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THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE: SHOULD IT APPLY TO OSHA ENFORCEMENT PROCEEDINGS?

I. INTRODUCTION

The doctrine that "a man's house is his castle" is well-rooted in Anglo-American jurisprudence.[1] In fact, it has been suggested that violations by the Crown of the common-law rights respecting search and seizure contributed to the American Revolution.[2] In any event, the Framers sought to better insure these rights against erosion through the fourth amendment to the United States Constitution.[3] By its terms, the fourth amendment protects the "right of the people to be secure in their persons, houses, papers, and effects."[4] Although the Constitution is silent about how these rights are to be specifically protected, the Supreme Court has on a number of occasions given meaning to the amendment's guaranty.[5] Out of this case law arose the exclusionary rule, a doctrine whereby evidence seized in violation of the fourth

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1. This idea dates back to at least 1603, when in Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603), the King's Bench held "[t]hat the house of every one [sic] is to him as his castle and fortress." *Id.* at 195. Another and perhaps more famous example of this idea can be found in Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), *cited in* Boyd v. United States, 116 U.S. 616, 626 (1885), where the King's Bench allowed an action in trespass for a search conducted pursuant to a defective warrant. That court held that to allow a search based on insufficient probable cause "would destroy all the comforts of society." 95 Eng. Rep. at 817.

2. *See* Dickerson, *Writs of Assistance as a Cause of the American Revolution* in THE ERA OF THE AMERICAN REVOLUTION (R. Morris ed. 1939).

3. *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

4. U.S. CONST. amend. IV.

5. The first attempt by the Supreme Court to enforce the fourth amendment by judicial construction appeared in Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, the district court ordered the claimants in a forfeiture proceeding to produce certain evidence. On appeal, the Supreme Court ruled that the forced production of the evidence was the equivalent of an unreasonable search and seizure, and that it forced the claimants to testify against themselves. *Id.* at 633.

Boyd was severely restricted by Adams v. New York, 192 U.S. 585 (1904), the Court refusing to disturb the common-law rule that a court would not conduct a collateral inquiry into how otherwise admissible evidence had been obtained. However, ten years later, the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914), formally set forth an exclusionary rule applicable to federal cases. In *Weeks*, the defendant, before trial, requested the return of certain documents which had been seized without a warrant by a United States Marshal. His request was denied and he was convicted, based in part upon the seized evidence. *Id.* at 386. The Supreme Court reversed the conviction, holding that the defendant was deprived of the documents in violation of the fourth amendment, and that the illegally seized documents should have been returned to him. Because the documents were not returned, they were admitted into evidence in violation of the fourth amendment, the Court reasoned. *Id.* at 398.

amendment is held inadmissible at trial.[6]

Recently, several courts and commentators have suggested that the exclusionary rule should not apply to evidence seized in violation of the fourth amendment if a law enforcement officer reasonably and in good faith believed the seizure was not inconsistent with the fourth amendment.[7] Known commonly as the "good-faith" exception to the exclusionary rule, the doctrine was most notably enunciated in *United States v. Williams*.[8] Although *Williams* was a criminal prosecution, the applicability of the exclusionary rule in the administrative context has been the subject of recent comment.[9] If the exclusionary rule does apply in the administrative arena, the question arises as to whether the good-faith exception should act, in an appropriate instance, to limit it. This comment will consider whether the good-faith exception to the exclusionary rule should apply to an OSHA administrative hearing. After discussing the good-faith exception in general and assuming, *arguendo*, that there exists some rational basis upon which to justify it,[10] this comment will analyze OSHA proceedings and the operation of both the exclusionary rule and its good-faith exception within the OSHA context.

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6. *See generally* W. LAFAVE, SEARCH AND SEIZURE §§ 1.1-1.11 (1978).

7. *See* United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981); United States v. Nolan, 530 F. Supp. 386, 398-99 (W.D. Pa. 1981); *cf.* Robberson Steel Co. v. Occupational Safety and Health Review Comm'n, 645 F.2d 22 (10th Cir. 1980); *see also* Leonard, *The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach For Criminal Justice*, 4 WHITTIER L. REV. 33 (1982); Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982).

8. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). In *Williams*, a federal law enforcement officer arrested the defendant for violating a condition of her bond. Ms. Williams had been previously arrested in Ohio on drug charges. A condition of her release on bond was that she remain in Ohio. Several months after her release on bond, the same agent who arrested her in Ohio spotted her in Atlanta. He then arrested her for violating her bond. During a search pursuant to that arrest, a large amount of drugs was recovered. The lower court held that the arrest and subsequent search were invalid. *Id.* at 834-35. The fifth circuit, en banc, reversed, holding that the second arrest of Williams in Atlanta was lawful and that the evidence seized in the search pursuant to that arrest was admissible. *Id.* at 837. After essentially disposing of the case on those grounds, the court engaged in a discussion of the good-faith exception and came to the conclusion that if evidence is sought to be excluded because of unauthorized police conduct, such evidence shall not be excluded if the police action was taken in a reasonable, good-faith belief that it was proper. *Id.* at 846-47. This has come to be the definition of the good-faith exception.

9. *See* Trant, *OSHA and the Exclusionary Rule: Should the Employer go Free Because the Compliance Officer Has Blundered?*, 1981 DUKE L.J. 667; *see also* Comment, *The Fourth Amendment and Administrative Inspections*, 16 HOUS. L. REV. 399 (1979); *cf.* Rothstein, *OSHA Inspections After Marshall v. Barlow's, Inc.*, 1979 DUKE L.J. 63.

