

Living With *Leon*

Donald Dripps†

In *United States v. Leon*¹ the Supreme Court announced a “good-faith exception” to the Fourth Amendment exclusionary rule for “searches conducted pursuant to warrants.”² The Court’s decision drew objections from three justices in two dissenting opinions,³ and since its appearance⁴ has provoked primarily critical scholarly reactions.⁵ If an unmistakable token of skepticism respecting the Court’s reasoning were required, the Mississippi Supreme Court surely provided one by holding that the *Leon* result violated the state constitution.⁶

This Article defends the *Leon* result, but criticizes the justification offered in the Court’s opinion. After recounting the development of the “good-faith exception,” I consider two species of objections to the *Leon* holding. One type of objection, which I shall refer to as categorical, criticizes the Burger Court for denying the defendant’s personal right to exclusion.⁷ In my view, this objection misconceives the relationship between

† Assistant Professor, University of Illinois, College of Law. I would like to thank Wayne LaFave, Yale Kamisar, Mike Hoeflich, Gerry Bradley, and Kit Kinports for helpful conversations and comments about this Article. Errors of thought and expression are solely the author’s.

1. 104 S. Ct. 3405 (1984). In a companion case, *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984), the Court refused to suppress evidence seized pursuant to a warrant that failed, due to a good-faith error, to particularize the items to be seized. This Article focuses on the more common situation presented by *Leon*, in which the police have failed to establish probable cause but the warrant issues nevertheless.

2. *Leon*, 104 S. Ct. at 3422.

3. *Id.* at 3430 (Brennan, J., dissenting in an opinion joined by Marshall, J.); *id.* at 3446 (Stevens, J., dissenting in *Leon* and concurring in *Sheppard*).

4. Prior to the Court’s decision, commentary was sharply divided. For opposition to the good-faith exception, see, e.g., Kamisar, Gates, “*Probable Cause*,” “*Good Faith*,” and *Beyond*,” 69 IOWA L. REV. 551 (1984); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith*,” 43 U. PITT. L. REV. 307, 333–61 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1399–1403 (1983). For support, see, e.g., Jensen & Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

5. See C. WHITEBREAD, CRIMINAL PROCEDURE § 2.03, at 6–9 (Supp. 1984); Alschuler, “*Close Enough for Government Work*”: *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309; LaFave, “*The Seductive Call of Expediency*”: *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895; Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984); *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 115 n.56 (1984).

6. *Stringer v. State*, No. 54,805, slip op. (Miss. Feb. 27, 1985) (en banc).

7. See *Leon*, 104 S. Ct. at 3434–35 (Brennan, J., dissenting); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than on an “Empirical Proposition”?*, 16

Fourth Amendment rights and the exclusionary sanction. A second objection, which I shall refer to as analytical, accepts the Court's characterization of the exclusionary rule as a judge-made remedy whose application depends on a balancing of costs and benefits, but maintains that the *Leon* majority badly misapplied this prudential calculus.⁸ This objection, I submit, ignores the constraints on unreasonable searches imposed by the costs of the warrant process, costs that probably surpass the risk of exclusion as a disincentive to abusive search warrants.⁹

Although agreeing with the *Leon* result, this Article condemns the Court's reasoning. Even if unlawful searches will not increase as a result of the good-faith exception for warrant searches, and even if the exclusionary rule is a deterrence-based remedy, the *Leon* majority has withdrawn that remedy in a class of cases for which no other remedy is available. In effect, *Leon* does less to effect an exception to the exclusionary rule than to substitute a procedural for a substantive definition of probable cause; probable cause within bounds of plain error is whatever a magistrate says it is. The Court's treatment of the deference due an issuing magistrate as a remedial rather than a substantive question has every appearance of a cynical maneuver intended to obscure the substitution of current judicial preferences in place of the values of the Framers, a century of unanimous precedent, and the status of the Constitution as the supreme law of the land.

But even this failure on the part of the *Leon* Court is curable. If the Court were to admit that the "good-faith exception" amounts to a procedural approach to the probable cause question, the inexorable tension between the existence of a constitutional violation and the absence of institutional regret would disappear; the Court's rule would achieve its objectives by declaring the police conduct in question *legal*, rather than *irremediable*. The costs of the warrant process would continue to provide a stronger check on speculative searches than the exclusionary rule. A process-based approach to probable cause would be at least as reasonable as the rule holding an indictment or arrest warrant determinative of the issue of probable cause to arrest.¹⁰ A plain-error limit on the deference due the magistrate would prevent abuse of the warrant process. The *Leon* regime,

CREIGHTON L. REV. 565 (1983); White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983).

8. See LaFave, *supra* note 5, at 903-11. Both Justice Brennan and Justice Stevens made similar arguments in their dissenting opinions. See *Leon*, 104 S. Ct. at 3440-46 (Brennan, J., dissenting); 104 S. Ct. at 3453-57 (Stevens, J., dissenting).

9. It follows that the good-faith exception has no place outside the warrant context, a context which provides unique intrinsic indicia of reliability about proposed searches. See *infra* text accompanying notes 193-204.

10. See *infra* notes 150-89 and accompanying text.

even now taking form in the lower courts, effects these same systemic consequences, but at the cost of ceasing to speak honestly about the Constitution. The probable cause approach could achieve the Court's political objectives without surrendering so profound a jurisprudential virtue.

I. THE GOOD-FAITH EXCEPTION

Almost as soon as *Mapp v. Ohio*¹¹ imposed the exclusionary rule on the states in 1961, critics began to argue that the rule should not apply to cases in which the police had "reasonable cause to believe there was reasonable cause."¹² For two decades the Court refused to recognize any such exception, reasoning that if "subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."¹³ *Leon*'s departure from this position is explicable only in the context of growing judicial discontent with the exclusionary rule, as expressed in an increasingly flexible balancing approach to the rule's application.

A. *United States v. Calandra and the Cost-Benefit Approach to Exclusion*

Little dispute surrounds the purposes of the Fourth Amendment: the Framers intended to prohibit general searches unsupported by probable cause.¹⁴ But little agreement exists respecting the purposes of the exclusionary rule, which remains the primary remedy for Fourth Amendment violations. The Supreme Court's current approach, however, was clearly set out in 1974, in the seminal case of *United States v. Calandra*.¹⁵

In *Calandra* the Court, reversing two lower courts that had refused to compel a grand jury witness to answer questions based upon evidence seized in violation of his Fourth Amendment rights,¹⁶ distinguished the exclusionary remedy from the constitutional rights protected by the rule. Justice Powell wrote for the majority:

The purpose of the exclusionary rule . . . is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth

11. 367 U.S. 643 (1961).

12. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 952 (1965).

13. *Beck v. Ohio*, 379 U.S. 89, 97 (1964).

14. See T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 23-44 (1969) (discussing founders' antipathy toward general warrants unsupported by probable cause).

15. 414 U.S. 338 (1974).

16. See *In re Application for Immunity of John P. Calandra*, 332 F. Supp. 737 (N.D. Ohio 1971), *aff'd sub nom. United States v. Calandra*, 465 F.2d 1218 (6th Cir. 1972).

Amendment against unreasonable searches and seizures. . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.¹⁷

The Court reasoned further that, “[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”¹⁸ Based on a “balancing process implicit in this approach,”¹⁹ the Court proceeded to “weigh” the “injury to the . . . functions of the grand jury against the potential benefits of the rule as applied in this context.”²⁰ Finding the deterrent benefits of exclusion “speculative,” the Court concluded that any such benefit could not justify “substantially impeding the role of the grand jury.”²¹

Since *Calandra*, the Court has applied this balancing approach to permit the use of illegally seized evidence in civil proceedings,²² for impeachment purposes in criminal trials,²³ to support a state conviction against a petition for federal habeas corpus,²⁴ and against any person except the search victim in the prosecution’s case-in-chief.²⁵

Given the Court’s basic approach, the argument for the good-faith exception is superficially strong. When the police believe their actions to be legal, the threat of exclusion of illegally obtained evidence is not likely to affect their behavior.²⁶ By contrast, the costs of exclusion—freeing the guilty—are as obvious in good-faith cases as they are in any other context. By the early 1980’s, after a series of decisions restricting the exclusionary rule’s application based on the balancing approach, and with the Fifth Circuit already adopting the good-faith exception,²⁷ approval of the exception by the Supreme Court seemed all but inevitable. The case for a good-faith exception was weakened, however, by a Supreme Court decision modifying, not the exclusionary rule, but the substantive standard for determining the existence of probable cause.

17. 414 U.S. at 347–48 (citations omitted).

18. *Id.* at 348.

19. *Id.*

20. *Id.* at 349.

21. *Id.* at 351–52.

22. *United States v. Janis*, 428 U.S. 433, 454 (1976).

23. *United States v. Havens*, 446 U.S. 620, 627–28 (1980).

24. *Stone v. Powell*, 428 U.S. 465, 494–95 (1976).

25. *United States v. Payner*, 447 U.S. 727, 734 (1980); *Rakas v. Illinois*, 439 U.S. 128, 134 & n.3 (1978).

26. *See Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting) (“When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect.”).

27. *United States v. Williams*, 622 F.2d 830, 841 (5th Cir. 1980) (en banc) (per curiam), *cert. denied*, 449 U.S. 1127 (1981).

B. *The Good-Faith Exception: Take One*

*Illinois v. Gates*²⁸ arose from an anonymous letter to the Bloomingdale, Illinois police department, received on May 3, 1978. The letter stated that Lance and Sue Gates were professional drug dealers; that on May 3 Sue would drive the family car to Florida to be loaded with drugs; and that Lance would fly down a few days later to pick up the car.²⁹ Subsequent police investigation revealed that Lance had made reservations to fly to West Palm Beach on May 5; that upon arrival he went to a motel room registered to Sue Gates; and that the couple left the motel at seven o'clock the following morning, driving northbound on an interstate highway that could have taken them back to Illinois.³⁰ Based on this information, the Bloomingdale police obtained a warrant to search the Gates' Illinois residence and automobile. The search warrant was executed upon the Gates' arrival, and the police discovered 350 pounds of marijuana in the trunk of their car, as well as weapons and additional drugs in their home.³¹

The Illinois courts suppressed the evidence,³² holding that, standing alone, the anonymous tip was insufficient to establish probable cause, and that the observations of the police could not cure this deficiency because all the police could corroborate was innocent activity.³³ The Supreme Court granted the state's petition for certiorari,³⁴ which raised one question: "Whether detailed information provided to police by an anonymous informer, coupled with government corroboration of the information, provide probable cause for the issuance of a search warrant?"³⁵

Prior to argument on this issue, the state moved to modify its petition for certiorari to incorporate the question whether, assuming the warrant application failed to establish probable cause, "the evidence [should] nevertheless be admitted at trial because the police acted in a reasonable good faith belief in the validity of the warrant."³⁶ The Court denied the motion and heard argument only on the probable cause issue.³⁷ But after argument, the Court, over three dissenting votes, ordered reargument on the good-faith issue.³⁸

28. 462 U.S. 213 (1983).

29. *See id.* at 225.

30. *See id.* at 226.

31. *Id.* at 227.

32. *People v. Gates*, 82 Ill. App. 3d 749-50, 403 N.E.2d 77 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981).

33. *See* 85 Ill. 2d at 384-89, 423 N.E.2d at 890-93.

34. *Illinois v. Gates*, 454 U.S. 1140 (1982).

35. *See* Petition for Writ of Certiorari for the State of Illinois at 1, *Illinois v. Gates*, 462 U.S. 213 (1983).

36. *See* Petitioner's Motion for Leave to Amend or Enlarge Question Presented for Review, *Illinois v. Gates*, 462 U.S. 213 (1983).

37. *Illinois v. Gates*, 455 U.S. 986 (1982).

38. *Illinois v. Gates*, 459 U.S. 1028 (1982).

The Court's inclination to decide this question collided with serious procedural obstacles. Since the state had not raised the good-faith issue in the Illinois courts, resolution of a federal question not considered below raised a serious doubt about the statutory basis of certiorari jurisdiction. The absence of any trial court findings on good faith created a substantial prudential reason for deferring resolution of that issue.³⁹ Moreover, the possible existence of an independent state ground for the decision below indicated that the issue should be remanded, for the Supreme Court of Illinois had applied the exclusionary rule since 1923—thirty-eight years before *Mapp v. Ohio*.⁴⁰

So, “with apologies to all,”⁴¹ the Court, speaking through Justice Rehnquist, declined to pass upon the good-faith question, consideration of which the Court itself had ordered *sua sponte*. Instead, the Court decided the original question raised in the state's petition for certiorari and held that the warrant application had established probable cause. In so doing, the Court abandoned the two-pronged test announced in *Spinelli v. United States* and *Aguilar v. Texas*, under which an informant's tip could establish probable cause only when the warrant application established both the informant's reputation for veracity and her basis of knowledge in the particular case.⁴² Under *Gates*, an informant's veracity and basis of knowledge constitute only relevant elements in “the totality of the circumstances.”⁴³ Probable cause, the Court emphasized, is a “fluid,”⁴⁴ “practical, nontechnical conception,”⁴⁵ “not readily, or even usefully, reduced to a neat set of legal rules.”⁴⁶ The Fourth Amendment thus requires only that the warrant application convince the magistrate that “a fair probability” exists that the proposed search will yield evidence or contraband.⁴⁷ And given the “great deference” owed to issuing magistrates by reviewing courts,⁴⁸ all that is needed to sustain the magistrate's decision to issue a search warrant is a “substantial basis” for finding this “fair probability.”⁴⁹ Applying this approach to the instant case, the Court concluded that taken together the anonymous tip and the police information

39. *Gates*, 462 U.S. at 221.

40. See *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923).

41. 462 U.S. at 217.

42. See *Spinelli v. United States*, 393 U.S. 410, 413 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

43. 462 U.S. at 233.

44. *Id.* at 232.

45. *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

46. 462 U.S. at 232. The Court continued: “Rigid legal rules are ill-suited to an area of such diversity.” *Id.*

47. *Id.* at 238.

48. *Id.* at 236 (quoting *Spinelli v. United States*, 393 U.S. at 419).

