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An Alternative Approach to the Good Faith Controversy

by Ronald J. Bacigal*

The current debate over the good faith exception to the exclusionary rule has often been cast in very narrow terms. The present controversy often isolates the exclusionary rule from the remaining body of fourth amendment law and centers upon the question of whether the exclusionary rule should, in theory, and can, in practice, deter good faith mistakes. The 'practical' question of deterrence cannot be answered because of the lack of empirical evidence on the effectiveness of the exclusionary rule.¹ A definitive answer to the 'theoretical' question has undesirable repercussions because adoption of an overly broad good faith exception appears to reward ignorance,² while rejection of all forms of good faith offers no incentive to the police to make their best effort to comply with the fourth amendment.

United States v. Leon³ and Massachusetts v. Sheppard⁴ are very limited adoptions of the good faith exception, but their language and analysis sow the seeds for a rapid and broad expansion of the exception.⁵ Before the Supreme Court moves too rapidly toward acceptance of good faith in all search and seizure cases, it might be wise to pause and consider an alternative approach that stops short of a complete endorsement of police good faith. This Article examines the role of police motivation in

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¹ Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 A.B.F. Res. J. 611.
⁵ United States v. Leon and Massachusetts v. Sheppard apply the good faith exception to searches pursuant to a warrant. The next question for the Court will be whether to extend the good faith exception to warrantless searches.

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all facets of fourth amendment jurisprudence and demonstrates that the Court has often considered good faith as one relevant but ill-defined factor in determining substantive aspects of the fourth amendment. The Article concludes that this ambiguous and flexible approach to substantive fourth amendment rights should be utilized when applying the remedy of exclusion.

I. POLICE MOTIVATION AND 'SUBSTANTIVE' FOURTH AMENDMENT LAW

While the good faith exception is subject to valid criticism, it may not be accurate to characterize the exception as an unprecedented concept designed to gut the exclusionary rule. Depending upon the definition of good faith, there may be considerable fourth amendment precedent for recognizing the motivation underlying a search. When defining a good faith exception, its proponents have not contended that a police officer's irrational motivation can justify a search so long as the officer is pure of heart. No one would seriously contend that a misguided but sincere officer could break into dwellings and seize matches and cigarette lighters as part of his plan to eliminate marijuana smoking. The good faith exception as adopted in United States v. Leon requires objectively reasonable efforts to comply with the fourth amendment. This concept of reasonable good faith can be integrated into the larger body of fourth amendment jurisprudence.

The Supreme Court's current 'balancing' approach to determination of reasonable searches is an extremely nebulous and open-ended standard, that could take cognizance of reasonable good faith. Under this approach, the Court balances reasonable efforts (objective good faith) to accomplish reasonable societal goals against reasonable expectations of privacy in order to determine the constitutional standard for reasonable searches. Thus, if motivation is defined to encompass the objective reasonableness of the searching officer's purpose, there are existing Supreme Court de-

6. See infra text accompanying note 166.
8. 104 S. Ct. at 3420 n.20. Leon emphasized that the good faith exception is grounded on an objective standard and not on the subjective good faith of individual officers.
9. See infra text accompanying note 64.
10. This Article uses 'motivation' and 'purpose' as functionally synonymous terms, both referring to the goals police officers or government agents seek to accomplish. Efforts to draw meaningful distinctions between motivation and purpose have not been productive. See generally, A Colloquium on Legislative Motivation, 15 SAN DIEGO L. REV. 925-1183 (1978).
cisions which suggest that motivation or purpose is relevant, not only to the operation of the exclusionary rule, but also with respect to other major areas of fourth amendment law.\textsuperscript{11}

At its most fundamental level, the fourth amendment seeks to protect individual privacy and to regulate the exercise of certain governmental power.\textsuperscript{12} The Supreme Court has recently emphasized the privacy aspects of the amendment,\textsuperscript{13} but has neglected to address regulation of police conduct because of the Court's dissatisfaction with the exclusionary rule. Criticism of the exclusionary rule should not confuse the procedural device of excluding evidence with the substantive goal of controlling police conduct. Regulating the police is not merely a means to accomplish the ends of the fourth amendment. Control of the police is itself a proper goal of the amendment.\textsuperscript{14} Controlling police misconduct through the procedural device of the exclusionary rule necessitates an examination of the substantive distinction between misconduct and police conduct that is proper under the fourth amendment. At this point motivation becomes relevant to substantive aspects of the amendment as well as to the remedy of exclusion.\textsuperscript{15}

History reveals that the framers of the fourth amendment were primarily concerned with police conduct that was arbitrary and capricious.\textsuperscript{16} The use and misuse of general warrants and writs of assistance is recognized


\textsuperscript{13} In Texas v. Brown, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring) and Segura v. United States, 468 U.S. 796 (1984), the Court distinguished between searches, that threaten privacy interests, and seizures, that 'merely' infringe upon property rights.

\textsuperscript{14} Delaware v. Prouse, 440 U.S. 648 (1979) is a prime example of utilizing the fourth amendment to regulate police conduct even when the privacy interests involved are relatively minor. The intrusion upon privacy in Prouse (stopping an automobile for a registration check) was slight, and had the court chosen to determine reasonableness by use of the balancing process, this minor intrusion upon privacy could easily have been subordinated to the 'weighty' interest in motor vehicle safety. Rather than focus on privacy interests, the court chose to emphasize the need to control a potentially arbitrary exercise of police power. \textit{Id.} at 661.

\textsuperscript{15} \textit{See infra} text accompanying note 163.

