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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

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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

INTRODUCTION

On the basis of two recent decisions, *United States v. Janis*[1] and *Stone v. Powell*,[2] the United States Supreme Court has signaled its readiness to effect a substantial modification of the fourth amendment exclusionary rule enunciated in *Weeks v. United States*[3] and extended to the states in *Mapp v. Ohio*.[4] This comment will focus on the important implications of these two decisions and their probable effects upon the exclusionary rule. To facilitate this analysis, prior decisions, *Janis* and *Stone* themselves, and the individual justices' opinions contained within these cases will be examined in detail.

The recent Supreme Court decisions in *Janis* and *Powell* indicate that the exclusionary rule will be subjected to increasing judicial scrutiny when controversies involving the rule are presented to the Court. Basing its recent rulings on the degree of deterrence[5] which might result from suppression of evidence under the facts,[6] the Court suggested that it no longer was going to adhere to an overly broad rule of exclusion which failed to make any distinction in the circumstances involved.[7]

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1. 96 S. Ct. 3021 (1976).
2. 96 S. Ct. 3037 (1976).
3. 232 U.S. 383 (1914).
4. 367 U.S. 643 (1961).
5. References to the deterrent effect as "marginal" in United States v. Janis, 96 S. Ct. at 3032 and as "minimal" in Stone v. Powell, *id.* at 3052, suggest that the Court is focusing on the *degree* of deterrence involved in each case.
6. The majority opinions in both *Janis* and *Stone* were careful to evaluate the degree of deterrence according to the specific facts of each case. 96 S. Ct. at 3029; *id.* at 3051-52.
7. In *Mapp*, the Supreme Court established a strict rule of exclusion whereby all evidence obtained through unconstitutional searches and seizures was inadmissible at trial. 367 U.S. at 655. The material element under the *Mapp* rule was the occurrence

In *Janis*, the Court held that the fourth amendment exclusionary rule does not apply to a federal civil proceeding where evidence has been obtained by state officers without federal participation. The majority opinion, written by Justice Blackmun,[8] included a lengthy discussion of the evidentiary rule which excludes at trial evidence obtained by police[9] in violation of the fourth amendment.[10] Finding that the admissibility of evidence in a federal civil proceeding was not significant enough to state police officers to encourage them to violate fourth amendment rights,[11] the majority refused to extend the exclusionary rule beyond the realm of criminal prosecutions.[12] The Court's holding in *Janis* was clearly a limitation on the broad mandate of *Mapp* that *all* evidence obtained in violation of the fourth amendment was inadmissible in court.[13] According to Justice Brennan, this was part of the Court's business of slow strangulation of the exclusionary rule.[14]

Contemporaneously with the *Janis* decision, the Supreme Court also ruled in *Stone* that because the deterrent effect of the fourth amendment exclusionary rule was only minimal[15] in federal habeas corpus review of state convictions, the rule's application was not justified in such cases.[16] Writing for a five-member majority,[17] Justice Powell

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of a fourth amendment violation, rather than the *circumstances* of the particular violation. Therefore, the fact that a mere technical infringement had occurred, or that good faith police conduct had been involved, was irrelevant in considering the suppression of evidence under the *Mapp* doctrine.

8. Chief Justice Burger and Justices White, Powell, and Rehnquist joined Justice Blackmun in his opinion. Justices Brennan, Marshall, and Stewart dissented.

9. The exclusionary rule does not apply to evidence obtained by private parties or foreign governments. 96 S. Ct. at 3033 n.31; Robson v. United States, 279 F. Supp. 631 (E.D. Pa.), *vacated on other grounds*, 404 F.2d 885 (4th Cir. 1968); Knoll Assocs. Inc. v. Dixon, 232 F. Supp. 283 (S.D.N.Y. 1964); Geniviva v. Bingler, 206 F. Supp. 81 (W.D. Pa. 1961).

10. *See* Parts III & IV of the majority opinion, 96 S. Ct. at 3027-35.

11. *Id.* at 3034 n.35.

12. The Supreme Court has never applied the rule to exclude evidence from either a state or federal civil proceeding. *Id.* at 3029. Although the Court specifically left undetermined whether the exclusionary rule was applicable to a civil proceeding involving an intra-sovereign violation, *id.* at 3033 n.31, the *Janis* majority indicated doubt as to whether the exclusionary rule is a substantial and efficient deterrent even in intra-sovereign cases. *See id.* at 3032 & n.27.

13. 367 U.S. at 655. Although the Supreme Court had never previously applied the exclusionary rule to exclude evidence from a civil proceeding, 96 S. Ct. at 3029, the all-encompassing language of *Mapp* did not preclude such an interpretation.

14. 96 S. Ct. at 3035 (Brennan, J., dissenting).

15. *Id.* at 3052.

16. *Id.* at 3051-52.

17. Joining Justice Powell in the majority opinion in *Stone* were Justices Stewart, Blackmun, Rehnquist and Stevens.

stated that considerations of judicial integrity[18] and deterrence of illegal police conduct were outweighed both by the "windfall" afforded to a guilty defendant in excluding the tainted evidence, where a prisoner's search and seizure claim had already been given full and fair consideration at trial and on direct review, and by the consequent generation of disrespect for law and the administration of justice such exclusion would engender.[19]

Considered together, *Janis* and *Stone* represent a new standard of review for search and seizure claims outside of criminal cases on direct review. In the past, the *Mapp* rule had mandated suppression of evidence at trial whenever a fourth amendment violation had been found to exist, regardless of the underlying circumstances. However, in *Janis* and *Stone*, the Court applied a balancing test to determine whether the rule's deterrence on police conduct outweighed the cost to society that its application inflicts.[20] This new judicial guideline is premised on the idea that (1) the primary purpose of the exclusionary rule is to deter the frequency of illegal searches and seizures by police;[21] and (2) that the rule is merely remedial in nature and not a personal constitutional right.[22] Thus, in order to invoke the rule in other than direct review of a criminal proceeding, there must exist a significant likelihood, under the facts of a particular case, that application of the rule will out-

18. First enunciated in *Weeks*, the "judicial integrity" rationale for the exclusionary rule is that the admission of evidence obtained by an illegal search or seizure amounts to a judicial affirmation of a constitutional violation. 232 U.S. at 394. Whether or not this ground for suppressing illegally obtained evidence has ever reached the constitutional level is debatable. *Compare* United States v. Calandra, 414 U.S. 338, 348 (1974), *with id.* at 360 (Brennan, J., dissenting).

