NOTES

The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects

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INTRODUCTION

Never a model of clarity in theory or practice, the exclusionary rule of the fourth amendment[1] has recently been the subject of substantial criticism.[2] More significant is the increasingly manifest move by the United States Supreme Court toward modification of the exclusionary rule.[3] This Note will focus on a suggested standard that would

1. The fourth amendment to the 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.

U.S. CONST. amend. IV.

2. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting); Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Burger, C.J., concurring in part and dissenting in part); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720-57 (1970). For a general discussion of trends in the exclusionary rule, see Note, *Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507, 507-19 (1975); Comment, *Fourth Amendment in the Balance—the Exclusionary Rule After Stone v. Powell*, 28 BAYLOR L. REV. 611, 611-31 (1976); Note, *Requiem for the Exclusionary Rule: Eulogy by the District of Columbia Circuit—United States v. Peltier; United States v. Bradshaw*, 19 HOW. L.J. 159, 160-75 (1976); Note, *Historical and Philosophical Foundations of the Exclusionary Rule*, 12 TULSA L.J. 323, 328-35 (1976); Note, *Exclusionary Rule Under Attack*, 4 U. BALT. L. REV. 89, 89-122 (1974).

3. Those justices having articulated forms of modification are Justice Rehnquist in United

exclude only evidence seized as a result of police conduct not in good faith. Through a comparative analysis with 42 U.S.C. § 1983,[4] some recognizable form will be given to the changes proposed, isolating and identifying some probable effects of modification.

Lacking even an implicit reference to enforcement, the fourth amendment stood for nearly a century before the exclusion of evidence resulting from an unreasonable search and seizure was first suggested,[5] and later adopted,[6] as a means of enforcement. Although academic discussion of possible alternative methods for enforcement of the fourth amendment has been prolific,[7] significant judicial modification of the rule has been nonexistent.[8]

States v. Peltier, 422 U.S. 531, 541-42 (1975), and Justice White in Stone v. Powell, 428 U.S. 465, 538-42 (1976) (White, J., dissenting). *See also* S. SCHLESINGER, EXCLUSIONARY INJUSTICE 71-93 (1977); Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 15-23 (1963); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1041-55 (1974); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 742-45 (1972).

4. 42 U.S.C. § 1983 (1976) provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. *See* Boyd v. United States, 116 U.S. 616, 618 (1886).

6. *See* Mapp v. Ohio, 367 U.S. 643, 656-57 (1916) (exclusionary rule applied to the states); Weeks v. United States, 232 U.S. 383, 398 (1914).

7. *See, e.g.*, R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947); Batey, *Deterring Fourth Amendment Violations Through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245, 248-72 (1976); Boker & Carrigan, *Making the Constable Culpable: A Proposal to Improve the Exclusionary Rule*, 27 HASTINGS L.J. 1291, 1298-1303 (1976); Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1, 4-10, 27-51 (1975); Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621, 622-32 (1955); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514-15 (1955); Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L.C. & P.S. 198, 205-14 (1977); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1011-12 (1965); Levin, *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 74, 75-80 (1974); Miles, *The Ailing Fourth Amendment: A Suggested Cure*, 63 A.B.A.J. 365, 371 (1977); Monaghan, *The Supreme Court, 1974 Term-Forward: Constitutional Law*, 89 HARV. L. REV. 1, 61 (1975); *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L.C. & P.S. 373, 380-84 (1974); Note, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453, 1459-71 (1973); Note, *Use of § 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards*, 5 HARV. C.R.-C.L.L. REV. 104, 110-17 (1970). *See generally* Newman, *Suing the Lawmakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcer's Misconduct*, 87 YALE L.J. 447 (1978), on the inadequacy of the various alternatives most commonly cited. The author, Jon Newman, a United Stated District Judge for the District of Connecticut, though favoring civil sanctions, *see id.* at 466, suggests that the possibility of criminal sanction against the offending officer will never provide an adequate alternative because

> prosecutors who need to maintain close working relationships with law enforcement agencies, are disinclined to charge police officials with criminal conduct. Moreover, the criminal case requires not only evidence that a constitutional right was denied, but proof beyond a reasonable doubt that the wrongdoer acted with specific intent to deny such a right.

Id. at 450 (footnote omitted). *See also* Mapp v. Ohio, 367 U.S. 643, 670 (1961) (Douglas, J., concurring).

8. Chief Justice Burger goes so far as to suggest that the exclusionary rule itself is a disincentive to the development of a more satisfactory means of enforcing the fourth amendment.

> With the passage of time, it now appears that the continued existence of the rule, as

The bulk of fourth amendment jurisprudence focuses on two problems: first, since the amendment prohibits only "unreasonable" searches and seizures, much controversy surrounds the proper definition of "unreasonable";[9] second, when a search or seizure is found to be unreasonable, consideration must then be given to the proper means of enforcing the mandates of the fourth amendment.

The worth of any means of enforcement is defined and assessed in reference to the desired result or benefits flowing from enforcement. Thus, the term "unreasonable," as it relates to searches and seizures, takes definition subject to a type of social cost-benefit analysis.[10] Simply stated, when the costs of a search and/or seizure outweigh the benefits, whatever their nature, that search and seizure is unreasonable. Unreasonableness, therefore, does not automatically flow from a finding of illegality. For example, assuming exclusion to be the preferred control, the cost of excluding the fruits of an illegal search and seizure is the elimination of what may be evidence useful in the factfinding procedure of a criminal action. If that cost is not outweighed by the benefit of exclusion, the search and seizure, though illegal, is reasonable. The benefit of exclusion against which the cost is balanced, however, is not so easily agreed upon.[11]

Led by the Chief Justice of the Supreme Court, those who favor major modification of the exlusionary rule[12] almost uniformly perceive deterrence of abusive police searches and seizures as the primary benefit derived from exclusion.[13] Because one may be deterred from unac-

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presently implemented, inhibits the development of rational alternatives. The reason is quite simple: Incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form.

Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, C.J., concurring); *see* Franks v. Delaware, 438 U.S. 154, 169, (1978). For a discussion of possible reasons why the Court has been slow to modify the exclusionary rule, see S. SCHLESINGER, *supra* note 3, at 87-92.

9. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358-67 (1974); Ivons, *The Burger Court: Discord in Search and Seizure*, 8 U. RICH. L. REV. 433, 434 (1974).

10. For example, Justice Powell, writing for the majority in Stone v. Powell, 428 U.S. 465, 468 (1976), cited several cases that balance the cost of exclusion against the benefit sought. *See id.* at 483-90. The Court in *Stone* said that "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs." *Id.* at 493. This selective application of the exclusionary rule by the Court has been criticized as undermining the overall legitimacy of the Court. *See generally* Schrock & Welch, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978). Schrock and Welch suggest that the Court has exceeded the legitimate bounds of its authority in fashioning certain "subconstitutional rules" relative to the fourth amendment. *See id.* at 1118-20.

11. *See* Schrock & Welch, *supra* note 10, at 1118.

12. See text & note 2 *supra*.

13. *See, e.g.*, United States v. Peltier, 422 U.S. 531, 536-38 (1975). Justice Rehnquist, the author of the majority opinion in *Peltier*, noted that references have been made "to 'the imperative of judicial integrity' . . . although the Court has relied principally upon the deterrent purpose served by the exclusionary rule." *Id.* at 536. Justice Rehnquist also cited with approval the Court's opinion in Desist v. United States, 394 U.S. 244 (1969), where the Court explicitly "decline[d] to extend the court-made exclusionary rule to cases in which its deterrent purpose would

ceptable behavior only if he perceives the suspect qualities of his conduct,[14] a test for the exclusion of evidence, which has deterrence as its underlying premise, would not exclude evidence that is a product of police searches conducted in good faith. Therefore, a search and seizure conducted in good faith, regardless of illegality, would meet the reasonableness requirements of the fourth amendment. Nevertheless, the good faith test and its accompanying analysis is at present only tentative, predictably broad in expression,[15] and uncertain as to the results of practical application.

Judicial sanctions against improper police conduct are not limited to the exclusion of evidence in a criminal proceeding. Because police misconduct may result in the deprivation of the victim's constitutionally guaranteed rights, the offending officer may also be subject to a civil claim for damages under section 1983. An often-litigated issue in actions of this type is the defense allowed the defendant officer for actions undertaken in good faith.[16] If the officer in good faith believed his conduct to be constitutional, he will have a defense to a claim for damages.[17]

Some analogy is apparent between the good faith standard for exclusion and the section 1983 good faith defense. Both seek to isolate those aspects of the officer's conduct that may justifiably inculpate the officer and reasonably subject him to civil or exclusionary sanctions. Therefore, an examination of the treatment of the section 1983 civil action defense of good faith should give some indication of the probable course and effect of a good faith test if applied to the exclusionary rule.

This Note will first examine the development of the exclusionary

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not be served." *Id.* at 254 n.24. *See* United States v. Peltier, 422 U.S. 531, 538 (1975). Justice White made the observation that

> as time went on after coming to this bench, I became convinced that both *Weeks v. United States* . . . and *Mapp v. Ohio* had overshot their mark insofar as they aimed to deter lawless action by law enforcement personnel and that in many of its applications the exclusionary rule was not advancing that aim in the slightest . . . .

Stone v. Powell, 428 U.S. 465, 537-38 (1976) (White, J., dissenting) (citation omitted). Doubtful of any beneficial effects of exclusion, deterrent or otherwise, Chief Justice Burger demanded that:

> To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its [the exclusionary rule's] retention—and surely its *extension*—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law.

Id. at 499-500 (Burger, C.J., concurring) (emphasis in original). *See generally* Schrock & Welch, *supra* note 10, at 1118-23.

14. *Cf.* Bouie v. City of Columbia, 378 U.S. 347, 351, 363 (1964) (due process requires that a criminal statute must give fair warning of the conduct that is a crime so that a person may conform his or her conduct accordingly).

15. To date, reference to a good faith standard for exclusion has come only by way of dicta. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 540-42 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 611-13 (1975) (Powell, J., concurring in part).

16. *See* text & notes 112-50 *infra*.

17. *See id.*

rule, focusing on the evolution of the deterrent rationale[18] to its current position of preeminence. Next, indications of the Court's apparent move toward a good faith standard for the exclusionary rule will be discussed. Pertinent section 1983 litigation will be canvassed, and its value as a predictor for the proposed good faith test for exclusion will be considered. Finally, the potential of police regulations as a standard against which good faith may be judged will be considered.

DEVELOPMENT OF THE EXCLUSIONARY RULE

History

Historical consensus indicates that use of general warrants and writs of assistance by the British in colonial America was the abuse that precipitated the formulation and adoption of the fourth amendment.[19] Although the framers were careful to draft into the fourth amendment protections against the above abuses, they did not suggest specific means of enforcement.[20]

Not until 1886, in *Boyd v. United States*,[21] was the exclusion of illegally seized evidence considered as a valid and effective means of protecting against official action violating the fourth amendment. *Boyd* involved the constitutionality of a statute requiring the production of certain private papers for use in a criminal proceeding.[22] Although a "search" or "seizure" in the more familiar sense was not involved, the statute in question was held to constitute a violation of both the fourth and fifth amendments.[23] To remedy the violation, the papers produced pursuant to the statute were ordered returned to the owner and were not allowed to be used as evidence in the criminal proceeding.[24] *Boyd*, however, dealt with the interrelationship of the fourth and fifth amendments[25] rather than the issue of whether the fourth amendment provided for any personal right to exclusion.[26]

The exclusionary rule was expressly adopted by a unanimous Court in *Weeks v. United States*.[27] *Weeks* was applicable only to the

18. *See generally* Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129, 1138-43 (1973).

19. *See* United States v. Chadwick, 433 U.S. 1, 6-8 (1977); Stone v. Powell, 428 U.S. 465, 482 (1976); Amsterdam, *supra* note 9, at 366, 452 nn.191-92.

20. Coolidge v. New Hampshire, 403 U.S. 443, 496 (1971) (Black, J., concurring and dissenting); *see* Kaplan, *A Reply to Critics of the Exclusionary Rule*, 62 JUDICATURE 66, 68 (1978).

21. 116 U.S. 616 (1886).

22. *See id.* at 618.

23. *See id.* at 634-35.

24. *See id.* at 638.

25. *See id.* at 633. The production of these papers was considered to be a violation of the fifth amendment right to protection from self-incrimination. *Id.*

26. *See* Adams v. New York, 192 U.S. 585, 597 (1904) (*Boyd* established no rule for exclusion because no unreasonable search or seizure was involved in the case).

