Glide Path to an "Inclusionary Rule": How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule

James P. Fleissner
Mercer University School of Law, fleissner_jp@law.mercer.edu

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Evidence Commons, and the Fourth Amendment Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Glide Path to an “Inclusionary Rule”: How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule

James P. Fleissner*

During recent political debates over the federal budget deficit, it became fashionable to speak of a “glide path” to a balanced budget. Advocates of a budget plan would plan certain tax rates and spending limits, factor in a set of economic assumptions, and graph a swooping path of declining deficits over several years. Needless to say, that sort of exercise in prediction does not involve the sort of odds that would inspire confidence in a gambler. The accuracy of the beguiling graph, of course, depends on whether tax and spending commitments are kept and whether a host of economic assumptions are correct. Common sense tells us to be wary: Reality may well convert that smooth arc of descent into a line resembling an “up” staircase.

Making predictions about the future of our constitutional jurisprudence is a similarly risky business. Shifts in the interpretation of the United States Constitution depend on many variables, from the direction

* Associate Professor of Law, Walter F. George School of Law, Mercer University, Macon, Georgia. Marquette University (B.A., 1979); University of Chicago Law School (J.D., 1986). Before joining the Mercer faculty, the author was a federal prosecutor in Chicago from 1986-1994, last serving as Chief of the General Crimes Section of the United States Attorney’s Office. The author is grateful for the able research assistance of Mary Frances Burnett, Mercer Law School Class of 1998. In September 1996, the author presented an earlier draft of this Article at a multidisciplinary conference in Omaha, Nebraska called “And Justice For All,” which was sponsored by the University of Nebraska at Omaha, Creighton University School of Law, and the University of Nebraska College of Law.
of the political winds to the chance occurrence of a case and controversy that raises a constitutional issue in the right factual setting. Despite the difficulty of the predictive enterprise, I believe that the jurisprudence of the Fourth Amendment is on a "glide path" toward a fundamental change in the Exclusionary Rule, which currently forbids the use of much illegally seized evidence. I believe that we are on a course towards an erosion of the Exclusionary Rule and a diminution of our rights. I fear that the Exclusionary Rule will be converted into a rule of inclusion. I see the principal vehicle for traveling this glide path as the continued expansion of the good faith exception to the Exclusionary Rule.

In its 1984 decision in United States v. Leon, the United States Supreme Court recognized a good faith exception to the Exclusionary Rule in a case when the police, acting in good faith, conducted a search pursuant to a warrant that, although issued by a magistrate, was later held by a reviewing court not to be supported by probable cause. As I will discuss, there is now growing support for extending the good faith exception to warrantless searches and seizures, so that evidence found by a court to be illegally obtained through unreasonable warrantless searches or seizures would not be excluded if law enforcement officers acted with an objective, good faith belief that their actions were legal. The rationale most often advanced for this position goes something like this: The purpose of the Exclusionary Rule is to deter misconduct by the police, and you cannot deter people who are acting in good faith. In the absence of any deterrent impact, so the argument goes, the truth-seeking process should not be distorted by excluding evidence. Supporters of this argument have extended it to justify eliminating the remedy of exclusion in cases of good faith violations of Fifth and Sixth Amendment rights.

To embrace the arguments for extending the holding of Leon, arguments which have gained a measure of legitimacy, would seriously undermine the protections of the Constitution by eliminating incentives for the law enforcement establishment to properly train officers and for individual officers to adhere strictly to the directives of that training. I think you will agree that a fundamental change of the Exclusionary Rule through expansion of the good faith exception is, at least, a plausible scenario and, more likely, a distinct possibility. I hope you will agree that such a path would be the wrong course.

This Article is comprised of three sections. The first section describes the origins of the good faith exception using Professor Herbert L. Packer's two models of the criminal process as a way of charting and understanding events leading to the recognition of the good faith exception. The second section describes the political forces and legal

developments that may provide the impetus for expansion of the good faith exception in the Fourth Amendment context and, possibly, Fifth and Sixth Amendment contexts as well. The final section makes the case against further expansion of the good faith exception to the Exclusionary Rule in cases of Fourth Amendment violations involving warrantless searches and seizures.

I. THE ORIGINS OF THE GOOD FAITH EXCEPTION

The famous text of the Fourth Amendment does not mention an exclusionary remedy for violations of the amendment, much less exceptions to such a remedy. Indeed, the amendment defines the right created in broad, sweeping terms:

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 will issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^2\)

Among the questions not answered in the text are these two: (1) What is an “unreasonable” search and seizure? (2) What should or must be the remedy when the right to be secure against unreasonable searches and seizures is violated? Not surprisingly, reasonable persons have disagreed on the answers to these questions.

In analyzing the different points of view on the proper meaning of the Fourth Amendment, it is useful to make reference to the framework provided by Professor Herbert L. Packer in his famous article entitled, “Two Models of the Criminal Process.”\(^3\) Professor Packer defined two dominant views of the criminal justice system: the Crime Control Model and the Due Process Model.\(^4\) The Crime Control Model is based on a value system that holds that “the repression of criminal conduct is by far

---

2. U.S. CONST. amend. IV.
4. The critical literature raises many interesting issues, but in the author’s view, Packer’s models remain very useful for describing the values and forces competing to shape the criminal justice system.
the most important function to be performed by the criminal process." 5

The Crime Control Model's goal is the efficient apprehension and punishment of criminals. 6 The ultimate goal is to protect the law-abiding citizen. One might say that the Crime Control Model would interpret the Bill of Rights in light of certain ends outlined in the Preamble of the Constitution: to establish justice and insure domestic tranquility.

