RETHINKING THE GOOD FAITH EXCEPTION
TO THE EXCLUSIONARY RULE

INTRODUCTION

Since its inception,1 the fourth amendment exclusionary rule has been the subject of much controversy.2 The Fifth Circuit's recent adoption of a "good faith exception" to the rule3 has sparked the most recent round of debate.4 In United States v.

1 Although the Supreme Court held as early as 1886 that the exclusion from the trier of fact of evidence obtained in violation of the fourth and fifth amendments was an appropriate remedy, see Boyd v. United States, 116 U.S. 616 (1886), its early exclusionary rule cases were heavily influenced by the fear that the evidence in question may have been unreliable or the result of compulsion in violation of the fifth amendment. See, e.g., Boyd, 116 U.S. at 633. It was not until Weeks v. United States, 232 U.S. 383 (1914), that the Court relied solely on the fourth amendment to bar, in a federal prosecution, the use of evidence that was seized illegally. And it was not until the 1961 landmark decision of Mapp v. Ohio, 367 U.S. 643 (1961), that the Court held that the fourteenth amendment fully incorporated the fourth amendment guarantee against unreasonable searches and seizures, and thereby held that evidence obtained in violation of the fourth amendment was inadmissible in a state court. 367 U.S. at 655. For a useful treatment of the history of the fourth amendment exclusionary rule, see Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 GEO. L.J. 1361, 1363-70 (1981).

2 As Schroeder, supra note 1, at 1361 n.2, has indicated, there are at least two books substantially or completely devoted to a discussion of the exclusionary rule, and literally hundreds of articles have been written on the rule and its effects, including one article written just on the commentary. See 1 W. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT (1978); S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977); Note, Trends in Legal Commentary on the Exclusionary Rule, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974). In fact, Schroeder observes, the 1980 Index to Legal Periodicals added the heading "Exclusionary Rule" to its subject index, a reflection of the voluminous amount of commentary on the subject. Commentators are in sharp disagreement on almost every issue surrounding the rule, and judicial debate on the rule has been described euphemistically as "warm." See United States v. Janis, 428 U.S. 433, 466 (1976).


4 Numerous articles and notes recently have been written about the good faith exception in general or about the Williams decision and its implications.
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Williams, the United States Court of Appeals for the Fifth Circuit, sitting en banc, held that henceforth in the Fifth Circuit "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." In the wake of Williams, several other federal and state courts have adopted or indicated a willingness to adopt some form of good faith exception in search and seizure cases. Among these are United States District Courts in the Southern District of New York and the Western District of Pennsylvania, the Supreme Courts of Arizona, Colorado, and Virginia, the New York Court of Ap-


5622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).

Although the Williams court was sitting en banc, the opinion that created the "good faith exception" was the second of two majority opinions, and was joined by only 13 of the 24 members of the court. See infra text accompanying notes 96-98.

7622 F.2d at 840.

8See United States v. Wyler, 502 F. Supp. 969, 973-74 (S.D.N.Y. 1980) (house search that revealed identity of key witness was unlawful, but because information about the witness was only a by-product of the search and the search was undertaken in the good faith belief that it was lawful, the technical illegality of the search does not taint the testimony of the key witness so as to invoke application of the exclusionary rule).

9See United States v. Nolan, 530 F. Supp. 386, 396-400 (W.D. Pa. 1981) (explicitly adopts Williams-type good faith exception, and holds that whether or not exigent circumstances justified officer's warrantless search of motel room, evidence seized should not be suppressed because it was obtained pursuant to good faith and reasonable belief that action taken was lawful).

10See State v. Mincey, 130 Ariz. 389, 402, 636 P.2d 637, 650 (1981), cert. denied, 102 S. Ct. 1638 (1982) (although photographs of murder scene were taken illegally without obtaining a warrant, they are admissible because officer who took photos acted on legal advice—of county attorney—that he did not realize to be incorrect).

11See People v. Eichelberger, 620 P.2d 1067, 1071 n.2 (Colo. 1980) (en banc) (cites Williams for proposition that reasonable police actions, as opposed to willful or flagrant actions, are not intended to be penalized by the exclusionary rule).
peals, and intermediate appellate courts in Illinois and Kentucky. In addition, Congress is presently considering legislation that would incorporate the concept of good faith into the exclusionary rule. Finally, the list of jurists and commentators who have argued in favor of some form of good faith exception is formidable.

12 See Holloman v. Commonwealth, 221 Va. 947, 950, 275 S.E.2d 620, 622 (1981) (although good faith exception not applied to prevent suppression of evidence seized pursuant to a defective warrant, court finds the logic of Williams and other judicial advocates of a good faith exception for warrantless searches to be persuasive).

13 See People v. Adams, 53 N.Y.2d 1, 9-11, 422 N.E.2d 537, 541-42, 439 N.Y.S.2d 877, 881-83 (1981) (evidence obtained by warrantless search should not be suppressed because officers acted in good faith, reasonable belief that they had received valid consent to search even though consenter had no authority to consent to the search of apartment where evidence was found).

14 See People v. Pierce, 88 Ill. App. 3d 1095, 1102, 1110, 411 N.E.2d 285, 301, 307 (1980) (because police actions taken as a whole met the good faith/reasonableness test set forth in Williams, confession was not tainted by search pursuant to a quashed warrant).

15 See Richmond v. Commonwealth, No. 80-1366 (Ky. Ct. App. July 31, 1981) (capsulized in 50 U.S.L.W. 2162-63 (Sept. 22, 1981)) (unnecessary to decide whether magistrate could issue warrant authorizing search outside of his jurisdictional territory, because police officer acted in good faith reliance on otherwise valid warrant and magistrate acted without bad faith, the evidence seized pursuant to warrant should not be suppressed, as suppression would have no deterrent effect).

16 See S. 101, 97th Cong., 1st Sess., 127 Cong. Rec. S154 (daily ed. Jan. 15, 1981). S. 101 would prohibit the suppression of evidence in a federal criminal proceeding unless the evidence-seizing officer's conduct violated the fourth amendment in an intentional or substantial way. S. 101, § 3505(a). In addition, the United States Attorney General has publicly advocated that legislation incorporating the concept of a good faith exception to the exclusionary rule be adopted as part of the Reagan Administration's anti-crime effort. See ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 55-56 (1981) [hereinafter cited as ATT'Y GEN.'S RPT.].

17 As discussed infra notes 36-43 and accompanying text, several Supreme Court Justices have advocated the adoption of some form of good faith exception. In addition, at least two prominent judges on the United States Courts of Appeals have spoken in favor of a good faith exception. See Virgin Islands v. Rasool, 657 F.2d 582, 593-96 (3d Cir. 1981) (Adams, J., concurring) (where police officers have not engaged in clear misconduct or an unreasonable search, evidence should not be suppressed); H. FRIENDLY, BENCHMARKS, 260-62 (1967) (Judge HenryFriendly of the United States Court of Appeals for the Second Circuit suggests that suppression should be limited to the fruits of activity intentionally or unreasonably illegal; see also United States v. Soyka, 394 F.2d 443, 451-52 (2d Cir. 1968) (Friendly, J., dissenting)). Several commentators also have suggested that a good faith exception be adopted. See, e.g., E. GRIEWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 58 (1975) (officer should be supported if he acted decently and did "what you would expect a good, careful conscientious police officer to do under the circumstances"); Weber, Good Faith of Peace Officers in Search and Seizure: Seeking Proper Limits to the Exclusionary Rule, 53 LOS ANGELES B.J. 307 (1977) (good faith exception is appropriate in circumstances where purposes of the exclusionary rule are not undermined); Wright, Must the Criminal Go Free if the Constable Blundered?, 50 TEX. L. REV. 739, 745 (1972) ("the criminal should go free if the constable has flouted the fourth amendment but not if he has made an honest blunder"); Note, The Good
The arguments advanced in favor of the good faith exception are relatively simple. First, its proponents point out, the Supreme Court has held that the exclusionary rule is not constitutionally compelled, but is a judicially created remedy designed solely to deter law enforcement officials from engaging in conduct violative of the fourth amendment. Evidence must not be suppressed, therefore, unless suppression will have a deterrent effect, especially in contexts where its deterrent effect would be limited supports this assertion. See, e.g., DeFillippo, 443 U.S. at 38 n.3 (evidence seized pursuant to a presumptively valid statute later declared unconstitutional should not be suppressed because suppression would have no conceivable deterrent effect); Stone, 428 U.S. at 493-95 (where state provided fair trial, state prisoner may not be granted federal habeas corpus relief on ground that unconstitutionally obtained evidence was introduced at trial, for exclusion of evidence at that late stage would have minimal, if any, deterrent effect); Janis, 428 U.S. at 454 (exclusion from federal civil proceedings of evidence seized illegally by state law enforcement officer would not have enough deterrent effect to outweigh societal costs of exclusion); United States v. Peltier, 422 U.S. 531, 542 (1975) (suppression of evidence obtained in reliance on subsequently invalidated precedent would have no deterrent effect, so exclusionary rule should not apply); Calandra, 414 U.S. at 351-52 (any incremental deterrent effect that might occur by exclusion of illegally obtained evidence from grand jury proceedings does not justify extension of the exclusionary rule to cover such proceedings); Alderman v. United States, 394 U.S. 165, 174-75 (1969) (the additional deterrence benefits of extending the exclusionary rule to defendants other than the victim of the illegal search are too insignificant to justify such an extension in light of strong countervailing considerations).
considering that exclusion of probative evidence can cause the release of dangerous and clearly guilty criminals, thus imposing high costs upon society. Second, exclusion of evidence obtained by well trained police officers who acted in a mistaken, but reasonable, good faith belief that their conduct comported with fourth amendment requirements has no deterrent effect.\textsuperscript{21} The law in this area is unclear and constantly in a state of flux.\textsuperscript{22} A court's after-the-fact determination that an officer's good faith conduct was constitutionally impermissible will cause even the ideal officer to do nothing more than he has already done—namely, to engage in an informed, good faith effort to gather evidence in a manner consistent with the requirements of the fourth amendment.\textsuperscript{23} Suppression hence accomplishes nothing positive, yet it causes reliable evidence to be kept from the trier of fact, thus substantially impairing the truth-finding process,\textsuperscript{24}—sometimes permitting the release of dangerous criminals—\textsuperscript{25}—and causing the public to lose faith in the criminal justice system.\textsuperscript{26}

Opponents of a Williams-type good faith exception generally concede that, at least under current Supreme Court doctrine, the exclusionary rule is a judicially created remedy whose purpose is to deter unconstitutional police conduct.\textsuperscript{27} In contrast to good

\textsuperscript{21} See, e.g., Stone, 428 U.S. at 540 (White, J., dissenting) ("When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect."); Williams, 622 F.2d at 842; Wyler, 502 F. Supp. at 974; Pierce, 88 Ill. App. 3d at 1102, 1110, 411 N.E.2d at 301, 307; Wright, supra note 17, at 740 ("A police officer will not be deterred from an illegal search if he does not know that it is illegal."); see also Janis, 428 U.S. at 459 n.35 ("[T]he officers here were clearly acting in good faith . . . a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion.").

\textsuperscript{22} As Professor Anthony Amsterdam has pointed out in a most understated manner: "For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974).

\textsuperscript{23} See Stone, 428 U.S. at 539-40 (White, J., dissenting) (when officer acts reasonably and in good faith, he has acted as he should, and exclusion "can in no way affect his future conduct unless it is to make him less willing to do his duty.").

\textsuperscript{24} See Stone, 428 U.S. at 490-91, 490 n.29; see also Schroeder, supra note 1, at 1382-85.

\textsuperscript{25} See id.

\textsuperscript{26} See id.

\textsuperscript{27} See, e.g., Mertens & Wasserstrom, supra note 4, at 385-86; Florida Case Comment, supra note 4, at 304; Vanderbilt Recent Development, supra note 4, at 218; Washington Recent Developments, supra note 4, at 853-55. Given the strong Supreme Court precedents cited supra notes 18-19, it is not surprising that even the harshest critics of exclusionary rule exceptions concede that the Court currently views the rule as a judicially created remedy designed solely to deter unlawful police conduct. As Mertens & Wasserstrom, supra note 4, at 385 n.100, have demonstrated, the Court in Janis essentially defined out of existence the
faith exception proponents, however, opponents argue that a proper understanding of the way exclusion of illegally obtained evidence affects the entire law enforcement system reveals that the suppression of even "good faith" evidence may deter future unconstitutional conduct. 28

The gist of the argument against the exception is as follows: If a good faith exception to the exclusionary rule is adopted, courts will shift their focus away from the question whether the police acted constitutionally and toward an examination of whether they acted reasonably and in good faith. The development of fourth amendment law will then "stop dead in its tracks" 29 as courts forgo

original justification for the rule—preservation of judicial integrity—by making it coextensive with the deterrence rationale. The Janis Court stated:

The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

428 U.S. at 458 n.35.

That critics of the good faith exception and other restrictions on the scope of the exclusionary rule generally recognize how the Court currently views the rule does not, however, mean that they accept the Court's current assertion that the rule is a judicially created remedy designed solely to deter unlawful police conduct. To the contrary, the debate over the rule's origin and purpose is a particularly "warm one." Id. 466. Justices Brennan and Marshall continue to assert that the exclusionary rule is not a judicially created remedy but is constitutionally mandated, and that its central purpose is to preserve judicial integrity. See, e.g., Peltier, 422 U.S. at 553 n.13 (Brennan, J., dissenting, joined by Marshall, J.); Calandra, 414 U.S. at 355-67 (Brennan, J., dissenting, joined by Douglas & Marshall, JJ.).