27. 232 U.S. 383, 398 (1914). Writing for the Court, Justice Day noted that the denial of a

fruits of federal searches and seizures until the Court in Mapp v. Ohio[28] extended the *Weeks* rule to the states by operation of the fourteenth amendment.[29] Since the time of the broad application of the rule in *Mapp v. Ohio*, the exclusionary rule has enjoyed a less than tranquil existence.[30] The often quoted statement of Justice Frankfurter aptly characterizes the development of fourth amendment law: "The course of true law pertaining to searches and seizures . . . has not—to put it mildly—run smooth."[31] In a more recent appraisal, Chief Justice Burger bitingly observed that "[t]he rhetoric has varied with the rationale to the point where the rule has become a doctrinaire result in search of validating reasons."[32]

The Chief Justice's statement, beyond indicating his personal disposition against the rule, isolates the aspect of fourth amendment jurisprudence that has impeded the consistent development of a coherent and practical rule: more than any single feature, the absence of substantial agreement as to the basic purpose of the fourth amendment has contributed to the longstanding confusion.[33] Does the fourth amendment protect a particular person, house, or papers from unreasonable searches and seizures? Or is the amendment essentially a canon requiring law enforcement procedures to be ordered in a way to insure that we will be collectively secure in our persons, houses, and papers against unreasonable searches and seizures?[34] In short, does the fourth amendment protect specifically or does it regulate generally? The analytical point of departure and the judicially expressed goals and purposes found in a given decision may not be essential to the resolution of the case immediately before the court. Nonetheless, when rules such as those for exclusion are diversely applied and extended, new theoretical directions are still largely governed by past expressions of general purpose. The effect of this process relative to the expressions of avowed

motion by the defendant for the return of letters and other private papers, which had been taken without a warrant by a United States Marshal, was a denial of fourth amendment protections. *See id.* at 398.

28. 367 U.S. 643 (1961).

29. *See id.* at 656-57.

30. For discussion of the Court's apparent confusion regarding the fourth amendment, see Amsterdam, *supra* note 9, at 349-56; Schrock & Welch, *supra* note 10, at 1118.

31. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

32. Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring).

33. *See* Schrock & Welch, *supra* note 10, at 1118. Evidence of the uncertain status of the deterrent rationale, which is most often cited to justify exclusion in a given case, is found in the tentative nature of the language used when reference is made to these justifying theories. Chief Justice Burger in his concurrence in *Stone v. Powell* referred to the "*avowed* deterrent objective." 428 U.S. 465, 499 (1976) (Burger, C.J., concurring) (emphasis added). Justice Powell, writing for the Court, noted that "[d]espite the absence of supportive empirical evidence, we have *assumed* that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." *Id.* at 492 (emphasis added) (footnote omitted).

34. Amsterdam, supra note 9, at 367.

purposes of fourth amendment exclusion has been the condition so contemptuously described above by the Chief Justice.[35] An examination of the development of exclusionary rule analysis, in its attempt to isolate and effectuate the amendment's true purpose, is therefore essential.

The Deterrent Rationale

During it genesis, the exclusionary rule was considered a means of protecting the fourth amendment rights of the individual.[36] In *Weeks*, the Court noted that if evidence obtained in violation of individual rights secured by the fourth amendment could be used against the accused, the guarantees of the fourth amendment "might as well be stricken from the Constitution."[37] In *Olmstead v. United States*,[38] Justice Brandeis in a celebrated dissent elaborated on the *Weeks* refusal to sanction police abuse of fourth amendment rights and articulated the judicial integrity rationale.[39] It was considered by Brandeis to be a degradation of judicial integrity to allow the use of illegally seized evidence in court.[40] Although often isolated as a separate justification for the exclusionary rule, the judicial integrity theory appears to be a premature expression of the regulatory or deterrence rationale.[41] To close the courts to illegally seized evidence does further judicial integrity, but more specifically, it forecloses judicial acquiescence and fostering of police misconduct.[42] In any event, as noted by Justice Rehnquist, the analysis differs little whether the rationale be the imperative of judicial integrity or deterrence.[43]

The deterrence or regulatory rationale in a distilled and recognizable form first found expression in *Wolf v. Colorado*.[44] It was noted in *Wolf* that there was no need to bind the individual states to the exclusionary rule because they already possessed sufficient means to control police misconduct.[45] In subsequent opinions, deterrence gained stature

35. See text & note 13 *supra*.

36. *See* J. LANDYUSKI, SEARCHES AND SEIZURES AND THE SUPREME COURT, A STUDY IN CONSTITUTIONAL INTERPRETATION 77-79 (1966).

37. Weeks v. United States, 232 U.S. 383, 393 (1914).

38. 277 U.S. 438 (1928).

39. *See id.* at 483-85 (Brandeis, J., dissenting).

40. *Id.* at 485.

41. *See* Schrock & Welch, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 265-69 (1974). For a good discussion on the use of the deterrent rationale and its relationship to the judicial integrity theory, see Note, *supra* note 18, at 1129, 1130-47.

42. *See* Schrock & Welch, *supra* note 41, at 265-69. *But see* Note, *supra* note 18, at 1138-43.

43. *See* United States v. Peltier, 422 U.S. 531, 538 (1975).

44. 338 U.S. 25, 31 (1949) (recognition by the majority that the deterrence of police misconduct is one of the purposes of the exclusionary rule).

45. *Id.* at 32-33. The Court cited such state remedies as protective statutes, *see id.* at 30 n.1, and noted the possibility that "public opinion of a community can far more effectively be exerted

as a valid justification for the exclusion of evidence. Therefore, discussion of alternative rationales was rendered largely academic.[46]

Recently, the regulatory view has pervaded the cases dealing with the exclusionary rule. In *United States v. Calandra*,[47] the Court took the position that the sole justification for the exclusionary rule is to deter the police from unconstitutional conduct.[48] The majority of the *Calandra* Court found that the exclusionary rule is a mere remedial device rather than a protection of any individually vested rights.[49] The dissent on the other hand, harkened back to notions of judicial integrity, questioning the ultimate efficacy of the exclusionary rule as a means of monitoring police conduct.[50]

Despite judicial attraction to the deterrence rationale, it is interesting to note the lack of hard evidence to support the theory. Considerable research has been devoted to the status of the exclusionary rule as an effective deterrent. However, uncertainty more than anything else characterizes the work to date.[51] In spite of the uncertain empirical

against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority previously exerted throughout the country." *Id.* at 32-33. Professor Monaghan argues that if deterrence is the controlling rationale it is inconsistent to apply the exclusionary rule to the states. *See* Monaghan, *supra* note 7, at 5-10.

46. *See* Stone v. Powell, 428 U.S. 465, 485 (1976).

47. 414 U.S. 338 (1974). *Calandra* established the principle that otherwise excludable evidence may be used in grand jury proceedings. *See id.* at 350. The Court reached this result on the premise that to bar the evidence would have little deterrent benefit as compared to the costs of exclusion. *See id.* at 351-52. *But see* Schrock & Welch, *supra* note 41, at 289-95.

48. *See* 414 U.S. at 348.

49. *Id. See* United States v. Janis, 428 U.S. 433, 446 (1976); Stone v. Powell, 428 U.S. 465, 486 (1976); Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (Black, J., concurring). Although the individual may have no right in exclusion, in appropriate fact situations the reasonableness of the officer's conduct regarding the search may be evaluated in light of the individual's right and expectation in privacy. *See* United States v. Chadwick, 433 U.S. 1, 11 (1977). However, any right or expectation in privacy interests will, according to the deterrent rationale, be balanced against the remedial effect of excluding the evidence. A violation of one's privacy interest will not, therefore, in all cases lead to exclusion, as would be the case if any individual expectation as opposed to deterrence were the governing factor. There remains, however, considerable commentary arguing that the fourth amendment does vest in the victim a constitutional right to have illegally seized evidence excluded. *See generally* Reynaud, *Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 IND. L.J. 259, 262-306 (1950); Sanderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L.C. & P.S. 141 (1978).

50. *See* 414 U.S. at 357-62 (Brennan, J., dissenting). The criticism of the exclusionary rule as an effective control of police misconduct is voluminous. *See* Irvine v. California, 347 U.S. 128, 135 (1954); note 2 *supra*. *But see* Canon, *Is The Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 697-727 (1974); Note, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740, 744-64 (1974). *See also* Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939 (1966). Mr. Murphy, former police commissioner for New York City, said that "[o]n behalf of the New York City Police Department as well as law enforcement in general, I state unequivocally that every effort was directed and is still being directed at compliance with and implementation of Mapp [Mapp v. Ohio]." *Id.* at 941.

51. For studies suggesting that the exclusionary rule is not effective as a deterrent, see S. SCHLESINGER, *supra* note 3, at 50-56; Oaks, *supra* note 2, 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). The research suggesting the exclusionary rule does have a deterrent effect, like

validity of the deterrence rationale, as dissatisfaction with strict and narrow application of the rule has increased,[52] the latitude in analysis afforded by the deterrence theory has perpetuated the doctrine's popularity. This trend is exemplified by those cases circumscribing the reach of the exclusionary rule by the utilization of a balancing or cost-benefit test. Central to the disposition of these cases is a balancing of the probability of deterrence against the costs of exclusion. In cases involving searches of parties not suspected of criminal activity,[53] the fruits of illegal searches,[54] the use of illegally seized evidence to impeach a criminal defendant's own testimony,[55] standing to raise a suppression issue,[56] the extension of the exclusionary rule to civil cases,[57] and the availability of federal habeas corpus review,[58] the cost of exclusion was weighed against the probability of effectively influencing police conduct. In each of those cases, deterrence was considered to be too tentative a possibility to justify exclusion, despite the conceded illegality of the search and seizure. Had those courts based their determination on the protection of a right personal to the victim, the above cited conclusions would have been constitutionally repugnant.[59] The individuals whose fourth amendment rights were violated in each of the above cases would be little concerned with the collateral and normative effects of exclusion. Once the right is vindicated, the victim is only secondarily concerned with whether future violation will be curtailed.

The deterrence argument has provided the Supreme Court with a path of least philosophical resistance. In reviewing fourth amendment violations, it is easier to argue lack of a recognizable effect on an absent third person—the police officer—than it is to establish that the privacy of the individual before the court has not been violated unreasonably. With these directions in mind, it is less difficult to appreciate the good faith test proposed most forthrightly by Justices White and Rehnquist[60] as the logical extension of a normative view of the exclusionary rule: only if a direct regulatory benefit is a virtual certainty will exclusion be

the negative research, admits the speculative nature of the empirically based assumptions claiming actual deterrent effect. *See generally* Canon, *supra* note 50, at 725-26.

52. *See* note 3 *supra.*

53. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 562 n.9 (1978).

54. Wong Sun v. United States, 371 U.S. 471, 484-87 (1963).

55. *See* Walder v. United States, 347 U.S. 62, 64-66 (1954). See Note, *Standing and the Fourth Amendment*, 38 U. CIN. L. REV. 691, 694-700 (1969), for arguments that current Supreme Court standing rules are not consistent with the deterrent rationale.

56. *See* Alderman v. United States, 394 U.S. 165, 174 (1969).

57. United States v. Janis, 428 U.S. 433, 453-55 (1976).

58. Stone v. Powell, 428 U.S. 465, 492-93 (1976).

59. For a general discussion of the implications of establishing a personal constitutional right in exclusion, see Schrock & Welch, *supra* note 10, at 271-335.

60. *See* Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting); United States v. Peltier, 422 U.S. 531, 532 (1975).

merited.[61]

Good Faith and the Exclusionary Rule

Justice White in his dissent in *Stone v. Powell*,[62] following a brief discussion of the good faith defense allowed defendant officials in section 1983 actions, made the following observations and proposals:

> If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf. . . . The exclusionary rule, a judicial construct, seriously shortchanges the public interest as presently applied. I would modify it accordingly.[63]

Justice White's opinion is important for two reasons. First, the Justice reaffirmed the current majority position of the Court as to the constitutional status of the exclusionary rule—referring to the rule as a mere "judicial construct."[64] Second, and most important, Justice White made an analogous reference to the section 1983 good faith standard.[65] Justice White's referral to the section 1983 good faith defense was not fortuitous. A short examination of the case history preceding *Stone v. Powell* will help in understanding the implications of Justice White's remarks.[66]

In 1968, Robert Kilgen was arrested for violating a then valid vagrancy ordinance.[67] During his detention, and after a proper *Miranda*[68] warning, Kilgen confessed to the armed robbery of a post office. The vagrancy ordinance upon which Kilgen's initial detention was based was later ruled unconstitutional.[69] On appeal, Kilgen sought to have his conviction overturned on the theory that his arrest was illegal since it was effected under a statute subsequently held unconstitutional,[70] and therefore, all evidence obtained as a result of that illegal arrest should have been excluded under the poison tree doctrine of *Wong Sun v. United States*.[71] Upholding the denial of the motion for

61. If the officer does not or should not be expected to perceive his conduct as constitutionally offensive, he may be assumed to be incapable of altering his conduct. If his actions are in good faith, the argument goes, the exclusion of the evidence serves no valid purpose.

62. 428 U.S. 465, 536-42 (1976) (White, J., dissenting).

63. *Id.* at 541-42.

64. *See id.*

65. *See id.* at 540-41.

66. The holding in Stone v. Powell, 428 U.S. 465, 494-95 (1976), reaches only the issue of habeas corpus review in the federal courts and not any specific exclusionary rule issue. This, however, did not deter the dissatisfied Justices from voicing their criticism of the rule and laying the foundation for modification. *See, e.g., id.* at 496-502 (Burger, C.J., concurring); *id.* at 537-42 (White, J., dissenting).

67. United States v. Kilgen, 445 F.2d 287, 288 (5th Cir. 1971).

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

69. *See* United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971).