49. 462 U.S. at 238–39 (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

tending to corroborate it established probable cause for the magistrate to issue the warrant.⁵⁰

The *Gates* decision seriously disturbed the justification for a good-faith exception. How often could a reviewing court hold that the issuing magistrate lacked a "substantial basis" for finding a "fair probability" that evidence would be discovered by the search, but the police justifiably entertained a "reasonable good-faith belief" that the warrant application established probable cause?⁵¹ The *Leon* Court overcame this obstacle by ignoring it, thereby casting serious doubt on the concern for procedural regularity expressed in the *Gates* opinion.

C. *The Good-Faith Exception: Take Two*

Leon involved a federal prosecution based on evidence obtained by the Burbank, California police department pursuant to a search warrant issued by a state superior court judge. An affidavit by an Officer Rombach in support of the warrant application based probable cause on a tip from a confidential informant and a plethora of corroborative police observations consistent with the tip but not of themselves compelling evidence of crime.⁵²

The informant told Rombach, on August 18, 1981, that persons known as Armando and Patsy were selling drugs from their residence at 620 Price Drive in Burbank, and that five months before, the informant personally had observed a drug transaction during which Patsy had sold five hundred methaqualone tablets. The informant claimed to have seen on this occasion a shoebox belonging to Patsy containing between fifty and one hundred thousand dollars in cash. According to the informant, Armando and Patsy kept most of their cache at another location, and dealt smaller quantities from the Price Drive residence.

The Burbank police began an extensive investigation to follow up on the tip. On August 19, police observed automobiles registered to Armando Sanchez and Patsy Stewart at the Price Drive residence. A records check indicated that Stewart had no criminal history, but that Sanchez had been

50. 462 U.S. at 241-46. For a critique both of the totality-of-the-circumstances test and of the result in *Gates*, see 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3, at 192-201 (Supp. 1986); Kamisar, *supra* note 4, at 552-84. For a defense of the *Gates* standard, see Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465 (1984).

51. See Kamisar, *supra* note 4, at 588-89 ("How could the officer have had a 'reasonable, good faith' belief that probable cause existed if it turns out that the totality of circumstances did not add up to even a 'substantial chance of criminal activity?'").

52. See Joint Appendix 34-52, *United States v. Leon*, 104 S. Ct. 3405 (1984) (reproducing Officer Rombach's affidavit). The following discussion summarizes the affidavit.

Living with *Leon*

found with twenty thousand dollars in cash at the Miami airport in 1977 and had been arrested in Miami in 1978 for possession of marijuana.

On August 24, police observed a vehicle registered to Ricardo DelCastillo arrive at the Price Drive residence. A Latin male left the automobile, entered the house, and returned ten minutes later carrying a paper bag. DelCastillo had been arrested in January 1979 for possession of fifty pounds of marijuana while attempting to board a flight to Los Angeles. DelCastillo's probation records indicated that he worked for an Albert Leon. Leon's record included arrests in 1979 and 1980 for narcotics violations. When police contacted a woman who had accompanied Leon at the time of one of the previous arrests, she refused to offer any information for fear that she might be killed by the "Cuban Mafia" in which she believed Leon to be involved. The Burbank police learned from a neighboring department that a confidential informant had indicated that Leon kept several thousand Quaalude tablets at his residence. At the end of August, Leon evidently moved to a house at 716 South Sunset Canyon in Burbank.

On both August 25 and August 26 the police observed individuals arrive at the Price Drive location, enter and return with a bag or box a few minutes later. One individual could not be identified because his vehicle was leased, but the other drove a pick-up truck registered to Thomas Kilburn, an individual arrested in 1974 for possession of hashish and cultivation of marijuana.

On August 28, police surveillance observed that DelCastillo's car was driven from the Price Drive residence to a Los Angeles condominium unit. Later the same day, Sanchez drove his automobile from the Price Drive location to Leon's residence on Sunset Canyon and returned with a small package.

On September 8, police engaged in surveillance in an unrelated narcotics investigation observed Patsy Stewart drive to the residence under observation. A woman emerged from the residence, entered Stewart's automobile, and returned to the house a minute later carrying a small paper sack. The occupants of the house were arrested later that day for an unrelated purchase of amphetamines.

Shortly after midnight on the morning of September 19, police observed a car registered to Sanchez parked by Leon's Sunset Canyon residence. The same automobile was later observed at the Price Drive location. Officers subsequently drove to the Los Angeles condominium, and for the first time observed interior lights on there; the utilities for the condominium were registered to Patsy Stewart, but there was no telephone service. Two days later, police observed Sanchez' vehicle parked outside the condominium.

Officer Rombach sought the search warrant on September 21. At that time the facts supporting probable cause included the informant's tip, now six months old, and a month-long pattern of contacts among Leon, Sanchez, and DelCastillo, all with narcotics records, and Stewart, who had made the apparent delivery to persons subsequently arrested on narcotics charges. Officer Rombach offered his professional opinion that the Los Angeles condominium served as the group's "stash pad," the separate location at which the informant had said most of the drugs would be stored. Based on this information, the judge issued a warrant to search the Price Drive residence, Leon's residence on Sunset Canyon, the Los Angeles condominium, and the vehicles of Stewart, Sanchez, Leon, and DelCastillo. The searches uncovered four pounds of cocaine and more than 1,000 Quaaludes from the condominium, nearly a pound of cocaine from Leon's residence, and an ounce of cocaine from the Price Drive residence.

Indicted on federal drug charges, the defendants interposed a motion to suppress. The district court granted the motion with respect to each of the defendants having standing to object to searches of particular premises; the district court viewed the tip as stale or nearly stale, and the subsequent corroboration "as consistent with innocence as it is with guilt."⁵³ The government took an interlocutory appeal, and prior to the Supreme Court's decision in *Gates*, the Ninth Circuit affirmed, Judge Kennedy dissenting.⁵⁴ In both the district court and the court of appeals, the government urged recognition of a good-faith exception. Neither lower court accepted the argument, but the district court after an evidentiary hearing found as a fact that the police had acted in good faith.⁵⁵ Conceding for purposes of its appeal the absence of probable cause, the government sought, and the Supreme Court granted, certiorari on the good-faith issue.⁵⁶

Again the Court faced a procedural obstacle in deciding the good-faith issue. The Ninth Circuit had affirmed the suppression order⁵⁷ over a strong dissent⁵⁸ before the *Gates* opinion set out the relaxed "totality-of-the-circumstances" test for probable cause. Under *Gates*, the search warrant at issue probably would withstand a motion to suppress. Indeed, the warrant application in *Leon* made a much stronger showing of probable cause than the application in *Gates*.⁵⁹ Applying the *Gates* test, any re-

53. *United States v. Leon*, No. Cr. 81-907 (C.D. Cal. Jan. 11, 1982) (unpublished ruling) (reprinted in Petition for Certiorari 9a, 10a, *United States v. Leon*, 104 S. Ct. 3405 (1984)).

54. *United States v. Leon*, 701 F.2d 187 (9th Cir. 1983).

55. See Petition for Certiorari at 14a.

56. *United States v. Leon*, 462 U.S. 1206 (1983).

57. See Petition for Certiorari at 1a.

58. See Petition for Certiorari at 5a.

59. In the first place, the informant in *Leon* was not unknown to the police, but simply confidential. Second, the informant clearly satisfied the basis of knowledge prong of the *Aguilar-Spinelli* test, see *supra* text accompanying note 42, because the *Leon* informant alleged personal observation of a

viewing court would be hard pressed to “presume innocent conduct when the only common sense explanation for it is on-going criminal activity.”⁶⁰

This time, however, there would be no apologies. Noting no more than that consideration of the good-faith issue is “within our authority, which we choose to exercise,”⁶¹ a six-justice majority adopted the exception in an opinion by Justice White. The Court began by deploying the now-familiar balancing approach:

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.” Only the former question is currently before us, and it must be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case-in-chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.⁶²

With the issue stated in this way, the Court had little difficulty concluding that exclusion of evidence obtained pursuant to a facially valid warrant fails to deter Fourth Amendment violations.

Confronted by overwhelming empirical evidence confirming the rule’s negligible cost in terms of convictions lost by suppression rulings,⁶³ the

drug sale at the Price Drive residence. The anonymous letter-writer in *Gates* was wholly unknown to the police and gave no inkling as to how he or she had come by his or her information. See Kamisar, *supra* note 4, at 552–53. Third, the subjects of police surveillance in *Leon*, Stewart excepted, had criminal records involving narcotics violations. Fourth, the corroboration established by the police in *Leon* was more suggestive than in *Gates* (an on-going pattern of suspicious activity as opposed to a single trip to Florida). Finally, the informant in *Gates* predicted that Sue Gates would drive down to Florida and then immediately fly back to Chicago. In fact, she did not do so, but was last observed before the warrant was sought with Lance Gates in the family car. See *Illinois v. Gates*, 462 U.S. 213, 291–93 (Stevens, J., dissenting); Kamisar, *supra* note 4, at 554.

60. *United States v. Leon*, 701 F.2d 187, 190 (9th Cir. 1983) (Kennedy, J., dissenting).

61. 104 S. Ct. at 3412.

62. *Id.* at 3412–13 (citation omitted).

63. See Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 A.B.F. RES. J. 585, 598 (successful motions to suppress physical evidence occurred in 0.69% of 7,484 criminal cases sampled); 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, 617–22 (National Institute of Justice study indicates that California prosecutors decline fewer than 1% of felony arrests because of search and seizure problems; other studies indicate that exclusionary rule’s combined effects at all stages of arrest processing “only results in the non-prosecution and/or nonconviction of in the range of 0.6% to 2.35% of felony arrests in the jurisdictions studied”); Report of the Comptroller General, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (Rep. No. CDG-79-45) (1979) (suppression motions based on Fourth Amendment granted in 1.3% of sample of 2,804 federal cases; convictions obtained in half of the cases in which motions were granted). Most directly relevant is R. VAN DUIZEND, L. SUTTON & C. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 57 (1983) [hereinafter cited as *NCSC STUDY*], indicating that for the seven cities studied, motions to suppress were granted in only 5% of prosecutions involving search warrants.

Court fell back on the notion that "the small percentages . . . mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures."⁶⁴ Justice White made no estimate as to what proportion of this "large absolute number" was freed by unlawful searches conducted in objectively reasonable reliance on defective search warrants, or what proportion of these good-faith but unlawful warrant searches might have been conducted in accordance with the Fourth Amendment absent an exclusionary rule.⁶⁵ The Court's real view about cost appears at the end of its apologetic footnote on the subject: "Because we find that the rule can have *no* substantial deterrent effect in the sorts of situations under consideration in this case . . . we conclude that it cannot pay its way in those situations."⁶⁶

The justification for the good-faith exception therefore turns on the absence of any deterrent benefits from excluding evidence in the search warrant context. On this issue, the Court began by offering three reasons for rejecting the possibility that exclusion might improve the performance of issuing magistrates:

First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment Third, [we do not believe] that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.⁶⁷

The Court is probably safe in discounting the idea that specific suppression orders penalize specific issuing magistrates in a way that encourages compliance with the probable cause requirement. But the assertion that "there exists no evidence" impugning the vigilance of magistrates deserves little credence, accompanied as it is by a footnote to leading authorities adopting a contrary view,⁶⁸ and ignoring as it does the record of judicial

64. 104 S. Ct. at 3413 n.6.

65. On the first point, see *id.* at 3442 (Brennan, J., dissenting) ("[T]he costs due to the exclusion of evidence in the narrower category of cases where police have made objectively reasonable mistakes must necessarily be even smaller."); LaFave, *supra* note 5, at 904. The second point, that convictions lost by applying the exclusionary rule are not a cost attributable to the exclusionary rule but rather to the Fourth Amendment itself, has been made often. See, e.g., *Leon*, 104 S. Ct. at 3436-37 (Brennan, J., dissenting); *The Exclusionary Rule Bills: Hearings on S. 101, S. 751 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 365 (statement of Yale Kamisar) [hereinafter cited as Senate Hearings]; Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1025, 1037-38 (1974); Stewart, *supra* note 4, at 1392-93.

66. 104 S. Ct. at 3413 n.6 (emphasis added).

67. *Id.* at 3418.

68. *Id.* at 3418 n.14 (choosing among conflicting authorities, Justice White summarily rejects adverse findings).

compliance with government requests for court-ordered electronic surveillance.⁶⁹

Nor did the majority find that the risk of exclusion significantly deterred law enforcement officers. Initially, the majority noted that in warrant cases “there is no police illegality and thus nothing to deter. . . . [O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.”⁷⁰ This discussion, however, fails to consider the decision to seek a warrant in the first place. As the Court itself later cautions, “[i]t is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.”⁷¹ Prior to the issuance of warrants, the police are likely to gather more evidence of probable cause if there is a greater risk of suppression.⁷²

The Court, however, has a stock reply to the claim “that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or ‘magistrate shopping’ and thus promotes the ends of the Fourth Amendment.”⁷³ “We find such arguments speculative and conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.”⁷⁴

Kind words for the Court’s opinion have not come easily.⁷⁵ Without establishing any constitutionally tolerated costs to exclusion in warrant cases, the Court deems these costs to outweigh “speculative” deterrent benefits evident in the case at bar. The Court also neglects the conse-

69. Warrant applications for electronic surveillance are only rarely denied. See *Hearings Before the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance* 7 (1976) (statement of Henry Petersen) (“Between 1969 and 1973 there were 3838 applications for intercept orders made, and 3836 were granted.”). While such statistics do not conclusively prove that judges are rubber stamps for the police, it is scarcely fair to describe the record as “no evidence” for that proposition.

70. 104 S. Ct. at 3420 (citation omitted).

71. *Id.* at 3421 n.24.

72. In *Leon* itself the police consulted three deputy district attorneys before presenting their application. *Id.* at 3410.

73. *Id.* at 3419.

74. *Id.* (footnote omitted). The “unusual cases” in which suppression remains appropriate, the Court explains, *id.* at 3421–22, are cases in which: (1) the police mislead the magistrate with knowingly false or reckless statements; (2) the magistrate abandons the judicial role under circumstances in which no well-trained officer would rely on her authorization; (3) the application is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,” *id.* (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)); and (4) the warrant fails on its face to particularize the objects of the search. See also *LaFave*, *supra* note 5, at 911–26.