19. 96 S. Ct. at 3050.

20. 96 S. Ct. at 3032; *Id.* at 3051-52.

21. 96 S. Ct. at 3028, 3033 n.34, 3034 n.35. Whether deterrence is the primary reason for the exclusionary rule has been subject to much debate among members of the Court. Despite the majority's finding in Linkletter v. Walker, 381 U.S. 618, 636-37 (1965), that since Wolf v. Colorado, 338 U.S. 25 (1949), all of the cases which required suppression of evidence obtained in violation of the fourth amendment were based on deterrence, Justice Black stated:

> I have read and reread the *Mapp* opinion but have been unable to find one word in it to indicate that the exclusionary search and seizure rule should be limited on the basis that it was intended to do nothing in the world except to deter officers of the law.

381 U.S. at 649 (Black, J., dissenting). *See* United States v. Calandra, 414 U.S. 338, 355, 360 (1974) (Brennan, J., dissenting).

22. 96 S. Ct. at 3028; *Id.* at 3048, 3052 n.37; United States v. Calandra, 414 U.S. 338, 348 (1974). *Contra,* Linkletter v. Walker, 381 U.S. 618 (1965) where Justice Black, in dissent, reasoned that if the exclusionary rule was not a right or privilege, but rather punishment to police officers, the Court in establishing such a rule was really "lawmaking" and not construing the Constitution. *Id.* at 649.

weigh the costs to society resulting from the suppression of relevant evidence.[23]

Upon close examination, the *Janis* and *Stone* opinions also provide considerable insight concerning the views of the current members of the Supreme Court toward the exclusionary rule in general. In *Janis*, Justice Blackmun criticized the fact that the rule frustrates the entire criminal process.[24] Through the use of extensive footnotes he listed numerous articles on the subject of less costly alternatives to the rule[25] and various empirical studies which have failed to prove that the rule actually deters illegal police conduct.[26]

Justice Powell also expressed dissatisfaction with the present status of the exclusionary rule. In particular, he was concerned with the wide disparity between the police error and the "windfall" afforded a guilty defendant in some cases, since this difference is contrary to the idea of proportionality, which is essential to the concept of justice.[27]

As a "sequel" to his dissent in *Bivens v. Six Unknown Named Federal Agents*,[28] Chief Justice Burger concurred with the majority's decision in *Stone* in an opinion which attacked the very existence of the exclusionary rule. Although finally admitting at the end of his opinion that the rule could be kept for a small and limited category of cases,[29] the Chief Justice was adamant in criticizing what he described as a doctrinaire result in search of validating reasons.[30]

Justice White dissented in *Stone* on the ground that, under the present habeas corpus statute,[31] Congress did not distinguish between

23. 96 S. Ct. at 3032. This is the same balancing test that the Court used in earlier cases. *See* notes 100-103 *infra* and accompanying text.

24. *Id.* at 3029.

25. *Id.* at 3030 n.21.

26. *Id.* at 3030-31 n.22.

27. *Id.* at 3050. In a footnote, Justice Powell stated: "Many of the proposals for modification of the scope of the exclusionary rule recognize at least implicitly the role of proportionality in the criminal justice system and the potential value of establishing a direct relationship between the nature of the violation and the decision whether to invoke the rule." *Id.* at n.29.

28. 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). Burger's dissenting opinion in *Bivens* detailed the flaws of the exclusionary rule, *id.* at 411-20, and presented an outline for a statutory scheme which would supplant the rule as a remedy to enforce fourth amendment rights. *Id.* at 422-23.

29. 96 S. Ct. at 3052. Even in *Bivens*, Chief Justice Burger suggested that he might settle for narrowing the rule, 403 U.S. at 424. But since the main bodies of his opinions in *Bivens* and *Stone* were primarily devoted to criticism of the rule's existence in any form, such suggestions seem to be only a grudging compromise, and not a true reflection of Burger's total dissatisfaction with the exclusionary rule.

30. 96 S. Ct. at 3053.

31. 28 U.S.C. § 2254 (1970).

cases alleging fourth amendment violations and those raising other constitutional issues.[32] However, he admitted that he opposed the present scope of the exclusionary rule and would join other members of the Court in substantially limiting its reach.[33] Unlike Chief Justice Burger, however, Justice White would overrule neither *Weeks* nor *Mapp*, but would prohibit the rule's application to evidence obtained through good-faith conduct.[34]

These critical statements by members of the Supreme Court towards what has become, at least for the lower federal courts, a hard and fast, all-encompassing rule of exclusion cannot be fully appreciated without a review of the Supreme Court's development of this doctrine of evidence suppression. The Court's present desire to reassess the scope of the rule[35] stems in large part from the manner in which the rule was established.

THE HISTORICAL EVOLUTION OF THE EXCLUSIONARY RULE

The fourth amendment exclusionary rule had its inchoate origin in *Boyd v. United States*[36] in 1886. In *Boyd*, the Supreme Court held unconstitutional a congressional act which authorized a federal judge

32. 96 S. Ct. at 3071-72 (White, J., dissenting).

33. *Id.* at 3072.

34. *Id.* The searches and seizures in *Weeks* and *Mapp* did not involve a good faith effort on the part of the police to observe fourth amendment rights. From an earlier search of the defendant's home by state officials, the Federal Marshal in *Weeks* was aware of probable cause to search, yet did not obtain a warrant for his later intrusion. 232 U.S. at 386. The police in *Mapp* attempted to gain entry into the defendant's apartment by telling her they had a warrant for the search. Yet at trial no warrant was produced and no reasons were advanced for the failure to obtain one. 367 U.S. at 644-45. *See* note 87 *infra* and accompanying text. In both cases, the officials who searched the defendants' homes had probable cause for a search well before their intrusion, but made no effort to fulfill the constitutional requirement of procuring a prior warrant.

