* at 417. If deterrence is the sole purpose of the exclusionary rule, there is no reason to apply the rule in these cases.

Empirical studies have been unable to confirm or deny the deterrent effect of the exclusionary rule. *See* S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50-56 (1977); Oaks, *supra* note 3, at 678-89, 700-09, 720-34; Spioto, *Search and Seizure, an Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243, 275-78 (1973). *See generally* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 725-26 (1974).

fourth amendment guarantees.[55] This trend arguably began with *Walder v. United States*[56] and *Wong Sun v. United States*.[57] In *Walder*, illegally obtained evidence was held admissible for impeachment purposes.[58] In *Wong Sun*, evidence obtained several days after an illegal search was held admissible because it was obtained by means distinguishable from and not tainted by the fourth amendment violation.[59] Justice Powell explained these decisions years later as attempts by the Court to weigh the benefits of exclusion in protecting fourth amendment rights against the rule's cost to the legitimate demands of law enforcement.[60]

In *Alderman v. United States*,[61] the Court refused to apply the rule to exclude evidence obtained through illegal searches and seizures not perpetrated against the accused.[62] The Court stated that the primary purpose of the rule was deterrence and noted that the social cost of exclusion would outweigh its deterrent benefit under the *Alderman* circumstances.[63] This social cost is manifested in the forfeiture of probative evidence and is present through each incident of exclusion. On the other hand, the deterrence value of exclusion encounters a point of diminishing returns.[64]

Application of the exclusionary rule in *Stone v. Powell*[65] and *United States v. Janis*[66] might have served some deterrent purpose. Nevertheless, the Supreme Court held in both cases that the benefits that might be derived were outweighed by the costs to society of freeing the guilty and ignoring the truth.[67] In *Stone*, the Court disallowed federal habeas corpus review for prisoners who had been convicted in state courts on the basis of tainted evidence but had been given opportuni-

55. See text & notes 56-78 *infra*.
56. 347 U.S. 62 (1954).
57. 371 U.S. 471 (1963).
58. 347 U.S. at 65. In *Walder*, the defendant testified before a grand jury that he had never posessed illegal narcotics. *Id.* at 63. The government thereafter sought to impeach his testimony with evidence obtained through an unconstitutional search and seizure. *Id.* at 64.
59. 371 U.S. at 487-88. Petitioner was lawfully arraigned and released after an illegal arrest. *Id.* at 475, 484. Several days later he voluntarily confessed. *Id.* at 476. The Court noted that evidence gleaned as a result of illegal police action was a "fruit of the poisonous tree" and could not be admitted into evidence. *Id.* at 488. The Court, however, distinguished the fruit of the poisonous tree from evidence which, even though it would not have been acquired but for the illegality, was nevertheless attenuated from, and not proximately the result of, the police illegality. *Id.* at 487-88. Thus, the Court held that defendant's voluntary confession was not a fruit of the police impropriety and could be admitted into evidence. *Id.*
60. Stone v. Powell, 428 U.S. 465, 488 (1976); Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part).
61. 394 U.S. 165 (1969).
62. *Id.* at 174-75; *see* note 31 *supra*.
63. 394 U.S. at 174-75.
64. *See* Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389-90 (1964).
65. 428 U.S. 465, 489 (1976).
66. 428 U.S. 433, 454 (1976).
67. Stone v. Powell, 428 U.S. at 489; United States v. Janis, 428 U.S. at 453-54.

ties to litigate their fourth amendment claims in those state courts.[68] In *Janis*, the Court refused to extend the exclusionary rule to civil proceedings.[69]

In *Linkletter v. Walker*,[70] the Court held that the *Mapp*[71] exclusionary rule should not be applied retroactively since exclusion could not deter illegal conduct that had already occurred.[72] Retroactivity was also denied in *United States v. Peltier*[73] where officers had relied on an existing statute which was subsequently declared unconstitutional.[74] The Court held in *Peltier* that exclusion could not deter conduct reasonably perceived by the officers to be legal at the time.[75]

Finally, the Court took the position in *United States v. Calandra*[76] that the exclusionary rule is applicable only when its application will effectively deter fourth amendment violations.[77] In refusing to apply the rule in the grand jury setting, the Court held that any deterrent value was outweighed by the burden exclusion would impose on the grand jury's investigative function.[78]

E. *Current Status and Possible Trends*

The decisions discussed above have not only held the exclusionary rule inapplicable when its application would serve no deterrent purpose but have also held it inapplicable under circumstances when it had arguable deterrent potential.[79] The deterrence rationale is intended to benefit society by promoting official deference to fourth amendment guarantees,[80] but exclusion offends the competing societal interest in securing justice.[81] The determination of guilt or innocence, of chief concern in a criminal proceeding, is hampered by evidentiary exclu-

68. 428 U.S. at 489.
69. 428 U.S. at 454.
70. 381 U.S. 618 (1964).
71. Mapp v. Ohio, 367 U.S. 643 (1961).
72. Linkletter v. Walker, 381 U.S. at 636-37. *Linkletter* involved a state conviction, prior to the *Mapp* decision, based on illegally obtained evidence. *Id.* at 619-20. The Supreme Court denied habeas corpus relief in holding that the *Mapp* rule was not retroactive. *Id.* at 638-40.
73. 422 U.S. 531 (1975).
74. *Id.* at 534-35.
75. *Id.* at 539 (citing Michigan v. Tucker, 417 U.S. 433, 447 (1974)).
76. 414 U.S. 338 (1974).
77. *Id.* at 348.
78. *Id.* at 349.
79. *See* text & notes 56-78 *supra*. Selective application of the exclusionary rule through the creation of limitations, *id.*, has been criticized as undermining the overall legitimacy of the Court. *See generally* Schrock & Welch, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 117 (1978). Schrock and Welch suggest that the Court has exceeded its legitimate authority in fashioning certain "subconstitutional rules" which serve to admit evidence intentionally seized in violation of the fourth amendment. *See id.* at 118-20.
80. *See* Elkins v. United States, 364 U.S. 206, 217 (1960).
81. *See* Note, *supra* note 3, at 619. Moreover, the rule operates to bar the admission of incriminating evidence only after it has been discovered, thus flaunting the cost of exclusion. *See* Kaplan, note 4 *supra*, at 1037.