Several commentators have agreed with Justices Brennan and Marshall that a proper understanding of the rule's origins reveals that it springs directly from the fourth amendment and therefore must be applied in all cases in which even the slightest constitutional violation has occurred. See, e.g., Cann & Egbert, The Exclusionary Rule: Its Necessity in Constitutional Democracy, 23 How. L.J. 299 (1980); Kamisar, A Defense of the Exclusionary Rule, 15 Ctrm. L. Bull. 5 (1979); see also Monaghan, The Supreme Court, 1874 Term—Forward: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975) (exclusionary rule is part of a constitutional common law); Schrock & Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251 (1974). Of course, if the rule is, in fact, properly viewed as being constitutionally mandated, then exclusion would be required in any case in which there had been a constitutional violation, and a good faith exception, no matter how it is structured, would be unconstitutional. See Ball, supra note 4, at 651.

28 Although it was written before Williams was decided, probably the most cogent criticism of the principle of permitting the use of evidence because of a police officer's "good faith" is contained in Justice Brennan's dissent in Peltier, 422 U.S. at 550-62 (Brennan, J., dissenting). Justice Brennan characterized his dissent as a demonstration that even if the deterrence rationale is accepted, the Peltier principle—which permits the use of good faith evidence—will have disastrous results. Id. 554 n.13.

29 Peltier, 422 U.S. at 554-55 (Brennan, J., dissenting); see also Mertens & Wasserstrom, supra note 4, at 450-53.
articulation in new situations of such fourth amendment requirements as probable cause, and instead decide the issue of suppression by determining simply whether the officer involved acted "reasonably and in good faith." 30 Without the continuing articulation of fourth amendment requirements, police officers in the future will have no guidance on how to act in borderline situations previously considered by courts, which will have engaged only in a good faith analysis. Over time, as evidence is admitted in every case in which a court thinks the police acted reasonably, the standards for compliance with the fourth amendment will become fuzzier and more diluted than at present. 31 Further, because such concepts as "good faith" and "reasonableness" are vague, 32 courts will spend inordinate time and effort in determining whether police acted "reasonably and in good faith," 33 and will ultimately decide the suppression issue on subjective and inarticulable grounds. The result will be that the good faith "exception" will gut the exclusionary rule and the fourth amendment, and the police will be able to violate the true, though unarticulated, requirements of the fourth amendment without consequence.

Despite the adoption of the good faith exception by the Fifth Circuit and the other courts listed above, 34 and despite the raging debate over the wisdom of the exception, 35 the Supreme Court has not yet squarely addressed the issue. In a recent decision, Justice Marshall, writing for the majority, noted in passing that the Court has not, "[t]o date," recognized the good faith exception. 36 Such dictum leaves open the possibility that an exception will be adopted in the future. Indeed, several commentators have speculated that the present Court will soon adopt some type of good faith excep-

30 See Mertens & Wasserstrom, supra note 4, at 452-53; Vanderbilt Recent Development, supra note 4, at 228-29 & 228 n.121.
31 See Mertens & Wasserstrom, supra note 4, at 449, 453; Georgia Case Comment, supra note 4, at 502; Vanderbilt Recent Development, supra note 4, at 228-29.
32 See Mertens & Wasserstrom, supra note 4, at 447; Georgia Case Comment, supra note 4, at 502, Vanderbilt Recent Development, supra note 4, at 229-30; see also infra text accompanying notes 103-12.
33 Specifically, it has been argued that determination of the officer's subjective and objective good faith would deflect the court's inquiry from the guilt of the defendant to the culpability of the police, and would require an additional layer of difficult fact-finding. See, e.g., Peltier, 422 U.S. at 560-61 (Brennan, J., dissenting); Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1045 (1974); Mertens & Wasserstrom, supra note 4, at 448-49.
34 See supra notes 8-15 and accompanying text.
35 See supra notes 4 & 17; text accompanying notes 18-26, 28-33.
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Chief Justice Burger and Justices White, Powell, and Rehnquist have already announced their support for some form of good faith exception. Justice Blackmun has indicated that the good faith and reasonableness of an officer should play at least some role in determining whether to suppress evidence he gathered. Although Justice O'Connor has not yet addressed the issue explicitly, she seems generally sympathetic to the arguments of those who would reduce the scope of the exclusionary rule. These six Justices

See Mertens & Wasserstrom, supra note 4, at 370-71; Note, Impending Frontal Assault on the Citadel: The Supreme Court's Readiness to Modify the Strict Exclusionary Rule of the Fourth Amendment to a Good Faith Standard, 12 Tulsa L.J. 337 (1976); cf. Schroeder, supra note 1, at 1416-17.

The Chief Justice announced his distaste for the exclusionary rule in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting), in which he complained that "honest mistakes have been treated in the same way as deliberate and flagrant . . . violations of the Fourth Amendment," id. 418, a policy that he characterized as just as foolish as punishing the freeing of a tiger in a schoolroom in the same way as the freeing of a mouse, id. 419. Although Burger did not advocate the abolition of the exclusionary rule in Bivens because he believed that no better alternative then existed, id. 420-21, he suggested in Stone, 428 U.S. at 500 (Burger, C.J., concurring), that unless the rule is abolished, preferable legislative alternatives will not be adopted. But he also made reference in his Stone concurrence to Justice White's suggestion that the rule be modified to incorporate the concept of good faith. Id. 501-02. This reference, combined with his comments in Bivens, suggests that although the Chief Justice prefers that the exclusionary rule be abandoned altogether, he would be willing to support a good faith exception as a step in the right direction.

See Stone, 428 U.S. at 538-42 (White, J., dissenting) (explicitly advocating the adoption of a good faith exception to the exclusionary rule).

See Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., with Rehnquist, J., concurring in part) (when police have not engaged in willful, or at the very least negligent, conduct, the exclusionary rule should not apply).

See id.; see also Peltier, 422 U.S. at 539 (Rehnquist, J.) ("'Where the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force.'") (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974) (Rehnquist, J.)).

See Janis, 428 U.S. at 458 n.35 (1976) (Blackmun, J.) (officer's good faith significantly reduces the deterrent effect of exclusion, which in turn counsels against exclusion).

In two major search and seizure cases during her first term, Justice O'Connor joined the majority in holding for the government. See Washington v. Chrisman, 454 U.S. 1 (1982); United States v. Ross, 102 S. Ct. 2157 (1982). Further, in United States v. Johnson, 102 S. Ct. 2579 (1982), Justice O'Connor joined the dissent, which maintained that a recent fourth amendment decision should not be applied retroactively to invalidate an arrest, partially because the officers acted in good faith. The dissenters (Justice White, joined by the Chief Justice, Justice Rehnquist, and Justice O'Connor) cited United States v. Peltier, 422 U.S. 531 (1975), in support of their contention that the exclusionary rule should not be applied in Johnson because:

First, "if law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material." Second, a deterrence purpose can only be served when the evidence to be suppressed is derived from a search which the law enforcement
—Burger, White, Powell, Rehnquist, Blackmun, and O'Connor—recently voted to hear reargument on a fourth amendment case, specifically requesting the parties to address the question whether the exclusionary rule should be modified to incorporate some form of a good faith exception. It thus appears that the Court is prepared to confront the issue directly, and that a comprehensive modification of the exclusionary rule is imminent.

Given the Court's current posture, this Comment does not simply join the ranks of those advocating either the acceptance or rejection of the concept of a good faith exception. Instead, it is assumed that the Supreme Court will adopt some form of exception. This Comment thus focuses on how such an exception should be structured. A properly conceived good faith exception, one that differs from the Williams exception, will permit the use of "good faith evidence" while encouraging courts and law enforcement officials to continue the development and articulation of strong fourth amendment guidelines.

The principal contention of this Comment is that evidence seized in violation of the fourth amendment should be admitted under a good faith exception only if the officer whose conduct is in question can prove that he acted pursuant to a specific and reasonable institutional guideline. Police will be most effectively deterred from unconstitutional conduct if police departments respond institutionally to search and seizure decisions by continually promulgating field regulations reflective of developing fourth amendment law, and by training officers to follow such regulations. The officers knew or should have known was unconstitutional under the Fourth Amendment.

102 S. Ct. at 2595 (citation omitted).

During her nomination hearings, Justice O'Connor declined to comment directly regarding her views on the good faith exception because she expected the issue to confront the Court in the near future. See Hearings Before the Senate Comm. on the Judiciary, Nomination of Sandra Day O'Connor, 97th Cong., 1st Sess. 143 (1981). She did note, however, that although the exclusionary rule should be applied "if force or trickery or some other reprehensible conduct has been used . . . I have seen examples of the application of the rule which I thought were unfortunate on the trial court." Id. 78.

44 See 51 U.S.L.W. 3145 (U.S. Nov. 30, 1982). The case restored to the calendar for reargument was State v. Gates, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), cert. granted, 102 S. Ct. 997 (1982) (No. 81-430) (argued Oct. 13, 1982). In Gates, the state challenges the suppression of evidence seized pursuant to a search warrant issued after the police received an anonymous tip that was partially corroborated.

45 See supra text accompanying notes 36-44.

46 See infra text accompanying notes 147-54, 233-69.

47 Id.

48 See infra text accompanying notes 117-46.
heretofore absent incentive for the promulgation of such regulations can be provided by permitting, under a good faith exception, the use of evidence seized pursuant to such regulations. To ensure that fourth amendment law will continue to be developed and articulated, this Comment proposes that courts determine whether an evidence-seizing officer’s conduct was constitutional before determining, under the new regulation-conscious good faith analysis, whether suppression is the proper remedy.

Part I of this Comment is a critical examination of the Williams-type good faith exception. It argues that the courts that have adopted the exception thus far have incompletely understood how suppression of evidence deters unconstitutional conduct. After an examination of the Williams decision, it concludes that the good faith exception as it currently exists will, as critics charge, permit the police to stretch the contours of the fourth amendment because court enforcement of its requirements will become weak, arbitrary, and inconsistent.

Part II reiterates the arguments of several police scholars and jurists that the exclusionary rule deters unconstitutional conduct primarily because of its effect on the institutions that shape police behavior. It is then argued that many of the problems with the Williams-type good faith exception stem from the good faith courts’ narrow and incomplete understanding of how the exclusionary rule deters improper conduct, and that any good faith exception should be based upon an institutional, or systemic, view of deterrence. The basic contours of a new good faith exception formulated under an institutional view of deterrence are then presented.

Part III examines several Supreme Court and other cases in which the use of unconstitutionally obtained evidence has been permitted because the police officers involved relied upon established guidelines, even though those guidelines were later held to be constitutionally defective. Although it is argued that some of these cases were wrongly decided because the court did not properly

49 See infra text accompanying notes 148-50, 261-64.

50 The reformulated good faith exception advocated in this Comment requires a court to determine, before undertaking its good faith inquiry, and independently of all countervailing considerations, whether the conduct being challenged was constitutional. See infra text accompanying notes 233, 236-38.

51 See infra text accompanying notes 74-77, 113-14.

52 See infra text accompanying notes 108-12.

53 See infra text accompanying notes 113-38.

54 See infra text accompanying notes 139-47.

55 See infra text accompanying notes 147-54.
scrutinize the guidelines involved, it is suggested that the cases examined provide some precedential support for the regulation-conscious good faith exception proposed.\(^6\)

Part IV of this Comment proposes and explores a new regulation-conscious good faith exception for search and seizure cases. The structure of the proposed exception is laid out in detail \(^5\) and then examined to illustrate how the new exception would be administered by the courts.\(^6\) The benefits of a regulation-conscious good faith exception are discussed, and arguments against the adoption of the proposed exception are confronted and rejected.\(^5\)

I. PROBLEMS WITH THE CURRENT FORMULATION OF THE GOOD FAITH EXCEPTION

The exclusionary rule generally requires that evidence obtained by law enforcement officers acting in violation of the fourth amendment cannot be presented at trial against a criminal defendant.\(^6\) The "good faith exception" permits the use of unconstitutionally obtained evidence in certain defined circumstances. Under the exception, as generally articulated, unconstitutionally obtained evidence "is not to be suppressed under the exclusionary rule when it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." \(^6\) This articulation of the good faith exception by the Fifth Circuit \(^6\) has been supported by Justice White,\(^6\) by commentators,\(^6\) and by almost every court that has adopted a good faith exception to date.\(^6\)

\(^{60}\) See infra text accompanying notes 155-221.

\(^{61}\) See infra text accompanying notes 233-34.

\(^{62}\) See infra text accompanying notes 236-64.

\(^{63}\) See infra text accompanying notes 265-69.