35. Neither the *Janis* nor *Stone* decisions should be surprising to those who have read closely the Supreme Court's opinions during the October, 1976 Term. On five different occasions during the months preceding July 6, 1976 the Court consistently narrowed the application of the exclusionary rule in a variety of factual circumstances. Texas v. White, 423 U.S. 67 (Dec. 1, 1975), involved the warrantless search of an automobile in police custody; United States v. Watson, 423 U.S. 411 (Jan. 26, 1976), concerned a warrantless arrest by federal officers without exigent circumstances; United States v. Miller, 425 U.S. 435 (Apr. 21, 1976), involved the issue of whether microfilms of checks, deposit slips, and other records relating to bank accounts came within the confines of the fourth amendment; United States v. Santana, 96 S. Ct. 2406 (Jun. 24, 1976), concerned the issue of whether an open residential doorway constituted a "public place"; and Andresen v. Maryland, 96 S. Ct. 2737 (June 29, 1976), involved the seizure of business records.

36. 116 U.S. 616 (1886).

to order a defendant to produce an invoice on imported goods.[37] Finding that the judicial order constituted a search and seizure[38] and that the papers ordered to be produced tended to incriminate the defendant, the majority held that use of such evidence violated both the fourth and fifth amendments.[39] However, a close analysis of the majority opinion reveals that the key to the decision was the finding that a fifth amendment violation had occurred.[40] It was only after this conclusion had been reached that the majority held that the search and seizure was consequently unreasonable.[41]

The emphasis throughout the *Boyd* opinion was on equating compelling a criminal defendant to produce incriminating private papers for use at trial with requiring him to actually testify on the stand against himself.[42] The concurring opinion recognized this fifth amendment basis for the decision, but rejected the argument that there had been

37. The order was made pursuant to Section 5 of the Act of June 22, 1874 ("An Act to Amend the Customs Revenue Laws and to Repeal Moieties") which pertained to all but *criminal* proceedings. 116 U.S. at 619. In pertinent part the Act read:

> [I]f the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed . . . . And if produced the said [Government] attorney . . . may offer the same in evidence on behalf of the United States.

Id. at 620. Although the original action in *Boyd* was instituted against "Thirty-five Cases of Plate Glass," *id.* at 618, and a subpoena duces tecum could not have been issued under the Act for criminal proceedings, the Supreme Court did not discuss the issue of whether the issuance of the subpoena had been a violation of the authorizing statute. Instead, the Court summarily found that the forfeiture came within the fifth amendment prohibitions that no person "shall be compelled in any criminal case to be a witness against himself," since suits for penalties and forfeitures are quasi-criminal in nature. *Id.* at 634.

38. *Id.* at 621-22.

39. *Id.* at 634-35.

40. Differentiating between the search and seizure of items which are protected by the fifth amendment and those which are not, the Court stated:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to possession of the property; in the other it is not.

Id. at 623 (emphasis in original). Thus, the Court separated solely search and seizure violations from those intertwined with what amounted to compelled self-incrimination. Since only the latter mandated suppression of evidence thereby obtained, it follows that had books or papers not been involved in Boyd, that case would have had a different result.

41. *Id.* at 633.

42. Comparing the two, the Court stated: "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Id.*

an unreasonable search and seizure, since the statute in question required only that the defendant produce the papers, and not that he part possession with them.[43]

Rather than being a forerunner of the fourth amendment exclusionary rule, the *Boyd* decision was actually based on the interrelationship between the fourth and fifth amendments,[44] and not on the notion that the fourth amendment might, in and of itself, prohibit the use of stolen or forfeited goods[45] in a criminal trial. This conclusion that *Boyd* did not establish a fourth amendment exclusionary rule was reached by the Supreme Court in the 1904 case of *Adams v. New York*,[46] wherein *Boyd* was construed as pertaining only to cases in which a defendant was virtually compelled to give testimony against himself.[47] In a unanimous opinion, the Court in *Adams* carefully noted that the concurring Justices in *Boyd* had not found an unreasonable search or seizure in that case.[48] Without considering the applicability of the fourth amendment to the states,[49] the *Adams* Court found that although private papers not subject to the issued warrant had been seized,[50] their introduction in the resulting criminal trial did not violate the fourth amendment,[51] since it was unnecessary for courts to inquire as to the means by which evidence was obtained.[52]

In the subsequent case of *Weeks v. United States*,[53] the Supreme Court established what has become known as the fourth amendment exclusionary rule. Writing for a unanimous court, Justice Day held that

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43. In their concurrence, Justice Miller and Chief Justice Waite emphatically refused to base the decision in *Boyd* on the fourth amendment:

> Nothing in the nature of a search is here hinted at [in the challenged statute]. Nor is there any seizure, because the party is not required at any time to part with the custody of the papers. They are to be produced in court, and, when produced, the United States attorney is permitted, under the direction of the court, to make examination in presence of the claimant, and may offer in evidence such entries in the books, invoices, or papers as relate to the issue. The act is careful to say that "the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

Id. at 640.

44. *Id.* at 633.

45. *Id.* at 623.

46. 192 U.S. 585 (1904).

47. *Id.* at 597-98.

48. *Id.* at 597.

49. *Id.* at 594.

50. The warrant specified only "policy slips" (tickets used in "numbers" games) and did not cover the personal papers seized along with the slips. *Id.*

51. *Id.* at 597. It was further found that this did not amount to compulsory self-incrimination as prohibited by the fifth amendment. *Id.*

52. *Id.* at 594.

53. 232 U.S. 383 (1914).

it was a violation of the fourth amendment for a federal judge to deny a defendant's motion for return of letters and other private correspondence, where they had been taken without a warrant by a United States Marshal, who entered the defendant's residence with the intention of obtaining evidence.[54] The Court chose to exclude these letters and correspondence for two reasons: first, the denial of a motion to suppress evidence which had been obtained in violation of the fourth amendment would in effect be a judicial sanctioning of unconstitutional conduct;[55] secondly, the protections of the fourth amendment would have no value without the suppression of the evidence thus obtained.[56]

Attempting to distinquish the facts from those in *Adams*, the Court noted that the alleged violation in *Adams* amounted to an incidental seizure made in the execution of a legal warrant[57] and therefore afforded no precedential authority[58] for the factual situation in *Weeks*, where there had been a direct fourth amendment violation.[59] Although clearly influenced by the blatancy of the violation before it,[60] the Court established the exclusionary rule without making any distinctions between direct and incidental violations.