75. See *supra* notes 5–6. But see *N.Y. Times*, July 6, 1984, at 1, col. 6 (asked about decision, President Reagan replied that he “loved it”).

quences that the *Gates* result may have on the justification for the good-faith exception. Moreover, Justice White offers no remedy to replace the exclusionary rule for warrant searches that are not supported by probable cause and therefore contrary to the letter of the Constitution.

Nonetheless, without approving the Court's somewhat disingenuous *Leon* opinion, this Article undertakes a defense of its result. A successful defense of the *Leon* result must refute the claims that defendants have a personal right to exclusion (the categorical objection) and that the good-faith exception will increase the likelihood of unreasonable searches (the analytical objection). The next two Sections of this Article undertake this task.

II. CATEGORICAL OBJECTIONS TO THE BALANCING APPROACH

If an unconstitutional search confers on the victim a personal right to suppression of its fruits, the balancing approach of *Leon* proceeds from an erroneous interpretation of the Fourth Amendment.⁷⁶ The personal rights theory, however, must overcome the apparent distinction between the search, which is illegal because it invades privacy without sufficient justification, and admission of the evidence, which does not itself invade the privacy of the search victim.⁷⁷

Proponents of a personal right to exclusion have pursued two basic approaches connecting the admission of evidence with the illegal searches that discovered it. One type of argument asserts that the admission of the evidence is really part of the search itself. The search and the trial are said to be part of a "unitary transaction," by virtue either of the police purpose to use the evidence they hope to find,⁷⁸ or of the judicial duty to review unconstitutional executive actions.⁷⁹ A second type of argument claims that use of evidence obtained unconstitutionally creates a new and independent constitutional wrong, by denying the defendant rights to property,⁸⁰ to due process,⁸¹ or against self-incrimination.⁸²

76. See 104 S. Ct. at 3432-45 (Brennan, J., dissenting).

77. See, e.g., *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) (refusing to give *Mapp* retroactive effect) ("The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved."); *Calandra*, 414 U.S. at 354.

78. See Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 289-307 (1974).

79. See *id.* at 335-72; Kamisar, *supra* note 7, at 590-97. A related argument links an exclusionary right to the integrity of the judiciary. See, e.g., *Calandra*, 414 U.S. at 360 (Brennan, J., dissenting); *Elkins v. United States*, 364 U.S. 206, 222-24 (1960).

80. This view was prominent in the early cases. See, e.g., *Gouled v. United States*, 255 U.S. 298, 305-06 (1921); Chafee, *The Progress of the Law, 1919-1922*, 35 HARV. L. REV. 673, 696-97 (1922). J.B. White has recently attempted to rehabilitate this approach. White, *supra* note 7.

81. See Schrock & Welsh, *supra* note 78, at 335-66.

82. See, e.g., *Mapp*, 367 U.S. at 662 (Black, J., concurring); *Olmstead v. United States*, 277 U.S. 438, 472-79 (1928) (Brandeis, J., dissenting).

Advocates of this latter argument have failed to articulate a discrete constitutional violation in the admission of illegally obtained evidence.⁸³ As a result, most of these theories are rejected even by advocates of the personal rights approach.⁸⁴ The unitary transaction theory has also proved easier to announce than to substantiate. Even by its own logic, the connection between the Fourth Amendment and the exclusionary rule is overbroad, for exclusion often neutralizes evidence the police might have seized constitutionally.⁸⁵ So long as the gravamen of the Fourth Amendment is privacy, any essential connection between the wrong of the search and a subsequent official proceeding will remain somewhat mystical.⁸⁶

83. Neither the self-incrimination theory nor the property theory can explain why a subpoena for physical evidence does not work the same wrong as an illegal search. Fundamentally, the Fourth Amendment forbids the government from learning of evidence through gratuitously intrusive means, and not from obtaining evidence once its location has been discovered.

The property theory has the further defects of failing to account for the right to exclude contraband, for the refusal to return contraband after it has been excluded, or for the inappropriateness of a damage remedy instead of exclusion. Pressed on the latter point, Professor White concedes that Fourth Amendment rights are political, not based on property. *See* White, *supra* note 7, at 1278 n.21. Any other conclusion would put up "constitutional rights for sale whenever the government unilaterally decides to purchase them." Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1266 n.168 (1983). For a convincing critique of the self-incrimination theory, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 414-15 (1971) (Burger, C.J., dissenting).

The due process theory is a tautology: liberty may be restricted only according to the law of the land, but if the Fourth Amendment does not itself command exclusion then a criminal conviction based on illegal evidence is nonetheless rendered *per legem terrae*.

84. *See* Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1088-90 n.16 (1959) (criticizing self-incrimination theory); Schrock & Welsh, *supra* note 78, at 263-69 (rejecting exclusion based solely on judicial integrity); *id.* at 363 n.276 (rejecting property theory).

85. In many cases the police could have obtained the evidence legally although in fact they did not. For example, in *Segura v. United States*, 104 S. Ct. 3380 (1984), government agents illegally entered private premises and discovered, but did not seize or otherwise disturb, evidence in plain view. Meanwhile other agents, without knowledge of the illegal entry, sought and obtained a search warrant. The Supreme Court, in a "carefully limited" disposition of the issue, held that the evidence was properly admitted.

In many other cases the police have information amounting to probable cause but do not include all of it in the warrant application, or lack probable cause but could establish it with further investigation. Any expansion of the *Segura* result, however, beyond an independent-source rule—any creation of an inevitable legal discovery exception—would mean that the government could in every case urge admission of the evidence because the police hypothetically might have complied with Fourth Amendment standards. Thus the Sixth Circuit, on facts similar to those of *Segura*, excluded the evidence because "[a]ny other view would tend in actual practice to emasculate the search warrant requirement." *United States v. Griffin*, 502 F.2d 959, 961 (6th Cir.) (per curiam), *cert. denied*, 419 U.S. 1050 (1974). *But see* *Patterson v. State*, 691 P.2d 253 (Wyo. 1984):

The officers had a reasonable purpose in securing the premises to prevent destruction of evidence. They did not have an opportunity to obtain a search warrant before the potential for such destruction became manifest. They acted in objective good faith, and if there was any transgression it was minor. *If they had waited for a search warrant and if the evidence were not destroyed, the result would have been the same.*

Id. at 259 (emphasis added). God help Wyoming.

86. *See* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 & n.16 (1975) ("Why the rule is 'an essential part' of that right [to privacy] has . . . never been made clear," although commentators have "attempted to fill the gap.").

More importantly, whether the claimed connection between search and use rests on the notion of a unitary transaction or of a derivative exclusionary right, the claims to a personal right to exclusion rest on a mistaken interpretation of the rights secured by the Fourth Amendment. The purpose of the Fourth Amendment is not the defeat of certain criminal laws, but the protection of the lawful enjoyment of privacy.⁸⁷ What makes a search constitutionally reasonable is the probability, neutrally determined whenever possible, that evidence exists at the place to be searched. Absent that probability, the search is no less intrusive; instead, the search is illegal because it is not likely to yield the desired fruit. Since suspicious but noncriminal activity is of no substantive concern to the government, the only point to restricting searches to cases of probable guilt is to avoid intruding on privacy when no evidence is present. With respect to a particular case, the actual existence of the evidence satisfies the value judgment struck by the Amendment.⁸⁸ Enforcement of the probable cause and warrant requirements in cases of actual guilt therefore has the object of protecting the lawful enjoyment of privacy in other cases.

This does not mean that any successful search is legal, because there is no way to protect lawful privacy without also protecting criminal privacy. The search without probable cause, however, is objectionable not because it discovered evidence, but because it represents an official practice likely to intrude upon the lawful enjoyment of privacy. A due regard for the deterrent function of a Fourth Amendment remedy adequately responds to the illegality of such an official practice.

In contrast to this positive prospective effect of the exclusionary rule, suppression does nothing to undo the evil done by an illegal search to those values that justify restricting searches in the first place.⁸⁹ The evil of

87. Thus, when a police technique can reveal *only* evidence of crime, it does not constitute a search. *United States v. Place*, 462 U.S. 696, 706-07 (1983) (canine sniff for narcotics). Conversely, whenever a police technique might unilaterally intrude upon a reasonable expectation of privacy, its use is a search within the meaning of the Amendment. *See Katz v. United States*, 389 U.S. 347, 350-53 (1967); *Loewy*, *supra* note 83, at 1248-56.

88. The probable cause standard attempts to measure the presence of evidence in the face of uncertainty. After the search the uncertainty in the instant case is dispelled. *Compare California v. Minjares*, 443 U.S. 916, 921 (1979) (Rehnquist, J., dissenting from denial of application for recall and stay) (That probable cause can only be "measured by objective facts known to the police officer prior to the search . . . while taken for granted today, was not inevitable. The Court certainly could have held that discovery of the articles sought is compelling evidence that the search was justified.") *with S. SCHLESSINGER, EXCLUSIONARY INJUSTICE* 48 (1977) (criminal conduct amounts to waiver of Fourth Amendment right). What this approach ignores is that the pattern of police intrusion is larger than a single successful example of it. If the police engage in a warrantless, house-to-house search, doubtless in many places they will discover evidence of crime. Is "discovery of the articles sought . . . compelling evidence that the search was justified"? I cannot imagine, say, James Otis answering that question in the affirmative. But it remains necessary to link the illegal search that yields evidence to other illegal searches that do not make this point compelling.

89. *See Schrock & Welsh*, *supra* note 78, at 316-17 n.158 ("Critics properly scorn . . . exclusion as *compensation* for unreasonable search and seizure.") (emphasis in original). Return of criminal

the search lies not in the discovery of criminal evidence, but in the concomitant exposure to the government, and thereby the world, of all those telltales of personality revealed in any place we take for private. To view the exclusionary rule as a personal right is to constitutionally enshrine the pistol in the basement or the cocaine in the coffee can, and to ignore as immaterial the music on the stereo, the books on the shelf, and the fading letters in the bedroom bureau drawer.

If this assessment of the Amendment's purpose is correct, none of the theories designed to establish a personal right to exclusion is tenable. Each theory attempts to link the initial illegality of the search with the ultimate admission of its fruits.⁹⁰ But linking the search and the trial still fails to establish a constitutional basis for the rule, because the Fourth Amendment in the first instance does not condemn the search when evidence exists unless lawful privacy would otherwise be compromised.⁹¹ Only the independent connection between illegal searches that discover evidence and illegal searches that do not can make the case for the exclusionary rule, and that case by its very nature depends upon deterrence.

Unless the probable cause requirement has the purpose of preventing searches even when evidence exists—to create “a right to commit crime within the four walls of one's abode secure from police intrusion”⁹² or a “privilege against conviction by unlawfully obtained evidence”⁹³—the exclusionary rule cannot protect a constitutionally cognizable interest of the search victim. Yet the evil of crime does not vary in any coherent way with its susceptibility to discovery; the suggestion that a restriction on searches has the purpose of insulating substantive conduct from criminal liability is accordingly remote.⁹⁴ Put another way, there is no normative

evidence restores only those aspects of personal privacy that the amendment has no purpose to protect.

90. See *supra* notes 78–81 and accompanying text.

91. Schrock & Welsh, *supra* note 78, at 278–79 n.85, criticize the notion that the criminal waives her Fourth Amendment rights because waiver could be applied to all constitutional rights. But unlike the Fifth Amendment, which explicitly recognizes a right against incrimination, the Fourth Amendment recognizes a right to privacy limited by the need to enforce the law. That limitation inhabits the probable cause standard by necessary implication—an implication entirely absent from other constitutional guarantees such as the privilege against self-incrimination (which, as the term suggests, extends primarily to the guilty), the right to counsel (for even the guilty, as plea-bargaining illustrates, may benefit from counsel), and the right to jury trial (for the jurors may acquit against the evidence).

In any event, I do not maintain that the guilty waive all rights against unreasonable searches, but only that the guilty have no right based on the presence of criminal evidence; “the right of the people” runs against the practice of searching without probable cause, or a warrant. The criminal's right thus exists solely because we cannot distinguish her case from others in advance, not because privacy in a single case is more valuable than law enforcement.

92. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 580 (1955) (footnote omitted) (opposing this view).

93. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 35 (footnote omitted) (apparently endorsing this view).

94. Singularly vicious crimes, such as the mass murders perpetrated by John Wayne Gacy or Leonard T. Lake, often occur in complete privacy; singularly innocuous crimes, such as possession of

distinction between two criminals exposed respectively by legal and illegal searches except that the criminal exposed by the illegal search is the target of an arbitrary government intrusion. It is thus the reckless undertaking rather than the fortuitous success of the search that the Amendment condemns. The pattern of police misconduct rather than the discovered evidence is therefore the proper object of the constitutional remedy.

More than a decade ago, in his celebrated Holmes Lectures, Professor Amsterdam drew a distinction between two basic perspectives on the Fourth Amendment.⁹⁵ One view interprets the Amendment as creating atomistic spheres of personal privacy; the other interprets restrictions on search and seizure as primarily directed toward regulating governmental conduct. At the time, Professor Amsterdam objected to the Supreme Court's tendency to adopt an atomistic perspective on rights that suffer in general when not defended expansively in particular cases. Somewhat ironically, the modern critics of the Court's exclusionary rule jurisprudence have themselves assumed this atomistic perspective, insisting that the exclusionary rule follows from the personal rights guaranteed by the Fourth Amendment. As the previous discussion makes clear, with respect to the exclusionary rule, the regulatory perspective follows from the values protected by the Constitution. I believe that at least to a degree, the current assault on the Court's balancing approach has less to do with an articulable basis for an individual right to exclusion than with the apprehension that the current Court wrongly weighs the balance.⁹⁶

marijuana, often occur in public.

95. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367-72 (1974).