The Due Process Model, as defined by Professor Packer, is rooted in different values: "If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process." 7 The Due Process Model is based on a skeptical view of the accuracy of the process for determining guilt, as well as a willingness to allow a guilty person to go free "if various rules designed to safeguard the integrity of the process are not given effect." 8

The contrast between the models is stark. The Crime Control Model intends to protect citizens from crime and allow them to enjoy the blessings of liberty. The Due Process Model intends to ensure that the government does not act oppressively or tolerate appreciable risks of inaccurate findings of guilt. The tension between these two models is what animates the debate about how to answer the crucial questions concerning the proper meaning to ascribe to the Fourth Amendment and the desirability of sanctioning violations with the exclusion of evidence. Indeed, Professor Packer noted that the issue of whether the criminal process should be designed "for correcting its own abuses" is an issue that "may well account for a greater amount of the distance between the two models." 9 He wrote:

In theory the Crime Control Model can tolerate rules that forbid illegal arrests, unreasonable searches, coercive interrogations, and the like if their enforcement is left primarily to managerial sanctions internally imposed. What it cannot tolerate is the vindication of those rules in the criminal process itself through the exclusion of evidence illegally obtained or through the reversal of convictions in cases where the criminal process has breached the rules laid down for its observance. The availability of these corrective devices fatally impairs the efficiency of the process. The Due Process Model, while it may in the first

5. Id. at 9.
6. Id. at 10-13.
7. Id. at 13.
8. Id. at 16.
9. Id. at 17.
The Crime Control Model suffers from an inconsistency as well: While touting criminal punishment to deter crime, the Crime Control Model decrees the sanction of exclusion to deter misconduct by the government. The clash between the models is also seen in how proponents of each answer these charges of inconsistency. Due Process Model advocates are willing to release the factually guilty to deter government violations of rights. Crime Control Model advocates prefer to allow the use of illegally seized evidence to convict the factually guilty and deter crime, and use less extreme methods to deter illegal seizures. That is not to say that each of the models reject outright the values of the other model. The Due Process Model recognizes the value of punishing the guilty and fighting crime; the Crime Control Model accepts the value of a fair process that protects the rights of the accused. But each model's position on the Exclusionary Rule is consistent with its respective hierarchy of values.

Supporters of each of these two models of the criminal process might take extreme positions on the Exclusionary Rule. The Crime Control Model advocate might argue for no exclusion of evidence whatsoever, leaving other means to try to address government overreaching. The Due Process Model advocate might argue for an absolute rule of exclusion for any improperly seized evidence. It should not come as a surprise that the history of the Exclusionary Rule is a story of a middle course of compromise between these extremes.

The first of the landmarks was Weeks v. United States,11 in which the Supreme Court read the Fourth Amendment as requiring the exclusion of evidence illegally seized by federal law enforcement officers. The Court stated:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of a crime or not, and the duty of giving it force and

10. Id. at 17-18.
effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people in all conditions have a right to appeal for the maintenance of such fundamental rights.\textsuperscript{12}

The Court concluded that to sanction the illegal conduct by allowing use of the evidence "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."\textsuperscript{13} \textit{Weeks} read an Exclusionary Rule into the Fourth Amendment. The rationale for this result was expressed in terms of judicial integrity, but the decision also implies a deterrent purpose.

In \textit{Wolf v. Colorado},\textsuperscript{14} the Supreme Court held that although the Fourth Amendment was enforceable against the states as "incorporated" into the Fourteenth Amendment, the \textit{Weeks} Exclusionary Rule was not.\textsuperscript{15} Justice Frankfurter's opinion in \textit{Wolf} noted that the \textit{Weeks} Exclusionary Rule "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication."\textsuperscript{16} Because most states and nations had declined to adopt an Exclusionary Rule to protect privacy rights, the Court stated that "we must hesitate to treat this remedy as an essential ingredient of the right."\textsuperscript{17} The Court left the states free to use other methods to sanction violations, such as private lawsuits, finding that the other methods, "if consistently enforced, would be equally effective."\textsuperscript{18} Thus, the Court portrayed the status of the Exclusionary Rule as something less than part and parcel of the core of the protection of the Fourth Amendment.

The Court further defined the purpose and status of the Exclusionary Rule in \textit{Elkins v. United States},\textsuperscript{19} when it held that evidence illegally seized by state officers would be excluded as evidence in a federal court.\textsuperscript{20} The purpose of the rule was stated in this way: "The rule is

\begin{flushright}
\textsuperscript{12} \textit{Id.} at 391-92. \\
\textsuperscript{13} \textit{Id.} at 394. \\
\textsuperscript{15} 338 U.S. at 33. \\
\textsuperscript{16} \textit{Id.} at 28. \\
\textsuperscript{17} \textit{Id.} at 29. \\
\textsuperscript{18} \textit{Id.} at 31. \\
\textsuperscript{19} 364 U.S. 206 (1960). \\
\textsuperscript{20} \textit{Id.} at 223.
\end{flushright}
calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."\(^2\) This language elevates the policy goal of deterrence to the forefront, unobscured by rhetoric about judicial integrity. This statement also disparages the effectiveness of the other methods of enforcing the Fourth Amendment alluded to in Wolf. Indeed, the Court in Elkins engaged in a discussion of the empirical proof supporting the effectiveness of the Exclusionary Rule, concluding that available statistical proof was inconclusive, but that "pragmatic evidence" indicated that exclusion was effective.\(^2\) As for the status of the Exclusionary Rule, the Court in Elkins invoked its supervisory powers over the federal courts and did not characterize the rule as part and parcel of the Fourth Amendment.\(^2\) The decision in Elkins strongly endorsed the Exclusionary Rule as the only effective remedy for Fourth Amendment violations, but refused to characterize the rule as inherent in the protection of the Amendment. To so characterize the Exclusionary Rule would raise the question of why the rule was not incorporated into the Fourteenth Amendment and applied to the states by the Court in Wolf.

That, of course, was the issue raised in Mapp v. Ohio.\(^4\) In Mapp, the Court overruled Wolf, holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."\(^5\) In order to accomplish the incorporation of the Exclusionary Rule into the Fourteenth Amendment, it was necessary to declare that the rule was an essential part of the Fourth Amendment, a declaration the Court had declined to make in prior cases.\(^6\) The Court reaffirmed its endorsement of the Exclusionary Rule as the only effective means of deterring constitutional violations, denouncing the alternatives with terms like "worthless and futile."\(^7\) Mapp represents the Exclusionary Rule at its zenith. The rule was declared part and parcel of the Fourth Amendment, one and inseparable. The rule was declared the only effective means of enforcing the Fourth Amendment. And the rule was imposed on the states. The Due Process Model was ascendent.