Justice Cardozo's opinion in *People v. Defore*[61] illustrates that this new federal doctrine[62] was not well-received by many state courts. Writing for a unanimous New York Court of Appeals in 1926, he commented on the far-reaching effects of the *Weeks* decision:

> The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the

54. *Id.* at 389, 398.

55. *Id.* at 394. In later opinions, this reasoning was referred to as the "imperative of judicial integrity." *See, e.g.*, Elkins v. United States, 364 U.S. 206, 222 (1960).

56. 232 U.S. at 393.

57. *Id.* at 396.

58. *Id.*

59. *Id.* at 398.

60. *Id.* at 386. Although not expressly stated in the opinion, the Marshal's conduct could not have been described as a good faith effort to comply with the search and seizure requirements of the fourth amendment. *See* note 35 *supra*; *see also* note 89 *infra* and accompanying text.

61. 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926).

62. The Court specifically limited the rule's application to conduct made under claim of federal authority or made after the finding of a federal indictment. *Id.* at 398.

> murderer goes free. Another search, once more against the law, discloses counterfeit money or the implements of forgery. The absence of a warrant means the freedom of the forger.[63]

Like the majority of state courts at that time,[64] the New York Court of Appeals in *Defore* was unable to accede to the creation of an exclusionary rule for a search and seizure statute, which, like the fourth amendment, says nothing about the consequences.[65]

Thus, except where adopted by individual states,[66] the *Weeks* doctrine was confined solely to conduct involving federal officials for several decades. This limitation was reaffirmed in *Wolf v. Colorado*,[67] where the Supreme Court held that although the fourth amendment right against arbitrary intrusions was now applicable to the states through the fourteenth amendment, the same was not true of the exclusionary rule. The Court's rationale was that the *Weeks* doctrine was merely "a matter of judicial implication"[68] and therefore was not derived from the "explicit requirements"[69] of the fourth amendment. Central to the Court's decision in *Wolf* was its reasoning that the exclusionary rule could not be an essential ingredient of the right of due process,[70] because at that time the majority of states had not chosen to adopt it.[71]

One year before the *Mapp* decision was handed down, the Supreme Court in *Elkins v. United States*[72] overruled the "silver platter" doctrine,[73] which had previously allowed evidence obtained solely by

63. 242 N.Y. at 23-24, 150 N.E. at 588. In a frequently quoted phrase, Justice Cardozo stated: "The criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587.

64. By 1926, of forty-five other states which had been confronted with the decision of adopting the *Weeks* exclusionary rule, thirty-one had rejected it. *Id.*

65. *Id.* at 22-24, 150 N.E. at 588.

66. For a list of states that adopted the *Weeks* doctrine prior to July 1949, *see* Wolf v. Colorado, 338 U.S. 25, 38 (1949), Table I, section (b).

67. 338 U.S. 25 (1949).

68. *Id.* at 28.

69. *Id.*

70. *Id.* at 29.

71. *Id.* at 29-30. The significance in the Court's decision that most states had not accepted the exclusionary rule is illustrated by the six-page appendix (*id.* at 33-39) to the majority opinion, wherein ten tables present an analysis of the consideration of the *Weeks* doctrine by the states. Some of these tables list the position of states towards the *Weeks* doctrine both before and after the *Weeks* decision was handed down. Other tables list those states which had overruled or adhered to prior contrary decisions after *Weeks* was decided. The Court was also influenced by the fact that most of the English-speaking world did not have a comparable rule. *Id.* at 29-30.

72. 364 U.S. 206 (1960).

73. The term "silver platter" originated in Lustig v. United States, 338 U.S. 74 (1949), where Justice Frankfurter wrote: "[A] search is a search by a federal official

state agents in illegal searches and seizures to be admitted in federal criminal trials. Perhaps as much influenced by a recent trend of the states[74] in adopting the exclusionary rule as by arguments about police deterrence[75] and judicial integrity,[76] the majority invoked the Court's supervisory power[77] over federal courts in extending the *Weeks* doctrine to apply to state conduct in federal criminal prosecutions.

Two rather striking similarities appear in the majority opinions of *Wolf* and *Elkins*. In neither case did the Court focus specifically on the facts presented it. The fact situation in *Wolf*[78] was not given in any of the justices' opinions. In *Elkins*, the only reference to the factual elements involved was at the beginning of the Court's opinion.[79] Both *Wolf* and *Elkins* were decisions made in the abstract without any special reference to the particular circumstances of the individual cases. Further, as shown by the lengthy chronological appendices,[80] both

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if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." *Id.* at 78-79.

74. 364 U.S. at 218-21. After the *Wolf* decision, North Carolina, Delaware and California switched to the exclusionary rule and Rhode Island had also adopted it by the time *Elkins* reached the Supreme Court. *Id.* at 219 & nn.12-13, 220 & n.14. The appendix to the majority opinion in *Elkins* presents a state-by-state chronological view of the adoption and rejection of the *Weeks* doctrine. *Id.* at 224-32. However, the interpretation of this data varied from a slow, but unstoppable movement toward adoption of the rule, *id.* at 219, to one-half of the states refusing to adhere to the Weeks rule. *Id.* at 242 (Frankfurter, J., dissenting).

75. *Id.* at 217-18.

76. *Id.* at 222-23.

77. The Supreme Court's supervisory power over federal courts in the area of admissibility of evidence in criminal proceedings is derived from FED. R. CRIM. P. 26, which states in pertinent part: "The admissibility of evidence . . . shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of *reason and experience*." (emphasis added). It was under the authority of Rule 26 that the Supreme Court in *Elkins* created the federal procedural rule prohibiting the use of evidence obtained by a search or seizure conducted by either state or federal officials in violation of the fourth amendment. Although this interpretation of the common law was influenced by reason, that is, arguments about judicial integrity and police deterrence, the Court was most influenced by the experience of the states' trend toward adoption of the exclusionary rule. This conclusion is derived from the fact that the majority opinion in *Elkins* devoted less than two pages to the deterrence argument, *id.* at 217-18, and only a single page to the judicial integrity rationale, *id.* at 222-23. On the other hand, four full pages of the opinion's text, *id.* at 218-22, and an eight-and-a-half page appendix, *id.* at 224-32, were devoted to detailing the experience of the states in their movement toward adoption of the *Weeks* rule.