70. *Id.*

71. 371 U.S. 471, 487-93 (1963).

suppression,[72] Judge Morgan, writing for the Fifth Circuit Court of Appeals, posited the following argument:

> Had Kilgen been convicted for vagrancy, that conviction would necessarily have been reversed when the court held the vagrancy ordinance unconstitutional. But overturning a conviction due to an invalid statute does not automatically render the previous arrest and detention illegal absent some showing that police officials lacked a good faith belief in the validity of the statute.[73]

As authority for this good faith standard for the validity of an arrest, Judge Morgan cited *Pierson v. Ray*,[74] a case that involved a section 1983 civil suit against a police officer for the deprivation of the criminal defendant's rights.[75] Although limited to factual circumstances involving an otherwise valid confession,[76] *Kilgen* nevertheless marked a significant departure from traditional exclusionary rule analysis by virtue of its analogous application in a criminal case of the section 1983 good faith standard[77] articulated in *Pierson*.

In *Powell v. Stone*,[78] the defendant was arrested under a Nevada vagrancy ordinance subsequently held unconstitutional.[79] A weapon used by Powell in a California murder was discovered during his detention.[80] Powell was convicted of murder in a California state court, and the conviction was affirmed on appeal.[81] Powell petitioned the Supreme Court of California for habeas corpus, but the writ was denied.[82] A petition for habeas corpus review was then made to the federal district court. The district court did not reach the issue of the constitutionality of the Nevada ordinance, holding only that since the

72. *See* United States v. Kilgen, 445 F.2d 287, 289-90 (5th Cir. 1971).
73. *Id.* at 289.
74. *Id.* (citing Pierson v. Ray, 386 U.S. 547 (1967)).
75. *See* 386 U.S. at 551.
76. A confession or physical evidence obtained as a result of police actions involving a collateral crime does not involve traditional notions of the exclusionary rule. Rather, the exclusion determination is based on a "fruit of the poison tree" doctrine, an extension of the exclusionary rule. *See* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Denial of the suppression motion is not based on the immediate arrest or search, but rather on the factual question of whether the "taint" of the initial illegal arrest or search has been adequately dissipated by intervening events. *See id.* The relative good faith of the officer is only one of many factors that could act to dissipate the taint.
77. For a case following *Kilgen*, see United States v. Carden, 529 F.2d 443, 445 (5th Cir. 1976). As in *Kilgen*, the *Carden* court held that if the officer acted in good faith pursuant to a then valid statute, the arrest and the resulting search would not of necessity be found invalid and the resulting confession excludable. *See id.* The Eighth Circuit has made a similar application of the *Kilgen* rule, allowing a confession to be used as evidence. "We think the good faith of the officers was an adequate basis for the ruling [allowing the confession as evidence], and uphold it on that basis." Wiley v. Dagget, 551 F.2d 776, 779 (8th Cir. 1977). *Accord*, United States v. Donovan, 460 F.2d 294, 295 (5th Cir. 1974).
78. 507 F.2d 93 (9th Cir. 1974), *rev'd*, 428 U.S. 465 (1976).
79. *Id.* at 94, 96.
80. *Id.* at 94.
81. *Id.*
82. *Id.*

evidence did not contribute to the conviction, the admission of the evidence was harmless error under the test of *Chapman v. California*.[83] On appeal, the Ninth Circuit held that the error was not harmless and that the Nevada ordinance was unlawful, making the arrest illegal and the evidence excludable.[84] The court distinguished the cases following *Kilgen* because they "involved consent searches rather than searches incident to arrest. They [cases following *Kilgen*] hold only that invalidation of the underlying substantive statute does not vitiate the consent to search."[85] The court, therefore, expressly refused to follow the *Kilgen* reasoning and apply the civil good faith standard of *Pierson v. Ray*.[86]

On appeal to the United States Supreme Court, the *Kilgen* good faith analysis was again argued by the state.[87] Because the Court did not directly reach the issue of exclusion, the analogous application of the civil good faith standard was not necessary to the disposition of the case.[88] Justice Powell based his decision on a balancing of the interests involved, holding that the possibility of any gain in deterrent effect does not merit the economic and social costs of a collateral review in the federal court.[89]

In terms of plotting the course of eventual modification of the exclusionary rule, the *Powell* decision in its treatment of the *Kilgen* theory is seminal. Although the Court did not directly reach the issue of good faith reliance, Justice Powell writing for the Court,[90] Chief Justice Burger in his concurring opinion,[91] and Justice White in his dissent,[92] all advocated modification of the exclusionary rule. Justice White identified the apparent theoretical consensus of those favoring modifi-

83. 386 U.S. 18, 23-24 (1967). "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 23 (quoting Fahy v. Connecticut, 395 U.S. 85, 86-87 (1963)). The error must not affect the substantial rights of the parties, and the harmlessness of the error must be proved beyond a reasonable doubt. *Id.* at 24.

84. *See* 507 F.2d at 94-99.

85. *Id.* at 98.

86. *See id.* at 97.

87. It was argued that the exclusionary rule should not be applied to cases involving good faith conduct by the police officers. *See* Petitioner's Brief, Stone v. Powell, 428 U.S. 465 (1976).

88. *See* Stone v. Powell, 428 U.S. 465, 481-82 (1976).

89. *See id.* at 489-90. Again, the cost-benefit analysis for exclusion was employed. See text & notes 53-59 *supra*.

90. Although Justice Powell does not explicitly advocate alteration, the tone of his treatment together with his footnote references to various modifications of the rule lead one to conclude he favors modification. *See* 428 U.S. at 485-89.

91. *See id.* at 496, 501-02 (Burger, C.J., concurring). The Chief Justice did not raise new issues or arguments. He merely reaffirmed the contempt for the exclusionary rule that was shown in his lengthy criticism of the rule in Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 411, 412-24 (1971) (Burger, C.J., concurring).

92. Stone v. Powell, 428 U.S. 465, 536 (1976). Justice White dissented as to the denial of habeas corpus review but joined with the majority in criticism of the exclusionary rule. *Id.* at 538 (White, J., dissenting).

cation.[93] Although not advocating overruling either *Weeks v. United States*[94] or *Mapp v. Ohio*,[95] Justice White took the position "that the 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 on the *good-faith belief* that his conduct comported with existing law and having reasonable grounds for this belief."[96]

Although *Stone v. Powell* does not constitute a presently applicable revision of the exclusionary rule[97]—any reference to a good faith standard being only dictum—it does forewarn of pending change in the operation and scope of the exclusionary rule. Given an appealing fact situation where the good faith of the officer is apparent, the Court is likely to analagously adopt the civil standard suggested in Justice White's opinion. In so doing, the Court will be able to consolidate its broad references to police good faith into an analytical construct that would accommodate the Court's currently prevailing views on criminal justice.[98] Because this is a real possibility, it is worthwhile to examine the theoretical underpinnings of the civil standard, as well as examine the good faith standard as it has been applied to date.

SECTION 1983 AND THE GOOD FAITH DEFENSE

History of Section 1983

In March of 1871, President Grant, speaking in a special session before Congress, asked for emergency legislation to deal with what the President considered a near state of anarchy in the post-Civil War South.[99] In response to the President's message, Congress passed the Act of April 20, 1871.[100] Through this Act, Congress sought to curb the "crimes perpetrated by concert and agreement, by men in large numbers."[101] Although the violence inflicted on blacks by the Ku Klux

93. *See id.* Justices Rehnquist and Powell had previously indicated a preference for the *Pierson v. Ray* good faith test. *See* Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., concurring in part).

94. 232 U.S. 383 (1914).

95. 367 U.S. 643 (1961).

96. Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting) (emphasis added). Note the similarity with the proposed test of Justice Rehnquist in United States v. Peltier, 422 U.S. 531, 541-42 (1975). Both used nearly identical language—if the officer "knew or should have known" the victim's rights were violated. *Compare id. with* Stone v. Powell, 428 U.S. 465, 538 (1976).

97. Retroactively applying the *Stone* test for federal habeas corpus review, courts have held that *Stone v. Powell* articulated no new rule for exclusion. *See, e.g.*, Stocker v. Hutto, 547 F.2d 437, 438 (8th Cir. 1977); Chavez v. Rodriquez, 540 F.2d 500, 502 (10th Cir. 1976); Bracco v. Reed, 540 F.2d 1019, 1020 (9th Cir. 1976).

98. For a general critique of the Burger Court's trend in treatment of the exclusionary rule, see Dershowitz & Ely, *Harris v. New York, Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1198-1227 (1971).

99. *See* CONG. GLOBE, 42d Cong., 1st Sess. 299 (1871).

100. Ch. 22, 17 Stat. 13 (1871) (known as the Ku Klux Klan Act).

101. CONG. GLOBE, 42d Cong., 1st Sess. 457 (1871) (remarks of Rep. Cobb).

Klan dominated the debate, a second purpose of the Act was aimed at controlling those southern officials whose "systematic maladministration, or . . . neglect"[102] resulted in the denial of equal protection and due process to the recently freed slaves.[103]

In the years following Reconstruction, a series of Supreme Court decisions limited severely the efficacy of the Civil Rights Act of 1871.[104] Between 1871 and 1920 only twenty-one actions were brought under the new Act.[105] In the 1920's and 1930's, section 1983 enjoyed a limited resurgence in cases involving voting rights.[106] However, it was not until the 1961 case of *Monroe v. Pape*[107] that section 1983 was "resurrected from ninety years of obscurity."[108]

Monroe v. Pape involved an abusive search, seizure, and detention by police officers.[109] *Monroe* established that plaintiffs in section 1983 actions need not prove that the defendant acted with a specific intent to deprive a person of a federal right.[110]

Emergence of the Good Faith Defense

Because *Monroe v. Pape* read section 1983 against the "background of tort liability,"[111] it allowed for the application of the common law tort defenses, such as probable cause, in section 1983 actions,[112] the status of the common law tort defenses was clarified

102. *Id.* at 153. *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1154 (1977); Note, *The Enforceability and Proper Implementation of § 1983 and the Attorney's Fees Awards Act in State Courts*, 20 ARIZ. L. REV. 743 (1978).

103. *See Developments in the Law—Section 1983 and Federalism*, *supra* note 102, at 1154.

104. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

105. *See* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

106. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 274 (1939) (right of blacks to sue for damages sustained because they were effectively denied the franchise by a discriminatory state statute). *See generally* Note, *The Proper Scope of the Civil Rights Acts*, 66 HARV. L. REV. 1286 (1953).

107. 365 U.S. 167, 172 (1961).

108. *Developments in the Law—Section 1983 and Federalism*, *supra* note 102, at 1169. *Monroe v. Pape*, insofar as it allowed an absolute immunity to defendant municipalities, was explicitly overruled by Monell v. New York City Dep't Soc. Servs., 436 U.S. 658, 700-01 (1978).

109. 365 U.S. 167, 168-70 (1961). Thirteen police officers broke into plaintiff's home, routed the family from their beds, made them stand naked in the living room, and ransacked every room. *Id.* Mr. Monroe was then taken to the station and detained on "open" charges for ten hours without being allowed to call his family or an attorney. *Id.* at 169. He was released without charges being filed against him. *Id.* Monroe alleged the search and arrest without a warrant was a deprivation of rights secured by the Constitution. *Id.* at 170. *See generally* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 278, 294-96 (1965); Note, *Limiting the Section 1983 Action in Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1489-90 (1969).

110. 365 U.S. at 187. Prior to *Monroe v. Pape*, courts had been reluctant to allow every false arrest and illegal search and seizure to rise to the level of a § 1983 violation. The claimant had generally been required to establish malicious intent in addition to illegal conduct. *See* Batista v. Weir, 340 F.2d 74, 81 (3d Cir. 1965); Stringer v. Dilger, 313 F.2d 536, 540 (10th Cir. 1963); Cohen v. Norris, 300 F.2d 24, 30-32 (9th Cir. 1962). *See generally* Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991, 998 (1975).

111. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961).

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

somewhat in *Pierson v. Ray*.[113] *Pierson* dealt squarely with the qualified immunity[114] afforded police officers who had made an arrest pursuant to a vagrancy statute subsequently held invalid.[115] In *Pierson*, the Court reiterated its desire that section 1983 be considered against the background of common law tort liability,[116] and determined that a good faith reliance on the constitutionality of a later invalidated statute was consistent with the common law privilege of peace officers to arrest on probable cause.[117] Read narrowly, *Pierson* allows a qualified immunity only for reliance on a statute[118] and, arguably, a warrant valid on its face.[119] However, the broad language of *Pierson* has resulted in considerable confusion as to the status and scope of the qualified immunity defense as it relates to constitutional tort claims.[120]

The standard for immunity broadly introduced by the Court in *Pierson* was refined by the court of appeals in *Bivens v. Six Unknown Named Federal Narcotics Agents*.[121] In *Bivens*, federal agents had entered plaintiff's apartment and made a warrantless search and arrest. After failing in both the district court[122] and the court of appeals,[123] Bivens persuaded the United States Supreme Court that he had a valid federal cause of action.[124] The Court remanded the case to the court of appeals for determination of any defenses to be allowed the agents,

(1974); Theis, *supra* note 110, at 997-1000. Prior to *Monroe*, in Tenney v. Brandhove, 341 U.S. 367 (1951), the Supreme Court allowed the common law legislative immunity because well-founded immunities had not been abrogated in the adoption of § 1983. *See id.* at 376. *See also* Imbler v. Pachtman, 424 U.S. 409, 418 (1976). In discarding the blanket immunity previously afforded municipalities, the Court in Monell v. New York City Dep't Soc. Servs., 436 U.S. 658 (1978), did not reach the question of whether qualified immunities remained. *See id.* at 713-14 (Powell, J., concurring).