\(^2\) Id. at 217.
\(^2\) Id. at 218-21.
\(^2\) Id. at 216.
\(^2\) Id. at 217.
\(^3\) 367 U.S. 643 (1961).
\(^5\) Id. at 655.
\(^5\) Id. at 657.
\(^7\) Id. at 651-52.
Since *Mapp*, various limitations on the Exclusionary Rule have been imposed. These limitations on the scope and applicability of the remedy of exclusion have been based on reasoning consistent with the Crime Control Model: When the ends of the Exclusionary Rule are not significantly advanced by exclusion, the government should be allowed to use the evidence to convict the defendant. Several examples will suffice at this juncture. One example is the refusal of the Supreme Court to apply the Exclusionary Rule to grand jury proceedings because doing so would create only an uncertain incremental deterrent effect. Another example is the doctrine on standing to raise Fourth Amendment claims, which limits the availability of the exclusionary remedy to the victims of the illegal search. Yet another example is the inevitable discovery doctrine, which holds that illegally seized evidence need not be excluded if the prosecution would inevitably have found the evidence despite the illegal seizure. These doctrines exemplify a shift toward promoting the values of the Crime Control Model.

The good faith exception is another such limitation to the Exclusionary Rule based on the promotion of the values of the Crime Control Model. The good faith exception is, I contend, the most critical limitation of the rule, not because of what it is today, but because of what it might become. In *United States v. Leon*, the Court addressed the question of whether the Exclusionary Rule should bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a magistrate but ultimately declared by a reviewing court not to be supported by probable cause. In contrast to the rhetoric in the *Mapp* decision, the Court in *Leon* portrayed the exclusionary remedy in a less reverent manner: The rule was called "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. The determination of whether to apply the Exclusionary Rule would "be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence" obtained in reliance on a search warrant.

In weighing the costs and benefits, the Court in *Leon* found the price of excluding evidence to be high. The Court expressed concern with the

---

32. *Id.* at 900.
33. *Id.* at 906 (quoting *Calandra*, 414 U.S. at 348).
34. *Id.* at 907.
Exclusionary Rule's interference with the truth-seeking process.\textsuperscript{35} Under the circumstances in which the officer acted in good faith in executing a warrant issued by a neutral and detached magistrate, the Court concluded that the deterrent benefit of exclusion would be "marginal or nonexistent."\textsuperscript{36} The Court made it clear that the rule was designed to deter police misconduct and not to punish or deter errors by judges. The Court stated that because judges do not have a stake in the outcome of cases, the threat of exclusion would not have any significant effect on their behavior.\textsuperscript{37} There are two aspects of the decision in \textit{Leon} that need to be highlighted because of their importance to the debate over extending the good faith exception to warrantless searches and seizures. The most important point is that the holding of \textit{Leon} was limited to allowing a good faith exception in cases where officers reasonably relied on a warrant issued by a neutral and detached magistrate.\textsuperscript{38} The \textit{Leon} case presented a situation in which the officers offered an application for a warrant to a magistrate who approved the warrant as being supported by probable cause.\textsuperscript{39} Thus, the Court allowed a good faith exception when a judicial officer approved a warrant before a search and when the officers relied in good faith on the judicial officer's determination that probable cause existed. In its discussion of the good faith exception it was creating, the Court emphasized the importance of the fact that the actions of the officers had been reviewed by a magistrate, who, although later reversed by a reviewing court, acted as a buffer to check the actions of the officers.\textsuperscript{40} In fact, the Court went to great lengths to state that it was not diluting any of the precedents ensuring the integrity of the warrant process, such as the requirement that the magistrate maintain a neutral and detached judicial role and the rule that suppression is appropriate where an application for a warrant is found to contain information the officer knew or should have known to be false.\textsuperscript{41} Not only did the Court place great emphasis on the importance of the role of the magistrate, but it drew a contrast with warrantless searches and seizures:

\textsuperscript{35} \textit{Id.} at 907-08.
\textsuperscript{36} \textit{Id.} at 922.
\textsuperscript{37} \textit{Id.} at 916-17.
\textsuperscript{38} \textit{Id.} at 920-21.
\textsuperscript{39} \textit{Id.} at 902.
\textsuperscript{40} \textit{Id.} at 913-25.
Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustain-able where without one it would fail."\(^2\)

The second aspect of the decision in Leon to highlight is the Court's concern over the need to continue to create incentives for the law enforcement establishment to properly train officers. In discussing the deterrent objective of the Exclusionary Rule, the Court referred to altering "the behavior of individual law enforcement officers or the policies of their departments."\(^4\) When one speaks of a deterrent, the usual meaning is to prevent undesirable conduct by threatening punishment. The language of deterrence tends to obscure an important result of the Exclusionary Rule, that of creating incentives for law enforcement agencies to train officers to avoid constitutional violations.\(^4\) In Leon, the Court adopted a good faith exception requiring that the good faith of the officer be objectively reasonable.\(^6\) This means that the warrant presented to the magistrate for review must be one that a reasonably well trained officer could believe to be based on probable cause. Therefore, if a warrant is so lacking in probable cause that a reasonably well trained officer could not believe that there was probable cause, obtaining the approval of an inattentive or inept magistrate would not save the fruits of the search under the objective good faith standard. The Court was explicit about why it adopted this objective test: The aim was to retain incentives for the police to continue training officers about the requirements of the Fourth Amendment.\(^\)\(^6\)

This completes the tracing of the development of the good faith exception to the Exclusionary Rule. The adoption of the Exclusionary Rule and its application to the states was an obvious victory for advocates of the Due Process Model of criminal justice. The adoption of rules limiting the scope of the Exclusionary Rule, such as the good faith exception, amounted to movement back in the direction of the values of the Crime Control Model. The next section will explore the possibility that the good faith exception will become the vehicle for further significant movement away from the values of the Due Process Model.