sion.[82] Aside from an interest in exacting retribution, society has an interest in convicting persons guilty of criminal conduct to deter future criminal activities and to restrain and rehabilitate the individual involved. These interests are offended when application of the exclusionary rule results in the acquittal of defendants who would have been convicted but for the exclusion.[83]

Unlike evidence gleaned through coerced confessions, evidence derived through violations of the fourth amendment presents no danger of unreliability. First, the element of coercion is not present in a search and seizure violation. The search produces physical evidence not dependent upon any representation by the accused and not solicited by an interrogator. Moreover, the reliability and probative worth of physical evidence is not dependent upon the legality of the search.[84] A coerced confession, however, is an intangible, mental product for which empirical verification is difficult. Furthermore, incriminating evidence adduced through coercion may be the product of the coercion rather than the truth, a danger not present in search and seizure violations.[85] Accordingly, exclusion of evidence gleaned in violation of an accused's right to be free from compulsory self-incrimination is considered a constitutional requirement,[86] while exclusion under the fourth amendment's command against unreasonable searches and seizures is now viewed as a mere judicially created remedial device.[87]

The Supreme Court's view of the exclusionary rule as non-constitutional in origin may lead to its further erosion.[88] The Court has already held that the rule need not be applied to exclude illegally seized evidence not offered directly against the accused at trial, reasoning that the societal costs of exclusion outweigh any possible deterrent benefit.[89]

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82. Stone v. Powell, 428 U.S. 465, 490 & n.27 (1976); United States v. Janis, 428 U.S. 433, 448-49 (1976).

83. *See* Coolidge v. New Hampshire, 403 U.S. 443, 473 (1971) (exclusion of evidence illegally seized from parked car because search warrant not issued by impartial magistrate resulted in reversal of conviction for the "particularly brutal" murder of a 14 year-old girl); Irvine v. California, 347 U.S. 128, 136 (1953) (rejection of evidence will likely result in release of the wrongdoer. "Society is deprived of a remedy against one lawbreaker because he has been pursued by another."). *See generally* Oaks, note 3 *supra*.

84. *See* Stone v. Powell, 428 U.S. 465, 490 (1976); United States v. Janis, 428 U.S. 433, 448-49 (1976).

85. *Compare* Brown v. Mississippi, 297 U.S. 278, 281 (1936) (defendant confessed after being hung from a rope and whipped repeatedly) *with* Coolidge v. New Hampshire, 403 U.S. 443, 445-48 (1971) (detailed in note 83 *supra*).

86. Mapp v. Ohio, 307 U.S. 643, 685 (1961) (Harlan, J., dissenting); *see* Kaplan, *supra* note 4, at 1035.

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

88. *See* United States v. Williams, 622 F.2d 830, 841-42 (5th Cir. 1980). Dissenting in United States v. Calandra, 414 U.S. 338 (1974), Justices Brennan, Douglas and Marshall voiced fears that the fourth amendment exclusionary rule might one day be abandoned altogether. *Id.* at 355. *See also* cases cited in note 3 *supra*.

89. *See* text & notes 56-78 *supra*.

The Court has yet to apply such a balancing test, however, to avoid exclusion of illegally obtained evidence proffered directly at trial solely because it was acquired in good faith.[90]

The following sections will consider the viability of two proposed modifications of the exclusionary rule that would balance the effects of all potential fourth amendment exclusions and test them against principles set forth in decisions limiting the scope of the rule.[91]

THE GOOD FAITH MODIFICATION

The good faith modification purports to apply the exclusionary rule only when the officer knew or reasonably should have known that the search was illegal.[92] This modification rests upon the assumption that the exclusionary rule cannot deter good faith, although technically illegal, searches and seizures.[93] The reasoning is that since the officer had a good faith belief that the search was legal, and the exclusionary rule is designed to deter knowing illegal conduct, application of the rule to good faith searches would not serve deterrence purposes.[94] Exclusion under these circumstances would still extract societal costs by obstructing society's legitimate interests in law enforcement and the determination of truth.[95] Under a balancing test, the societal costs of exclusion again seem to outweigh any deterrent benefit.[96]

The standard of good faith contemplated by the "knew or reasonably should have known" language is beyond the scope of this note, but a brief examination will provide an overview of the good faith determination and the issues in need of clarification.[97] A promising standard

90. *See* United States v. Williams, 622 F.2d at 849 (Rubin, J., concurring) (Criticizing the alternative holding, which adopted a good faith exception to the exclusionary rule, several judges noted that there exists no direct precedent for the exception other than dissents and law review articles.)

91. *See* text & notes 56-78 *supra*. The Court's balancing test, weighing social cost against deterrent value, will also be applied. *See* Stone v. Powell, 428 U.S. 465, 488 (1976); Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part).

92. Wood v. Strickland, 420 U.S. 308, 322 (1975); Hoopes, *supra* note 5, at 930; *see* Procunier v. Navarette, 434 U.S. 555, 562 (1978); Stone v. Powell, 428 U.S. 465, 501-02 (1976) (Burger, C.J., dissenting) (exclusionary rule should be modified to prevent its application where evidence "seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief."). *See also* United States v. Peltier, 422 U.S. 531, 535 (1975); Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388, 424 (1971) (Burger, C.J., dissenting); United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971); text & notes 127-35 *infra*.

93. *See* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting) (exclusion of evidence obtained illegally, but in good faith and on reasonable grounds, cannot deter police misconduct; it may instead deter law enforcement personnel even from proper actions); United States v. Peltier, 422 U.S. 531, 535 (1975); Michigan v. Tucker, 417 U.S. 433, 447 (1974). *See generally* Desist v. United States, 394 U.S. 244 (1969).

94. See cases cited in note 93 *supra*.

95. *See* text & note 82 *supra*.

96. *See* Note, *supra* note 3, at 613-16; text & notes 88-90 *supra*.

