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IN DEFENSE OF THE FOURTH AMENDMENT
EXCLUSIONARY RULE—A REPLY TO ATTORNEY
GENERAL SMITH

*John Wesley Hall, Jr. **

The Reagan Administration has mounted a legislative, judicial, and public relations attack on the fourth amendment exclusionary rule. The Administration earnestly seeks implementation of a "good faith exception" to the exclusionary rule which, if adopted, would make criminal evidence apparently illegally seized in violation of the fourth amendment admissible into evidence in a criminal trial if the seizing officer was acting in a good faith belief he was following the law and his violation was merely a technical one.

On the legislative front, the Administration proposes a new section to the federal criminal code which adopts a subjective good faith exception.¹

On the judicial front, the Administration, buoyed by its success in the former Fifth Circuit *en banc* decision in *United States v. Williams*,² is now seeking to establish good faith exception beachheads on the exclusionary rule at every turn in the courts. It participated as *amicus curiae* both in briefs and oral argument in the abortive

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1. Proposed 18 U.S.C. § 3505 is quoted in the text following note 64, *infra*.

2. 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127.

good faith exception case of the 1982 Term, *Illinois v. Gates*,³ where the Supreme Court wisely realized that, factually and legally, *Gates* was not the case to decide whether a blanket good faith exception should be adopted.⁴

Now, the Administration has moved to the public relations front to promote the good faith exception with Attorney General William French Smith as its chief spokesman.⁵ The Attorney General has spoken on this on nationwide television, and he has been making speeches around the country decrying the alleged societal evils of the fourth amendment exclusionary rule. In an effort to persuade lawyers, his speech has now begun appearing in bar journals under the title "The Exclusionary Rule 'BE DAMNED.'"⁶

It is not legal argument. It is, rather, the latest chapter of the running debate on the Politics of Crime, circa 1980's. The Attorney General goes to great lengths to accuse the fourth amendment exclusionary rule of contributing to the imbalance between the lawless and the rights of society. He concludes by touting the Reagan Administration's proposed legislation to create a "good faith exception" to the exclusionary rule where good faith technical violations of the fourth amendment do not require evidentiary exclusion. As is typical of this Administration, Attorney General Smith, its chief law enforcement officer, makes sweeping generalizations about the exclusionary rule and the good faith exception with simple solutions to the so-called "problems." In generalizing, however, he makes some glaring legal errors and unsupported factual assumptions about the exclusionary rule and the good faith exception and even the practical necessity of a broad good faith exception under existing law.

I read the Attorney General's remarks in my own bar journal, and I was concerned that the nation's chief law enforcement officer could make such legally specious comments with impunity. I feel constrained to respond and enter the fray. After considering differ-

3. 103 S.Ct. 2317 (1983). In inexplicably ordering reargument, the Supreme Court directed the parties to brief the issue of whether the "good faith exception" should be adopted. *Illinois v. Gates*, 103 S.Ct. 436 (1982).

4. 103 S.Ct. at 2321.

The Court has, however, recently granted certiorari in four good faith cases: *Michigan v. Clifford*, 32 Cr.L. 4169 (No. 82-357, Jan. 24, 1983); *Massachusetts v. Sheppard*, 33 Cr.L. 4093 (No. 82-963, June 27, 1983); *Colorado v. Quintero*, 33 Cr.L. 4094 (No. 82-1711, June 27, 1983); *United States v. Leon*, 33 Cr.L. 4094 (No. 82-1771, June 27, 1983).

5. FBI Director William Webster also has publicly appeared as a spokesman with Attorney General Smith.

6. Smith, *The Exclusionary Rule "BE DAMNED"*, 17 Ark. Law. 112 (1983) [hereinafter cited as Smith].

ent avenues to pursue this response, I settled on a point-by-point rebuttal which I believe makes the Attorney General's position constitutionally suspect at best and legally fortifies the exclusionary rule as a part of our constitutional jurisprudence.

A summary of the Administration's position

In his speech, Attorney General Smith first states that the public believes the courts are not doing their part to curb the growth of crime. He adds that our historic concern for the rights of the accused have "overwhelm[ed] the even more historic first principle of government: Providing for the defense of society."⁷ Further, he notes that "[m]ore and more Americans recognize that an imbalance has arisen in the struggle between law and the lawless,"⁸ and one weight in that imbalance is the exclusionary rule.