78. In Irvine v. California, 347 U.S. 128, 133 (1954), it was pointed out that *Wolf* was decided in a vacuum without any reference to its facts.

79. 364 U.S. at 206-07.

80. 338 U.S. at 33-39; 364 U.S. at 224-32.

opinions placed great emphasis on the attitude of the individual states toward the exclusionary rule.[81]

This reliance upon evidence of state acceptance of the exclusionary rule and the failure of the Court to mold its decision to the facts before it were again seen in the 1961 decision *Mapp v. Ohio*,[82] where the Supreme Court by a 4-2-3 vote substantially altered constitutional law by holding that all evidence obtained by searches and seizures in violation of the fourth amendment was inadmissible in either a state or federal court proceeding.[83] Incensed by the "casual arrogance"[84] exhibited by police in making a warrantless invasion of the defendant's residence,[85] four members of the Court[86] chose to reverse the conviction and extend the *Weeks* doctrine to the states. However, this plurality did not limit its holding to the "flagrant"[87] violation in *Mapp*,[88] but rather made the nondiscriminating evidentiary rule of the *Weeks* case constitutionally applicable to the states.[89]

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81. 338 U.S. at 29; 364 U.S. at 218-21.

82. 367 U.S. 643 (1961).

83. *Id.* at 655.

84. *Id.* at 671 (Douglas, J., concurring).

85. Although the police waved a paper in front of the defendant which purportedly was a warrant, there is considerable doubt as to whether a warrant for the search ever existed. *Id.* at 668 n.2. *See* note 34 *supra*.

86. Chief Justice Warren and Justices Brennan and Douglas joined Justice Clark in the plurality opinion.

87. 367 U.S. at 655. Justice Clark considered the following conduct of the police in *Mapp* as flagrant: (1) the defendant's door was forcibly opened when she did not answer the policemen's knock immediately, (2) after the defendant placed in her bosom a purported search warrant, police physically retrieved it and handcuffed her for resisting their rescue of the document, (3) without further justification a policeman grabbed the defendant's hand and twisted it, causing her to plead with him because it hurt, (4) although her attorney arrived while the police were at defendant's house, they refused to let the attorney enter the house or see the defendant, and (5) no search warrant was produced at trial and no explanation for its disappearance was given. *Id.* at 644-45.

88. That *Mapp* was not limited to its facts, but rather was an all-encompassing announcement of constitutional law, was illustrated in Davis v. Mississippi, 394 U.S. 721 (1969), wherein Justice Brennan stated: "[I]n *Mapp v. Ohio* . . . we held that '*all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court'." *Id.* at 724 (emphasis in original) (citation omitted). Undoubtedly, one of the reasons for establishing an all-encompassing rule was to put an end to the great controversy which followed the *Wolf* holding of extending the substantive fourth amendment rights but not the exclusionary rule to the states. *See* 367 U.S. at 670 (Douglas, J., concurring).

89. The plurality in *Mapp* was more concerned with elevating the *Weeks* doctrine to a position where it was "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), than it was with the result of the case before the Court. This is borne out by Justice Harlan in his dissenting opinion in *Mapp* with which two other members of the Court concurred. 367 U.S. at 672 (Harlan, J., dissenting). Terming the holding in Justice Clark's opinion as reaching out to overrule that portion of *Wolf* which limited the constitutional application of the exclusionary rule to the fed-

The Court gave many reasons for its finding in *Mapp* that the exclusionary rule was an essential part of the fourteenth amendment right of privacy.[90] Writing for the plurality, Justice Clark emphasized that the deterrent aspect of the rule was necessary for the viability of the right of privacy because the alternative remedies were ineffective.[91] Although this rationale was bolstered by the judicial integrity argument[92] and several other factors,[93] the plurality was probably most influenced by the changed attitude of the states towards the exclusionary rule after the *Wolf* decision. Although in 1949 almost two-thirds of the states opposed the use of the rule, by 1961 more than half of those states which had subsequently passed upon it had either wholly or partially adopted the *Weeks* holding, either by legislative enactment or judicial decision.[94]

PRESENT REASSESSMENT OF THE RULE

The foregoing analysis suggests two important conclusions. First, the Supreme Court's evolution of the exclusionary rule was fashioned more in a legislative than a judicial manner. Instead of limiting its holding in *Weeks* and *Mapp* to the facts of each case, the Court announced an all-encompassing rule, as if drafting a piece of legislation.[95]

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eral government, *id.* at 674, Justice Harlan pointed out that re-examination of *Wolf* had only been a subordinate issue in the appellant's brief and was neither argued therein nor orally. *Id.* at 672, 674 nn.5-6.

90. 367 U.S. at 656.

91. *Id.* at 652. Only 23 of the then 48 states had criminal provisions relating directly to illegal searches and seizures. Of these states, two punished a magistrate for issuing a warrant without a supporting affidavit, ten had provisions punishing police officers who willfully exceeded the authority of a search warrant, eleven established criminal liability of a police officer who searched either with an invalid warrant or without a warrant and seventeen provided criminal sanctions for an affiant who maliciously procured a search warrant (New York limited this liability to police officers). *Id.* at 652 n.7. Trespass actions against police officers were mainly illusory. *Id.* at 670 (Douglas, J., concurring). Thus, Justice Clark was prompted to remark that the *Wolf* holding had merely extended the right against unreasonable search and seizure to the states, but had withheld the privilege and enjoyment of that right by failing to make the exclusionary rule constitutional. *Id.* at 656.

92. *Id.* at 659.

93. These other considerations included the lack of a future need to reconcile seemingly inconsistent decisions, *id.* at 658, the strict enforcement of federal standards on the states for other amendments, *id.* at 656, and the unenduring effectiveness of shortcuts in the history of criminal law, *Id.* at 658.

