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GOOD FAITH, THE EXCLUSIONARY REMEDY, AND RULE-ORIENTED ADJUDICATION IN THE CRIMINAL PROCESS

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I. INTRODUCTION

In the past twenty years, the United States Supreme Court has meandered through the criminal process, opting in some cases for strict rules to guide the police and the courts, while establishing in other cases flexible and amorphous standards. An excellent illustration of this adjudicatory dichotomy is provided by comparing the strict litany of procedural rights in *Miranda v. Arizona*,[1] which must be recited to a suspect prior to custodial interrogation,[2] with the fluctuating reasonableness-balancing analysis maturing in *Terry v. Ohio*.[3] This disparity in the Court's reaction to law enforcement activities reflects a judicial belief in both the need to provide hard-and-fast guidelines and the necessity to maintain flexibility through a case-by-case determination of the reasonableness of particular police practices.

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1. 384 U.S. 436 (1966).

2. *Id.* at 444.

3. 392 U.S. 1 (1968). The Supreme Court actually initiated direct use of the fourth amendment reasonableness clause one year prior to *Terry* in the companion cases of Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), in which the Court relied on the reasonableness language to adopt the concept of an administrative search warrant which was issuable on less than traditional probable cause.

Historically, the Supreme Court has imposed a strict rule on the states either to insure effective constitutional control over local operation of the criminal justice system[4] or to promote consistency among jurisdictions.[5] Recently, however, a new goal of rule-oriented adjudication appears to have emerged which is aimed at providing guidance to the police concerning permissible investigatory practices so that constitutional violations and hence operation of the exclusionary rule can be avoided. Two factors seem to have coalesced to create the new rule orientation. First, the feeling persists that fourth amendment doctrine should be expressed in the form of clear, precise rules that are easily applied by the police in routine law enforcement activities.[6] Although the case-by-case approach may retain needed flexibility, its amorphous nature provides little guidance to the police as to what investigatory practices

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4. An illustration of this control is Gideon v. Wainwright, 372 U.S. 335 (1963), in which the Supreme Court held the sixth amendment applicable to the states and required the appointment of counsel for indigents in all felony cases. Prior to *Gideon*, the provision of counsel was governed by the due process fundamental fairness standard, which required a case-by-case determination of the need for an appointed attorney. *See* Betts v. Brady, 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963). The Supreme Court overruled *Betts* because of the failure of the state courts to apply the fundamental fairness approach fairly and equitably.

See also Miranda v. Arizona, 384 U.S. 436 (1966), which dealt with the problem of custodial interrogation by requiring that law enforcement officers give suspects certain warnings prior to custodial questioning.

5. *See* Mapp v. Ohio, 367 U.S. 643 (1961). Although *Mapp* can be viewed as an effort to impose constitutional control on local law enforcement, its primary thrust was to make such control uniform throughout the states by the adoption of a mandatory federal exclusionary remedy applicable to fourth amendment violations. In Wolf v. Colorado, 338 U.S. 25 (1949), in which the Court held the fourth amendment applicable to the states by virtue of the due process clause of the fourteenth amendment, the majority nevertheless refused to apply the federal exclusionary remedy of Weeks v. United States, 232 U.S. 383 (1914), to the states. 338 U.S. at 33. The Court in *Wolf* felt that the states should be permitted to experiment with the appropriate remedy for fourth amendment violations. Twelve years later, however, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court recognized the inadequacy of other remedies and the trend in the states toward adoption of the *Weeks* rule and, consequently, held the exclusionary rule applicable to the states as necessary to provide uniform and adequate constitutional protection. 367 U.S. at 655-56.

6. *See, e.g.*, Robbins v. California, 453 U.S. 420, 426-27 (1981), *overruled*, United States v. Ross, 102 S. Ct. 2157 (1982); New York v. Belton, 453 U.S. 454, 458-59 (1981), *modified*, United States v. Ross, 102 S. Ct. 2157 (1982); United States v. Robinson, 414 U.S. 218, 235 (1973); LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141-42; Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 433 (1967).

will be viewed retrospectively as reasonable on balance with the individual interest affected.[7]

The second factor that coalesced to create rule-oriented adjudication in the criminal process is the desire by some to engraft a "good faith" exception onto the federal exclusionary remedy.[8]

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7. *See* New York v. Belton, 453 U.S. 454, 456-60 (1981).

8. The United States Court of Appeals for the Fifth Circuit has gone as far as any court in adopting such a good faith rule. *See* United States v. Williams, 622 F.2d 830, 840 (5th Cir.) (en banc) (Gee & Vance, J.J., alternative holding for a separate majority), *cert. denied*, 449 U.S. 1127 (1981). *See also* People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981) (adopting a good faith standard for testing the propriety of consent searches authorized by third parties); Richmond v. Commonwealth, 29 CRIM. L. RPTR. 2529 (Ky. Ct. App., July 31, 1981) (application of good faith rationale to evidence seized under a technically deficient warrant).

Arguably, the United States Supreme Court also has relied on the good faith approach in upholding searches in certain cases. *See* Michigan v. DeFillippo, 443 U.S. 31, 40 (1979), in which the Court refused to apply the exclusionary rule to a search undertaken pursuant to an unconstitutional ordinance. The majority reasoned that an officer could not be required to anticipate that a court subsequently would hold the evidence unconstitutional, and consequently the deterrence function of the exclusionary rule would not be served in such cases. 443 U.S. at 38. In United States v. Peltier, 422 U.S. 531 (1975), the Court refused to apply one of its border search decisions retroactively under the theory that the border patrol could not have anticipated the Court's holding, and thus the past conduct of the border patrol would not have been deterred by threat of the exclusionary sanction. 422 U.S. at 538-39. In dissent, Justice Brennan expressed the concern that this holding foreshadowed the adoption of a bad faith standard for the exclusion of evidence. *Id.* at 551 (Brennan, J., dissenting). At least one Justice has openly advocated a good faith exception to the exclusionary rule, *see* Stone v. Powell, 428 U.S. 465, 538-42 (1976) (White, J., dissenting), and at least three other Justices apparently would favor such an approach. *See* California v. Minjares, 443 U.S. 916, 928 (1979) (Rehnquist, J., joined by Burger, C.J., dissenting from the denial of a stay) (would consider whether, and to what extent, the exclusionary rule of *Weeks* should be retained); Stone v. Powell, 428 U.S. 465, 496-502 (1976) (Burger, C.J., concurring); Brown v. Illinois, 422 U.S. 590, 610-12 (1975) (Powell, J., joined by Rehnquist, J., concurring in part). In addition, Justice O'Connor has indicated that she might vote in favor of a good faith standard; her vote would provide the necessary five-Justice majority for such a rule. *See Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 77-78, 195 (1981). Although a majority of the Court recently refused to adopt a good faith exception in a case arising in Alabama, that particular case involved an illegal arrest and a subsequent confession in which the conduct of the police clearly violated one of the Court's established precedents. *See* Taylor v. Alabama, 102 S. Ct. 2664 (1982). The facts in *Taylor* thus were not ripe for serious consideration and adoption of the good faith approach.

The Court now has squarely positioned itself to decide the question of engrafting a good faith exception onto the exclusionary rule. A case recently was reargued on March 1, 1983 on the issue of whether the exclusionary rule should be modified by a good faith standard. *See* Illinois v. Gates, 103 S. Ct. 436 (1982) (mem.), *supra* notes 202-21 and accompanying text.

Under this proposal, application of the exclusionary rule would be limited to cases in which police officers intentionally or recklessly violated constitutional rights. Evidence obtained in a reasonable, good faith belief in the permissibility of the activity in question would be admissible despite the fact that constitutional rights may have been violated.

A distinction based on the good or bad faith of law enforcement officers creates the need for precision in the standards that govern police activities because such standards would make bad faith more readily detectable. Definite rules, established in advance and clearly indicating to the police what can and cannot be done within the limits of their constitutional authority, make a bad faith standard for application of the exclusionary rule practicable. Whereas both a fluctuating reasonableness criterion[9] and rules hedged with a variety of caveats make a bad faith standard impossible to administer, police violation of bright-line rules presumptively would establish bad faith and thus would make a standard based on bad faith more attractive.

The United States Supreme Court's current exclusive focus on the deterrent function of the exclusionary rule[10] suggests that a good faith exception to the rule's application may be near adop-

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9. *See* Ashdown, *The Fourth Amendment and the Legitimate Expectation of Privacy*, 34 VAND. L. REV. 1289, 1296-97 (1981).

10. *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980) (court's use of its supervisory power to exclude evidence held improper when defendant lacked standing to invoke fourth amendment exclusionary rule); United States v. Havens, 446 U.S. 620 (1980) (illegally obtained evidence held admissible to impeach defendant's testimony given in response to proper cross-examination when the evidence did not squarely contradict defendant's testimony on direct examination); Rakas v. Illinois, 439 U.S. 128 (1978) (automobile passengers possessed no fourth amendment protection against police search of the owner's vehicle); Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus jurisdiction limited when state provided full and fair review of fourth amendment claims); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule held inapplicable to federal civil tax suit); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule held inapplicable to grand jury proceedings); Alderman v. United States, 394 U.S. 165 (1969) (standing required to challenge admissibility of evidence obtained by electronic surveillance); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (consideration of illegally obtained evidence in sentencing process held not improper). *See also* Harris v. New York, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* held admissible for impeachment purposes); Burkoff, *The Court That Devoured the Fourth Amendment: Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979).

tion.[11] The policy goal of discouraging police disrespect for constitutional standards through the exclusion of evidence from criminal trials arguably has little application to honest mistakes. To the extent that law enforcement personnel subjectively believe that they are following the commands of the fourth amendment, their conduct will not be affected by the exclusion of evidence from criminal trials.[12] In terms of deterrence, the most the exclusionary rule can accomplish is to encourage good faith efforts on the part of the police to comply with fourth amendment requirements. The exclusion of evidence in the case of a good faith effort to comply will encourage, at best, only greater care in the implementation of search and seizure rules. But when the fourth amendment nevertheless is violated by officers acting with a good faith belief in the lawfulness of their conduct, the exclusionary provision is superfluous in discouraging such conduct.[13] The threat of the exclusion of the evidence obtained simply does not control police behavior in these cases.[14]

Bypassing the response to this deterrence notion by those who oppose a good faith approach,[15] implementation of any such exception to the exclusionary rule remains highly problematic. Good faith is an elusive concept. Its adoption as a workable standard is complicated by at least two major idiosyncracies. First, good faith can be evaluated from either a subjective or objective perspective, both of which suffer from defects. Accurate subjective evaluation is

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11. *See supra* note 8. The Supreme Court's decisions that refuse to apply the exclusionary rule on the theory that no deterrent effect will be achieved provide a foundation for the adoption of a good faith exception to the exclusionary rule. *See supra* note 10.

12. *See* United States v. Williams, 622 F.2d 830, 846 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978).

13. It has been argued, on the contrary, that the exclusion of evidence seized in good faith discourages the police from taking chances, and that a good faith exception will encourage the police to test the limits of the rule, thereby increasing the frequency of fourth amendment violations. *See* Peltier v. United States, 422 U.S. 531, 559 (1975) (Brennan, J., dissenting); LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright-Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 358-59 (1982).

14. Even though the exclusion of evidence seized reasonably and in good faith will have no effect on the behavior of the individual officer involved, this ignores the educational effect and controlling influence such an exclusion may have in the future on officers in similar situations. *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 431-32 (1981).

15. *See supra* note 14.

virtually impossible;[16] yet, objective analysis may be equally inaccurate because it deals with a retrospective view of what should have been in the mind of the reasonable actor. Police encounters, by their very nature, do not lend themselves to this type of objective analysis because they tend to be highly charged, emotional, and spontaneous events. Thus, objective evaluation may not identify those situations actually involving bad faith either because a cold, retrospective analysis will ignore the realities of police work or, conversely, because undue deference may be given to the volatile nature of the occupation. A case-by-case determination of good faith based on an objective analysis consequently will not accurately distinguish situations in which the officer's conduct was deterrable from those in which it was not.

A second problem facing the adoption of a good faith approach is the ambiguous nature of many fourth amendment standards. This inherent ambiguity results in situations where police officers may be unsure of the legality of their actions and thus do not act either in good or bad faith.

The administrative problems with the good faith standard no doubt have contributed to the refusal of the United States Supreme Court to adopt it. Recently, however, the Fifth Circuit Court of Appeals adopted a good faith exception to the exclusionary rule,[17] and the Supreme Court appears poised to follow suit.[18]

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16. The determination of an officer's state of mind solely from his testimony may not be credible. Similarly, focusing on his statements at the time of the occurrence may not be helpful because such statements may not exist, they may be ambiguous, or the source of the statements, who very often will be the criminal defendant, may be unreliable. For an example of the kind of rigorous analysis necessary to gain any insight into an officer's subjective state of mind when conducting a search, see Mertens & Wasserstrom, *supra* note 14, at 417-23.