96. Of course, it is no answer to an argument that its proponents have come to it late or for private reasons. Nevertheless, the logical object of criticism from the personal rights perspective is not *Calandra*, but *Linkletter v. Walker*, 381 U.S. 618 (1965), refusing to give *Mapp* retroactive effect. Yet the fire directed against *Linkletter* had little to do with the Court's interpretation of the exclusionary rule, but rather concerned the then-novel announcement of a judicial power to make new law and apply it only prospectively. See Haddad, "*Retroactivity Should be Rethought*": A Call for the End of the *Linkletter* Doctrine, 60 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 417, 424-41 (1969). Prior to *Calandra*, Professor Kamisar confesses, many defenders of the exclusionary rule, himself included, had accepted the deterrence line of reasoning. See Kamisar, *supra* note 7, at 617-21. This suggests that the deterrence rationale was not so unstable or unprincipled as now supposed in light of the Court's manipulation of the cost/benefit analysis. I would be surprised if Justice Traynor's exclusionary rule decisions, e.g., *People v. Martin*, 45 Cal. 2d 755, 760, 290 P.2d 855, 857 (1955), although clearly dominated by the deterrence rationale, were condemned, as are the current Supreme Court's decisions, because "the language of deterrence involves the Court in a set of judgments that it is incompetent to make, and avoids those more particular judgments that it is its duty to make. . . ." White, *supra* note 7, at 1283. After all, Justice Brennan and Chief Justice Warren joined the Court's opinion in *Linkletter*. That even now, in light of *Calandra* and its myopic progeny, the Court's critics are at pains not to disavow *Linkletter*'s result strongly suggests that the real dispute is not about absolute rights and cost/benefit analysis, but about the terms upon which the cost/benefit analysis will turn. See McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 692-93 (1972).

III. ANALYTICAL OBJECTIONS

If the exclusionary rule is not a personal right of the accused, its application must depend on some more general objective of public law. At least since *Calandra*, the Supreme Court consistently has ascribed a deterrent purpose to the rule and balanced the benefits of deterrence against the costs of freeing the guilty. This Part considers whether the *Leon* majority correctly applied the *Calandra* balancing test.

Critics of the Court maintain that the *Leon* majority overstated the costs and underestimated the benefits of applying the exclusionary rule to warrant cases.⁹⁷ They note that the available empirical data indicate that very few convictions are lost to suppression orders in warrant cases,⁹⁸ and that withdrawal of the exclusionary sanction may contribute to the execution of defective warrants in a variety of ways.⁹⁹ In this view, *Leon* eliminates the incentive for the police to present the strongest possible application,¹⁰⁰ the incentive for the police bureaucracy to create screening procedures for warrant applications,¹⁰¹ the incentive for magistrates to take their role seriously,¹⁰² and the incentive for maintaining police training programs in search and seizure law.¹⁰³ Even granting the force of these contentions, however, *Leon* poses only a minor risk of encouraging speculative search warrants.

This assessment of deterrence is based upon the actual operation of the search warrant process. In particular, two facts confirmed by the available empirical data deserve emphasis. Warranted searches almost always uncover incriminating evidence, and this evidence, even before *Gates*, was almost never excluded.

The evidence supporting the second conclusion—that warrant searches rarely result in suppression—is overwhelming. Studies consistently have concluded that the fraction of convictions lost due to suppression amounts

97. See *Leon*, 104 S. Ct. at 3441–45 (Brennan, J., dissenting); *id.* at 3454–56 (Stevens, J., dissenting); LaFave, *supra* note 5, at 903–11.

98. 104 S. Ct. at 3441–42 (Brennan, J., dissenting); LaFave, *supra* note 5, at 904.

99. See Mertens & Wasserstrom, *supra* note 4, at 456–57 (pre-*Leon* critique of good-faith exception).

100. See 104 S. Ct. at 3445 (Brennan, J., dissenting) (“[T]he good faith exception will encourage police to provide only the bare minimum of information in future warrant applications.”); *id.* at 3454 (Stevens, J., dissenting) (“[E]ven when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait.”).

101. LaFave, *supra* note 5, at 910 (“Why should a police officer take the risk that some conscientious prosecutor or police supervisor will say the application is insufficient when, if some magistrate can be induced to issue a warrant, the affidavit is thereafter virtually immune from challenge?”).

102. 104 S. Ct. at 3444 (Brennan, J., dissenting); LaFave, *supra* note 5, at 906–09.

103. 104 S. Ct. at 3444 (Brennan, J., dissenting). Professor LaFave made the point prior to *Leon* that a failure to apply the exclusionary rule in the good-faith context communicates “an unmistakable message to society at large and to law enforcement supervisors; namely, that there really is no need to expend the money or time that is needed to adequately train the police.” Senate Hearings, *supra* note 65, at 329 (statement of Wayne LaFave).

to less than 1% of all arrests.¹⁰⁴ Given the deference due search warrants even before *Gates*,¹⁰⁵ there is reason to suspect that the losses in warrant cases would be lower than in other Fourth Amendment cases. The most recent and thorough study of the search warrant process, a survey of warrant practice in seven cities carried out under the auspices of the National Center for State Courts (NCSC), found that motions to suppress were granted in only 5% of the prosecutions involving warrants.¹⁰⁶

These figures strongly support Professor LaFave's description of the *Leon* majority's cost analysis as "apparently embrac[ing] the kind of cock-eyed characterization which previously had been found almost exclusively in the least sophisticated anti-exclusionary rule diatribes."¹⁰⁷ Moreover, successful suppression motions do not guarantee acquittals; in the NCSC sample, for example, at least two thirds of the prosecutions involving successful suppression motions nevertheless yielded convictions.¹⁰⁸ Even this number overstates the cost of exclusion because at least some of the "lost" convictions could never have been obtained had the police obeyed the Fourth Amendment,¹⁰⁹ and because the *Gates* decision has made suppression less likely than before.¹¹⁰ Hard data thus confirm that lost convictions in warrant cases constitute a mere trace element in the criminal justice system. Thus, the Supreme Court certainly could have decided, like the Mississippi court that reviewed a decade of its own decisions and found but a single conviction reversed because of a defective search warrant,¹¹¹ that "if it ain't broke, don't fix it."¹¹²

Nevertheless, to analyze the decision the Court chose to render, it is necessary to ask why search warrants are so rarely subject to successful attack. To some extent the low rates of lost conviction may indicate judicial reluctance to apply the exclusionary rule.¹¹³ But judicial hostility to the exclusionary rule, although doubtless present in certain cases, is not the only explanation for a low rate of lost convictions. The second fact

104. See *supra* note 63.

105. See, e.g., *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (magistrate's determination "should be paid great deference by reviewing courts"); *United States v. Ventresca*, 380 U.S. 102, 106 (1965) ("[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.").

106. NCSC STUDY, *supra* note 63, at 57.

107. LaFave, *supra* note 5, at 905.

108. NCSC STUDY, *supra* note 63, at 56.

109. See 104 S. Ct. at 3457 (Stevens, J., dissenting); LaFave, *supra* note 5, at 905-06.

110. See Kamisar, *supra* note 4, at 585-89.

111. *Stringer v. State*, No. 54,805, slip op. (Miss. Feb. 27, 1985) (available on Lexis and Westlaw).

112. *Id.*

113. On trial-court hostility to the exclusionary rule, see M. WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE 18-20 (1982), reprinted in Senate Hearings, *supra* note 65, at 437-39; Kaplan, *supra* note 65, at 1045; Mertens & Wasserstrom, *supra* note 4, at 449.

about search warrants—their surprising accuracy in predicting the location of criminal evidence—provides an objective indication that the low suppression rate is consistent with the thesis that most warrants are validly issued.

In the NCSC study, the authors measured the frequency with which warrant searches resulted in the seizure of evidence described in the warrant, based on the number of returns filed. In six of seven cities,¹¹⁴ the proportion of searches that discovered at least some of the evidence named in the warrant ranged from 74% to 89%.¹¹⁵ That record, reflecting the best available information, is strikingly impressive.¹¹⁶

Reviewing judges, therefore, do not need to endorse mere fishing expeditions to ensure admissibility of evidence. While discovery of evidence of itself does not prove the antecedent demonstration of probable cause in the affidavit, the discovery of fruits anticipated in the warrant application in the vast majority of the searches strongly suggests that the reason for the low rate of lost convictions is not judicial manipulation but the prevalence of sound warrant applications.

As critics of *Leon* suggest, the success of the warrant process may reflect the salutary influence of the exclusionary rule prior to its unwise curtailment.¹¹⁷ I am convinced, however, that this explanation is at least largely mistaken.

The exclusionary rule does not so much punish the police as remove one incentive for illegal searches. Thus the exclusionary rule does no more than render a particular search fruitless, just as if no evidence had been found in the first place. But the very high success rate of warrant searches suggests that warrants are not sought in cases of marginal suspicion.¹¹⁸

114. In one of the seven cities, returns were filed in only about half the cases, a lapse due in part to the failure to file a return for unproductive searches and in part to defective record-keeping practices. NCSC STUDY, *supra* note 63, at 47–48.

115. These percentages were obtained by taking the percentage of searches in cases in which returns were filed that led to seizure of some item named in the warrant, *id.* at 50, and multiplying that percentage by the percentage of warrants for which returns were in fact filed, *id.* at 46. *See also* Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 723 (1972) (success rate for search warrants based on informant's information was 64% in 1968 and 70% in 1969; success defined as seizure of evidence regardless of whether warrant specified seized item).

116. This high success rate is especially surprising because "probable cause" may refer to a quantum of suspicion that under certain circumstances is less than more-probable-than-not. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 210.1(7) & commentary at 449 (Proposed Official Draft 1975). The tenor of the *Gates* opinion suggests as much. *See* Kamisar, *supra* note 4, at 588; Grano, *supra* note 50, at 495–501; *cf.* 1 W. LAFAYE, *supra* note 50, § 3.2(e).

117. Mertens & Wasserstrom, *supra* note 4, at 456 ("[A]n effective system for the issuance of warrants . . . can, in no small measure, be attributed to the exclusionary rule.").

118. It may indeed be the case that the expected success of possible searches declines precipitously after the point of virtual certainty. If most warrant searches are of the latter category—*e.g.*, searches of a suspect's abode after her arrest has yielded evidence of the crime, searches based on a police undercover operation, and so on—but a few warrant searches are speculative, then the overall success

The police, thus, appear to decline the search warrant process even when a very substantial chance of obtaining admissible evidence exists. The limiting factor appears to be something other than the risk of exclusion.

The more likely explanation for the success of warrants focuses on the costs of the warrant process to police. If the police view obtaining a warrant as a costly proposition, a proposed search would have to promise very likely returns to justify the expenditure of law-enforcement resources.¹¹⁹ A warrant application, such as Officer Rombach's, that involves a substantial time commitment for drafting and screening, will not be undertaken without a very high subjective expectation that evidence will be found. A speculative search, inspired by "mere suspicion," certainly risks suppression of its fruits, but that threat is minor compared to the intrinsic costs of the warrant process.

The responses of law-enforcement officers interviewed for the NCSC study illustrate the primacy of the cost factor in the decision to obtain a warrant:

Delay and inconvenience were widely cited as the principal basis for officers' reluctance to seek a search warrant. Said one detective in Mountain City:

[Y]ou see, search warrants are double the time, sometimes

rate of warrant searches would be close to the success rate revealed in the NCSC data, but the expected success of additional warrant searches could be quite low. But there are good reasons for doubting any such discontinuous distribution of probable search success. First, when empirical data are collected for the warrant searches considered least likely to succeed in the aggregate—the confidential informant cases—the rate of success is only marginally lower than for other types of warrant searches. Rebell found that for this type of warrant search, the success rate, unadjusted for seizures of items not specified in the warrant, was 64% and 70% in two different years. Rebell, *supra* note 115, at 723. Compare the figures for "Harbor City," NCSC STUDY, *supra* note 63, at 42 table 2-11, and *id.* at 50 table 2-19.

Second, my impression is that often when evidence is excluded for failure to obtain a warrant, little doubt exists that the police could have established probable cause for the search. If warrantless searches were categorically less likely to succeed than warrant searches, the warrant requirement would largely overlap with the probable cause requirement. Together, these impressions suggest that the expected success rate of searches varies across a continuum rather than declining dramatically after the point of virtual certainty.

A further potential difficulty is that the police perception of the costs and returns to searching may not comport with the Fourth Amendment. In ordinary cases, the cost of the warrant process may demand a high expectation of success, but in a case involving, say, the shooting of a law-enforcement officer, the police may perceive any chance of discovering evidence to be worth the effort. To suppose that prosecutorial screening would not lose much of its rigor in such cases, absent the exclusionary threat, would blink reality. Nonetheless, policy must speak to the ordinary and not the exotic case. In general, the costs of the warrant process are not arbitrary, but geared to the encouragement of constitutional behavior. In this form, these costs ordinarily have sufficed to ensure that warrants issue only on a basis considerably stronger than mere suspicion.

119. This is the fundamental tenet of price theory: consumption will fall as price rises. The whole analysis could accordingly be put in economic terms, complete with graphs, models, and technical vocabulary. In the instant case I think the point is better conveyed by relating the less formal line of inquiry that led me to the present conclusions.

triple the time that you take on arrest warrants, and arrest warrants are long enough. Arrest warrants, you figure a half a day.

Another added:

Actually, there are a lot of warrants that are not sought because of the hassle. You just figure it's not worth the hassle. . . . I don't think you can forego a case because of the hassle of a search warrant, but you can . . . work some other method. If I can get consent [to search], I'm gonna do it.¹²⁰

The authors conclude that "[t]he effort and time required [were] cited by many law enforcement officers as the most troublesome disincentives to obtaining a search warrant."¹²¹

Other things equal, the exclusionary rule might make a difference in the government's decision to obtain a warrant, by reducing the expected return to the search. Yet even on the assumption that the withdrawal of the exclusionary rule from warrant cases will induce the police to conduct warrant searches which otherwise would not take place at all, the cost of obtaining a warrant will ensure that the additional searches are more than mere fishing expeditions. If harassment is the goal, no warrant is required;¹²² if evidence is the goal, the police will not waste the resources to obtain a warrant on a mere chance that something might turn up.

This is not to say that the exclusionary rule does not influence search and seizure activity; indeed, I believe the evidence unequivocally confirms the exclusionary rule's impact on police behavior.¹²³ Absent the exclusion-

120. See NCSC STUDY, *supra* note 63, at 21.

121. *Id.* at 151. See also L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 113-15 (1967).