10. The author makes no attempt to find a constitutional prohibition or justification for either the exclusionary rule or a good-faith exception. For the purpose of this comment, it will be assumed that the Constitution does not, in every instance, preclude the use of a good-faith exception.

II. THE GOOD-FAITH EXCEPTION

The good-faith exception is a judicially-created doctrine which acts to disable the exclusionary rule and admit evidence when otherwise illegal searches and seizures are conducted in a manner in which a law enforcement officer reasonably and in good-faith believes the seizure not inconsistent with a defendant's fourth amendment rights.[11] The justification for this exception is based upon the view that the primary, if not exclusive, purpose of the exclusionary rule is the deterrence of police misconduct.[12] Because the "good-faith" efforts of police indicate an absence of "deterrable" misconduct, it is argued that the exclusion of the fruits of a good-faith, albeit illegal, search and seizure does not serve the deterrence purpose of the exclusionary rule.[13]

Courts and commentators have also suggested that the good-faith exception is consistent with some of the secondary policies underlying the exclusionary rule.[14] For example, a historical argument supporting the use of the exclusionary rule is that the integrity of the judiciary would be impaired if it were to sanction illegal methods used to obtain evidence by admitting such evidence at trial.[15] However, it might be argued that the exclusionary rule would similarly impair judicial integrity if it were to result in the release, on a perceived "technicality," of one who might otherwise have been convicted of a serious felony.[16] The public at large may, in essence, lose faith in the ability of the judiciary to mete out "justice."

However, exceptions to the exclusionary rule in general, and the good-faith exception in particular, have been widely criticized.[17] It has

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11. *See* United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981).

12. There are three common justifications for the exclusionary rule. The first justification is that it is a constitutional right implied by the fourth amendment. This rationale was rejected by the Supreme Court in Wolf v. Colorado, 338 U.S. 25 (1949), and is not currently regarded as an important justification for the rule. The second reason to justify the exclusionary rule is the maintenance of judicial integrity; it has been urged that the courts should express their distaste for illegal seizures by refusing to admit such evidence at trial. The Supreme Court has recently held that judicial integrity will not independently justify the use of the rule. United States v. Janis, 428 U.S. 433, 458 n.35 (1976). The only justification for the rule which currently has the support of the Supreme Court is that of deterrence; that is, illegally seized evidence will be excluded if doing so will deter future illegal seizures. United States v. Calandra, 414 U.S. 338, 347-48 (1974).

13. *See generally* Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1096-1100 (1982); Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing,"* 62 JUDICATURE 336 (1979).

14. *See also* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 223 (1978); *cf.* United States v. Janis, 428 U.S. 433, 458 n.35 (1976).

15. *See* Weeks v. United States, 232 U.S. 383, 392 (1914).

16. *See generally* Wilkey, *supra* note 14, at 223-25.

17. *See* Kamisar, *supra* note 13, at 345-47; Goodpaster, *supra* note 13, at 1097.

been argued that the unlawful acts of police are best deterred by the exclusion of evidence regardless of the good faith of the offending officer.[18] While fourth amendment violations cannot be deterred retrospectively, other officers in similar situations in the future might arguably be deterred from committing the same mistakes.[19] Also, the exclusion of evidence without regard to the good faith of the police may make law enforcement officers more cognizant of fourth amendment rights.[20] With a good-faith exception, an officer is encouraged to "take a chance" in violating fourth amendment rights since any mistake he might make will not affect the competency of the seized evidence.[21]

In opposition to the adoption of a good-faith exception, some commentators have drawn a parallel between the application of the exclusionary rule and strict liability in product liability cases.[22] In product liability cases, manufacturers of defective goods are not insulated from liability simply because they were not negligent in the manufacture of those goods. The rationale for imposing strict liability upon manufacturers is that because they alone are able to find and repair defects, they should have a duty to do so, and be liable for failing to do so.[23] Rejecting the good-faith exception would be analogous to adopting a "strict liability" approach towards fourth amendment violations. The government is uniquely able to prevent fourth amendment violations, and arguably has a duty to do so. Under a strict liability approach, the government could not shield itself with the good faith of its agents.

In spite of these and other arguments in opposition to the good-faith exception,[24] the Supreme Court has indicated some willingness to relax the exclusionary rule and adopt some type of "reasonableness" or good-faith exception.[25] In *United States v. Calandra*,[26] the Court laid the foundation for a less stringent exclusionary rule. In *Calandra*, the Court held that a grand jury witness may not refuse to answer questions even though such questions were based on illegally seized evidence. The Court concluded that excluding questions based on illegally

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18. Goodpaster, *supra* note 13, at 1096-97.

19. *Id.* at 1082-84.

20. *Id.* at 1097.

21. *See* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044-45 (1974).

22. *See, e.g.*, Goodpaster, *supra* note 13, at 1098.

23. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *see generally* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151 (1973).

24. *See supra* text accompanying notes 17-22.

25. *See infra* text accompanying notes 26-42; *see also* United States v. Janis, 428 U.S. 433 (1976); Michigan v. DeFillippo, 443 U.S. 31 (1978).