17. *See* United States v. Williams, 622 F.2d 830 (5th Cir.), *cert. denied*, 449 U.S. 1127 (1981). *See also* People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981) (adopting a good faith standard for testing the propriety of consent searches authorized by third parties); Richmond v. Commonwealth, 29 CRIM. L. RPTR. 2529 (Ky. Ct. App., July 31, 1981) (application of good faith rationale to evidence seized under a technically deficient warrant); *supra* note 8.

18. *See* Illinois v. Gates, 103 S. Ct. 436 (1982) (mem.), *supra* notes 202-21 and accompanying text. *See also* Rhode Island v. Innis, 446 U.S. 291 (1980) (adopting an objective good faith standard in the area of *Miranda* interrogation); Michigan v. DeFillippo, 443 U.S. 31 (1979) (upholding an arrest and search undertaken pursuant to an unconstitutional ordinance on the theory that the officers could not have anticipated the subsequent invalidation of the statute and therefore acted in good faith reliance on it); Brewer v. Williams, 430 U.S.

This renewed interest in good faith violations may be due to the belief that the problems in distinguishing good and bad faith can be largely eliminated and the rule made manageable by the adoption of bright-line rules to guide the police. Bad faith then would be objectively determinable by a failure of law enforcement personnel to comply with the clear standards. Whether by design or coincidental discovery, the Supreme Court seems to have recognized this potential of rule-oriented decision-making with respect to the superimposition of a good faith limitation on the operation of the exclusionary remedy. This judicial realization, coupled with recent legislative and executive interest in the good faith approach,[19] indicates that this form of analysis is on the fourth amendment horizon.

This Article does not propose to debate the advisability of engrafting a good faith exception onto the exclusionary rule. That task already has been accomplished.[20] This Article, instead, will

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387 (1977) (finding sixth amendment violation partly on basis of the unlawful motive of interrogating officer); United States v. Peltier, 422 U.S. 531 (1975) (refusal to apply a border search decision retroactively because of good faith reliance by border patrol agents on the federal statutory and decisional law in effect at the time of their actions). Although a majority of the Court recently refused to adopt a good faith exception, the refusal came in a case involving an illegal arrest and subsequent confession when the police conduct involved clearly violated one of the Court's established precedents, which would have made a finding of good faith somewhat difficult. *See* Taylor v. Alabama, 102 S. Ct. 2664 (1982). *See also supra* note 8.

19. Attorney General William French Smith's Task Force on Violent Crime recommended that Congress adopt a good faith exception. *See* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 56-57 (1981). Senator DeConcini of Arizona introduced a bill in Congress which would forbid the exclusion of evidence in federal courts unless the court found, as a matter of law, based upon "all of the circumstances," that the violation was "intentional or substantial." S. 101, 97th Cong., 1st Sess. (1981). Additionally, several state legislatures are considering enacting a good faith exception, and Colorado already has enacted one. COLO. REV. STAT. § 16-3-308 (1981).

20. *See* Ball, *supra* note 12; Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51 (1980); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 952 (1965); LaFave, *supra* note 13; Mertens & Wasserstrom, *supra* note 14; Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV., 736, 740 (1972); Note, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915 (1978); Comment, *Exclusionary Rule: Good Faith Exception — The Fifth Circuit's Approach in* United States v. Williams, 15 GA. L. REV. 487, 498-503 (1981); 34 VAND. L. REV. 213, 226-31 (1981); 55 WASH. L. REV. 849, 861-70 (1980).

show that bright-line rules cannot solve the problems inherent in the good faith notion, and that bright-line rules operating in conjunction with a good faith exception to the exclusion of evidence are unlikely to provide any relief from the current Supreme Court's inclination to interpret narrowly the fourth amendment.

First, the suggestion that clear-cut rules can make a good faith standard administerable through an objective evaluation of rule compliance is both optimistic and misleading. Actual bright-line rules, which can be applied easily to varying factual situations, are difficult to draft. Two cases decided at the end of the Supreme Court's 1980 Term provide excellent illustrations of this point.[21] Even if clear-cut rules could be formulated in some areas, litigation would simply be diverted from rule violation, which would presumptively establish bad faith, to other areas of uncertainty not foreclosed by a good faith analysis, such as whether exigent circumstances existed or whether the officers involved acted under a reasonable mistake as to the operative facts. The possible interplay between the formulation of bright-line rules and the good faith approach also works a kind of paradox. Rather than adopt clear rules to facilitate the operation of the good faith standard, courts might instead determine whether the law enforcement activity fell within the realm of reasonableness and was therefore in good faith. Thus, courts never would formulate categorical rules for future occasions.

Despite the problems that surface in working through the interplay between bright-line rules and a good faith exception, one critical point stands out. Any symbiosis between clear rules and good faith is unlikely to relieve the current doctrinal pressure on the fourth amendment.[22] As long as a sphere of exclusion remains, the area of evidentiary inadmissibility — bad faith — is likely to be narrowly circumscribed. With the Supreme Court narrowly interpreting the fourth amendment to minimize the exclusion of evidence from criminal trials,[23] bright-line rules adopted by the Court

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21. *See* New York v. Belton, 453 U.S. 454, *modified,* United States v. Ross, 102 S. Ct. 2157 (1982); Robbins v. California, 453 U.S. 420 (1981), *overruled,* United States v. Ross, 102 S. Ct. 2157 (1982), *supra* notes 55-100 and accompanying text.

22. *See* Ashdown, *supra* note 9; Bernardi, *supra* note 20.

23. *See* Burkoff, *supra* note 10, at 160, 186; Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027, 1038, 1047 (1974); McMillian, *Is There Anything Left of the Fourth Amendment?,* 24 ST. LOUIS U.L.J. 1, 3-4 (1979); Trager & Lobenfeld, *The Law of*

probably will be drafted broadly in favor of law enforcement, thereby reducing the incidence of findings of bad faith in which the exclusionary rule would continue to operate.

II. The Relationship Between "Bright-Line" Rules And Police "Good Faith"

A. *Defining Good Faith*

The major, persistent drawback to the injection of any good faith notion into fourth amendment law has been the lack of administerability. Whether the good faith determination is based on a subjective standard, an objective test, or both, significant problems exist for trial and appellate courts viewing a given set of facts retrospectively. At the very least, the good faith approach will force courts to undertake a burdensome case-by-case analysis,[24] with only a minimal probability of accuracy from case to case, and nothing to show for the process except the increased availability of evidence for introduction into criminal trials. This expansion of admissible evidence is achieved without any clear points of demarcation between good and bad faith, thus creating a serious idiosyncrasy for a system based on the deterrence of unlawful invasion of privacy.[25]

It makes little difference whether the focus is on the subjective state of mind of the officer or on the objective reasonableness of his conduct. These standards, ultimately, are virtually identical. Anyone familiar with the determination of subjective mental states in the criminal law recognizes the impossibility of determining precisely an individual's state of mind on a particular occasion unless the individual specifically discloses what he was thinking at the time he acted. Whether made by a criminal defendant or by a law enforcement officer, such a candid disclosure is unlikely. Moreover,

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Standing Under the Fourth Amendment, 41 Brooklyn L. Rev. 421, 453 (1975).

24. *See* United States v. Peltier, 422 U.S. 531, 560-61 (1975) (Brennan, J., dissenting); LaFave, *supra* note 13, at 355-57.

25. *See* Mertens & Wasserstrom, *supra* note 14, at 431. The authors argue that, in ruling on suppression motions, the good faith approach will cause courts to focus on the reasonableness of a police officer's conduct in light of the facts and the law without making clear determinations of whether the fourth amendment was violated. Such a finding of good faith irrespective of a fourth amendment violation will have little educational and deterrent impact for future cases.

evidence of such a disclosure is more likely to be available in the case of the criminal defendant, whose accomplice may have an incentive to protect himself at his codefendant's expense, than in the case of a police officer, whose fellow officers will operate from a perspective of mutual protection.

In any event, direct evidence of a subjective state of mind generally will be unavailable, and thus the officer's mental state must be discovered in some other way. The method utilized is one of determining what a reasonable person under the facts and circumstances would have thought or intended.[26] Admittedly, the standard is still subjective, and consequently, the actor is entitled to testify about his mental processes, including whether he acted in good faith. Such testimony, however, is likely to be self-serving and unreliable; therefore, additional considerations become relevant. It is in this regard that a reasonableness criterion is utilized to determine what the circumstances and the person's conduct indicate about his mental state in light of what is generally known about human behavior. Consequently, any discussion about subjective versus objective standards in regard to police good faith is largely pedantic, unless of course, a policeman happened to have particular subjective characteristics such as mental retardation or a physical handicap which would be taken into account under a subjective approach. The presence of such characteristics, however, is an inherent impossibility because, unlike criminal defendants, police officers do not possess such idiosyncracies; otherwise, they never would have qualified for law enforcement in the first place. Thus, any concern for the inability of judges to determine an officer's subjective state of mind[27] is largely superfluous because of inferences which can be made from circumstantial evidence.

Regardless of the virtual merger of the subjective and objective views of good faith, most advocates of the good faith limitation favor the objective, reasonable person standard because of per-

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26. *See, e.g.*, State v. Beale, 299 A.2d 921, 925 (Me. 1973), in which the court held that "knowledge" of stolen property must be determined on the basis of what the defendant subjectively knew, but that the jury, in reaching its decision, was allowed to consider what a man of ordinary, average intelligence, or the reasonable person, would have concluded.

27. *See* United States v. Peltier, 422 U.S. 531, 553, 560-61 (1975) (Brennan, J., dissenting); LaFave, *supra* note 13, at 355-56.

ceived advantages in administerability.[28] The United States Supreme Court already appears to have adopted the objective approach in judging the conduct of law enforcement personnel.[29]

A test for determining good faith based on reasonableness, however, is unlikely to prove any more workable than subjective determinations. To the extent that an officer relies on a statute later declared unconstitutional[30] or on a case which is subsequently overruled,[31] good faith is generally apparent. In the vast majority of cases in which good faith is alleged, however, the issue will be whether the officer made a reasonable mistake as to the operative facts or with respect to his legal authority.[32] This issue is not easily resolved. This then is the inherent problem with the utilization of a good faith notion in fourth amendment litigation, and it is here that the concept of drafting clear, easily applicable, bright-line rules becomes relevant.

B. *Bright-Line Rules*

Bright-line rules describe a routine practice or standardized procedure with precise boundaries that is applicable to situations of a given type regardless of variations in the facts of particular cases.[33]

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28. *See* Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting); United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981); ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 55 (1981). For whatever its independent worth, all of these proposals for a good faith exception apparently contain a subjective criterion as well.

29. *See* United States v. Ross, 102 S. Ct. 2157, 2172 (1982) (indicating that the determination of probable cause is to be based on objective facts and not the subjective good faith of police officers); Rhode Island v. Innis, 446 U.S. 291 (1980) (adopting a reasonableness approach to defining interrogation under *Miranda*); Scott v. United States, 436 U.S. 128 (1978) (upholding a wiretap under an objective analysis of the federal agents' conduct even though the agents admitted that they made no effort to comply with the "minimization" requirement of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976)). *But see* Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 75-83 (1982) (arguing that the Supreme Court has not forsaken all subjective motivations).

30. *See* Michigan v. DeFillippo, 443 U.S. 31 (1979); Stone v. Powell, 428 U.S. 465 (1976).

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

32. *See* Stone v. Powell, 428 U.S. 465, 538-39 (1976) (White, J., dissenting). Justice White also recognized the technical type of fourth amendment violation in which the law changes or a statute is declared unconstitutional.

33. *See* E. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 47 (1975); LaFave, *supra* note 13, at 322-23 (quoting Wilkey, J., dissenting in United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972), *rev'd*, 414 U.S. 218 (1973)).

The function of such rules is to remove the uncertainty from fourth amendment law for the police and the courts. Rather than leaving permissible search and seizure practices dependent on case-by-case evaluation of the justification for the procedure employed, hard-and-fast rules are designed to make the fourth amendment clear and consistent for those who apply it. Currently, the primary champion of such an approach to interpreting the fourth amendment is Professor LaFave, who "believe[s] that it is extremely important that fourth amendment doctrine be expressed in terms understandable to the police, to whom, after all, it is directed."[34] The United States Supreme Court now has clearly picked up this theme and, in fact, recently cited Professor LaFave for a statement of the proposition.[35]

The first case in which the Court clearly applied this approach in the fourth amendment context was *United States v. Robinson.*[36] In *Robinson,* the United States Court of Appeals for the District of Columbia had invalidated a search following the arrest of the defendant for driving after revocation of his operator's license. The court held that the legality of such a search depended on the probability in a given case that the suspect was armed or concealing evidence.[37] The United States Supreme Court, however, rejected this case-by-case approach. Justice Rehnquist's majority opinion concluded that:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth

34. LaFave, *supra* note 13, at 333.

35. *See* New York v. Belton, 453 U.S. 454, 458 (1981) (quoting LaFave, *supra* note 6, at 141-42).