122. See *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (The exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal."). Even when the police hope to obtain admissible evidence, a warrant is rarely indispensable. Persons and vehicles are always subject to the "arrest incident to a search," and even residences may yield admissible evidence if consent, liberally understood, is given. See L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 121, at 122 ("It is also a fact that many arrests are made, not primarily to obtain custody of the suspect, but rather as a method of providing a legitimate basis for making a search."). See generally 2 W. LAFAVE, *supra* note 50, at § 8.1. Under *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the police need not warn the suspect of the right to refuse consent, and the focus of inquiry turns to whether the "consent" was "voluntary," i.e., not the product of police coercion.

123. I am at a loss to explain the prevailing agnosticism on this issue, e.g., *United States v. Janis*, 428 U.S. 433, 449-54 (1976). Although crude, the best measure of the exclusionary rule's success is the rate of successful suppression motions, because granted motions directly measure the legality of the search. Two studies claim to discredit the deterrent hypothesis by depending largely on inferences drawn from a continued high rate of successful suppression motions in Chicago, despite enforcement of the exclusionary rule. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 681-89 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEG. STUD. 243 (1973). More recent and comprehensive data

ary rule, the police have no incentive to obtain warrants except the spectral possibility of civil damages. Not surprisingly, warrant use increased dramatically after *Mapp v. Ohio*.¹²⁴ Even when the police do not seek a warrant, they attempt to conform their conduct to one of the exceptions to the warrant requirement, typically search incident to arrest or consent. This obedience to legal form would be pointless but for the exclusionary rule. And forceful testimony from informed observers strongly suggests that exclusion significantly diminishes illegal police conduct.¹²⁵

The prospect of suppression, then, encourages the use of warrants, but once it becomes clear that admission of the evidence depends on securing a warrant, the costs of the warrant process, independent of the exclusionary rule, create a powerful disincentive to speculative searches. In light of this analysis, *Leon* probably will not have much deleterious impact on police willingness to seek dubious warrants. Absent a strong expectation of success, the police will not undertake the cost.¹²⁶ Nor do I believe that the

indicate overwhelmingly, however, that the successful suppression motion is quite rare. *See supra* note 63. Unless defense attorneys neglect to file motions in a great many meritorious cases, these figures, based on far broader samples of contemporary cases, indicate that the appropriate inference about deterrence is the opposite of that initially suggested by the Oaks and Spiotto research. The possibility of defense neglect appears unlikely in light of Nardulli's data indicating that the percentage of total cases involving successful motions does not vary coherently with the percentage of cases in which motions are filed. *See Nardulli, supra* note 63, at 596, 598 (Table 9).

124. 367 U.S. 643 (1961). *See Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 708-11 (1974) (warrant use in Cincinnati rose from 0-7 per year to 89-113 following *Mapp*; in Boston, the number of warrants rose from 176-267 to 560-940); Murphy, *Judicial Review of Police Methods in Law Enforcement*, 44 TEX. L. REV. 939, 941-42 (1966) (prior to *Mapp*, search warrants "had been rarely used," but as of December, 1965, 17,889 had been obtained). The magnitude of this increase and the cost factor make it unlikely that the increase resulted from any independent development.

125. For example, Mertens & Wasserstrom, *supra* note 4, at 400-01 & nn.174 & 175, document police responses to several Supreme Court decisions. Following the Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979) (random traffic stops unconstitutional), the District of Columbia Police Department, which previously had relied on a contrary case from the D.C. Circuit Court of Appeals, immediately issued a directive ordering compliance with the decision. *Id.* at 400. The Delaware State Police took similar action following the trial court's decision in *Prouse*, which the Supreme Court ultimately affirmed. *Id.*

Even two prosecutors with quite different views of the exclusionary rule controversy reach the same conclusion. *See Senate Hearings, supra* note 65, at 336-37 (statement of G. Robert Blakey) ("To the degree that I have been involved in [criminal justice] for 20 years, I will tell you unequivocally that the exclusionary rule, in fact, deters. . . . Anyone who suggests to you the contrary in my judgment doesn't know what he is talking about."); Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 28, 30 ("I have watched the rule deter, routinely, throughout my years as a prosecutor.").

126. The wiretap evidence, which is entirely consistent with the general account of the warrant process given in the text, is especially illuminating in this regard. Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982), law enforcement officers may engage in electronic surveillance only after obtaining a warrant as provided by the statute, which includes several procedural hurdles absent from the ordinary warrant procedure. As the previous discussion would lead one to expect, the costly nature of the procedure, in particular the statutorily mandated executive screening, operates as a strong disincentive to frivolous warrant requests. Applications for electronic surveillance authorizations are virtually never denied, *see supra* note 69, but this is probably not the result of rubber-stamping by the judiciary. As Professor Blakey observed,

good-faith exception will weaken the vigilance of reviewing magistrates. Although many commentators have minimized the scrutiny magistrates actually apply to warrant applications,¹²⁷ the NCSC data suggest that the trial court judges who issue most warrants reject applications in a significant number of cases.¹²⁸ If issuing magistrates take the application process seriously because they desire to avoid losing convictions on a subsequent suppression motion, *Leon* may reduce the intensity of this stage of review.¹²⁹ For three reasons, I do not believe that such an erosion of magisterial scrutiny poses a serious threat to individual privacy.

First, the costs of the warrant process, independent of the final judicial check, minimize the likelihood that a purely speculative search warrant application will reach the judges at all. Second, even if judges have taken a tough stance on warrant requests for the purpose of avoiding ultimate suppression, outright preclusion of a proposed search would not have resulted. Instead, such judges probably have told the police to strengthen the application and then come back. *Leon* therefore may decrease the rigor with which the application establishes probable cause, but probably will not change the actual searches that take place. Third, any reduction in the vigilance of magistrates sympathetic to the police must be considered along with the possibility that other magistrates, knowing the likely unreviewability of their decisions, will scrutinize applications more carefully. One unfortunate effect of the exclusionary rule on the warrant process was to encourage the impression that the suppression hearing, which cannot restore privacy, provides the proper forum for a thorough testing of the warrant application.¹³⁰ It has been noted that "the same judge may

2 *Hearings Before the National Commission*, *supra* note 69, at 1123, "except for a few judges, none have indeed denied orders. But our record indicates that the place where they are being denied is at the prosecutorial level." Again as the textual account of the warrant process would suggest, electronic surveillance warrants are accurately targeted and rarely result in suppression. For example, in 1982, 83 of 84 motions to suppress in Federal District Court were denied; in the state courts, 43 of 45 were denied. Of 130 warrants obtained by federal authorities, only 6 failed to produce any incriminating evidence. Of the 388 state authorizations for which reports were filed, only 25 failed to produce incriminating evidence. See Administrative Office of the United States Courts, *Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the period January 1, 1982 to December 31, 1982*, at 23-85 (1983) (tables listing motions to suppress and number of incriminating intercepts).

127. *E.g.*, Senate Hearings, *supra* note 65, at 366 (statement of Yale Kamisar) ("You ask any scholar about how the search warrant procedure works today and they will tell you it is a joke."); 2 W. LaFAVE, *supra* note 50, § 4.1, at 5-6.

128. NCSC STUDY, *supra* note 63, at 30-32 (average length of review two minutes and forty-eight seconds; applications rejected in 8% of observed cases); *id.* at 64-67 (issuing judges harbor different attitudes toward warrants but many take role seriously).

129. See, *e.g.*, LaFave, *supra* note 5, at 906-07; NCSC STUDY, *supra* note 63, at 129.

130. See NCSC STUDY, *supra* note 63, at 133-34 (One judge maintained that "police should be given a certain amount of latitude at this initial point in the investigation because justice can be ensured at a later stage, such as the preliminary hearing, when additional evidence is made available for a full factual determination of probable cause.").

consider the matter much more carefully when confronted with a motion to suppress evidence in court than he did when asked to issue the search warrant."¹³¹ To this type of judge, *Leon* sends a clear signal: Do it right the first time.

Which tendency will prevail—the willingness to obtain admissible evidence even when probable cause must be fudged a bit, or the desire to review the application seriously knowing that this review is the only real check on the police—is difficult to tell until experience with the *Leon* rule accumulates. The impact either way is likely to be less substantial than supposed, especially to the extent that judges with warrant duty are neither law-and-order adjuncts of the police, nor self-styled civil libertarians, but conscientious people trying to apply the rules.

The most troubling aspect of the *Leon* result, from a deterrence perspective, is the possibility that the absence of the exclusionary sanction may induce the law enforcement bureaucracy to dispense with some of the screening procedures that have separated line officers from issuing judges.¹³² In most large jurisdictions, a line officer who wants to obtain a warrant must present the project either to a superior within the police organization or to a government attorney.¹³³ This review can lead to the rejection of unsupportable applications and to the presentation of other applications in the strongest possible terms.¹³⁴ If this process is abandoned, some of the intrinsic reliability of search warrants will be lost.

It is also possible that by minimizing the pre-application investigation police must undertake to support a warrant application, the good-faith exception will decrease the costs, and thereby the reliability, of warrants. Where previously the police could never be sure their investigation had gone far enough, under *Leon* they know that the minimum showing required to convince an issuing magistrate will satisfy the reviewing court on a motion to suppress.¹³⁵ This will have the effect of reducing the time required to establish probable cause, so that searches previously not worth the cost of a warrant will become attractive.

131. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 121, at 120. The authors observe that on rare occasions the judge who issued the warrant finds it defective at a subsequent suppression hearing.

132. *See supra* notes 101 & 117.

133. NCSC STUDY, *supra* note 63, at 23–25 (preapplication screening either by police supervisors, prosecutors, or both occurs in all cities studied); L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 121, at 114 (“The prevailing practice in large metropolitan areas is for all applications for search warrants first to be reviewed by a member of the prosecutor’s staff . . .”).

134. NCSC STUDY, *supra* note 63, at 25 (“From our interviews, however, it appears that although few applications are screened out completely, in a significant number of cases (the estimates varied from 10 percent . . . to between 33 and 50 percent . . .) the screening prosecutor will ask the police officer to add information to the affidavit.”).

135. *See Leon*, 104 S. Ct. at 3444–45 (Brennan, J., dissenting); *id.* at 3454 (Stevens, J., dissenting).

A recent Louisiana decision, *State v. Wood*,¹³⁶ illustrates how far *Leon* may go in this direction. An affidavit stated that a police officer believed that “various narcotics, marijuana and other drug paraphernalia, and also a [presumably stolen] 5200 Poulan chain saw with a bow bar” were in the defendant’s possession because: “I received information from two (2) confidential informants that the above listed items have been seen at the above location. These two (2) informants have found [sic] to be very reliable in past investigations.”¹³⁷ The trial court had denied a motion to suppress, on the fantastic basis that the application established probable cause. The appellate court rejected this reasoning, but upheld the convictions on the authority of *Leon*.

The Louisiana court acknowledged that, under *Leon*, the exclusionary rule remains available when the warrant application so plainly fails to establish probable cause that reliance upon it is “entirely unreasonable.”¹³⁸ The *Leon* majority cited the “bare bones” affidavit as an example of such a situation.¹³⁹ The *Wood* court concluded, however, that “the affidavit in the present case is almost in the ‘bare bones’ category, but not quite.”¹⁴⁰

If this is a correct reading of *Leon*, then indeed there is much to fear. In *Wood*, a deputy sheriff, evidently entirely on his own authority, obtained the warrant. The only investigative effort involved appears to be typing a form—and perhaps inventing the informants. Not surprisingly, when the cost of obtaining a warrant is so low, the warrant application turned out to be wildly inaccurate.¹⁴¹ A search based on no more than such frail suspicion is very likely to cut to the core of the Fourth Amendment by thrusting the police into the private affairs of entirely innocent parties.

If *Leon* is not to endanger legitimate privacy interests by reducing the cost of the warrant process, it must be interpreted not to apply to cases such as *Wood*. This is entirely possible; there could scarcely be more difference between the warrant issued for the search of Wood’s trailer and Officer Rombach’s 28-page affidavit, based on a known informant and a month of surveillance, and reviewed by three government attorneys. In-

136. 457 So. 2d 206 (La. Ct. App. 1984).

137. *Id.* at 208.

138. *Id.* at 209.

139. 104 S. Ct. at 3422. The Court evidently refers to Justice White’s concurring opinion in *Gates*, 462 U.S. at 263–64, a passage in which Justice White (the author of the *Leon* opinion) indicated that even under a good-faith regime, he “would apply the exclusionary rule when it is plainly evident that a magistrate or judge had no business issuing a warrant,” citing *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Nathanson v. United States*, 290 U.S. 41 (1933). The only thing about the *Wood* affidavit that might make it more probative than the *Nathanson* and *Aguilar* warrants is the ritual invocation of not one “reliable” informant, but two.

140. 457 So. 2d at 210.

141. All the officers found was “a small quantity of marijuana.” *Id.* at 207.

deed, another state court recently held police reliance on a warrant "entirely unreasonable" on facts far stronger than those in *Wood*.¹⁴² The *Leon* Court described the basic inquiry as "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization," an inquiry in which "all of the circumstances" may be considered.¹⁴³ Taking *Leon* for the moment at face value, I submit that well-trained officers would not seek a warrant without (1) significant independent investigation and (2) internal screening by a police superior or a government lawyer. Accordingly, in the absence of independent investigation and preapplication screening, the good-faith exception should not apply.

The independent investigation element would help combat the ugliest risk that *Leon* encourages, the police-manufactured anonymous tip.¹⁴⁴ The responsible thing for an officer to do on receiving a tip, anonymous or otherwise, is not to dash to the nearest magistrate for a warrant but to do what Officer Rombach did—check the tip against other information, particularly the justice system's criminal records. A warrant application supported by independent police work reduces the risk of intruding on innocent privacy in two ways. First, a particularly extravagant tip may be rejected if the independent investigation fails to corroborate the informant. Second, by attaching some cost even to the use of "Old Reliable,"¹⁴⁵ an independent investigation requirement would discourage warrant applications based on mere suspicion. The *Leon* Court did not discuss the importance of independent investigation in general; but in connecting the good faith inquiry to "all of the circumstances," and in deciding that the Burbank police were entitled to rely on the warrants at issue in part because the "affidavit related the results of an extensive investigation,"¹⁴⁶ the Court clearly has left room for consideration of independent investigation as a factor, and perhaps as a requirement, in a showing of good faith.