26. 414 U.S. 338 (1974).

seized evidence from grand jury proceedings would not significantly deter police officers from seizing such evidence.[27] The Court reasoned that the deterrent purpose of the exclusionary rule would not be served and that the rule should therefore not apply. Subsequently, the Court did focus upon considerations of good faith *vel non* in *Michigan v. Tucker*.[28] In *Tucker*, the Court refused to exclude the testimony of a witness whose name had been mentioned in a statement made by the defendant before he had been given full *Miranda* warnings. The Court held that because the officer's interrogation was conducted in complete good faith and in accordance with prevailing law, an "inadvertent disregard" of the "procedural" rules later established in *Miranda v. Arizona*[29] was insufficient to exclude the testimony of the third-party witness.[30] Although *Tucker* was decided on grounds other than the fourth amendment,[31] it indicated a desire on the part of the Court to consider the nature of the constitutional violation before excluding evidence.

In *United States v. Peltier*, the Supreme Court again discussed the significance of good faith in the search and seizure context.[32] In *Peltier*, border patrol officers conducted a warrantless search pursuant to a federal statute which was later declared unconstitutional.[33] The Court held that since the officers were acting "in good-faith . . . with [the] then-prevailing constitutional norms,"[34] neither the need to preserve judicial integrity nor the desire to deter similar violations in the future required the exclusion of the evidence seized.

Several current Supreme Court Justices have independently expressed desires to relax the exclusionary rule. In *Brown v. Illinois*,[35] Justice Powell, in a concurring opinion joined by Justice Rehnquist, wrote that a determination of the nature of a fourth amendment violation should be made before applying the exclusionary rule.[36] Justice Powell divided fourth amendment violations into "flagrantly abusive" and "technical" violations. In the case of a "flagrantly abusive" viola-

27. *Id.* at 349-52.

28. 417 U.S. 433 (1974).

29. 384 U.S. 436 (1966). The interrogation apparently was conducted in accordance with Escobedo v. Illinois, 378 U.S. 478 (1964), but before *Miranda* was decided.

30. 417 U.S. at 445-47.

31. The Court ultimately held that the manner in which the interrogation was conducted did not deprive the defendants of their privilege against self-incrimination.

32. 422 U.S. 531 (1975).

33. Border Patrol officers conducted the search pursuant to 8 U.S.C. § 1357 (1970), which authorized warrantless searches within 100 miles of the United States border. This statute was declared unconstitutional in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), approximately four months after Peltier was searched and arrested.

34. 422 U.S. at 536.

35. 422 U.S. 590, 606 (1975) (Powell, J., concurring).

36. *Id.* at 610-12.

tion, the deterrence function of the exclusionary rule would be effective and hence the rule should apply. On the other hand, where the violation is merely technical, the deterrence purpose of the exclusionary rule would not be served and the rule should not apply. As an example of a technical violation, Justice Powell cites a "good faith arrest" in reliance on a defective warrant. This might indicate that Justice Powell is favorably disposed towards a good-faith exception similar to that in *Peltier*.[37]

Justice White, dissenting in *Stone v. Powell*,[38] expanded his view of the good-faith exception to include a good-faith "mistake." The good-faith mistake rationale differs from the technical violation exception in that it excuses a reasonable, good-faith judgment error on the part of a law enforcement officer. According to Justice White, if a law enforcement officer violates the fourth amendment under a good-faith belief that his conduct is legal, with reasonable grounds for that belief, the exclusionary rule should not apply.[39]

With a majority on the Supreme Court apparently willing to embrace the good-faith exception,[40] the Court's imprimatur on the doctrine seems likely in the future. Any of the several good-faith exception cases now pending before the Court may afford the Justices this opportunity.[41] The ramifications of such a decision would be broad indeed, and relevant in proceedings other than the criminal forum.[42] The impact in the administrative arena would be especially great; the remainder of this comment will be devoted to the good-faith exception's role in the context of OSHA proceedings.

III. OSHA

In response to growing national concern about the safety of the workplace,[43] Congress in 1970 passed the Occupational Safety and

37. In fact, the Supreme Court later adopted part of Justice Powell's "technical violation" exception in Michigan v. DeFillippo, 443 U.S. 31 (1979).

38. 428 U.S. 465, 536 (1976) (White, J., dissenting).

39. *Id.* at 538.

40. *See* United States v. Peltier, 422 U.S. 531 (1975); United States v. Janis, 428 U.S. 433 (1976); *see also* Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 606 (1975) (Powell, J., concurring); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415-19 (1971) (Burger, C.J., dissenting).

41. *See* Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983); Colorado v. Quintero, 657 P.2d 948 (Colo.), *cert. granted*, 103 S. Ct. 3535 (1983); *see also* United States v. Leon, 701 F.2d 187 (9th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983).

42. *See supra* text accompanying notes 9-10.

43. For a detailed history of the events leading up to the passage of the Act, see M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW §§ 1-3 (1978).

Health Act.[44] The Act was intended to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[45] The Act authorizes the Secretary of Labor to promulgate and enforce regulations designed to promote safety and health in almost all businesses involved in interstate commerce.[46] The responsibility for enforcing regulations promulgated pursuant to the Act rests with the Occupational Safety and Health Administration (OSHA) of the Department of Labor.[47] OSHA enforces these regulations by having OSHA enforcement officers, known as compliance officers,[48] inspect businesses covered by the Act. Based upon these inspections, citations are issued for violations.[49] If an employer wishes to challenge the officer's determination of a violation, he may, within fifteen days, file a notice of contest.[50] The dispute is then heard by an administrative law judge, whose decision is forwarded to the Occupational Safety and Health Review Commission (OSHRC).[51] If the OSHRC accepts the judge's decision, it becomes final thirty days after its issuance.[52] Any person adversely affected by a final order of the OSHRC may appeal to the United States Court of Appeals.[53]