36. 414 U.S. 218 (1973).

37. United States v. Robinson, 471 F.2d 1082, 1093 (D.C. Cir. 1972).

> Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.[38]

The Supreme Court similarly refused to adopt a fluctuating standard in *Dunaway v. New York*[39] in which the defendant was taken into custody for questioning although he was not formally arrested or booked. The State contended that a balancing test should be utilized which would permit a custodial detention for investigation on something less than probable cause but something more than the suspicion involved in a *Terry*-type stop.[40] The Supreme Court rejected this view, because a "single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[41] The Court held that any detention or custodial interrogation required probable cause for its justification.[42] Again, the Court had steered away from a flexible approach which would have required contemporaneous factual evaluations by the police and retrospective ad hoc determinations by the courts.

Prior to *Dunaway*, a majority of the Court likewise had avoided such a result in *Pennsylvania v. Mimms*.[43] In *Mimms*, the Pennsylvania Supreme Court had reversed the respondent's conviction, holding that his revolver had been seized in violation of the fourth amendment because following a minor traffic arrest he was illegally ordered to get out of his vehicle.[44] This conclusion was based on the fact that the officer "could point to no objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety."[45] Again, the United States Supreme Court disagreed with this approach. Although mentioning nothing about bright-line rules, the majority applied a balancing process to support the adoption of a

38. 414 U.S. at 235.
39. 442 U.S. 200 (1979).
40. *See* Terry v. Ohio, 392 U.S. 1 (1968).
41. 442 U.S. at 213-14.
42. *Id.* at 216.
43. 434 U.S. 106 (1977).
44. Commonwealth v. Mimms, 471 Pa. 546, 370 A.2d 1157, *rev'd per curiam*, 434 U.S. 106 (1977).
45. 471 Pa. at 551, 370 A.2d at 1160.

clear and precise rule for the police to follow: a motorist could legitimately be ordered out of a vehicle following a traffic arrest.[46]

In addition to providing clear instructions to the police, *Mimms* highlights a justification for the adoption of rigid rules. In *Mimms,* the Court concluded that the interest in the safety of the police officer[47] outweighed the minor intrusion on the driver's personal liberty when he was ordered to get out of the car following a traffic stop. This analysis suggests that a universal rule was adopted not only to guide police officers, but also because the facts of this particular kind of case — a traffic stop — would always justify a police officer asking the motorist to get out of his vehicle.

Thus, a related basis for a hard-and-fast rule exists anytime case-by-case adjudication would consistently produce the same result.[48] The best example of such a case is *Michigan v. Summers,*[49] in which the defendant was detained at the scene of the execution of a search warrant and then was arrested following the discovery of contraband in the basement of his home. Heroin was found in his coat pocket in a search incident to his arrest. In a prosecution for possession of the heroin found on his person, the trial judge suppressed the evidence on the ground of an illegal detention. Both the Michigan Court of Appeals and the Michigan Supreme Court affirmed this ruling.

On certiorari, a majority of the United States Supreme Court reversed, holding that it was permissible, for fourth amendment purposes, to detain persons found at the scene of the execution of a warrant to search for contraband.[50] Although suggesting that the detention involved in *Summers* was of reduced intrusiveness,[51] the

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46. 434 U.S. at 110-11.

47. The two risks confronting an officer following a traffic stop, which were mentioned by the per curiam opinion, are the threat of armed assault and accidental injury from passing traffic. *Id.*

48. Professor LaFave suggests that this is one of four questions which should be explored before any bright-line rule is adopted. *See* LaFave, *supra* note 13, at 325-26. LaFave asks "whether the rule will produce results that at least approximate those which could be obtained if a more careful case-by-case application of a principle were feasible." *Id.* at 328. He does not argue, however, that this is a prerequisite to the adoption of a straightforward, monolithic rule.

49. 462 U.S. 692 (1981).

50. *Id.* at 705.

51. *Id.* at 701-02.

majority's conclusion was based primarily on an analysis of the facts generally present when a search warrant for contraband is executed. Justice Stevens' majority opinion mentioned four factors that justified the detention of persons found at the scene of the execution of a search warrant: (1) preventing flight of the suspects; (2) minimizing the risk of harm to the officers; (3) providing assistance to the officers by the occupants of the premises; and (4) the existence of suspicion for the detention based on the regular issuance of the search warrant supported by probable cause.[52] The Court in *Michigan v. Summers* thus adopted a bright-line rule as a short-hand for case-by-case analysis when the presence of universal factors always would lead to the same result.

The latest series of cases in the Supreme Court's rule-oriented approach to fourth amendment adjudication involves automobile searches. This is an area that had plagued the courts for years, not so much because of the relevant rules, but because of the unpersuasiveness of their theory[53] and the uncertainty of their application.[54] These problems undoubtedly explain the Supreme Court's recent struggle in this area to develop straightforward rules to guide the police and the courts.

Two decisions announced on the same day at the end of the 1980 Term led the way. In *New York v. Belton*,[55] a majority of the Court endeavored to delimit clearly the scope of a search incident to a vehicular arrest. Although *Chimel v. California*[56] established

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52. *Id.* at 702-03.

53. The Supreme Court has relied on two separate theories to justify granting the police greater freedom to search automobiles: mobility of the vehicle, *see* Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925), and a diminished expectation of privacy, *see* Rakas v. Illinois, 439 U.S. 128 (1978); South Dakota v. Opperman, 428 U.S. 364 (1976). The mobility notion is not applicable where the police have taken the vehicle into custody or otherwise have immobilized it prior to the search. Additionally, not everyone would agree that the public expects less privacy in their automobile trunk than they do in their home or office.

54. Historically, the area within the immediate control of the vehicular arrestee justifying a search incident to the arrest has been less than clear. The Supreme Court attempted to eliminate this confusion in New York v. Belton, 453 U.S. 454 (1981). *See infra* text accompanying notes 55-60. The permissible scope of a vehicular search based on probable cause is also uncertain. The court dealt with this problem in the recent case of United States v. Ross, 102 S. Ct. 2157 (1982). *See infra* text accompanying notes 68-83.

55. 453 U.S. 454 (1981).

56. 395 U.S. 752 (1969).

the permissible bounds of a search incident to an arrest as including the "arrestee's person and the area within his immediate control,"[57] the application of the latter part of this rule always proved troublesome in cases in which the defendant was arrested in an automobile.[58] Consequently, after citing Professor LaFave's call for clear rules readily applicable by the police[59] and stressing the need for a familiar, workable rule in this area, the Court held that following a lawful custodial arrest of the occupant of an automobile, the policeman may search the entire passenger compartment of the vehicle, including any containers found therein.[60]

The second relevant case, *Robbins v. California*,[61] was factually similar to *Belton* except that no arrest preceded the search. After the petitioner was stopped for a traffic violation, an officer smelled marijuana smoke. A vial of liquid was then discovered in a frisk of the petitioner, and small amounts of marijuana were found in the passenger compartment of petitioner's car. Two packages wrapped in green opaque plastic subsequently were uncovered in a recessed luggage compartment of the station wagon. Each package was unwrapped by the police and found to contain fifteen pounds of marijuana. Thus, the Court was faced with deciding the extent of the automobile exception to the warrant requirement in light of *United States v. Chadwick*[62] and *Arkansas v. Sanders*,[63] which had refused to extend a warrantless automobile search to luggage found in the vehicle. In those cases, the Court held that a warrant was required to validly search luggage found in a vehicle because a greater privacy expectation applied to the luggage than to the vehicle.[64]

In *Robbins*, the Court had to determine the reach of *Chadwick* and *Sanders* with respect to the packages containing marijuana. In an effort to establish a bright-line rule[65] of general applicability,

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57. *Id.* at 763.

58. *See, e.g.*, New York v. Belton, 453 U.S. 454, 459 (1981), and cases cited therein.

59. *Id.* at 458 (citing LaFave, *supra* note 6, at 141-42).

60. *Id.* at 460.

61. 453 U.S. 420 (1981).

62. 433 U.S. 1 (1977).

63. 442 U.S. 753 (1979).

64. *Chadwick* involved a footlocker and *Sanders* involved an unlocked suitcase.

65. *See* Robbins v. California, 453 U.S. 420, 429 (Powell, J., concurring); *id.* at 443 (Rehnquist, J., dissenting).

Justice Stewart, in a plurality opinion joined by Justices Brennan, White, and Marshall, concluded that a closed, opaque container could not be searched without a warrant despite the fact that the container was found during the lawful warrantless search of an automobile.[66]

Dissatisfied with the resolution of the problem in *Robbins* and its interplay with the *Belton* rule,[67] the Court granted certiorari in yet another automobile search case, *United States v. Ross*,[68] with instructions that the parties should reargue the issue presented in *Robbins*. *Ross* involved a narcotics prosecution based on the seizure of heroin from a brown paper bag found in the trunk of the defendant's automobile. Also seized and introduced into evidence at trial was $3,200 in cash discovered in the trunk in a zippered red leather pouch. Although the police had probable cause to search the car based on an informant's tip,[69] the United States Court of Appeals for the District of Columbia, sitting en banc, ruled that no distinction of constitutional significance existed between the two containers and that they could not be searched validly without a warrant.[70]

Thus, the issue facing the Court in *Ross* was the legality of the warrantless search of the paper bag and leather pouch found in the vehicle's trunk.[71] Although the Court could have addressed the issue of whether a legitimate expectation of privacy attached to the

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66. *Id.* at 428.

67. According to *Belton*, closed containers found in the passenger compartment of the vehicle can be searched incident to an arrest of an occupant of the vehicle. *See supra* text accompanying notes 55-60. Thus, an officer could avoid the *Robbins* rule with respect to containers in the passenger compartment by claiming that he made a preceding arrest. This argument could have been advanced in *Robbins*. *See* 453 U.S. at 422-23.

68. 102 S. Ct. 2157 (1982).

69. The informant, who previously had proved to be reliable, stated that he had observed the respondent selling narcotics and that respondent had told him additional narcotics were in the trunk of his car. *Id.* at 2160.

70. United States v. Ross, 655 F.2d 1159, 1170-71 (D.C. Cir. 1981), *rev'd*, 102 S. Ct. 2157 (1982). A three-judge panel of the court of appeals previously had applied a privacy analysis in concluding that the warrantless search of the paper bag was valid but the search of the leather pouch was not. 102 S. Ct. at 2161.

71. Although Ross was arrested after the discovery of a pistol in the glove compartment and prior to the search of the trunk, the search incident to arrest rule of New York v. Belton, 453 U.S. 454 (1981), would not validate the search of the items found in the trunk, because the *Belton* rule permits only the search of containers found in the passenger compartment of the vehicle.

individual containers (or in the language of *Robbins*, whether they required warrants because they constituted "closed, opaque containers"),[72] a majority instead chose to reconsider the issue dealt with in the plurality opinion in *Robbins* — the constitutional permissibility of opening a closed container found in an automobile in the course of a valid warrantless search of the vehicle based on probable cause.

In resolving this question, Justice Stevens' majority opinion initially distinguished *Chadwick* and *Sanders* by noting that probable cause existed in those cases to search only the luggage in question and not the entire vehicle.[73] Stevens then noted that *Carroll v. United States*,[74] the source of the automobile exception, permitted considerably more than a plain view search of the vehicle,[75] and that two of that Court's cases,[76] as well as lower court cases,[77] had upheld the warrantless search of containers found during a lawful search of an automobile. The majority opinion concluded that the same impracticability that justifies the warrantless search of a vehicle also applies to containers found inside.[78] Noting that a lawful search of fixed premises extends to confines and containers where the object of the search might be located,[79] the Court held that the permissible scope of the warrantless search of a vehicle is as broad as that which a magistrate could authorize with a warrant.[80] "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents

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72. The majority expressly refused to draw a distinction between "worthy" and "unworthy" containers. 102 S. Ct. at 2171.

73. *Id.* at 2167. Justice Stevens' distinction of *Chadwick* and *Sanders* was taken from the Chief Justice's concurring opinion in *Sanders*, and the opinions of Justices Powell and Stevens, concurring and dissenting respectively, in Robbins v. California, 453 U.S. 420, 429-36, 445-53 (1981). Although Justice Stevens' majority opinion in *Ross* distinguished *Sanders*, he noted that the language of *Sanders* was considerably broader than the basis of his distinction. 102 S. Ct. at 2167 n.19.

74. 267 U.S. 132 (1925).

75. 102 S. Ct. at 2169.

76. Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931).

77. *See* 102 S. Ct. at 2170 n.25 (citing lower court cases).

78. *Id.* at 2170.