113. 386 U.S. 547 (1967).

114. *See id.* at 551. The qualified good faith immunity applies only to actions seeking damages. When injunctive relief is sought, since the effect is remedial, not compensatory, the added protection of the good faith defense is not necessary. *See* Stanford Daily v. Zurcher, 550 F.2d 464, 465 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978); Eslinger v. Thomas, 476 F.2d 225, 230 (4th Cir. 1973). *But cf.* Fowler v. United States, 258 F. Supp. 638, 646 (C.D. Cal. 1966) (allowed good faith defense for claim seeking injunctive relief).

115. *See* 386 U.S. at 551-52.

116. *See id.* at 556 (citing Monroe v. Pape, 365 U.S. 167, 187 (1961)).

117. *Id.* at 555.

118. *See* Theis, *supra* note 110, at 1003.

119. *See* Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring) (citing United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971)).

120. Contemporaneous with this evolution of the civil good faith test is the increasing dissatisfaction with the exclusionary rule. *See* note 2 *supra*. Because the object of the *Pierson* case was to protect the officer in the good faith execution of his duties, similarly, those Justices who favored a broad application of the good faith test contemporaneously criticized what they considered to be, in terms of deterrence, the counter-productive effect of the exclusionary rule.

121. 456 F.2d 1339, 1342-48 (2d Cir. 1972). *Bivens* is based on a constitutional tort rather than § 1983. The defenses and their analysis, however, are the same. *See* Butz v. Economou, 98 S. Ct. 2894, 2908-09 (1978). For an extensive discussion of *Bivens*, see Lehman, *Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977).

122. 276 F. Supp. 12, 16 (E.D.N.Y. 1967).

123. 409 F.2d 718, 726 (2d Cir. 1969).

124. 403 U.S. 388, 390-95 (1971).

such defenses to be determined by reference to the common law of torts.[125]

On remand, the second circuit adopted a two-pronged test, the *Bivens II* test, for the determination of good faith.[126] The court ruled that to come under the purview of the good faith defense as identified in *Pierson*, the defendant must establish: (1) that he acted under an actual subjective good faith belief that his actions were constitutional; and (2) he must establish that his belief was reasonable.[127] This test has been the subject of considerable criticism directed mainly at the subjective element of the test.[128] However, much of this criticism is unfounded. The *Bivens II* test does not eliminate an objective element of inquiry—to view the test as so doing is to disregard the test's second prong of objective reasonableness. If the officer's subjective belief is to be considered reasonable, it must be so established by objective standards. The *Bivens II* two-pronged test for good faith has been given broad judicial approval,[129] and a similar test of good faith was approved by the Supreme Court in *Wood v. Strickland*.[130]

In *Wood*, a school board member was held "not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected."[131] The objective reasonableness of the official's conduct is to be determined in "light of all the circumstances."[132] In *Wood*, several

125. *Id.* at 397-98. *See also* text & notes 112-20 *supra.*

126. Bivens v. Six Unknown Named Fed. Narcotics Agents, 456 F.2d 1339, 1348 (2d Cir. 1972).

127. *Id.* at 1348. The *Bivens II* test is nearly indistinguishable from the test for exclusion proposed by Justices White in Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting), and Rehnquist in United States v. Peltier, 422 U.S. 531, 536-41 (1975).

128. *See* Theis, *supra* note 110, at 1023 (the *Bivens II* test is overly subjective because it "dispenses with any objective evaluation of police misconduct, [and] gives the police officer a durable shield against charges of misconduct"). *See also* Note, *Accountability for Government Misconduct: The Good Faith Defense*, 49 TEMPLE L.Q. 938, 946-63 (1976).

129. *See, e.g.*, Skehan v. Board, 538 F.2d 53, 61 (3d Cir. 1976); Burgwin v. Mattson, 522 F.2d 1213, 1214 (9th Cir. 1975); Glasson v. City of Louisville, 518 F.2d 899, 908 (6th Cir. 1975); Brubaker v. King, 505 F.2d 534, 536 (7th Cir. 1974); Anderson v. DeCristofalo, 494 F.2d 321, 323 (2d Cir. 1974); Hill v. Rowland, 474 F.2d 1374, 1377 (4th Cir. 1973); Rodriguez v. Jones, 473 F.2d 599, 605 (5th Cir. 1974); Jones v. Perrigan, 459 F.2d 81, 83 (6th Cir. 1974).

130. 420 U.S. 308, 315, 318 (1975). *See also* discussion notes 134-41 *infra. But see* Theis, *supra* note 110, at 1019.

131. Wood v. Strickland, 420 U.S. 308, 322 (1975). The *Wood* Court, with language comparable to the first prong of the *Bivens II* test, denied immunity where the official actually knew his actions were improper. *See* Bivens v. Six Unknown Named Fed. Narcotics Agents, 456 F.2d 1339, 1347-48 (2d Cir. 1972). Similarly, the *Wood* Court denied immunity where the officer should have known of the impropriety of his conduct. Wood v. Strickland, 420 U.S. 308, 322 (1975). This is comparable to the second prong of the *Bivens II* test—the belief of the officer is subjected to an objective standard of reasonableness. *See* Bivens v. Six Unknown Named Fed. Narcotics Agents, 456 F.2d 1339, 1347-48 (2d Cir. 1972).

132. 420 U.S. at 318 (quoting Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974)). For a time, surrounding circumstances determined the reasonableness of police conduct as well. *See generally* Amsterdam, *supra* note 9, at 394. Amsterdam characterizes this period as the "nadir of fourth amendment development." *Id.* In United States v. Rabinowitz, 339 U.S. 56 (1950), a criminal case dealing with the scope of a search incident to a lawful arrest, we find familiar language:

students were expelled for "spiking" the punch at a school dance. The parents of the students brought an action under section 1983 alleging that the students were denied due process.[133] The district court[134] held that absent a showing of malice[135] the defendants were immune from damage suits.[136] On appeal, the Eighth Circuit held that there had been a violation of the students' due process rights.[137] The Supreme Court, recognizing the confusion surrounding the "good faith" defense,[138] rejected the district court's wholly subjective analysis and perceived the proper definition of good faith as incorporating elements of both a subjective and objective analysis.[139] The Court articulated a test requiring that the official involved believe his conduct to be constitutional and that such belief be objectively reasonable.[140] The official's conduct would be per se unreasonable if the actions of officials were in violation of "settled, indisputable law."[141] Ignorance of established principles is not a defense.[142]

"[t]he recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." *Id.* at 63. The test, said Justice Minton in *Rabinowitz*, "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.* at 66. The *Rabinowitz* test was overruled in Chimel v. California, 395 U.S. 752, 768 (1969), where the Court returned to the more objective test of Trupiano v. United States, 334 U.S. 699 (1948), which looked to whether the facts indicated it was reasonable to procure a search warrant, *id.* at 708.

The difference between the *Rabinowitz* test and the *Trupiano-Chimel* test is one of focus only; they both look to the facts and judge the reasonableness of the officer's judgment and actions in the context of surrounding circumstances. *Chimel* indicated the facts are not important except insofar as they reflect an opportunity for the officer to have procured a warrant. *See* 395 U.S. at 762-64. In *Rabinowitz*, the Court looked to the facts pursuant to a broader inquiry: do the facts as a whole justify the officer's overall conduct rather than his failure to procure a warrant? *See* 339 U.S. at 63, 65-66. This inquiry into the reasonableness of conduct is as central to the civil test for liability as it is to the determintion of the excludability of criminal evidence. Like *Rabinowitz* and *Chimel*, the key question in *Wood v. Strickland* was under what standard will the reasonableness of the officials' conduct be judged? *See* 420 U.S. 308, 322 (1975).

133. *See* 420 U.S. at 310.

134. 348 F. Supp. 244 (W.D. Ark. 1972).

135. Representing a minority view, some courts require a showing of bad faith or malice, looking almost exclusively to the subjective state of mind of the defendant official. *See, e.g.*, Smith v. Board of Educ., 365 F.2d 770, 782-83 (8th Cir. 1966); Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Rosales v. Lewis, 454 F. Supp. 956, 959-60 (S.D. Iowa 1978); Jones v. McElroy, 429 F. Supp. 848, 863 (E.D. Pa. 1977); Joyner v. McClellan, 396 F. Supp. 912, 915 (D. Md. 1975); Mitchell v. Boslaw, 357 F. Supp. 199, 202-03 (D. Md. 1973); *cf.* Bogard v. Cook, 405 F. Supp. 1202, 1210-12 (D. Miss. 1975) (absent a showing of bad faith, there is no statement of valid cause of action).

136. *See* 420 U.S. 308, 322 (1975).

137. *See* Strickland v. Inlow, 485 F.2d 186, 190 (8th Cir. 1973).

138. *See* Wood v. Strickland, 420 U.S. 308, 315 (1975). "There is general agreement on the existence of a 'good faith' immunity, but the courts have either emphasized different factors as elements of good faith or have not given specific content to the good faith standard." *Id.*

139. *Id.* at 321.

140. *Id. Compare id. with* the *Bivens II* two-pronged test at text & notes 126-27 *supra*.

141. Wood v. Strickland, 420 U.S. 308, 321 (1975). *See generally* text & notes 235-39 *infra*.

142. The most recent Supreme Court attempt at defining the correct statement of a cause of action as it related to the requisite culpable intent of the defendant official is found in Procunier v. Navarette, 434 U.S. 555 (1978). The question before the Court was whether the negligent denial of the prisoner-plaintiff's constitutional rights in free speech through the use of the mails constituted a valid claim under § 1983. *Id.* at 559. The plaintiff claimed that "the 'interference' or 'confiscation' had occurred because the three subordinate officers had 'negligently and inadver-

The position of the *Wood* majority summarized above precipitated the dissenting views of Justices Powell, Blackmun, Rehnquist, and Chief Justice Burger. These Justices contended that the test adopted by the majority in *Wood* was a higher standard than that imposed upon other government officials in *Scheuer v. Rhodes*[143] and *Pierson v. Ray*,[144] decisions the dissenters read as properly lacking the requirement imposed by the *Wood* majority that officials have knowledge of certain principles of constitutional law.[145] The liberal allowance of discretion to the official advocated by the dissenting Justices in *Wood* in determining the existence of good faith looms ominous because it is these same Justices who lead the move toward a good faith standard for exclusion of evidence.[146]

Although the notion that officials should be expected to have some understanding of prevailing constitutional law is not novel in section 1983 litigation,[147] courts have been not only quite liberal in finding an absence of a clearly settled constitutional right,[148] but also uncertain as

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tently' misapplied the prison mail regulations and because the supervisory officers had 'negligent[ly]' failed to provide sufficient training and direction to their subordinates." *Id.* at 558.

Citing extensively from *Wood v. Strickland*, Justice White, writing for the Court, reaffirmed the qualified immunity available to the defendant official for acts undertaken in good faith. *See id.* at 561-62. Justice White noted that the qualified good faith immunity would not be available to the official if he knew or reasonably *should have known* the plaintiff's rights would be violated, or if the official acted with "malicious intention." *See id.* at 562. Perhaps the "should have known" standard would allow an allegation of gross or culpable negligence to stand, but the Court clearly rejected the validity of a claim based on ordinary negligence. *See id.* at 566.

Justice Stevens dissented on the ground that the case should not have been disposed of merely because the plaintiff alleged only a negligent state of mind rather than a malicious one. *Id.* at 570-74 (Stevens, J., dissenting). Rather, said Justice Stevens, the validity of the defense should be determined by "carefully examining the factual basis for the defense in each case in which it is asserted." *Id.* at 569 (Stevens, J., dissenting). The dispute between Justice Stevens and the majority is fundamental. Essentially, it is between an analysis favoring a subjective focus (Justice White holding that the dispositive factor is the intent of the alleged offender) and a more objective focus (Justice Stevens favoring a more objective evaluation of the surrounding facts).

143. 416 U.S. 232, 247-48 (1974) (suit against the Governor of Ohio for actions taken under his authority at Kent State riots).

144. 386 U.S. 547, 557 (1967).

145. Wood v. Strickland, 420 U.S. 308, 330-31 (1975) (Powell, J., concurring in part and dissenting in part).

146. See text & note 3 *supra*.

147. For cases holding officials to some degree of knowledge, see Perez v. Rodriguez 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 be violative of demonstrator's first amendment rights); Palmer v. Hall, 517 F.2d 705, 708-09 (5th Cir. 1975) (officer held to knowledge 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).

148. *See, e.g.*, Sullivan v. Meade Indep. School Dist., 530 F.2d 799, 806-07 (8th Cir. 1976) (constitutionality of right of privacy for male and female teachers co-habitating not clearly established); Bertot v. School Dist. No. 1, 522 F.2d 1171, 1184-85 (10th Cir. 1975) (teacher's rights in termination proceeding not clearly established); Poindexter v. Woodson, 510 F.2d 464, 465-66

to the means to employ in determining the existence of such rights.[149] Admittedly, this element of reasonableness, requiring knowledge of some right, gives an added dimension of objectivity to the good faith standard. However, the determination of reasonable good faith remains essentially a factual one.[150]

The Good Faith Defense and Police Search and Seizure

The first prong of the *Bivens-Wood* good faith test, subjective good faith belief, although subject to some proof requirements, will usually be asserted by the officer and will be difficult to disprove absent evidence of some statement by the officer indicating malicious intent. The second prong of the test, that the good faith belief be reasonable by objective standards, therefore emerges as the dispositive element.