\textsuperscript{16} "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy . . . ." United States v. United States Dist. Court, 407 U.S. 297, 317 (1972). In McDonald v. United States, 335 U.S. 451 (1948), the Court observed: "Power is a heady thing; and history shows that the police acting on their own cannot be trusted." \textit{Id.} at 456.
as one of the prime causes of the American Revolution. These instruments gave such unfettered power to law enforcement officers that, in the words of James Otis, they placed "the liberty of every man in the hands of every petty officer." Security against arbitrary police intrusions is a basic tenet of a free society and lies at the heart of the fourth amendment. The constitutional framers thus sought to control police power by proscribing certain conduct (unreasonable searches) and by prescribing the proper manner of conducting lawful searches (the specific commands of the warrant clause).

When interpreting both the proscriptions and prescriptions of the fourth amendment, the Court, at times, has found police motivation to be a relevant consideration. This Article examines the role that police motivation has played in determining: (1) The scope of the amendment; (2) the requirement of probable cause; (3) the applicability of the warrant requirement; (4) the manner of executing a search; and (5) third party consent.

A. Motivation and the Scope of the Fourth Amendment

In Frank v. Maryland, the Court defined the scope of the fourth

18. 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Wroth & H. Zobel eds. 1965) (quoting James Otis).
20. The Supreme Court has been engaged in a long-standing controversy over the relationship of the reasonableness clause and the warrant clause. See the majority and dissenting opinions in United States v. Rabinowitz, 339 U.S. 56 (1950) (overruled in Chimel v. California, 395 U.S. 722, 768 (1969)). The relationship between these two clauses need not be resolved in this Article because police motivation is relevant when interpreting the specific commands of the warrant clause and when applying the general rubric of reasonableness. See infra text accompanying note 64.
22. See infra text accompanying note 64.
23. See infra text accompanying note 93.
24. See infra text accompanying note 120.
25. See infra text accompanying note 153.
amendment by reference to the governmental motivation that prompted the search. The Court in Frank viewed the fourth amendment as primarily concerned with searches for evidence to be used in a criminal prosecution, but did not view inspections for violations of a health code to be searches within the meaning of the amendment. 27 Under Frank v. Maryland, the constitutionality of the government's conduct turned upon the motivation of the searching agents. 28 If the agents' purpose was to obtain evidence for a criminal prosecution, then their action was a search and the fourth amendment was applicable. 29 If the government agents' purpose was unrelated to a criminal prosecution, then their action was not a search, and the fourth amendment was inapplicable. 30

Root v. Gauper 31 illustrates how a factual determination of police motivation can decide the applicability of the fourth amendment. 28 In Root, the victim telephoned an operator saying that he had been shot and needed an ambulance. 32 The operator connected the victim with an ambulance driver who in turn notified the town marshall. The ambulance driver proceeded to the victim's house and radioed the marshall that he was transporting the victim to the hospital. 34 The marshall arrived at the victim's home and waited for the sheriff to arrive. The two officers then entered and seized items which were subsequently offered in evidence. 36 After holding that the police intrusion could not be justified on grounds of consent or plain view, the court considered the applicability of the

27. 359 U.S. at 365-67.
28. If the police conduct is not designated a "search," the fourth amendment is inapplicable, and "the law does not give a constitutional damn" about whether the police conduct complied with any of the provisions of the amendment. Moylan, The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?" 1977 S. ILL. U.L.J. 75, 76.
29. "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action." Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957).
30. See, e.g., United States v. Gravitt, 484 F.2d 375 (5th Cir. 1973), cert. denied, 414 U.S. 1135 (1974), in which the court upheld an inventory search of an automobile because the purpose of the intrusion was:

the police interest in protecting the property of the accused and in protecting themselves. It was not an interest in gathering evidence, such as seizing contraband or dangerous weapons. That is usually involved when a search is made on the basis of a warrant or on grounds that there exists probable cause combined with exigent circumstances. Where interests of the former kind are involved, it is of course of no consequence whether or not there was probable cause.

484 F.2d at 380 n.5 (emphasis added).
31. 438 F.2d 361 (8th Cir. 1971).
32. Id. at 364.
33. Id. at 363.
34. Id.
35. Id.
emergency doctrine. The court recognized that "police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." Applying an "objective standard as to the reasonableness of the officer's belief," the court found that the knowledge that the victim had been removed, and the fact that the marshall waited for the sheriff rather than entering immediately, were not consistent with a motive to assist an injured person. Instead, the facts suggested "that the purpose of entering the house was to obtain evidence relating to the commission of the crime." Thus, once the court factually ascertained the purpose of the intrusion, the applicability of the fourth amendment was automatically determined.

The Frank v. Maryland distinction between 'searches' motivated by the desire to obtain incriminating evidence, and 'intrusions' motivated by a desire to accomplish other purposes was overruled in Camara v. Municipal Court, in which the Supreme Court stated: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." The court in Camara emphasized that an intrusion upon privacy is the proper test for defining the scope of the fourth amendment, and that the underlying governmental motivation for the intrusion is largely irrelevant when determining the amendment's scope.

Camara has not, however, remained unchallenged. The Court qualified its position on governmental motivation in the subsequent cases of Harris v. United States and Wyman v. James.

In Harris, the Court approved the "precise and detailed findings of the District Court, accepted by the Court of Appeals . . . to the effect that the discovery of the . . . [seized item] was not the result of a search of the car, but of a measure taken to protect the car while it was in police

37. 438 F.2d at 364.
38. Id.
39. Id. at 365.
40. Id.
41. Id. See also United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972), cert. denied, 416 U.S. 943 (1974).
42. 387 U.S. 523 (1967).
43. Id. at 530.
44. Id. at 534-35. See also United States v. Resnick, 455 F.2d 1127 (5th Cir. 1972), cert. denied, 414 U.S. 1008 (1973). "[T]he scope of the Fourth Amendment is not determined by the subjective conclusion of the law enforcement officer." 455 F.2d at 1132.
custody." The Court in *Harris* thus upheld the intrusion into the automobile because the police were not motivated by a desire to obtain incriminating evidence, but were seeking only to protect themselves from civil liability for the mishandling of private property. *Harris* is in direct conflict with *Camara* in considering the relevance of police motivation, although the subsequent holding in *South Dakota v. Opperman* may have repudiated *Harris*. The Supreme Court, however, has never repudiated its discussion of governmental motivation in *Wyman v. James*.