97. For an exhaustive study of good faith as a defense in civil actions based on illegal searches and seizures, see Theis, *"Good Faith" as a Defense to Suits for Police Deprivation of Indi-*

for good faith may be derived from decisions in which good faith has operated as a valid defense in civil rights/invasion of privacy actions under section 1983.[98] In *Monroe v. Pape*,[99] the Supreme Court determined that section 1983 provided a tort cause of action.[100] Accordingly, the common law defenses of good faith and probable cause were permitted.[101]

The Supreme Court introduced the good faith defense to section 1983 actions in *Pierson v. Ray*.[102] The *Pierson* Court held that reasonable reliance on a vagrancy statute subsequently ruled unconstitutional would exculpate the defendant officials in a civil action for illegal arrest and detention.[103] The Court conditioned availability of the reliance defense on a reasonable interpretation by the officers of both the statute and the facts giving rise to its application.[104] Read narrowly, the *Pierson* defendants could assert good faith only where a specific statute or warrant authorized the arrest.[105]

In *Wood v. Strickland*,[106] the Court considered further the meaning of good faith in the context of a civil action. In *Wood*, several high school students, expelled for "spiking" the punch at a school dance, contended that they were denied due process and sought damages from the school officials responsible for their expulsion.[107] The defendant school board member was denied good faith immunity because one in his position "knew or should have known" that his actions would violate the constitutional rights of the students.[108] The *Wood* Court indi-

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vidual Rights, 59 MINN. L. REV. 991 (1975). A discussion of the good faith defense to avoid evidentiary exclusion in criminal cases appears in Hoopes, note 5 *supra*.

The good faith modification would apparently require adjudication on a case by case basis. Thus, each determination of good faith would be based on a particular set of facts and might provide little guidance in subsequent cases. Moreover, courts may not question the legality of a given search or seizure once good faith is found. Without a clear standard, the realm of "good faith decisions" could become so inconsistent as to obscure an accurate determination of the reasonableness of a given search and seizure.

98. 42 U.S.C. § 1983 (1976) (state officials, acting under color of law, are liable to those whose constitutional rights they violate). *See generally*, Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1967).

99. 365 U.S. 167 (1961).

100. *Id.* at 187.

101. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 6 (1974).

102. 386 U.S. 547 (1967).

103. *Id.* at 555.

104. *Id.* at 550-51, 557-58.

105. *See* Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring). Theis, *supra* note 97, at 1003.

106. 420 U.S. 308 (1975).

107. *Id.* at 310.

108. *Id.* at 322. In adopting the "knew or should have known language," the Court specifically endorsed the test adopted by the Second Circuit on remand in Bivens v. Six Unknown Federal Narcotics Agents, 456 F.2d 1339, 1348 (2d Cir. 1972). 420 U.S. at 322. The *Bivens II* test has been broadly approved and applied in determining the existence or lack of good faith in civil actions. *See, e.g.*, Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53, 61 (3d Cir. 1976); Burgwin v. Muttson, 522 F.2d 1213, 1214 (9th Cir. 1975); Glasson v. City of Louisville,

cated that a determination of whether the defendant "knew or should have known" contemplates both a subjective and objective analysis.[109]

The subjective test may be appropriate in situations where malicious intent can be shown, but evidence of the defendant's state of mind will rarely be available. Therefore, the majority of cases will turn on the objective reasonableness of the official's conduct, determined in light of all the circumstances.[110] The *Wood* Court noted that the official conduct is per se unreasonable if it violates "settled, indisputable law."[111] Thus, the *Pierson* defendant was clearly acting in good faith when he reasonably relied upon a valid law specifically authorizing his conduct. On the other hand, the defendant in *Wood* was clearly not acting in good faith when his conduct violated a clearly settled right.

In *Procunier v. Navarette*,[112] the Supreme Court explained its determinations of good faith in *Wood*[113] and *Pierson*.[114] In *Procunier*, the plaintiff claimed that prison authorities violated his consitutional right to privacy through "negligent and inadvertent" interference with his mail and knew or should have known that such interference was illegal.[115] The Court held that the prison officials were immune from suit because they had acted in good faith.[116] Because the officials were not relying on a law that authorized their conduct, the Court cited *Wood* as controlling.[117] The good faith defense prevailed because the right al-

518 F.2d 899, 908 (6th Cir. 1975); Brubaker v. King, 505 F.2d 534, 536 (7th Cir. 1974); Anderson v. DeCritofalo, 494 F.2d 321, 323 (2d cir. 1974); Rodriquez v. Jones, 473 F.2d 599, 605 (5th Cir. 1974); Hill v. Rowland, 474 F.2d 1374, 1377 (4th Cir. 1973).

109. 420 U.S. at 321.

110. *See id.* at 318.

111. *Id.* at 321. Officials have been required to know the law pertinent to their responsibility; *e.g.*, Perez v. Rodriquez Bou, 575 F.2d 21, 23 (1st Cir. 1978) (university president held to know that student had right to hearing prior to suspension); Ware v. Heyne, 575 F.2d 593, 595 (7th Cir. 1978) (prison official held to know of prisoner's right to notice of disciplinary hearing); Glasson v. City of Louisville, 518 F.2d 899, 908 (6th Cir. 1975) (police officer held to know that destruction of placard would violate demonstrator's first amendment rights); Palmer v. Hall, 517 F.2d 705, 708-09 (5th Cir. 1975) (officer held to know that use of deadly force was not permitted in stopping commission of a misdemeanor, and mayor held to know that "shoot to kill" order was not a legal exercise of discretion); Zweibon v. Mitchell, 516 F.2d 594, 631 (D.C. Cir. 1975) (Attorney General of United States held to know that a search warrant should be sought whenever practicable); Nesmith v. Alford, 318 F.2d 110, 125 (5th Cir. 1963) (arresting officer held to have knowledge of arrestee's rights to freedom from unlawful arrest, freedom of speech, and freedom of association). *But see* Sullivan v. Meade Indep. School Dist., 530 F.2d 799, 806-07 (8th Cir. 1976) (knowledge not imputed because constitutionality of right of privacy for male and female teachers cohabitating not clearly established); Bertot v. School Dist. No. 1, 522 F.2d 1171, 1184-85 (10th Cir. 1975) (same, because teacher's rights in termination proceeding not clearly established); Poindexter v. Woodson, 510 F.2d 464, 465-66 (10th Cir. 1975) (knowledge not imputed because unconstitutionality of "strip cell" not clearly established); Eslinger v. Thomas, 476 F.2d 225, 229 (4th Cir. 1973) (state senate clerk's ignorance of women's right to equal employment considered justified). *See also* Hoopes, *supra* note 5, at 944-46.