He notes that, historically, the exclusionary rule is a "judicially created rule of law" not even mentioned in the fourth amendment to the United States Constitution or anywhere else in the Constitution, the Bill of Rights, or the federal criminal code. Since it was recognized by the Supreme Court in 1914 in *Weeks v. United States*,⁹ the rule has been criticized. The Attorney General does not mention that *Weeks* recognized the exclusionary rule as a *personal right*.¹⁰ He says that the states were not fully convinced of the value of the exclusionary rule because, by the time the Court first decided that the fourth amendment was not incorporated into the due process clause of the fourteenth amendment,¹¹ only sixteen states had adopted the exclusionary rule while thirty-one had refused to adopt it.¹² The Supreme Court finally made the exclusionary rule binding on the states in *Mapp v. Ohio*¹³ in 1961. He says that the effect of the exclusionary rule is that, quoting Justice Cardozo when Cardozo was a judge on the New York Court of Appeals, "The criminal is to

7. *Id.* at 112.

8. *Id.*

9. 232 U.S. 383 (1914). The exclusionary rule actually was first applied in the state courts in *State v. Slamon*, 50 A. 1097 (Vt. 1901), and *State v. Sheridan*, 96 N.W. 730 (Iowa 1903).

10. *Weeks v. United States*, 232 U.S. at 392-94, 398. See *infra* notes 55-60 and accompanying text.

11. *Wolf v. Colorado*, 338 U.S. 25 (1949), (overruled in *Mapp v. Ohio*, 367 U.S. 643 (1961)).

12. 338 U.S. at 33-39.

13. 367 U.S. 643 (1961).

go free because the constable has blundered.”¹⁴ No matter how technical a violation of the fourth amendment, the evidence is suppressed. “There is no weighing by the court of the seriousness of the crime or the significance of the evidence. Even a good faith attempt by a law enforcement officer to ensure the legality of the search will not—if a technical flaw is uncovered—save the evidence of crime.”¹⁵

The Attorney General pays lip service to two of the arguments in favor of the exclusionary rule: deterrence of unlawful police conduct and the preservation of judicial integrity. No mention is made of the personal right rationale of the exclusionary rule. He flatly states that the deterrence rationale has no “empirical evidence” to support it. The judicial integrity rationale is turned inside out by his statement that there is no judicial integrity when the guilty go free.

In support of his position, the Attorney General states that “[t]he rule is invoked upon the most technical of violations—even when the officer could not reasonably have been expected to do otherwise.”¹⁶ In support of this proposition, he cites, with some justification, the bizarre judicial circumlocution of *Robbins v. California*¹⁷ and *New York v. Belton*¹⁸ in 1981. The Supreme Court held on somewhat similar probable cause facts that the trunk search in *Robbins* should be suppressed while the search incident of the passenger compartment in *Belton* should be sustained. Then in 1982 the Court overruled *Robbins* in *United States v. Ross*,¹⁹ holding that probable cause to search a vehicle extends throughout the vehicle wherever the probable cause might take the officer.

The Attorney General recognizes the 1979 report of the General Accounting Office of the U.S. Congress²⁰ which found that the exclusionary rule was judicially invoked in only 1.3% of federal criminal cases and figured in the declining of prosecution in only 0.4% of federal criminal cases. He says, however, that these figures are misleading because the percentages are higher in some larger districts unstudied by GAO. Also, he says the prosecutorial and judicial (trial and appellate) workload is unnecessarily high because of fourth amendment issues. In addition, he finds an effective civil

14. *People v. Defore*, 242 N.Y. 13, —, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926) (denying suppression of the evidence).

15. Smith, *supra* note 6, at 113.

16. *Id.*

17. 453 U.S. 420 (1981) (overruled in *United States v. Ross*, 456 U.S. 798 (1982)).

18. 453 U.S. 454 (1981).

19. 456 U.S. 798 (1982).

20. Smith, *supra* note 6, at 114.

remedy under the civil rights acts²¹ as a result of the broadening of this civil remedy by the Supreme Court.²²

Finally, he says that the Administration has a remedy for the "absurd consequence [of the exclusionary rule] of releasing the guilty"²³—its proposed good faith exception legislation²⁴ which is already the law in the Fifth and Eleventh Circuits as a result of *United States v. Williams*.²⁵ This proposal, he says, when added to other unidentified Administration proposals, "would . . . greatly strengthen the ability of government to protect the law abiding—without impairing our Constitutional liberties."²⁶

What is the fourth amendment?

The fourth amendment states as follows: "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."²⁷

The history of the fourth amendment shows that the first clause provides a general protection against unreasonable searches and seizures and the second clause dictates the requirements of search warrants.²⁸

The quantity and complexity of fourth amendment litigation has become mind boggling. Nowhere in the law have so few words generated so much litigation and confusion. After more than twenty years of intense litigation, since *Mapp v. Ohio*²⁹ made the exclusionary rule binding on the states, much of the body of fourth amendment law is now settled. While there are still several areas of the

21. See 42 U.S.C. § 1983.

22. In support of his statement, the Attorney General cites *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). See also *Owen v. City of Independence*, 445 U.S. 622 (1980).