79. *Id.*

80. *Id.* at 2172.

that may conceal the object of the search."[81]

Although the majority opinion in *Ross* did not state specifically that its objective was the establishment of a bright-line rule in the case of automobile searches, the opinion did speak of the need for clarification in this area.[82] Justices Blackmun and Powell, in separate concurring opinions, also specifically mentioned the need for a clearly established legal rule to guide law enforcement officials.[83]

An analysis of the majority opinion in *Ross* leads to the conclusion that one of the primary goals of the Court was the establishment of a precise, straightforward standard in this troubled area. The first notable feature of Justice Stevens' opinion is that he virtually ignores the privacy analysis which the Court had developed for measuring the necessity of a search warrant.[84] In particular, he fails to adequately deal with the Court's former conclusion that a legitimate expectation of privacy attaches to closed containers and that therefore a warrant must be obtained to search them.[85]

Instead, the opinion returned to the mobility notion for justifying the warrantless search of an automobile and its contents.[86] This is especially interesting because the Court had shifted to a privacy analysis as the basis of the automobile exception[87] due, in part, to the inadequacy of the mobility argument. An automobile,

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81. *Id.*

82. *Id.* at 2161-62.

83. *Id.* at 2173.

84. *See* Ashdown, *supra* note 9.

85. Although Justice Stevens' majority opinion in *Ross* distinguishes *Chadwick* and *Sanders* by arguing that in those cases probable cause existed only to search the luggage in question and not to search the entire vehicle, *see supra* note 73, the opinion fails to explain satisfactorily why an individual's expectation of privacy in a closed container is altered when the container is placed in a vehicle. In his only reference to privacy, Justice Stevens states that "an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband." 102 S. Ct. at 2171. This statement, however, is more conclusive than explanatory, because it lumps together vehicles and closed containers, items which the Court formerly had treated differently. Additionally, this statement fails to explain why the privacy expectation in a container is generally protected by the warrant requirement, but is sacrified when the article is placed in a vehicle.

86. 102 S. Ct. at 2162, 2171.

87. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 12-13 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976); Texas v. White, 423 U.S. 67 (1975); Cardwell v. Lewis, 417 U.S. 583, 591-92 (1974); Cady v. Dombrowski, 413 U.S. 433, 441-42 (1973).

once stopped and subjected to police control, is no longer mobile.[88] Justice Stevens attempts to counter this fact arguing by reference to *Chambers v. Maroney*[89] that, for constitutional purposes, no difference exists between the warrantless seizure of a car and its warrantless search, and that if an immediate search on the street is permissible, a subsequent warrantless search at the station also is valid.[90]

Although these conclusions are based largely on the impracticability of seizing a vehicle while the probable cause issue is presented to a magistrate, this reasoning does not satisfactorily deal with the difference between seizing and holding an automobile and seizing a container found inside it while a warrant is sought.[91] A movable container can easily be taken into physical possession and brought to the magistrate.[92] This reliance on the mobility theory as justification for a warrantless search appears problematic when it is extended to closed containers, which readily can be taken into police custody with only minimal inconvenience to the owner. As explained by Justice Marshall in his dissent in *Ross*, it is not probable cause alone that justifies a warrantless search of an automobile, but probable cause plus mobility.[93]

Although the Supreme Court in *Ross* purported not to overrule *Chadwick* and *Sanders*, the cases are difficult to distinguish analytically. For example, a piece of luggage that police have probable cause to search located outside a vehicle is just as mobile or immobile as the same luggage found inside an automobile,[94] and the

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88. Once the occupants have been removed from a vehicle, the only real interruption in complete police dominion of the automobile (and the possible loss of evidence) occurs when the vehicle is towed to the police garage by a private towing company. The potential for the loss or destruction of evidence in these circumstances, however, is minimal.

89. 399 U.S. 42 (1970).

90. 102 S. Ct. at 2163 n.9.

91. *Id.* at 2174 (Marshall, J., joined by Brennan, J., dissenting).

92. *Id.* at 2176 (Marshall J., joined by Brennan, J., dissenting).

93. *Id.*

94. The mobility notion is the precise argument that the Supreme Court rejected in United States v. Chadwick, 443 U.S. 1 (1977). In *Chadwick*, the Chief Justice's majority opinion concluded:

> Nor does the footlocker's mobility justify dispensing with the added protection of the Warrant Clause. Once the federal agents had seized it . . . and had safely transferred it to the . . . Federal Building under their exclusive control, there was not the slightest danger that the footlocker or its contents could

same kind of privacy expectation should apply in either case.[95]

The Court's ultimate resolution of the issue presented in *Robbins* and *Ross* — the permissibility of opening containers found in a vehicle during a warrantless auto search — suggests the concomitant goals of expediency[96] and clarification.[97] Justice Stevens' majority opinion states: "When a legitimate search is underway, . . . nice distinctions . . . must give way to the interest in the prompt and efficient completion of the task at hand."[98] Permitting the immediate search of containers found inside a vehicle being searched on the basis of probable cause clearly expedites crime detection because it eliminates the time and trouble of seeking a warrant from a magistrate, thus "ensuring that the private containers into which criminal suspects often place goods no longer will be a Fourth Amendment shield."[99]

In addition to streamlining auto searches, Justice Stevens' language and analysis indicate that a majority of the Court in *Ross* was following the recent pattern of fourth amendment adjudication which establishes rules providing specific guidance to law enforcement officers. As stated by Justice Powell in his concurrence in *Ross*, "in enunciating a readily understood and applied rule, today's decision is consistent with the similar step taken last Term in *New York v. Belton*."[100]

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have been removed before a valid search warrant could be obtained.

Id. at 13. In an accompanying footnote, Chief Justice Burger distinguished automobiles in the following way:

> This may often not be the case when automobiles are seized. Absolutely secure storage facilities may not be available . . . , and the size and inherent mobility of a vehicle make it susceptible to theft or intrusion by vandals.

Id. at 13 n.7 (citations omitted).

95. The Court relied on the relative expectations of privacy in luggage and automobiles to distinguish *Chadwick* and *Sanders*. Nevertheless, the majority in *Ross* offered a disavowal of this analysis by stating, without explanation, that "an individual's expectation of privacy in a vehicle *and its contents* may not survive if probable cause is given to believe that the vehicle is transporting contraband." 102 S. Ct. at 2171 (emphasis added).

96. *See* United States v. Ross, 102 S. Ct. 2157, 2181 (1981) (Marshall, J., joined by Brennan, J., dissenting).

97. *See supra* text accompanying notes 82 & 83.

98. 102 S. Ct. at 2170-71.

99. *Id.* at 2181 (Marshall, J., joined by Brennan, J., dissenting).

100. *Id.* at 2173 (Powell, J., concurring).

C. *Bright Lines and Good Faith*

United States v. Ross is the latest in a series of cases that exhibit a rule-oriented method of fourth amendment adjudication. Such an approach to the resolution of fourth amendment issues not only provides clear guidance to the police, it also provides the structure needed to implement the proposed good faith exception to the exclusionary rule. Under a precisely formulated standard, the police should know exactly what investigatory and detection practices they are permitted to employ in particular situations. If the actions of law enforcement officers are permitted by a bright-line rule, under an objective approach, no constitutional violation occurred and good faith is irrelevant. Conversely, if a clear, easily applied standard is violated, bad faith can be presumed.[101]

A few examples, one actual and the other hypothetical, adequately illustrate the operation of this good faith/bad faith dichotomy. In *Dunaway v. New York*,[102] the Supreme Court rejected the state's argument that a balancing test of reasonableness should apply to all seizures that do not constitute technical arrests. The Court held instead that a single, familiar standard of probable cause was necessary to support detention for custodial interrogation.[103] Consequently, in the recently decided case of *Taylor v. Alabama*,[104] the Supreme Court reversed the petitioner's conviction where a confession was obtained six hours after he was picked up for questioning based on an informant's tip that failed to establish probable cause.[105] Most importantly, the Court refused to consider the state's argument that the conduct of the police was in good faith where the investigatory arrest without probable cause vio-

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101. In fact, it can be argued that a pervasive set of bright-line rules virtually eliminates the need to consider the good faith/bad faith dichotomy. *See* LaFave, *supra* note 13. With a system of clear standards guiding and governing the police, any violation would lead to the exclusion of evidence. This of course assumes that a rule violation would be dispositive with no room to argue exigent circumstances or mistake of fact.

102. 442 U.S. 200 (1979). For a discussion of *Dunaway*, see *supra* text accompanying notes 39-42.

103. 442 U.S. at 213.

104. 102 S. Ct. 2664 (1982).

105. The informant had never before provided similar information to the officer involved, he did not indicate how he acquired his information on this occasion, and he did not provide any details of the crime in question. *Id.* at 2667.

lated the clear rule of *Dunaway*.[106]

The interplay between *Ross* and *Chadwick* represents another situation in which the message to law enforcement officials, if not the logic of the rules,[107] is clear. If the police discover a closed container, for example a suitcase, in an automobile that they have probable cause to search, they can search the luggage without a warrant; however, if the same suitcase is found in a home or at the airport, a warrant is required even though probable cause to search exists.[108] If officers were to search in the latter case without first obtaining a warrant, any evidence obtained would be subject to exclusion even under a good faith exception because it could be concluded that they acted in bad faith due to violation of the explicit rule of *Chadwick*. Although a finding of bad faith in such a case need not be automatic, a bright-line rule violation would at least establish a rebuttable presumption of dereliction, and a strong showing of facts supporting a reasonable belief in an exigency would be necessary to overcome this presumption.

In areas where the Supreme Court has been able to formulate bright-line rules, a bad faith approach to the exclusion of evidence appears to be at least superficially workable. Nevertheless, even though a series of easily understood and applied standards may alleviate the administrative burden of the good faith notion, such a system creates its own problems of administerability. Of greater significance, this method of adjudication fails to eliminate a deeper tension in the criminal process — the restriction in the substantive reach of the fourth amendment. It is to these problems that this Article will now turn.

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106. *Id.* at 2669. Of course, the Court has not yet adopted a good faith exception to the exclusion of evidence. If, however, a majority of the Court were so inclined, *Taylor v. Alabama* would have been a poor case in which to adopt this rule because *Taylor* involved a violation of a clear Court precedent. *See supra* note 8.

107. *See supra* text accompanying notes 95-100.

108. This assumes that a warrantless search would not be supportable as incident to an arrest. *See infra* notes 171-73 and accompanying text.

III. Administrative Difficulties

A. *Developing Bright Lines*

As previously discussed,[109] the possibility of a working relationship exists between bright-line rules and the operation of the proposed good faith exception to the exclusionary rule. For this alliance to be effective, however, a fairly pervasive set of unequivocal rules must exist. At present, only a handful of cases provide the criminal process, or more particularly, the law of search and seizure, with such clear standards.[110] Therefore, two options are available: either the adoption of a good faith standard can await the development of a complete body of bright-line rules, a process that will take considerable time given the lethargic movement of cases through the criminal justice system, or a good faith exception can be presently adopted, with its operation to be augmented by rule-oriented decisions as they become available. Given the impracticality of the former choice, the development of a system in which the good faith determination is geared to categorical rules would most likely have to follow the latter pattern.[111] It is with respect to this kind of a scheme that new administrative problems begin to emerge.

Such a system obviously is dependent on the continued formulation of bright-line rules to facilitate the good faith/bad faith determination. There is some reason to believe, however, that once a good faith notion is accepted into fourth amendment law, development of the needed categorical rules will be impeded. Impediments will occur for several reasons. First, the use of a good faith notion in search and seizure adjudication may limit the number of fourth amendment claims, thereby reducing the opportunities for courts to fashion explicit rules. When the police have complied with a statute or court decision, defendants will have little incentive to challenge the statute or seek modification of the decision because law enforcement compliance with the law in existence at the time of their conduct conclusively establishes good faith under an objec-

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109. *See supra* text accompanying notes 101-08.

110. *See supra* text accompanying notes 35-100.

111. Another option for future fourth amendment adjudication would be to focus on the development of clear standards to guide the police and the courts without adopting a good faith exception to the exclusionary rule. *See* LaFave, *supra* note 13.

tive standard.[112] Criminal defendants, who by nature are self-serving, and defense attorneys, who operate under time constraints, will have little interest in seeking an alteration of the law exclusively for future cases.[113]

In addition, even in cases in which the police have failed to comply with existing law, liberalization of permissible law enforcement behavior under the good faith rationale will reduce the incentive to challenge the conduct in question.[114] Given the relative ease with which good faith can be established in cases in which the police conduct is not egregious,[115] defendants and their attorneys may prefer to devote their energy to other aspects of the case.