112. 434 U.S. 555 (1978).

113. Wood v. Strickland, 420 U.S. 308 (1975).

114. Pierson v. Ray, 386 U.S. 547 (1967).

115. 434 U.S. at 557-58.

116. *Id.* at 562-63.

117. *Id.*

legedly infringed had not been clearly established and the officials neither knew nor should have known that opening the plaintiff's mail violated his right to privacy.[118] In *Procunier*, as in *Wood*, the Court made its determination in negative terms by describing actions it considered to be in bad faith rather than by specifying what affirmatively constitutes good faith conduct.[119]

Nevertheless, the Court provided some guidelines for future determinations by breaking its good faith determination into component parts.[120] The Court indicated that a "clearly established right" can be identified by referring to legal authorities that have declared unconstitutional particular courses of official conduct.[121] The Court stated that this determination is a question of law.[122] The *Procunier* Court dealt with the "knew or should have known" prong of the good faith test by stating that officials should be deemed to know of individuals' constitutional rights when their position requires that they confront issues giving rise to such rights.[123] The test is whether a reasonable person in the same position would know that such rights are legally protected,[124] a question of fact.[125] Viewed in this manner, the good faith defense appears to be broad, indeed.[126]

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118. *Id.* at 562. Had the officials acted with malicious intent to cause injury, the good faith defense would have been unavailable to them even if their conduct was in fact constitutional. *Id.* at 572. Likewise, a good faith defense may even be unavailable to officers who have acted in reliance upon a valid statute if they should have anticipated the constitutional development rendering the statute invalid. *See* Miller v. Stinnet, 657 F.2d 910 (10th Cir. 1958); Flemming v. South Cardina Elec. & Gas Co., 239 F.2d 277 (4th Cir. 1956). *But see* Boca Raton v. Coughlin, 299 So. 2d 105 (Fla. Dist. Ct. App. 1974).

119. *See* Procunier v. Navarette, 434 U.S. at 562. The Court noted that it would consider as in bad faith an official action that violates a clearly established right. *See id.* at 565.

120. *See id.*

121. *See id.* at 564 n.11.

122. *Id.*

123. *Id.*

124. *See id.* at 562.

125. *See* Nesmith v. Alfred, 318 F.2d 110, 122-23 (5th Cir. 1963); RESTATEMENT (SECOND) OF TORTS § 121, Comment i (1965).

126. *Procunier* has not made it clear whether the burden of proving good faith or not in § 1983 actions lies with the defendant as an affirmative defense or with the plaintiff as an element of the cause of action. The allocation of the burden will arguably affect the availability of the good faith defense. The burden of proof issue was not resolved in Wood v. Strickland, 420 U.S. 308 (1975), and remains open because the lower courts have allocated it inconsistently. *Compare* Landman v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978), *and* Pritchard v. Perry, 508 F.2d 423, 426 (4th Cir. 1975) (affirmative defense; majority position), *with* Stadium Films, Inc. v. Baillargon, 542 F.2d 577, 579 (1st Cir. 1977) *and* Gaffrey v. Silk, 488 F.2d 1248, 1250 (1st Cir. 1973) (plaintiff must prove lack of good faith for § 1983 claim). In Williams v. United States, 622 F.2d 830 (5th Cir. 1980), a good faith modification was adopted in the criminal context, see text & notes 127-35 *infra*, but the court was not confronted with and did not address the burden of proof issue. 622 F.2d at 847.

In support of a motion to suppress evidence, a criminal defendant has the initial burden of alleging specific facts sufficient to make a given search and seizure *prima facie* unconstitutional. Once the defendant has met this threshold showing, the burden shifts to the prosecution to prove that the challenged search and seizure was indeed legal. *See generally* Rogers v. United States, 330 F.2d 535 (5th Cir.), *cert. denied*, 379 U.S. 916 (1974); United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959). A good faith modification

A similarly broad good faith modification to the exclusionary rule was recently adopted by the Fifth Circuit in *United States v. Williams*.[127] The *Williams* court held that the proponent of proffered evidence may avoid exclusion regardless of the illegality of a given search and seizure by demonstrating a reasonable good faith belief that it was proper.[128] In adopting the rule in a criminal context as a means of avoiding suppression of evidence rather than tort liability, *Williams* applied "good faith" standards similar to those which evolved in § 1983 good faith defense litigation. The court utilized all but the precise language of the "knew or should have known" test.[129] Instead of "clearly established right," the court created a "controlling precedent" standard.[130] Instead of subjective and objective good faith prongs, the court queried whether the assertion of good faith was bona fide and reasonable.[131] Moreover, the court seemed to distinguish between conduct that was apparently authorized, as in *Pierson*, and conduct that was not apparently prohibited, as in *Wood*.[132] It classified the former as the "technical violation facet"[133] and the latter as the "good faith mistake facet."[134] In both situations, presumably, the ultimate inquiry is whether the officer knew or should have known that his or her conduct violated a settled right.[135]

Accordingly, much of the reasoning espoused in the § 1983 actions should be applicable in the criminal context. Police officers should be presumed to know all search and seizure law since this body of law provides the express parameters of their investigative function.[136] The fourth amendment arguably grants a clearly established right to be free from unreasonable searches and seizures.[137] Thus, a determination of good faith in a particular case should turn upon whether the officer knew or should have known the search or seizure was unreasonable.[138]

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of the exlusionary rule should result in a similar allocation of the burden of proof, except that the prosecution could also gain admissibility of the evidence by establishing the search, though illegal was conducted in good faith. *See* United States v. De la Fuenta, 548 F.2d 528, 533-34 (1977); Hoopes, *supra* note 5, at 944. *See generally* Franks v. Delaware, 438 U.S. 154, 171 (1978).

127. 622 F.2d 830 (5th Cir. 1980).

128. *Id.* at 846-47.

129. *Id.* at 843.

130. *Id.*

131. *Id.*

132. *See* text & notes 97-111 *supra*.

133. 622 F.2d at 846.

134. *Id.* at 844-46.

135. See note 138 *infra*.

136. *See* text & note 123 *supra*.

137. *See* text & note 121 *supra*.