OSHA inspections are generally governed by a priority scheme which assigns the highest priority to the most serious of the suspected violations.[54] Advance notice of an inspection is not usually given to the target of a proposed inspection, although notice may be given under certain conditions.[55] The compliance officer, upon presentation of his credentials,[56] and when appropriate, a search warrant,[57] "is authorized

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44. 29 U.S.C. §§ 651-78 (1976 & Supp. IV 1981).
45. *Id.* at § 651(b).
46. *Id.* at § 651(b)(3).
47. *See* M. ROTHSTEIN, *supra* note 43, at § 4.
48. *Id.*
49. 29 U.S.C. § 658(a) (1976 & Supp. IV 1981); *see also* 29 C.F.R. § 1903.1 (1982).
50. 29 U.S.C. § 659(a) (1976 & Supp. IV 1981).
51. *Id.* at § 659(c).
52. *Id.*
53. *Id.* at § 660(a). Venue is proper in the circuit where the violation is alleged to have occurred, or where the employer has its principal place of business, or in the Court of Appeals for the District of Columbia.
54. OCCUPATIONAL SAFETY AND HEALTH ADMIN., FIELD OPERATIONS MANUAL ch. IV-B (1977). The highest priority goes to imminent dangers, followed by catastrophe and fatality investigations, employee complaints, special emphasis program inspections, and random inspections. For a detailed discussion of the OSHA inspection priority system, see M. ROTHSTEIN, *supra* note 43, at §§ 206-12.
55. Advance notice may be given when immediate abatement of an imminent danger is necessary, or for inspections after regular business hours, or when special arrangements for inspection are needed. 29 C.F.R. § 1903.6 (1982).
56. 29 U.S.C. § 657(a) (1976 & Supp. IV 1981). This is apparently done to guard the employer against industrial espionage. *See generally* M. ROTHSTEIN, *supra* note 43, at § 228.
57. *See infra* notes 62-93 and accompanying text (where the warrant requirement is dis-

to enter without delay . . . any factory, plant, establishment, . . . and to inspect . . . all pertinent conditions, structures, machines, apparatus, devices, [etc.]."[58] At the end of the inspection, the compliance officer will usually inform the employer of any apparent violations.[59] The employer may then offer explanations for the violations or ask questions pertaining to the inspection. Citations are not usually given at this time, since most compliance officers are not authorized to give citations.[60] Instead, the compliance officer's report is reviewed by his or her supervisor, who determines which violations warrant citations.[61]

An employer who does not wish to consent to an OSHA inspection may require the compliance officer to produce a search warrant.[62] The warrant requirement for OSHA inspections is the result of a series of Supreme Court cases beginning with *Camara v. Municipal Court*[63] and *See v. City of Seattle*.[64] In *Camara,* the occupant of an apartment refused to admit a city housing inspector who was attempting to make a routine inspection.[65] In *Seattle,* a city fire marshal was denied access to the defendant's building when trying to conduct a warrantless, routine fire inspection.[66] In both *Camara* and *Seattle,* the Court held that administrative searches must be conducted in a manner consistent with the fourth amendment.[67] More significantly, however, the Court held that the "probable cause" required by the fourth amendment for a warrant to issue in an administrative search is different than the "probable cause" required in a criminal search.[68] This "administrative probable cause" exists "if reasonable legislative or administrative standards for conducting an area search are satisfied."[69] There is no requirement that any particular violation be suspected.[70] All that is required in or-

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cussed in more detail).

58. 29 U.S.C. § 657(a) (1976 & Supp. IV 1981). For a more detailed discussion of the inspection procedure, see M. ROTHSTEIN, *supra* note 43, at §§ 229-33.

59. M. ROTHSTEIN, *supra* note 43, at § 4.

60. *Id.*

61. *Id.*

62. A warrant is not normally required in extreme emergencies, nor when the employer gives his or her consent to the inspection, nor when the violation is in "open view." *See* M. ROTHSTEIN, *supra* note 43, at §§ 225-27.

63. 387 U.S. 523 (1967).

64. 387 U.S. 541 (1967).

65. 387 U.S. at 525-26.

66. *Id.* at 541.

67. *Camara,* 387 U.S. at 534; *Seattle,* 387 U.S. at 543-44. In these companion cases, the Court concluded that administrative searches were "significant intrusions upon the interests protected by the Fourth Amendment" and were therefore subject to the warrant requirement.

68. *Camara,* 387 U.S. at 534-39.

69. *Id.* at 538.

70. In contrast, a criminal search warrant may only be issued when a specific violation of the law is suspected. *See generally* W. LAFAVE, SEARCH AND SEIZURE §§ 3.1-3.7 (1978).

der to obtain an administrative search warrant is a statute or regulation that authorizes the search and defines its scope.[71] The rationale for this relaxed probable cause standard is asserted to be based on the need to balance the legitimate public interest in safety against the individual's fourth amendment interest in privacy.[72] Another justification for the relaxed probable cause standard suggested by the *Camara* Court is that an administrative search is a "less hostile intrusion" than a criminal search.[73] Whether or not an administrative search is in fact significantly "less hostile" than a criminal search,[74] the Supreme Court has shown no sign of retreating from the relaxed administrative probable cause standard.[75]

The warrant requirement announced in *Camara* and *Seattle* was somewhat limited in *Colonnade Catering Corp. v. United States*[76] and *United States v. Biswell*.[77] In *Colonnade*, the Court upheld the right of the Department of the Treasury to conduct warrantless inspections of retail liquor establishments. Similarly, in *Biswell*, the Court allowed a warrantless inspection by Treasury agents of a firearms dealer. In both cases, the Court based its decision in part on the theory of "implied consent," finding that the retailers, by participating in a heavily licensed and regulated industry, "implicitly" consented to warrantless searches.[78] In addition to relying upon the historical regulation of the liquor and firearms industries, the Court distinguished *Camara* and *Seattle* by noting that the building code violations which were the focus of the inspections in those cases were "relatively difficult to conceal or to correct in a short [period] of time," whereas the delay caused by a warrant requirement in the alcohol and firearms context could cause contraband to disappear and effectively frustrate such inspections.[79]

The distinction between the *Camara-Seattle* warrant requirement

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71. *Camara*, 387 U.S. at 538-39.