\(^{64}\) In its discussion of the origin and history of the exclusionary rule, the Supreme Court stated in Mapp v. Ohio, 367 U.S. 643, 648 (1961), that the rule means, "quite simply, that 'conviction by means of unlawful seizures and coerced confessions... should find no sanction in the judgments of the courts...,' and that such evidence 'shall not be used at all.'" (citation omitted).


\(^{66}\) See id.


\(^{68}\) See, e.g., ATT'T GEN.'S REP., supra note 16, at 56-57; E. GRISWOLD, supra note 17, at 58; Ball, supra note 4, at 635; Note, supra note 17, at 31; Skolnick, supra note 17.

\(^{69}\) See cases cited supra notes 8-15; see also Virgin Islands v. Rasool, 657 F.2d 582, 595 (3d Cir. 1981) (Adams, J., concurring).
As outlined above, the rationale for adopting the good faith exception as articulated by the Williams court is fairly simple: The exclusionary rule is a judicially created remedy that should be applied only when its effect will be to deter unconstitutional conduct. "When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect." Furthermore, the law should require only that officers act as "reasonable officer[s] would and should act in similar circumstances," because to require more is unrealistic. Officers can be expected to make mistakes on the street, but it is wrong to penalize, through suppression of probative evidence, those reasonable mistakes that will happen under the best of circumstances. The societal costs of exclusion are quite high, it is contended, and the exclusionary rule should not be applied when the deterrent effect of exclusion does not outweigh the societal costs—let alone when exclusion has no deterrent effect at all.

In arguing that suppression of "good faith" evidence has no deterrent effect, the proponents of the good faith exception implicitly adopt what can be labelled a "narrow" view of deterrence. Under such a "narrow" view, the exclusionary rule's effect is thought to be felt by the individual police officer whose evidence has been suppressed and by other street officers only through reading the suppression decision and responding directly to the fourth amendment principles pronounced therein. By arguing that exclusion of "good faith evidence" has no deterrent effect, the good faith exception courts do not recognize that suppression of such evidence may have a significant long-term deterrent effect, as law enforcement agencies respond institutionally to newly articulated and enforced fourth amendment principles.

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66 See supra text accompanying notes 18-26.
67 See supra notes 18-19 and accompanying text.
69 Stone, 428 U.S. at 539-40 (White, J., dissenting).
71 See supra text accompanying notes 24-26.
72 See Stone, 428 U.S. at 494-95; Williams, 622 F.2d at 843.
73 See Stone, 428 U.S. at 540 (White, J., dissenting); Williams, 622 F.2d at 847.
74 This deterrent effect has also been labelled "special deterrence." See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Cm. L. Rev. 665, 709-10 (1970).
75 Oaks, supra note 74, at 710-11, defines this type of deterrence as "direct deterrence," one subcategory of what he labels "general deterrence."
76 See infra text accompanying notes 113-41.
their "narrow" view of deterrence, courts that have adopted the good faith exception have focused their good faith inquiry almost exclusively on the behavior of the individual officer who seized the evidence in question, and on how his or her behavior might be affected by suppression.77

In order to invoke the good faith exception under the Williams test, it must be established by the prosecution that the evidence-seizing officer's actions were taken in both subjective and objective good faith.78 The officer must prove that he believed he was acting constitutionally (subjective good faith), and it must be demonstrated that the officer's belief was reasonable (objective good faith).79 The Williams court suggested that good faith would have little meaning if not based on objective criteria as well as subjective belief.80 It is often impossible for a court to determine with certainty whether a police officer in fact believed that he was actingconstitutionally when evidence was seized. Generally, the only evidence before the court on the subjective good faith of the officer will be the officer's

77 See, e.g., Williams, 622 F.2d at 842, 846 (officers who have made reasonable attempt to act lawfully cannot be deterred by suppression from acting in same manner in the future; agent in case acted reasonably and in good faith so suppression can have no deterrent effect); United States v. Nolan, 530 F. Supp. 386, 399-400 (W.D. Pa. 1981) (close inspection of officer's actions reveals that he acted reasonably and in good faith, so, because suppression would not deter future police misconduct, the evidence should be admitted at trial); United States v. Wyler, 502 F. Supp. 966, 973-74 (S.D.N.Y. 1980) (record in case established that agents acted in good faith and reasonably; therefore, the deterrence purpose of the exclusionary rule would not be advanced by suppression and evidence was admitted); People v. Adams, 53 N.Y.2d 1, 9, 422 N.E.2d 537, 541-42, 439 N.Y.S.2d 877, 881 (1981) (purpose of exclusionary rule is to deter; there is no deterrence when evidence obtained by police who believed they were acting lawfully is suppressed, so because agents in case reasonably believed they had consent to search apartment, evidence should not be suppressed.). In addition, as one commentator has noted, the Supreme Court has frequently adopted a narrow view of deterrence, which has contributed to the Court's willingness to take individual officer's good faith into account in determining whether to apply the exclusionary rule. See Washington Recent Developments, supra note 4, at 854 n.32, 856-57; see, e.g., Michigan v. Tucker, 417 U.S. 433, 447 (1974):

By refusing to admit evidence gained as a result of [willful, or at the very least negligent] conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

(emphasis added.)

78 See Williams, 622 F.2d at 841 nn.4-4a, 844; see also Williams, 622 F.2d at 848 (Hill, J., concurring specially).

79 Id.

80 See Williams, 622 F.2d 841 n.4a. See also People v. Adams, 53 N.Y.2d 1, 9-10, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881 (1981); Ball, supra note 4, at 647.
own testimony.81 One commentator has noted that "[s]uch testimony, whether truthful or perjured, is almost impossible to refute."82 In fact, evidence suggests that the exclusionary rule already fosters false testimony by the police.83 Thus, although subjective good faith must be proven to avoid suppression, it is likely that this branch of the good faith test will almost always be met.84 The objective branch of the test thus becomes critical.

The Williams court, and other good faith courts and commentators, recognize the importance of the objective branch of the good faith test.85 Without the requirement that the evidence-seizing officer's actions be "reasonable," as well as having been taken in subjective good faith, a well-intentioned officer completely ignorant of the Constitution would never have his evidence suppressed, no matter how egregious his actions. The Williams test attempts to prevent this possibility through its "reasonableness" requirement. The court stated, "a series of broadcast breakins [sic] and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify" for application of the good faith exception.86 The implication is that the objective facet of the good faith exception is the most important because it alone ensures that police conduct meets certain fourth amendment standards.

It is argued below, however, that one serious flaw with the "objective" test of the Williams-type good faith exception is that courts are permitted to conclude that it has been passed without providing principled reasons for their determinations. The narrow, officer-specific inquiry into the "reasonableness" of an officer's conduct requires courts to make subjective and arbitrary determinations that cannot be transformed into articulable and applicable standards for future police conduct.87 The problems with the ob-

81 See Ball, supra note 4, at 655.
82 Id.
84 This is not to suggest that it is impossible to demonstrate that a police officer acted in bad faith. If, for example, it can be demonstrated by reference to past police records that a particular officer often has his evidence suppressed, the argument might be made that the officer pays little attention to the requirements of the fourth amendment, but instead simply "acts first" and tries to justify his actions later if necessary. See infra text accompanying notes 248-50. In fact, two commentators have argued that a close look at the record of the agent whose conduct was reviewed in Williams reveals that he may not have acted in good faith. See Mertens & Wasserstrom, supra note 4, at 417-23.
85 See supra notes 78-80.
86 622 F.2d at 841 n.4a.
87 See infra text accompanying notes 103-12.
jective facet of the Williams-type good faith test can be illustrated by examining how the good faith exception was applied to the facts of Williams itself.

In United States v. Williams, Jo Ann Williams had been arrested for the second time by Drug Enforcement Agency (DEA) Special Agent Paul J. Markonni. Markonni had originally arrested Williams for possession of heroin, but Williams was released pending appeal of the denial of a suppression motion. As a condition of her release, she was required to remain in Ohio, pursuant to a federal statute authorizing travel restrictions as part of bond conditions. The second arrest, which was the subject of the Williams court's inquiry, occurred when Agent Markonni subsequently saw Williams in an Atlanta airport deboarding a flight from Los Angeles. Aware of her travel restriction, Markonni arrested Williams for violating her bond conditions. In a search incident to the arrest, Markonni found a packet of heroin in Williams' coat pocket, and a later search of Williams' suitcases seized by Markonni revealed a large quantity of heroin.

Williams moved to suppress the introduction of the heroin on the ground that violating court-imposed bond conditions was not a valid ground for arrest by a DEA agent, and that the search incident to the arrest, and the later suitcase search, were tainted by the invalid arrest and were therefore unlawful. The magistrate who originally heard Williams' suppression motion held that the arrest was lawful, but the district court overruled the magistrate and sustained Williams' suppression motion. A Fifth Circuit panel agreed that the heroin should be suppressed, reasoning that only a court had the authority to enforce its bond restrictions and that a DEA agent acting on his own could not do so.

The Fifth Circuit, on its own motion, directed an en banc rehearing of the case. In one of two majority opinions, sixteen of the twenty-four members of the en banc court held that the

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89 See Williams, 622 F.2d at 833.
90 Id.
91 Id. 834.
92 Id.
93 Id. 835.
94 Id.
95 United States v. Williams, 594 F.2d 86 (5th Cir. 1979) (Goldberg & Simpson, JJ; Clark, J., dissenting), reh'g granted, 594 F.2d 98 (1979), rev'd, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).
96 594 F.2d 98 (5th Cir. 1979).
arrest was valid, and reversed the panel's granting of the suppression motion.\textsuperscript{97} In the critical second majority opinion, 13 of the court's 24 members held that whether or not the arrest was lawful need not be decided in order to determine whether to grant the suppression motion\textsuperscript{98}—the heroin was admissible solely because the arrest was made in the good faith and reasonable belief that such an arrest was lawful.\textsuperscript{99} The second majority found that Agent Markonni acted under the belief that he had the authority to arrest Williams because her conduct violated her bond restriction.\textsuperscript{100} After announcing and supporting its two-pronged test for application of its newly fashioned good faith exception,\textsuperscript{101} the court found that Markonni's actions were taken in subjective good faith and were objectively reasonable.\textsuperscript{102} The only guidance the court gave for applying the critical objective facet\textsuperscript{103} of its test, however, was contained in a footnote. The court stated that in order to be considered "reasonable," the officer's belief must "be based on articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully."\textsuperscript{104} The court failed, however, to articulate why Markonni's belief—that violating a bond condition was a valid ground for a DEA agent to effectuate an arrest—was a reasonable belief. The only support given by the court for its determination that Markonni's actions were reasonable was its comment that the Fifth Circuit had not addressed the legal issue facing Markonni when he made the arrest, but that the Fourth Circuit had "inferentially" indicated that an arrest made by a law enforcement officer for

\textsuperscript{97} 622 F.2d at 833-39.
\textsuperscript{98} 622 F.2d at 840 (although many of the judges who join the good faith opinion agree with the other majority that the officer's conduct was constitutional, it is "our view" that the evidence should not be suppressed "whether or not" the officer's actions were lawful; "good faith" analysis then undertaken without any discussion of constitutional issue); see also id. 847 (Hill, J., concurring specially) (supports approach of good faith majority, and emphasizes that the court should, if possible, decline to reach and decide the constitutional issue if it can find the evidence admissible on other grounds).
\textsuperscript{99} 622 F.2d at 840-47.
\textsuperscript{100} Id. 846.
\textsuperscript{101} See supra text accompanying notes 78-86.
\textsuperscript{102} 622 F.2d at 846, 847.
\textsuperscript{103} The objective facet of the Williams test is critical for the reasons discussed supra at text accompanying notes 80-86.
\textsuperscript{104} 622 F.2d at 841 n.4a. Not only did the court confine its definition of "reasonableness" to a short footnote, but it appears that even the footnote was added as an afterthought—it is numbered.4a.
violation of bond restrictions was valid. Not only was the cited opinion of questionable relevance, but there was no indication that Agent Markonni knew anything about the 1971 Fourth Circuit opinion. In fact, there was no indication that Agent Markonni could articulate any precedential support at all for his actions. In sum, the court held that Markonni's actions were "objectively" reasonable simply because they looked reasonable. Right or wrong, it can hardly be argued that the court applied any articulable, objective standards in making its reasonableness determination.

Given these serious problems with the objective facet of the Williams test, many of the criticisms of Williams outlined above seem to follow. As demonstrated by examining the Williams court's application of its own test to the facts of that case, the critical "reasonableness" determination under the Williams test can be made without elucidation as to what constitutes "reasonable" police behavior. Whether a police officer's actions on the street will later be considered "reasonable" is thus almost impossible for the officer to predict. This consideration, combined with the fact that under the Williams formulation it is unnecessary for a court to determine, before beginning its good faith inquiry, whether the conduct in question violated the fourth amendment's requirements, will mean that the continued development and articulation of fourth amendment standards will be curtailed. Such fourth amendment standards as probable cause and consent to search will be diluted into a vague and subjective "reasonableness" requirement.