Generally, in any search and seizure, the officer will rely on a warrant or an exception to the warrant requirement. Therefore, the inquiry turns to the reasonableness of the officer's reliance.

An officer's reliance on a search warrant valid on its face is "per se reasonable."[151] This reliance is reasonable even if the officer should have known that probable cause for the warrant was lacking.[152] The purpose of this rule is twofold: first, if the officer were held liable for negligent acts in seeking and executing a search warrant, he would be discouraged from seeking search warrants;[153] and second, the final determination of probable cause required for the issuance of a valid warrant is properly left in the hands of the magistrate.[154]

(10th Cir. 1975) (unconstitutionality of "strip cell" not clearly established, *but see* 510 F.2d at 467 (Doyle, J., dissenting)); 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).

149. It has been suggested that resolution may require a decision by a judge. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 219-22 (1975). In a Second Circuit case, the expert testimony of a law professor was allowed on the uncertain state of the law pertaining to administrative searches. *See* Laverne v. Corning, 522 F.2d 1144, 1150 (2d Cir. 1975).

150. *See* Imbler v. Pachtman, 424 U.S. 409, 419 nn.13-14 (1976) (given the factual situation confronting the officer, including the status of the right involved, the official should have expected his conduct to have violated the defendant's rights). As is the case with any factual issue, the burden of proof is of fundamental importance. *See generally* text & notes 228-34 *infra*.

151. Stadium Films, Inc. v. Baillargeon, 542 F.2d 577, 578 (1st Cir. 1976); *see* Brown v. Illinois, 422 U.S. 590, 612 (1975) (Powell, J., concurring in part); Madison v. Manter, 441 F.2d 537, 538 (1st Cir. 1971). *See also* Scott v. Dollahite, 54 F.R.D. 430, 434 (N.D. Miss. 1972).

152. Stadium Films, Inc. v. Baillargeon, 542 F.2d 577, 578 (1st Cir. 1976); Madison v. Manter, 441 F.2d 537, 538 (1st Cir. 1971).

153. Madison v. Manter, 441 F.2d 537, 538-39 (1st Cir. 1971). Writing for the court, Chief Judge Aldrich discussed the consequences of holding the police officer liable for negligent errors in the procurement of a warrant. The officer "may be discouraged from seeking warrants if the cost is a suit for negligence." *Id.*; *cf.* Boyd v. Hoffman, 342 F. Supp. 787, 789 (N.D. Ohio 1972) (as a practical matter, police officers cannot decide whether a warrant is valid on its face). *See also* United States v. Illinois Bell Tel. Co., 531 F.2d 809, 814-15 (7th Cir. 1976) (dictum) (good faith defense allowed for reliance on district court order).

154. Madison v. Manter, 441 F.2d 537, 539 (1st Cir. 1971). "The individual who is the object of a warrant has a more single-minded protector [than the arresting officer]—the official whose duty is to screen the application before issuing the warrant." *Id.* The constitutional requirement

A second type of search involves a different type of reliance. The fourth amendment requirement of reasonableness has increasingly turned on the demands of the fourth amendment warrant clause.[155] Searches without warrants are per se unreasonable subject only to exceptions that have been "jealously and carefully drawn."[156] It is the searches made under the various exceptions to the warrant requirement that allow for the greatest degree of discretionary latitude[157] and potential abuse.[158] The exceptions to the warrant requirement fall into three general groupings: consent searches, a limited class of routine searches, and searches made under conditions where the obtaining of a search warrant could be extremely impractical.

Lacking a warrant, an officer may make a search if the victim has consented to it.[159] To establish valid consent, the prosecution must prove that the consent was freely and voluntarily given.[160] The voluntariness of the consent is determined "from the totality of all the circumstances."[161] Because the threshold legality of the warrantless search rests on factual considerations, including the officer's conduct,[162] it would be superfluous to make a good faith defense in a civil action for a warrantless consent search. Facts showing good faith could also show legality in the first instance—an absolute defense.[163]

A "routine search"[164] is usually made by the officer in reliance on existing policies, practices, or legislation. Typical examples of such searches are border searches,[165] searches of locales licensed for the sale

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that a warrant be issued by a "neutral and detached magistrate" is one of long standing. *See* Coolidge v. New Hampshire, 403 U.S. 443, 453-55 (1971).

155. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 315 (1972) (reasonableness of warrantless search depends on whether warrant could have been obtained).

156. Jones v. United States, 357 U.S. 493, 499 (1958). *But see* Haddad, *supra* note 7, at 199-204, suggesting that the well-delineated exception rule has become inverted, characterizing it as "The Myth of the Well-Delineated Exception."

157. *See generally* Amsterdam, *supra* note 9, at 414-16.

158. Justice Jackson noted that "the extent of any privilege of search and seizure without a warrant which we sustain, the officers interpret and apply themselves and will push to the limit." Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

159. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

160. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

161. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

162. *See id.* at 226.

163. *See* Reimer v. Short, 578 F.2d 621, 628 (5th Cir. 1978). The § 1983 action in this case was based in part on the illegal search and seizure by the defendant police officer. *Id.* at 623. Although the officers claimed the searches and seizures were based on the consent of the plaintiff and therefore legal, *id.*, the issue of consent was in the end subsumed in the broader issue of good faith, *id.* at 628.

164. *See generally* Amsterdam, *supra* note 9, at 358-59. Professor Amsterdam uses the term "routine searches" as "only a shorthand description of the rare cases in which unconsented searches may be made without either a warrant or any individuating judgment that the person or place to be searched is connected with criminal activity." *Id.* at 359.

165. *See* Blefare v. United States, 362 F.2d 870, 874-76 (9th Cir. 1966). The border search exception to the warrant requirement has been severely limited by Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973). In *Almeida-Sanchez*, the Court held that a statute may properly authorize such searches without a warrant or probable cause, but such searches must be lim-

or distribution of such regulated items as liquor and firearms,[166] and inventory searches of vehicles taken into police custody.[167] In each of the above situations, the searches may be conducted without warrants, but must be made pursuant to an existing statutory authorization or an articulated policy or practice.

The courts in civil actions have been liberal in their allowance of good faith defense where the official relied on existing legislation or policy. Drawing heavily from *Pierson v. Ray*,[168] the Third Circuit has allowed a defense of qualified good faith immunity to the official who pleads and proves reasonable reliance on existing law or practice.[169] Courts have held that reliance may be reasonable when based on administrative procedures,[170] statutes,[171] judicial orders,[172] or general law or practice.[173]

In section 1983 claims based on an illegal search and seizure, courts have judged the officer's conduct reasonable if he relied on a statute subsequently found unconstitutional. In *Huotari v.*

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ited, at the very least, to "the border itself, . . . [and] its functional equivalents." *Id.* at 272 (1973). An example of such a statute is the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3) (1976), which provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States." *See also* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (something less than probable cause, *i.e.*, reasonable suspicion, is needed for random investigatory stops in border areas).

166. An underlying theory of this exception is that businessmen involved in heavily regulated enterprises have limited expectations of privacy. *See* United States v. Biswell, 406 U.S. 311, 316 (1972) (approving warrantless search of premises used for sale of firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (approving warrantless search of premises used for sale of liquor).

167. *See* Harris v. United States, 390 U.S. 234, 236 (1968), as limited and explained by Cady v. Dombrowski, 413 U.S. 433, 444-46 (1973) (actual physical custody of the automobile by the police is required).

168. 386 U.S. 547, 557 (1967).

169. *See* United States *ex rel.* Tyrrell v. Speaker, 535 F.2d 823, 828 (3d Cir. 1976). The burden of pleading and proof as to reliance was held to rest on the defendant. Where the defendant, a prison warden, offered no evidence that he did rely on a state statute, court orders, or general law in his confining of plaintiff prisoner in administrative segregation, no presumption of good faith would be allowed as a defense. *Id.* at 828-29.

170. *See, e.g.*, McKinney v. DeBord, 507 F.2d 501, 505 (9th Cir. 1974) (reliance by warden on existing censorship regulations held reasonable even though those regulations relied upon were later held to constitute denial of procedural due process); Thompson v. Anderson, 447 F. Supp. 584, 598 (D. Md. 1977) (no liability for reliance on unwritten department policy that allowed warrantless searches of dwellings); Dawes v. Philadelphia Gas Comm'n, 421 F. Supp. 806, 821 (E.D. Pa. 1976) (good faith defense available for reliance on termination of service procedure held reasonable even though the procedure was subsequently held to constitute denial of procedural due process); *cf.* O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (no duty on the part of an official to anticipate unforeseeable constitutional developments). *See also* Urbano v. McCorkle, 346 F. Supp. 51, 54 (D.N.J. 1972) (administrative segregation).

171. *See* Wiley v. Memphis Police Dep't, 548 F.2d 1247, 1254 (6th Cir. 1977) (officer's reliance on the then constitutional statute authorizing deadly force for fleeing felon was reasonable).

172. *See, e.g.*, Baer v. Baer, 450 F. Supp. 481, 488 (W.D. Cal. 1978) (good faith defense available for reliance on court order that was valid on its face); Brunson v. Hyatt, 409 F. Supp. 35, 37 (D.S.C. 1976) (jailor not liable for unlawful detention because he had relied on a judicial order of confinement valid on its face).

173. *See* Laverne v. Corning, 522 F.2d 1144, 1150 (2d Cir. 1975) (reliance on general law of administrative searches that prevailed at the time held to be reasonable).

Vandeport,[174] the court held that an officer's reliance on a state statute, which at that time had not been challenged in court or found unconstitutional, was reasonable.[175] Therefore, the court precluded an award of damages for the officer's warrantless entry into the plaintiff's apartment to arrest a suspected felon.[176] In *Miller v. Jones*,[177] a sheriff who made an arrest in reliance on an arrest warrant that had been withdrawn prior to the arrest was sued for unlawful detention.[178] In the court's view, the recall of the warrant was not a proper basis for subjecting the officer to civil liablity.[179] Although *Miller* involved an arrest warrant rather than a search warrant, the case nonetheless illustrates the court's readiness to protect the official's reasonable reliance on a collateral authorization. However, reliance on a presumptively valid statute, practice, or procedure does not alone necessarily assure the official a valid good faith defense. The good faith defense may be unavailable under the *Wood v. Strickland* test[180] where the official's conduct violates clearly established rights.[181] Moreover, actions though in reliance on some collateral authority may not be found to be in good faith if they exceed that authority, or are of "such a shocking nature that no reasonable man could have believed that they were constitutional."[182]

174. 380 F. Supp. 645 (D. Minn. 1974).

175. *Id.* at 651.

176. *Id.*

177. 534 F.2d 1178, 1179 (5th Cir. 1976).

178. *See id.* at 1179. Claim was based on the common law tort of unlawful detention, not § 1983. *Id.*

179. *Id. See also* Atkins v. Lanning, 556 F.2d 485, 487-89 (10th Cir. 1977) (defense allowed for good faith belief that warrant was valid on its face).

180. See text & notes 138-42 *supra.*

181. In Jannetta v. Cole, 493 F.2d 1334, 1338 (4th Cir. 1974), the court found liable an official who fired a fireman for circulating a petition because the official should have known that the firing constituted a denial of the fireman's first amendment rights. For discussion of the problem of what constitutes a clearly settled right, see text & notes 235-39 *infra.*

182. Landman v. Royster, 354 F. Supp. 1302, 1318 (E.D. Va. 1973). In discussing the defendant warden's abusive treatment of prisoners (bread and water diet and placement naked in roach-infested cell), the court stated that despite protestations of ignorance, the warden had exceeded the legitimate scope of his disciplinary authority because he had "at least some notice that the practices which he directed and condoned were constitutionally suspect. He [the warden] had not been performing his job in a vacuum, totally removed from increasing awareness by courts of the rights of prisoners." *Id.*

In Guzman v. Western State Bank, 540 F.2d 948 (8th Cir. 1976), the defendant repossessed plaintiff's mobile home pursuant to a state statute which was, subsequent to the repossession, found unconstitutional under Fuentes v. Shevin, 407 U.S. 67 (1972). 540 F.2d at 950, 952. The court in *Guzman* stated:

> There may be circumstances, such as exist here, where bad faith may be found under § 1983 even though a defendant acts pursuant to a presumptively valid statute. A person may feel he is pursuing his legal rights but, where his acts are oppressive and *in reckless disregard of another person's constitutional rights*, he can still be liable under § 1983 for his misconduct. . . . Where a plaintiff asserts denial of constitutional rights under § 1983, a defendant's claim of good faith immunity due to reliance on a presumptively valid statute must be considered in light of not only the *sincerity* in his belief that what he was doing was right, but the *reasonableness* of his actions in the circumstances. Where it is patently obvious that his conduct will oppressively harm another person and he acts with reckless disregard of a person's constitutional rights, a submissable case is

For example, it has been held in the context of search and seizure that no good faith defense would be allowed to an officer who had proceeded without a warrant to seize items that clearly were not in plain view.[183]

The third general exception to the warrant requirement involves emergency situations where resort to a magistrate would be impossible. Warrantless searches may be made of automobiles that may be driven away before a warrant can be procured,[184] provided that the searching officer has probable cause to believe the vehicle contains criminally related objects.[185] Similarly, other highly mobile objects such as luggage may be subject to warrantless searches.[186] Certain general emergency searches may also be made if the prosecution can establish a compelling urgency to justify the failure to obtain a warrant prior to the search. Such emergencies have included cases where crucial evidence may be destroyed[187] or where duty-bound investigation leads officers to evidence in plain view.[188]

Civil suits have also accommodated the emergency situation. In the context of a suit for damages, the finding of reasonable reliance is more flexible in cases involving exigent circumstances. Referring to *Wood v. Strickland*, which indicates that all circumstances surrounding

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made. . . . It is not necessary that one be a constitutional lawyer to fully appreciate the consequences of his acts.