94. *Id.* at 651. *But see* Justice Harlan's dissent, pointing out that a recent survey had indicated that one-half of the states still followed the common law non-exclusionary rule and that Maryland retained the rule for felonies. *Id.* at 680 (Harlan, J., dissenting).

95. *See* note 90 *supra.* Flagrant fourth amendment violations on the part of police were involved in both *Mapp* and *Weeks.* *See* note 35 *supra.* Had the Court limited its holding to the bad faith intrusions in each case, the result of those decisions would

Second, the exclusionary rule was not developed with the idea that the degree of deterrence of illegal police conduct involved would guide the Court in marking the boundaries of its applicability. Rather, other factors, such as the trend of the states in adopting the rule as well as the elusive "imperative of judicial integrity,"[96] prevented the Supreme Court, as well as lower federal and state courts, from molding a rule based on the potential effect of exclusion to deter illegal police searches and seizures under the facts of each case.

These two points are the primary reasons why some members of the Supreme Court have begun to carefully reassess the scope of the exclusionary rule. The majority hopes to avoid making a *Mapp*-like decision which, instead of putting an end to a long-standing constitutional controversy,[97] merely gives rise to a new one.[98] Part of the Court's reevaluation of the exclusionary rule has been the development of a balancing test to determine the limits of the *Weeks* and *Mapp* doctrines. Under this test, the rule is applied whenever the Court finds the potential deterrence to illegal police conduct is greater than the harm caused to society by the exclusion of relevant evidence.[99]

In *Walder v. United States*,[100] the Supreme Court allowed a federal prosecutor to use illegally obtained evidence to impeach the credibility of a defendant who had perjured himself in his own defense. In *Linkletter v. Walker*,[101] the Court specifically limited the application of the *Mapp* doctrine when it refused to apply *Mapp* retroactively. This was done primarily because no deterrent purpose would have been served otherwise.[102] Finally, in *United States v. Calandra*,[103] the ex-

have remained the same—exclusion of the illegally obtained evidence. Thus, the majority in each instance established a rule of law created not to fit the facts before the Court (a judicial function), but rather to solve the many enforcement problems presented by the fourth amendment (a legislative function).

96. Although in recent cases the Court has treated the question of whether the admission of illegally obtained evidence encourages fourth amendment violations as essentially the same one concerning whether exclusion would serve a deterrent purpose, *see* notes 110-111 *infra* and accompanying text, these two inquiries were treated separately in earlier cases. *See* notes 55-56, 91-92 *supra* and accompanying text.

97. In his concurring opinion in *Mapp*, Justice Douglas characterized the Court's holding in that case as bringing to an end a storm of constitutional controversy that had raged since the *Wolf* decision. 367 U.S. at 670 (Douglas, J., concurring).

98. The new controversy, which began with the *Calandra* holding that the exclusionary rule was not applicable to grand jury proceedings, centers around the limits of the *Mapp* doctrine.

99. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 349-52.

100. 347 U.S. 62 (1954).

101. 381 U.S. 618 (1965).

102. *Id.* at 636-37.

103. 414 U.S. 338 (1974).

clusionary rule was found inapplicable to grand jury proceedings because the Court, through a balancing process, found the deterrent effect outweighed by the potential injury to the function of the grand jury.

Although this balancing test has been used before by the Court to limit the application of the *Weeks* and *Mapp* doctrines, the resulting limitations have only exempted certain areas, such as grand jury proceedings,[104] or made certain decisions of the Court prospective in application.[105] The holdings of *Janis* and *Stone* do not represent a departure from this trend, since *Janis* exempts civil proceedings involving intersovereign violations and *Stone* exempts federal habeas corpus review of state convictions from the exclusionary rule.

There has been no Supreme Court decision modifying the *Weeks* and *Mapp* doctrines, so that this balancing test can be applied generally by lower courts in all cases. However, *Janis* and *Stone* do represent a continuation of the trend to further limit a broadly applied exclusionary rule.

Another indication that the Court is reassessing the role of the exclusionary rule is the diminishing focus on the judicial integrity rationale. Beginning with *Weeks*, the imperative of judicial integrity became one of the Court's primary reasons for justifying the rule's existence. However, an abrupt change occurred in 1974 when the majority opinion in *Calandra* failed to mention judicial integrity. This omission was especially noticeable because judicial integrity was the thrust of Justice Brennan's dissent in that case.[106] The concept reemerged, however, in *United States v. Peltier*,[107] where Justice Rehnquist pointed out that judicial integrity was not offended by a fourth amendment violation if it was the result of good faith police conduct.[108] Although Justice Brennan argued in his dissenting opinion that *Peltier* had merged together the judicial integrity and deterrent purpose rationales,[109] it was not until *Janis* that the majority stated that the foci of the two were essentially the same.[110] In *Stone*, Justice Powell stated that the concern over preserving judicial integrity has limited force where the ex-

104. *See* note 103 *supra* and accompanying text.

105. *See* note 101 *supra* and accompanying text. *See also* note 125 *infra* and accompanying text.

106. In reaction to the Court's failure to mention judicial integrity, Justice Brennan stated: "For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct." 414 U.S. at 360 (Brennan, J., dissenting).

107. 422 U.S. 531 (1975).

108. *Id.* at 537-38.

109. *Id.* at 553-54 n.13 (Brennan, J., dissenting).

110. 96 S. Ct. at 3034 n.35.

clusion of highly probative evidence is sought.[111] Thus, it appears that judicial integrity has been relegated to a secondary position in the Court's current search for the proper scope of the exclusionary rule.

The importance of this displacement of judicial integrity by the concept of deterrence is found in Justice Brennan's dissent in *Calandra.* He argued that the imperative of judicial integrity mandated no limitations on the *Mapp* rule to eliminate even the slightest appearance that a court was sanctioning unconstitutional conduct.[112] By disposing of judicial integrity as a separate focal point in reassessing the limits of *Mapp,* the Court has also eliminated from consideration the attendant argument that the scope of the exclusionary rule should be all-encompassing.