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106 In Avery, the fourth circuit merely held that a defendant who had travelled outside the area in which he was ordered to remain, pursuant to the provisions of the Williams bond-condition statute, was properly adjudged guilty of violating his bond terms despite his possession of a round-trip air ticket. There is no indication that the defendant challenged his arrest on the ground that it should have been executed by a court officer. In fact, there is no indication that the arrest was challenged at all—it appears that the defendant merely challenged the sufficiency of the evidence that led to his conviction. See id. 979. It is no wonder that the Williams court characterized Avery as "inferentially" supporting Agent Markonni's alleged basis for arrest, but even that characterization appears to have been an exaggeration.

107 As Mertens & Wasserstrom, supra note 4, at 417-18, have pointed out, Markonni was in fact unsure about the basis he had to arrest Williams.

108 See supra text accompanying notes 28-33.

109 See supra note 98 and accompanying text.

110 This result is the one most feared by several good-faith-exception critics. See authority cited supra note 29.

111 See authority cited supra note 31.
Deterrence cannot work if the police do not know what they are to be deterred from doing.\textsuperscript{112} If the courts make no effort to announce clear and objective fourth amendment standards, but instead engage in the fuzzy and unpredictable "reasonableness" inquiry which is at the heart of the Williams good faith exception, then police officers will not be deterred effectively from violating the Constitution in the future.

II. THE INSTITUTIONAL VIEW OF DETERRENCE: A BETTER BASIS FOR THE FORMULATION OF A GOOD FAITH EXCEPTION

As argued in Part I, courts that have adopted the good faith exception thus far have typically held a "narrow" view of deterrence.\textsuperscript{113} They believe that suppression of unconstitutionally obtained evidence deters unconstitutional conduct primarily because officers respond directly to suppression decisions, altering their future behavior to prevent their evidence from being suppressed again.\textsuperscript{114} It is argued in this section that, contrary to the "narrow" view of the good faith courts, suppression of evidence deters unconstitutional conduct primarily by causing law enforcement policy makers to respond to suppression decisions on an institutional level, and that developing fourth amendment standards are filtered down to police officers on a widespread basis through internal police channels.\textsuperscript{115}

Because good faith courts have thus far improperly understood how deterrence works, it is not surprising that they have formulated a good faith exception that will significantly reduce the real deterrent effect of the exclusionary rule.\textsuperscript{116} More important, a proper, institutionally based, understanding of how police officers are deterred from engaging in unconstitutional conduct suggests how a new good faith exception can be developed that will avoid the pitfalls of the current exception.

A. The Institutional View of Deterrence

Like proponents of the narrow view of deterrence, proponents of the "institutional" or "systemic" view agree that the exclusionary

\textsuperscript{112} See \textit{id}. Professor Oaks, \textit{supra} note 74, at 731 has stressed that unclear fourth amendment rules will make suppression an ineffective deterrent. He cites the Bible at I Cor. 14:8: "For if the trumpet give an uncertain sound, who shall prepare himself to the battle?" \textit{Id.} 731 n.194.

\textsuperscript{113} See \textit{supra} text accompanying notes 74-77 & note 77.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} See \textit{infra} text accompanying notes 117-41.

\textsuperscript{116} See \textit{infra} text accompanying notes 142-46.
rule deters unconstitutional conduct. Unlike proponents of the narrow view, however, proponents of the institutional view argue that the exclusionary rule's primary effect is on the institutions that shape police behavior, and that exclusionary rule decisions are aimed only incidentally at individual police officers. As Justice Powell suggested when writing for the court in Stone v. Powell, the exclusion of unconstitutionally obtained evidence not only has the immediate effect of removing the police officer's incentive to violate the fourth amendment, but "[m]ore importantly, over the long term, [the demonstration provided by suppression] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." Deterrence, according to the institutional view, occurs not because individual police officers read suppression decisions, but because police policy makers read them and fashion departmental policies and regulations accordingly. Police training programs are devised according to the policy maker's understanding of fourth amendment decisions, and these programs, combined with other internal guidelines, ultimately determine police conduct on the street. As changes in fourth amendment law occur, they are

117 It should be noted that there is considerable debate about whether the exclusionary rule deters unconstitutional police conduct at all, through any method. Although limited empirical studies on the deterrent effect of the rule have been made, the results are generally agreed to be inconclusive. For a flavor of the debate surrounding whether the rule deters at all, compare Cannon, The Exclusionary Rule: Have Critics Proven that it Doesn't Deter Police?, 62 JUDICATURE 398 (1979) (empirical studies critical of the rule's deterrent effect are inconclusive, but common sense indicates the rule has some deterrent effect) with Schlesinger, The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to the Police?, 62 JUDICATURE 404 (1979) (advocates of the rule have failed to meet their burden of proving that the rule works). While it is beyond the scope of this Comment to undertake another empirical study on the effects of the present exclusionary rule, it is argued infra at text accompanying notes 118-54 that the rule has the potential, even if now untapped, to deter unconstitutional police behavior, and that it will work even more effectively if its potential effect on the police as an institutional body is properly understood and exploited.

118 See, e.g., J. SKOLNICK, JUSTICE WITHOUT TRIAL 219-20 (2d ed. 1975); Amstarden, supra note 22, at 430-32; Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1320, 1412-13 (1977); Kaplan, supra note 33, at 1050-55; Mertens & Wasserstrom, supra note 4, at 399-401; Oaks, supra note 74, at 711-12, 756.


120 Id. 492 (emphasis added).

121 Empirical studies suggest that a very low percentage of officers can be expected to read or to learn about such decisions. See infra note 128, and accompanying text.

122 See infra text accompanying notes 134-41.
gradually incorporated into the institutional guidelines that shape police behavior.

As several commentators¹²³ and Justices¹²⁴ have argued, the advantage to adopting an institutional view of deterrence is simple: it most accurately describes how police conduct is influenced by the exclusionary rule. The idea underlying the narrow view of deterrence—that court decisions directly affect police conduct—has been seriously questioned by many commentators and jurists.¹²⁵ The lines of communication between the prosecutor’s office and individual officers whose conduct is challenged are often quite poor.¹²⁶ In addition, court decisions are often rendered years after the unconstitutional conduct in question occurred.¹²⁷ Further, studies show that an extremely small percentage of police officers read court decisions.¹²⁸ Even for the few officers who attempt to read suppression decisions, it is unrealistic to expect them to keep abreast of the latest legal intricacies of fourth amendment law as articulated by courts all over the country.¹²⁹ Fourth amendment decisions tend to be quite complex, and most police officers will have difficulty gleaning practical guidelines from them.¹³⁰ Finally, perhaps the most significant reason to question the idea underlying the narrow view of deterrence is that many police officers do not regard “ivory tower” judges as legitimate and respected regulators of police conduct.¹³¹ Thus, contrary to the narrow view that court decisions directly affect police conduct, the institutional view recognizes that police officers are more likely to respect and respond to administrative norms developed by fellow law enforcement officials,¹³² even if

¹²³ See supra note 118.
¹²⁷ See Bivens, 403 U.S. at 417 n.4 (Burger, C.J., dissenting).
¹²⁸ See Hyman, supra note 126, at 42 (survey of local county police officers indicated that only 3.3% of those questioned read court decisions, .006% read United States Law Week, and .008% read law reviews); see also Bivens, 403 U.S. at 417 (Burger, C.J., dissenting).
¹²⁹ See id.; Oaks, supra note 74, at 731.
¹³⁰ See Bivens, 403 U.S. at 417 n.4 (Burger, C.J., dissenting); Oaks, supra note 74, at 731; see also Amsterdam, supra note 22, at 349.
¹³¹ See J. SKOLNICK, supra note 118, at 225-29.
¹³² See id. 219; see also Schroeder, supra note 1, at 1402-03. See generally Caplan, The Case for Rulemaking by Law Enforcement Agencies, 36 LAW & CONTEMP. PROBS. 500 (1971).
those norms are contrary to court decisions.\textsuperscript{133}

Those who hold an institutional view of deterrence also point out that police policy makers, including police administrators and high-ranking officers, are in a much better position than rank-and-file officers to develop and articulate fourth amendment standards. Policy makers are more likely than street officers to pay close attention to developing fourth amendment case law because they are usually more concerned with successful prosecutions.\textsuperscript{134} Also, police administrators have an institutional duty to develop comprehensible guidelines for search and seizure activity in that they are responsible for officer training.\textsuperscript{135} Finally, police administrators can effectively communicate fourth amendment standards through training materials and formal or informal regulations.\textsuperscript{136} Rank-and-file officers will be more likely to pay attention to such internal guidelines than they would to guidelines contained in suppression decisions not only because police policy makers are more respected by fellow enforcement officers than the courts are,\textsuperscript{137} but also because such guidelines will undoubtedly be more understandable, realistic, and practical than whatever guidelines are contained in suppression decisions.\textsuperscript{138}

Although there is very little empirical "proof" that the exclusionary rule in fact deters police conduct through the institutional mechanisms described or through any other method,\textsuperscript{139} logic, expert commentary, and concrete examples\textsuperscript{140} suggest that if the exclusionary rule deters at all, the institutional view of deterrence is far more accurate than the "narrow" view in describing how that deterrence occurs. Hence if police policy makers can be encouraged to be more aggressive in developing and implementing detailed fourth amendment guidelines for the police to follow,\textsuperscript{141} police

\textsuperscript{133}See Oaks, supra note 74, at 727.
\textsuperscript{134}See Mertens & Wasserstrom, supra note 4, at 399.
\textsuperscript{135}See id. 399-400; Hyman, supra note 126, at 55-56; cf. Caplan, supra note 132, at 505.
\textsuperscript{136}See Mertens & Wasserstrom, supra note 4, at 399.
\textsuperscript{137}See supra note 131 and accompanying text.
\textsuperscript{138}See Schroeder, supra note 1, at 1403.
\textsuperscript{139}See supra note 117.
\textsuperscript{140}See generally sources cited supra note 118. Mertens & Wasserstrom, supra note 4, at 399-401, point out that the District of Columbia Police Department responded to the Supreme Court's decision in Delaware v. Prouse, 440 U.S. 648 (1979), which outlawed random traffic stops, by promulgating departmental regulations. This immediate and effective response to a suppression decision, they argue, should significantly deter such unconstitutional behavior in the future. Id. 400-01; see also infra note 229 and accompanying text.
\textsuperscript{141}At present, few police departments have undertaken the kind of administrative rulemaking efforts necessary to contribute significantly to deterrence. See
conduct will be much more likely to conform to the requirements of the fourth amendment.

Because the Williams-type good faith exception is based on a narrow view of deterrence that fails to understand how police conduct is actually affected by the exclusionary rule, it is not designed to encourage the development of internal police regulations. In fact, because the Williams formulation permits the courts to forgo determinations of whether constitutional violations occurred, and because the current good faith exception's critical "reasonableness" test will produce only vague rationalizations for the court's "objective" determinations, it will be almost impossible for even the most well-intentioned police policy makers to glean practical fourth amendment standards from Williams-type good faith decisions for their use in police regulation development. To be sure, the Williams-type good faith exception will permit the use of more probative evidence, but, contrary to the claims of its supporters, deterrence will be significantly reduced.

B. A Reformulated Good Faith Exception: Introduction

By fashioning a good faith exception based on an institutional understanding of deterrence, a rule can be formulated that permits the use of probative evidence in good faith situations without reducing the deterrent effect of the exclusionary rule. The new good faith exception can be articulated simply: evidence should be admitted under a good faith exception only if it was obtained by an officer who, even though later determined to have acted unconstitutionally, acted pursuant to a specific institutional guideline that reasonably reflected fourth amendment law as it existed at the time of the officer's action.

The new good faith exception has the following advantages: First, like the Williams exception, it will permit the use of more probative evidence than the present exclusionary rule does. There will be situations in which police officers complied with regulations but still acted unconstitutionally. For example, because fourth amendment law is quite complex and constantly changing, there

Schroeder, supra note 1, at 1404; Caplan, supra note 132, at 501-02; infra note 230 and accompanying text.

142 See supra text accompanying notes 74-77.
143 See supra text accompanying notes 123-46.
144 See supra text accompanying note 98.
145 See supra text accompanying notes 108-12.
146 See supra text accompanying notes 21-23, 68-73.
147 See supra note 22.
will be cases in which a regulation followed by an officer, though reflective of constitutional standards when followed, did not anticipate a new fourth amendment interpretation made by a court after the actions occurred. In such situations the new good faith exception would permit the use of the evidence seized even though the officer's actions are found by a reviewing court to have been unconstitutional. Second, conviction-conscious police policy makers will be given a strong new incentive to promulgate extensive search and seizure regulations, because the new exception permits the use of unconstitutionally obtained evidence only if it was seized pursuant to a specific institutional guideline. The promulgation of regulations should result in more effective deterrence from unconstitutional conduct, because street officers respond most effectively to internal police regulations. Third, police policy makers will be provided with clearly articulated standards upon which to base revisions of the regulations, because, as discussed in part IV, the recommended formulation of the good faith exception requires courts to determine, before beginning the regulation-conscious good faith analysis, whether a constitutional violation occurred. Finally, courts applying the good faith test can replace the fuzzy Williams-type "objective" test with a simple inquiry into whether the officer's conduct was consistent with a police regulation.