23. Smith, *supra* note 6, at 115.

24. Quoted in the text following note 64, *infra*.

25. See *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

26. Smith, *supra* note 6, at 115.

27. The Attorney General makes a Freudian slip in his speech—he omits the probable cause and warrant clause when he quotes the Fourth Amendment. Smith, *supra* note 6, at 112. The significance of this omission will be apparent below in understanding the Administration's proposed "good faith exception" which could very well be unconstitutional.

28. K. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES*, at 102-03 (1937).

29. 367 U.S. 643 (1961).

law of search and seizure uncharted by the Supreme Court, the settled principles of search and seizure law have made the Supreme Court's decisions over the last several years somewhat predictable, at least to fourth amendment lawyers.

Why do we have a prohibition against unreasonable searches and seizures?

The history of the fourth amendment is fascinating. It is rooted in free speech, taxation, smuggling, corruption, litigation, and politics.³⁰

In England, the power to search developed soon after the invention of the printing press made it possible for malcontents to subject the Crown to widespread criticism. General warrants and writs of assistance were issued by the Crown to almost anyone (not necessarily police officers) to search private property to seize allegedly libelous and seditious publications. The infamous Star Chamber issued and enforced general warrants. Somewhat later, the power of search and seizure was used to enforce the tax laws and collect import duties.

The general warrant and writ of assistance came to the colonies to restrict American foreign trade. It turned out, however, that they were used more vigorously here than in England.

The general warrant first succumbed to a judicial attack in England in 1765 in *Entick v. Carrington*³¹ which held invalid a general search warrant to seize papers. Meanwhile, the various states adopted their own protections against unreasonable searches and seizures just before and after the Declaration of Independence. The Constitutional Convention omitted a Bill of Rights, but there was an understanding that one would be shortly referred to the states. This contributed to the delay in adoption of the Constitution. The Bill of Rights was finally sent to the states and adopted in 1792.

The Attorney General seems to attribute the Bill of Rights to

30. This brief account of the history of the Fourth Amendment is summarized from J. HALL, SEARCH AND SEIZURE §§ 1:11-1:15 (1982), which summarized the two significant works on the history of the Fourth Amendment: K. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ch. 1-3 (1937) and J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT ch. 1 (1966). See also *Marcus v. Search Warrant of Property*, 367 U.S. 717, 724-29 (1961); Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather Than An "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 571-79 (1983).

I apologize to the reader for occasionally citing myself—it is easier to do so than restate propositions and recite many other authorities.

31. 19 Howell's St. Tr. 1029 (1765).

“our historical concern for the rights of the accused” and that “we have needlessly allowed [this concern] to overwhelm the even more historic first principle of government: Providing for the defense of society.”³² The fourth amendment, however, was intended to protect all citizens, both the law-abiding and the lawless, from governmental intrusions.³³ After all, it does refer to “The right of the *people* to be secure . . .”; not just the criminal element. Indeed, the entire body of the law of administrative searches and inspections developed from a need to enforce civil law rather than the criminal law.

The Attorney General cannot so easily dismiss our right to be free from unreasonable searches and seizures as a mere protection for the criminal accused. The fourth amendment protects all of us.

The exclusionary rule as a remedy for a fourth amendment violation

The Attorney General observes that “[t]he exclusionary rule is a judicially created rule of law” that is “not to be found anywhere in the Constitution, the Bill of Rights, or the federal criminal code. It was also not inherited from English law.”³⁴

True. But the entire common law and the law of equity is based on judicially created remedies. The exclusionary rule had not been found necessary by the time the fourth amendment was ratified because an after-the-fact remedy was not yet required.³⁵ How else do we enforce fundamental constitutional rights in our present system of justice so the fourth amendment will not become a mere “form of words”?³⁶ After all, it is no longer the Eighteenth Century. The *Weeks* court made this absolutely clear nearly seventy years ago:

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

32. Smith, *supra* note 6, at 112.

33. See, e.g., *Ker v. California*, 374 U.S. 23, 33 (1963); *Miller v. United States*, 357 U.S. 301, 313 (1958); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); *Agnello v. United States*, 269 U.S. 20, 32 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914).

34. Smith, *supra* note 6, at 112.

35. *Kamisar*, *supra* note 30, at 571-79.