138. *See* Imbler v. Pachtman, 424 U.S. 409, 419 nn. 13-14 (considering the factual situation confronting the official, his status, and the right involved, the official should have known his conduct would violate the defendant's rights). Good faith will be more easily established when the officer has relied on subsequently invalidated authority, characterized by the court in Williams v. United States, 622 F.2d 830, 841 (5th Cir. 1980), as "technical violations," than when the officer is

An unreasonable search is one conducted without a warrant or valid exception to the warrant requirement.[139] Consequently, a search may be conducted in good faith only if an objectively reasonable interpretation of the law at the time of the search authorizes the officer's conduct.[140]

Despite its apparent logic, the proposed good faith modification has been criticized as placing a premium on ignorance. The critics assert that by knowing less about constitutional rights, public officials can more frequently justify their actions as taken in good faith.[141] This objection, directed at the subjective prong of the good faith test, may be overcome by holding officers to an objectively reasonable knowledge of the law.[142] By knowing and applying constitutional principles in their investigative work, officers can more reasonably judge what conduct is legal.[143] Under the good faith modification, searches and seizures conducted in subjective good faith pursuant to objectively reasonable interpretations of existing law will always produce admissible evidence.[144] Consequently, the good faith modification would reward police officers who comply with existing law by assuring the admission of evidence seized pursuant thereto. In contrast, current law sometimes dictates exclusion of evidence obtained in reliance on custom and law valid at the time of the search[145] or permits the admission of evidence intentionally obtained illegally.[146]

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mistaken as to a crucial fact or where there is an absence of clearly settled authority. *Compare Pierson*, note 102 *supra*, *with Wood* note 111 *supra*.

139. Jones v. United States, 357 U.S. 493, 498-99 (1958). Proper exceptions include searches with consent, Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973), a limited class of routine searches, such as searches conducted at international borders or in airports for security purposes, *see* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366, 452 nn. (1974), and searches of vehicles which may easily be removed from the jurisdiction before a warrant can be obtained. *See* United States v. Chadwick, 433 U.S. 1, 12 (1977); Chambers v. Maroney, 399 U.S. 42, 52 (1970); Carrol v. United States, 267 U.S. 132, 149 (1925). Finally, warrantless searches conducted in some emergency situations have been judicially approved. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (warrantless entry proper when in hot pursuit of suspect); Ker v. California, 374 U.S. 23, 47 (1963) (imminent threat of bodily harm, escape of suspect, or destruction of evidence may validate otherwise illegal entry). *See also* Note, *Murder Scene Warrantless Searches: A Proposal*, 21 ARIZ. L. REV. 777, 780 & nn. 20-24 (1980).

140. United States v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980); *see* Wood v. Strickland, 420 U.S. 308, 318 (1975) (objective reasonableness of officers' conduct to be determined in "light of all the circumstances"); Scheur v. Rhodes, 416 U.S. 232, 247-48 (1974) (objective determination of reasonableness for existing circumstances); United States v. Rabinowitz, 339 U.S. 56, 63 (1950) (reasonableness of search "must find resolution in the facts and circumstances of each case").

141. *See* Theis, *supra* note 97, at 1003. *See also* Note, *Accountability for Government Misconduct: The Good Faith Defense*, 49 TEMP. L.Q. 938, 946-63 (1976).

142. United States v. Williams, 622 F.2d 830, 848 (1980). *See* text & notes 109-10 *supra*.

143. *But see* United States v. Williams, 622 F.2d 830, 851 n.4 (5th Cir. 1980) (Rubin, J., specially concurring).

144. *See* text & notes 136-40 *supra*.

145. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (search held illegal although conducted in reliance on statute).

146. *See* Alderman v. United States, 394 U.S. 165, 174-75 (1969) (illegally obtained evidence admitted because search not perpetrated against accused). *See also* J. LANDYNASKI, *supra* note 7, at 76-77; Comment, *supra* note 29, at 349; text & notes 56-78 *supra*.

Critics of the proposed good faith modification have also argued that it may freeze fourth amendment development by permitting the admission of evidence obtained in a search which, although technically illegal, was conducted pursuant to statute, pursuant to a warrant valid on its face, or authorized by settled law.[147] Criminal defendants will be unable to get evidence excluded even if they demonstrate that the current law which authorized the challenged search should be overruled or that the warrant contained latent defects; exclusion will result only if good faith cannot be found. The accused, moreover, can successfully raise lack of good faith as an issue only if it is alleged that the officer should have known the action undertaken would violate the accused's clearly established rights.[148] The proposed modification might ultimately discourage or eliminate litigation of fourth amendment issues when no authority clearly proscribes the allegedly unconstitutional conduct.[149] By limiting exclusion, the proposed good faith modification might increase criminal convictions but could deter constitutional challenges of legislative acts and search warrants, thus restricting future fourth amendment development. The uncertain impacts of the good faith modification upon fourth amendment rights weigh heavily against any benefits to be derived from its application. Another proposed modification may, however, avoid these difficulties.

THE SERIOUS CASES MODIFICATION

Professor Kaplan proposes that the exclusionary rule be deemed inapplicable in prosecutions for serious crimes which are exclusively: armed robbery; kidnapping; murder; treason; and espionage.[150] This proposed serious cases modification relies upon the same kind of balancing employed by the Supreme Court in limiting the scope of the exclusionary rule and rests on the assumption that the cost of excluding reliable evidence in prosecutions for serious crimes outweighs any benefit to fourth amendment guarantees.[151] Under the proposal, however,

147. *See* United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting). While listing defects in the *Peltier* decision, Justice Brennan observed:

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

Id. at 554. *But see* Hoopes, *supra* note 5, at 942 (the judge would determine the legality of a given search first, and only then consider the good faith issue).

148. *See* Wood v. Strickland, 420 U.S. 308, 321 (1975). Moreover, "clearly established rights" are few and far between. *Id.*

149. See note 147 *supra*.

150. Kaplan, *supra* note 4, at 1046.

151. *Id.* at 1036-37, 1046. The modification is premised on the view that society is better served by the conviction of offenders in serious cases, to prevent recurrence, than by whatever deterrence value is gleaned by exclusion in such cases.

evidence seized through impermissible means in connection with serious crimes will still be excluded if the search or seizure was so unreasonable as to be unconscionable.[152] The modification would thus permit exclusion of evidence to deter egregious police misconduct.