It should be clear, however, that under the reformulated good faith test, the courts must still make difficult "reasonableness" judgments. The institutional guidelines upon which the officer relied must reflect a reasonable, non-novel interpretation of fourth amendment law as it existed at the time of the officer's actions. The reasonableness of an officer's conduct can only reflect the reasonableness of the guidelines upon which he relied. As the institutional perspective suggests, deterrence can only be achieved if the entire law enforcement system is imbued with proper fourth amendment values. As discussed in more detail in part IV, however, the beauty of the reformulated good faith exception is that because courts will be evaluating the reasonableness of amendable police

145 See supra text accompanying note 134.

149 See infra text accompanying notes 234, 243-46.

150 See supra text accompanying notes 131-38.

151 See infra text accompanying notes 233, 233-38.

152 See supra text accompanying notes 103-07.

153 Professor Amsterdam has suggested that the fourth amendment should be viewed as creating a regulatory atmosphere under which the government as a whole must function. See Amsterdam, supra note 22, at 367-72.

154 See infra text accompanying notes 233, 236-38, 260-64.
regulations after deciding whether the officer's conduct was constitutional, instead of evaluating the reasonableness of the officer's past conduct without determining whether it was constitutional, future deterrence through institutional reform is not threatened, and fourth amendment law will continue to be developed.

III. POLICE RELIANCE UPON SUBSEQUENTLY INVALIDATED LEGAL AUTHORITY: PRECEDENTIAL SUPPORT FOR A REFORMULATED GOOD FAITH EXCEPTION

The Supreme Court has supported the general principle that evidence seized by an officer relying upon a subsequently invalidated legal rule should not always be suppressed. Commentators and good faith courts generally characterize such cases as "technical violations," and have included within this category of good faith cases those in which an officer relied upon a "statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled." Such cases have been distinguished from those involving "good faith mistakes," a category including cases in which a police officer made a "judgmental error concerning the existence of facts sufficient to constitute probable cause," consent to search, or the like. The proposed reformulated good faith exception outlined in part II and discussed in detail can be understood as requiring simply that the "reliance requirement" underlying the "technical violations" cases should be applied in the "good faith mistake" area as well.

This section examines cases that can be said to have involved "technical violations." Although, it is demonstrated, the Supreme Court has accepted the basic principle that when police officers rely on subsequently invalidated guidelines the evidence should be admitted, some lower courts have improperly understood and applied this principle in "technical violations" cases. Once again, it is suggested that the courts' errors stem from their failure to adopt an "institutional" perspective, which has caused the courts to fail to extend their good faith and reasonableness inquiries beyond the

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155 See infra text accompanying notes 162-72, 177-85.
156 See, e.g., United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); Ball, supra note 4, at 635-36.
157 Ball, supra note 4, at 635-36. The Williams court also indicated that a reasonable interpretation of a statute that is later construed differently should be included under the "technical violations" facet of the exception. 622 F.2d at 843.
158 Ball, supra note 4, at 635; see Williams, 622 F.2d at 841.
159 See supra text accompanying notes 147-54.
160 See infra text accompanying notes 233-64.
level of the police officer to the type and applicability of the guideline followed.

A. Reliance on Judicial Opinions Later Overruled

It is almost axiomatic that a police officer should be able to rely on a controlling court decision to guide his actions. When an officer can show that he relied directly on a policy announced in a controlling and applicable court decision, then he has responded correctly to guidelines approved by the judiciary. In some cases, however, the court decision relied upon by a police officer, though valid when the officer acted, may be overruled subsequent to his actions but before, or while, his conduct is reviewed. The reviewing court may believe that the decision relied upon by the officer incorrectly interpreted a previously announced principle of fourth amendment law, or the court may wish to announce a new principle of constitutional law that expands individual rights. In either case, neither the acting officer nor police policy makers can be expected to anticipate that the decision relied upon will be overruled. Rather, all elements of the police hierarchy have responded as well as they could to concrete (though later invalidated) guidelines. Thus, application of the good faith exception to permit use of the evidence seized seems appropriate.

The Supreme Court approved this general principle in United States v. Peltier. Although, as Professor Edna Ball has pointed out, Peltier was decided upon principles established in preceding cases concerning the retroactive application of constitutional rulings, "the bulk of the majority opinion is devoted to establishing that the policies underlying the exclusionary rule do not require retroactive application in cases where officials acted in good faith reliance upon administrative regulations and judicial opinions." In Peltier, a border patrolman acting in the Ninth Circuit's territory searched the defendant's car in a manner consistent with police authority under a statute as interpreted by decisions in the Fifth, Ninth, and Tenth Circuits, and pursuant to longstand-

162 422 U.S. 531 (1975).
163 See Ball, supra note 4, at 641 n.70.
164 Id.; see Peltier, 422 U.S. at 536-42.
165 See cases cited in Peltier, 422 U.S. at 541 n.9.
166 See cases cited in Peltier, 422 U.S. at 541 n.10.
167 See cases cited in Peltier, 422 U.S. at 541 n.11.
Soon after the search, the circuit court precedents were overruled in *Almeida-Sanchez v. United States*, in which the Supreme Court held unconstitutional a search conducted even closer to the border than the *Peltier* search. The *Peltier* court held that *Almeida-Sanchez* should not be applied retroactively to cause suppression of the *Peltier* evidence, because the officers involved had acted “in good-faith compliance with then-prevailing constitutional norms,” and application of the exclusionary rule would have no deterrent effect.

The *Peltier*-type situation, in which an officer bases his action on a clearly applicable judicial precedent, should be distinguished from cases in which an officer seeks to justify his actions based on a novel interpretation of a court decision, without any judicial precedent or administrative regulations to support it. Although fourth amendment decisions are often open to interpretation, the institutional view of deterrence suggests that police policy makers, and not individual officers, should be the only law enforcement officials to be rewarded for translating search and seizure decisions into practical police guidelines. If individual officers (or, more realistically, prosecutors handling their cases) are permitted to support “good faith” claims with stretched interpretations of existing cases, then the fourth amendment’s requirements will most surely be watered down. The Supreme Court, of course, has routinely rejected attempts to justify unconstitutional police conduct with stretched interpretations of existing precedents.

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168 See *Peltier*, 422 U.S. at 540. The regulations permitted roving border patrol searches at any point within 100 miles of any external boundary of the United States. *Id.* The *Peltier* search was conducted about 70 miles from the border. *Id.* 533.

169 413 U.S. 266 (1973). The *Peltier* search occurred four months before the Court decided *Almeida-Sanchez*. See *Peltier*, 422 U.S. at 532.

170 See *Almeida-Sanchez*, 413 U.S. at 273.

171 *Peltier*, 422 U.S. at 536.

172 *Id.* 542.

173 See *Arkansas v. Sanders*, 442 U.S. 753, 757 (1979) (“law enforcement officials often find it difficult to discern the proper application of . . . principles to individual cases . . .”).

174 This is not to suggest that police policy makers should be permitted to interpret court decisions as they please; their interpretations must be scrutinized by the courts for their reasonableness. See *supra* text accompanying notes 153-54 and *infra* text accompanying notes 251-64.

175 See, e.g., *Robbins v. California*, 453 U.S. 420 (1981), overruled, United States v. Ross, 102 S. Ct. 2157 (1982). In *Robbins*, the officer attempted to justify his warrantless search of two opaque wrapped packages found in the trunk of an automobile by advocating an expansive interpretation of the automobile warrant exception announced in *Chambers v. Maroney*, 399 U.S. 42 (1970). But the Court rejected the officer’s interpretation and held that the search was unconstitutional under the rule of *Arkansas v. Sanders*, 422 U.S. 753 (1979), that closed containers
B. Reliance on Statutes Later Invalidated

An important part of the police's duty is to enforce statutory law. An officer who performed precisely as commanded by a statute necessarily made a good faith effort to act properly. The Supreme Court has lent support to the general principle that evidence seized pursuant to a statute should not be suppressed even if the statute is later ruled to be unconstitutional.\textsuperscript{176}

In \textit{Michigan v. DeFillippo},\textsuperscript{177} the Michigan Court of Appeals had held that a Detroit ordinance, which permitted police officers to stop and question an individual upon reasonable cause to believe the individual's behavior "warrants further investigation for criminal activity," and which also declared it unlawful for a person so stopped not to identify himself,\textsuperscript{178} was unconstitutionally vague.\textsuperscript{179} The United States Supreme Court held, however, that despite the statute's unconstitutionality, evidence seized pursuant to a then-lawful arrest under the statute (for failure to produce identification) should \textit{not} be suppressed,\textsuperscript{180} noting that "[t]o deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule."\textsuperscript{181}

The Court somewhat confusingly distinguished the Detroit ordinance from statutes which, "by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements . . . ."\textsuperscript{182} In cases involving statutes of the latter type the Court had held that suppression found within vehicles cannot be searched without a warrant unless there are exigent circumstances. Interestingly, in United States v. Ross, 102 S. Ct. 2157 (1982), the post-O'Connor Court ultimately vindicated the Robbins officer's interpretation, although it obviously could not "un-suppress" the Robbins evidence, by overruling Robbins and holding that even closed containers within automobiles could be searched under the automobile warrant exception.

\textsuperscript{176} See infra text accompanying notes 177-85.

\textsuperscript{177} 443 U.S. 31 (1979).

\textsuperscript{178} Id. 33 n.1.

\textsuperscript{179} See id. 34.

\textsuperscript{180} See id. 40.

\textsuperscript{181} Id. 38 n.3.

\textsuperscript{182} Id. 39. The Court seemed to draw a distinction between substantive laws that define criminal offenses—such as the Detroit ordinance that made failure to produce identification if stopped a criminal offense—and procedural statutes that improperly define circumstances in which warrantless searches are permitted. Evidence seized during searches conducted pursuant to the former type of statute is not to be suppressed even if the statute is later held to be unconstitutional, whereas evidence seized pursuant to the second type of statute is to be suppressed. As one commentator has noted, however, the basis for this distinction is not clear. See Washington Recent Developments, \textit{supra} note 4, at 865-66.
GOOD FAITH EXCEPTION

was required even though the evidence had been obtained pursuant to the statute.\footnote{See DeFillippo, 443 U.S. at 38.} It appears, then, that DeFillippo suggests that officers who act pursuant to statutes valid at the time the actions took place have acted in good faith, and that the evidence seized pursuant to such statutes should not be suppressed unless later analysis reveals that the statute is “flagrantly unconstitutional” or “by [its] own terms” authorizes searches without probable cause.\footnote{Id. 38-39. It might be argued that DeFillippo extends a limited “good faith” test to legislatures, by permitting the use of evidence seized under a statute as long as it is not “flagrantly” or “by [its] own terms” violative of the fourth amendment requirements.}

It should be clear that just as Peltier does not authorize the admission of evidence seized pursuant to an unsupported interpretation of judicial precedent,\footnote{See supra text accompanying notes 173-75.} DeFillippo does not authorize admission of evidence seized pursuant to a novel statutory interpretation—evidence is admissible only if its seizure was justified by a direct and unambiguous statutory provision\footnote{In DeFillippo, there was no question that the defendant had not produced identification as specifically required by the Detroit ordinance, and so the search and seizure that followed was clearly authorized by the statute. See DeFillippo, 443 U.S. at 34.} or a statutory interpretation supported by clear judicial precedent.\footnote{In United States v. Peltier, 422 U.S. 531 (1975), the border patrolman’s interpretation that the statute involved permitted border searches within 70 miles of the border was supported by several clear judicial precedents, see id. 540-41.} One justification for the holding in United States v. Williams was that the officer’s actions were based on a reasonable interpretation of a statute establishing bond conditions.\footnote{See United States v. Williams, 622 U.S. 830, 843, 846 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).} However, the officer in Williams could not point to an unambiguous judicial decision or even an applicable administrative regulation to support his construction of the statute.\footnote{See supra text accompanying notes 104-07.} Contrary to the court’s assertion, therefore, neither Peltier nor DiFillippo supports the “technical violation” facet of the court’s good faith holding.\footnote{See supra, 622 F.2d at 843; see supra text accompanying notes 162-75, 177-85.}

C. Reliance on Warrants Later Invalidated

The requirement of a warrant signed by a magistrate and based on probable cause as a precondition to most searches and arrests is
a fundamental fourth amendment requirement.\textsuperscript{191} Although the Supreme Court has carved out substantial and important exceptions to the warrant requirement,\textsuperscript{192} warrants still form an integral part of the fourth amendment regulatory system, and police officers are encouraged to secure them in all doubtful situations.\textsuperscript{193} Any good faith exception should not alter the warrant requirement, and the Williams court, in what has been described as a moment of "uncharacteristic self-restraint,"\textsuperscript{194} made it clear that its good faith exception does not apply to factual situations in which a warrant was obtained.\textsuperscript{195} Several commentators have suggested, however, that the logic behind the good faith "technical violations" branch can be extended to warrant cases\textsuperscript{196}—when an officer relied on a warrant later invalidated, he responded correctly to institutional guidelines, so the evidence he seized should be admitted.