36. *Mapp v. Ohio*, 367 U.S. at 655.

from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . In *Adams v. New York*, 192 U.S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended to the action of the Government and officers of the law acting under it. *Boyd Case*, 116 U.S. 616. To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.³⁷

As I read Blackstone, I submit that he would have approved of the exclusionary rule had it been thought of in his time.³⁸

Many alternatives to the exclusionary rule have been proposed in the last twenty years, the most notable and influential being in Chief Justice Burger's dissenting opinion in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.³⁹ *Bivens* held that there was a federal cause of action against federal officers for fourth amendment violations. Chief Justice Burger used *Bivens* as a forum to restate his longstanding views⁴⁰ that the exclusionary rule should be reformulated or replaced outright.⁴¹ He generally stated five alternatives: (a) waiver of sovereign immunity for search and seizure torts; (b) creation of a cause of action for search and seizure torts; (c) creation of a tribunal to hear search and seizure tort claims; (d) a statutory remedy in lieu of evidentiary exclusion; and (e) general

37. *Weeks*, 232 U.S. at 393-94.

38. See 1 BLACKSTONE, COMMENTARIES *244-45:

For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies. [emphasis in original].

39. 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

40. See Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964).

41. *Bivens*, 403 U.S. at 413-19 (Burger, C.J., dissenting).

provisions prohibiting the exclusion of evidence.⁴² He also spoke approvingly of the then proposed ALI Model Code of Pre-arraignment Procedure "Substantiality Test."⁴³ The ALI Substantiality Test is a form of the good faith exception which requires that the violation of the right against unreasonable searches be "substantial [*i.e.*, "gross, willful, and prejudicial to the accused"] or . . . otherwise required by the Constitution . . ."⁴⁴ Nevertheless, Chief Justice Burger did concede "the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials."⁴⁵

The exclusionary rule does not always free the guilty

The Attorney General states almost as fact that the guilty go free when evidence is excluded because the exclusionary rule is invoked. This is not always so.

Evidence illegally seized is, of course, powerful evidence of guilt. Its evidentiary reliability is usually unquestioned. When illegally seized evidence is excluded, the case proceeds from there. In possessory offenses, such as drug, gambling, and weapons cases, suppression of the evidence could very well result in a dismissal of charges. In other types of cases, however, the result of the criminal case could very well be unchanged. Take, for example, *Coolidge v. New Hampshire*,⁴⁶ mentioned by the Attorney General for another proposition in his speech. *Coolidge* involved probably the most heinous murder in New Hampshire's history. After Coolidge's conviction, evidence seized from his house and car was suppressed by the Supreme Court as a result of illegal searches, and his conviction was reversed. On retrial, Coolidge was convicted without the illegally seized evidence. Consider also *Mincey v. Arizona*⁴⁷ which involved the killing of a police officer during a drug raid. Notwithstanding eyewitnesses to the occurrence, the police felt compelled to subject the defendant's house to an intensive four-day search, and the evidence so obtained was used against him. The Court suppressed the

42. *Id.* at 422-23.

43. *Id.* at 419. See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.2 (Official Draft 1975).

44. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 290.2(3) (Official Draft 1975).

45. *Bivens*, 403 U.S. at 415.

46. 403 U.S. 443 (1971).

47. 437 U.S. 385 (1978).

search, and Mincey stood trial again and was convicted.⁴⁸

The Attorney General makes note of the General Accounting Office report that the exclusionary rule was actually invoked in only 1.3% of filed federal criminal cases and that only 0.4% of declined cases were declined for prosecution because of fourth amendment problems. He finds this "exceedingly weak support for the exclusionary rule's continuation."⁴⁹ He further counters this statistic by challenging its true effect because 33% of all defendants *going to trial* file suppression motions (accounting for 55% of all motions filed) which waste the time of courts and prosecutors and because suppression motions are made in 20% of all cases in some larger districts. He also notes that a 1971 state court study in three branches of the Chicago Circuit Court reported that fourth amendment suppression motions *in only possessory offenses* were successful 30% of the time.

The most common failures of the police to comply with the requirements of the fourth amendment are in possessory offenses. It is here that the exclusionary rule has its greatest impact because the entire case may very well turn on the legality of a search and seizure or an arrest or both.

But, Mr. Attorney General, let's not ignore the fact that a large number of street encounters result in illegal searches and arrests where there is no pretext of a successful prosecution. The police succeed in removing a small quantity of drugs or a gun from circulation. And who is there to complain; the dope dealer illegally stripped of his cache of drugs? Hardly. Only when the police get serious and decide to prosecute do they usually have to justify their conduct.