\(^{42}\) 468 U.S. at 913-14 (citations omitted).
\(^{43}\) Id. at 918.
\(^{44}\) Id. at 919-20.
\(^{45}\) Id. at 922.
\(^{46}\) Id. at 919 n.20.
II. THE GLIDE PATH TO THE EXPANSION OF THE GOOD FAITH EXCEPTION

It is a distinct possibility that political forces and legal developments may lead to a significant expansion of the good faith exception. In the Fourth Amendment context, the most significant potential for expansion of the good faith exception is the area of warrantless searches and seizures. Such a development, if it were to occur, would constitute a major change in the Exclusionary Rule, allowing much illegally seized evidence to be used and reducing the incentives for needed training of law enforcement officers. Converting the Exclusionary Rule into an "Inclusionary Rule" would mark a swing of the pendulum from the middle area between the Due Process Model and the Crime Control Model towards the values of the Crime Control Model. The change would not be as dramatic as complete abandonment of the Exclusionary Rule, but it would be a major move in that direction.

Let us begin with a brief overview of the role of warrantless searches and seizures in the criminal justice system. Fourth Amendment jurisprudence has identified many instances in which law enforcement officers may make warrantless searches and seizures. One example is the rule that an officer may make a public arrest for commission of crime if the officer has probable cause to do so, even if the officer could have obtained a warrant without endangering the chances of apprehending the suspect.47 Another example is the rule that officers may make a warrantless entry and search if they have probable cause to believe contraband is present and if available information indicates that evidence will be destroyed; this is one of the so-called "exigent circumstances" exceptions.48 Warrantless arrests and seizures must be supported by probable cause, just like warrants. As currently formulated by the Supreme Court, the standard of probable cause is whether, based on the totality of the circumstances, there is a fair probability that evidence will be found in a particular place or that a suspect has committed a crime.49 Probable cause requires that the facts and circumstances are sufficient to warrant a person of reasonable prudence to believe that evidence will be found.50

The Fourth Amendment also regulates police-citizen encounters that do not rise to the level of an arrest. The Fourth Amendment allows for

50. Id. at 231-32.
brief investigatory detentions of persons and property if an officer has "reasonable suspicion" of criminal activity, as well as limited authority to perform a protective pat-down search of the seized person when there may be danger to the officer. The reasonable suspicion standard has been said to require "a particularized and objective basis," which is something more than a hunch, and something less than probable cause. Professor Anthony Amsterdam has referred to the reasonable suspicion standard as that "pint-sized version of probable cause required for stop-and-frisk."

The reasonable suspicion standard has been said to require "a particularized and objective basis," which is something more than a hunch, and something less than probable cause. Professor Anthony Amsterdam has referred to the reasonable suspicion standard as that "pint-sized version of probable cause required for stop-and-frisk.

The Supreme Court has stated that the "probable cause" and "reasonable suspicion" standards which govern warrantless searches and seizures cannot be articulated with precision; "[t]hey are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." The only buffer between citizens and unconstitutional warrantless searches and seizures is the training and judgment of the law enforcement officer. If an officer makes an illegal warrantless arrest or investigatory stop, the Exclusionary Rule operates to suppress evidence. If the good faith exception is applied to warrantless searches and seizures, the finding of illegality would not necessarily result in suppression. Instead, the good faith exception would give rise to a second inquiry: Could a reasonably well trained officer have believed in good faith that the standard required for the search or seizure (i.e., probable cause or reasonable suspicion) had been met? In other words, was the decision to conduct the search or make the seizure a reasonable mistake in legal judgment by the officer? These are the issues courts would face if the good faith exception is expanded. That is a brief sketch of where the glide path would lead us.

Will politics and legal developments take us on that course? As for the current political winds, it is clear that recent years have seen growing support for the Crime Control Model and hostility to the Exclusionary Rule. One obvious sign that the good faith exception might become the vehicle for severely limiting the reach of the Exclusionary Rule is the passage by the House of Representatives of the “Exclusionary Rule Reform Act of 1995,” which (some might say ominously) was numbered as H.R. 666. This bill, which was passed by the House

55. The text of H.R. 666 was as follows:

Admissibility of evidence obtained by search and seizure:
pursuant to the Contract With America, declared that evidence obtained by objectively reasonable searches and seizures, including warrantless searches and seizures, would not be subject to the Exclusionary Rule in the federal courts. Oddly, the bill contained two exceptions: The new law would not apply to searches or seizures carried out by the Bureau of Alcohol, Tobacco, and Firearms or the Internal Revenue Service. Presumably, these bizarre exceptions were the product of the sponsors' distrust of those agencies. In any event, singling out those agencies certainly casts a partisan light on the House's foray into reform of the Bill of Rights.56

With respect to the House legislation, one might pose the question many lawyers hear: "Can they do that?" Can Congress pass a law limiting the scope of the Exclusionary Rule as it is set forth in Supreme Court decisions? Certainly the Supreme Court has the power to

(a) Evidence Obtained By Objectively Reasonable Search or Seizure- Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the fourth amendment to the Constitution of the United States, if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the fourth amendment. The fact that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of the existence of such circumstances.

(b) Evidence Not Excludable By Statute or Rule-

(1) Generally- Evidence shall not be excluded in a proceeding in a court of the United States on the ground that it was obtained in violation of a statute, an administrative rule or regulation, or a rule of procedure unless exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority.

(2) Special Rule Regulating To Objectively Reasonable Searches and Seizures- Evidence which is otherwise excludable under paragraph (1) shall not be excluded if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the statute, administrative rule or regulation, or rule of procedure, the violation of which occasioned its being excludable.

(c) Rules of Construction- This section shall not be construed to require or authorize the exclusion of evidence in any proceeding. Nothing in this section shall be construed so as to violate the fourth article of amendments to the Constitution of the United States.

(d) Limitation- This section shall not apply with respect to a search or seizure carried out by, or under the authority of, the Bureau of Alcohol, Tobacco, and Firearms.