Rochin v. California[153] provides an example of unconscionable police misconduct that would justify full application of the exclusionary rule even if a serious crime had been at issue. In *Rochin*, police illegally entered the defendant's bedroom and caused him to expel the contents of his stomach so they could recover narcotics he had swallowed.[154] The Supreme Court declared that such a search "shocks the [public] conscience."[155]

In prosecutions for other than serious crimes, the exclusionary rule would be retained for any illegal search and seizure.[156] The identified serious crimes have as a common element implicit danger to human life.[157] The societal need to secure convictions for less serious crimes is not as compelling because the danger to human life is not as great. Kaplan argues that the deterrent benefits derived from exclusion of illegally seized evidence exceed society's interest in the prosecution of these less serious crimes.[158] Moreover, many less serious crimes may be properly characterized as consensual in that all parties involved are willing participants in a proscribed activity.[159] Such consensual crimes also lack complainants and police must employ intrusive investigative techniques just to discover if the crime has been committed.[160] Not surprisingly, therefore, the vast majority of illegal searches and seizures occur in the consensual crime context, thus requiring greater attention to deterrence.[161]

The serious cases modification essentially posits that the applicability of the exclusionary rule in a given case depends in part upon the crime under investigation. There is some authority for such a distinc-

152. *Id.* at 1046-47. Theoretically, society would prefer that even a serious offender remain free in order to avoid "unconscionable" searches or seizures.

153. 342 U.S. 165 (1952).

154. *Id.* at 172.

155. *Id.*

156. Kaplan, *supra* note 4, at 1048.

157. See text & note 150 *supra*.

158. Kaplan, *supra* note 4, at 1047, 1049.

159. Consensual crimes, often described as "victimless crimes," might include: illegal gambling; traffic in illegal or controlled drugs; prostitution; the sale of pornography; liquor law violations; and other crimes too numerous to list here.

160. *See* N. MORRIS & G. HAUHNS, THE HONEST POLITICAN'S GUIDE TO CRIME CONTROL 3-4 (1970). Interestingly enough, both Weeks v. United States, 232 U.S. 383 (1914) (lottery tickets), and Mapp v. Ohio, 367 U.S. 643 (1961) (obscene materials), were prosecutions for nonvictim crimes.

161. Kaplan, *supra* note 4, at 1049.

tion.[162] For example, in *People v. Sirhan*,[163] the California Supreme Court affirmed Sirhan's murder conviction, holding that the gravity of the offense was sufficient to authorize the warrantless search of the defendant's bedroom the morning after the murder of Robert F. Kennedy.[164] Furthermore, many limitations to the exclusionary rule were first applied during serious crimes prosecutions.[165] In determining that the societal need for justice outweighed the deterrent value of exclusion in those circumstances, the courts may have tacitly considered the seriousness of the crimes at issue. The rule's limitations, however, are now law and must be applied equally in all prosecutions. The limitations are arguably detrimental to fourth amendment values when they are applied to avoid evidentiary exclusion in prosecutions for less serious crimes where society's interest in securing criminal justice is outweighed by whatever deterrent value exclusion may serve.[166]

If a serious/non-serious distinction was actually employed to permit the admission of illegally seized evidence in serious cases, there would be little need to retain many of the limitations on the application of the exclusionary rule. Initially, it should be apparent that the limitations would serve no purpose in serious crimes prosecutions. The limitations would still be applied, however, to avoid exclusion in the prosecution of less serious crimes, the balance theory, which avoids exclusion where society's interest in criminal justice exceeds its interest in deterring police misconduct, could have reverse application. The limitations could thrive only if the need to attain convictions in the consensual crimes context outweighed the diminution in deterrence of police misconduct occasioned by the admission of illegally obtained evidence through judicially evolved principles such as standing, doctrines such as inevitable discovery, and the various rules that allow admission

162. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting); McDonald v. United States, 335 U.S. 451, 459 (1948) (Jackson, J., concurring). *But see* Brewer v. Williams, 430 U.S. 387, 408 (1977) (Marshall, J., concurring) ("The heinous nature of the crime is no excuse, as the dissenters would have it, for condoning knowing and intentional police transgression of the constitutional rights of a defendant."). *Cf.* Scheuer v. Rhodes, 416 U.S. 232, 246 (1974) (Governor ordered military personnel to site of student antiwar demonstration; Court held such action would have been proper only in event of serious civil disorder).

163. 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 395 (1971), *cert. denied*, 410 U.S. 947 (1972).

164. *Id.* at 739, 497 P.2d at 1140, 102 Cal. Rptr. at 404.

165. *See generally* Stone v. Powell, 428 U.S. 465 (1976) (murder prosecution, held: habeas corpus review of state search and seizure decisions no longer available); Alderman v. United States, 394 U.S. 165 (1969) (standing requirement created in prosecution for murderous threats); Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963) (inevitable discovery doctrine adopted in murder prosecution). Obviously, however, some of the rule's limitations were first applied in prosecutions for lesser crimes. *See* United States v. Peltier, 422 U.S. 531 (1975) (search and seizure decisions held non-retroactive in marijuana prosecution); United States v. Calandra, 414 U.S. 338 (1974) (illegally obtained evidence held admissible before grand jury in loan sharking prosecution); Wong Sun v. United States, 371 U.S. 471 (1963) ("fruit of the poisonous tree" doctrine first applied in prosecution for possession and sale of heroin); Walder v. United States, 347 U.S. 62 (1954) (illegally obtained evidence admissible for impeachment purposes in heroin prosecution).

166. See note 79 *supra*.

of tainted evidence in grand jury proceedings or for impeachment purposes and deny federal habeas corpus review of state search and seizure decisions. Presumably, the balance would tip against many of the limitations[167] and fourth amendment protection would be enhanced.