72. *Id.* at 539. The *Camara* Court concluded that three factors tipped the balance in favor of the relaxed probable cause standard. First, administrative search programs have a long history of judicial and public acceptance. Second, the public interest demands that dangerous conditions be prevented or abated; certain of these hazards, such as faulty wiring, can only be discovered during a thorough inspection. Third, since the inspections are non-criminal and impersonal, they are less of an intrusion into personal privacy. *Id.* at 537.

73. *Id.* at 530; *see also supra* note 72. For other possible justifications for the relaxed probable cause standard, see Rothstein, *supra* note 9, at 66-67.

74. For a discussion of the "quasi-criminal" nature of OSHA sanctions, see Trant, *supra* note 9, at 692-707.

75. The "administrative probable cause" concept was reaffirmed and the language in *Camara* and *See* cited with approval in Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978).

76. 397 U.S. 72 (1970).

77. 406 U.S. 311 (1972).

78. 406 U.S. at 316; 397 U.S. at 76-77.

79. 406 U.S. at 316.

and the exceptions announced in *Colonnade* and *Biswell* was made more explicit with respect to OSHA inspections in *Marshall v. Barlow's, Inc.*[80] The Court held in *Barlow's* that the Act was unconstitutional as violative of the fourth amendment to the extent that it permitted warrantless, nonconsensual administrative searches.[81] The Court's decision was primarily based on two grounds. First, the Court held that warrantless searches may generally be presumed unreasonable.[82] The Secretary of Labor had argued that warrantless inspections were reasonable since the legitimate interests of OSHA, such as the need for surprise and expediency in searches, required a warrantless search.[83] The Court responded that since these interests could be served by other devices available to OSHA, such as *ex parte* warrants[84] and a relaxed probable cause standard,[85] a warrantless search was not required and hence unreasonable.

Second, the Court held that an OSHA search did not fall into the licensing exceptions announced in *Colonnade* and *Biswell.*[86] The Court viewed those cases as exceptions to the warrant requirement and based on "unique circumstances."[87] The Court defined "closely regulated industries" for purposes of the *Colonnade-Biswell* exception as those with a "long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware."[88] The Court concluded that mere participation in interstate commerce did not justify warrantless searches.[89]

The Supreme Court in *Barlow's* determined that a search warrant is required in a nonconsensual OSHA inspection. However, because the relief granted in *Barlow's* was an injunction barring the warrantless search,[90] no OSHA inspection was ever conducted. Therefore, the Court did not have the opportunity to consider the admissibility of evidence obtained in a warrantless, nonconsensual OSHA inspection. The remainder of this comment will consider briefly whether the exclusionary rule should apply to exclude such evidence, and whether a "good-faith" exception should operate in the event the exclusionary rules does apply.

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80. 436 U.S. 307 (1978).
81. *Id.* at 325.
82. *Id.* at 312 (*quoting* See v. City of Seattle, 387 U.S. 541, 543 (1967)).
83. *Id.* at 311, 316.
84. *Id.* at 320 n.15.
85. *Id.* at 319-20; *see also supra* notes 68-75 and accompanying text.
86. 436 U.S. at 313.
87. *Id.*
88. *Id.*
89. *Id.* at 314.
90. *Id.* at 325 n.23.

IV. ANALYSIS

A. *The Exclusionary Rule in OSHA Proceedings*

The use of the exclusionary rule in OSHA proceedings has gradually gained acceptance among courts and commentators.[91] Although the Supreme Court has never applied the rule in a civil proceeding,[92] it has suggested that the rule is applicable in "quasi-criminal" proceedings.[93] In *Kennedy v. Mendoza-Martinez*,[94] the Supreme Court analyzed the distinction between purely civil and quasi-criminal hearings, and delineated certain elements to be considered in labelling a proceeding "quasi-criminal." The Court noted several elements in particular: whether the penalty involves an affirmative restraint; the historical view of the penalty as punishment; the need for scienter; the degree to which the penalty furthers the purpose of punishment, such as retribution and deterrence; whether the proscribed acts are already crimes; whether the penalty has a purpose other than punishment, and whether the penalty is excessive in relation to this other purpose.[95] In a widely-cited article, one commentator has written that an analysis of these elements in the context of an OSHA proceeding leads to the conclusion that such a proceeding is "quasi-criminal."[96] If this conclusion is correct, the use of the exclusionary rule in an OSHA proceeding would not be barred by the historical prejudice against its use in civil proceedings.[97]

The few cases which have ruled on the applicability of the exclusionary rule in an OSHA proceeding have indicated support for its use.[98] In *Donovan v. Sarasota Concrete Co.*,[99] the Eleventh Circuit held that the exclusionary rule must apply to OSHA proceedings if fourth amendment rights are to be protected.[100] The court reasoned

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91. *See* Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982); Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982); *see also* cases cited *infra* note 98. *See generally* Trant, *supra* note 9.