Careful analysis, however, reveals that because of the unique position of the warrant in the fourth amendment regulatory system, a proper good faith exception should have only limited application in this area. There is no question that a police officer who obtained a presumptively valid warrant and acted pursuant to its authority has performed his duty in subjective good faith. But even the Williams court recognized that an officer's good faith is not enough—his actions must also be reasonable.\textsuperscript{197} The question, then, is whether police actions taken pursuant to a warrant should automatically be deemed reasonable, as actions taken pursuant to DeFillippo-type statutes\textsuperscript{198} and clear court precedents\textsuperscript{199} have been, or whether the reasonableness of his actions is completely dependent upon the "reasonableness" of the warrant.

The correct answer is the latter—an officer's actions can only be deemed "reasonable" if the warrant he relied upon is reasonable. The very purpose of the warrant requirement is to inject a detached judicial determination of whether the required elements for a search

\textsuperscript{191} See Aguilar v. Texas, 378 U.S. 108, 111 (1964) (the reasons for the preference for searches conducted pursuant to warrants "go to the foundations of the Fourth Amendment").

\textsuperscript{192} For a brief summary of the warrant exceptions, see United States v. Ventresca, 380 U.S. 102, 107 n.2 (1965); J. Israel & W. LaFave, Criminal Procedure in a Nutshell 132-56 (3d ed. 1980).

\textsuperscript{193} See Ventresca, 380 U.S. at 106.

\textsuperscript{194} Mertens & Wasserstrom, supra note 4, at 427.

\textsuperscript{195} See Williams, 622 F.2d at 840 n.1.

\textsuperscript{196} See, e.g., Ball, supra note 4, at 635-36, 641; Mertens & Wasserstrom, supra note 4, at 427.

\textsuperscript{197} See supra text accompanying notes 78-80, 85-86.

\textsuperscript{198} See supra text accompanying notes 177-87.

\textsuperscript{199} See supra text accompanying notes 162-72.
or arrest exist in a particular case. If magistrates are permitted to issue “unreasonable” warrants, which authorize searches without probable cause, then the warrant has not served its constitutionally mandated function. Without the requirement that magistrates issue constitutionally valid warrants, magistrates disposed to authorize “broadcast break-ins” would go unchecked.

The more difficult question is how “reasonable” a magistrate’s determinations must be. Should searches conducted pursuant to a warrant that reflects a “good faith and reasonable,” but incorrect, interpretation by the magistrate of the required elements of probable cause be upheld? A proper understanding of the unique place of the warrant within the law enforcement system compels a negative answer. Because warrants are issued by detached magistrates and are relevant only to the specific facts of a particular case, there is no institutional reason to permit them to be anything less than completely correct constitutionally. Detached magistrates, unlike police officers acting under competitive and trying circumstances, should be required to be more than reasonably correct—they should be required to be correct, just like any other judge whose decision is reviewed. This is not harsh, for under present law a magistrate’s determination is already considered constitutionally correct if it is reasonable. The tests for probable cause that presently exist permit the magistrate to exercise some discretion in applying them to fact-specific situations, and require that he exercise no more than common sense and reasonableness in his judgments. To add another level of “good faith and reasonableness” scrutiny hence seems unnecessary.

Another reason warrants should be judged under a different standard than, for example, police regulations is that it is much easier to determine if probable cause exists under a particular set of facts than it is to formulate a regulation which will ensure that officers acting in a variety of situations will have acted with probable cause. In addition, regulations can be revised if found to be reasonable but not absolutely correct, whereas a warrant that has authorized a search without probable cause, because it is designed

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201 The fourth amendment explicitly requires that “no warrants shall issue, but upon probable cause ....” U.S. Const. amend. IV.
202 See Ventresca, 380 U.S. at 108-09 (affidavits supporting search warrants should be interpreted in a commonsense and realistic fashion, and resolution of doubtful cases should be largely determined by the preference to be accorded to warrants issued by magistrates); Brinegar v. United States, 338 U.S. 160, 175 (1949) (the existence of probable cause turns on the “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”).
to apply in only one particular situation, has completely failed in its one-time function. Permitting some leeway in scrutiny of police regulations is justified on the ground that such leeway will at least encourage their promulgation, which will have long-term deterrent benefits, whereas permitting even slightly constitutionally defective warrants can have no long-term deterrent benefit, but will only result in the dilution of the probable cause requirement.

The good faith exception, however, can be applied to scrutiny of warrants for statutory requirements that have nothing to do with probable cause. Such requirements are usually procedural in nature, and can be accurately deemed "technical." When a magistrate fails to meet a statutory requirement, he usually has not committed a judgment error that affects the suspect's constitutional rights, but has committed an inadvertent procedural error. For example, a New York court correctly upheld a warrant when a magistrate heard all of the information necessary to sustain an immediate nighttime search, but inadvertently failed to include in the warrant a sentence specifically authorizing such a search, as required by a New York statute. Similarly, the Kentucky Court of Appeals correctly applied the good faith exception to admit evidence seized pursuant to a warrant mistakenly issued beyond the magistrate's territorial jurisdiction. In both cases, the suspect's constitutional rights were not affected by the defective warrants, and it appears that there would be no deterrence served by application of the exclusionary rule to such inadvertent errors.

D. Reliance on Administrative Rules

Application of the good faith exception is also appropriate when a police officer has acted in reliance on clearly delineated administrative regulations. Rules that delineate a code of conduct for police should be encouraged, because they most effectively deter unconstitutional conduct and provide natural, objective criteria by which courts can evaluate a police officer's good faith. In

203 See infra text accompanying notes 252-55.
204 See supra text accompanying notes 139-41; infra text accompanying note 264.
205 See, e.g., cases discussed infra notes 206-07.
208 See infra text accompanying notes 243-47.
209 See supra text accompanying notes 118-41.
Peltier and at least one other case, police reliance on longstanding administrative regulations, though subsequently held to be constitutionally defective, weighed heavily against exclusion of the evidence seized.

As discussed briefly earlier, and developed later, however, a sensible good faith analysis must extend not only to the reasonableness of an officer's reliance on specific regulations, but also to the reasonableness of the regulations themselves. The good faith court must inquire whether the regulations relied upon were reasonable in light of fourth amendment law as it existed at the time of the seizure.

In State v. Mincey, the Arizona Supreme Court recently went halfway toward adopting a sensible good faith exception by recognizing the propriety of applying the exception to a situation in which an officer relied on well-defined police procedures even though his actions ultimately were unconstitutional. The court reached the wrong result, however, because it failed to extend, as suggested by an institutional view of deterrence, the good faith inquiry beyond the principal officer involved.

In Mincey, a homicide detective acting in accordance with a specific police policy sought legal advice on the necessity of obtaining a search warrant. The officer was told by the county attorney, incorrectly, that he did not need a warrant to conduct the search contemplated. Because the officer had acted in good faith reliance on the sought-after information, the court admitted the wrongfully seized evidence.

The Mincey court reached the wrong result because it failed to realize the importance of scrutinizing the county attorney's actions. His actions should have been examined because of their profound institutional effect on the officer's behavior and the behavior of future officers acting pursuant to the regulation requiring that his advice be sought. In Mincey, the county attorney's advice...

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210 422 U.S. at 541 (reliance upon statute as interpreted by longstanding administrative regulations that had been approved by the judiciary weighs against exclusion of evidence).

211 See United States v. The Recorder, 27 F. Cas. 723 (C.C.S.D.N.Y. 1849) (No. 16,130) (seizure of ship pursuant to interpretation of navigation act adopted by Secretary of Treasury upheld even though construction later proved erroneous).

212 See supra text accompanying notes 153-54.

213 See infra text accompanying notes 251-64.


215 See Mincey, 130 Ariz. at 402, 636 P.2d at 650.

216 See id.

217 See id.
was not only clearly wrong under current fourth amendment law, but the attorney testified that he knew he was giving incorrect advice. The attorney's bad faith should have been imputed to the officer, and the evidence should have been excluded. Exclusion in Mincey would deter the attorney from giving knowingly and clearly incorrect advice in the future, which would in turn prevent unconstitutional action by police officers seeking his advice.

In sum, there is ample support for the proposition that the exclusionary rule should not be applied when police officers have acted pursuant to certain types of recognized legal authority that is later declared invalid. The most difficult determination is whether the type of legal authority relied upon—a court opinion, statute, warrant, or administrative regulation—is the type that requires an extension of the good faith inquiry to scrutiny of the "reasonableness" of the authority relied upon, and if so, the level of scrutiny to be applied. It has been argued that the "reasonableness" of administrative regulations must be scrutinized, and in part IV, which discusses in detail the regulation-conscious good faith exception proposed above, it is suggested that police regulations must be scrutinized for their reflection of existing fourth amendment values and their reasonableness as enlightened by a proper understanding of the importance of such regulations to effective deterrence of unconstitutional police conduct.

IV. PROPOSAL FOR A REFORMULATED GOOD FAITH EXCEPTION

A. Introduction

Although the reliance principle discussed in part III has been applied to justify the use of unconstitutionally obtained evidence in "technical violation" cases, the current good faith exception does not require the principle to be applied in "good faith mistake" cases involving on-the-street judgment errors by police officers. Such errors, often the result of split-second decisions,

218 See id.
219 See supra text accompanying notes 153-54, 212-13.
220 See supra text accompanying notes 147-54.
221 See infra text accompanying notes 251-64.
222 See supra text accompanying notes 155-219.
223 E.g., situations in which the court precedent, statute, warrant, or administrative rule relied on by an officer is invalidated after the actions in question occurred. See supra text accompanying notes 161-219.
225 E.g., mistakes regarding the existence of facts sufficient to establish probable cause necessary to conduct a warrantless search; the validity of a consent to search;
are at issue in many fourth amendment exclusionary rule cases. Thus, unless officers are comprehensively trained in how to respond consistently with the fourth amendment when confronted with on-the-street situations, the institutional view of deterrence suggests that the likelihood of unconstitutional police conduct is high.227 It is therefore not surprising that the concept of police rulemaking and training in the fourth amendment context has received strong support.228

Unfortunately, studies suggest that although some police departments have made an effort to develop search and seizure guidelines,229 such efforts are not widespread. Even when such efforts are undertaken, they usually produce only token training programs, and regulations that are far from comprehensive.230 Unless police de-

227 It is because such decisions involve a good possibility of being incorrect that the preference for warrants issued by detached magistrates has been created. See supra text accompanying notes 193, 200.

228 See supra text accompanying notes 118-41.

229 See, e.g., K. Davis, DISCRETIONARY JUSTICE 80-96 (1969); Amsterdam, supra note 22, at 416-34; Caplan, supra note 132, at 500-14; Hyman, supra note 126, at 55-61; Kaplan, supra note 33, at 1050-55; McGowan, Rule-Making and the Police, 70 Mich. L. Rev. 659 (1972); Quinn, The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights, 52 U. Det. J. Urb. L. 25 (1974) (also points out that that concept of police rulemaking has been approved by the ABA and ALI, see STANDARDS RELATING TO THE URBAN POLICE FUNCTION 116-44 (Approved Draft 1973) and MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 10.3 (Official Draft No. 1, 1972)).

230 Although there is no available empirical study scrutinizing recent police department efforts at rulemaking, several older studies suggest that some departments have either experimented with or instituted departmental rules in the search and seizure area. Quinn, supra note 228, at 26 n.9, has documented rulemaking efforts by the Chicago, Columbus, New York City, District of Columbia, Los Angeles, Memphis, and San Antonio Police Departments. Caplan, supra note 132, at 502 nn.5-6, has also documented the District of Columbia Police Department's actual promulgation of specific orders governing eyewitness identification of suspects and automobile searches, and Mertens & Wasserstrom, supra note 4, at 399-401, have documented the District of Columbia Police Department's recent rulemaking efforts regarding random traffic stops, and also the institutional responses of border-patrol-agent policy makers, id. 400 n.174, and federal law enforcement officials, id. 401 n.175, to fourth amendment decisions. Finally, the development of the "drug courier profile" by the Drug Enforcement Administration, see United States v. Lewis, 556 F.2d 385 (6th Cir. 1977), indicates that police agencies can develop practical guidelines to aid in the search and seizure area, although the Supreme Court has held that the "drug courier profile" needs refinement before satisfaction of its criteria can alone be considered to establish probable cause necessary to conduct a warrantless search, see Reid v. Georgia, 448 U.S. 438 (1980). The Supreme Court will soon take another look at the drug courier profile in State v. Royer, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1980), cert. granted, 454 U.S. 1079 (1981) (No. 80-2146). The Court could conceivably give a boost to the concept of police rulemaking in the fourth amendment area by legitimizing the profile or using it as the basis for the application of a reformulated good faith exception.

230 See Caplan, supra note 132, at 501-02; Schroeder, supra note 1, at 1404 (both indicate that few police departments have developed more than minimum
partments are given stronger incentives to develop meaningful search and seizure regulations and training programs, unconstitutional conduct will continue undeterred. 231

The necessary incentive can be created by developing a new good faith exception that extends the "reliance requirement" to the good faith mistake area. 232 This can be done by permitting the use of unconstitutionally obtained evidence on the condition that the acting officer relied on a specific administrative regulation. Once such regulations are in place, courts will be better able to evaluate whether police officers acted in accordance with the specific requirements of the fourth amendment, because printed search and seizure regulations will provide an objective link between on-the-street police behavior and courtroom review.