The serious cases modifications would also protect fourth amendment values by reducing pressure on the judiciary to fashion questionable theories to avoid exclusion in serious cases.[168] Hard cases would no longer need to make bad law. For example, in *Abel v. United States*,[169] the Supreme Court affirmed the conviction of a Russian spy after refusing to hold that evidence seized in a warrantless search of his hotel room should have been excluded.[170] The Court reasoned that the search was legal because the defendant had abandoned the room by being arrested.[171] Under the serious crimes modification, the evidence seized in the search of Abel's room would have been admitted but without the questionable abandonment rationale. Decisions like *Abel* may be popular in their own context because of their ultimate results, but the precedents set by such decisions serve generally to reduce fourth amendment protections.[172]

The exclusionary rule may, on the other hand, sometimes cause fourth amendment protections to be unreasonably expanded. Lower courts, anxious to avoid exclusion of evidence in serious crimes prosecutions, may endorse doubtful findings of fact during a suppression hearing.[173] Appellate courts, unable to make new factual findings may exclude the evidence in such cases by announcing new constitutional principles.[174] The new principles, however, will be only in response to particular situations, not fair and accurate constitutional interpretations in a general context. By removing any impetus to interpret the

167. Arguably, the balance has already tipped against the standing requirement, even in the absence of a modification to the exclusionary rule. *See* note 32 *supra*.

168. Kaplan, *supra* note 4, at 1036. *See also* People v. Sirhan, 7 Cal. 3d 710, 492 P.2d 1121, 102 Cal. Rptr. 385 (1971), *cert. denied*, 410 U.S. 947 (1972).

169. 362 U.S. 217 (1960).

170. *Id.* at 222-25.

171. *Id.*

172. Kaplan, *supra* note 4, at 1047. Kaplan argues that fourth amendment rights are diminished because the precedents set by such decisions apply equally to serious and nonserious crimes: "Increases in the range of the exclusionary rule sanction tend to cause the contraction of substantive rights protected." *Id.* Moreover, Kaplan posits that judges reviewing nonserious crime convictions would construe the fourth amendment more liberally if the resulting rule would be inapplicable to serious crime prosecutions. *Id.* Following *Mapp*, the Supreme Court has arguably refused to expand and may, indeed, have reduced the scope of the fourth amendment. *See* Terry v. Ohio, 392 U.S. 1 (1968) (warrant and probable cause requirements reduced for stop-and-frisk); Camara v. Municipal Court, 387 U.S. 523 (1967) (aggregate probable cause requirement for administrative inspections for housing code violations); text & notes 50-78 *supra*. The Court has arguably become more passive in regard to illegal police behavior. *See generally* United States v. Robinson, 414 U.S. 218 (1973); Ker v. California, 374 U.S. 23, 44 (1964) (Harlan, J., concurring). *But see* Arkansas v. Sanders, 442 U.S. 753, 762-63 (1979) (police must obtain warrant to search suitcase taken from an automobile after highway stop even though probable cause indicated).

173. Kaplan, *supra* note 4, at 1036-37; *see* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 803-10 (1970).

174. *See* Amsterdam, *supra* note 173, at 803-10.

constitution to produce a specific result, the serious cases modification would promote better fourth amendment jurisprudence.

The serious cases modification does sacrifice some fourth amendment protection. The exclusionary rule would be inapplicable in serious crimes prosecutions unless the search or seizure violation was so egregious as to shock the public conscience.[175] Fourth amendment violations would not be tolerated in the investigation of less serious crimes but would be tolerated in investigations of serious crimes. Officers investigating serious crimes would have no constitutional limits other than conscionability placed on their searches and seizures.[176] Some illegal police conduct would not, therefore, be discouraged. It is difficult to determine, however, whether the proposed modification would shield a greater or lesser number of fourth amendment infringements from the reach of the exclusionary rule than are currently shielded by the various limitations on its application. Both current application of the exclusionary rule in conjunction with its limitations and the proposed serious cases modification allow evidence to be admitted even though intentionally seized in violation of the law. A new modification, proposed below, would admit illegally seized evidence in serious cases only if the officer had an actual and reasonable belief that the search and seizure was legal.

THE GOOD FAITH IN SERIOUS CASES MODIFICATION

A combination of the good faith modification with Kaplan's serious cases modification would more adequately protect against unreasonable searches and seizures than independent application of either modification or application of the exclusionary rule as it currently exists. Furthermore, the public's interest in bringing criminals to justice would not be unduly sacrificed under this hybrid modification.

Arguably, the societal interest in criminal justice increases with the severity of the crime.[177] Kaplan assumes that at some point this societal interest must outweigh the benefits to be derived from exlusion.[178] Since exclusion has little deterrent value when the search or seizure was conducted in good faith,[179] the societal interest in trials unfettered by evidentiary exclusion will almost always prevail if a balancing test is applied to good faith searches in serious crime cases. Some benefits do,

175. Kaplan, *supra* note 4, at 1046.
176. *See id.*
177. See text & notes 56-78 *supra*. The common element in Kaplan's "serious" crimes—armed robbery, kidnapping, murder, treason, and espionage, *see* Kaplan, *supra* note 4, at 1046—is injury or threat of injury to persons or government. Thus, any crime that poses an immediate danger to persons should be considered serious.
178. Kaplan, *supra* note 4, at 1036-37, 1046.
179. See note 93 *supra*.

however, accrue from exclusion even when a given search or seizure was conducted in good faith. For example, exclusion under such circumstances may give defendants an incentive to raise new fourth amendment issues they might otherwise forego.[180]

All these benefits may be attained if the exclusionary rule is deemed inapplicable to good faith searches and seizures only in serious cases. In such cases, the societal costs of exclusion surely outweigh the fourth amendment benefits to be derived. Moreover, the rapidity with which the Supreme Court has avoided the exclusionary sanction in cases where exclusion would have little deterrent value[181] is an indication that the crime at issue need not be as serious, in the good faith context, as Kaplan would require.