92. United States v. Janis, 428 U.S. 433, 447 (1976).

93. *Cf.* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). The Court characterized a "quasi-criminal" sanction as one whose purpose was "to penalize for the commission of an offense against the law." *Id.* at 700.

94. 372 U.S. 144 (1963).

95. *Id.* at 168-69.

96. *See* Trant, *supra* note 9, at 707.

97. *Id.* at 700-01.

98. *See* Savina Home Industries, Inc. v. Secretary of Labor, 594 F.2d 1358, 1363 (10th Cir. 1979) (exclusionary rule would apply if inspection took place after *Marshall*); *cf.* Usery v. Lacy, 628 F.2d 1226 (9th Cir. 1980). *But see* Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683 (9th Cir. 1978). However, since all these cases were decided on the basis of the non-retroactive application of the decision in *Marshall*, the portions of these decisions dealing with the exclusionary rule may be considered dictum and of little precedential value.

99. 693 F.2d 1061 (11th Cir. 1982).

100. *Id.* at 1071.

that since OSHA inspection procedures are uniform and centrally controlled by the Secretary of Labor, these procedures could be changed quickly and efficiently if it were ruled that they were inconsistent with the fourth amendment.[101] Also, the Secretary and other OSHA officials can insure compliance with constitutionally sound inspection procedures by exercising their discretion in not prosecuting certain contested violations.[102] Therefore, the court reasoned that the exclusionary rule has the requisite deterrent impact to justify its use in the OSHA context.[103]

In *Donovan v. Federal Clearing Die Casting Co.*,[104] the Seventh Circuit did not expressly hold that the exclusionary rule was applicable in an OSHA proceeding. However, since the court in *Federal Clearing* engaged in a lengthy discussion of the good-faith exception, it might have implicitly recognized the applicability of the exclusionary rule.[105] Also, in both *Sarasota* and *Federal Clearing*, the Secretary of Labor apparently did not seriously contest the use of the exclusionary rule to enforce fourth amendment rights in OSHA proceedings.[106]

In addition to recent case law, several policy considerations favor the application of the exclusionary rule in the OSHA context. First, it has been suggested that society at large is the principal beneficiary of the exclusionary sanction—not the accused wrongdoer who may be released when incriminating evidence is suppressed.[107] Although the accused wrongdoer is benefited by the exclusionary rule when otherwise competent evidence is suppressed, it might be argued that the prime beneficiaries are those who have yet to be accused of a crime, who nevertheless possess fourth amendment "insurance" against warrantless intrusions.[108] A contrary viewpoint would compel the conclusion that fourth amendment rights belong to everyone except those who rely upon them.

Second, the absence of an exclusionary sanction would allow the compliance officer to flagrantly disregard the warrant requirement. *Marshall v. Barlow's, Inc.*[109] probably requires the Secretary of Labor to change OSHA inspection procedures so that they comply with the warrant requirement of the fourth amendment. Assuming that it does,

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101. *Id.*
102. *Id.*
103. *Id.*
104. 695 F.2d 1020 (7th Cir. 1982).
105. *Id.* at 1022-25.
106. 693 F.2d at 1070; 695 F.2d at 1022, 1023 n.6.
107. *See* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 329-32 (1973).
108. *Id.*
109. 436 U.S. 307 (1978), discussed *supra* at text accompanying notes 80-90.

the absence of the exclusionary rule from OSHA hearings would reward compliance officers for the disregard of their own regulations by permitting OSHA, through its agents, to effectively ignore *Barlow's*.[110]

The use of the exclusionary rule in OSHA proceedings could be abandoned if adequate alternatives to the rule were developed. An often-suggested alternative is a claim in tort against either the offending agent or the government.[111] This may be especially effective in the OSHA context since almost all OSHA-imposed penalties are pecuniary: either in fines or in the form of costs incurred to correct violations. This alternative, however, is subject to serious criticism. The costs of litigation, the prospect of losing, and the size of the judgment may discourage an employer from redressing the violation of his or her fourth amendment rights. Also, it may be difficult to collect even a relatively small judgment from a middle-income civil servant, such as a compliance officer. If the compliance officer is indemnified by the government, the deterrence value of the remedy against the individual compliance officer is minimized or eliminated.[112] If, however, an award of damages could be fashioned so that it were large enough to provide an incentive for an employer to sue the government in order to protect his or her rights, and also provide for a separate, limited judgment against the individual compliance officer, a remedy in tort could provide an effective alternative to the exclusionary rule in OSHA proceedings.[113]

Another alternative to the use of the exclusionary rule in OSHA proceedings is the use of OSHA internal disciplinary actions to correct misconduct by compliance officer. These internal proceedings could serve a purpose similar to that of the exclusionary rule in that they are aimed directly at compliance officer misconduct. A compliance officer interested in avoiding such a disciplinary action may be "deterred" from committing acts of indiscretion when conducting inspections. However, at least one study has cast serious doubt on the effectiveness of internal disciplinary proceedings used by police departments.[114] It has, however, been suggested that OSHA may be in a better position than police departments to implement an effective disciplinary

110. For a more detailed discussion of the policy considerations, pro and con, inherent in the use of the exclusionary rule in the OSHA context, see Trant, *supra* note 9, at 707-10.

111. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 421-24 (1971) (Burger, C.J., dissenting).

112. Of course, being the subject of one or more large judgments is similarly unlikely to endear a compliance officer to his employers. In this way, the loss of job security may act as a deterrent.