(e) Limitation- This section shall not apply with respect to a search or seizure carried out by, or under the authority of, the Internal Revenue Service.


interpret the Constitution. Certainly Congress can not amend the Constitution through legislation. But, the Supreme Court has invited legislative attempts to alter the Exclusionary Rule by giving the rule the status of a judicially created remedy that is a creature of the Court's supervisory power, not part and parcel of the Fourth Amendment. That status, which makes the Exclusionary Rule sound like judicial legislation, emboldens the Congress to become an equal partner in the legislative enterprise. As a matter of federalism, it is a curiosity how a judicially created prophylactic measure is imposed on the states through the Fourteenth Amendment, as was done by the Court in *Mapp*. Of course, the answer is that the Court in *Mapp* treated the Exclusionary Rule as inherent in the Fourth Amendment; that is the very point on which the decision in *Mapp* changed the prior holding in *Weeks*. Having elevated the rule to constitutional status to apply it to the states, the Court has since waffled and demoted the rule to a status that will allow limiting its scope. That lower status is also what has allowed Congress to get in on the act.

The death of H.R 666 in the Senate seems a good example of the basic theories of the founders as reflected in civics textbooks: The House reflects the passions of the electorate and the Senate proceeds with deliberation and caution. However, it cannot be denied that the passion is real. The House passage of the bill in February 1995 reflected hostility to the Exclusionary Rule, as well as the selection of the good faith exception as the vehicle to limit the rule.

Evidence of the current political climate could also be found in the last presidential campaign. A major public controversy erupted when a federal district court judge, appointed by President Clinton, suppressed a large quantity of cocaine seized during a warrantless search of a car. Judge Harold Baer, Jr. found that officers did not have probable cause to search. Because the judge made some very critical comments about the police, the case became a political issue. The Republicans blasted the President's judicial appointments as too liberal, using Judge Baer's suppression order as a prime example of letting the guilty off on "technicalities." The Republicans promised tough, conservative judges in a Dole administration. While the President defended his judicial appointments as mainstream, he sharply criticized Judge Baer's suppression order as being a bad ruling. As the political firestorm raged, Judge Baer granted a motion to reconsider his ruling and reversed his order of suppression.57

The fight over the philosophy of the federal judiciary was also reflected in the refusal of the Senate to confirm the President's judicial nominees during the election season; confirmations were reduced to a trickle.\textsuperscript{58} With his reelection, the President will have the opportunity to nominate over a hundred new federal judges.\textsuperscript{59} However, the Republican leadership has vowed to be very tough in screening the nominees, and there has been talk of pressuring the administration to cede up to half the nominations to the Republicans.\textsuperscript{60} Furthermore, a group of conservative House members has begun a movement to impeach activist judges, and guess who tops the hit list? None other than Judge Harold Baer.\textsuperscript{61} The current political climate is such that the President may keep to his first term style and avoid sending controversial nominees. That policy avoids expending political capital in nomination fights and reduces the prospect that a nominee might be left to languish in the limbo of a stalled confirmation process. With the Exclusionary Rule flap from the election season still fresh in everyone's mind, it is clear that an essential part of the profile of a "noncontroversial" nominee is disdain for excluding evidence. There can be no doubt that the Exclusionary Rule will be a prominent issue in the selection and confirmation of judges and justices for quite some time.

Assuming the political will to make drastic changes in the scope of the Exclusionary Rule, will judges have the legal theories and precedents to make the glide path to an expanded good faith exception a reality? As will be demonstrated, lawyers arguing for expansion of the good faith exception to warrantless searches and seizures will have ample authority to cite in their briefs. In comparison to the authority supporting the good faith exception at the time of the decision in \textit{Leon}, proponents will have more to work with. However, other court decisions, including the Supreme Court's last major decision on the good faith exception, will provide support for the opponents of expanding the holding of \textit{Leon}.

It is true that since \textit{Leon} most federal courts have resisted extending the good faith exception to warrantless searches and seizures, usually by
noting the limits of the holding in Leon. However, one pre-Leon decision by the United States Court of Appeals for the Fifth Circuit, United States v. Williams, adopted the good faith exception to the Exclusionary Rule for all Fourth Amendment violations, with or without a warrant. After Leon, the Fifth Circuit applied the good faith exception to an investigatory stop and found support for its decision in the Leon case. So far, the Fifth Circuit is alone in explicitly adopting the good faith exception for warrantless searches and seizures. As to whether the Williams holding might eventually be considered by other courts, consider the treatment given to the Williams decision in Leon. In a footnote, the Court in Leon cited a long series of concurring and dissenting Supreme Court opinions arguing that the Exclusionary Rule needed to be reined in. At the end of the footnote, the Court noted that these pronouncements by members of the Court had "no doubt influenced" the Fifth Circuit in the Williams decision. There is no hint of disapproval.

Another source of legal authority supporting the case for extension of the good faith exception to warrantless searches and seizures are the Supreme Court cases setting forth the contours of qualified immunity in tort cases involving allegations of Fourth Amendment violations by police. In one qualified immunity case, the Court has held that an officer is immune from liability for a Fourth Amendment violation involving a warrantless search if the mistake was objectively reasonable. The Court stated: "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." Thus the Court has applied a qualified immunity rule in cases involving

---


64. 622 F.2d at 840.


66. However, the decision in Williams is arguably the law of the Eleventh Circuit as well, as that case was part of the caselaw of the Fifth Circuit adopted by the Eleventh upon its creation in 1981. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

67. Leon, 468 U.S. at 913 n.11.


70. Id. at 644. The court in Anderson did not discriminate between reasonable police errors in probable cause determinations and police errors in reasonable suspicion cases. Id.
illegal warrantless searches and seizures that parallels the test that would apply if the good faith exception to the Exclusionary Rule applied to cases not involving a warrant. In essence, the Court has created and administered the very test that might be applied if the the good faith exception is extended. Advocates of extending the exception will argue that the qualified immunity standard be “cloned” and applied in the context of the Exclusionary Rule. The qualified immunity cases may be a harbinger of the Court’s predisposition to adopt such a test.