Finally, the dicta in *Janis* and *Stone* criticizing the present status of the exclusionary rule indicate that a majority of the present members of the Court are no longer satisfied with the *Weeks* and *Mapp* doctrines as they are currently administered. In obvious response to Justice Brennan's dissenting argument in *Stone,*[113] Justice Blackmun reemphasized in *Janis,* as did Justice Powell in *Stone,* the *Calandra* holding that the exclusionary rule is not a personal constitutional right, but rather a remedial device based on the potential deterrence of future unlawful police conduct.[114] Justice Blackmun pointed out that despite numerous empirical studies to determine whether the rule actually deters fourth amendment violations, each seemed to be flawed.[115] He also posited the view that the exclusionary rule encourages police to lie in court to avoid suppression of evidence[116] and that police often do not consider trial and conviction an important aspect of law enforcement.[117] Although no position was taken by the Court on these arguments, their placement in a majority opinion gives credence to the belief that the Court is reconsidering the scope of the exclusionary rule.[118]

THE GOOD FAITH STANDARD

How will the Supreme Court alter the *Mapp* doctrine, assuming

111. 96 S. Ct. at 3047.
112. 414 U.S. at 360 (Brennan, J., dissenting).
113. 96 S. Ct. at 3059 & n.9 (Brennan, J., dissenting).
114. 96 S. Ct. at 3028-29; *Id.* at 3048.
115. 96 S. Ct. at 3030.
116. *Id.* at 3029 n.18.
117. *Id.* at n.20.
118. One federal district judge has even stated that *Janis* emphasizes that the Supreme Court is in doubt as to the application of the exclusionary rule to criminal cases. Ekelund v. Secretary of Commerce, 418 F. Supp. 102, 106 (E.D.N.Y. 1976).

it is on the verge of doing so? In *Weeks* and *Mapp* the Court was confronted by blatant violations of the fourth amendment. In neither instance was a warrant obtained by the intruding officers, even though there had been more than sufficient time to obtain one; in fact, there was no suggestion in either case that the officers had even attempted to comply with the requirements of the fourth amendment. Had the Court not required suppression of the evidence seized in each instance, its decision, in effect, would have condoned the officers' *arrogant neglect*[119] of a constitutional right.

Not all search and seizure violations are made in bad faith. Some involve technical defects which even the most conscientious and capable law enforcement officer might overlook. This was exactly the situation involved in *Janis* where Justice Blackmun pointed out that the affidavit bore some similarity to the affidavit the Court *later* considered and found deficient by a 5-3 margin in *Spinelli v. United States.*[120] Because of this, Blackmun classified the unlawful search and seizure as having been made in good faith reliance on a warrant which was later proven defective.[121]

Although unnecessary[122] to the outcome in *Janis*, Justice Blackmun reiterated several times in his opinion that a good faith violation was involved.[123] He also thought it worthy to twice note that good faith significantly reduces the potential deterrent effect of exclusion.[124] In *Stone*, Justice Powell pointed out that good faith conduct on the part of the law enforcement officers in *Peltier* was part of the Supreme Court's reasoning in that case not to hold retroactive an earlier decision concerning the substantive requirements of the fourth amendment.[125]

119. Justice Douglas described the police conduct as "casual arrogance" in his concurring opinion in *Mapp*. 367 U.S. 671 (Douglas, J., concurring).

120. 393 U.S. 410 (1969). The affidavit involved in *Janis* was issued two months before *Spinelli* was decided. *See* 96 S. Ct. at 3023 n.2.

121. *Id.* at 3029. Although not stated by the Court, the facts in *Stone* involved a search and seizure conducted by police in a good faith belief that the probable cause for the search (the arrest) was based on a valid vagrancy ordinance. It was only *later* that the Supreme Court held a similar ordinance unconstitutional. *See* note 134 *infra.*

122. *See* notes 130-33 *infra* and accompanying text. *Janis* was based on the reasoning that since there is not a substantial likelihood of deterring illegal police fourth amendment intrusions by refusing to admit in a federal civil proceeding evidence unlawfully obtained by state officials, the societal costs of exclusion outweigh the minimal deterrent effect. 96 S. Ct. at 3032. Therefore, the fact that the search and seizure violation in *Janis* was made by police in a good faith effort to comply with the Constitution merely buttressed the final outcome of the case. *See* note 133 *infra* and accompanying text.

123. 96 S. Ct. at 3023, 3029, 3034 n.35.

124. *Id.* at 3032 n.28, 3034 n.35.

125. 96 S. Ct. at 3047-48 n.23.

Both Justices Blackmun and Powell indicated in footnotes what Justice White openly stated in his dissenting opinion in *Stone*: The scope of the exclusionary rule should be modified to exclude violations by police acting in a reasonable, good faith belief that their conduct comports with existing law.[126]

These Justices are not alone in their desire for change. In *Stone*, Chief Justice Burger deplored the suppression of evidence in cases involving good faith mistakes by policemen or where purely technical deficiencies in search warrants were involved.[127] Justice Rehnquist, who wrote the majority opinion in *Peltier*, also placed great emphasis on the fact that no deterrent purpose is served where good faith conduct is involved.[128] It is arguable, therefore, that a majority of the present members of the Supreme Court advocate some good-faith exception to the *Mapp* doctrine.

Although only alluded to in *Stone*,[129] the importance placed on good faith conduct by the majority in *Janis* was quite apparent. In fact, Justice Blackmun included a reference to the element of good faith in framing the issue presented by the case.[130] Twice thereafter Blackmun pointed out that good faith conduct on the part of police substantially reduces the deterrent effect of the exclusionary rule.[131] Despite these statements, the factor of good faith was missing in the Court's holding.[132] It was, however, a secondary reason given by the Court for its decision, since the last footnote of the case states that the fact that the officers acted in good faith was an additional reason for the Court's ruling.[133]

References concerning good faith in these recent decisions are not incidental. They appear too frequently in *Janis* not to have been placed there intentionally.