The proposed hybrid modification would apply the good faith rule to make evidence admissible in prosecutions for crimes that pose a substantial threat to people despite the fact that the evidence was illegally seized.[182] Illegally seized evidence would continue to be excluded in prosecutions for lesser crimes even if the search or seizure was conducted in good faith. Since most fourth amendment violations occur during investigation of consensual crimes,[183] the hybrid modification would virtually assure continued development of the exclusionary rule since defendants would have an incentive to raise claims about even technical violations. Furthermore, exclusion of evidence seized in good

180. See text & notes 147-48 *supra*.

181. See text & notes 56-78 *supra*.

182. Other proposed modifications which may or may not be integrated with the good faith in serious cases modification include: 1) A statute proposed by Chief Justice Burger in his *Bivens* dissent which would provide a civil remedy for search and seizure violations in lieu of and without an option for exclusion, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 422-23 (1971); and 2) a provision in the Model Code of Prearraignment Procedure which would require exclusion only if the search and seizure violation was substantial. MODEL CODE OF PREARRAIGNMENT PROCEDURE § 55290.2 (proposed official draft, 1975). A fourth amendment violation would be deemed substantial if it was gross, wilful, and prejudicial to the accused. 403 U.S. at 424-26. A violation that did not meet the conditions set forth above could nonetheless be deemed substantial after consideration of all the relevant circumstances. *Id.* Circumstances to be considered include:

(a) the importance of the particular interest violated;
(b) the extent to which the search deviated from one lawfully conducted;
(c) the extent to which the violation was wilful;
(d) the extent to which the search invaded the privacy of the accused;
(e) the extent to which exclusion would tend to deter future violations of the Code;
(f) whether, but for the violation, the things seized would have been discovered; and
(g) 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.

Id.

Even if the proposed modification is adopted, the balancing test employed by the Supreme Court, see text & notes 83-91 *supra*, could be used to avoid exclusion in extremely serious cases where the illegal search or seizure was not conducted in good faith, but the official violation is nonetheless deemed insubstantial after judicial consideration of the circumstances set forth above. *See generally*, Abel v. United States, 362 U.S. 217 (1960); People v. Sirhan, 7 Cal. 3d 710, 492 P.2d 1121, 102 Cal. Rptr. 385 (1971), *cert. denied*, 410 U.S. 947 (1972).

183. Kaplan, *supra* note 4, at 1049.

faith in a prosecution for a lesser crime will have some precedential effect. Officers will be hard pressed to assert good faith in subsequent prosecutions—even for serious crimes—once a particular type or course of search or seizure has been condemned by a court and its fruits have been excluded. The proposed modification would thus motivate police to keep abreast of trends and developments in search and seizure law.[184] There is no similar incentive under current interpretations of the exclusionary rule since evidence may be excluded in any case regardless of the fact that the search which uncovered it was conducted in good faith by officers who reasonably relied upon existing law.[185]

The good-faith-in-serious-cases modification has two further advantages. First, this modification would forestall a less desirable change, such as judicial adoption of either the good faith or serious crimes modifications independently, or the complete demise of the exclusionary rule.[186] Second, the good-faith-in-serious-cases modification might limit the tendency of courts to create exclusionary rule limitations piecemeal. Professor Kaplan argues that serious crimes beget pressures to avoid exclusion.[187] These pressures arguably lead courts to fashion limitations which, when applied in subsequent cases, may permit the admission even of evidence intentionally seized illegally.[188] Fourth amendment protections would be served by eliminating limitations that prevent the exclusion of evidence derived from intentional search and seizure abuses.[189] The good-faith-in-serious-cases modification would deter judicial adoption of new theories to avoid the exclusionary rule on an *ad hoc* basis by providing a predictable alternative means for avoiding exclusion. If a given search is conducted in good faith and the crime is serious, the evidence will be admissible; a court need not resort to an exclusionary rule limitation or create a new one. Judicial application of the rule in less serious cases where a criminal defendant would arguably have been convicted but

184. An officer will only find the fruits of his search admissible in even a serious crime prosecution if he can satisfy the good faith test—objectively reasonable reliance upon existing law. See text & notes 137-40 *supra*.

185. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

186. Dissenting in *United States v. Calandra*, 414 U.S. 338 (1974), Justice Brennan, joined by Justices Douglas and Marshall, expressed alarm that the Court was positioned to "abandon altogether the exclusionary rule in search and seizure cases." *Id.* at 365. Indeed, four members of the court have expressed their preference for some major modification of the rule. United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980); *see* Stone v. Powell, 428 U.S. 465, 485-89, 576-42 (1976) (Powell, White, JJ., dissenting); Peltier v. United States, 422 U.S. 531, 537-38, 542 n. 12 & 13 (1976); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 424 (1971) (Burger, C.J., dissenting).

187. See note 165 *supra*.

188. See note 79 *supra*.

189. Some deterrent benefit attaches even in cases where limitations apply. See note 79 *supra*. Moreover, the balancing procedure employed by the Court in fashioning limitations, see text and notes 56-78 *supra*, necessarily admits of some deterrent benefit.

for the exclusion of otherwise reliable evidence is neither as offensive nor as dangerous to society.

Courts applying the proposed modification would protect fourth amendment guarantees by recognizing a distinction between an illegal search conducted in good faith and one which was not. Judicial exclusion, which can already do little to deter a good faith search, would still operate to deter those conducted in bad faith. Furthermore, by limiting the good faith exclusionary rule exception to serious cases, adoption of the new modification would assure continued development of fourth amendment protections while avoiding exclusion where society has the greatest interest in securing criminal justice. A proper vehicle for judicial adoption of the hybrid modification must include a concededly good faith search or seizure in a serious crime prosecution, but such a case has not yet come before the court.

CONCLUSION

The exclusionary rule proclaims a warranted dedication to fourth amendment guarantees but occasionally offends the important societal interest in obtaining criminal justice. The rule should not be applied beyond its theoretical justifications because no benefit to fourth amendment protections results and substantial societal costs are incurred. Society's interest can, however, be met without reducing fourth amendment guarantees if the exclusionary rule is deemed inapplicable in the prosecution of serious crimes when the illegal search that produced the evidence which the accused seeks to exclude was conducted in good faith. The modification proposed herein may have desirable side effects. It may strengthen the fourth amendment and it may increase the impetus for law enforcement officials to follow the law to the greatest extent of their capability. Eventually, the proposed modification could result in the erosion of some of the various limitations which allow evidence to be introduced at trial even though it was intentionally seized illegally.

The hybrid modification proposed here would, if adopted, avoid the drawbacks inherent in other proposed modifications by retaining the exclusionary rule for all but good faith searches and seizures in serious cases. Most importantly, the good-faith-in-serious-cases modification would not impair the future development of fourth amendment law. Finally, the proposal would not reduce, but would in fact strengthen, the capacity of the exclusionary rule to deter police misconduct and breed judicial integrity.