The Supreme Court’s most recent case involving the good faith exception may provide some solace to opponents of further expansion of the exception, but ultimately the signals are mixed. In Arizona v. Evans, one of the few cases since Leon to explicitly discuss the good faith exception, the Court discussed the rationale of the decision in Leon. In Evans, the Court was faced with a situation in which a defendant had successfully moved to suppress drugs seized from his car when he was arrested on a warrant that previously had been quashed but remained in a computer system because of an error by court employees. The Court characterized the reasoning in Leon as focusing on three factors. First, the Exclusionary Rule is designed to deter police misconduct. Second, magistrates are not inclined to ignore the Fourth Amendment, so the extreme sanction of exclusion of the evidence is inappropriate. Third, excluding evidence because of an error by a magistrate would not serve any deterrent purpose. Applying these factors to the facts, the Court found that the Exclusionary Rule was not designed to deter mistakes by court employees; that there was no evidence that court employees are inclined to subvert the Fourth Amendment; and that there is no basis to believe that exclusion would effect the court employees’ behavior. The Court distinguished court employees from law enforcement officers engaged in the fight against crime, stating that the court employees “have no stake in the outcome

72. The other cases were Illinois v. Krull, 480 U.S. 340 (1987) (expanding the good faith exception to officers who acted in reasonable reliance on a statute later declared unconstitutional) and Massachusetts v. Sheppard, 468 U.S. 981 (1984) (companion case to Leon involving execution of a warrant). There has been some debate about whether other Supreme Court cases not explicitly referring to the good faith exception should be treated as belonging to the Leon line of cases. See, e.g., Maryland v. Garrison, 480 U.S. 79 (1987); David R. Childress, Note, Maryland v. Garrison: Extending the Good Faith Exception to Warrantless Searches, 40 BAYLOR L. REV. 151 (1988).
73. 115 S. Ct. at 1187-88.
74. Id. at 1191.
75. Id. at 1193.
of particular criminal prosecutions." This certainly suggests that the Court has not abandoned its concerns about deterring misconduct by those with a stake in the outcome of criminal cases, such as the police.

However, Justice Stevens' dissent suggested that he feared the majority in Evans was beginning to blur what he believed to be the proper limits of the holding in Leon:

The reasoning in Leon assumed the existence of a warrant; it was, and remains, wholly inapplicable to warrantless searches and seizures . . . . The Leon Court's exemption of judges and magistrates from the deterrent ambit of the exclusionary rule rested, consistently with the emphasis on the warrant requirement, on those officials' constitutionally determined role in issuing warrants. Taken on its own terms, Leon's logic does not extend to the time after the warrant has issued; nor does it extend to court clerks and functionaries, some of whom work in the same building with police officers and may have more regular and direct contact with police than with judges or magistrates. 77

Thus, while the decision in Evans does not clearly indicate any erosion in the limits of the holding in Leon, there is substantial political support, and some significant legal authority, for doing exactly that.

I should add one final note on where the glide path I have described might lead us. This discussion has focused on the expansion of the good faith exception in the Fourth Amendment context. There is no question that if we follow the glide path expanding the good faith exception that the first major developments will be in Fourth Amendment jurisprudence. But it must be remembered that exclusionary remedies have also been applied to violations of Fifth78 and Sixth79 Amendment rights as well. If the good faith exception is expanded to warrantless searches and seizures, it will set the stage for rolling back the exclusionary remedies provided for violations of Fifth and Sixth Amendment rights.

Consider an example in the Fifth Amendment context. In Edwards v. Arizona, 80 the Supreme Court held that once a suspect has invoked the right to counsel pursuant to being read his Miranda rights, the suspect may not be interrogated further until counsel has been made available, unless the suspect initiates further communications. 81 Any evidence obtained by improper interrogation is excluded. It has also been held that the Court's rule in Edwards is violated even where an officer

76. Id.
77. Id. at 1196 (Stevens, J., dissenting).
81. Id. at 484-85.
interrogates a suspect without knowing that the suspect had previously invoked his right to counsel in a statement to another officer. 82 The government cannot seek to admit the evidence on the theory that the interrogating officer's actions were in good faith because he was unaware of the suspect's invocation of rights to the other officer; the knowledge of the officer who heard the invocation of rights is said to be imputed to the other. 83 This rule obviously is designed to prevent the police from trying to get around the rule requiring interrogation to cease upon the invocation of the right. If the good faith exception is expanded to cover warrantless searches and seizures that are unregulated by a judicial officer, it will be argued that the same logic requires extention of the exception to violations of the Edwards rule.

There are political forces and legal developments in the Fifth Amendment context similar to those in the Fourth Amendment context that set the stage for expansion of the good faith exception. For example, the Supreme Court has characterized the Exclusionary Rule in the Fifth Amendment context as judge-made rules that are "not themselves rights protected by the constitution." 84 As we have seen in the Fourth Amendment context, lowering the status of the Exclusionary Rule makes it easier to roll back the scope of the rule.

Classifying the rule as judge-made also opens the door to legislative efforts like H.R. 666. One remarkable, and often overlooked, development in the law of the Fifth Amendment is that Congress has already enacted legislation, which, by its terms, repeals the judge-made exclusionary remedies that enforce the Fifth Amendment. 85 That

(a) In any criminal prosecution by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after the arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to
legislation, which has been on the books since 1968, states that only confessions that are involuntary will be excluded and that the failure to follow procedures like those required by the decisions in *Miranda* and *Edwards* will not automatically result in exclusion. Probably because of suspicions that the statute is unconstitutional, the executive branch has ignored it. This unusual situation recently caused Justice Scalia to issue a strong rebuke to the Justice Department, stating, "I will no longer be open to the argument that this Court should continue to ignore the commands of § 3501 simply because the Executive declines to insist that we observe them." As you can see from these judicial and legislative developments, it is apparent that the glide path to limiting the scope of the Exclusionary Rule is likely to go beyond the Fourth Amendment context.

III. THE CASE AGAINST EXPANSION OF THE GOOD FAITH EXCEPTION

The holding of *Leon* should be adhered to strictly, as should its factual premises. The good faith exception should not be expanded to cases involving warrantless searches and seizures. Expanding the good faith exception will skew the existing balance between the values of the Crime Control Model and the Due Process Model in a way that will significantly diminish the protections of the Fourth Amendment. We should change course from our current glide path.

I will advance three principal contentions in making the case against expansion of the good faith exception. First of all, the Exclusionary Rule is the most effective method of enforcing the Fourth Amendment. In the *Mapp* decision, the Court noted that it is difficult to prove the effectiveness of the Exclusionary Rule by the use of statistics, but that significant proof for the value of the rule exists. Professors Wayne LaFave and Jerold Israel have written:

make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.