Executive branch screening of warrant applications serves the same

142. *State v. Thompson*, 369 N.W.2d 363 (N.D. 1985). In *Thompson*, an anonymous informant claimed that the defendants were selling marijuana from their home; the police were able to corroborate the informant's representations on all noncriminal details. The same informant had previously provided completely accurate information that had led to a specified criminal conviction. Although the *Thompson* opinion does not say, the detail with which the application was made suggests that someone with search warrant experience had a hand in drafting or reviewing it. Under the test I have proposed, given this independent investigation and executive screening (I am assuming the latter), the warrant process would by itself establish probable cause unless, to borrow Justice White's phrase, the magistrate had no business issuing the warrant. Certainly the warrant issued in *Thompson* does not fall within that category.

143. 104 S. Ct. at 3421 n.23.

144. For examples, see *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980); NCSC STUDY, *supra* note 63, at 78.

145. Justice Douglas coined the phrase, dissenting in *McCray v. Illinois*, 386 U.S. 300, 316 (1967).

146. 104 S. Ct. at 3423.

functions. Unsound applications may be rejected or deferred until a stronger showing can be made; and the cost of the screening process will ensure that it is undertaken only in cases of substantial suspicion. Again the Court left open the precise importance that the presence or absence of screening should have on the good-faith inquiry. The "all of the circumstances" language suggests some consideration, and the favorable references to Officer Rombach's consultations with the government lawyers reinforce this possibility.¹⁴⁷

Indeed, it is difficult to identify other kinds of police conduct that contribute to objective reasonableness, and anything other than conduct is subjective. The district court finding in *Leon* itself illustrates the point: "[T]here is not any question about good faith. [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and . . . consulted with three Deputy District Attorneys before proceeding."¹⁴⁸ Thus, the indicia of objective reasonableness contained in the record before the Court were (1) the independent police investigation; (2) the prosecutorial screening; and (3) the divided opinion of the court below on the substantive probable cause issue.¹⁴⁹ A powerful argument therefore can be made that the *Leon* exception does not apply absent independent investigation and executive review of the application.

From the standpoint of deterrence, then, the *Leon* result is defensible, so long as the costs of obtaining warrants restrict applications to cases of substantial suspicion, confirmed by independent investigation and executive review. What we know about search warrants strongly suggests that these costs, and not the exclusionary rule, explain the surprising success of the warrant process.

IV. TOWARD A PROCEDURAL THEORY OF PROBABLE CAUSE

Despite the previous defense of the *Leon* result, this Article condemns the Court's opinion based on an argument that I shall refer to as the jurisprudential objection. The gist of this objection is that by withdrawing

147. *Id.* at 3410. The Court cited with approval Professor Israel's observation that "the requirement that the officer act in 'good faith' is inconsistent with closing one's mind to the possibility of illegality." *Id.* at 3420 n.20 (quoting Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1413 (1977)). That observation related to police training programs, but seems equally apposite to the question of screening; a well-trained officer knows that she should process a warrant application through a superior or a prosecutor. The refusal to consult a government attorney or a superior officer, and most particularly a decision to abandon such screening procedures put in place before *Leon*, would seem to present a paradigm case of "closing one's mind to the possibility of illegality."

148. *Leon*, Petition for Certiorari at 14a.

149. *See* 104 S. Ct. at 3423. The latter factor is relevant only as a measure of how close to probable cause the application came.

the exclusionary sanction from an entire category of Fourth Amendment violations for which no other sanction is available, even in theory, the *Leon* majority has rendered "the constitutional language that all warrants be issued only on a showing of probable cause . . . a nullity."¹⁵⁰ In effect, the Court maintains that searches pursuant to defective warrants violate the Fourth Amendment, but that nothing happens when such violations take place. This treats the amendment as a mere advisory norm rather than, as the supremacy clause commands, as the "supreme Law of the Land."¹⁵¹ For all practical purposes, a search unsupported by probable cause but pursuant to a facially valid warrant is now legal.

The vice in the Court's opinion, however, can be cured by accepting this conclusion. If *Leon* were reformulated as a procedural analogue to *Gates*, as the lower courts already have begun to treat it, then whatever benefits the Court hopes the *Leon* rule will achieve could be obtained without indulging in judicial hypocrisy. Perhaps it is too late for clearing the air in this way, but I prefer, however naively, an outcome following from reasons rather than preceding rationalizations, explained with candor rather than with code words.

A. *The Jurisprudential Objection*

The majority opinion derived the good-faith exception from the line of cases following *Calandra*, but an important distinction separates *Leon* from the rest of the Court's exclusionary rule decisions. *Calandra* and its progeny restricted the procedural settings in which the exclusionary rule is available. For any given illegal search, the exclusionary rule remained fully applicable during the government's case-in-chief at trial. By contrast, *Leon* applied the *Calandra* calculus to a species of police conduct, not a class of legal proceedings. After *Leon*, a search in good-faith reliance on an insufficiently supported warrant cannot result in any application of the exclusionary rule in any proceeding. Moreover, the class of cases from which *Leon* withdraws the exclusionary sanction is the same class of cases in which government agents as a matter of law are immune to damage actions. Thus the Court has eliminated, not curtailed, the remedy.¹⁵²

Leon is therefore vulnerable to the objection that the majority opinion fails to treat the Constitution *as law*. The Fourth Amendment states that

150. *People v. David*, 119 Mich. App. 289, 298, 326 N.W.2d 485, 488 (1982) (refusing to recognize good-faith exception).

151. U.S. CONST. art. VI.

152. See *Leon*, 104 S. Ct. at 3456 n.35 (Stevens, J., dissenting). In *Malley v. Briggs*, 54 U.S.L.W. 4243 (No. 84-1586 Mar. 5, 1986), the Court explicitly held that "the same standard of objective reasonableness that we applied in . . . *Leon* . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Id.* at 4245 (footnote omitted).

“no Warrants shall issue but upon probable cause.” The *Leon* majority announced that this provision could be violated but that nothing would happen. Indeed the Court goes further, and says that nothing should happen, for “where the officer’s conduct is objectively reasonable, . . . the officer is acting as a reasonable officer would and *should* act under the circumstances.”¹⁵³ The implication is that the police have a duty to execute the illegal warrant. But the boilerplate language on most search warrants, taking the form of a court order to execute the search, scarcely insulates the police from a Fourth Amendment violation. The command issues only when the police ask for it, and in some cases the command issues but no search takes place.¹⁵⁴ Such executive discretion suggests that it is absurd to describe a warrant as “a judicial mandate to an officer to conduct a search or make an arrest, [which] the officer has a sworn duty to carry out”¹⁵⁵

By purporting to recognize constitutional violations to which no sanction attaches, the *Leon* majority refused to treat the Fourth Amendment as law. For law, as distinct from morality, is a system of *political* norms. When political consequences do not attach to violations, normative prescriptions do not qualify as laws. While a sanction itself may be insufficient to make a norm legal, there is almost no dispute that without the possibility of sanctions a norm cannot be legal.¹⁵⁶

153. 104 S. Ct. at 3420 (quoting *Stone v. Powell*, 428 U.S. 465, 539–40 (1970) (White, J., dissenting)) (emphasis added).

154. Warrant requests are rarely denied, see NCSG STUDY, *supra* note 63, at 32. Moreover, on occasion a warrant will issue but not be executed. *Id.* at 47. Accordingly, it is entirely inappropriate to speak of the warrant as a judicial rather than an executive creature.

155. 104 S. Ct. at 3420 n.21 (quoting ATTORNEY GENERAL’S TASK FORCE ON VIOLENT CRIME FINAL REPORT 55 (1981)).

156. In this regard it is important to note that the critique of classical positivism raised by H. HART, *THE CONCEPT OF LAW* 27 (1961), does not deny the central role of political coercion to the legality of norms. Hart argues that the Austinian model of law, conceived of as orders backed by threats, fails to account for power-conferring rules such as those governing the validity of wills and contracts. But Hart does not suggest, and it would plainly be unnatural to suggest, that such a rule would be legal in character even though compliance was a matter of political indifference. The statute requiring two witnesses for a valid will would not be properly termed a law if the heirs named in an unwitnessed will took nevertheless. The rule would, in that instance, neither confer nor deny any power whatever, and would have meaning, if at all, only as a moral exhortation to testators. Similarly we would describe rules governing the operation of courts as laws only to the extent that compliance with them affected the validity of judgments rendered, and welfare eligibility rules as laws only to the extent that the state admits their binding force. Thus a norm upon whose observance the availability of state power does not depend cannot be treated as legal.

The only legal theorists I know of who deny the necessity for political consequences to the legality of municipal norms are David Lyons and Tony Honore, who argue that if toothless rules were observed by a Utopian community, there would be “no good reason to deny that these people have a legal system, though it is devoid of legal sanctions.” D. LYONS, *ETHICS AND THE RULE OF LAW* 47 (1984); see Honore, *Groups, Laws, and Obedience*, in *OXFORD ESSAYS IN JURISPRUDENCE* 20 (2d Ser. A. Simpson ed. 1973). But this, like the proverbial marooned economist who assumes a can opener, begs the question. If there are no violations, the Utopians surely have a moral system, but what is the point of calling it legal? And if there are violations that go unsanctioned, the “good reason” for saying no legal system exists is to distinguish the Utopian social system from social sys-

For Holmes the point was fundamental. "If you want to know the law and nothing else," he wrote, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."¹⁵⁷ Not surprisingly, Holmes defended an unyielding application of the exclusionary rule, since admissibility "reduces the Fourth Amendment to a form of words."¹⁵⁸

The function served by a meaningful sanction is not solely "systemic deterrence," although the sanction does contribute to that goal.¹⁵⁹ To a significant degree, the severity of the sanction expresses the importance of the violated norm.¹⁶⁰ Even if the sanction does not deter, the refusal to apply it or anything else expresses the judgment that the underlying norm is of little importance.¹⁶¹ *Leon* teaches that Fourth Amendment violations do not matter. Such an evaluation betrays the fundamental principle of constitutionalism, which is after all that the Constitution states the law.

This betrayal promises a further illegitimate effect. By treating the constitutional norm as authoritative and revered, but the existence as well as the scope of the sanction as contingent upon the judiciary's subconstitutional discretion,¹⁶² the *Leon* approach greatly facilitates the substitution of judicial for constitutional value choices. To some degree, the Constitution's meaning, like that of all laws, turns upon interpretation. But the very existence of a Constitution asserts that its provisions are not wholly indeterminate.¹⁶³ Those who accept that assertion should recognize the danger to constitutional integrity presented by the Court's approach, a danger that goes beyond the risks of irresponsible interpretation. For the

tems in which political coercion plays an important role.

157. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

158. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

159. See, e.g., *Stone v. Powell*, 428 U.S. 465, 492 (1976) ("[O]ver the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.") (footnote omitted).

160. See P. SOPER, *A THEORY OF LAW* 87 (1984) ("The seriousness of the obligation is directly proportional to the seriousness, as indicated by the severity of the attached sanctions, with which those who demand others' compliance will view disobedience.")

161. Cf. J. WILSON, *THINKING ABOUT CRIME* 157 (rev. ed. 1983) ("Even if we were absolutely certain that a convicted murderer would never murder again, we would still feel obliged to impose a relatively severe sentence in order to vindicate the principle that life is dear and may not be unlawfully taken without paying a price.")

162. This is where the *Leon* Court parts company with Professor Monaghan's essay on constitutional common law, which scrupulously avoids suggesting that the judiciary or the legislature has discretion to withdraw all remedies from a category of constitutional violations. See Monaghan, *supra* note 86, at 44.

163. "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

Leon approach can justify the judicial nullification of a constitutional provision without straining interpretation. Indeed, as the Court acknowledges, rather than bending the law, judges can gratify their antipathy to the rule they have sworn to uphold by declaring the law violated but unenforceable.¹⁶⁴

The same method can dispense with any constitutional guarantee. Yes, the Court might acknowledge, *Roe v. Wade*¹⁶⁵ held that the Constitution forbids statutory interference with the decision to abort a fetus. But, “[a]s with any remedial device,”¹⁶⁶ the availability of injunctive relief or Supreme Court review depends on a balancing of costs and benefits. While the benefit of injunctive relief in securing the right to abortion is significant, the cost in political turmoil and hostility to the judiciary has been even greater. So, without in any way casting doubt on its decision in *Roe*, the Court could elect, in its discretion, to withhold the injunctive remedy against state statutes outlawing this constitutionally protected practice.¹⁶⁷

In exchange for this doctrinal danger, the Court gains nothing; declarations of illegality not accompanied by any sanction serve no identifiable purpose. The usual argument against the Holmes “bad man” position is that the law also governs the “puzzled man” who is willing to do what is required if only told what that might be.¹⁶⁸ Thus, Justice White noted in *Leon* that resolution of the substantive Fourth Amendment question, prior to good-faith analysis, may sometimes be “necessary to guide future action by law enforcement officers and magistrates.”¹⁶⁹

But regardless of whether advisory norms directed to the voluntarily obedient might count as laws in a general sense, constitutional limits on

164. 104 S. Ct. at 3422 n.26. In some instances, the courts may articulate a legal right that will not become politically effective until some future time. See, e.g., Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741 (1985). This approach differs fundamentally from the *Leon* Court's reasoning, in that *Leon* holds not that a new right is recognized and will eventually be enforced, but that an old right remains recognized but will never be enforced. The former bifurcation of right and remedy, unlike the latter, does not deny the ultimate availability of state power to vindicate the right declared. Indeed, in cases of the former variety, the Court has maintained that when the other branches of government “fail in their affirmative obligations” to effectuate judicially declared constitutional rights, “judicial authority may be invoked” for that purpose. *Swann v. Board of Education*, 402 U.S. 1, 15 (1970). Were it otherwise, judicial recognition of rights would be indistinguishable from the moral exhortations of all those who seek to influence the political branches of the government.