Finally, it should not be lost on anyone what the Attorney General's figures really mean: In urban areas the police are more likely to have violated the fourth amendment, and he is tacitly admitting that the police are not going to comply with the fourth amendment in a substantial number of cases. The fact that some classes of people are more likely to be subjected to an illegal search and many police will invariably violate civil liberties should be a compelling reason to retain the exclusionary rule, not discard it. The Attorney General's argument just does not follow.

48. See *State v. Mincey*, 130 Ariz. 389, 636 P.2d 637 (1981), *cert. denied*, 102 S.Ct. 1638 (1982).

49. Smith, *supra* note 6, at 114.

Judicial economy is no ground to modify the exclusionary rule

The Goddess of Justice is not a Cost Accountant. The criminal courts exist to resolve disputes between government and its citizens over whether criminal laws were violated and whether the Constitution was violated in getting the defendant before the bar of the court. The fact that the Administration seriously argues that the courts have better things to do than determine whether the government has violated the rights of its citizens is incredible.

The deterrence rationale is not a failure

The Supreme Court now considers whether the police will be deterred from fourth amendment violations in determining whether to order exclusion in a particular case. In *United States v. Calandra*,⁵⁰ Justice Powell wrote for six members of the Court:

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:

'[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' *Linkletter v. Walker*, 381 U.S. 618, 637 (1965). Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:

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

In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served. The balancing process implicit in this approach is expressed in the contours of the standing requirement.⁵¹

There is a justifiable belief that the deterrence rationale was not even considered when the exclusionary rule was fashioned in

50. 414 U.S. 338 (1974).

51. *Id.* at 347-48 (footnote omitted).

Weeks.⁵²

Without even getting into the argument over the true purpose of the exclusionary rule,⁵³ one cannot logically say that the exclusionary rule does not ever deter unlawful police conduct. A professional police officer strives to make sound cases in order to make convictions. If he has too many invalid arrests or searches, his personnel record will show it and promotions may not follow. If he develops a reputation as a liar or one who "plays fast and loose" with the fourth amendment, judges will not believe him at suppression hearings or even at court trials on the merits of a criminal case. If he is more concerned with clearing outstanding cases by arrest and has no concern whether he convicts anyone, then the deterrence rationale simply will not be effective as to him. And, what if he simply chooses not to be deterred at all?

I, for one, refuse to believe that professional law enforcement officers *as a group* are so devious or stupid that the deterrence rationale cannot have an effect on the way they do their job. It is human nature to succeed in one's profession and do well.

But some want to do well at the expense of others. They measure success by arrests and not convictions. They blame the courts for being lenient when their constitutional errors must be accounted for. Those of us in the search and seizure bar have all encountered law enforcement officers who will go to any length to make a case against someone who they believe deserves to be convicted. Even the threat of a perjury conviction does not deter them. Obviously, the exclusionary rule does not deter these officers either. How, then, Mr. Attorney General, do you propose to protect the citizenry from the criminal hiding behind a badge who is not to be deterred by anything? The only protection is evidentiary exclusion.

It has been said that the empirical data on the administration of the exclusionary rule does not support the conclusion that the rule deters unlawful police conduct.⁵⁴ Ideally, the fourth amendment itself should deter fourth amendment violations, but it doesn't, and the courts have done a lot to promote fourth amendment violations by not taking suppression motions seriously. The fourth amendment is violated every day in every major jurisdiction. What other

52. *Id.* at 356-58 (Brennan, J., dissenting).

53. See *infra* text accompanying notes 55 to 60.

54. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 666 (1970). But see generally Kamisar, *supra* note 30.

remedy except the exclusionary rule is effective to limit police conduct *before it occurs*? I don't see one yet.

What about the personal right rationale?

Weeks considered the exclusion of evidence due to a fourth amendment violation to be a matter of personal right.⁵⁵ While the present Supreme Court has ignored this rationale for exclusion in favor of the deterrence rationale,⁵⁶ it has been forcefully argued by some influential commentators that *Weeks*' original understanding still has currency and constitutional validity.⁵⁷ These commentators find the *Weeks*' personal right theory as "simply another name for judicial review" of executive action⁵⁸ under *Marbury v. Madison*.⁵⁹ The personal right rationale eliminates the need to consider the sometimes imponderable question of whether invoking the rule in a particular case would serve to deter the police from future violations of the fourth amendment.