86. See LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 6.5(e) (2d. ed. 1992) (§ 3501 "is unconstitutional to the extent that it purports to repeal Miranda."). It should be noted that the statute applies with equal force, whatever that may be, to the Sixth Amendment exclusionary remedy set forth in *Massiah*, 377 U.S. 201 (1964). See LAFAVE & ISRAEL, supra, at § 6.4(i).

That the suppression doctrine has had a deterrent effect is nonetheless suggested by various post-exclusionary rule events, such as the dramatic increase in the use of search warrants where nearly none were used before, stepped up efforts to educate police on Fourth Amendment law where such training had before been virtually nonexistent, and creation and development of working relationships between police and prosecutors.88

As a former prosecutor and refugee from the law enforcement establishment, I strongly believe that the Exclusionary Rule not only deters individual violations of the Fourth Amendment but creates incentives for law enforcement to train officers. In Leon, the Court was careful to adopt an objective good faith test to preserve the incentives for law enforcement to train officers, citing with approval Professor Israel’s statement that the key to the Exclusionary Rule’s effectiveness as a deterrent is the incentive provided for police training.89 The evidence supporting the beneficial effects of the Exclusionary Rule can be contrasted with the dismal record and prospects of the alternatives. Professor Kamisar put it this way: “The overwhelming consensus is that civil suits, criminal prosecution, injunctions, review boards, and internal police discipline are sadly inadequate.”90

Of course, the decisions of the Supreme Court rightly assume that the Exclusionary Rule can provide significant benefits. When those benefits seems slight, as in Leon, the Court has found the cost of excluding the evidence to outweigh the benefit. But, as recently as the decision in Evans, the Court has reaffirmed that the Exclusionary Rule is aimed at police misconduct because they are the ones with a stake in the outcome. The Court has not indicated a retreat from the view that exclusion is a valuable remedy when police conduct can be influenced and that the cost of exclusion in individual cases is outweighed by the value of protecting Fourth Amendment rights. A majority of the Court has not questioned that the Exclusionary Rule is the most effective available means of enforcing the Fourth Amendment.

88. LAFAVE & ISRAEL, supra note 86, at § 3.1(c).
89. Leon, 468 U.S. at 919 n.20.
The second point is that the Exclusionary Rule is particularly important in preventing illegal warrantless searches and seizures. On the street, there is no magistrate to act as a buffer. The well intentioned police officer will follow or violate the Constitution based on his or her knowledge of the law. In *Leon*, the Court stressed that a case involving a warrant approved by a magistrate is different from “the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’” This distinction should become the firewall that prevents expansion of the good faith exception to warrantless searches and seizures. The Court placed great emphasis on the role of the magistrate in the situation confronting them in the *Leon* case. In warrantless searches and seizures, we must do what we can to maximize the chances that the police will know and follow the law so that violations of the Fourth Amendment will be reduced. As has been noted, the Court has recognized the role of the Exclusionary Rule in promoting police training and removing the rewards of a violation. The Court should not abandon the critical limitation in the *Leon* holding, nor should it abandon the long held acceptance of the proposition that excluding evidence will advance the values of the Fourth Amendment.

The third point is that applying the good faith exception to warrantless searches and seizures will significantly reduce the effectiveness of the Exclusionary Rule and will be very difficult to administer. Consider the example of a warrantless arrest. A police officer has observed facts A, B, and C, which lead him to believe a suspect is carrying illegal drugs. The officer, believing he has probable cause to arrest, goes ahead and arrests the suspect. Suppose no drugs are found, but that the search incident to arrest reveals an illegal weapon. The suspect, now facing a weapons charge, challenges the arrest as not being supported by probable cause. At the suppression hearing, the officer testifies to how facts A, B, and C lead him to make the arrest. However, the judge concludes that facts A, B, and C do not establish probable cause that a drug offense was being committed. If the good faith exception applies, the judge must now ask, “Was this mistake of law a mistake that a reasonably well trained officer could make?” Just last term, the Supreme Court reiterated the difficulty of precisely defining probable cause and its side-kick, reasonable suspicion:

> Articulating precisely what “reasonable suspicion” and “probable cause” mean is not possible. They are commonsense, nontechnical conceptions that deal with “the factual and practical considerations of everyday life.

---

on which reasonable and prudent men, not legal technicians, act . . . .”

[T]hese two legal principles are not “finely-tuned standards,” comparable to the standards of proof beyond a reasonable doubt or proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.92

Given the fluid nature of the definition of probable cause, it will be easy for the judge to conclude that the officer made a reasonable error. Indeed, the judge may be reluctant to conclude that the mistake was so bad that the officer should be branded as incompetent. And that is exactly how a suppression order will translate: “Officer, I find that no reasonably well trained officer could have made this mistake.” Furthermore, the decisions facing courts applying the good faith exception to warrantless searches and seizures often will require an involved, time-consuming inquiry. Determining good faith in cases not involving a warrant will be much more involved than cases in which there is a warrant, like Leon. And more often than not, the inquiry will result in admission of the challenged evidence.

The extension of the good faith exception to warrantless searches and seizures may well alter the behavior of courts, police, prosecutors, and defense lawyers in undesirable ways. The courts may well streamline proceedings by addressing the issue of good faith first, and thereby, avoid a clear ruling on the Fourth Amendment issue. The courts may reason that if the case is a close call, that the officer’s mistake fits the good faith exception and that a definitive resolution of the Fourth Amendment issue is unnecessary and a waste of time. In Leon, the Supreme Court discouraged that style of adjudication,93 but it is difficult to believe that courts would not be tempted to resolve cases in the most expeditious manner. If the courts took this approach, the development of Fourth Amendment law would be retarded. Instead of

92. Ornelas v. United States, 1661 S. Ct. 1657, 1661 (1996) (citations omitted). In Ornelas the Court held that federal appellate courts must review appeals from denials of suppression motions de novo in cases involving warrantless searches and seizures. The Court maintained the clear error standard for cases involving warrants. Id. at 1659. What, if anything, does the Ornelas decision portend for expansion of the good faith exception to warrantless searches and seizures? On the one hand, the heightened scrutiny on appeals involving warrantless searches and seizures suggests heightened concern about warrantless cases; indeed, the Court in Ornelas stated that it believed the heightened scrutiny in warrantless cases creates an incentive for officers to obtain warrants. Id. at 1663. On the other hand, heightened appellate scrutiny in warrantless cases might be an extra safeguard to reassure those concerned about extention of the good faith exception to warrantless cases.