113. Such a remedy would probably have to be sought pursuant to the *Civil Rights Act* or other direct authority of Congress. *Cf.* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

114. *See* Trant, *supra* note 9, at 714 n.364 and accompanying text.

system.[115]

In spite of these other options,[116] the Supreme Court has consistently chosen not to recognize any alternative.[117] Instead, the Court has retained the exclusionary rule and corrected "errors" in its application by carving out a number of exceptions.[118] The remainder of this comment will consider whether an exception to the exclusionary rule known as the "good-faith" exception[119] should apply to OSHA proceedings.

B. The Good-Faith Exception in OSHA Proceedings

There is scant authority on the applicability of the good-faith exception to the exclusionary rule to an OSHA proceeding. In two recent cases, however, the Seventh and Eleventh Circuits have come to differing conclusions.[120] In *Donovan v. Sarasota Concrete Co.*,[121] a former employee of Sarasota filed a complaint with OSHA alleging that some of Sarasota's trucks were dangerous to operate. On the basis of this complaint, OSHA obtained a warrant to inspect Sarasota's entire workplace. Upon inspection, OSHA discovered several "non-serious" violations: none related to the allegedly defective trucks referenced in the complaint.[122] Sarasota contested the violations, claiming that the complaint failed to provide sufficient probable cause to justify an inspection of the entire workplace.[123] In an administrative hearing, the judge found the warrant invalid and granted Sarasota's motion to suppress evidence of the violations.[124] On appeal, the OSHRC affirmed the use of the exclusionary rule and rejected the Secretary of Labor's suggestion that the good-faith exception should operate to allow the use of the evidence, since the compliance officer reasonably and in good faith believed that the search was legal. The Eleventh Circuit affirmed the decision of the OSHRC.[125] The circuit court's one-page disposition of the good-faith issue deferred in large part to the finding by the OSHRC that the exclusionary rule is an effective deterrent to fourth amendment violations by OSHA, and that a good-faith exception

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115. *Id.* at 714.

116. For a more detailed discussion of these and other alternatives to the exclusionary rule in the OSHA context, see Trant, *supra* note 9, at 710-15.

117. *See* Elkins v. United States, 364 U.S. 206, 222-23, (1960); *see also* Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319; Kamisar, *supra* note 13, at 345-46.

118. *See supra* text accompanying notes 25-42.

119. *See supra* notes 11-16 and accompanying text.

120. Donovan v. Sarasota Concrete Co., 693 F.2d 1061 (11th Cir. 1982); Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982).

121. 693 F.2d 1061 (11th Cir. 1982).

122. *Id.* at 1063-64.

123. *Id.* at 1064.

124. *Id.* at 1065.

125. *Id.* at 1072-73.

would be an unwarranted dilution of that deterrent.[126] The court found that the OSHRC has a "special expertise" in understanding OSHA and its procedures, and gave great weight to its view of the "deterrent impact of the exclusionary rule" and the effect of a good-faith exception on that deterrence. In deferring to the conclusory findings of the OSHRC, the court missed an opportunity to properly analyze the effects of a good-faith exception.

The *Sarasota* court also unconvincingly distinguished *United States v. Williams,*[127] a case adopting the good-faith exception in the criminal context.[128] The court noted that *Williams* was a criminal case, while "the citation issued against Sarasota was civil in nature."[129] This distinction is factually questionable and inconsistent with the court's own reasoning. The *Sarasota* court accepted the exclusionary rule as an appropriate sanction in an OSHA proceeding. If however, such a proceeding were "civil in nature," the applicability of the exclusionary rule would be in doubt, because the exclusionary rule is not normally applied in a "civil" proceeding.[130] Furthermore, the characterization of an OSHA proceeding as "civil" has been criticized.[131]

In *Donovan v. Federal Clearing Die Casting Co.,*[132] the Seventh Circuit concluded that a good-faith exception to the exclusionary rule was appropriate in the OSHA context. In *Federal Clearing,* a compliance officer, spurred by a news report of an industrial accident, obtained a warrant to inspect the workplace where the accident occurred. Although Federal Clearing challenged the warrant, OSHA was upheld by the district court and the circuit court refused to stay the execution of the warrant pending appeal.[133] OSHA then inspected Federal Clearing's workplace and found several violations. Subsequently, the warrant under which the inspection was conducted was found invalid.[134] The OSHRC granted Federal Clearing's motion to exclude all evidence discovered under the defective warrant.[135] The Seventh Circuit reversed, holding that because the compliance officer conducted the inspection with a reasonable and good-faith belief that the warrant was valid, the evidence gathered during the inspection should not be suppressed under

126. *Id.* at 1072.
127. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1982).
128. *See supra* note 8 and accompanying text.
129. 693 F.2d at 1072.
130. *See supra* note 92 and accompanying text.
131. *See supra* note 96 and accompanying text.
132. 695 F.2d 1020 (7th Cir. 1982).
133. *Id.* at 1021 nn.2-3.
134. *Id.*
135. *Id.* at 1021.

the exclusionary rule.[136]