This leads to the major point to be made with respect to the difficulty in establishing bright-line rules in the context of a good faith exception to the suppression of evidence. With good faith as the focal point of a decision, courts are unlikely either to decide the actual constitutional questions presented or to engage in the promulgation of precise standards to govern law enforcement officers in future similar cases. Under the good faith formula, the judicial inquiry is likely to be centered on the reasonableness of the police behavior under the circumstances rather than on the dual inquiry of whether the fourth amendment was actually violated and the need for a clear rule in cases such as the one under consideration.[116]

Two cases that have utilized the good faith notion highlight the

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112. When law enforcement officers have complied with an existing statute or court decision that is subsequently invalidated or modified, their conduct falls within the so-called "technical violations" branch of the good faith exception. *See* United States v. Williams, 622 F.2d 830, 840-41 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) (citing Ball, *supra* note 12, at 635-36); Mertens & Wasserstrom, *supra* note 14, at 424-31. *Cf.* Stone v. Powell, 428 U.S. 465, 538-42 (1976) (White, J., dissenting). Although Justice White does not specifically refer to technical violations, he speaks of situations where an officer acts in reasonable reliance on a court decision that may later be modified or on a statute that subsequently is declared unconstitutional. *Id.*

113. *See* Mertens & Wasserstrom, *supra* note 14, at 451-52.

114. When the conduct of the police fails to conform to an existing court decision, good faith may be claimed on the basis of a reasonable mistake of fact. This falls within the "good faith mistake" branch of the good faith rule. *See supra* note 112.

115. *See* Ball, *supra* note 12, at 655-56; Mertens & Wasserstrom, *supra* note 14, at 452.

116. Justice Brennan probably was the first to express this fear when he stated in his dissenting opinion in United States v. Peltier, 442 U.S. 531 (1971), that the good faith exception "could stop dead in its tracks judicial development of Fourth Amendment rights." *Id.* at 554 (Brennan, J., dissenting). *See also* LaFave, *supra* note 13, at 354-55.

accuracy of this projection. In *United States v. Williams*,[117] the first case to work a wholesale adoption of the good faith exception, the United States Court of Appeals for the Fifth Circuit in a second majority opinion[118] applied its new standard without first determining whether the underlying conduct of the federal agent was illegal. Williams was arrested by an agent of the Drug Enforcement Administration for jumping bail or, alternatively, for violating a bond condition.[119] A search incident to this arrest produced narcotics, which were the basis of the subsequent prosecution. The United States District Court for the Northern District of Georgia and a panel of the Court of Appeals for the Fifth Circuit held that the federal agent had no authority to arrest Williams in this situation and consequently that the search incident thereto was illegal.[120] The Fifth Circuit, on its own motion, granted rehearing en banc.[121] In the second of two majority opinions, thirteen judges considered it unnecessary to determine if the arrest was valid. Instead, they held that "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."[122] In suggesting that the agent may have violated the fourth amendment, but not deciding this question because the agent acted reasonably and in good faith, the second majority provided no insight as to the power of law enforcement officers to arrest for jumping bail and violating bail conditions. This type of adjudication not only fails to provide clear rules in the fourth amendment field, it also undermines the educational and deterrent effect of the exclusionary rule itself.[123]

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117. 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981).

118. After 16 judges joined in an opinion upholding the drug enforcement agent's arrest of Williams and, consequently, the incident search that produced narcotics, 622 F.2d at 833-39, 13 judges joined in a separate majority adopting and applying a good faith exception to the exclusion of evidence. *Id.* at 840-47.

119. The condition placed on the order releasing Williams on bond was that she not travel outside of Ohio. *Id.* at 833. She was arrested in the Atlanta International Airport. *Id.* at 834.

120. *Id.* at 835.

121. 594 F.2d 98 (5th Cir. 1979).

122. 622 F.2d at 840.

123. Although, when viewed retrospectively, the conduct of an officer who acts in good faith is not deterrable, this limited view of deterrence ignores the educational effect and the impact on police behavior that the clear resolution of a constitutional issue can have. *See*

Similarly, in *Richmond v. Commonwealth*,[124] a recent decision of the Kentucky Court of Appeals utilizing a good faith analysis where officers acted under the authority of a warrant, the court refused to decide the constitutional issue. The defendant had challenged the warrant because it was issued by a district judge outside the territorial limits of his district. The court stated:

> We doubt the authority of a district judge, while outside the territorial limits of his district, to issue a warrant for the search of premises outside his district. . . . [125] We find it unnecessary [,however,] to decide that particular issue . . . because we believe the fruits of the search should not have been suppressed even though the magistrate may not have had authority to issue [the warrant].[126]

This reasoning was based on the conclusion that the officer had acted reasonably and in good faith.[127] Because the court used the good faith rationale employed in *Williams*, it failed to answer the relevant constitutional question — whether the judge had authority to issue a warrant outside of his territorial jurisdiction.

Williams and *Richmond* exemplify the potential for the good faith rule to turn fourth amendment adjudication into an inquiry based solely on reasonableness.[128] Under this analysis, not only will courts be able to avoid settling fourth amendment issues and formulating bright-line rules, but well-established fourth amendment concepts such as "probable cause," "articulable suspicion," and "exigent circumstances" are likely to be diluted.[129] The ultimate paradox is that instead of encouraging the development of unequivocal standards to guide the police and to operate as ready benchmarks for the bad faith determination, the good faith analysis actually will cause courts to gravitate away from rule-oriented

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Mertens & Wasserstrom, *supra* note 14, at 431.

124. No. 80-CA-1366-MR (Ky. Ct. App., July 31, 1981), *aff'd on other grounds*, 637 S.W.2d 642 (Ky. 1982).

125. *Id.*, slip op. at 4.

126. *Id.*

127. *Id.*, slip op. at 9.

128. *See* Ball, *supra* note 12, at 655-56; Bernardi, *supra* note 20, at 104; Mertens & Wasserstrom, *supra* note 14, at 428.

129. *See* Mertens & Wasserstrom, *supra* note 14, at 528.

adjudication.[130] This phenomenon, coupled with the fact that some fourth amendment concepts, such as probable cause, are not reducible to easily quantifiable and readily applicable rules, will leave a significant portion of fourth amendment law without the help of bright-line rules to aid the good faith determination.

B. *Exigent Circumstances and Mistakes of Fact*

Even when precise procedural standards are available, administrative difficulties cannot be eliminated entirely. Unless a rule violation automatically amounts to bad faith, courts still will be faced with the ad hoc resolution of factual issues which will emerge from the government's attempt to rebut the presumption of bad faith arising from the failure of the police to comply with a standardized procedure. Bad faith, and the concomitant suppression of evidence, cannot be unequivocally deduced, however, from the violation of an explicit rule. Noncompliance may be based on some exigency or on a reasonable mistake of fact. These circumstances, in which the conduct of the police is in theory nondeterrable, represent the very foundation on which the good faith notion is grounded. Therefore, unless rules can be drafted in such a straightforward, hard-and-fast fashion as to eliminate all exceptions, a task which seems virtually impossible given the tremendous variety of police-suspect encounters, courts still will be faced with the burden of making difficult factual decisions when rules are violated.

For example, in cases in which the police have failed to comply with the rule requiring an arrest warrant to enter private premises to make an arrest,[131] both trial and appellate judges still find themselves adjudicating the factual question of whether exigent

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130. This result could possibly be avoided if courts were to decide the fourth amendment issue first, formulating clear rules when possible, before turning to the good faith question. *See* Note, *supra* note 20, at 942. Courts generally are not inclined, however, to reach issues they do not have to decide in order to resolve the case. As stated by Justice Brennan, "there is clear precedent for avoiding decision of a constitutional issue raised by police behavior when in any event the evidence [is] admissible in the particular case at bar." United States v. Peltier, 422 U.S. 531, 555 n.14 (1975) (Brennan, J., dissenting). Current examples are the second majority opinion in United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981), and Richmond v. Commonwealth, No. 80-CA-1366-MR (Ky. Ct. App., July 31, 1981), *aff'd on other grounds*, 637 S.W.2d 642 (Ky. 1982). *See supra* text accompanying notes 117-27.

131. *See* Payton v. New York, 445 U.S. 573 (1980).

circumstances justified the warrantless entry. In *People v. Carmack*,[132] the Appellate Court of Illinois analyzed the facts in terms of seven separate factors before concluding that exigent circumstances justified a warrantless arrest of the defendant in his home. Even when the allegation of exigent circumstances has been rejected in this context, courts are forced to spend time analyzing the claim.[133]

Although the Supreme Court expressly excepted exigent circumstances from its arrest warrant rule,[134] such an express recognition is hardly necessary to trigger a good faith claim following violation of a clear-cut rule. Assume, for instance, that the police violate the *Chadwick-Sanders-Ross* principle[135] by searching, without a warrant, a suitcase found at an airport. Even though a warrant clearly is required under such circumstances,[136] an immediate search of the suitcase arguably may have been necessary to identify which of several suspects owned the luggage and was therefore subject to arrest. Although a court might reject this argument, for example, because independent probable cause existed to arrest the defendant, the court, nevertheless, would have to consider the facts and the arguments of the parties before resolving the matter. The exi-

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132. 103 Ill. App. 3d 1027, 432 N.E.2d 282 (1982).

133. *See, e.g.*, United States v. McEachin, 670 F.2d 1139, 1144 n.7 (D.C. Cir. 1981) (discussing *Dorman* but also suggesting that exigent circumstances may depend on the availability of a telephone warrant); United States v. Minick, 438 A.2d 205 (1981), *vacated and rehearing en banc granted*, Jan. 13, 1982 (applying multifactor test of *Dorman*); Spring v. State, 626 S.W.2d 37 (Tex. Crim. App. 1981) (unsupported home entry following arrest); Provost v. State, 631 S.W.2d 173 (Tex. Crim. App. 1981) (actions of police contradicted their stated purpose for warrantless entry).

See also Washington v. Chrisman, 455 U.S. 1 (1982), in which two state appellate courts, and ultimately the United States Supreme Court, were required to analyze the operative facts to determine if a warrantless room entry was proper. The Supreme Court held the entry permissible because a lawful arrest already had taken place and the officer was thus authorized to closely monitor the movements of the arrestee.

134. Payton v. New York, 445 U.S. 573, 590 (1980).

135. Together, these cases stand for the principle that a legitimate expectation of privacy applies to a repository of personal effects or other closed containers, and consequently such containers cannot be searched without a warrant if they are found outside a vehicle. United States v. Ross, 102 S. Ct. 2157 (1982); Arkansas v. Sanders, 442 U.S. 753 (1979); Chadwick v. United States, 433 U.S. 1 (1977).

136. This assumes either that no arrest has taken place or, if there has been an arrest, that the suitcase could not be opened or searched incident thereto. *But cf.* text accompanying notes 171-73.

gent circumstances issue thus lurks in the background of bright-line rules to prevent such rules from providing the desired administrative efficiency in a system of adjudication based on good faith.

The above-mentioned example also illustrates another problem undermining the ready determination of bad faith based on non-compliance with an explicit rule. When an officer acts on the basis of an erroneous assessment of the operative facts, bright-line rules simply do not alleviate the administrative burden of determining good faith.[137] In the above examples regarding residential arrests and luggage searches, if the officers reasonably believed that exigent circumstances existed, then they acted in good faith even though mistaken. Thus, a court faced with this question cannot rely on the violation of a bright-line rule, but must determine the reasonableness of the alleged mistake of fact.

Most significant with respect to factual mistakes is the realization that virtually every one of the Supreme Court's bright-line rules involves the probable cause determination in some form.[138] Despite compliance with the bright-line rule,[139] the basic triggering mechanism which activates the rule — probable cause — may be challenged. A court then would have to determine whether probable cause existed and, if not, whether the alleged belief in its existence was reasonable, thereby establishing good faith.[140]

What this means, of course, is that the establishment of clear, precise rules as to what the police can and cannot do in certain situations will not solve the practical difficulties in determining good faith. Although initially and superficially it might appear that good faith can be equated with rule compliance and bad faith with

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137. Justice White was the first to observe that police conduct based on a mistake of fact cannot be deterred by the exclusionary rule. Stone v. Powell, 428 U.S. 465, 540-42 (1976) (White, J., dissenting).

138. Other than situations in which the fourth amendment does not apply because of the absence of a privacy expectation, and *Terry*-type stops based on articulable suspicion, all police investigatory practices require probable cause regardless of whether a warrant is also required.

139. *See supra* text accompanying notes 36-100.

140. *See* Stone v. Powell, 428 U.S. 465, 538-40 (1976) (White, J., dissenting). Justice Brennan has argued that the operation of the good faith rule in this context will reduce the probable cause standard to one of reasonableness thereby undermining the deterrence rationale by encouraging the police to take chances. *See* United States v. Peltier, 422 U.S. 531, 556-59 (1975) (Brennan, J., dissenting).

noncompliance, such a ready formula is too simplistic for a good faith system based on the deterrence rationale. This represents another of the pragmatic problems with a good faith/bright-line rule partnership. The real problems, however, are jurisprudential rather than administrative. It is to this concern that we will now turn.