Id. at 951-53 (emphasis in original). *See also* Stephenson v. Garkins, 531 F.2d 765, 766 (5th Cir. 1976); Seals v. Nicholl, 378 F. Supp. 172, 178 (N.D. Ill. 1973).

183. *See* Adekalu v. New York City, 431 F. Supp. 812, 817 (S.D.N.Y. 1977). The court noted that seizure of evidence not in plain view was not "a situation in which there was an abrupt change in law which the officers could not reasonably be expected to predict." *Id.*

184. *See* Carroll v. United States, 267 U.S. 132, 149 (1925). Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971), limits this exception to probable cause searches of vehicles with a significant degree of mobility. *Id.* at 464. The mobility is judged at the time of seizure. *See* Chambers v. Maroney, 399 U.S. 42, 52 (1970). However, Chief Justice Burger pointed out that the treatment of automobiles is based only in part on their mobility, noting that the Court has also sustained " 'warrantless searches of vehicles . . . in cases in which the possibility of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent.' " United States v. Chadwick, 433 U.S. 1, 12 (1977) (quoting Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973)). The Chief Justice said: "The answer lies in the diminished expectation of privacy which surrounds the automobile . . . ." 433 U.S. at 12.

185. *See* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221-22 (1968).

186. *See, e.g.* Hernandez v. United States, 353 F.2d 624, 627 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); United States v. Zimmerman, 326 F.2d 1, 4 (7th Cir. 1963). The question of mobile objects, such as luggage, does not turn only on the mobility of the object. In United States v. Chadwick, 433 U.S. 1, 13 (1977), the Court held that the owner's expectation of privacy in a locked footlocker together with the fact that the footlocker was in the exclusive control of police required the police to procure a search warrant. *Id.* In short, the inherent mobility of the footlocker did not alone dispose of the warrant requirement.

187. *See* Cupp v. Murphy, 412 U.S. 291, 296 (1973) (fingernail scrapings); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (blood sample).

188. Where an officer, hearing loud screams in the dead of night, entered an apartment to investigate, the seizure of counterfeit bills in plain view was not the product of a *search* as governed by the fourth amendment. *See* United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964). Because the officers were lawfully on the premises in response to the scream, they could seize evidence that came into plain view. *Id.*

the official conduct should be considered,[189] a recent Sixth Circuit decision applied the exigent circumstances test to police action subjected to a section 1983 claim.[190] Although the court held that the officer's conduct was not reasonable in the particular case at bar, it indicated that the determination of reasonableness should include consideration of special circumstances confronting the officer who was forced to make an almost instantaneous judgment[191] and then act upon it. The court noted that the officer "may be acting in the urgency of a street confrontation and not in the contemplative atmosphere of judicial chambers."[192] When we delegate to the officer the choice, albeit limited, of when to conduct a search, we are often subjected to the abuses sought to be prevented by requiring the officer under most circumstances to resort to a magistrate.[193] However, as exemplified by the exigent circumstances exception to the warrant requirement, a balance of interests involved—abusive search versus destruction of evidence—may force one to conclude that in certain circumstances delegation of discretion to the officer is expedient.[194]

The search incident to a lawful arrest poses unique problems in this regard. Not only is discretion as to how far the incident search should go[195] delegated to the officer, but in the case of the warrantless arrest, the determination of probable cause is also delegated to the officer. This probable cause directly supports the arrest and indirectly the search.[196] Once probable cause is established and the arrest effected, the limited scope of the search incident to a lawful arrest exception to the warrant requirement is defined by its purpose, to facilitate the execution of a safe and effective arrest.[197] Therefore, it follows that

189. *See* Wood v. Strickland, 420 U.S. 308, 314 (1975).

190. *See* Glasson v. City of Louisville, 518 F.2d 899, 908 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

191. *See id.* (dictum).

192. *Id.* (dictum). *See also* Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951), and cases cited therein.

193. *See generally* United States v. Chadwick, 433 U.S. 1, 9 (1977).

194. For a discussion of the exercise of discretion in all areas of police activity, with emphasis on the decision to take into custody, see Thomas & Fitch, *The Exercise of Discretionary Decision-Making by the Police*, 54 N. DAK. L. REV. 61 (1977).

195. Commenting on problems of scope when searches are conducted without warrants Chief Justice Burger said: "Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.'" United States v. Chadwick, 433 U.S. 1, 9 (1977).

196. The fourth amendment requires probable cause to support *both* the issuance of an arrest warrant, *see, e.g.*, Shadwick v. Tampa, 407 U.S. 345, 350 (1972) (dictum); Whiteley v. Warden, 401 U.S. 560, 566 (1971), and an arrest without a warrant, *e.g.*, Wong Sun v. United States, 371 U.S. 471, 479 (1963); Henry v. United States, 361 U.S. 98, 100 (1959); Draper v. United States, 358 U.S. 307, 313 (1959).

197. Chimel v. California, 395 U.S. 752, 762-63 (1969). Because the purpose of a search incident to arrest is to protect the arresting officer from the dangers of concealed weapons and to promote the interests of justice by preventing the destruction or concealment of evidence, the

the search may not exceed that area within which the person under arrest might reach in order to grab a weapon or evidence.[198]

Because the authorization for the search is only once removed from the finding of probable cause for the underlying arrest, the validity of the arrest is a paramount concern. *Pierson v. Ray*, read even in its most narrow application, allows the arresting officer a defense provided that the arrest is based on probable cause.[199] In explicit language, Chief Justice Warren stated: "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."[200] Probable cause must be determined by reference to the legal standards in existence at the time of an alleged violation of constitutional rights.[201] Subsequent acquittal of the plaintiff does not produce retroactive liability for the arresting officer if probable cause existed at the time of arrest.[202] Moreover, subsequent findings of lack of probable cause in habeas corpus[203] or grand jury proceedings[204] will not be fatal to the officer's defense of good faith and probable cause.

In addition to being a test for legality, probable cause provides the threshold standard to determine good faith when the constitutionality of the arrest is challenged in a section 1983 action against the officer. However, if the good faith test were adopted as the standard for exclusion, one aspect of section 1983 litigation to date becomes critical—courts dealing with the good faith defense have become increasingly dissatisfied with traditional formulations of the probable cause standard.

Good Faith and Probable Cause

Decisions involving section 1983 claims arising out of unlawful arrest not pursuant to a warrant for the most part follow the common law of torts position[205] that probable cause is the ideal barometer for police

search is limited to those areas where one could reasonably expect to find a weapon or concealed evidence. *See id.*

198. *Id.* at 763. The officer may at least search the person of the arrestee even though the officer may lack grounds to believe evidence or weapons are concealed. *See* United States v. Robinson, 414 U.S. 218, 235 (1973).

199. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

200. *Id.*

201. *See id.*

202. *Id.* at 555-57. "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." *Id.* at 555.

203. *See* Henderson v. Gocke, 329 F. Supp. 1160, 1162 n.5 (E.D. Pa. 1971), *aff'd mem.*, 491 F.2d 749 (3d Cir. 1973).

204. *See* Banish v. Locks, 414 F.2d 638, 641-42 (7th Cir. 1969).

205. *See* Joseph v. Rowlen, 402 F.2d 367, 369-70 (7th Cir. 1968); Anderson v. Haas, 341 F.2d 497, 501 (3d Cir. 1965).

misconduct and protection of fourth amendment rights.[206] However, the trend in civil treatment of the probable cause-good faith defense is to allow a finding of good faith when something less than probable cause if found.[207] Those courts favoring the *Bivens II* test[208] have, in reference to the good faith defense, adopted the position of Judge Lumbard in his concurring opinion in *Bivens II*.[209] Judge Lumbard distinguished the constitutional test for probable cause from a less stringent test of good faith, the latter of which he considered more appropriate in assessing the culpability of the officer under section 1983 claims.[210] The judge considered it contrary to the public interest to hold officers to a probable cause standard because in many cases they would not act "for fear of guessing wrong."[211] Rather, he maintained a defense should be allowed "if they [the officers] act in good faith and with a reasonable belief in the validity of the arrest and search."[212]

The difference between the constitutional standard[213] and the civil standard of *Bivens II* does not on its face seem substantial. The difference becomes noticeable however in the focus of the inquiry. A Seventh Circuit court explaining the *Bivens II* test observed, "the question is not whether there was, in fact, probable cause for the arrest, but whether the defendant officers had a reasonable, good faith belief that probable cause existed."[214] This contrasts starkly with Justice Holmes' classic statement in his discussion of the requisite intent of the police tortfeasor: "The question is not whether he [the officer] thought the

206. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949); Director Gen. of Railroads v. Kastenbaum, 263 U.S. 25, 28 (1923) (quoting from Chief Justice Taft: "[A]s we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable.").

207. This trend is most evident in the Seventh Circuit, where courts follow the rationale of Brubaker v. King, 505 F.2d 534, 536-37 (7th Cir. 1974). *See* Hunter v. Claudy, 558 F.2d 290, 292 n.1 (5th Cir. 1977) (dictum); Foster v. Zecko, 540 F.2d 1310, 1313 (7th Cir. 1976); Tristis v. Backer, 501 F.2d 1021, 1023 (7th Cir. 1974); Ellis v. Zieger, 449 F. Supp. 24, 26 (E.D. Wis. 1978); Thompson v. Anderson, 447 F. Supp. 584, 590 (D. Md. 1977); Pritz v. Hackett, 440 F. Supp. 592, 598 (W.D. Wis. 1977); Norton v. Turner, 427 F. Supp. 138, 145-46 (E.D. Va. 1977); Morales v. Hamilton, 391 F. Supp. 85, 89 (D. Ariz. 1975). See text accompanying note 214 *infra*. The rule has recently been embraced by the Fifth Circuit. *See* Reimer v. Short, 578 F.2d 621, 627 (5th Cir. 1978).

208. *See* Boscarino v. Nelson, 518 F.2d 879, 881-82 (7th Cir. 1975) (adopting the *Bivens II* test and expressly rejecting the rationale of Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968), which required probable cause in the constitutional sense); Street v. Surdyka, 492 F.2d 368, 373 (4th Cir. 1974); Hill v. Rowland, 474 F.2d 1374, 1377 (4th Cir. 1973). See text & note 129 *supra*.

209. Bivens v. Six Unknown Named Fed. Narcotics Agents, 456 F.2d 1339, 1348-49 (2d Cir. 1972) (Lumbard, J., concurring). The majority was not so explicit in setting forth a lesser standard for probable cause. *See id.* at 1348.

210. *Id.*

211. *Id.* at 1349.

212. *Id.*

213. The generally accepted test of probable cause is whether the officer's information at the moment of the arrest would justify a person of reasonable caution in believing that the suspect had committed or was committing an offense. *See* Beck v. Ohio, 379 U.S. 89, 91 (1964).

214. Brubaker v. King, 505 F.2d 534, 538 (7th Cir. 1974).

facts to constitute a probable cause, but whether the court thinks he did."[215] Thus, the *Bivens II* test increases subjectivity in comparison to the traditional Holmes-type test.

Although an objective scrutiny remains under the *Bivens II* test, it is diluted severely because the frame of reference for an objective evaluation is narrowed to include only the situation as perceived by the officer. This added emphasis on the subjective belief of the officer places a greater burden on the civil plaintiff because he is required to prove the mental state of the officer rather than establish surrounding facts to be objectively evaluated by the court. Moreover, an overly subjective examination of the officer's judgment leads to the dangers cited by the court in *Glasson v. City of Louisville*.[216] "To hold that a police officer is exonerated from liability if he merely acts in subjective good faith might foster ignorance of the law or, at least, encourage feigned ignorance of the law."[217] As courts move toward adoption of the good faith test for the exclusion of evidence, they should note these dangers and avoid an overly subjective analysis. Otherwise, the police officers left unchecked may well become a law unto themselves. The safeguards and mandates of the fourth amendment deserve more substantial protection.[218]

The good faith test as applied to section 1983 is far from uniform in conception of purpose or in method of application. However, when confronted with a good faith issue, courts attempt to define the contours of good faith and provide for valid methods of evaluating the officer's conduct. Apparent is an effort by the courts to avoid the dangers inherent in an overly subjective analysis, while not rendering the test of reasonable good faith so rigid as to defeat its underlying purpose as a vehicle of social engineering.[219] How the courts have dealt with the good faith test for civil liability, with its accompanying issues and procedural complications, will aid in predicting the effect of a similar test for the exclusionary rule.

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215. O. HOLMES, THE COMMON LAW 140 (1923).

216. 518 F.2d 899, 910 (6th Cir. 1973), *cert. denied*, 423 U.S. 930 (1975).

217. *Id.* at 909-10.