In *Wyman*, Mrs. James, a welfare mother was notified that, pursuant to state law, welfare workers were to visit her home. Mrs. James refused to grant permission to enter her home and was notified that such refusal would result in the termination of all welfare assistance. When Mrs. James filed a civil rights suit seeking declaratory and injunctive relief, the first issue before the Court was whether home visits by welfare workers constituted searches under the fourth amendment. The lower court had not considered the question of governmental motivation, but held that "[a]ny unauthorized physical penetration into the premises occupied by plaintiff is a search." The Supreme Court paid homage to the tradition of jealous protection of fourth amendment rights, but then declared the tradition irrelevant to the facts of *Wyman* "for the seemingly obvious and simple reason that we are not concerned here with any search . . . in the Fourth Amendment meaning of that term." Although the Court recognized the possibility that a 'visit' by welfare officials could uncover evidence of fraud and lead to a possible criminal prosecution, the Court held that the prime purpose of the visit was not investigative in a criminal sense. "It is . . . true that the caseworker's posture . . . is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law

47. 390 U.S. at 236.
48. *Id.*
50. 400 U.S. at 309.
51. *Id.* at 313-14.
52. *Id.*
53. *Id.* at 314-16. The Court held that the 'visits' were not searches under the fourth amendment. *Id.* at 323-24. The Court held in the alternative that if the visits were searches, they were nonetheless reasonable under the fourth amendment. *Id.* at 326. For a discussion of the alternative holding, see *infra* text accompanying note 73.
55. 400 U.S. at 317.
56. *Id.* at 323.
context."  

A search 'in the traditional criminal law context' is a quest for incriminating evidence. Under the holding of Wyman, a government intrusion for a purpose other than criminal investigation is simply not a search, and the fourth amendment is totally inapplicable. The purpose behind the intrusion may be a 'noble' community interest (e.g., public welfare) as in Wyman, or it may be a very narrow interest as in Harris v. United States (e.g., protecting the police from civil liability for the mishandling of private property). Wyman and Harris indicate that it is not necessary to characterize the purpose of the intrusion as noble or as serving broad community interest. The important factor is to characterize the motivation as other than a quest for incriminating evidence. Once the intrusion is so characterized, the fourth amendment is deemed inapplicable.

The relevance of police motivation in determining the scope of the fourth amendment reached its apex in Frank v. Maryland and has been followed by a general retreat with some exceptions. By emphasizing the privacy aspects of the fourth amendment, the subsequent holdings in Camara and Katz v. United States suggested that police motivation was largely immaterial in defining the scope of the amendment. The exceptions, however, such as Wyman and Harris, indicate that while governmental motivation may no longer be the sole determinative factor, governmental motivation continues to play some role in defining the applicability of the fourth amendment. The lower courts continue to consider police motivation and sometimes distinguish between a fourth amendment search and a civil intrusion upon the basis of that motivation.

B. Police Motivation and the Requirements of Probable Cause or Reasonableness

The fourth amendment consists of two conjunctive clauses: the reasonableness clause, which protects against unreasonable searches and seizures, and the warrant clause, which prescribes conditions for the issuance of a warrant. The proper relationship between these two clauses

57. Id. at 317 (emphasis added).
58. See supra text accompanying note 26.
59. 400 U.S. at 326.
60. 359 U.S. 360 (1959).
61. 387 U.S. at 528.
63. See generally Bacigal, supra note 36.
64. The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affir-
has been the subject of much debate centering on whether the clauses are dependent or independent of each other. One view holds that reasonableness is the ultimate standard for a search and "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." The other view holds that balancing to determine reasonableness is the exception and that the warrant clause standard of probable cause is the general rule for determining the constitutionality of searches.

The two views shade into each other when the Court defines reasonableness by looking to the warrant clause and defines the probable cause requirement of the warrant clause by looking back to the reasonableness clause. With the Court's recognition of a 'sliding scale' of probable cause, police motivation is relevant under either the reasonableness standard or the probable cause standard. In applying either standard, the Court balances the government's purpose in searching against the intrusion upon privacy. Thus, "it would seem to make no difference in terms of outcome whether the balancing is done merely to determine what is reasonable or to determine what level of probable cause is required."

Whether the balancing is done under the reasonableness or probable cause standard, the purpose (motivation) of the police must first be identified and accorded weight before the balancing can occur. For example, the motivation to save lives is accorded more weight than the motivation to obtain incriminating evidence and will thus affect the outcome of the balancing process. In acknowledging the relevance of police motivation, Justice Jackson observed:

If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a

mation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.
65. 387 U.S. at 536-37.
67. "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." 387 U.S. at 534.
roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.\textsuperscript{70}

The Court also recognized the relevance of governmental motivation in \textit{Wyman v. James}.\textsuperscript{71} Although the primary holding of \textit{Wyman} was that the noncriminal purpose of the intrusion made it a ‘nonsearch’,\textsuperscript{72} the Court also noted that, if the intrusion is deemed to be a search, it is not unconstitutional because it “does not descend to the level of unreasonableness.”\textsuperscript{73} The \textit{Wyman} opinion listed eleven factors that led the Court to conclude that the search was not unreasonable.\textsuperscript{74} These factors essentially consist of the noncriminal interests served by such intrusions.\textsuperscript{75} Thus, in an alternative holding, the Court in \textit{Wyman} recognized the motivation underlying a search as one factor in determining its reasonableness.\textsuperscript{76}