IV. THE FOURTH AMENDMENT AND BRIGHT-LINE RULES

A. *The Difficulty of Illuminating the Law of Search and Seizure*

Professor Wayne LaFave, one of our foremost fourth amendment scholars and a longtime advocate of clear standards to guide the police,[141] has said in reference to bright-line rules that "the 'bright-line' needed . . . is one which irradiates, [and] not one which bedazzles."[142] The problem, however, is an inherent inability to achieve an adequate level of irradiation for the police to consistently follow and for the courts to effectively utilize. Fourth amendment encounters between the police and the public are simply too numerous and too varied to be subject to standardized procedures that will always dictate the appropriate police response. Because of this variety and diversity, attempts to draft bright-line rules have proved unsuccessful. Such rules provide some guidance but are incapable of addressing in advance all the factual situations that police may encounter. To the extent that bright-line rules bedazzle, they will be of little help to the courts in dealing with the good faith question.

United States v. Robinson,[143] the Supreme Court's first holding expressly eschewing case-by-case analysis of the justification for the police practice employed in favor of a standard procedure available to the police in all similar fourth amendment cases, exemplifies the difficulties in drafting hard-and-fast rules. Although *Robinson* instructs the police that they may engage in a full search of the person incident to a lawful custodial arrest, the decision says nothing of when a custodial arrest is legitimate.[144] An officer thus

141. *See* LaFave, *supra* note 13; LaFave, *supra* note 6.

142. LaFave, *supra* note 13, at 327.

143. 414 U.S. 218 (1973).

144. *See* Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). Justice Stewart points out the relevance of the issue of whether taking someone into custody following a minor traffic arrest is legitimate under the fourth amendment. Once the consti-

is left with a case-by-case evaluation of whether to make a custodial arrest and a subsequent personal search. The existence of such discretion under the *Robinson* rule is subject to obvious abuse[145] and provides little aid in the good faith determination.[146]

Another bright-line rule was established in *Michigan v. Summers*[147] in which the Supreme Court concluded that detention of persons found at the scene of the execution of a search warrant was constitutionally permissible.[148] This rule appears clear-cut and operates to expedite law enforcement by facilitating a further search and seizure of the person if incriminating items should be uncovered in the execution of the warrant. The *Summers* rule, however, creates more questions than it answers and fails to address the major issue in this area. The facts of *Summers* specifically involved the occupant of a home for which a search warrant had been issued. Although the language and analysis of Justice Stevens' majority opinion suggests that the detention rule might be limited to residents,[149] whether the holding applies to nonresidents or to places other than dwellings is uncertain. If *Summers* is given an expansive reading, then the police and the courts are left with the question of who can be arrested following the detention of those found at the scene and the discovery of contraband on the premises. Obviously occupant-residents can be arrested, but, otherwise, what kind of property or business connection is necessary to provide probable cause for arrest? The opinion does not say.

A further ambiguity created by the Supreme Court's detention rule is the scope of the "scene" of the execution of the warrant. Does the rule apply to persons in the yard or to people in

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tutional validity of the arrest is established, the validity of the incidental search follows therefrom. Stewart points out, however, that the validity of the arrest may be the subject of an initial and persuasive challenge. *Id.*

145. Gustafson v. Florida, 414 U.S. 260 (1973), provides an example of such abuse. Gustafson was arrested for failure to have an operator's license in his possession.

146. The reasonableness and consequent good faith of the arresting officer in taking the arrestee into custody still will be subject to case-by-case determination.

147. 452 U.S. 692 (1981).

148. The Court's holding was based on a conclusion that the intrusion was minimal, valid law enforcement objectives were involved, and the regular issuance of a search warrant provided sufficient articulable suspicion for the detention. 452 U.S. at 701-04.

149. Summers, in fact, was a resident of the home for which the warrant was issued, and Justice Stevens' majority opinion at several places refers to "occupants." *Id.* at 702, 703, 705.

automobiles parked in front of the premises? Can persons leaving the scene when officers arrive[150] or coming after commencement of the search be detained?

In addition to the ambiguities mentioned above, which suggest something less than a bright-line rule,[151] *Summers* is of absolutely no aid in deciding the more difficult question of when persons found at the scene, but not named in the warrant, may be searched.[152] This is both the most important and most troublesome issue facing the police and the courts in the area of search warrant execution and currently must be decided on an ad hoc basis. Some guidance with respect to this issue is needed in the form of a standardized procedure.[153]

Any discussion of the adequacy of the Court's bright-line rule cases would be incomplete without consideration of the recent *Robbins-Belton-Ross* automobile trilogy.[154] *Robbins v. California*[155] and *New York v. Belton*[156] were decided on the same day at the end of the Supreme Court's 1980 Term. Both cases dealt with the search of closed items — a wrapped package and a zippered jacket pocket — found in an automobile. The issue in these cases was created by the Supreme Court's earlier decisions in *United States v. Chadwick*[157] and *Arkansas v. Sanders*[158] which held that luggage, to which a reasonable expectation of privacy attached, could not be searched without a warrant even though found in an auto-

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150. This question seems to be answered in *Summers* to the extent that persons are walking out the door or descending the "front steps" when officers arrive. *Id.* at 693. *Summers* does not indicate, however, how far from the premises suspects can be and nevertheless still be detained.

151. Arguably, a bright-line rule does exist if the decision is limited to its facts — the detention of a resident who attempts to leave the scene upon the arrival of the police.

152. *See* 2 LAFAVE, SEARCH AND SEIZURE § 4.9(e) (1978). Of course, if someone found at the scene of a search is arrested legitimately, then they can be searched incident to the arrest. *See* Michigan v. Summers, 452 U.S. 692 (1981).

153. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (officers saw and smelled marijuana when attempting to serve arrest warrant at suspect's home; five other persons found on the premises were detained until search warrant was obtained); Ybarra v. Illinois, 444 U.S. 85 (1979) (search warrant for tavern and bartenders served while patrons present).

154. United States v. Ross, 102 S. Ct. 2157 (1982); New York v. Belton, 453 U.S. 454 (1981); Robbins v. California, 453 U.S. 420 (1981).

155. 453 U.S. 420 (1981).

156. 453 U.S. 454 (1981).

157. 433 U.S. 1 (1977).

158. 442 U.S. 753 (1979).

mobile that was subject to a warrantless search. Because an intervening arrest had taken place in *Belton,* the Court analyzed the container search question differently in the two cases. In *Belton,* a majority of the Justices concluded that the search of the zippered jacket pocket was justifiable as a search incident to the preceding arrest.[159] In *Robbins,* a plurality opinion, the Court held that a warrantless, probable cause search of an automobile could not extend to the opening of "closed, opaque containers" found inside.[160]

In *Robbins,* the Supreme Court was faced directly with elucidation of the holdings in *Chadwick* and *Sanders.* These latter cases involved luggage, and *Robbins* involved the warrantless opening of two packages wrapped in green, opaque plastic. The packages were found in a recessed luggage compartment of the petitioner's station wagon after he had been stopped for a traffic violation and the officers had detected the presence of marijuana in the vehicle. Marijuana was found in the packages after they were opened.

Justice Stewart's plurality opinion in *Robbins* attempted to crystallize the *Chadwick* and *Sanders* decisions into a clear rule of general application to guide the police in future auto search cases in which containers were found inside the vehicle. The phrase chosen by the plurality, however, was less than illuminating and again exemplified the difficulty of drafting bright-line rules. The plurality opinion concluded that "closed, opaque containers" found during the lawful search of a vehicle may not be opened without a warrant.[161] Although the Court consistently had drawn distinctions between automobiles and certain kinds of containers based on perceived differences in privacy interests, there had not been a clear point of demarcation as to which kinds of containers were entitled to the greater protection of a search warrant. The *Robbins* plurality attempted to draw this line with its "closed, opaque container" rule.

As pointed out by Justice Powell's concurring opinion, however, the plurality's attempt to establish a bright-line rule is far from satisfying.[162] Each one of the terms in the chosen phrase is some-

159. 453 U.S. at 460-61.
160. 453 U.S. at 426, 428-29.
161. *Id.*
162. *Id.* at 433-34 (Powell, J., concurring).

what indefinite. What is a container and when is it closed and opaque?[163] Does the term apply to bottles, tins, cardboard boxes, paper cups, laundry bags, and the "ubiquitous brown paper grocery sack?"[164] The plurality also left unclear whether these questions were to be answered categorically or whether in each case a court was to inquire into whether a reasonable expectation of privacy attached to a particular container.[165] Thus, *Robbins* did little to advance the objective of formulating bright-line rules to guide the police and the courts.

Equally troublesome is *New York v. Belton*,[166] which was decided the same day as *Robbins*. In *Belton*, a five-Justice majority[167] seized the fact that an arrest had occurred to justify the subsequent search of the zippered pocket of a jacket found in the back seat of the automobile. In order to provide "[a] single familiar standard . . . to guide police officers,"[168] the Court held that incident to the lawful custodial arrest of the occupant of an automobile, the entire passenger compartment of the vehicle could be searched, including any closed containers found therein.[169]

Although such a rule defining the permissible scope of a search incident to a vehicular arrest seems clear, Justice Brennan's dissenting opinion plainly points out the ambiguity of the rule:

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163. Justice Stewart used the word "opaque" in a rather confusing fashion, for he apparently intended the term to refer to something that cannot be seen through, or is impenetrable by light. Although this is the correct definition, the term "opaque" may be understood colloquially to mean something which light does pass through and which vaguely can be seen through.

164. *See* Robbins v. California, 453 U.S. 420, 429 n.1, 434 n.3 (1981) (Powell, J., concurring). The Court ultimately dealt with the brown paper bag question in United States v. Ross, 102 S. Ct. 2157 (1982).

165. 453 U.S. at 434 n.3. This raises the "worthy" versus "unworthy" container issue that was the basis of the court of appeals' panel decision in United States v. Ross, 655 F.2d 1159, 1161 (D.C. Cir. 1981), *rev'd*, 102 S. Ct. 2157, 2160-61 (1982).

166. 453 U.S. 454 (1982).

167. Interestingly, *Belton* involved the fortuity of an intervening arrest based on the smell of marijuana and the discovery of an envelope marked "supergold." *Id.* at 456. *Robbins* involved virtually the same facts, the smell of marijuana and the discovery of a vial of liquid; but in *Robbins*, the search preceded the arrest. Both cases involved probable cause to search as well as arrest; thus reliance on the fact of arrest in *Belton* attests to the current disagreement on the Court with respect to the permissible scope of vehicular searches.

168. 453 U.S. at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

169. *Id.* at 460-61. It should be noted that the *Belton* rule allowing searches incident to vehicular arrests does not extend to the automobile's trunk.

> The Court's new approach leaves open too many questions and, more important, it provides the police and the courts with too few tools with which to find the answers.
>
> Thus, although the Court concludes that a warrantless search of a car may take place even though the suspect was arrested outside the car, it does not indicate how long after the suspect's arrest that search may validly be conducted. Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours? Does it matter whether the suspect is standing in close proximity to the car when the search is conducted? Does it matter whether the police formed probable cause to arrest before or after the suspect left his car? And *why* is the rule announced today necessarily limited to searches of cars? What if a suspect is seen walking out of a house where the police, peering in from outside, had formed probable cause to believe a crime was being committed? Could the police then arrest that suspect and enter the house to conduct a search incident to arrest? Even assuming today's rule is limited to searches of the "interior" of cars — an assumption not demanded by logic — what is meant by "interior"? Does it include locked glove compartments, the interior of door panels, or the area under the floorboards? Are special rules necessary for station wagons and hatchbacks, where the luggage compartment may be reached through the interior, or taxicabs, where a glass panel might separate the driver's compartment from the rest of the car? Are the only containers that may be searched those that are large enough to be "capable of holding another object"? Or does the new rule apply to any container, even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested"?
>
> The Court does not give the police any "bright-line" answers to these questions. More important, because the Court's new rule abandons the justifications underlying *Chimel, it offers no guidance to the police officer seeking to work out these answers for himself.*[170]

Not only does the *Belton* rule raise questions with respect to searches incident to automobile arrests, the abandonment of the

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170. *Id.* at 469-70 (Brennan, J., dissenting) (citations omitted). The questions that Justice Brennan raises can be answered only through careful analysis. *See* LaFave, *supra* note 13, at 327-28 n.114.

rationale of *Chimel v. California*,[171] noted by Justice Brennan, raises questions with respect to other arrests as well. A majority of the Court in *Belton* apparently adopted the view that the *Chimel* rule, which permits the search of the immediate area surrounding the arrestee, was designed to define an area that can be searched rather than to be functionally limited to the area where the persons arrested could *actually* reach to grab a weapon or evidence.[172] Under the former approach, the immediate area of the arrest could be searched even though the arrestee was incapable of reaching a weapon or evidence, because either immobilized or removed from the area. In *Belton*, the majority adopted this broader view to provide a bright-line rule for the police to follow in the case of a vehicular arrest. This obviously raises the question of whether this same approach is to be applied in the case of other searches incident to arrest also for the reason of providing the police with a clear rule.[173]

The confusion created by *Belton* and its troublesome interplay with *Robbins v. California*[174] led the Supreme Court last term to consider and decide *United States v. Ross*.[175] The search in *Ross* went beyond the *Belton* rule[176] and thus gave the Court a chance to reconsider *Robbins*, this time in the context of the search of a brown paper bag.[177] To harmonize *Robbins* and *Belton* and provide consistency and clarity to the automobile/closed container dichotomy, a majority of the Court in *Ross* held that closed containers found in the lawful search of a vehicle can be opened without a warrant.[178] This rule appears to be as straightforward as is possible. It avoids the necessity of police reliance on a preceding arrest

171. 395 U.S. 752 (1969).