165. 410 U.S. 113 (1973).

166. The language is taken from *Calandra*, 414 U.S. at 348, and is quoted in *Leon*, 104 S. Ct. at 3413.

167. There is no distinguishing the exclusionary rule as judicially created and the injunctive remedy as constitutionally given. The Court admits as much when it speaks of “any remedial device.” In point of fact, all remedies for constitutional violations are judicially implied, see *Kamisar*, *supra* note 7, at 581–89, and the injunction device has received some of the same criticisms as the exclusionary rule. See G. McDOWELL, *EQUITY AND THE CONSTITUTION* 14 (1982).

168. See H. HART, *supra* note 156, at 39.

169. 104 S. Ct. at 3422.

state power can count as law only to the extent that they are enforced. The Framers meant not just to establish a government, but to limit its power over individuals. They viewed official power with an almost paranoid suspicion; and they believed that suspicion justified by power's *inherent* nature.¹⁷⁰ Theirs was indeed the "bad man's" view, for they saw in official power the likely cultivation of bad men. They sought to oppose the corrupting dynamics of power not with words but with laws enforceable in courts of justice.¹⁷¹ Hamilton expressed this view in the 78th Federalist Paper: "Limitations, [on legislative authority] can be preserved in practice no other way than through the medium of courts of justice. . . . Without this, all the reservations of particular rights or privileges would amount to nothing."¹⁷²

Thus it is easy to see why Justice Stewart has written, with respect to the good-faith exception, that "the framers did not intend the Bill of Rights to be no more than unenforceable guiding principles—no more than a code of ethics under an honor system. The proscriptions and guarantees in the amendments were intended to create *legal* rights and duties."¹⁷³ Indeed, prior to *Leon*, even critics of the exclusionary rule had stoutly asserted the necessity for some legal consequence attending illegal searches. Chief Justice Burger, for example, in an influential critique of the exclusionary rule, refused to "question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric."¹⁷⁴

170. For the classic exposition, see B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

171. As Madison said of the Bill of Rights in its entirety:

If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 ANNALS OF CONG. 457 (1789). Ironically, and instructively, the citation of this passage passed from the majority opinion in *Mapp*, 367 U.S. at 647, to a dissenting opinion in *Leon*, 104 S. Ct. at 3431 (Brennan, J., dissenting).

172. *THE FEDERALIST* No. 78 at 524 (A. Hamilton) (J. Cooke ed. 1961). See also Wilson, *Enforcing the Fourth Amendment: The Original Understanding*, 28 CATH. LAW. 173, 175-83 (1983) (Constitution was intended to be law, which implies remedy, although legislature might alter damage action remedy implied by Fourth Amendment).

173. Stewart, *supra* note 4, at 1383-84 (footnote omitted) (emphasis added).

174. *Bivens*, 403 U.S. at 415 (Burger, C.J., dissenting). Even the Court that decided *Wolf v. Colorado*, 338 U.S. 25 (1949), was unanimous in holding that the Fourth Amendment binds the states through the Fourteenth, and that the Constitution requires some remedy—the exclusionary rule or another "equally effective." *Id.* at 31. Similarly Professors Kaplan, see Kaplan, *supra* note 65, at 1030, and Monaghan, see Monaghan, *supra* note 86, at 3-10, in various proposals to modify the remedial mix, have not questioned the need for "something that works." Even Dallin Oaks concluded his influential critique of the rule by urging its retention until meaningful substitutes are in place: "If constitutional rights are to be anything more than pious pronouncements, then some measurable con-

Living with *Leon*

Even aside from the need for a Constitution of laws, Justice White's vision of reviewing courts informing police and issuing magistrates of their errors is far-fetched. The first and overriding problem with this vision is that the Supreme Court itself does not seem to view bad warrants as undesirable. The rhetoric of the *Leon* opinion describes such illegal searches as morally valuable. The loss of the evidence would be a "cost;" the actions of the police were "objectively reasonable." Language such as this cannot inform police or judges of their errors, for it implicitly denies that error has occurred.

Even assuming good-faith decisions incorporate some unambiguous denunciation of illegal warrants, such condemnation probably will have no effect on future law-enforcement activity. Certainly the documented attitude of the police equates admissibility with legality.¹⁷⁵ As for judges, even assuming they parse appellate opinions for occasional dicta about the legality of a warrant they might remember issuing, there is no reliable way for them to translate holdings about probable cause into prospective standards.¹⁷⁶ The threat of exclusion may encourage police and judges to take extra care in general in making such assessments—to "err on the side of constitutional behavior."¹⁷⁷ But merely pointing out that a warrant was issued illegally is no substitute for suppression, because an identical case will never arise. So it is very difficult to see the point of the procedural and forensic contortions that the *Leon* majority performed to preserve the rhetoric of remedies. Whatever the propriety of *Calandra's* approach in determining the applicability of the exclusionary rule in collateral proceedings, remedial analysis is plainly inappropriate when, as in *Leon*, the issue is the elimination of all remedies in all proceedings.¹⁷⁸

sequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequences." Oaks, *supra* note 123, at 756.

175. See Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 38-39 (1980) (extensive interviews with and observations of police indicate that in the absence of exclusionary rule "police would doubt the applicability of fourth amendment standards"); Kamisar, *Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 69-73 (1978) (prior to *Mapp*, police equated admissibility with legality).

176. *Gates*, 462 U.S. at 232. Indeed, the Court opined, "[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another." *Id.* at 238 n.11.

177. *United States v. Johnson*, 457 U.S. 537, 561 (1982) (footnote omitted).

178. It might be objected that in many cases prior to *Leon*, no remedy was available for similar violations: An innocent victim of an illegal search executed in good-faith reliance on a search warrant could not invoke either a damage remedy or the exclusionary rule. But this argument repeats the fallacy of the personal rights approach, for the relevant question is not whether the search victim has a remedy but whether government lawlessness will encounter a sanction. Exclusion is a sanction against the practice of searching without probable cause, and as such is enough to express the seriousness of the underlying norm. That the sanction is contingent on a fact other than the violation is not essential, just as the nullification of an invalid contract depends on a breach of the contract. The point

B. *The Probable Cause Approach*

Leon is better understood as a probable cause decision rather than as a remedial, exclusionary rule decision. The warrant process itself provides indicia of reliability sufficient to meet traditional standards of probable cause, at least when that process includes independent investigation and screening procedures. Predicating the admissibility of evidence in cases like *Leon* on the legality of the search would avoid the danger of trivializing the Constitution by recognizing rights without remedies.

1. *Leon is a Probable Cause Decision in All But Name*

Whatever its drawbacks, the probable cause approach accurately describes the *Leon* result. No adverse consequences attend an "invalid" warrant of the *Leon* variety. Nor does this result depend on the actual good faith of the police. The Court went out of its way to "emphasize that the standard of reasonableness we adopt is an objective one."¹⁷⁹ Thus the availability of the good-faith exception depends on the substantive content of the warrant application—on how far short of the traditional probable cause showing it falls. In effect, all the Court's decision accomplishes is to reduce the degree of suspicion which a warrant application must establish to insulate a search from the exclusionary rule.

Lower court interpretations of *Leon* confirm this analysis. Rather than deciding whether a particular search warrant issued illegally, the courts tend to decide whether the affidavit "was not so lacking in indicia of probable cause that the officer executing the warrant could not with reasonable objectivity rely in good faith on the magistrate's probable-cause determination."¹⁸⁰ In practice, the issue of the existence of probable cause and

is that political consequences—the exercise or denial of official power at a litigant's behest—may turn on the failure to abide the norm, and that these potential consequences signal the seriousness of the rule.

179. 104 S. Ct. at 3420 n.20.

180. *State v. Wildes*, 468 So. 2d 550, 551 (Fla. Dist. Ct. App. 1985). For other examples, see *United States v. Gant*, 759 F.2d 484, 486 (5th Cir. 1985) ("Because we find that the officers acted in objective good faith, we need not resolve the probable cause issue."); *United States v. One 1973 Chevrolet Pickup*, No. 84-1085, (6th Cir. Mar. 28, 1985) (available April 2, 1986 on LEXIS, Genfed library, U.S. App. file) ("The District Court held that the affidavit for the warrant established probable cause. We need not review whether this is in fact the case. . . . The affidavit and warrant are not so facially deficient that the warrant could not reasonably be presumed to be valid . . ."); *United States v. Fama*, 758 F.2d 834, 835 (2d Cir. 1985) ("While we acknowledge that a creditable probable cause question is raised, we do not reach it because we believe that, under the circumstances, we are compelled by [*Leon*] to reverse the suppression order.") (citation omitted); *Walker v. State*, 462 So. 2d 794, 795 (Ala. Crim. App. 1984) ("[E]ven if this defect invalidates the warrant, the stolen property obtained when the search warrant was executed was still properly admitted into evidence."); *People v. Helmquist*, 161 Cal. App. 3d 609, 612, 207 Cal. Rptr. 718, 719 (1984) ("After *Leon*, the correctness of Helmquist's assertion of insufficient probable cause may be irrelevant.").

the issue of good faith merge into a single inquiry about the sufficiency of the warrant application.

At this reduced level of suspicion, it is “objectively reasonable” for the police to rely on a warrant, and loss of the evidence would be a “cost.” Without maintaining, as Justice Stevens did in dissent,¹⁸¹ that an absolute contradiction inhabits the Court’s description of objectively reasonable unreasonable searches, one might question whether there is any difference between saying that such searches are objectively reasonable and saying that they are just plain reasonable. The Fourth Amendment’s clear implication that a search without probable cause is unreasonable bars this inquiry; but if the issuing judge’s probable cause decision is dispositive within bounds of plain error, this obstacle would disappear. Thus the proposed approach effects everything the Court expects the good-faith exception to achieve, with the added advantage of dispensing with the fiction that *Leon*-type searches are illegal.

2. *The Warrant Process Satisfies Traditional Standards of Probable Cause*

The traditional standard for probable cause provides that a search may be undertaken when “the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief” that evidence will be discovered.¹⁸² And a “magistrate’s ‘determination of probable cause should be paid great deference by reviewing courts.’”¹⁸³ It is not that large a move to identify the magistrate as the formula’s “man of reasonable caution.” Such a move would not seriously threaten individual privacy, and would be more faithful to the Fourth Amendment than the *Leon* rationale.

A warrant application of the sort at issue in *Leon* presents at least two features strongly suggestive of probable cause whenever it is attacked on a motion to suppress. First, the cost of the warrant process ensures that the police object is admissible evidence, which they have a strong subjective expectation of discovering. Second, a warrant search is authorized not only by executive branch screening procedures, but also by an independent judicial officer. So long as preapplication screening procedures do not deteri-

181. 104 S. Ct. at 3446–47 (Stevens, J., dissenting) (“[A]n official search and seizure cannot be both ‘unreasonable’ and ‘reasonable’ at the same time.”). The contradiction may be more apparent than real, inasmuch as “reasonable” may be a term of constitutional art. No one supposed a contradiction to inhere in the good-faith defense to tort actions for unreasonable searches and seizures, which presents the same doctrinal tension.

182. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)) (brackets in original).

183. *Gates*, 462 U.S. at 236 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)).

orate in response to *Leon*, these factors justify deeming the warrant process to be determinative of the probable cause issue within bounds of plain error, *i.e.*, so long as official belief in the warrant's legality is not "entirely unreasonable."

This approach would not nullify the warrant clause, but only acknowledge that the probable cause standard is primarily directed to issuing judges rather than reviewing courts. In other contexts, appropriate and neutral procedures have long satisfied the probable cause standard. For example, an indictment " 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry."¹⁸⁴ Similarly, one arrested pursuant to warrant has no constitutional right to challenge the sufficiency of the warrant application, but may be compelled to remain in detention until trial,¹⁸⁵ because probable cause "can be determined reliably without an adversary hearing."¹⁸⁶

The magistrate's determination of probable cause to search is no less reliable than her determination of probable cause to arrest. Indeed, the typical search warrant is both more costly to the police,¹⁸⁷ and more thoroughly reviewed by the issuing magistrate,¹⁸⁸ than is the typical arrest warrant. And certainly the search warrant process is less of a rubber stamp for the executive than the "properly constituted grand jury," whose modern function consists primarily of expanding rather than containing prosecutorial powers.¹⁸⁹

There would remain an important role for subsequent review even under this reformulation, for in two ways the deterrent influence of the exclusionary rule is an essential part of the approach. First, the law enforcement bureaucracy should understand that to the extent the reliability of the warrant process declines, its officers act at peril of suppression. Inquiry into the substance of the probable cause showing would be appropriate if, for example, the executive branch abandons established preapplication screening practices, or if, because of either judicial abdication or executive unprofessionalism, the judicial role in the process is nullified. Thus, in the *Wood* case, the reviewing court should have reached (and

184. *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975) (quoting *Ex Parte United States*, 287 U.S. 241, 250 (1932)).

185. See *Gerstein*, 420 U.S. at 125; 2 W. LAFAVE, *supra* note 50, § 5.1, at 247 ("Gerstein makes it clear . . . that no such [probable-cause] determination is necessary if the defendant was arrested with warrant. . .").

186. *Gerstein*, 420 U.S. at 120.

187. See *supra* text accompanying note 120.

188. See L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 121, at 119.

189. See, e.g., *Hawkins v. Superior Court*, 22 Cal. 3d 584, 589-90, 586 P.2d 916, 919 (1978); Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 155-56 (1965); Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 179-80 (1973).

rejected) the substance of the application after determining that the warrant procedure did not merit the deference suggested by the *Leon* result. The latter holding could rest either on the complete absence of either executive screening or independent investigation, or on the insufficiency of the application to “allow [the magistrate] to determine probable cause.”¹⁹⁰ Under such circumstances the reality of the case is a warrantless search accompanied by a piece of paper, and a substantive inquiry under the *Gates* standard becomes appropriate.