93. Leon, 468 U.S. at 924-25.
caselaw with case-by-case guidance as to what is a violation of the Fourth Amendment, we would have caselaw that identified close questions justifying a finding of an objectively reasonable mistake of law.

The conduct of the police will also be affected. When courts issue opinions finding a violation of the Fourth Amendment, that ruling will often be accompanied by a finding that the violation was objectively reasonable. It will be tempting for the law enforcement establishment to train officers not only that a given arrest was found not to be supported by probable cause, but also that the evidence from that arrest was not suppressed because the violation was a good faith error. The cases thus become a guide to committing objectively reasonable violations of the Fourth Amendment. Police will be trained not only about the line between the legal and the illegal, but also about the line between the reasonably illegal and the unreasonably illegal. The police, engaged as they are in the fight against crime, may be expected to conduct themselves according to what will result in suppression rather than what is held to violate the Fourth Amendment. And, given the fluid nature of probable cause and the need for case-by-case determinations, it would be difficult to conclude that the issuance of a decision finding a Fourth Amendment violation would put officers on notice so that they could not claim good faith error in similar circumstances.

The behavior of prosecutors will also be changed. In the absence of a good faith exception in cases of warrantless searches and seizures, prosecutors are motivated to play a significant screening role. Where the prosecutor finds that probable cause is absent, a decision is often made to decline to seek to use the fruits of the illegal search or seizure. Many Fourth Amendment violations are never considered by a court, but are filtered out of the system by the prosecutor. Under the regime of the good faith exception, the prosecutor's motivation is changed: Even when the prosecutor believes probable cause is absent, the fruits of the search or seizure may be used if the court can be convinced that the error was made in good faith. Prosecutors would join the courts and the police in focusing not on the fact of the Fourth Amendment violation, but on characterizing the conduct of the police as a good faith error. Indeed, prosecutors might find themselves under considerable pressure from police to push for good faith findings, not only because the evidence could be used, but because of the implications of a good faith finding in the event a civil suit is brought against the officer.94

Is it possible that defense lawyers might behave differently under a good faith exception? It has been argued that the good faith exception would distort the development of Fourth Amendment law by making

94. See the discussion of qualified immunity, supra notes 68-70 and accompanying text.
suppression motions nearly futile and allowing courts to avoid declarations of illegal conduct by finding that any error was reasonable.\textsuperscript{95} It is doubtful that defense lawyers would not pursue possibly valid claims, particularly when litigating the issue would involve a hearing and a chance to see and test part of the government’s case. But it is possible that a flood of good faith findings would discourage defense lawyers in some cases. It is also possible that in deciding the threshold issue of whether to grant the defendant a hearing on a motion to suppress that the court might find that the defense made a sufficient showing of a violation, but an inadequate showing that the violation was not a good faith error.

The minimal nature of the test for probable cause means that many, if not most, police errors on probable cause are close cases or near misses. When speaking of probable cause determinations with or without a warrant, at least it is plausible to speak of a category of judgments by the police that are objectively reasonable but not based on probable cause. But there is a further conceptual problem when considering good faith errors under the standard of reasonable suspicion. The reasonable suspicion standard, of course, is a test of reasonability. Where a judge finds a lack of reasonable suspicion, the application of the good faith exception would have the judge ask: Is this mistake one that a reasonably well trained officer could make? That requires application of another test of reasonability. Finding that the good faith exception applies requires finding that the stop was “reasonably unreasonable.”\textsuperscript{96} In the context of fluid reasonable suspicion determinations, this test seems unworkable. In effect, such a test would recognize a category of cases involving unreasonable searches and seizures that a reasonably well trained officer could have conducted.\textsuperscript{97} Interpreting the Fourth Amendment to contain such a standard would not be a proud moment in the history of the Bill of Rights.


\textsuperscript{96} Anderson, 483 U.S. at 643. It is interesting to note that in Anderson, the Court did not discriminate between reasonable police errors in probable cause determinations and police errors in reasonable suspicion cases. The Court rejected the argument that adoption of a reasonable error standard in a probable cause determination was to create a category of “reasonably unreasonable” searches. Id. at 643-44.

\textsuperscript{97} Id. at 644. In Anderson, the Court was confronted with this argument, but rejected it without a detailed discussion. Id. There was a vigorous and persuasive dissent in the only federal appeals court decision applying the good faith exception to investigatory stops based on reasonable suspicion. See United States v. DeLeon-Reyna, 930 F.2d 396, 402-09 (5th Cir. 1991) (en banc) (Thornberry, J., dissenting).
IV. CONCLUSION

The good faith exception should not be extended to cases involving warrantless searches and seizures. The Exclusionary Rule, the only effective way to enforce the Fourth Amendment, should remain in full force in such cases. The price of police error in such cases should be exclusion. That will promote police training and remove any reward for a violation. This is especially critical in warrantless searches and seizures, where the training of the police is the only way to prevent violations. Adopting the good faith exception in such cases will dramatically reduce the beneficial effects of the Exclusionary Rule and will prove difficult to administer. As Professor Greenhalgh has stated,

The warrant clause of the Fourth Amendment was not written on flash paper; its words are indelibly inscribed with the sanctity of constitutional impregnability. Extending the good faith warrant sanctuary exception to warrantless searches would be an unwarranted expansion of this narrow exception . . . . [O]ught the Court not needlessly cast adrift one last exclusionary safeguard by this inexorable process of devitalization. The rule is hardly a derelict on the sea of the law, as it protects us all. 98

Amen. Limiting the good faith exception to cases involving warrants (or reliance on a statute) will strike a proper balance between the values of the Crime Control Model and the Due Process Model. We should chart a glide path that protects the integrity of the Fourth Amendment and ensures that the process of devitalizing the Exclusionary Rule will not undermine the integrity of the guarantees of the Fifth and Sixth Amendments as well.

---