172. This is the debate that raged in the lower courts following the *Chimel* decision. *See* LAFAVE, *supra* note 152, at § 6.3(c).

173. Application of the *Belton* approach to other situations would lend validity to cases such as People v. Perry, 47 Ill. 2d 402, 266 N.E.2d 330 (1971), in which a dresser drawer and a purse in defendant's motel room were searched following the defendant's arrest and removal from the room.

174. *See infra* text accompanying notes 196-98.

175. 102 S. Ct. 2157 (1982).

176. The *Belton* "search incident to arrest" rule applies only to the interior of the vehicle. The search in *Ross*, however, involved items found in the automobile's trunk.

177. A zippered leather pouch was also searched. 102 S. Ct. at 2160.

178. *Id.* at 2172.

to justify a container search, and it treats all parts of the vehicle[179] and all containers consistently.[180]

Even the straightforward rule announced in *Ross*, however, has one analytical and two practical ambiguities. On the practical side, Justice Stevens' majority opinion emphasized the necessity of probable cause to search the automobile as an antecedent justification for the inspection of closed containers found inside. One issue that this requirement creates is a clear necessity to distinguish between probable cause to search and probable cause to arrest. In the latter case, assuming an arrest has taken place, only containers found inside the vehicle can be searched under *Belton*. To search the trunk and items discovered therein, probable cause to search the car is required. Although probable cause to arrest generally will also provide probable cause to search the vehicle,[181] this may not always be the case.[182] Thus, *Ross* still may leave officers with the need to make fine distinctions in some cases.

More importantly, the *Ross* decision purports to distinguish *Chadwick* and *Sanders* as cases in which probable cause existed only to search the respective pieces of luggage. The majority opinion noted that probable cause to search the vehicle did not exist independently in *Chadwick* and *Sanders*, and the fact that the luggage in these cases was seized from an automobile was merely coincidental.[183] This creates an interesting dichotomy for the police to use and abuse. For example, if prior probable cause exists to search a briefcase, the fact that it is placed in a vehicle does not justify its warrantless search. Only when probable cause to search the car exists independently can the briefcase be searched without a warrant. This places police officers in the difficult position of having to determine whether probable cause exists to search the automobile or only the briefcase.

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179. No distinction was made in *Ross* between the immediate interior of vehicles and other repositories such as glove compartments and trunks.

180. The majority specifically refused to distinguish "worthy" from "unworthy" containers. 102 S. Ct. at 2171.

181. *Compare, e.g.*, Robbins v. California, 453 U.S. 420 (1981) (probable cause to search also supplying probable cause to arrest) *with* Belton v. New York, 453 U.S. 454 (1981) (probable cause to arrest also supplying probable cause to search).

182. For example, the defendant may be arrested on an outstanding warrant and no independent probable cause develops at the time of the arrest to search the vehicle.

183. United States v. Ross, 102 S. Ct. at 2166-67, 2168, 2172.

Unless probable cause to search the vehicle develops independently at the scene, it seems that an answer to this type of question will depend on a case-by-case evaluation of the information known to the police and the amount of time the suspect spends in the vehicle prior to the stop. Every time a suspect enters a vehicle carrying some type of satchel, or even wearing a trenchcoat, the police, and later the courts, will have to engage in this kind of factual analysis with respect to the probable cause issue. The result of this analysis is crucial, for under the Supreme Court's analysis in *Ross* and its distinction of *Chadwick* and *Sanders,* if probable cause is focused on a particular container, it cannot be searched without a warrant even after it is placed in a vehicle. On the other hand, if the facts and the nature of the crime provide probable cause to search the car as well, the container can be inspected without the necessity of obtaining a warrant. This obviously creates the potential for abuse by police who delay the encounter with a suspect until a vehicle becomes involved, because the vehicle becomes a linchpin for the warrantless search of items the suspect may have placed inside it. Thus, not only will police and the courts have to evaluate the probable cause issue, but courts also will have to consider the possibility of subterfuge. Consequently, although *Ross* is the most radiant line the Supreme Court has drawn in the automobile/container dichotomy thus far, it is not completely illuminating and fails to eliminate factual analysis in these cases in favor of standardized procedure.

In addition to the pragmatic ambiguities left by the Supreme Court's decision in *Ross,* the opinion also creates a major analytical problem because it undermines the Court's fourth amendment privacy analysis. The Court has relied heavily on its privacy formula in recent fourth amendment cases,[184] and the effort in *Ross* to establish a bright-line rule creates a major confrontation with prior decisions. The majority in *Ross* purports not to overrule *Chadwick* and *Sanders;* however, as pointed out by Justice Marshall in his dissent,[185] *Ross* is blatantly inconsistent with the privacy rationale of those prior cases. *Chadwick* and *Sanders* held that a legitimate expectation of privacy attached to luggage and therefore a warrant

184. *See* Ashdown, *supra* note 9.

185. 102 S. Ct. at 2179-81 (Marshall, J., joined by Brennan, J., dissenting).

was required in order to search it. *Ross*, however, held that when such closed containers are placed in automobiles, they can be searched without a warrant. Justice Marshall points out that the *Ross* holding cannot be explained on a mobility notion because such a theory was rejected in *Chadwick* and, in any event, containers, unlike vehicles, are not mobile.[186] Additionally, custodial detention of containers does not involve the same kind of inconvenience associated with the detention of automobiles.[187]

With regard to privacy, it must be assumed that the Supreme Court has not abandoned its conclusion in *Chadwick* and *Sanders* that a legitimate expectation of privacy generally applies to repositories of personal effects. The easiest explanation of *Ross* is that this legitimate expectation of privacy is sacrificed when such an item is placed in an automobile. In fact, this appears to be the rationale behind the holding.[188] One's privacy expectations in personal satchels may depend on where the satchels are located or where they are placed. This notion, however, fails to explain why a legitimate expectation of privacy attaching to luggage is sacrificed when the luggage is placed in a vehicle. Surely a piece of luggage carried in public is less private than when it is placed in the trunk of an automobile. Nevertheless, the majority in *Ross* suggests that the luggage is protected by the warrant requirement in the former case.[189] Apparently, the Supreme Court's rather flexible privacy approach has encountered a direct conflict with the Court's recent interest in establishing bright-line rules to guide the police and expedite law enforcement.

B. *Narrowing the Scope of the Fourth Amendment*

The recent *Robbins-Belton-Ross* automobile trilogy exemplifies

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186. *Id.* at 2179. (Marshall, J., joined by Brennan, J., dissenting).

187. *Id.*

188. *Id.* at 2171-72.

189. The entire thrust of the *Ross* opinion is that personal containers, like luggage, become vulnerable only when caught up in the probable cause search of an automobile. Justice Stevens' majority opinion labors to distinguish United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), thereby generally preserving the legitimate expectation of privacy (and the warrant requirement) generally applicable to luggage. Of course, luggage placed in a private residence does not need its own privacy umbrella for warrant protection. *See* Payton v. New York, 445 U.S. 573 (1980).

the difficulty the Supreme Court has encountered in drafting bright-line rules to guide the police. This difficulty has led to the unfortunate complication of placing pressure on the fourth amendment's substantive scope. While the Court has strived to eliminate uncertainties and ambiguities from prior rules in order to provide clear instructions to the police, the area of permissible police investigatory practices has expanded at the expense of fourth amendment protection.

The demands of clarity offer a choice. Warrantless police practices can be circumscribed narrowly to permit only minimal intrusions so that the procedure will always be justified given the limited invasion.[190] Alternatively, a rule can be drawn broadly to cover all situations in a particular category of investigatory work, thereby eliminating the need for factual evaluation and judgment by the police. Given the Supreme Court's law and order bent with respect to search and seizure practices,[191] the Court has chosen the latter course, consistently expanding the reach of detection procedures in the name of clarification and expediency.

The first indication of this tendency to define police powers broadly to avoid whatever uncertainty flows from case-by-case fac-

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190. Examples might include a request to a motorist to get out of his vehicle following a traffic stop, *see* Pennsylvania v. Mimms, 434 U.S. 106 (1977), or a brief encounter on the street where a few questions are asked. *See* Brown v. Texas, 443 U.S. 47 (1979); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968).

191. *See, e.g.*, United States v. Ross, 102 S. Ct. 2157 (1982); Washington v. Chrisman, 455 U.S. 1 (1982); New York v. Belton, 443 U.S. 454 (1981); Michigan v. Summers, 452 U.S. 692 (1981); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); United States v. Payner, 447 U.S. 727 (1980); United States v. Havens, 446 U.S. 620 (1980); United States v. Mendenhall, 446 U.S. 544 (1980); United States v. Crews, 445 U.S. 463 (1980); Smith v. Maryland, 442 U.S. 735 (1979); Bell v. Wolfish, 441 U.S. 520 (1979); Dalia v. United States, 441 U.S. 238 (1979); Rakas v. Illinois, 439 U.S. 128 (1978); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Pennsylvania v. Mimms, 434 U.S. 106 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976); Andresen v. Maryland, 427 U.S. 463 (1976); United States v. Santana, 427 U.S. 38 (1976); United States v. Miller, 425 U.S. 435 (1976); United States v. Watson, 423 U.S. 411 (1976); Texas v. White, 423 U.S. 67 (1975); Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Edwards, 415 U.S. 800 (1974); United States v. Matlock, 415 U.S. 164 (1974); Gustafson v. Florida, 414 U.S. 260 (1973); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973); Cupp v. Murphy, 412 U.S. 291 (1973); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Brown v. United States, 411 U.S. 223 (1973); Adams v. Williams, 407 U.S. 143 (1972).

tual determinations came in *United States v. Robinson.*[192] In *Robinson,* the Supreme Court disagreed with the conclusion of the United States Court of Appeals for the District of Columbia that the validity of a full search of the person following a custodial arrest was dependent in each case on the need to disarm the suspect or to discover evidence. The court of appeals held that because only a traffic arrest was involved, there was no evidence to seize and the search, therefore, was limited to a frisk for weapons.[193] Instead of adopting this straightforward rule permitting only patdowns in the case of custodial arrests for traffic-type violations, the Supreme Court chose to adopt a broader rule permitting a full personal search in the case of all custodial arrests, thus avoiding the need for officers to make judgments about the likely presence of weapons or evidence in particular cases.[194] Although such a rule has the virtue of relieving the police from making factual evaluations and exercising judgment in custodial arrest situations, this rule runs counter to several considered fourth amendment principles.[195] The majority in *Robinson* nevertheless felt that it was necessary to provide the police with a rule for all occasions in which an arrestee was to be taken into custody, and this was accomplished by drawing the rule broad enough to cover all custodial arrests despite the potential for abuse.[196]

The best example of the continual expansion of permissible police practices to give law enforcement a bright-line standard is the recent *Robbins-Belton-Ross* automobile trilogy. Compounding the lack of clarity already discussed, which arose from the individual opinions in *Robbins* and *Belton,*[197] was the additional uncertainty created by the interplay between the two cases. The plurality opin-

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192. 414 U.S. 218 (1973).

193. United States v. Robinson, 471 F.2d 1082, 1095 (D.C. Cir. 1972), *rev'd,* 414 U.S. 218 (1973).

194. 414 U.S. at 235-36.

195. *See* Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968). For a discussion of the conflict between the principles developed in these cases and the *Robinson* decision, see Justice Marshall's dissenting opinion in *Robinson.* United States v. Robinson, 414 U.S. 218, 248-59 (1973) (Marshall, J., joined by Douglas, J., and Brennan, J., dissenting).

196. The abuse would take the form of a subterfuge custodial arrest to undertake a full personal search. *See* Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring).

197. *See supra* text accompanying notes 154-73.

ion in *Robbins* refused to permit the search of a closed, opaque container found in a vehicle in the course of a probable cause search, whereas the *Belton* rule permits the opening of closed containers found in the interior of an automobile following the arrest of an occupant of the vehicle. Because the *Belton* decision was based on an expansion of the permissible scope of a search incident to a vehicular arrest, the search of a container taken from a vehicle after *Robbins* and *Belton* had to be justified on the basis of a valid preceding arrest. If the container search preceded the arrest, even though both probable cause to arrest and search existed — which will often be the case — the search would have been invalid under *Robbins*.[198] Given this less than rational and somewhat confusing state of the law,[199] the Supreme Court reconciled the two cases by holding in *Ross* that closed containers discovered during the warrantless search of a vehicle could also be searched without a warrant.