Second, in cases in which the warrant process plainly fails—cases like *Wood*—maintenance of the exclusionary rule would encourage both police and magistrates to avoid seeking and issuing plainly illegal warrants. Even when the procedure in general works well, the exclusionary sanction can prevent egregious cases from slipping through. In a situation in which well-trained police would know that the application should never have been presented without more investigation, retention of the exclusionary sanction can negate the “incentive to submit it to a magistrate, on the chance that he may take the bait.”¹⁹¹

The resulting regime would treat probable cause in warrant cases as primarily a question for the issuing judge, just as negligence is primarily an issue for the jury. Such a procedural approach would recognize the infinite variety of factual circumstances involved in probable cause determinations, and would depend on the total process to serve the overall objectives of a regulatory scheme rather than to produce consistent results among cases.¹⁹² Judicial review would remain necessary to safeguard the

190. *Gates*, 462 U.S. at 239. Although this situation is not specifically enumerated as calling for suppression in the *Leon* opinion, see 104 S. Ct. at 3421–22, it would seem to follow from two suggestions in that passage of the Court’s opinion. First, by indicating that suppression remains appropriate when the magistrate abandons her detached and neutral role, the Court appears to conclude that the breakdown of the warrant process justifies retaining the exclusionary sanction. Second, by indirectly citing *Aguilar* and *Nathanson* as examples of when “the magistrate or judge had no business issuing a warrant,” see *supra* note 139, the Court implies that “bare bones” affidavits are “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Id.* at 3422 (citation omitted).

191. *Leon*, 104 S. Ct. at 3454 (Stevens, J., dissenting). Review of this nature would parallel the checks on other procedures for determining probable cause. The decision to issue an arrest warrant is subject to all the ultimate protections of the trial process, and indeed habeas corpus after that. See *Gerstein*, 420 U.S. at 125 n.27. Searches incident to arrest may be attacked on the basis of the arrest warrant’s inadequacy even when the resulting detention cannot be challenged on the same ground. See 3 W. LAFAYETTE, *supra* note 50, § 11.4, at 642. Presumably this type of suppression motion is also now subject to the good-faith exception. But with respect to the fruits of searches authorized directly by a search warrant or implicitly by an arrest warrant, the procedural determination of probable cause by the issuing magistrate should remain subject to suppression when the magistrate’s judgment was “entirely unreasonable.” This does no more than duplicate the *Leon* rule, under which suppression remains appropriate when the probable cause showing is wholly inadequate. 104 S. Ct. at 3422.

192. The proposed approach thus would spare courts the difficult and ultimately problematic task of deciding factual probable cause issues as a predicate to the determination that the police conduct was otherwise reasonable. Indeed, one advantage of treating probable cause as a procedural issue would be recognition of its essentially factual nature. Professor Grano argues:

integrity of the procedure, but only within the narrow bounds even the *Leon* majority acknowledged to be unavoidable. Such a system would accomplish whatever gains for law enforcement the Court hopes *Leon* will achieve, would not threaten serious intrusions on legitimate privacy interests, and would avoid the risk that treating constitutional violations as too costly to remedy may trivialize the legal status of the Constitution.

C. *Warrantless Searches*

The possibility exists that the Court may extend the good-faith exception to warrantless searches. The previous discussion makes clear at least one good reason for not doing so. Just as treating illegal warrants as no cause for institutional regret implicitly denies the status of the Fourth Amendment as law, a good-faith exception for warrantless searches risks trivializing the Constitution. The jurisprudential objection therefore applies to any extension of the good-faith exception to warrantless searches.

Moreover, sound analytical and categorical objections apply to extension of the exception despite their inapplicability in the warrant context. In the warrantless context, there is not even the pretense that the police are relying on a superior determination of probable cause; the deterrent influence of the exclusionary rule is therefore not blunted by authoritative but erroneous official opinion regarding matters of law. Without a warrant there is no judicial determination of the legal issue.

Deterrence considerations accordingly counsel against indulging deference to police judgment about legality of police action. As for errors about underlying circumstances, the law already judges the officers' actions by the facts as they appear at the time and not by what the circumstances are ultimately proven to be. With probable cause to arrest one Hill, the police may lawfully arrest one Miller without a warrant provided the police have a "reasonable, good-faith belief that the arrestee Miller was in fact Hill."¹⁹³ Similarly, the police may rely on statements from victims or other citizens, plausible on their face, even though the statements turn out to be inaccurate.¹⁹⁴

Reasonably cautious people, however, frequently respond to the same facts differently. We know, for example, that on the same evidence one jury may acquit while another may convict, but, except in unusual cases, we are prepared to accept either response as reasonable. On appeal of a jury verdict, the court does not ask whether it would have found the defendant guilty but only whether a reasonable jury *could have* found the defendant guilty. Applying this principle to the review of a finding of probable cause, the court should similarly ask only whether the reasonably cautious person could have concluded that probable cause was present.

Grano, *supra* note 50, at 507 (footnotes omitted) (emphasis in original); *see also id.* at 506-12.

193. *Hill v. California*, 401 U.S. 797, 802 (1971).

194. *See* 1 W. LAFAYE, *supra* note 50, § 3.4, at 594 ("The better and modern view . . . is that as a general proposition any person purporting to be a crime victim or witness may be presumed reliable, though the police must remain alert to the existence of any circumstances which would make

In only two situations might the police plausibly rely on independent authorization for the search so as to make a case for applying the good-faith doctrine. In one situation, the police ask for consent to search the premises and receive it from someone with apparent, but not actual, authority. The courts currently disagree about this question.¹⁹⁵ If a consent search requires neither a warrant nor probable cause because Fourth Amendment rights are personal and may be waived—from the atomistic perspective—then one without actual authority has no commission to surrender another's rights. From the regulatory perspective, if a consent search is legal because the police practice at issue does not threaten legitimate privacy interests in other cases, apparent authority should suffice so long as the police act reasonably.¹⁹⁶

Applying the good-faith exception to cases of apparent authority would resolve the issue, but in an unsatisfactory manner. If searches authorized only by apparent authority are judged to be unreasonable, they ought to be deterred.¹⁹⁷ Conversely, if searches based on apparent authority are indeed reasonable and ought not to be deterred, the appropriate approach is to endorse the regulatory view of what the Fourth Amendment forbids. Justice Traynor, for example, authored both a leading opinion in defense of the exclusionary rule and a leading opinion endorsing the apparent authority position.¹⁹⁸ Rather than recognize another inconsequential Fourth Amendment violation, the Court should decide the underlying issue of reasonableness.

The other possible basis for police reliance is executive regulation. Commentators have proposed that when police act in reliance on a considered and colorably constitutional general regulation, the exclusionary rule should not apply.¹⁹⁹ In theory this is an attractive proposition, for it would encourage police rule-making and yet permit the courts to invalidate prospectively rules that overreach police authority. This proposal, however, invites the jurisprudential objection in starker form than does *Leon* itself. Instead of deferring to police reliance on a judicial error of law, withholding the exclusionary sanction from police conduct pursuant

that presumption inoperative in a particular case.”).

195. See 2 W. LAFAYE, *supra* note 50, § 8.3, at 717–18 n.91.

196. *Id.* at 716–25.

197. Thus, the Colorado Supreme Court, applying that state's statutory good-faith exception, suppressed the fruits of a search consented to by the landlord but not the tenant, since Colorado law clearly established the ineffectiveness of the landlord's consent. *People v. Brewer*, 690 P.2d 860, 864 (Colo. 1984). Only when the law is uncertain about the effectiveness of a particular third-party consent does the *Leon* logic of nondeterrence apply, and those situations invite retroactivity rather than generalized good-faith analysis.

198. *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955) (adopting exclusionary rule); *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955) (adopting apparent authority doctrine).

199. See Kaplan, *supra* note 65, at 1050–55; Comment, *Rethinking the Good Faith Exception to the Exclusionary Rule*, 130 U. PA. L. REV. 1610, 1642–55 (1982).

to illegal rules would honor police reliance on police judgment. This appears to nullify substantive constitutional guarantees because the executive branch has disapproved them. Second, a good-faith exception for police rules would undermine deterrence. Once the law enforcement bureaucracy is aware of the exception, its members will know that they can exempt from the exclusionary rule any police practice whose current legal status is uncertain. This would encourage writing rules as a hedge against future court developments, creating a positive incentive to err on the side of *un-constitutional* behavior.²⁰⁰

Thus a good-faith exception in warrantless cases cannot follow either from police reliance on an independent determination of questions of law, or from the need to allow for reasonable mistakes of fact. All it could mean is what it condenses to in the warrant context: a further diminution in the rigor of the probable cause (and, in the warrantless context, the reasonable suspicion) standards. Applying *Leon* to warrantless searches would mean that the judgment of the police that their actions were legal would be accepted unless the officer's belief was "entirely unreasonable." From the standpoint of deterrence, this would have two very serious consequences.

First, a general dilution in existing standards would encourage increasingly speculative search and seizure activity. When the police need not clear the costly hurdle of the warrant process, knowledge that nothing short of an entirely unreasonable belief in probable cause will result in suppression would leave no disincentive to searching and arresting on reasonable suspicion, and to stopping and frisking for no reason at all. If this effect were slow to come, it would also be inevitable, for we can count on police bureaucracies to train and reward their officers with an eye to admissible evidence and not to abstract legality.²⁰¹ A sufficiently energetic officer, by frisking everyone in a suitably crime-ridden neighborhood, could build up not only an impressive record of arrests, but indeed an impressive record of "good arrests."

Second, extending *Leon* to warrantless searches would undermine deterrence by making the warrant process less attractive.²⁰² *Leon* gives the police an incentive to demonstrate the probity of a search by undertaking

200. This is not to exclude executive procedures from a role in determining Fourth Amendment reasonableness. Indeed, I have argued here that executive screening procedures for warrants ought to bear on the probable-cause determination. But procedures and regulations are different things. To say that a procedure of proven reliability contributes to a showing of substantive legality is one thing. It is quite another to say that an executive pronouncement can immunize from consequence a declared illegality. The latter approach invites overreaching regulations and tolerates unconstitutional executive actions in a way that the former approach does not.

201. See *supra* notes 124 & 175.

202. See, e.g., LaFave, *supra* note 5, at 927.

the costs of the warrant process. In this sense procuring a warrant truly is a sign of good faith. To treat warrantless cases in the same way would penalize those police who take the time to seek a warrant. Again the result would be to encourage “cheap and dirty” searches, searches likely to require innocent people to expose their private lives to the armed power of the government.

In addition to sacrificing deterrence, extending *Leon* to warrantless searches would strengthen the force of the categorical argument for a right to judicial review.²⁰³ In most cases, the possibility of a tort action at least preserves some forum for review of executive search and seizure activity. Even in *Leon* itself, there is the initial judicial check by the issuing magistrate. Under the approach I have urged, there would also be review of the legality of the search, measuring probable cause by the integrity of the warrant procedure, with suppression remaining available when the procedure plainly fails. But a good-faith exception in warrantless cases would withdraw judicial scrutiny from a class of executive actions that are concededly illegal. Whatever else might be unchanged in such a world, it would no longer be “emphatically the province and duty of the judicial department to say what the law is.”²⁰⁴

V. “ALL THE DIFFERENCE IN THE WORLD”

I have argued that the unique features of the warrant process largely negate the risks to individual privacy posed by the Court’s holding in *Leon*. Indeed, much of the criticism of that decision holds that the good-faith exception does little more than duplicate current law under the rubric of a new vocabulary.²⁰⁵ If such criticism unfairly refuses to grant the new doctrine the virtue of its defects,²⁰⁶ it also reflects a deep-seated disapproval of the majority’s *attitude* toward the Fourth Amendment.

Of course in time bad doctrine will out. If the Court refuses to insist on those procedural safeguards that have prevented abuse of the warrant process, we can expect to see an increasingly speculative and ultimately abusive reliance on warrants. If the Court extends the good-faith doctrine to

203. See *supra* notes 76–95 and accompanying text.

204. *Marbury*, 5 U.S. (1 Cranch) at 177.

205. See Kamisar, *supra* note 4, at 588–89.

206. Professor LaFave points out that *Leon*’s focus on the reasonableness of *police* reliance on the magistrate’s finding of probable cause increases the deference to *magistrates* effected by *Gates*. LaFave, *supra* note 5, at 925–26. While doctrinally correct, few cases are likely to fall between the deferential review of the totality of the circumstances before the magistrate, and the objectively reasonable reliance of well-trained police. Indeed, in *Gates* the cases cited by Justice Rehnquist as examples of when probable cause is lacking, 462 U.S. at 239, are *Nathanson* and *Aguilar*, the same cases Justice White cited as examples of police reliance that is not objectively reasonable. *Id.* at 264.

warrantless searches, in spite of the total irrelevance of *Leon*, we can expect yet more serious deprivations of individual liberty.

But the Court's attitude is indeed troubling on its own account. Justice Frankfurter could have had the *Leon* majority in mind when he wrote:

It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.²⁰⁷

Put another way, I sincerely doubt that the members of the *Leon* majority would have put the Fourth Amendment in the Constitution. What after all is the point of a law whose observance is a "cost" and whose violation is "objectively reasonable?"

The judges are entitled to their attitudes, but the people are entitled to their law. If the law is not supple enough to accommodate circumstance through interpretation, then the judges' duty is to apply it until the people come to the judges' wisdom. In this sense, *Leon* embodies a double failure in judicial craftsmanship. The Court's refusal to do anything about an announced violation of the Constitution is more than a betrayal of constitutionalism; it is a gratuitous betrayal as well, for principled if not uncontested interpretations of the Fourth Amendment could achieve the Court's result without so completely substituting judicial for constitutional values. As Professor Weinreb has observed, the Fourth Amendment speaks in magnificent generalities.²⁰⁸ For the Court to ignore the opportunity for interpretation makes graphically clear its fundamental antipathy to the prohibition of unreasonable searches and seizures.

Decisions like *Leon* pose one further danger. As Justice Frankfurter wrote on another occasion, the "Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."²⁰⁹ I have defended *Leon*, much as I have in this Article, to my students in criminal procedure. No other decision generated as much enduring cynicism about neutral principles and the rule of law. Strong-willed people in positions of apparently ultimate authority may not see any harm in disillusioning law students. A stewardly respect for a noble institution might inspire them to reflect, however, that in the same sense as is the Fourth Amendment, Article Three and *Marbury* are only words on paper.

207. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

208. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 47-50 (1974).

209. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).