More directly on point is \textit{Cady v. Dombrowski},\textsuperscript{77} in which the Court upheld a warrantless search on the ground that the motivation of the police was to perform “community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal estatute.”\textsuperscript{78} \textit{Dombrowski} concerned the arrest of an off-duty policeman for driving while intoxicated. The car he was driving was to a garage, and the police inventoried the automobile in order to remove the police revolver defendant was believed to have been carrying.\textsuperscript{79} In the process, the police discovered blood-stained objects that led to defendant’s conviction for murder.\textsuperscript{80} The Court took note

\textsuperscript{70} Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting). See also People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956). “Necessity often justifies an action . . . where the act is prompted by the motive of preserving life or property . . . .” 47 Cal. 2d at 377, 303 P.2d at 723. In \textit{Terry v. Ohio}, 392 U.S. 1 (1968), the Court recognized the need to protect the physical safety of police and noted: “We are now concerned with \textit{more than the governmental interest in investigating crime . . . .}” 392 U.S. at 23 (emphasis added). For suggestions that the severity of the crime is an appropriate factor in the balancing process, see Greenberg, \textit{The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara}, 61 CALIF. L. REV. 1011, 1040 (1973).

\textsuperscript{71} 400 U.S. 309 (1971).

\textsuperscript{72} Id. at 317-18.

\textsuperscript{73} Id. at 318.

\textsuperscript{74} Id. at 318-24.

\textsuperscript{75} For example, “The public’s interest in . . . assistance to the unfortunate . . . .” Id. at 318; “The visit is not one by police or uniformed authority.” Id. at 322; “[T]he [welfare] program concerns dependent children and the needy families of those children. It does not deal with crime or with the actual or suspected perpetrators of crime.” Id. at 323; “The home visit is not a criminal investigation . . . .” Id.

\textsuperscript{76} Id. at 318-19.

\textsuperscript{77} 413 U.S. 433 (1973).

\textsuperscript{78} Id. at 441.

\textsuperscript{79} Id. at 436-37.

\textsuperscript{80} Id. at 437-39.
of the ‘specific motivation’ of the intruding officer, which was “concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle,” and held that this purpose justified the search as constitutionally reasonable.

Just how far police motivation can go in reducing the required level of probable cause was illustrated in People v. Sirhan. The government action in Sirhan, a warrantless search of a private dwelling and seizure of a personal diary, intruded upon interests that society generally considers intimately private. Balanced against these interests was the desire of the police to dispel the potential panic that could follow a political assassination. The Supreme Court of California held the search and seizure to be reasonable because:

The crime was one of enormous gravity, and the “gravity of the offense” is an appropriate factor to take into consideration. The victim was a major presidential candidate, and a crime of violence had already been committed against him. The crime thus involved far more than possibly idle threats. Although the officers did not have reasonable cause to believe that the house contained evidence of a conspiracy to assassinate prominent political leaders, we believe that the mere possibility that there might be such evidence in the house fully warranted the officers' actions. It is not difficult to envisage what would have been the effect on this nation if several more political assassinations had followed that of Senator Kennedy.

The possible police motives for intruding upon privacy are infinitely diverse. In noncriminal situations, the motives can range from control of political demonstrations to protecting underprivileged children. Police motivation in traditional criminal law searches can range from checking for violation of automobile registration laws to apprehending vicious murderers. Although individual justices have cautioned us “to be most

81. Id. at 447.
82. Id. at 448.
84. 7 Cal. 3d at 736, 497 P.2d at 1138, 102 Cal. Rptr. at 402.
85. Id. at 737-39, 497 P.2d at 1139-40, 102 Cal. Rptr. at 403-04.
86. Id. at 739, 497 P.2d at 1140, 102 Cal. Rptr. at 404 (citations omitted).
87. In Donohoe v. Duling, 330 F. Supp. 308 (E.D. Va. 1971), aff'd 465 F.2d 196 (4th Cir. 1972), the court stated: "It has long been the policy in Richmond and other places throughout the nation to photograph persons participating in vigils, demonstrations, protests and other like activities whether peaceful or otherwise." 330 F. Supp. at 309.
on our guard to protect liberty when the Government's purposes are beneficent," the courts have often considered police motivation when determining the reasonableness of a search.

C. Police Motivation and the Warrant Requirement

The probable cause or reasonableness standards, in theory and in fact, may be flexible enough to take account of police motivation. A court must balance the right to privacy against other legitimate interests, and it may strike the balance at different points, depending upon the governmental motivation underlying the search, for example, the desire to save lives versus the desire to obtain incriminating evidence. The same need for flexibility is not so apparent, however, with respect to the warrant requirement. Its function is not to balance conflicting interests, but to serve as a limitation of police power by providing a procedure which assures that the judiciary performs the balancing of interests. When police bypass the magistrate and conduct a warrantless search they usurp the judicial function of determining when the right of privacy can be set aside. The courts should be jealous of this power and skeptical of the need of police to exercise such power. Thus, the warrant requirement should remain a strict requirement and should not be bypassed solely because of a benevolent motive of the police conducting the search.