218. For a general criticism of the subjectivity of the *Bivens II* test, see Theis, *supra* note 110, at 1007-20.

219. It is the social engineering or conduct regulating aspect of tort law that manifests the point at which the theories of tort and criminal law draw closest. Discussing the normative aspect of tort law, William Prosser made the following statement:

> The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoers. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 4, at 23 (4th ed. 1971).

THE PROBABLE EFFECT OF A GOOD FAITH TEST ON THE EXCLUSIONARY RULE

The good faith test leaves little doubt as to the underlying goal of the exclusionary rule. If one considers the fundamental role of the exclusionary rule to be a remedy for invasion of individual rights of privacy, the good faith test is clearly lacking.[220] However, the predominance of the deterrent rationale and the corresponding de-emphasis of the expectations of the individual predate any discussion of good faith as a possible standard for exclusion. Thus, it is improbable that the adoption of the good faith test will impede the resurrection of the personal right rationale more than the other deterrent-based decisions of recent years.[221] Relative to the deterrent rationale, the good faith test at least clarifies the issue and purpose of the inquiry.

Retroactivity

Only after the search and seizure has been determined to be illegal may the judge, ruling on the exclusion question, determine if the officer at the time he acted knew or should have known that his conduct was impermissible.[222] Whether the search will retroactively be judged unreasonable—or similarly, whether the officer will be considered to have acted in good faith—rests mainly upon the facts and circumstances incident to the search.

In *United States v. Peltier*,[223] the majority refused to exclude evidence seized pursuant to a statute authorizing check point border searches,[224] even though four months after the seizure the Court had ruled check point border searches to be unconstitutional in *Almeida-Sanchez v. United States*.[225] The *Peltier* Court noted that no deterrent function would be served by retroactive application.[226] The thrust of the opinion was that the officers had in good faith acted on a then valid statute.[227] The adoption of the good faith test would broaden the effect

220. *See* Schrock & Welch, *supra* note 10, at 271-335. However, if a personal right in exclusion is the standard, anything short of exclusion in all cases is inadequate.

221. Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1409-14 (1977). Professor Israel suggests that the damage done by the Burger Court, and implicitly by the good faith test, to the exclusionary rule as formulated by the Warren Court is "primarily to the civil libertarian's pride, not to the primary function of the exclusionary rule." *Id.* at 1409.

222. Justice Brennan, in United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting), voiced concern that the adoption of a good faith type of test will stall the development of fourth amendment law. In response to Justice Brennan's criticism, it should be noted that the implications and meanings of the fourth amendment must be considered, and therefore developed, when the trial court considers the threshold illegality of the officer's conduct.

223. 422 U.S. 531 (1975).

224. *Id.* at 541-42.

225. 413 U.S. 266, 272-75 (1973).

226. 422 U.S. at 535-42. *See generally* text & notes 53-59 *supra*.

227. *See* 422 U.S. at 536-43.

of *Peltier* to include reliance on authority other than statutes and clarify the inquiry by focusing on the reasonableness of the officer's reliance. But the explicit adoption of a good faith test would not modify the basic thrust of *Peltier*, that is, the Court's unwillingness to condemn the officer's reliance on what reasonably appeared to be a valid authorization.

Two additional concerns having important implications to the application of the good faith test must now be addressed. First, it must be decided whether the prosecution bears the burden of proving good faith or whether the defendant must prove lack of good faith. Second, a standard must be developed to determine which rights are clearly settled.

Burden of Proof

The burden of pleading facts proving good faith or the lack of it was left open in *Wood v. Strickland*[228] and has not been allocated uniformly in courts below.[229] Allocating the burdens of pleading and proving good faith will have several implications if the good faith test is applied in the criminal context. For example, militating in favor of placing the burden on the officer is his overall accessibility to sources of information, such as arrest reports.[230]

Although in the criminal context the defendant-movant must allege sufficient facts to reasonably raise an issue of possible illegality of the search, once the issue is correctly and timely raised, the prosecution has the burden of persuasion in establishing the legality of the

228. *See* Skehan v. Board of Trustees, 538 F.2d 53, 61 (3d Cir. 1976).

> Several questions not addressed by the Supreme Court in Wood v. Strickland will of necessity arise on remand in this case. These include which side has the burden of going forward with evidence and which side has the burden of proof on the two qualifications [two pronged test] to the defendant's immunity.

Id.

229. For cases following an apparent majority, holding that the qualified immunity is indeed a defense and as such must be proved by the defendant, *see, e.g.*, Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978); Pritchard v. Perry, 508 F.2d 423, 426 (4th Cir. 1975); Bivens v. Six Unknown Named Fed. Narcotics Agents, 456 F.2d 1339, 1348 (2d Cir. 1972); Skehan v. Board of Trustees, 431 F. Supp. 1379, 1389 (M.D. Pa. 1977); Flair v. Cox, 402 F. Supp. 818, 821-22 (M.D. Tenn. 1975). *But see* Stadium Films, Inc. v. Baillargeon, 542 F.2d 577, 579 (1st Cir. 1977) ("Our own precedents have placed this burden [proof of bad faith] on the plaintiff in a § 1983 action for damages. We are aware that other circuits have taken a contrary position."); Gaffney v. Silk, 488 F.2d 1248, 1250 (1st Cir. 1973); Baer v. Baer, 450 F. Supp. 481, 488-89 (N.D. Cal. 1978); Salvati v. Dole, 364 F. Supp. 691, 700 (W.D. Pa. 1973).

230. However, given the expanding scope of defense access to documents under prevailing discovery rules, this becomes a less troublesome concern. *See* ARIZ. REV. STAT. ANN. § 15.1 (1973). *See generally* Note, *New Rules of Criminal Procedure: Proving Ground for the Speedy Administration of Justice*, 16 ARIZ. L. REV. 167 (1974). The Arizona rules follow closely the discovery rules recommended by the Advisory Committee on Pretrial Proceedings of the American Bar Association. *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Approved Draft, 1970).

search.[231] Moreover, if the good faith test were applied in the context of a criminal evidentiary hearing, the defendant-movant would be required to raise the issue of lack of good faith by pleading specific facts, but the prosecution would bear the burden of persuasion as to the existence of good faith.[232] Of course, where the officer involved in the illegal search and seizure could establish his reliance on collateral authorization, he would benefit from at least the inference that he acted in good faith.[233] Requiring the defendant to allege specific facts raising the question of illegality of the search would allow adequate protection against frivolous or dilatory defense motions.[234] At the same time, the ultimate burden of proof rests on the officer—the party whose conduct we ultimately seek to influence.

"Clearly Settled Right"

Determining when the officer has not acted in good faith because he has violated the defendant's clearly settled rights presents a more serious problem. By way of analogy to *Wood v. Strickland*,[235] the right to be free from the abuses of an unconstitutional statute would obviously not be clearly established, at least until the statute, policy, or practice regarding search and seizure is declared unconstitutional. However, this standard raises more questions than it answers. Assuming the object of the officer's reliance is found unconstitutional, when does the right to be free from searches and seizures predicated on such authority become clearly established? In other words, when does its

231. *See* Alderman v. United States, 394 U.S. 165, 183 (1969).

232. *See* United States v. De La Fuente, 548 F.2d 528, 533-34 (5th Cir. 1977):

> [W]e have not found a single case holding that a defendant can prevail at a suppression hearing by simply conjecturing that the government *might* have acted illegally. . . . [D]efendants must at least *allege* particular facts which would tend to indicate some governmental impropriety and that general, conclusory allegations based upon mere suspicions do not entitle a defendant to have evidence suppressed.

Id. at 534.

233. See text & notes 151-83 *supra*. To allow more than an inference, a presumption for instance, would throw back on the defendant the burden of proving that the officer's reliance was not in fact reasonable. The procedural choice between inference or presumption turns on the desirability of a rule requiring the officer to justify each aspect of his conduct. If the officer is granted a presumption of good faith where he has relied on collateral authorization, shifting the burden to the defendant arrestee, but the arrestee is able to produce evidence that would indicate that the officer's action exceeded the authorization, see text & notes 182-83 *supra*, the presumption should disappear—the officer once again being required to carry the full burden of persuasion.

234. *Cf.* Franks v. Delaware, 438 U.S. 154, 171 (1978). When the defendant raises the question of misrepresentations by a police officer in the affidavit for a warrant

> [t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory. . . . [T]hey should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. . . . Allegations of negligence or innocent mistake are insufficient.

Id. at 268. Analogizing to the good faith test, courts could similarly require that the defendant specifically identify those aspects of the officer's search and seizure which were not in good faith; mere negligence or innocent mistake being insufficient.

235. 420 U.S. 308, 322 (1975).

application cease to be retroactive? Does the right become settled when a majority of the courts hold it to be so? Does it become settled when the jurisdiction in which the officer operates holds it to be so,[236] or does it only become clearly settled when the officer involved subjectively appreciates the "clearly settled status of the right?"[237]

The majority in *Wood v. Strickland* indicated that officials are held to some standard of knowledge, determined by the nature of their position.[238] Police officers should be held to knowledge of clearly estab-

236. In Procunier v. Navarette, 434 U.S. 555 (1978), Justice White held that the rights of the prisoner regarding the particular mailing policies involved had not been clearly established. Justice White wrote: "Whether the state of the law is evaluated by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court, there was no 'clearly established' . . . right . . . ." *Id.* at 565. The proper inference to be drawn from Justice White's statement is that where one may look for a "clearly settled right" is uncertain; it does not seem to endorse, as proper sources for such determinations, any of the courts mentioned.

237. Wolfel v. Sanborn, 555 F.2d 583 (6th Cir. 1977), provides an example of how difficult it can be to establish when a right has become sufficiently settled to find the offending official culpable. In May 1973, two months after his release from prison, Wolfel, a parolee, was arrested on intoxication charges. Bond was posted and forfeited by Wolfel. Days later a complaint was filed against him for brandishing a gun. This resulted in Wolfel's arrest the next day for parole violations. *Id.* at 585. He was provided no preliminary "on site" hearing to determine whether there was probable cause to revoke his parole. *Id.* Prior to these events, the United States Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972), held that such an "on site" hearing was a requirement of the fourteenth amendment. *Id.* at 485. In January 1973, the Department of Rehabilitation and Correction of Wolfel's jurisdiction had issued a bulletin calling to all parole officers' attention the *Morrissey* decision and required officers to provide for an " 'on site' hearing [e]xcept when . . . there had been . . . a conviction of any crime or an adjudication of any fact constituting a violation of parole." 555 F.2d at 586. Defendant Sanborn contended that he in good faith believed the forfeiture of bail to constitute a conviction. *See id.* at 587.

Despite the Supreme Court's pronouncement and a department policy, which had been brought to the attention of the official prior to the alleged offense, the *Wolfel* court found that Sanford could be free of liability because he did not have what would amount to an almost perfect subjective understanding of a technical point of law. *See id.* at 592-93. The implication of this holding is that the defendant's right to a determination of probable cause for a parole revocation had not been "clearly established"—a difficult result to fathom in view of the facts.

But cf. Perez v. Rodriguez Bou, 575 F.2d 21, 23 (1st Cir. 1978). One week before the defendant university president suspended the plaintiff without notice or hearing, the United States Supreme Court ruled in Goss v. Lopez, 419 U.S. 565 (1975), that in those circumstances notice and hearing was required, *id.* at 573-84. Moreover, prevailing law of the Federal District of Puerto Rico also required notice and hearing. *See* Marin v. University of Puerto Rico, 377 F. Supp. 613, 623 (D.P.R. 1974). In light of these facts, the court ruled that Rodriguez Bou had violated Perez' clearly settled rights. *See* 575 F.2d at 23.

Ware v. Heyne, 575 F.2d 593 (7th Cir. 1978), involved a claim under § 1983 based on the defendant prison official's failure to provide Ware with notice of his disciplinary hearing. *Id.* at 594. On May 16, 1973, the Seventh Circuit in United Staes *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), ruled that prisoners must be afforded advance written notice of disciplinary charges brought against them. 575 F.2d at 595. Two months later, Ware, without notice, was called before the Conduct Adjustment Board of the Indiana Reformatory. *Id.* at 594. As defense to Ware's claim, the defendant alleged that though the *Miller* decision came down in May, it was not reported in the West's advance sheets until September, and therefore, claimed the defendant, the right to notice was not clearly established at the time of the alleged violation in July. *Id.* at 595. The court rejected defendant's argument characterizing it as "sheer nonsense." *Id.*

One may only conclude from the above that any potential defendant will be hard pressed to determine when any right has been clearly established, making him liable for violation of that right.

238. Wood v. Strickland, 420 U.S. 308, 322 (1975).

> [A] school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic,

lished and basic rights concerning arrest and criminal investigation, just as the school board official is held to knowledge of the established rights of his charges. Thus, a workable definition of what constitutes a clearly established right must be agreed upon.[239]

POLICE REGULATIONS: A STANDARD FOR GOOD FAITH

Recent commentators have suggested that if police operations were governed by administrative regulations subject to judicial review, police misconduct and constitutional abuse would be lessened.[240] The purpose of this Note, however, is not to discuss the relative merits of that position. This section will focus instead on the value of police regulations as a standard for good faith.

In his opinion in *Irvine v. California*,[241] Justice Clark confronted the inadequacy of judicial formulations as standards for police conduct.

> Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process, in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth,

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unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system.

Id.

239. The unworkable nature of the term and concept of a "clearly established right" is the focus of Justice Powell's dissent in *Wood*. *See id.* at 329 (Powell, J., concurring in part and dissenting in part). *See also* note 236 *supra*.