Ross eliminated the probable cause search/search incident to arrest dichotomy and, most importantly, expanded the automobile exception[200] to include the search of closed containers found not only in the interior of a vehicle, but also in the trunk. In an effort to reconcile and clarify prior decisions, the Supreme Court in *Ross* opted for an expansion of the rights of law enforcement officers in an effort to provide a clear standard and thus avoid the need for ad hoc judgments.

The Court is poised to go even further in the automobile area. Certiorari recently was granted in a case dealing with the controversial issue of whether a *Terry* patdown can extend to parts of the

198. Although searches occasionally have been validated as incident to an arrest even though they preceded the arrest in point of time, *see* Cupp v. Murphy, 412 U.S. 291 (1973); People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955), no attempt was made in *Robbins* to justify the search on this ground.

199. Justice Stevens summarized this most forcefully. *See* Robbins v. California, 453 U.S. 420, 444-53 (1981).

200. The so-called "automobile exception" refers to the doctrine permitting the probable cause search of an automobile without the necessity of obtaining a warrant. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); Texas v. White, 423 U.S. 67 (1975); Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

automobile after the suspect has been removed and frisked.[201] An affirmative answer to this question to clearly delineate the permissible practice in this context would not be surprising given the Court's attitude toward automobiles. An expansive reading of the right to frisk in the case of an automobile stop would make the motorist subject to police scrutiny of his vehicle in the case of mere suspicion, a clear expansion beyond the probable cause requirement of *Belton* and *Ross*.

There is no reason to suppose that the adoption of a good faith exception to the exclusionary remedy operating in conjunction with the Court's rule-oriented method of adjudication will relieve this doctrinal pressure on the fourth amendment. The Supreme Court's law enforcement bent in this area undoubtedly is tied to an effort to avoid the operation of the exclusionary rule. Although the good faith rule avoids the sanction of exclusion in the case of police good faith, findings of bad faith would still render evidence inadmissible. If the good faith determination is to be presumptively based on compliance with a bright-line rule, the incentive to draft the rules broadly to avoid findings of bad faith and the consequent exclusion still will be present.

There is even reason to fear that the narrowing of the fourth amendment and the expansion of investigatory practices will be compounded if a good faith exception is in effect. With good faith as the controlling issue, appellate courts will be reviewing most fourth amendment questions in the context of appeals brought by the government. Realizing that reasonableness is the focal point of fourth amendment litigation under the good faith approach, criminal defendants are unlikely to press their fourth amendment claims on appeal. The chances of success then would be reduced well beyond even the current probabilities of victory on appeal, because arguing a fourth amendment violation alone would be insufficient; the police conduct also would have to be objectively unreasonable. Consequently, most fourth amendment cases would reach the appellate courts in the posture of the government seeking to overturn a trial judge's finding of bad faith by arguing for an expansion of permissible law enforcement detection practices. Thus,

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201. Michigan v. Long, 413 Mich. 461, 320 N.W.2d 866, *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-256).

the scales are pragmatically weighted in favor of a continued narrowing of the fourth amendment.

V. THE FOURTH AMENDMENT HORIZON: *Illinois v. Gates*

The United States Supreme Court appears poised in *Illinois v. Gates*[202] to adopt a good faith modification of the exclusionary rule; hence we will soon know whether the scales have tipped in favor of a narrowed fourth amendment. After *Illinois v. Gates* was argued on the issue of whether probable cause could be supplied by an anonymous informant who failed to indicate the source of his information,[203] the Supreme Court set the case for reargument on the issue of whether the exclusionary rule "should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."[204] The facts of *Gates* indicate why the Court chose it for consideration of this issue. Unlike other cases where the good faith rule has been urged on the Justices,[205] the conduct of the police in *Gates* was based on a reasonable interpretation of the law, and they acted on the authority of a search warrant issued by a circuit judge. The case is thus a perfect vehicle for recognition of the good faith principle.[206]

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202. 103 S. Ct. 436 (1982) (mem.).

203. The case was first argued before the Court on October 13, 1982. On November 29, 1982, the Court issued an order asking the parties to reargue the case on the good faith issue. 103 S. Ct. 436 (1982) (mem.).

204. Illinois v. Gates, 103 S. Ct. 436 (1982) (mem.). This issue was argued before the Court on March 1, 1983.

205. *See* Taylor v. Alabama, 102 S. Ct. 2664 (1982) (suppressing the defendant's confession where he was arrested without a warrant and without probable cause and taken to the station for questioning). The majority dismissed the State's argument for a good faith exception to the exclusionary rule in a single sentence. *See id.* at 2669.

206. Apparently, the Supreme Court itself recognized this fact because following oral argument on the original probable cause issue, the Court set the case for reargument on the good faith issue—a question the Court previously and unanimously had refused the State permission to argue. Illinois v. Gates, 103 S. Ct. 436, 437 (1982) (mem.) (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting from restoration of the case to the calendar for reargument).

One commentator, however, after observing the oral arguments on the good faith issue, questioned whether *Gates* was an appropriate case in which to recognize a good faith exception. Under Illinois law, trial courts must test the facial sufficiency of search warrants against a probable cause standard. Thus, adopting a good faith exception to the exclusionary rule may be irrelevant in this case. Lauter, *Did the Court Pick the Wrong Case?*, Nat'l

In *Gates*, the police department of Bloomingdale, Illinois received an anonymous, handwritten letter indicating that Lance and Sue Gates were drug dealers travelling back and forth to Florida to purchase drugs to sell in their Bloomingdale home.[207] The Bloomingdale Police Department, with the aid of a detective of the Chicago Police Department and an agent of the Drug Enforcement Administration (DEA), verified much of the detail in the anonymous letter. The Gates' address provided by the informant was correct, and on May 5, 1978 Lance Gates was, indeed, booked on a flight to West Palm Beach, Florida, where the informant indicated Lance would meet his wife who had driven down a few days earlier to obtain drugs. The informant's letter stated that the car would then be driven back to the Chicago area loaded with drugs. The DEA agent in Florida confirmed that Lance Gates had arrived in West Palm Beach and taken a cab to a Holiday Inn and entered a room registered to his wife. The agent then informed the Bloomingdale police that Gates and a woman had left the room and had driven away in a red and gray Mercury with 1978 Illinois license plates. The plate number proved to be registered to Lance B. Gates, but for a different automobile.[208]

Based on the anonymous letter and verification of the informa-

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L.J., Mar. 14, 1983, at 6.

207. The letter recited as follows:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida where she leaves it to be loaded up with drugs then Lance flys [sic] down and drives it back. Sue flys [sic] back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact that they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.
>
> Lance & Sue Gates
> Greenway
> in Condominiums

People v. Gates, 423 N.E.2d 887, 888 (Ill. 1981).

208. *Id.* at 888-89.

tion provided in it, Detective Mader of the Bloomingdale Police Department acquired a search warrant from a circuit judge of DuPage County, Illinois for the Gates' residence in Bloomingdale and the car they were driving in Florida. The warrant was executed early the following morning as Lance and Susan Gates returned to their home in Bloomingdale. The trunk of the Mercury contained approximately 350 pounds of marijuana; additionally, weapons, ammunition, more drugs, and drug paraphernalia were discovered in the Gates' residence.[209]

Although the affidavit on which the warrant was based did not satisfy the specific probable cause requirements of *Aguilar v. Texas*[210]—the anonymous letter did not indicate how the information was acquired and there was no evidence of the general reliability of the informant—the details in the letter had been independently verified by law enforcement authorities. Thus, the affidavit arguably fell within *Draper v. United States*[211] and *Spinelli v. United States*,[212] in which the Supreme Court indicated that probable cause for the issuance of a warrant could be supplied from a detailed informant's tip coupled with independent corroboration of the information provided.

Nevertheless, the Illinois courts held that the anonymous letter did not contain sufficient detail to establish that the informant had acquired his information in a reliable way.[213] Additionally, the Illinois appellate court held that corroboration of the information supplied by the informant could not satisfy the reliability aspect of the *Aguilar* standard.[214] Although both the Illinois appellate court[215] and the Illinois Supreme Court[216] acknowledged the general disagreement over the effect of corroboration on the probable cause question, the Illinois Supreme Court held that it need not consider the issue because the corroborative evidence was "only of

209. *Id.*

210. 378 U.S. 108 (1964).

211. 358 U.S. 307 (1959).

212. 393 U.S. 410 (1969).

213. People v. Gates, 403 N.E.2d 77, 80-81 (Ill. App. 1980), *aff'd*, 423 N.E.2d 887, 893 (Ill. 1981).

214. 403 N.E.2d at 81 (Ill. App. 1980).

215. People v. Gates, 403 N.E.2d 77, 81 (Ill. App. 1980).

216. People v. Gates, 423 N.E.2d 887, 893 (Ill. 1981).

clearly innocent activity" and therefore insufficient to satisfy either of *Aguilar's* requirements.[217] This conclusion appears erroneous given the fact that the corroboration in *Draper v. United States*[218] was also of innocent activity.[219]

Recognition of the uncertainty about the effect of corroboration on the probable cause issue together with the Illinois Supreme Court's questionable conclusion about the corroboration of facts themselves innocent, points out that the police conduct in *Gates* was at worst a reasonable mistake of law. In addition, the fact that Detective Mader sought and obtained a search warrant makes his behavior all the more innocent and reasonable. Thus, the uncertainty of the law coupled with the use of the warrant procedure makes *Illinois v. Gates* the perfect case for the adoption of good faith exception to the exclusionary rule.

VI. CONCLUSION

The pressure on the fourth amendment created by dissatisfaction with the exclusionary rule seems to be entering a new phase marked primarily by two phenomena: bright-line rules and the good faith notion. Regardless of whether there is an ultimate marriage of these two concepts to restrict further the exclusionary remedy and facilitate the operation of the good faith system, the rule-oriented direction of fourth amendment adjudication already seems established. If, as appears to be the case, all hedges are to be made in favor of law enforcement in the process of drafting straightforward rules for the police to follow, we can only hope for some ameliorative factor to soften the impact on the fourth amendment as a mediator between the police and the public.

A good faith exception possibly could relieve some of the pressure on the fourth amendment created by the exclusionary rule. This could happen in one of two ways. If the good faith issue is

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217. *Id.*

218. 358 U.S. 307 (1959).

219. The details verified in *Draper* were that Draper would return to Denver from Chicago on one of two specified days, Draper's physical description and the clothing he was wearing, that he would be carrying "a tan zipper bag," and that he habitually "walked real fast." *Id.* at 309-10. From this, the Supreme Court concluded that the federal agent was justified in concluding that the rest of the informant's information—that Draper would have heroin in his possession—was acquired in a reliable way and therefore true. *Id.* at 313.

addressed without resolving whether a constitutional violation in fact occurred, police conduct often would be upheld as reasonable, avoiding the need to further narrowly tailor the fourth amendment to suit the particular law enforcement activity in question. Alternatively, if violation of the fourth amendment is determined before the good faith issue is reached, sound search and seizure rules giving due consideration to individual privacy interests could be developed given the realization that the exclusionary rule nevertheless can be avoided by a finding of good faith. In other words, the good faith exception could be viewed as diminishing the need for an expansive view of permissible police practices.

If the Supreme Court adopts the good faith approach in *Gates*, presumably it will tell us how the standard is to be applied. Of necessity, the Court will be forced to indicate whether the fourth amendment question is to be decided before the good faith issue is reached. If the Court first rules that the search warrant in *Gates* was invalid due to the failure of the supporting affidavit to establish probable cause, and then concludes that the evidence nevertheless will survive the exclusionary rule because of the good faith of those involved,[220] the Court will have indicated to lower courts that the fourth amendment issue is to be resolved at the outset.[221] Hopefully, the Court will say this expressly as did the federal district judge for the Western District of Pennsylvania in a case recently employing the good faith approach.[222] Answering the underlying search and seizure question before addressing the good faith issue will protect the future development of fourth amendment law, and, at the same time, should encourage courts to take a more expansive view of fourth amendment rights because the exclusion

220. It seems obvious that any good faith rule would also require the good faith of the judge or magistrate who issued a warrant. The police and prosecution should not be insulated from the exclusion of evidence by authority of a search warrant issued in bad faith.

221. Conceivably, the Court could simply uphold the search based on the good faith of those involved without answering the underlying fourth amendment issue. However, to reach the good faith question, the Court, at least implicitly, has to recognize the questionable validity of the search warrant. Otherwise, they could have upheld the search under the authority of the warrant (the issue on which certiorari originally was granted) without the need of addressing the good faith question (the issue on which the case was set for reargument). Given this procedural scenario, if the Court ultimately adopts a good faith rule, it is likely they will resolve the fourth amendment question first.

222. United States v. Nolan, 530 F. Supp. 386, 398 n.16 (W.D. Pa. 1981).

of evidence then can be avoided by application of the good faith principle.