Of course, the warrant requirement is not absolute and the Supreme Court has long recognized a number of exceptions to the warrant requirement. In the words of Camara, the warrant procedure may be bypassed whenever "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." In determining whether the warrant requirement would frustrate the purpose of the search, the lower courts have traditionally considered three factors: (1) the time required to obtain a warrant; (2) the time required to frustrate the search

92. See, e.g., Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), in which the court held that probable cause requires only "some basis from which the court can determine that the [in­trusion] was not arbitrary or harrassing." Id. at 415.
93. The protection of the warrant clause "consists in requiring that those inferences [concerning probable cause] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948).
96. Id. at 533.
by destroying or altering the object of the search; and (3) the likelihood that the destruction or alteration will take place. Those who advocate extending the good faith exception to warrantless searches would add a fourth factor for consideration: the nature of the government interest that may be frustrated by the delay required to obtain a warrant. The proponents of a good faith exception for warrantless searches argue that any delay to obtain a warrant creates some risk of frustrating the search, and that the risk society is willing to run is colored by the governmental purpose behind the search. In order to protect privacy, society may be willing to run a fairly high risk of frustrating the search when the purpose of the search is merely to obtain incriminating evidence of some minor crime. Society, however, is willing to run very little risk of frustrating a search when the purpose of a search is the more significant interest in preserving life.

Chief Justice Burger subscribes to this view and gave an early indication of his position on 'good faith' when sitting on the District of Columbia Circuit Court of Appeals. Justice Burger stated the following in Wayne v. United States:

"When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act on that information, even if ultimately found erroneous."

Somewhat surprisingly, the Chief Justice did not discuss the relevance of good faith when the opportunity arose in South Dakota v. Opperman. Rather than emphasize the good faith of the officers who


98. The 'no knock' cases most often deal with the ease with which evidence can be destroyed. See, e.g., State v. Gassner, 6 Or. App. 452, 488 P.2d 822 (1971). See infra text accompanying note 127.


100. This view was expounded in Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), cert. denied, 380 U.S. 966 (1965). "The delay which would necessarily have resulted from an application for a search warrant might have been the difference between life and death . . . . The preservation of human life has been considered paramount to the constitutional demand of a search warrant as a condition precedent to the invasion of the privacy of a dwelling house." 236 Md. at 396, 204 A.2d at 80. See also United States v. Reed, 572 F.2d 412 (2d Cir.), cert. denied sub nom. Goldsmith v. United States, 439 U.S. 913 (1978).

102. 318 F.2d 205 (D.C. Cir. 1963).

103. Id. at 212.

inventoried an impounded vehicle, the Chief Justice focused on the di­
minished expectation of privacy in automobiles and decided the case
under the general rubric of reasonableness. 108 It was left to Justice Powell
to address the warrant requirement in a concurring opinion. 106

Justice Powell identified three purposes served by the warrant require­
ment, two of which relate to the issue of controlling police misconduct
and the issue of good faith. 107 The first function of a warrant is to insure
that the police officer does not make a discretionary and potentially dis­
criminatory determination to search, thereby substituting his judgment
for that of the magistrate. 108 Justice Powell found that inventory searches
pursuant to uniform and standardized police department procedures in­
sure the good faith (i.e., nondiscriminatory intent) of the searching officer
and thus alleviate the need for a search warrant. 109 The second related
purpose of the warrant requirement is to prevent hindsight and police per­
jury 110 from affecting the evaluation of the constitutionality of a search. 111
Justice Powell found that inventory searches conducted in ac­
cordance with routine police department practices insure the good faith
of the searching officer by precluding the opportunity for postsearch per­
jury by police. 112 Justice Powell thus employed a doctrine of equivalent protec­tions, 113 in which case, constitutionality depended on whether the challenged procedures provided adequate substitute safeguards that com­
penated for noncompliance with the warrant clause. The standardized
police department regulations in South Dakota v. Opperman insured the
good faith of the searching officers, and thus served the same purpose as
the warrant clause in controlling potential police misconduct. 114

105. Id. at 367.
106. Id. at 376 (Powell, J., concurring).
107. Id. at 383-84. The third purpose of a warrant, not relevant here, is that a warrant
communicates to the citizen that the police are acting under lawful authority and sets forth
the lawful limits of the power to search. Id. at 384.
108. Id. at 383.
109. Id.
110. "[A]fter-the-event justification for the . . . search [is] too likely to be subtly influ­
enced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96
(1964).
111. 428 U.S. at 383.
112. Id.
113. The concept of equivalent protections may have originated in Trupiano v. United
(overruled in Chimel v. California, 395 U.S. 752, 768 (1969)). Chief Justice Vinson objected
to an insistence "upon the use of a search warrant in situations where the issuance of such a
warrant can contribute nothing to the preservation of the rights which the Fourth Amend­
ment was intended to protect . . . ." 334 U.S. at 714-15 (Vinson, C.J., dissenting).
114. There have been numerous suggestions that police department regulations are supe­
rior to the exclusionary rule in controlling police conduct. See K. Davis, Police Discretion
The Supreme Court, however, has not uniformly allowed good faith or noble motives to excuse the absence of a warrant. In Payton v. New York, the Court enforced the warrant requirement in spite of many law enforcement agencies' good faith reliance on considerable precedent authorizing a warrantless arrest in a dwelling. The Court in Mincey v. Arizona refused to recognize a 'murder scene' exception to the warrant requirement, despite noble intent to apprehend vicious murderers. The opinion in South Dakota v. Opperman and the lower court cases addressing searches designed to save lives indicate, however, that police motivation may play a part in determining when the police must obtain a warrant.

D. Motivation and the Manner of Executing a Search

A search that is lawful at its inception (i.e., the issuance of the warrant is proper) may become illegal because of the manner in which the search is executed. The requirement that police give notice before entering the premises to be searched and the scope and intensity of the search once the police are properly within the premises are considerations of prime relevance.