The time is ripe for a reemergence of the personal right rationale. Indeed, on June 29 the Oregon Supreme Court applied the personal right theory in excluding evidence.⁶⁰

A civil remedy is ineffective

The Attorney General urges aggrieved criminal defendants to instead pursue the allegedly expanded civil remedies provided for under 42 U.S.C. § 1983 (1976).⁶¹ It is folly to think that a potential civil action by a defendant convicted on illegally obtained evidence has any deterrent or remedial value at all. As the Attorney General must recognize, the brunt of the civil action will fall on the governmental entity employing the officer, not the officer himself, both in the costs of defense and in paying judgments. Also, the increased use of insurance shifts the cost away from the officer and his employer. Finally, and by no means lastly, it has not been lost on the police that a person they can label "criminal" in a civil trial makes a miserably poor plaintiff. Anyone who has tried a § 1983 illegal

55. See *supra* text accompanying note 37.

56. See *Calandra*, 414 U.S. at 338 (1974).

57. Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); see also Kamisar, *supra* note 30.

58. Shrock & Welsh, *supra* note 47, at 324-26, 335-66; see also Kamisar, *supra* note 30, at 590-97.

59. 5 U.S. (1 Cranch) 137, 177-78 (1803).

60. *State v. Davis*, Ore.S.Ct. (No. 28881, June 29, 1983) (NLJ, 7-18-83).

61. See cases cited *supra* note 22.

search action where evidence of the crime was found can vouch for that. The police attitude to civil actions can best be summed up in an exchange I had with a police officer⁶²: "If you don't like it, sue me. You can't get somethin' for nothin'." To this I replied, "Besides, you're insured, right?" He just smiled.

So, Mr. Attorney General, how does a civil action provide any deterrence or any effective remedy?

The Administration's proposed good faith exception

The Attorney General proposes in his speech that the exclusionary rule be eliminated⁶³ in favor of a good faith exception which would allow the admission of evidence whenever an officer conducts a search with a warrant or, in the case of warrantless searches, with a reasonable good faith belief he was acting in accordance with the fourth amendment.

The good faith exception is almost unworkable in its practical application, and it has some serious constitutional problems if not properly administered. As a practical matter, these problems must be resolved on a case-by-case basis before a broad good faith exception can be adopted by statute or judicial decision.

The good faith exception takes two forms: subjective good faith and objective good faith. One cannot tell exactly which one the Attorney General espouses. What has been said publicly does not always square with the language of the proposal. At times, the Administration confuses the two, and the distinction is crucial as to how the exception will be administered and applied.

The Administration's proposal is said to adopt the result in *United States v. Williams*.⁶⁴ *Williams* is clear as to its holding, but the Administration's proposal is as inscrutable as the fourth amendment itself. Proposed 18 U.S.C. § 3505 provides:

Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution of the United States. A showing

62. This was during the course of a search and seizure of a client's business property, and I suggested that a later, more convenient production of the items sought would not leave the obvious appearance that the officers were trying to harm the client's business.

63. Sometimes he says "modified."

64. See *infra* text accompanying note 82.

that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

What is a "reasonable, good faith belief"? Reasonable by what standard and according to whom? How will the good faith exception be administered? Is it constitutional?

The good faith exception is unworkable

Professor LaFave has identified four adverse consequences which will result from the good faith exception applicable to the Administration's proposal.⁶⁵

First, the good faith exception, to paraphrase Justice Brennan, could stop development of fourth amendment doctrine dead in its tracks because, without clear precedent, no officer would not be acting in good faith.⁶⁶

Second, the suppression judge will have to "probe the subjective knowledge" of the searching officers.⁶⁷ That is nearly impossible. Also, the government's case will be the officer's "self-serving and generally uncontradicted testimony."⁶⁸

I would add a further comment: the good faith exception is an open invitation to police perjury. To a good many police officers, the end justifies the means in this "often competitive enterprise of ferreting out crime."⁶⁹ They could fabricate their good faith belief in fact or law from whole cloth, and no one could contradict it. After all, isn't a little perjury preferable to letting a criminal loose on the streets, especially if you can't get caught at it?⁷⁰

Third, adoption of the good faith exception "would likely result in a distinct pro-police (or, if you prefer, anti-fourth amendment)

65. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 354-59 (1982). This article contains an excellent discussion of the good faith exception. *Id.* at 333-59.

66. *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).

67. *Id.* at 553.

68. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1045 (1974).

69. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

70. Then who is the bigger criminal? In *PRINCE OF THE CITY*, a story about police corruption in a special narcotics investigation unit, the U.S. Attorney's Office is questioning Det. Ralph Alvarez about whether or not he ever perjured himself to secure a drug conviction. Alvarez said, "Yeah. I've committed perjury about twenty times. You guys don't understand the system. You want a conviction, but you got these stupid search and seizure laws."

bias in suppression rulings."⁷¹ "[W]hat it means in practice is that appellate courts defer to the trial courts and trial courts defer to the police."⁷²

Fourth, application of the good faith exception legalizes the challenged conduct in the future.⁷³ The police will also then " 'push to the limit' any authority they are given by the courts."⁷⁴

Litigating the officer's subjective state of mind is nearly impossible. The Supreme Court rejected that very argument in declining to adopt target standing in *Rakas v. Illinois*⁷⁵ because of the "administrative burdens" in determining who the officer considered a "target."⁷⁶

Can you imagine how far afield a suppression hearing could go if the officer's state of mind would suddenly be relevant? Would the officer's overall suppression and conviction record then become relevant to his claim that he acted in good faith when he violated the fourth amendment? (How about the magistrate's record or the officer's knowledge that the magistrate has a bad record in fourth amendment cases?) The one hour suppression hearing may become an all day affair. In 1982 in *State v. White*,⁷⁷ the Washington Supreme Court found the good faith exception unworkable because of this subjectivity problem which imposed an unnecessary and unworkable burden on the courts.⁷⁸

71. LaFave, *supra* note 65, at 357.

72. *Id.* (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974)).

Generally, factual determinations of the suppression judge are not reversed unless clearly erroneous. If there is a conflict in the facts, the judge's findings are seldom overturned.

73. *See Terry v. Ohio*, 392 U.S. 1, 13 (1968). *See also infra* note 91.

74. LaFave, *supra* note 65, at 359 n.285 (quoting *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting)).

75. 439 U.S. 128 (1978).

76. *Id.* at 136-37. *See* J. HALL, SEARCH AND SEIZURE §§ 23:5, at 654 n.6 (1982) & 23:3.1, at 287 (1983 Supp.), suggesting that *Rakas* must effectively be overruled if the Supreme Court chooses to adopt the good faith exception.

77. 97 Wash. 2d 92, 640 P.2d 1061 (1982). *See also* *Jennings v. City and County of San Francisco Superior Court*, 104 Cal. App. 3d 50, 163 Cal. Rptr. 391, 395-96 (1980) (good faith exception rejected as contrary to judicial integrity); *Commonwealth v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom.* *Massachusetts v. Sheppard*, 51 U.S.L.W. 3913 (U.S. June 28, 1983) (No. 82-963) (good faith exception rejected as to magistrate's error even though police conduct proper).

78. *See State v. White*, 640 P.2d at 1069 n.6:

The officer's 'good faith' in *Michigan v. DeFillippo*, *supra*, required a showing only that he enforced a presumptively valid statute in the good faith belief it was valid. The incorporation of a subjective good faith test is unworkable in situations not directly addressed by Chief Justice Burger's opinion. For example, what if, as

Some of the proposed good faith exception statutes require a finding of good faith if the magistrate issued a warrant. What about the subjective good faith of the magistrate? What if the magistrate is not "neutral and detached," but is a mere "rubber-stamp" for the police? Can any lazy or incompetent judge turn a bad search into a good one by giving it his or her blessing?⁷⁹ Can a judge make a good search bad by issuing a defective warrant?⁸⁰ (Warrants are usually written and provided by the police. Surely the courts and legislatures know that.)

The good faith exception is undefinable

In its broad sense, the good faith exception is undefinable. For any form of good faith exception to be recognized and reasonably administered, it must be developed on a case-by-case basis. If there will be no deterrence in a particular situation, we can analyze it and see how and why. To adopt a good faith exception by shotgunning the exclusionary rule, we have no way of knowing whether deterrence is involved in any particular type of situation until it arises and the officer testifies about the occurrence.⁸¹

An objective good faith exception developed realistically on a case-by-case basis has some limited appeal. Then, it would conceptually make sense. The former Fifth Circuit's objective good faith formulation in *United States v. Williams* requires that the officer's good faith conduct "must be grounded in an objective reasonableness" and "must therefore be based upon articulable premises suffi-

here, a similar statute was invalidated 10 years previously? How about 1 month before the arrest? What if fellow officers know of contrary case law, but the arresting officer does not? How do courts probe the minds of officers to see if their beliefs of validity are truly held? Can a criminal defendant ever successfully refute the officer's assertions of good faith? See *Amsterdam, Perspective on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974). The good faith standard imposes yet another factual burden on the courts in the already complex Fourth Amendment area. See *United States v. Peltier*, 422 U.S. 531, 560-61 (1975) (Brennan, J., dissenting). We believe the objective probable cause standard is the only workable test in cases such as the one before us.