The court in *Federal Clearing* implicitly accepted the proposition that the exclusionary rule should apply in OSHA proceedings[137] but concluded that the rule should not apply when the deterrence factor is absent.[138] The court thus accepted the reasoning of *Williams*:[139] namely, that since the function of the exclusionary rule is deterrence, and "good faith errors cannot be deterred,"[140] the exclusionary rule should not apply to good-faith errors. The court also mentioned several reasons why the good-faith exception might be particularly applicable in the OSHA context. First, the court noted that to apply the exclusionary rule in this case would prohibit OSHA from ordering the abatement of hazardous working conditions and generally stymie OSHA's efforts to enforce the Act. This argument had previously been rejected by the Supreme Court in *Marshall v. Barlow's, Inc.*[141] Furthermore, if the exclusionary rule were disabled simply because incriminating evidence was discovered, fourth amendment protections would apply only to those who did not presently require them.[142]

Second, the court in *Federal Clearing* noted that "there are already substantial deterrents to OSHA violations of employers' constitutional rights" including the warrant requirement and the employer's right to challenge the warrant.[143] However, the court did not explain how the constitutional requirement of obtaining a warrant before conducting an inspection deters OSHA from violating employers' constitutional rights. Instead, the *Federal Clearing* decision posits the circular argument that—in spite of the lack of a remedy—a constitutional amendment somehow "deters" one from violating that constitutional amendment.

Neither the *Sarasota* nor the *Federal Clearing* courts adequately discussed the major policy considerations concerning the applicability of a good-faith exception in an OSHA proceeding. A major criticism of the exclusionary rule is that it impedes the efforts of law enforcement officers to enforce the law.[144] Presumably, the good-faith exception would allow law enforcement officials to pursue their art, suppressing evidence only in the case of willful or unreasonable fourth amendment

136. *Id.* at 1021-22.

137. *Id.* at 1023. *See also supra* note 105 and accompanying text.

138. *Id.*

139. *See supra* note 8 and accompanying text.

140. 695 F.2d at 1024 (quoting United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973) (en banc)).

141. *See supra* notes 83-85 and accompanying text.

142. *See supra* notes 107-08 and accompanying text.

143. 695 F.2d at 1024.

144. See Whitney, *supra* note 14, at 218-20.

violations. In the OSHA context, however, this rationale is not applicable. Because OSHA may obtain warrants under a relaxed probable cause standard,[145] the "impediment" caused by fourth amendment constraints is much less here than in the criminal context. Therefore, the need for a good-faith exception in an OSHA proceeding is minimal.

Secondly, if a good-faith exception were adopted in OSHA proceedings, and if possession of a warrant were prima facie evidence of good faith, as in *Federal Clearing*, a technique known as "magistrate shopping" might become popular among compliance officers.[146] Undoubtedly, some magistrates are far more "flexible" with respect to probable cause requirements than others. This flexibility may be enhanced by the relaxed probable cause standard. If a mere warrant insulated OSHA from the exclusionary rule, the most lenient magistrate would become the magistrate of choice. And since judicial appointments are essentially political in nature, the recognition of a magistrate's signature on a warrant as *carte blanche* for the violation of fourth amendment rights could precipitate an unhealthy tip in the balance of power between the executive and judicial branches of government.[147]

Additionally, the sanctioning of fourth amendment violations through the use of the good-faith exception could arguably increase contempt on the part of the employers towards OSHA in general. This could have several effects on OSHA inspections. First, an increasingly uncooperative attitude toward the inspection procedure may result. This could manifest itself in many ways, including the active concealment of violations. Certainly, this hostile atmosphere between compliance officers and employers would serve to frustrate the very purpose of the Act, which is to preserve the health and safety of the workplace. Second, this uncooperative attitude could cause more employers to demand a warrant before inspection. Since most OSHA inspections are conducted without a warrant and with the consent of the employer,[148] the increased demand for warrants could add to the compliance officer's workload, thereby reducing the number of inspections and, again, frustrating the purpose of the Act.

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145. *See supra* notes 68-75 and accompanying text.

146. *See* Trant, *supra* note 9, at 709.

147. It is the province of the judicial branch to determine questions of law, including the existence of probable cause, administrative or otherwise. U.S. CONST. art. III. A politically influenced magistrate may breach the independence of the judiciary and effectively delegate judicial powers to the executive branch. THE FEDERALIST NO. 78 (A. Hamilton). In the case of federal magistrates, appointment strategies aimed at insulating them from political influence may not be effective since federal magistrates are often the most qualified persons to fill vacancies in higher posts, such as federal district and circuit court judgeships.

148. Rothstein, *supra* note 9, at 69.

Finally, the presence of a good-faith exception in an OSHA proceeding may act as a disincentive for a compliance officer to act responsibly when conducting inspections. Since the determination of the compliance officer's "good faith" ultimately depends upon his or her state of mind, the officer would be encouraged not to become familiar with the finer points of fourth amendment protections.[149]

V. CONCLUSION

The exclusionary rule is one of the more widely accepted and employed methods for enforcing fourth amendment rights. Although the rule has been frequently criticized, no alternative has been used with success to protect these rights. The method most often used to correct deficiencies in the application of the rule is to create exceptions to it. A popular and controversial exception to the exclusionary rule is the "good-faith" exception.

The use of the exclusionary rule has been extended beyond the criminal arena into "quasi-criminal" proceedings. This probably includes OSHA administrative proceedings. Although the good-faith exception has at times been invoked in OSHA proceedings,[150] the applicability of the good-faith exception in this context has not been determined. However, in addition to any arguments which militate against the application of the good-faith exception in any proceeding, civil or criminal, there are several policy considerations which make the good-faith exception particularly inapplicable in the OSHA context. On balance, the good-faith exception to the exclusionary rule is unnecessary and unjustifiable in OSHA administrative proceedings.

John Tiedge

149. *See* Trant, *supra* note 9, at 708-09.

150. *See* Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982).