B. The Anatomy of the Reformulated Good Faith Exception: A Skeletal Sketch

The proposed regulation-conscious good faith exception must be structured so that it can be easily administered by the courts and so that its application will permit greater use of probative evidence without reducing the deterrent effect of the current exclusionary rule. It is helpful to understand the context into which each step of the proposed good faith inquiry fits before analyzing each step in detail; therefore, in this subsection, the skeletal anatomy of the proposed new exception will be presented, and in the next subsection its parts will be examined.

A court desiring to apply the proposed good faith exception must engage in what is essentially a three-part inquiry, with the second part consisting of two important subparts. Each step involves finding the answer to a "yes or no" question. Whether it is necessary to the suppression decision to go on to the next step depends solely upon the answer to each of those questions. The separate inquiries engaged in must be conducted only in the order stipulated.

written rules of conduct, with the exceptions noted supra note 229). Studies have commonly called for increased police training. See, e.g., NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, POLICE 392 (1973). A 1967 study showed that the average police officer received less than 200 hours of formal training, as compared with more than 9000 hours for lawyers, 5000 hours for embalmers, and 4000 hours for barbers. See id. 380.

231 See Schroeder, supra note 1, at 1404 ("[a]bsent external prodding, it is unlikely that many [departments] will [engage in rulemaking]").

232 See supra text accompanying notes 147-54; infra text accompanying notes 243-64.
First, the court must ask whether the officer's conduct was unconstitutional. This is the traditional fourth amendment inquiry; it must be conducted without regard to the officer's subjective or objective good faith. The court must simply decide if the officer's conduct was consistent with the strict requirements of the fourth amendment and must forgo all balancing that would be appropriate if it were trying to decide whether to apply the judicially created suppression remedy.233

During this part of its inquiry the court should feel free to apply current fourth amendment doctrine as strictly required by the Constitution. If the court determines that the police officer's conduct was completely consistent with the fourth amendment, then the evidence seized should not be suppressed and the case has been fully decided. If, however, the court determines that the officer's conduct was unconstitutional, then it may proceed to determine whether the suppression remedy is appropriate according to the new good faith inquiry.

Second, the court must determine whether the evidence-seizing officer acted in reliance upon a reasonably specific and applicable institutional guideline.234 If the answer is negative, then the evidence must be suppressed regardless of any mitigating circumstances, and the case has been fully decided. If the answer is positive, then it is necessary to proceed to step three. The second and third steps are only necessary if the prosecution wishes to press the "good faith" defense. The burden of proving the elements necessary to pass the tests in the last two steps is on the prosecution.

In engaging in the regulation-conscious second inquiry, the court must confront two separate issues. First, it must determine if the regulation allegedly relied upon was specific enough to dictate the appropriate response to the situation the officer faced. If the regulation was not specific enough, then the second inquiry ends and the evidence seized must be suppressed. Second, the court must determine if the acting officer in fact relied upon the regulation he or she claims to have relied upon. In most cases, it will be difficult to refute testimony that the officer acted in (subjective) good faith reliance upon the regulation presented to the court.235 But if

233 It is critical that the constitutional inquiry be conducted first. See infra text accompanying notes 236-38.

234 In this section of the Comment, the focus is on police reliance on departmental regulations. However, as discussed supra at text accompanying notes 155-84, the police officer may also validate his search by demonstrating that he relied on a controlling court precedent or on a DeFillippo-type statute.

235 See supra text accompanying notes 81-83.
there is sufficient evidence of bad faith; then the evidence seized must be suppressed even if the officer's conduct conformed with the regulation presented. If the court determines, however, that the regulation was specific enough to dictate the appropriate response and was in fact relied upon, then it must proceed to the third part of its good faith inquiry.

Third, the court must ask whether the institutional guideline relied upon was a reasonably accurate reflection of fourth amendment law as it existed at the time the evidence was seized. If the answer is negative, then the evidence must be suppressed because the unreasonableness of the regulation must be imputed to the officer's conduct. If the answer is positive, then the evidence seized may be admitted at trial under the new good faith exception.

As good faith cases applying the recommended analysis proliferate, regulations that were deemed reasonable in an early case will not be deemed reasonable again if they are not revised to prevent the reoccurrence of the type of unconstitutional conduct they permitted in the first case.

C. Analysis of the Reformulated Good Faith Exception

The regulation-conscious good faith exception sketched above is structured to permit the maximum use of probative evidence with the minimum reduction in the deterrent effect of the exclusionary rule. In this section, the rationale for the new exception's structure is presented, and some of the problems that will be faced in administering the test will be discussed.

Perhaps the most critical feature of the recommended good faith exception is the requirement that the court decide, before beginning the good faith inquiry, whether the officer's conduct in question was constitutional. If police policy makers are to develop and continually revise fourth amendment regulations, it is essential that they be able to ascertain what conduct has been determined to be unconstitutional. Otherwise, as Justice Brennan has argued, fourth amendment law will "stop dead in its tracks" as suppression cases are decided solely on the basis of whether police conduct was reasonable and in good faith, and without the articulation of clear and sometimes new fourth amendment standards.236 Because the new good faith exception requires courts to decide the constitutional issues first and to articulate the reasons for their constitutional hold-

236 United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting); see supra text accompanying notes 29-33; 108-12.
ings, future police policy makers will know where the continually developing contours of the fourth amendment lie.

The requirement that a constitutional determination be articulated may have a further salutary effect. It has been argued that courts suspecting that evidence might be admitted under a good faith exception even if they find the police to have engaged in unconstitutional conduct will feel freer to interpret the fourth amendment honestly and more liberally, because they will not be influenced in their constitutional reasoning by the realization that a strict interpretation might cause the release of dangerous criminals. If this is the case, it is essential to structure the good faith exception so that the courts have a chance to exercise their heretofore confined ability to interpret the fourth amendment accurately.

Once a constitutional violation is held to have occurred, the burden of establishing the good faith defense should be on the prosecution. This should prevent criminal defendants from being overly discouraged from attempting to establish a fourth amendment violation. Defendants should realize that, especially

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238 It might be argued that the requirement that a good faith court decide the constitutional issue before confronting the good faith question will require the courts to engage in the disfavored practice of rendering advisory opinions on constitutional issues. See Mertens & Wasserstrom, supra note 4, at 450. The Supreme Court, however, has held that for purposes of deciding suppression motions, the "focus on intent... becomes relevant only after it has been determined that the Constitution was in fact violated." Scott v. United States, 436 U.S. 128, 139 n.13 (1978) (emphasis added); see also Schroeder, supra note 1, at 1420. As Judge Rubin suggested in his dissent in Williams, it is unnecessary and unwise to embark on a good faith inquiry unless the defendant has prevailed first in his contention that the police's conduct was unconstitutional. See Williams, 622 F.2d at 848 (Rubin, J., dissenting).

As a practical matter, it is impossible for a court to determine if police conduct or a governing police regulation is "reasonably" close to the applicable constitutional standard unless the court first determines what that standard is. Further, as one good faith court noted, "jurisprudential considerations require that the court decide whether or not the actions of the officers [were] indeed lawful... Not to do so would undercut the responsible obligation of the Courts to articulate the contours of responsible conduct." United States v. Nolan, 530 F. Supp. 386, 398 n.16 (W.D. Pa. 1981). Finally, because the exclusionary rule is properly viewed as a judicially created remedy, see cases cited supra note 18, and because consideration of remedies is inappropriate until the determination has been made that a right has been infringed, inquiry into whether there has been a fourth amendment violation should precede the determination of whether the remedy of suppression is appropriate or whether a good faith defense makes it inappropriate.

239 Mertens & Wasserstrom, supra note 4, at 451-53, have argued that the present good faith exception will reduce the defendant's incentive to file suppression motions.

240 See supra text following note 234.
during the early stages of the new exception, the prosecution may have difficulty meeting its burden because police departments will not yet have promulgated regulations comprehensive and specific enough to meet the first part of the second test described above.\footnote{See supra text accompanying note 234; infra text accompanying notes 243-46.} Further, as one proponent of police regulations has pointed out,\footnote{See Kaplan, supra note 33, at 1051-52.} putting the burden on the prosecution to establish that applicable regulations have been promulgated will force the prosecution to present printed regulations to the court, which will relieve the defendant from being forced to discover police records, ensure that suppression decisions are based on tangible evidence, and simplify appellate review. Finally, because all cases in which the good faith inquiry is reached will, under the proposal, necessarily involve unconstitutional police conduct, it is appropriate that the burden to prove the existence of applicable regulations, the reasonableness of those regulations, and the subjective good faith of the officer involved, should fall upon the prosecution, which seeks to avoid the harsh consequences of the exclusionary rule.

As proposed above,\footnote{See supra text following note 234.} once it has been established that the police engaged in unconstitutional conduct, the court should begin its good faith inquiry by determining whether the officer involved followed specific and applicable police regulations. The applicable regulations must be presented in printed form to the court so that it can determine if they are specific enough to have dictated the officer's response in the situation in which he or she acted. This requirement will encourage the police to develop clear and specific regulations covering as comprehensively as possible the variety of situations with which officers in the department are likely to be confronted.

Thus, regulations should be tailored to the particular tour of duty of the various classes of officers within a department. There should be, for example, separate sets of regulations for narcotics officers, highway patrolmen, border patrolmen, street officers, undercover agents, and vice-squad members. Regulations should reflect the varying problems likely to be encountered in day versus night duty, high-crime versus low-crime areas, commercial versus residential versus industrial areas, airports, and so on. Standards should be developed to guide officers trying to determine if probable cause, reasonable suspicion, exigent circumstances, or consent to search is present. In sum, the regulations should be drawn to combine the
practical experience of the police with appropriate constitutional standards. Under the good faith test advocated, the more specific the regulation, the more likely the evidence will be admitted—and, incidentally but importantly, the closer police behavior should become to constitutional conduct.

Courts trying to determine if police regulations are specific enough to have dictated an officer's behavior must be sensitive to the fact that it is impossible to develop regulations covering every possible fact-specific situation, and that even if it were possible to do so, the regulations would be so voluminous that individual officers could not possibly absorb them. Hence, the court should not require the regulation allegedly followed to be perfectly tailored to the precise fact situation the officer confronted, but only that the regulation announce a fairly specific practical guide which in fact offered guidance to the officer involved. As regulations are refined over time, the proper balance between broadness and specificity will be struck because police departments will be forced to amend overbroad regulations, which permitted unconstitutional behavior, in order to have the regulation declared "reasonable" again in the future. In any event, the existence of printed regulations will make it much easier for courts to determine objectively whether police officers acted reasonably and in good faith.

If a court determines that the regulations allegedly followed were not specific enough to dictate the officer's behavior, then the unconstitutionally seized evidence must be suppressed. Conversely, if the court determines that the regulation was adequate, it must embark on the second prong of the two-part test: it must determine whether the officer was in fact influenced by the regulation presented to the court and whether there is any evidence of subjective bad faith. It will usually be difficult for the prosecution to fail this test, because in most cases the officer's testimony, that he relied upon the specific guideline being presented to the

244 Specific examples of hypothetical police-made rules appear in Hama'i, supra note 126, at 58-61; Quinn, supra note 228, at 44-54. These examples indicate that the practical experience of police officials, and constitutional standards, can be combined to form useful regulations.

245 See Schroeder, supra note 1, at 1406; Quinn, supra note 228, at 33.

246 See supra text following note 234; infra text accompanying notes 256, 259, 261-64.

247 Of course, the officer may still attempt to show that he relied upon a valid legal authority other than a police regulation, such as a clear and applicable court decision or a DeFillippo-type statute. It is expected, however, that as police regulations become more comprehensive, they will almost completely replace such authority as guides to police action.
court, will be difficult to refute. But facts may come to light that suggest that such testimony is false. For example, a defense attorney may bring out on cross-examination that the officer involved does not have a reasonable grasp of departmental regulations. Or, the defense attorney may demonstrate that the officer involved has a record of constitutional violations, thus suggesting that the officer feels insufficiently constrained by constitutional requirements. Because the burden falls on the prosecution to establish that the officer who acted unconstitutionally did so despite a good faith effort to follow a police regulation, courts should view the absence of police records on individual officer's constitutional violations as evidence of bad faith. If the prosecution cannot establish by a preponderance of the evidence that the officer involved fully intended to comply with an applicable institutional guideline, then the evidence should be suppressed.

Some may question the need for a "subjective" facet of the new good faith test, arguing that because the subjective intent of an officer has no bearing on whether evidence is admitted when a court determines that the officer acted constitutionally, it should have no bearing on the application of a good faith exception if he acted in full, though unintentional, compliance with police regulations. However, without the subjective facet of the test, there will be less incentive for critical police training programs. Prosecutors would simply be able to assess the police conduct involved and pick a regulation, after the fact, to justify the conduct. There would be no need for the officer involved to take the witness stand, and whether the officer involved even knew of the regulation would become inconsequential. Also, because a "good faith" officer's actions are already tainted by their unconstitutionality, and the determination being made is whether to apply an exception to the general rule that evidence seized by such conduct must be suppressed, it is not unreasonable to exclude the class of cases that are further tainted by the officer's subjective bad faith.