79. See the last sentence of proposed 18 U.S.C. § 3505: "A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation."

80. Compare *Commonwealth v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), cert. granted sub nom. *Massachusetts v. Sheppard*, 51 U.S.L.W. 3913 (U.S. June 28, 1983) (No. 82-963), where the Massachusetts court refused to apply the good faith exception to a magistrate's fourth amendment error in the warrant where the police acted properly.

81. To legislate in advance that the officer is not deterred pretty well answers the question for us, doesn't it?

cient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully."⁸² This may be narrow enough to satisfy the deterrence rationale.⁸³ The Administration's proposal ignores this important requirement. Under its proposal the officer's own belief (and, hence, his state of mind) is determinative. LaFave notes, however, that existing fourth amendment doctrine already sufficiently deals with that issue.⁸⁴ So what possible purpose would the Administration's proposal really serve?

A broad good faith exception is unnecessary

I submit that a good faith exception statute is unnecessary. The Supreme Court already recognizes the good faith exception on a case-by-case basis where good faith is evident, and the deterrence rationale would not be served by suppression of the evidence.⁸⁵ Why, then, is it necessary to pass a statute with innumerable potential administrative problems? Additionally, *Williams* even dodged the crucial question of which side carries the burden of proof on demonstrating good faith or lack of good faith.⁸⁶

Conclusion

Our system of justice depends upon the rule of law and the premise that government should follow the law when enforcing it. The fourth amendment cannot be so hollow a constitutional guarantee that it is relegated to being an ineffective tort remedy when government agents choose to violate the law in the name of law and order.

The Attorney General's claim that our constitutional liberties will not be impaired if the exclusionary rule is done away with

82. *United States v. Williams*, 622 F.2d at 841 n.4a (5th Cir. 1980).

83. *See LaFave, supra* note 65, at 347-48.

84. *Id.* at 348, 348-354.

85. *See, e.g., Michigan v. DeFillippo*, 443 U.S. 31 (1979) (search incident to arrest under presumptively valid ordinance would not be suppressed even where ordinance was later declared invalid); *United States v. Peltier*, 422 U.S. 531 (1975) (fourth amendment retroactivity case; search would not be suppressed where officers relied on consistent body of decisional law and administrative regulation later overturned); *Michigan v. Tucker*, 417 U.S. 433 (1974) (fifth amendment case; confession not excluded where officers violated *Miranda* in good faith).

86. *United States v. Williams*, 622 F.2d at 846-47. Under existing law, however, the burden would seem to be with the prosecution in a warrantless search and with the defense in a search under a warrant. *See, e.g., Franks v. Delaware*, 438 U.S. 154, 171 (1978) (search under warrant) *and United States v. Matlock*, 415 U.S. 164, 174 (1974) (warrantless search). How the defense will be able to carry the burden when the officer's state of mind is an issue is hard to imagine. *See supra* text following note 76.

under the Administration's proposal just does not square with logic or any form of common understanding.

In a related vein concerning the ongoing debate on the sixth amendment good faith "Christian burial speech" case,⁸⁷ Circuit Judge Richard Sheppard Arnold of the Eighth Circuit wrote just this year in *Williams v. Nix*⁸⁸:

It will inevitably be remarked that our opinion focuses more on the conduct of the police than of the alleged murderer. If Williams is indeed guilty, and if he goes free as a result of our holding, then complete justice may not have been done, even though Williams has served 14 years in prison. A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.⁸⁹

The police often treat the fourth amendment like it is "a mere technicality" anyway.⁹⁰ If the courts start doing it too, the freedom of all of us has been seriously weakened. Wholesale adoption of the good faith exception will effectively grant the police the right to violate the fourth amendment with relative impunity.⁹¹ The last seventy years under the exclusionary rule will be just so much history. If the fourth amendment can no longer be relied on as a basic limi-

87. See *Brewer v. Williams*, 430 U.S. 387 (1977).

88. 700 F.2d 1164 (8th Cir.), cert. granted, 103 S.Ct. 2427 (1983).

89. *Id.*, 700 F.2d at 1173.

90. See Justice Frankfurter's dissent in *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950):

It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in *Boyd v. United States* . . . , in *Weeks v. United States* . . . , in *Silverthorne Lumber Co. v. United States* . . . , in *Gould v. United States* . . . , or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.

91. When the courts accept illegally seized evidence, they induce further such violations of the fourth amendment. Amsterdam, *supra* note 61, at 432.

tation on government to protect us from unreasonable governmental intrusions, what will? I, for one, cannot imagine a society where personal liberty is at the whim of the good faith (real, imagined, or manufactured) of the police.⁹² There, none of us will be safe.

92. *See* L. HAND, *SPIRIT OF LIBERTY 189-90* (3d ed. 1960):

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.