In Ker v. California, the Supreme Court dealt with the question of notice prior to entry for purposes of making an arrest. The lower courts have generally assumed that Ker applies to search warrants. Except in those jurisdictions where the magistrate may issue a 'no-knock' warrant, the decision to give or dispense with notice is entrusted to the police officers executing the search warrant. The officer's decision is not discretionary, but must be based on the officer's good faith and reasona-
ble assessment that the existing circumstances fit within one of the fol-
lowing recognized exceptions to the notice requirement: (1) the useless
gesture exception; (2) the destruction-of-evidence exception; or (3) the
danger-to-person exception.126 State v. Gassner,127 is illustrative of how
the first two exceptions relate to the issue of police good faith.

In Gassner, the state endeavored to justify an unannounced entry of
the defendant’s apartment on grounds that the officer believed the apart-
ment was vacant,128 or in the alternative, that notice was not required
when police were searching for drugs that could easily be destroyed.129
Regarding the useless gesture exception, the court found that the officer’s
assumption that he was entering a vacant apartment was unwarranted
under both an objective and subjective standard.130 The officer’s belief
failed to meet the objective standard because there were no objective
facts indicating the apartment was vacant. There was also some indica-
tion of subjective bad faith “in the testimony of the apartment manager
that the police plan, before they even went to the apartment, was to just
knock and enter with the pass key.”131

The police officer’s concern with the destruction-of-evidence exception
also failed to meet objective and subjective standards.132 The court sum-
mearily rejected the State’s rather weak efforts to establish the officer’s
subjective belief regarding the destruction of evidence and accepted the
thrust of the officer’s testimony that he was not thinking about potential
destruction at the time of his entry.133

The court in Gassner also commented upon the wisdom of a ‘blanket
rule’ in which a court does not require notice whenever the seizable items
are drugs because of the ease with which the evidence can be destroyed.134
The court stated that such a blanket rule could lead to anomalous results
in which an exception to the constitutional requirement of notice would
totally consume the requirement.135 Under a blanket rule, unannounced
entry would be permitted, even though the police were subjectively aware
that the destruction of evidence was impossible.136 The court also noted

128. No one was seen entering or leaving; the time of day was as likely to suggest occu-
pancy as vacancy. Id. at 458-59, 488 P.2d at 825.
129. Id. at 458, 488 P.2d at 824-25.
130. Id. at 458-59, 488 P.2d at 825.
131. Id. at 459, 488 P.2d at 825.
132. Id. at 465, 488 P.2d at 828.
133. Id.
134. Id. at 463, 488 P.2d at 827. See, e.g., State v. Loucks, 209 N.W.2d 772 (N.D. 1973);
State v. Spisak, 520 P.2d 561 (Utah 1974).
135. 6 Or. App. at 463, 488 P.2d at 827.
that most jurisdictions had rejected a blanket rule in favor of a requirement that the police officer make a specific showing of the facts warranting a conclusion that destruction of the evidence was likely.\textsuperscript{137} The court in \textit{Gassner} then adopted a compromise position authorizing unannounced entries when the officer reasonably believes there is a likelihood of destruction because: (1) The officer has probable cause to believe there is a small, readily disposable amount of evidence; or (2) the officer, in good faith, does not know the amount.\textsuperscript{138} The court found a lack of a subjective and reasonable belief on the part of the searching officer because the officer was subjectively aware that the drugs to be seized were of a sufficient quantity to preclude rapid destruction.\textsuperscript{139}

The danger-to-person exception to the notice requirement does not raise any questions distinct from the destruction-of-evidence exception. In \textit{People v. Dumas},\textsuperscript{140} the court considered whether to apply a blanket rule to situations in which the police reasonably believe the suspect to be in possession of a weapon.\textsuperscript{141} As in \textit{Gassner}, the court in \textit{Dumas} rejected a blanket rule and required that police officers demonstrate a reasonable belief "based on specific facts and not on broad unsupported presumptions"\textsuperscript{142} that a weapon will be used against them if they give notice.\textsuperscript{143} Likewise in \textit{Tatman v. State},\textsuperscript{144} the court found only an unsupported assertion of fear that defendant might have a weapon and thus found a lack of support for a 'good faith belief' on the part of the police officers.\textsuperscript{145} Courts in these cases rejecting blanket rules to justify no-knock entries have engaged in an examination of police good faith. The officer's belief that the circumstances justify a no-knock entry must be both genuine (good faith belief) and objectively reasonable (supported by specific facts). The officer's good faith is also relevant in assessing the reasonableness of the search actually carried out after a lawful entry.\textsuperscript{146}

"As to what is to be taken, nothing is left to the discretion of the officer

\textsuperscript{138} 6 Or. App. at 464, 488 P.2d at 827-28.
\textsuperscript{139} \textit{Id.} at 464, 488 P.2d at 828. The seized drugs were 1,000 Benzedrine pills.
\textsuperscript{140} 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973).
\textsuperscript{141} \textit{Id.} at 878-79, 512 P.2d at 1213-14, 109 Cal. Rptr. at 309-10.
\textsuperscript{142} \textit{Id.} at 879, 512 P.2d at 1213, 109 Cal. Rptr. at 309.
\textsuperscript{143} \textit{Id.} at 878-79, 512 P.2d at 1213, 109 Cal. Rptr. at 309.
\textsuperscript{144} 320 A.2d 750 (Del. 1974).
\textsuperscript{145} \textit{Id.} at 751.
\textsuperscript{146} \textit{Id.}
executing the warrant."\textsuperscript{147} The command of the fourth amendment that warrants particularly describe the items to be seized\textsuperscript{148} was intended to prevent the type of police misconduct historically associated with general warrants.\textsuperscript{149} The statement that nothing is left to the discretion of the officer is an overstatement though, because a lawful search may be as intense as is reasonably necessary to find the items described in the warrant.