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126. *Id.* at 3072 (White, J., dissenting).
127. *Id.* at 3054 (Burger, C.J., concurring).
128. 422 U.S. at 538.
129. 96 S. Ct. at 3047-48 n.23.
130. 96 S. Ct. at 3023. This issue was also restated in Part IV of the Court's opinion. *Id.* at 3029.
131. *Id.* at 3032 n.28, 3034 n.35.
132. Justice Blackmun stated the Court's holding in *Janis* as follows:

> [W]e conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule.

Id. at 3032 (footnote omitted).
133. *Id.* at 3034 n.35.

Why, however, if the facts of *Janis* included the element of good faith police conduct, did the Court not make good faith an express part of its holding?[134] It is probable that some members of the majority desired to limit the opinion as much as possible, to avoid a broader ruling than was necessary to achieve the desired result in the *Janis* case. Instead of creating a good faith exception, which would have been a direct modification of *Mapp*,[135] the Court chose only to exempt from the exclusionary rule an area the Court had never actually held came within the *Mapp* doctrine.[136]

It is also possible that other members of the *Janis* majority, such as Justice White,[137] advocated a good faith standard but were unable to secure majority support for that position. It is, therefore, conceivable that as a compromise, the *Janis* majority agreed among themselves not to establish a broader than necessary holding and only to make references to the Court's disposition for such an exception. These statements would signal the lower courts to begin applying a good faith standard. Additionally, these references to good faith could have been intended as groundwork to provide precedent for a future opinion creating an exception for good faith conduct.

134. This question might also be asked about *Stone*, since its facts involved a search and seizure violation by police who acted in a good faith belief that the ordinance the defendant had violated in their presence was constitutional. 96 S. Ct. 3039-40. *See id.* at 3073 (White, J., dissenting). It was not until the case reached the Court of Appeals for the Ninth Circuit almost seven years later that the ordinance for which the defendant initially had been arrested was held to be unconstitutional, based on a similarly vague vagrancy ordinance which the Supreme Court had held unconstitutional in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), four years after the arrest of the defendant in *Stone*. The murder weapon, obtained by searching the defendant after his arrest on the vagrancy charge, was held by the Ninth Circuit to be subject to the exclusionary rule, despite the fact that at the time the defendant was arrested, the vagrancy ordinance had complied with all *existing* Supreme Court rulings. Thus, the conduct of the police in *Stone* was similar to that of the police in *Janis*, where the Supreme Court classified their actions as made in a good faith belief that the search and seizure of the defendant comported with the requirements of the fourth amendment. 96 S. Ct. at 3034 n.35. *See id.* at 3023 n.1.

Unlike *Janis*, *Stone* also involved a collateral issue—the scope of federal habeas corpus review. 96 S. Ct. at 3039. This factor alone was probably sufficient for the Court to ignore the possible broader good faith holding. Also, *Stone* was consolidated with Wolff v. Rice, 96 S. Ct. 3037 (1976), a case where the search warrant's technical defect could not be classified as having been made in reasonable good faith. *Id.* at 3040-41. Additionally, Justice White, the only member of the *Janis* majority besides the Chief Justice to openly advocate a good faith exception, *id.* at 3072, did not join the *Stone* majority opinion, but rather dissented on habeas corpus grounds. *Id.* at 3071-72 (White, J., dissenting).

135. *See* note 7 *supra* and accompanying text.

136. *See* notes 12-13 *supra* and accompanying text.

137. *See* note 34 *supra* and accompanying text.

This desire for a good faith standard should not be surprising. With the Court's gradual elimination of the judicial integrity rationale,[138] deterrence has emerged as the sole criterion upon which application of the exclusionary rule is founded.[139] As stated in *Peltier*, good faith conduct is a factor in measuring the degree of deterrence which will likely result from a given decision.[140]

By establishing a good faith exception, the Court can do nothing more than characterize good faith as a *per se* limitation on the *Mapp* doctrine. This change conforms with Justice Blackmun's statement in *Janis* that good faith conduct significantly reduces the deterrent effect of exclusion.[141] Further, it would reflect Justice Powell's comment in *Stone* that not even judicial integrity is offended by the admission of evidence obtained by officials acting in a good faith belief that their conduct comported with the fourth amendment, even though subsequent case law held such conduct nonpermissible.[142] In effect, the Court would be narrowing the issue in many cases from an inquiry into whether deterrence of unlawful conduct is likely to result to whether the police acted in good faith at the time the fourth amendment violation was committed.

CONCLUSION

Janis and *Stone* may appear to merely continue the Supreme Court's trend of reducing, by use of a balancing test, the areas to which the strict exclusionary rule of *Mapp* is applicable.[143] But underlying these recent opinions is a desire by the majority to carve out an exception to the *Mapp* doctrine which can be applied by lower courts under all circumstances, rather than only in those areas where the Court has previously ruled that the balancing test is to be used. This exception, only alluded to in *Stone*[144] but brought out more clearly in *Janis*,[145] is based on the idea that suppression of evidence unlawfully obtained serves no deterrent purpose where police acted in a reasonable good faith belief that their conduct complied with the fourth amendment.[146]

138. *See* notes 106-11 *supra* and accompanying text.
139. 96 S. Ct. at 3028.
140. *See* note 125 *supra* and accompanying text.
141. 96 S. Ct. at 3034 n.35.
142. 96 S. Ct. at 3047-48 n.23.
143. *See* notes 99-105 *supra* and accompanying text.
144. 96 S. Ct. at 3047-48 n.23.
145. *See* notes 130-33 *supra* and accompanying text.
146. *See* note 99 *supra* and accompanying text.

The reluctance of the Court to apply such a good faith standard to the *Janis* facts is probably due to the desire of some members of the majority to carefully limit their decisions and to avoid unnecessarily broad rulings.[147] Nevertheless, Chief Justice Burger and Justice White have openly advocated a good faith exception.[148] With their lead, and with the remainder of the majority leaning in that direction, it appears to be only a matter of time[149] until the strict exclusionary rule of the fourth amendment is modified to exempt from its application evidence obtained by police acting in a good faith belief that their conduct comported with the requirements of the fourth amendment.

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147. *See* notes 134-35 *supra* and accompanying text.
148. *See* notes 126-27 *supra* and accompanying text.
149. *See* notes 134-35 *supra* and accompanying text.