As proposed above, a court that determines that the officer in question did act pursuant to a specific institutional guideline must undertake one final inquiry: whether the regulation relied

248 See supra text accompanying notes 81-83.
249 Evidence suggests that police perjury is disturbingly common in exclusionary rule cases. See supra note 83.
250 For example, Mertens & Wasserstrom, supra note 4, at 418-23, suggest that an examination of the past record of the agent involved in Williams reveals a history of attempts to stretch fourth amendment standards to the limit and beyond.
251 See supra text following note 234.
upon was reasonably reflective of fourth amendment standards as they existed when the officer acted. If the determination is positive, then the evidence is admissible; if negative, then it must be suppressed. Because, as the institutional view of deterrence suggests, internal police guidelines have a significant effect on police behavior, it is essential that the guidelines reflect fourth amendment law accurately. If police policy makers know that evidence seized pursuant to any police regulation will be admissible under the new good faith exception, then they will have no incentive to promulgate the kind of tough regulations necessary to force police officers to conduct themselves as required by the Constitution.

In making its difficult determination regarding the "reasonableness" of the regulation followed in a particular case, a court must be sensitive to the effect its determination will have on police department incentive to promulgate regulations. Under the proposal, if the court has progressed in its analysis to the point where evaluation of the followed regulation is appropriate, it necessarily has already determined that the police acted unconstitutionally. Obviously, if the court takes the extreme view that any regulation that has permitted unconstitutional behavior is unreasonable, the police will have little incentive to promulgate fourth amendment regulations, because despite their presence the court will ultimately suppress all "good faith evidence." Deterrence will ultimately suffer. On the other hand, if the court takes the opposite position that any regulation promulgated in subjective good faith by police policy makers should be considered reasonable, no matter how inaccurately it reflects fourth amendment law, then the police will write regulations stretching the contours of the fourth amendment beyond recognition, and the reformulated good faith exception will gut the exclusionary rule.

With these countervailing considerations in mind, there appear to be at least two situations in which the court should hold that a regulation that has permitted unconstitutional behavior is nevertheless a reasonably accurate reflection of fourth amendment standards. First, because police regulation writers should not be required

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252 See supra text accompanying notes 132-41.
253 See supra text accompanying notes 131, 236-38.
254 Because police regulations most effectively deter unlawful police conduct, see supra text accompanying notes 132-41, and because some incentive is needed to encourage the police to write more regulations than presently exist, see supra notes 229-31, a good faith exception which does not encourage the promulgation of such regulations will certainly not increase the deterrent effect of the exclusionary rule as presently structured, but will reduce its deterrent effect for the reasons stated supra at text accompanying notes 108-12.
to anticipate new fourth amendment developments, courts should uphold any regulation that accurately reflected fourth amendment law as it existed when the conduct in question occurred. In some cases, such as Pettir, the new law will have been articulated between the time of the officer's conduct and the time the suppression motion is decided. In other cases, the court hearing the suppression motion may believe its own determination that the officer's conduct was unconstitutional involves a novel interpretation of the fourth amendment. In both situations, the court should hold that the regulation followed is reasonable, and should thus deny the defendant's suppression motion under the reformulated good faith exception.

 Implicit in the court's holding, however, is the requirement that the regulation in question be amended to incorporate the newly announced fourth amendment principle. If the police do not so amend their regulation, then a court faced with the same regulation in the future must hold it to be unreasonable, and may point to the first good faith decision as precedent.

 Appreciation of the difficulty of writing regulations that will elicit the proper response in all conceivable situations suggests the second class of cases in which a court should hold a police regulation to be reasonable even though it permitted unconstitutional police conduct in the case before the court. If a reasonably specific police regulation accurately reflects prevailing fourth amendment standards; but could reasonably have been understood by an on-the-street officer to have permitted the unconstitutional action taken, then the regulation should be deemed reasonable for the limited purpose of permitting the use of the evidence seized in the case being considered. Once again, however, implicit in the

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256 422 U.S. 531 (1975).

256 As Professor Skolnick has stated, "[t]he standard, almost by definition, cannot offer police more than one bite at the apple of a given good faith mistake. Police could scarcely, in good faith, say they made the same mistake twice." Skolnick, supra note 17.

257 See supra text accompanying notes 245-46.

258 For example, suppose a police officer believes that a warrantless search of a suspect's apartment will uncover critical evidence that can be destroyed quickly and easily, and his departmental training brings to his mind a regulation governing consent searches. Assume that the regulation authorizes warrantless searches in the circumstances confronting the officer only if the officer receives the full and voluntary consent of a party possessing the apparent authority to give consent to enter the premises, and the regulation further requires that the officer must have articulable reasons to believe that the consenting party in fact possesses the authority to consent to the search. This regulation accurately reflects fourth amendment requirements, and should be deemed reasonable, even though it might authorize unconstitutional behavior in some circumstances.
court’s holding is the requirement that the regulation be amended so that it cannot reasonably be understood in the future as permitting the type of unconstitutional conduct that occurred in the case being decided. If the court believes that the regulation encourages or unambiguously authorizes unconstitutional behavior, however, then it should be stricken as unreasonable and the evidence seized should be suppressed.

Concededly, the “reasonableness” of police regulations under prevailing fourth amendment standards will not always be easy for a court to evaluate objectively. However, the consequences of a mistaken or poorly supported reasonableness judgment are not nearly as serious under the regulation-conscious good faith exception recommended as they are under the current Williams formulation. Under the Williams formulation, poorly supported and articulated reasonableness determinations will seriously reduce the long-term deterrent effect of the exclusionary rule, because police policy makers will not be given clear fourth amendment holdings necessary to formulate institutional guidelines. The same cannot be said of the regulation-conscious good faith exception advocated.

In addition, no matter how the court comes out in its good faith determination, once it holds the conduct in question to have been unconstitutional, police departments will have strong incentives to rewrite the regulation involved or to improve training.

The facts of People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981), provide such an example. In Adams, officers confronted with exigent circumstances obtained from the suspect’s girlfriend consent to search the suspect’s apartment before beginning the search. The officers believed that the girlfriend had the authority to consent to the search because she provided precise information about the location and interior contents of the apartment to be searched, possessed a key to the premises, and claimed to be the suspect’s girlfriend. These facts led the police to believe she resided with the suspect and was thus consenting to a search of her own apartment. The police then conducted a search, which revealed incriminating evidence. They would have been acting pursuant to the regulation above, if it had existed. However, the consenter did not reside at the suspect’s apartment, and thus did not have the actual authority to consent to the search. A properly functioning good faith court confronted with these facts might believe that the police should have asked the consenter whether she resided in the apartment to be searched before they concluded that the consent was valid. Because the police in the case described failed to make this inquiry, the court might hold that the search was invalid and the police conduct was thus unconstitutional. However, because the police followed a clearly applicable regulation in good faith and believed that the consent was valid, the court under the recommended good faith analysis should not suppress the evidence uncovered.

For example, the regulation discussed supra note 258 would have to be amended to specify that the police must ask a third-party consenter whether she or he resides in the premises to be searched before concluding that the consenter has the authority to consent to the search. If the regulation is not so amended, then it must be stricken as unreasonable the next time it comes before the court in a suppression case.

See supra text accompanying notes 108-12.
procedures. If the prosecution cannot meet the “objective” facet of the reliance test—requiring that a specific and applicable regulation be followed\(^\text{261}\)—then suppression will give the police the incentive to rewrite the regulation to make it more specific. If the “subjective” facet of the reliance test is failed because the officer cannot show that he actually relied on a regulation,\(^\text{262}\) then suppression will give the police department the incentive to improve its training program. Finally, if the prosecution cannot establish that the regulation followed was reasonably reflective of fourth amendment standards,\(^\text{263}\) then suppression will provide the incentive to rewrite the regulation to prevent the same result in the future.

Even if the prosecution meets both facets of the reliance test and the regulation-reasonableness test, and hence successfully utilizes the good faith exception in the case being decided, the police will still have a strong incentive to rewrite the regulation involved. The incentive remains because under the suggested formulation of the good faith exception the police are only given “one bite”—a regulation that permitted unconstitutional conduct but has nevertheless been deemed reasonable will not be deemed reasonable again unless it is amended to prevent the type of conduct it permitted once. Because police policy makers will want to take full advantage of the regulation-conscious good faith exception in the future, they will amend their regulations in response to court decisions regardless of whether the evidence was suppressed.

Hence, fourth amendment law will not only continue to develop, but it will be articulated through continually refined police regulations. This process may have a more profound effect on police behavior than even the current exclusionary rule, which contains no good faith exception and no incentive for regulation-writing. Further, because the courts under the reformulated good faith exception will be reviewing police regulations directly, the courts should have a greater impact than at present on the content of those regulations. If the courts are sensitive to the threat that overly strict reasonableness review can pose to police incentives to promulgate regulations,\(^\text{264}\) then over time regulations will be promulgated and revised to be appropriately specific and understandable guidelines for on-the-street behavior.

\(^{261}\) See supra text accompanying notes 43-46.

\(^{262}\) See supra text accompanying notes 48-58.

\(^{263}\) See supra text accompanying notes 51-59.

\(^{264}\) See supra text accompanying notes 253-54.
Some may contend that one overriding problem with the regulation-conscious good faith exception proposed is that the police simply do not have the resources or expertise necessary to promulgate comprehensive fourth amendment guidelines.\textsuperscript{265} However, commentators, including at least one police officer,\textsuperscript{266} have argued for years that police regulations should and could be developed in the fourth amendment area.\textsuperscript{267} In addition, some departments already have successfully promulgated regulations and developed training programs on a limited scale,\textsuperscript{268} thus demonstrating that the concept of fourth amendment regulations is not foreign to police departments. Finally, at present the police have no compelling incentive to undertake massive regulation-writing efforts, which explains the lack of resources presently allocated to the task. But the reformulated good faith exception will provide the heretofore missing incentive because it will permit the use of probative evidence obtained pursuant to regulations. It is hence not unrealistic to expect police policy makers to try to take advantage of the new good faith exception by increasing their regulation-writing efforts dramatically.

Finally, some may contend that the recommended good faith exception will be difficult for suppression courts to administer because of the multiple steps of analysis it requires.\textsuperscript{269} Concededly, the new exception will require a more extended analysis than is required under the exclusionary rule with no exception. However, the extra steps merely involve scrutinizing printed and easily accessible police regulations, and the prosecution has the burden of producing all the evidence necessary to prove the good faith defense; therefore, there will be no need for massive discovery, and the court's determinations will primarily be legal determinations. The enormous benefits in long-term institutional deterrence and short-term use of probative evidence provided by the reformulated good faith exception far outweigh any inconvenience caused to suppression courts that may have to make a few additional legal determinations in good faith cases.

\textsuperscript{265} See, e.g., Caplan, supra note 132, at 512 (describes practical obstacles to police regulation-writing, although he ultimately concludes that regulations are feasible).

\textsuperscript{266} See Hyman, supra note 126, at 55-61.

\textsuperscript{267} See authority cited supra note 228.

\textsuperscript{268} See supra note 229.

\textsuperscript{269} See, e.g., commentators cited supra note 33.
V. Conclusion

Given the Supreme Court's current view of the source and purpose of the exclusionary rule, the adoption of a broad good faith exception seems likely. Several courts, most notably the Court of Appeals for the Fifth Circuit, have already adopted some form of a good faith exception. Unfortunately, these courts have generally misunderstood how the exclusionary rule affects long-term police behavior and have consequently formulated a good faith exception that will significantly reduce the deterrent effect of the rule.

This Comment suggests that the exclusionary rule influences police conduct primarily because of its effect on police policy makers who in turn shape the behavior of individual officers. Thus, measures that will encourage the development of comprehensive police regulations governing search and seizure activity are desirable. Regulations most effectively deter police officers from engaging in unconstitutional conduct. The heretofore absent incentive for the development of such regulations can be provided by a properly structured good faith exception, one that rewards police departments that promulgate comprehensive fourth amendment regulations. The proposed structure rewards such departments by permitting the use of unconstitutionally obtained evidence only if it was seized pursuant to a concrete institutional guideline.

Precedential support for the regulation-conscious good faith exception proposed can be found in Supreme Court cases that have permitted the use of unconstitutionally obtained evidence seized in reliance on later-invalidated court precedents or statutes. Finally, the understanding of the institutional basis of deterrence suggests a way to formulate the regulation-conscious good faith exception that will permit the use of more probative evidence while encouraging, not retarding, the development of practical fourth amendment standards.

\[270\] See supra text accompanying notes 37-44.
\[271\] See supra notes 3, 8-15.
\[272\] See supra text accompanying notes 74-77, 114-45.
\[273\] See supra text accompanying notes 108-12, 142-46.
\[274\] See supra text accompanying notes 117-41.
\[275\] See supra text accompanying notes 147-54, 233-64.
\[276\] See supra text accompanying notes 155-90.
\[277\] See supra text accompanying notes 147-54, 233-64.