It is difficult to imagine that a case could arise where an officer executing a valid search warrant would not at some stage in the matter be required in the very nature of things to exercise his judgment as to what thing or things . . . were to be seized under the warrant.\textsuperscript{150}

When a police officer executes a warrant, the officer’s judgment must be objectively reasonable, and subjectively the officer must execute the warrant in good faith. Consequently, courts will not permit a search for stolen automobile tires to extend to the top shelf of a closet because the searching officer could not reasonably believe that the tires were located in such a small place.\textsuperscript{151} In order to avoid general warrants,\textsuperscript{152} a search “must be directed in good faith toward finding the objects described in the search warrant . . . .”\textsuperscript{153} The searching officer’s motivation or reason for searching an area is thus a necessary consideration in determining the proper scope of a lawful search.

\textbf{E. Motivation and Third-Party Consent}

The above discussion of police motivation and the fourth amendment demonstrates that police motivation or purpose is at times a relevant consideration in determining the constitutionality of a search. There is, however, no large body of precedent that indicates a ringing endorsement for utilizing police good faith as a constitutional consideration because most

\textsuperscript{147} Marron \textit{v.} United States, 275 U.S. 192, 196 (1927).

\textsuperscript{148} The fourth amendment provides that the warrant “particularly [describe] the place to be searched, and the persons or things to be seized,” U.S. Const. amend. IV.

\textsuperscript{149} See \textit{supra} text accompanying note 16. To allow a search for items not specified in the search warrant “would come perilously close to reviving the long discredited general warrant.” United States \textit{v.} Sanchez, 509 F.2d 886, 890 (6th Cir. 1975).


\textsuperscript{152} See \textit{supra} text accompanying note 16.

of the Supreme Court's recognition of police motivation has been tangential or covert. This lack of precedent is particularly true in the area of third-party consent. The Court declined an opportunity to rule upon police good faith and third-party consent when the issue was squarely presented in United States v. Matlock. In Matlock the government argued that police could legitimately accept consent to search from a third person with 'apparent' authority to authorize a search. The concept of apparent authority focuses on the facts as they reasonably appear to the police officer, even if unknown facts ultimately show that the third party lacked actual authority to consent to a search. Under the facts in Matlock, however, the Court found actual authority and, thus, declined consideration of the government's theory of apparent authority.

In contrast, the Court may have given recognition, albeit implicit recognition, to police good faith in another third-party consent case. In Frazier v. Cupp, the police searched defendant's duffel bag after acquiring the consent of defendant's cousin, Rawls, who shared the use of the bag. Defendant argued that Rawls had actual permission to use only one compartment of the bag and had no authority to consent to a search of the other compartments. The Court declined to "engage in such metaphysical subtleties" and held that defendant "must be taken to have assumed the risk that Rawls would allow someone else to look inside." The Court's invocation of the assumption of the risk doctrine makes little sense from the perspective of the defendant's subjective state of mind (i.e., voluntary consent). The Court failed to explain why a defendant assumes the risk that a cousin will consent to a search of a duffel bag when a defendant does not assume the risk, for example, that a hotel clerk will consent to a search of the defendant's room, as in Stoner v. California. The Court's use of assumption of risk analysis in Frazier makes sense only if the facts are viewed from the perspective of the police officer's state of mind. The police may reasonably be charged with knowledge that hotel clerks lack authority to consent to searches of occupied hotel rooms, but the police cannot reasonably be charged with knowledge of secret and 'metaphysical' divisions of authority over compartments of a duffel bag. The holding in Frazier is proper and distinguishable from Stoner only if

155. Id. at 167-69.
156. Id. at 171 n.7.
157. Id. at 175-78.
159. Id. at 740.
160. Id.
161. Id.
163. 394 U.S. at 740.
the Court implicitly recognized police good faith as a relevant consideration in assessing the constitutionality of third-party consent searches. In third-party consent cases, as in the other areas discussed, police motivation continues to play some undefined role in fourth amendment jurisprudence.

II. CONCLUSION

Justice White suggested an alternative approach to the good faith question in his concurring opinion in Illinois v. Gates,164 in which he expressed the view that the operation of the exclusionary rule and the question of good faith should not be divorced from substantive fourth amendment law.165 Unfortunately, Justice White abandoned this view in United States v. Leon166 and adopted the majority's position in Gates that the remedy of exclusion is separate from the question of substantive fourth amendment rights.167 Had Justice White retained his goal of integrating the exclusionary rule and the good faith exception into the full body of fourth amendment jurisprudence, he could have used a consistent approach in Gates and Leon. The Court in Gates abandoned the rigid rules of Aguilar v. Texas168 in favor of a more flexible totality of the circumstances test.169 Instead of formulating a rigid rule on good faith in its decision in Leon, the Court should have shown the same preference for the flexibility inherent in an examination of the totality of the circumstances.

The Court should recognize that police good faith is but one of the circumstances affecting the application of the exclusionary rule. The remedy of exclusion, like the determination of substantive fourth amendment rights, is best addressed by balancing all of the relevant circumstances. The flexibility inherent in a totality of the circumstances test allows the Court to attach some unspecified weight to police motivation, instead of being forced to Leon's all-or-nothing decision on good faith.170 For exam-

165. "[T]he scope of the exclusionary rule cannot be divorced from the Fourth Amendment. . . . [T]he issues surrounding a proposed good faith exception are intricately and inseverably tied to the nature of the Fourth Amendment violation . . . ." Id. at 249 (White, J., concurring).
167. "Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" Id. at 3412 (1984) (quoting Gates, 462 U.S. at 223).
169. 104 S. Ct. at 3411 n.5.
170. See supra text accompanying note 3.
ple, a flexible balancing approach would permit the Court to find that
certain invasions of privacy are deemed so serious (e.g., a seizure of a
personal diary) that even reasonable mistakes cannot be tolerated. Under
a flexible balancing approach to the application of the exclusionary rule,
the weight accorded police motivation would be deliberately left ambigu­
ous, just as it remains ambiguous in other fourth amendment areas. Al­
though ‘bright line’ clarity is sacrificed under such an approach, recogniz­
ing police good faith as one relevant factor in the totality of

III. EPILGUE

Fourth Amendment Cliches: A Tongue-in-Cheek Look at the Good
Faith Exception

'Tho boys throw stones at frogs in jest, the frogs do not die in jest but
in earnest.' The United States Supreme Court ignored this old maxim on
motivation and recently hurled some fatal stones at the fourth amend­
ment. The Court's adoption of the good faith exception in United States
v. Leon171 adds nothing new to an understanding of fourth amendment
jurisprudence, but merely recites some rather tired cliches. We may now
be entering an era when search and seizure cases are decided, not by rea­
soned analysis, but by invocation of handy cliches. The reader can test
his or her ability at this new form of fourth amendment practice by an­
swering the following quiz and comparing his or her responses with the
best and worst answers as scored by the Supreme Court.

1) The road to hell is paved with good
intentions. T F
2) The end justifies the means. T F
3) Ignorance of the law is no excuse. T F
4) What you don't know can't hurt you. T F
5) The buck stops here. T F
6) What you see is what you get. T F
7) It doesn't count if you don't mean it. T F
8) Work expands to fill the time available. T F

1) The road to hell is paved with good intentions. The correct answer
is False. It is the road to admission of illegally seized evidence that is
paved with good intentions. The good faith exception recognizes police
motivation as the sine qua non of the exclusionary rule. In other words,

171. 104 S. Ct. at 3405.
the exclusionary rule exists to deter police misconduct, and there can be no misconduct when the police make reasonable good faith efforts to comply with the fourth amendment by obtaining a search warrant. **Worst answer**—The good faith exception is inadequate because it assumes that the exclusionary rule exists only to address deliberate police misconduct. Totally ignored is the exclusionary rule’s objective of educating the police about lawful searches so that a citizen’s right to privacy will be intruded upon only when the constitutional requirement of probable cause is met.

2) **The end justifies the means.** True. Legal technicalities such as constitutional rights cannot stand in the way of effective law enforcement. The ‘first’ principle of fourth amendment interpretation is that the constitutional standard must be “workable for application by rank and file, trained police officers.”

**Worst answer**—'No man is above the law.' Law enforcement officials have a responsibility to know and obey the law, even when they act upon noble intent to apprehend law breakers.

3) **Ignorance of the law is no excuse.** The correct answer is true for criminal defendants; false for police officers. **Worst answer**—The good faith exception encourages police to remain ignorant of the constitutional standards for proper searches. (See question (4) below).

4) **What you don't know can’t hurt you.** The correct answer is true. **Worst answer**—The conscientious law enforcement officer who seeks to comply with constitutional requirements is at a disadvantage. If he recognizes that probable cause is lacking, he will have to continue his investigation until adequate facts are developed. The officer who is ignorant of constitutional standards will see probable cause lurking behind every tree. The officer has nothing to lose and everything to gain when he submits inadequate information to a magistrate who is equally ignorant of probable cause requirements.

5) **The buck stops here.** False. The police have no responsibility to make a correct determination of probable cause, but may pass the buck to the magistrate. (Extra credit if the officer spouts another cliche: ‘It’s not my job.’) **Worst answer**—In the area of warrantless searches the Court has recognized that the police may substitute their determination of probable cause for the judgment of a magistrate. Given this power (and presumed knowledge) to recognize when probable cause is present, the police should have the concomitant responsibility (and knowledge) to recognize when probable cause is lacking.

6) **What you see is what you get.** The correct answer is false. If the magistrate accepts an affidavit to search for seizable item X, but issues a warrant for seizable item Z, the police may search for X.

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need not read the warrant to see if they got what they asked for. *Worst answer*—It is not an unconscionable burden to require police to read the warrant they plan to execute.

7) *It doesn’t count if you don’t mean it.* True. Citizens will forgive violations of their privacy so long as the offending officer did not intentionally violate the citizen’s constitutional rights. Extra credit for: ‘I’ll still respect you in the morning.’ *Worst answer*—‘Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent.’ 174

8) *Work expands to fill the time available.* The best answer is true. The judiciary in this country has too much time on its hands and will welcome the opportunity to render advisory opinions on unconstitutional searches even though the opinion has no effect on the case before the bench. *Worst answer*—Courts do not generally render advisory opinions, and overburdened courts will regard the constitutionality of the search as a moot point whenever the good faith exception applies. Fourth amendment law, thus, will stagnate because the police may reasonably rely on existing law and cannot be required to anticipate future developments defining illegal searches.

It may take some time to become comfortable with this new form of litigation by cliche, but it does have advantages. Justice Rehnquist once observed: ‘Very little that has been said in our previous decisions . . . and very little that we might say here can usefully refine the language of the [Fourth] Amendment itself in order to evolve some detailed formula for judging cases such as this.’ 175 Nonetheless, the average search and seizure case takes little more than twice as many pages as the average of all cases decided by the Supreme Court. These lengthy discourses have wasted a great deal of paper and endangered our national forests. Thousands of trees will be spared when counsel can utilize a short hand method of argument by cliche, and even more trees will be saved when the Court can limit its opinion to that most comprehensive of all cliches: ‘I know it when I see it.’