240. *See* Amsterdam, *supra* note 5, at 416-30. "Rule making offers the last hope we have for getting policemen consistently to obey and enforce constitutional norms that guarantee the liberty of the citizen." *Id.* at 428. Professor Amsterdam believes this to be true for two reasons:

> First, the rules made by police are most likely to be obeyed by police, [and] second, when police-made rules are not obeyed, they are most likely to be effectively enforced against the disobedient. Realistically, no extra-departmental body has the information, the resources and direct disciplinary authority necessary to control the police effectively and consistently.

Id. But see Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 69-108 (1976). Professor Allen favors more clearly drafted criminal codes rather than administrative regulations to control potential abuse of police discretion. *Id.* at 110-11. *But cf.* Franks v. Delaware, 438 U.S. 154, 169 (1978) (suggesting that sanctions other than exclusion which attempt to curb police abuses will not be successful). "[T]he alternative sanctions [sanctions other than exclusion] of . . . administrative discipline, . . . [or] civil suit are not likely to fill the gap." *Id.* (citations omitted). *See generally* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION (Approved Draft, 1973); K. DAVIS, POLICE DISCRETION 128-64 (1975); Brent, *Redress of Alleged Police Misconduct: A New Approach to Citizen Complaints and Police Disciplinary Procedures*, 11 U.S.F.L. REV. 587, 612-20 (1977); Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 703-17 (1974); *Contemporary Studies Project: Administrative Control of Police Discretion*, 58 IOWA L. REV. 892, 949-70 (1973).

241. 347 U.S. 128 (1953).

> the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions.[242]

It seems only logical that a right of an individual with whom the official must deal is more "clearly established" in the mind of the official if the right and procedure for the protection of that right were provided for in the department rules than if the officer must conduct himself with reference to more removed, and often more confusing, judicial notions concerning the proper treatment of the interests involved.[243]

Because courts do not feel it is appropriate to force police departments to promulgate rules,[244] relatively little has been done by way of substantive police rulemaking.[245] The rules adopted to date are mainly of a housekeeping nature—how to wear the uniform, how to carry the gun.[246] More recently, drafted rules are mainly attempts to codify prevailing Supreme Court holdings into rules understandable to the officer.[247] Professor Kenneth Culp Davis feels that these rules are a step in the right direction, but his hope is that the Supreme Court's rulings

242. *Id.* at 138.

243. *See* LaFave & Remington, *supra* note 7, at 1003-11. "[W]hen a decision is made by a trial judge, he seldom explains it in a manner likely to have an impact upon the particular police practice that is in issue." *Id.* at 1004. *Accord*, Murphy, *supra* note 50, at 939, 942.

244. In Rizzo v. Goode, 423 U.S. 362, 368-80 (1976), the Supreme Court rejected the district court's attempt to impose rules and regulations on the Philadelphia police. *Id.* at 380. They so ruled because the abuses of the officers were not connected closely enought to the supervisory officials of the department. *Id.* at 375-76. Because municipalities may not be liable solely under the theory of respondeat superior for the acts of police officers, Reimer v. Short, 578 F.2d 621, 626 (5th Cir. 1978), the plaintiff must establish a link between the acts of the individual policeman and municipal authorities. *See* Turpin v. Mailet, 579 F.2d 152, 167 (2d Cir. 1978). However, this link need not be a substantial one. *See id.* at 168. Failure to adequately supervise the officers, failure to enforce department regulations, Norton v. McKeen, 444 F. Supp. 384, 388 (E.D. Pa. 1977), and failure to weed from the force officers who have exhibited a "sadistic and trigger happy nature," Glover v. City of New York, 446 F. Supp. 110, 114 (E.D.N.Y. 1978), were considered adequate to establish the required link. Although the above may not satisfy the standards of Rizzo v. Goode, 423 U.S. at 368-80, so as to allow for court-imposed rulemaking, the mere increased potential for liability of the municipality may cause the municipality and police department to require their police officers to conform to more specifically drafted rules and regulations.

As an alternative to the court forcing the police departments to promulgate rules for searches and seizures, it has been suggested that the court itself could promulgate and enforce rules pertaining to police investigations. *See generally* Gerstein, Search and Seizure in the Supreme Court: A Legislative Problem in the Adjudicatory Context (1967) (unpublished dissertation, University of California, Los Angeles).

245. *See* McGowan, *Rule-making and the Police*, 70 MICH. L. REV. 659, 667-71 (1972).

246. Davis, *An Approach to Legal Control of the Police, supra* note 240, at 712; *Contemporary Studies Project: Administrative Control of Police Discretion, supra* note 240, at 913-15.

247. *See* PROJECT ON LAW ENFORCEMENT POLICY AND RULEMAKING, MODEL RULES FOR LAW ENFORCEMENT (1974) (the model rules cover warrantless searches of persons and places; searches, seizures and inventories of motor vehicles; stop and frisk; and search warrant execution); authorities cited note 240 *supra*.

on criminal procedure will be sufficiently broad to allow for meaningful, creative, and protective police regulations.[248]

While serving the normative function of exclusion, the good faith test remains sufficiently broad to allow for regulation by the police according to the administrative methods envisioned by Professor Davis. Administrative rules would be subject to judicial scrutiny to guard against abusive police practices violative of constitutional rights. Also, as stated initially, the regulations would provide an improved benchmark to aid in the determination of when a right has become "clearly settled."[249]

Any standard established by police regulation or by judicial opinion is relevant in the determination of good faith in either of two ways. First, the standard may act to establish the intent of the officer involved—when the officer acted did he subjectively appreciate the existence of any norms or regulations governing his conduct. Alternatively, the existence and comparative remoteness of the standard would be one of many factors considered in objectively determining if the officer acted in good faith.

CONCLUSION

In *Wood v. Strickland*, the Court's first serious attempt to establish some valid analytical framework for the determination of good faith, Justice White for the majority wrote:

> [A] school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system.[250]

An examination of this language supports the conclusion that intent is not wholly dispositive of the issue of good faith and that the existence

248. Davis, *An Approach to Legal Control of the Police, supra* note 240, at 708-13. Citing language in the *Miranda* opinion where the Court denied "that the Constitution necessarily requires adherence to any particular solution," Davis points out that the Court emphasized that its decision "in no way creates a constitutional straight-jacket." *Id.* at 713 (citing Miranda v. Arizona, 384 U.S. 436, 467 (1966)). Davis notes that police departments would be encouraged in their rulemaking efforts by intimations from the Supreme Court that its requirements might "yield to legislative or other regulations, such as those of local police departments." United States v. Wade, 388 U.S. 218, 239 (1967). However, Professor Davis concedes that "[b]ecause court-made rules are complex and police rules must be simple enough to practically use, the draftsmen have a truly difficult task." Davis, *An Approach to Legal Control of the Police, supra* note 240, at 713.

249. See text & notes 235-39 *supra*.

250. Wood v. Strickland, 420 U.S. 308, 322 (1975).

of a clearly settled right, however and to whatever degree established, is a factor to be considered along with actual intent to determine if the official acted in good faith. Justices Powell, Blackmun, Rehnquist and Chief Justice Burger seem to focus on this very point in their dissenting opinion.[251] These Justices object to the suggestion that the existence of a constitutional standard should be considered in judging the actions of the official.[252] Although the dissent does cite language to the effect that the standard is "whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith,"[253] this writer suggests that a careful reading of the dissenting opinion as a whole will lead to the conclusion that the dissent considers "all the circumstances"[254] relevant only insofar as they are able to reveal malicious intent.[255] According to the dissent, the mental state of the officer is the dispositive element.[256]

The dissenting opinion of Justice Stevens in *Procunier* exposed the essential problem of the prevailing good faith analysis. Justice Stevens pointed out that "[t]he heart of the good faith defense is the manner in which the defendant has carried out his job."[257] The mental state of the official, be it malicious or merely negligent, is only one of many factors that should be considered in determining if the officer acted in good faith. The other factors that should also be considered would vary from case to case but could include: (1) the officer acting in a situation of emergency or exigent circumstances; (2) the officer's abusive or excessive treatment of the defendant while effecting the search and seizure; or (3) a department policy or regulation covering the cir-

251. *Id.* at 327-39 (Powell, J., dissenting).
252. *Id.*
253. *Id.* at 330.
254. *Id.*
255. The impact of the dissent is that the official should not, according to Sheuer v. Rhodes, 416 U.S. 232, 238-50 (1974), be subject to any affirmative duty to know. Unless the overall circumstances reveal malice, there has been no violation. *See* 420 U.S. at 330.
256. *See* 420 U.S. at 330. If the majority in *Wood* contemplated that intent should not be the predominant factor in determining good faith, that position has changed in light of Procunier v. Navarette, 434 U.S. 555, 560-66 (1978). In *Procunier*, the plaintiff made three claims: the first was based on "knowing disregard" of plaintiff's rights, *see id.* at 557, the second was based on "bad faith disregard" of rights, and the third was based on "negligent and inadvertant" interference with plaintiff's rights, *see id.* at 558. The Court held that the defendant was immune at least as to the claim of negligent interference. *Id.* at 566. All Justices except Justices Burger and Stevens joined in the majority opinion, and Chief Justice Burger dissented only because he felt the majority did not deal forcefully enough in rejecting the negligence claim. *See id.* at 567-68 (Burger, C.J., dissenting). The clear focus of the majority, as well as the Chief Justice's dissent, was on the mental state of the defendant official. This analytical focus departed from the apparently more objective factual focus of *Wood.* Evidence of this departure is the fact that the *Procunier* analysis was able to satisfy the *Wood* dissenters who joined the majority in *Procunier* in rejecting the claim based on negligence. Furthermore, as noted above, the other dissenter in *Wood,* Chief Justice Burger, objects to the *Procunier* analysis only in regard to its intensity, not its focus. *See id.*
257. 434 U.S. at 570.

cumstances involved. In short, the question is: would the totality of the facts as they in fact existed indicate that the officer acted in good faith? Put another way, would it be reasonable under the circumstances as they existed to find the officer culpable, so as to control or deter conduct of officers who in the future may be confronted with similar circumstances?

On the other hand, if the mental state predominates as the determinative factor in a finding of good faith, one is almost inexorably led to the conclusion that facts are important mainly to the degree and in the manner the officer perceived them. Some objective standard of reasonableness of belief may remain, but its role is minimized by the subjective emphasis inherent in the intent-oriented analysis. The most graphic example of the effect of this type of analysis is found in recent lower court treatment of good faith in the context of an arrest made pursuant to the police officer's determination of probable cause.[258] The above outlined analytical distinction is not so important when the officer has relied on authority other than his own judgment, such as a warrant, statute, or regulation. In such cases, the differences between an intent-oriented analysis and a more broad factual analysis are minimized because the officer's reliance on collateral authority is presumed reasonable and in good faith. The facts, therefore, take on less importance. It is when the officer makes a search incident to an arrest based on his own finding of probable cause that the analysis selected becomes of fundamental importance.

In these cases where the search and seizure is based on anything other than the officer's determination of probable cause, administrative rules governing police conduct are beneficial. For the officers, they provide a more proximate and clear conduct model; for the courts, rules provide a more concrete standard by which the good faith of the officer may be judged. However, even the most comprehensive of regulatory schemes must in some instances rely on the officer's assessment of probable cause.[259] In those instances, it is up to the courts as they evaluate the good faith of the officer to preserve whatever quantum of probable cause they deem requisite to preserve the protections of the fourth amendment.

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258. See text & notes 207-19 *supra*.

259. *See* Murphy, *supra* note 50, at 943-46. The former Police Commissioner of New York City states:

> We have not been able to develop instructional material of sufficient specificity to enable the officer to make a proper determination [of probable cause] in all cases. . . . Perhaps we can do no more for the police officer who asks for guidelines than to tell him generally what the rule is, give him a sampling of instances where the Supreme Court has or has not found probable cause, and then in effect advise him "use your own best judgement."

Id.

The Supreme Court, increasingly dissatisfied with the present formulation and application of the exclusionary rule, appears ready to modify the rule. Upon balancing the harm caused to the factfinding process by the operation of the rule against the possibility of evidence-acquisition procedures in violation of the fourth amendment, the Court has become favorably disposed to the adoption of a good faith test for exclusion.

A good faith defense of relatively long standing under section 1983 has been available to the official defendant subjected to civil suit for violations of the plaintiff's constitutionally guaranteed rights. The treatment of this defense allowed to governmental officials, including police officers subjected to liability for illegal searches and seizures, provides considerable insight into the possibilities of a good faith standard as a determinant for the exclusion of criminal evidence. Case history of the section 1983 good faith defense reveals its potential as a viable test for the excludability of criminal evidence. Moreover, if applied, it could correctly be characterized a nominal change rather than a dramatic break from fourth amendment law as presently perceived and applied.

If the more salient problems of burdens of proof and workable standards for the determination of when the officer's intent may be judged culpable can be resolved, a properly defined and focused good faith test for exclusion could well provide a rational and effective means of protecting those rights provided for in the fourth amendment. Nevertheless, although the good faith test would appear to make no substantive changes in exclusionary rule analysis, if the Supreme Court draws heavily on the civil history of the good faith standard, the result may be an analysis that focuses disproportionately on the officer's assessment of the facts. This result seems inconsistent with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer.