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United States v. Leon and its Ramifications

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In 1981, officers of the Burbank Police Department, acting on an informant's tip, searched several residences and seized large quantities of drugs. Although the officers obtained a search warrant before entering the defendant's premises, the Federal District Court for the Central District of California held that the affidavit supporting the warrant, based on information from an unreliable informant, did not establish probable cause.[1] Applying the exclusionary rule, the court suppressed the evidence gained from the search.

On appeal, the government argued that even if the officers did not have probable cause to search, evidence obtained during their search should be admissible at trial. As grounds for its argument, the government claimed that the officers' efforts in securing a warrant constituted "good faith" and that the subsequent determination that the warrant was defective should not be dispositive. The Court of Appeals for the Ninth Circuit rejected the government's argument, however, and affirmed the lower court's decision to exclude evidence of the search.[2]

On the final day of its 1983 term, the Supreme Court of the United States reversed. In *United States v. Leon*,[3] the Court held that evidence seized by law enforcement officials who act in objective good faith— demonstrated by obtaining a warrant— cannot be excluded from the prosecution's case-in-chief, even if a court later determines that the warrant was obtained in violation of the fourth amendment.[4] By accepting the government's argument, the Court created a good faith exception to the exclusionary rule.

While some might characterize *Leon* as a landmark decision, the case, taken alone, is unexceptional. For years, the Supreme Court has been eroding the constitutional protections of the fourth amendment exclusionary rule.[5] From the beginning of Chief Justice Burger's ten-

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1. United States v. Leon, 104 S. Ct. 3405, 3411 (1984).
2. *Id.*
3. *Id.* at 3405.
4. *Id.* at 3420.
5. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974), in which the Supreme Court refused

ure on the Court, in fact, many observers predicted that the exclusionary rule, a remedial measure designed to deter police misconduct, would be substantially curtailed or completely eliminated.[6] Given the Chief Justice's continuing dissatisfaction with the rule[7] and the appointment of Justices sharing his philosophy,[8] the Court's manipulation of fourth amendment principles to avoid the effect of the remedy has not been surprising. Yet not until *Leon* had the Court explicitly decided to reject the exclusionary sanction when it otherwise would have been used to withhold evidence from the prosecution's case-in-chief.[9]

This article analyzes the impact of the *Leon* decision on fourth amendment principles. The article first explores the Supreme Court's willingness to utilize a cost-benefit balancing test to determine the applicability of the exclusionary rule.[10] It suggests that after *Leon* the rationale for the exclusionary rule—deterring illegal police conduct—has little continuing vitality when considered in light of the balancing approach. The article also examines the "objective" nature of the *Leon* decision.[11] It argues that the Court's exceptions to the new rule have the effect of turning a purportedly objective formula into a subjective one.[12] Along the same lines, it suggests that some of the Court's conclusions regarding the decision's effect on magistrates are erroneous.[13] The article then looks at the impact of *Leon* on law enforcement activity after the Court's ruling in *Illinois v. Gates*.[14] Finally, it predicts the impact the case will have on state[15] and federal law.[16]

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to apply the exclusionary sanction to grand jury proceedings; Stone v. Powell, 428 U.S. 465 (1976), in which the Supreme Court refused to apply the exclusionary sanction to federal habeas corpus proceedings when there was an opportunity to litigate the fourth amendment issue in state court; and United States v. Janis, 428 U.S. 433 (1976), in which the Supreme Court refused to apply the exclusionary sanction to civil proceedings.

6. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting). Given this decision there was good cause for this prediction.

7. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring).

8. Justice Blackmun, appointed in 1970; Justice Powell, appointed in 1971; Justice Rehnquist, appointed in 1972.

9. *But see* United States v. Calandra, 414 U.S. 338 (1974); Stone v. Powell, 428 U.S. 465 (1976); United States v. Janis, 428 U.S. 433 (1976).

10. *See infra* notes 26-30 and accompanying text.

11. *See infra* notes 33-34 and accompanying text.

12. *See infra* notes 35-41 and accompanying text.

13. *See infra* notes 43-52 and accompanying text.

14. 103 S. Ct. 2317 (1983); *see infra* notes 59-72 and accompanying text.

15. *See infra* notes 73-89 and accompanying text.

16. *See infra* notes 90-110 and accompanying text.

THE RATIONALE OF *LEON*: BALANCING THE COSTS AND BENEFITS OF THE EXCLUSIONARY RULE

In its 1961 decision, *Mapp v. Ohio*,[17] the Supreme Court held that evidence seized in violation of the fourth amendment is not admissible in state criminal trials. On its face, *Mapp* appeared simply to extend the exclusionary rule—formerly applied in federal cases only—to state court decisions.[18] In reality, however, *Mapp*'s impact was far broader. By making the exclusionary sanction applicable to the states through the fourteenth amendment, the Court acknowledged that the exclusionary rule, while not expressly mentioned in the fourth amendment, is an indispensable element of individual fourth amendment protections.[19] In support of its conclusion, the Court explained that without the exclusionary remedy, the fourth amendment would be " 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties."[20] The Court also emphasized in *Mapp* what it perceived to be the purpose of the exclusionary rule. It said the remedy was created to deter official misconduct "by removing the incentive to disregard it."[21]

In recent years, the Supreme Court has disregarded *Mapp*'s view of the exclusionary rule as an essential part of fourth amendment protection. Instead, the majority has focused on the deterrent purpose of the rule. In several cases, the Court has held that the exclusionary 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."[22]

In the *Leon* dissent,[23] however, Justices Brennan and Marshall, referring to the rationale of *Mapp*, attacked the majority's characterization of the exclusionary rule. They argued that the fourth amendment's failure to provide expressly for the exclusion of evidence does not render the exclusionary rule a mere judicial remedy. According to the Justices, "many of the Constitution's most vital imperatives are stated in general terms and the task of giving meaning to these precepts is therefore left to subsequent judicial decision-making in the context of concrete cases."[24] The dissent also claimed that even if the Court were to accept the deterrence rationale for the exclusionary

17. 367 U.S. 643 (1961).
18. *Id.* at 657.
19. *Id.* at 655.
20. *Id.*
21. *Id.* at 656 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).
22. *Leon*, 104 S.Ct. at 3412 (citing United States v. Calandra, 414 U.S. 338, 354 (1974)).
23. *Id.* at 3430-3446 (Brennan, J., dissenting).
24. *Id.* at 3432 (Brennan, J., dissenting).

rule, the majority's narrow view of deterrence, which excludes sanctions for magisterial misconduct, "relegates the judiciary to the periphery."[25]

With the deterrence rationale as its guide, the Court has used a "balancing" test to decide whether the exclusionary rule should be applied in criminal prosecutions. Rejecting the proposition that the rule is compelled by the fourth amendment,[26] the Court has "weighed" the benefits of deterrence against the social costs of excluding valuable information from the fact-finder.[27] By applying the balancing test to the facts of *Leon*, the Court concluded for the first time in a criminal prosecution that the costs of the rule exceeded the benefits.

The cost-benefit approach has several shortcomings. Perhaps the most apparent is that there is no precise way to measure the potential costs and benefits of the exclusionary rule. As Justice Brennan indicated in his dissent in *Leon*, the cost-benefit rhetoric "creates an illusion of technical precision and ineluctability."[28] It is especially difficult to measure the benefits of deterring official wrongdoing because the task requires speculation about the effect a restrictive policy might have in the future. Empirical data, to the extent that it exists, generally addresses the costs of the sanction rather than the benefits of deterrence.[29] The costs of suppressing evidence, such as freeing the guilty or reducing sentences through plea bargaining, are far more visible and tangible than the benefits of deterrence, thus serving the interests of the exclusionary rule's adversaries.[30]

Furthermore, given the low esteem in which the majority of Supreme Court Justices hold the exclusionary rule, the litigation burden has been placed on individuals who advocate the rule's constitutional importance or its practical application.[31] Yet casting the

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25. *Id.* at 3432. I am deliberately not analyzing the foundation of this deterrence rationale, which I question. *See* Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?* 16 CREIGHTON L. REV. 565 (1983).

26. 104 S.Ct. at 3412, 3413.

27. *Id.* at 3412, 3413, 3416.

28. *Id.* at 3430 (Brennan, J., dissenting).

29. *See, e.g., id.* at 3441, 3442 n.11.

30. As Professor Kamisar points out in his superb article tracing the history of the exclusionary rule:

> In a number of recent search and seizure cases, the court has "narrowed the thrust of the exclusionary rule" by "balancing the competing interests" and concluding that the "benefits" of the rule's application in various settings are "outweighed" by the "costs" it imposes on society. It is very difficult to come away from these cases, however, without the impression that the court is "balancing by assumption" or "intuition" or worse, "balancing by predisposition." Kamisar, *supra* note 25, at 645-46 (citations omitted).

31. *See, e.g.*, Stone v. Powell, 428 U.S. 465 at 499-500 (1976):

> To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention—and surely its extension—to demonstrate that it serves its declared deter-

burden of proof on proponents of the rule, especially where evidence that the sanction actually deters police misconduct is inconclusive, is "merely a way of announcing a predetermined conclusion."[32] The decision in *Leon* is the inevitable result of the balancing approach. The indefinite elements of the Court's balancing formula have stacked the deck heavily against the continued vitality of the exclusionary remedy. In the future, it is likely that the rule will be restricted even further.

ANALYSIS OF *LEON*: PROBLEMS WITH THE GOOD FAITH TEST

Justice White, writing for the majority in *Leon*, insisted that the good faith exception is based on an objective standard.[33] According to White, the exception applies only when a police officer acts "reasonably." In turn, an officer's actions are reasonable only when he obtains a warrant. The mere act of procuring a warrant, however, does not presume objective reasonableness: one must still inquire whether the officer was justified in his reliance on the issuing process and on the warrant itself. Justice White emphasized this additional requirement when he stated: "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued."[34]

In discussing objective reasonableness, the Court stated that "our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization."[35] Although the "reasonably well-trained officer" standard does not inquire into the mind of an individual officer,[36] it raises many questions. For instance, how much training is reasonable? Must we take into account the differences between a large urban police force and small rural force? Should the individual officer's experience or inexperience matter? These types of uncertainties suggest that the Court may have been incorrect when it said "the good faith exception, turning as it

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rent purpose and to show that the results outweigh the rule's heavy costs to rational experience of the criminal law. . . . The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade.

32. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 333 (1973).

33. 104 S.Ct. at 3422.

34. *Id.* at 3421.

35. *Id.* at 3421 n.23.

36. Precluding an inquiry into the mind of an individual officer may result in nonsuppression of evidence even though an individual officer deliberately violated a constitutional provision.

does on objective reasonableness, should not be difficult to apply in practice."[37]

The Supreme Court further undermined its claim that the good faith exception is objective by limiting the circumstances in which the exception applies. The Court held, for example, that the good faith exception is inapplicable when "no reasonably trained officer" would have relied on the warrant because the magistrate issuing the warrant had participated in its execution.[38] The Court also said that suppression would be appropriate when an officer relied on a supporting affidavit " 'so lacking in . . . probable cause as to render official belief in its existence entirely unreasonable.' "[39] In addition, the Court refused to apply the exception when the warrant is so facially deficient that an officer could not "reasonably presume it to be valid."[40] By simply asking whether a police officer has acted reasonably, the Court invites a subjective assessment. As Professor Whitebread has noted, "[t]he decision as to what is 'reasonable' is sure to vary across jurisdictions."[41] The Court's limitations are so indefinite that they appear intended to assure the application of the good faith exception rather than to guard against its improper use.

In *Leon*, the majority found that the magistrate—not the police officers—had erred by issuing a warrant. Nevertheless, the Court asserted that the possibility that evidence subsequently will be excluded does not deter magistrates, and therefore the exclusionary rule should not be applied to them.[42] One possible consequence of *Leon* is that magistrates will give warrant applications only cursory review, since their decisions are now virtually insulated from review.[43] Furthermore, if magistrates regard their decisions as meaningless, their incli-

37. 104 S.Ct. at 3422.

38. *Id.*

39. *Id.* (citing Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

40. *Id.*

41. C. WHITEBREAD, CRIMINAL PROCEDURE 7 (1980 and 1984 Supp). Also, it is interesting to note that in a February 11, 1985 decision of the Colorado Supreme Court, two judges in concurring opinions disagreed as to whether or not an officer's belief in the existence of probable cause was "entirely unreasonable." Justice Quinn concluded that the belief in probable cause was entirely unreasonable. Justice Dubofsky concluded that the belief in probable cause was not entirely unreasonable. People v. Deitchman, No. 84 SA 16 (Colo. Feb. 11, 1985).

42. 104 S.Ct. at 3418-19.

43. Even before the creation of a good faith exception, magistrate decisions to issue warrants were often rather perfunctory. NATIONAL CENTER FOR STATE COURTS, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 149 (1984). Also, as Justice Brennan points out in his dissent in *Leon*:

> Creation of this new exception for good faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence: If their decision to issue a warrant is correct, the evidence will be admitted; if their decision was incorrect but the police relied in

nation to review warrant applications carefully will dwindle. The Court has responded to charges that magistrates are unaccountable by citing such protections as 28 U.S.C. section 631(i), a statute which provides for direct supervision of magistrates by district courts.[44] Even if the Court's argument is accurate, however, the statutory provisions it cites as evidence of checks and balances on judicial officers do not apply in state courts, where most warrants are issued.[45]

The Court suggested that after *Leon* there still would be opportunities for substantive review of the fourth amendment. According to the Court, even appellate courts will be motivated to review substantive fourth amendment principles because of a desire to inform lower courts or magistrates of their errors.[46] Given the nature of the adversary system, however, which imposes upon individual parties the burden of undertaking appeals, the Supreme Court's theory is unlikely to prove realistic. With expansive decisions like *Leon* on the books, defendants will see their chances of success on appeal as greatly diminished and will be far less likely to challenge unfavorable decisions. Furthermore, the case and controversy requirement of the United States Constitution[47] discourages and may indeed prohibit a court from deciding unnecessary constitutional questions.[48]

The *Leon* Court also dismissed the contention that the good faith exception would promote "magistrate shopping" by police officers.

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good faith on the warrant, the evidence will also be admitted. Inevitably, the care or attention devoted to such an inconsequential chore will dwindle.

104 S.Ct. at 3444. *See also* United States v. Karathanos, 531 F.2d 26, 33 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976):

> While we do not assume that United States magistrates or state officials authorized to issue search warrants are necessarily prone to act as the "rubber stamp[s] for the police" condemned in *Aguilar v. Texas*, the exclusionary rule's effect of making them aware that their decision to issue a search warrant is a matter of importance not only in regard to the constitutional rights of the person to be searched, but also in regard to the success of any subsequent criminal prosecution, may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires. . . . (citations omitted).

44. 104 S.Ct. at 3419 n.18.

45. Since most state judges are elected to office the removal provisions of 28 U.S.C. § 631(i) would be problematic.

> [T]he suggestion that 'magistrate-shopping' or patronization by the police of lenient or 'rubber stamp' justices of the peace could be remedied by removal of the offenders ignores the fact that many state officials entitled to issue search warrants are elected to office.

United States v. Karathanos, 531 F.2d 26, 34 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976).

46. 104 S. Ct. at 3423. *See* Justice Brennan in dissent, 104 S.Ct. at 3445 n.15:

> [I]t is difficult to believe that busy courts faced with heavy dockets will take the time to render essentially advisory opinions concerning the constitutionality of the magistrate's decision before considering the officer's good faith.

47. U.S. CONST. art. III, § 2.

48. *See, e.g.*, Bowen v. United States, 422 U.S. 916, 920 (1975), in which the Supreme Court warned lower courts not to decide fourth amendment issues when the retroactivity question resolved the case.

The Court concluded that claims of magistrate shopping were merely "speculative."[49] The National Center of State Courts, however, has found that "often officers [are] able, by 'judge shopping,' to avoid submitting a request for a warrant to a judge known to be particularly demanding."[50] Before the *Leon* decision, there was some incentive on the part of officers to seek demanding magistrates to avoid later suppression of evidence. After *Leon*, the incentive has been removed, and police officers are likely to expend greater effort to find "rubber stamp" magistrates.

In *Massachusetts v. Sheppard*,[51] a case decided the same day as *Leon*, the Court increased the odds that police officers will "shop" for favorable magistrates. In *Sheppard*, officers obtained a warrant which failed to particularize the articles to be seized in a search. Although the warrant was facially deficient, the Court held that an officer can presume a warrant is valid whenever its validity is confirmed by the issuing magistrate.[52] By allowing an officer to assume that a facially invalid warrant is valid simply because it has been issued by a magistrate, the Court established a further temptation for arresting officers to seek lenient judicial officials.

The effect of *Leon* on the warrant process is not entirely clear. If, as *Leon* seems to indicate, the chances of suppression are substantially reduced when a policeman obtains a warrant, conscientious law enforcement officials logically will be encouraged to seek warrants before conducting a search. Several cases decided prior to *Leon* underscore this notion. In *United States v. Ventresca*,[53] the Court, analyzing probable cause, stated that "in a doubtful or marginal case, a search under a warrant may be sustainable where without one it would fall."[54] In *Illinois v. Gates*,[55] the Court's deference to a magistrate's warrant decision also helped to promote the use of warrants. Yet the Court's purported attempt to create a warrant incentive does not ring true when its actions in other fourth amendment cases are considered. The Court generally has expanded the scope of warrantless searches.[56] In *United States v. Ross*,[57] for example, the Court minimized the role of

49. 104 S.Ct. at 3419.

50. NATIONAL CENTER FOR STATE COURTS, *supra* note 43, at 65-66.

51. 104 S.Ct. 3424 (1984).

52. *Id.* at 3429.

53. 380 U.S. 102 (1965).

54. *Id.* at 106 (citing Jones v. United States, 362 U.S. 257, 260 (1960)).

55. 103 S. Ct. 2317 (1983). *See infra* notes 59-72 and accompanying text.

56. *See generally* Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231 (1983). *See also* Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. L. REV. 691 (1982).

57. 456 U.S. 798 (1982).

the magistrate by holding that the allowable scope of a warrantless search of an automobile was the same as the allowable scope of a search authorized by a magistrate.[58] Thus, despite the Court's apparent insistence in *Leon* that reliance on a warrant was crucial, the case raises the suspicion, in light of decisions like *Ross*, that in time the Court will expand the good faith exception to include warrantless searches.

MINIMAL EFFECT OF *LEON* AFTER *ILLINOIS V. GATES*

In its 1983 decision in *Illinois v. Gates*,[59] the Supreme Court departed from the technical determination of probable cause often referred to as the "two-pronged test."[60] Developed in the cases of *Aguilar v. Texas*[61] and *Spinelli v. United States*,[62] the two-pronged (or *Aguilar-Spinelli*) test was utilized when information came from an unidentified informant. Under *Aguilar-Spinelli*, in order to use information from an unidentified informant, the state had to establish through specific facts that the informant was credible and that his information was obtained in a reliable manner. A deficiency in either prong could result in a finding that probable cause did not exist. The majority in *Gates*, feeling that the two-pronged test was too rigid,[63] opted for a broader, totality-of-the-circumstances approach.[64] The Court concluded that probable cause determinations should be based on practical, common-sense considerations rather than the rigid *Aguilar-Spinelli* standard.[65]

The Court emphasized in *Gates* that a magistrate's probable cause determination should not be overturned unless the judicial officer had no substantial basis to conclude probable cause existed.[66] If the Court adheres to the totality-of-the-circumstances test and the deference it accords a magistrate's application of the probable cause standard, few cases will overrule a magistrate's probable cause determination. In essence, therefore, *Gates* insulates the issuance of a warrant from meaningful review. After the *Gates* decision, *Leon*'s creation of a good faith exception, which applies after a warrant has been obtained, has only minimal effect. With the totality-of-the-circumstances standard in

58. *Id.* at 825.
59. 103 S.Ct. 2317 (1983).
60. *Id.* at 2328 n.6.
61. 378 U.S. 108 (1964).
62. 393 U.S. 410 (1969).
63. 103 S. Ct. at 2328.
64. *Id.* at 2328 and 2332.
65. *Id.* at 2332.
66. *Id.* at 2331.

place, the major basis for challenging a magistrate's issuance of a warrant—the determination of probable cause—has been substantially reduced.[67] Under *Leon*, when probable cause cannot be found even by applying the relaxed *Gates* test, the admission of evidence is a "double dilution"[68] of the fourth amendment probable cause standard.

The appellate court in *Leon* made its probable cause determination before the Supreme Court handed down its decision in *Gates*.[69] Given *Gates*'s broader test for determining probable cause, the Court almost certainly could have achieved the same result in *Leon* by remanding the case and instructing the court of appeals to reconsider it in light of *Gates*.[70] In short, *Leon* did not have to reach the question of good faith.

Why, then, did the Supreme Court proceed to a good faith exception, especially when it usually defers broad new policy decisions? The only reasonable explanation is that the Court was anxious to place a good faith limitation on the exclusionary rule. The result in *Leon* was foreshadowed in *Gates* when the Court took the unusual action of asking the parties to address the issue of good faith even though the issue had not been briefed or argued in the lower courts.[71] In *Gates*, however, the Court followed its customary self-imposed restraint by refusing to decide an issue not raised in the lower courts.[72]

FUTURE RAMIFICATIONS—STATE LAW

Although *Leon* established a constitutional good faith exception in its interpretation of the fourth amendment, the practical impact of the decision must be assessed at the state level, where most warrant decisions are reviewed. To predict whether a state will apply the good faith exception, one must examine the state's constitutional and statutory counterparts of the fourth amendment. The essential question is whether the state's highest court has interpreted its fourth amendment

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67. Justice Brennan, dissenting in *Leon*, outlined this proposition:

> Finally, even if one were to believe, as the Court apparently does, that police are hobbled by inflexible and hypertechnical warrant procedures, today's decision cannot be justified. This is because, given the relaxed standard for assessing probable cause established just last Term in Illinois v. Gates, . . . the Court's newly fashioned good faith exception, when applied in the warrant context, will rarely, if ever, offer any greater flexibility for police than the *Gates* standard already supplies (citations omitted).

104 S. Ct. at 3445 (Brennan, J., dissenting).

68. This phrase was coined by Professor Kamisar. Address by Yale Kamisar at the Fifth Annual Supreme Court Review and Constitutional Law Symposium 33-46 (Sept. 23, 1983) at 34.

69. *See Leon*, 104 S.Ct. at 3447 (Stevens, J., dissenting).

70. *Id.*

71. 103 S. Ct. at 2321.

72. *Id.*

counterpart as providing greater protection to the individual citizen than the Supreme Court's interpretation of the fourth amendment of the U.S. Constitution affords.[73]

The tendency on the part of some states to interpret their constitutional provisions differently, even though the provisions are similar to the fourth amendment, results from disagreement with the Supreme Court's cutback in fourth amendment protections. The Oregon Supreme Court, for example, recently rejected the Supreme Court's deterrence rationale for the exclusionary rule.[74] The Oregon court indicated that exclusion of evidence is an integral part of the rights guaranteed by the due process clause of the fourteenth amendment.[75] By rejecting the deterrence rationale, the Oregon court invalidated the foundation of the balancing approach, the focus of the Court's analysis in *Leon*. In addition, the Supreme Judicial Court of Massachusetts, in a decision subsequent to *Leon*,[76] paved the way for avoiding the Supreme Court's ruling by recognizing an exclusionary remedy under its state constitutional counterpart to the fourth amendment.

Justice Brennan, in an article reflecting his concern with the Supreme Court's departure from the protection of individual rights,[77] exhorted his state brethren to interpret independently their constitutional provisions:

> [T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them.[78]

Some states, of course, have rejected the Brennan admonishment. In Florida, for example, voters amended the search and seizure provisions of the Florida constitution to comply with Supreme Court inter-

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73. *See generally Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

74. State v. Davis, 295 Or. 227, 666 P.2d 802 (1983).

75. 666 P.2d at 807.

76. Commonwealth v. Ford, 394 Mass. 421 (1985).

77. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

78. *Id.* at 502. For example, in Colorado, where Article II, Section 7 of the Colorado Constitution is virtually identical to the fourth amendment, greater individual protection has been provided. *See* People v. Sporleder, 666 P.2d 135 (Colo. 1983), where the Colorado court held that an individual has a reasonable expectation of privacy in a telephone pen register under the Colorado Constitution even though he has no corresponding right under the fourth amendment.

pretations.[79] Colorado also has adopted legislation in response to the Supreme Court's failure to limit the exclusionary rule. In 1981, the Colorado General Assembly adopted a good faith statute.[80] The statute, unlike *Leon*, provides a limited exception for warrantless police searches as well as for searches conducted with a warrant where the officer has made a good faith mistake. As interpreted by the Colorado Supreme Court, the statute has a much narrower focus than the exception in *Leon*.[81] The statute defines a good faith mistake as "a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause."[82]

The Colorado statute was first construed in *People v. Quintero*.[83] In *Quintero*, several police officers, acting without a warrant, arrested an individual under the mistaken belief that they had probable cause to do so. The Colorado Supreme Court found the good faith statute inapplicable because the mistake involved a judgment of law, not of fact. Under the Colorado court's interpretation, an invalid judgment of law regarding the existence of probable cause, whether based upon actual or mistaken facts, is not subject to the statute's exception to the exclusionary rule.[84] *Leon*, on the other hand, would allow for a good

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79. Florida v. Casal, 462 U.S. 637, 638 (1983) (Burger, C.J., concurring), *dismissing cert.*, Florida v. Casal, 410 So. 2d 152 (Fla. 1982). The Florida Constitution now states:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

FLA. CONST. art. I, § 12.

80. COLO. REV. STAT. § 16-3-308 (Supp. 1984). The provision states, in part:

> (1) Evidence which is otherwise admissible in a criminal proceeding shall not be suppressed by the trial court if the court determines that the evidence was seized by a peace officer, as defined in section 18-1-901(3)(1), C.R.S., as a result of good faith mistake or of a technical violation.
>
> (2) As used in subsection (1) of this section:
>
> (a) "Good-faith mistake" means a reasonable judgmental error concerning the existence of facts which if true would be sufficient to constitute probable cause.
>
> (b) "Technical violation" means a reasonable good faith reliance upon a statute which is later ruled unconstitutional, a warrant which is later invalidated due to a good faith mistake, or a court precedent which is later overruled.

COLO. REV. STAT. § 16-3-308(1) and (2) (Supp. 1984).

81. *See* Justice Neighbors' concurrence in People v. Deitchman, No. 84 SA 16 at 6 (Colo., Feb. 11, 1985):

> Regardless of what the legislature might have intended, the plain language of the statute, including the use of the phrase "reasonable judgmental error concerning the existence of facts" renders the good faith exception to the exclusionary rule more narrow than the exception established by the Supreme Court. . . .

82. COLO. REV. STAT. § 16-3-308(2)(a) (Supp. 1985). *See supra* note 80.

83. 657 P.2d 948 (Colo. 1983), *cert. granted*, 103 S. Ct. 3535, *cert. dismissed*, 104 S. Ct. 543 (1983).

84. *Id.* at 951. *See also* People v. Deitchman, No. 84 SA 16 at 6 (Colo., Feb. 11, 1985), in which this interpretation of the statute was reaffirmed by the concurring opinions of Justices Dubofsky, Quinn, and Neighbors. Chief Justice Erickson, however, interpreted the statute as applying to good faith mistakes of law as well as good faith factual errors. *Id.* at 3.

faith exception even without sufficient probable cause as a matter of law, as long as the facts were sufficient to make an officer's belief in probable cause reasonable.[85] Had the United States Supreme Court ultimately decided the *Quintero* case[86] (discounting the warrantless aspect of the case), it is likely that the good faith exception would have been applied: in *Quintero* the officer had sufficient facts to form a reasonable belief in the existence of probable cause.

In *People v. Mitchell*,[87] a case decided by the Colorado Supreme Court just before *Leon* was handed down, a police officer arrested the defendant under the mistaken belief that he was acting pursuant to a lawful arrest warrant. The Colorado court, again interpreting its state statute, found that the arrest warrant had been issued on facts insufficient to establish probable cause, and upheld the trial court's suppression of the evidence obtained as a result of the arrest.[88] In reaching its decision, the court did not evaluate the reasonableness of the police officer's judgment, but focused instead on the warrant issuance process. The *Leon* Court probably would have reached precisely the opposite result. Under similar facts, the Supreme Court would not have asked whether the issuing authority had erred, but would have looked exclusively at the arresting officer's judgment to determine whether he had acted in good faith.[89]

FUTURE RAMIFICATIONS—FEDERAL LAW

Although the facts and language of *Leon* indicate that the good faith exception applies only when police act pursuant to a search warrant, a number of factors suggest that the exception will be extended into the warrantless search area. For example, the balancing rationale, as used by the Court, provides the opportunity for extending the exception. In his analysis of the costs and benefits of the exclusionary rule, Justice White stated: "[a]n objectionable collateral consequence of [the exclusionary rule's] interference with the criminal justice system's truth-finding function is that some guilty defendants may go free . . . [p]articularly when law enforcement officers have acted in objective good faith or their transgressions have been minor. . . ."[90] Ac-

85. *See supra* note 41 and accompanying text.

86. *Quintero* was originally scheduled to be heard with *Leon* but was dismissed when the respondent died. 104 S. Ct. 543 (1983).

87. 678 P.2d 990 (Colo. 1984).

88. *Id.* at 995, 996.

89. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. . . . Imposition of the exclusionary sanction is not necessary meaningfully (sic) to inform judicial officers of their errors." 104 S. Ct. at 3418.

90. 104 S. Ct. at 3413.

cording to White, the exclusionary rule should not be applied when law enforcement officers commit minor fourth amendment transgressions because under those circumstances the costs of the rule exceed the benefits of deterrence. What constitutes a "minor" fourth amendment transgression is, of course, subject to interpretation. Moreover, minor transgressions could occur in the context of warrantless activity as well as in searches conducted pursuant to a warrant.

There are other indications that the Court may be persuaded to extend *Leon* into the warrantless search area.[91] In *Immigration and Naturalization Service v. Lopez-Mendoza*,[92] a case decided the same day as *Leon*, Justice White took issue with the Court's refusal to apply the exclusionary rule in immigration proceedings.[93] Arguing that application of the exclusionary rule in civil cases would not result in the suppression of large amounts of evidence, White said, "[The exclusionary rule] should be applied in deportation proceedings when evidence has been obtained by deliberate violations of the Fourth Amendment or by conduct a reasonably competent officer would know is contrary to the Constitution."[94] Justice Stevens, separately dissenting in *Lopez-Mendoza*, challenged White's unexplained omission of the warrant requirement: "Because the Court has not yet held that the rule of *United States v. Leon* . . . has any application to warrantless searches, I do not join the portion of Justice White's opinion that relies on that case."[95]

In *Leon*, the Court suggested that any police officer who obtains a warrant is presumed to have acted in objective good faith.[96] The Court contended that the objective standard eliminates many of the uncertainties inherent in a less precise formula. The Court's concern for an objective standard lacks credibility, however. In *Illinois v.*

91. Justice White, in *Illinois v. Gates*, 103 S. Ct. 2317, 2344 (1983), discussed a good faith exception that would involve a reasonable belief in the existence of probable cause with no mention of the necessity for a warrant. *See also* Professor Kamisar's comments in *Constitutional Law Conference*, 53 U.S.L.W. 2189, 2190 (Oct. 16, 1984). He states that "after years and years of talk about a good faith . . . exception to the exclusionary rule, the Court finally reached out to adopt such an exception only to limit it to the tiny percentage of police searches conducted pursuant to warrants."

92. 104 S. Ct. 3479 (1984).

93. *Id.* at 3491 (White, J., dissenting).

94. *Id.* at 3495.

95. *Id.* at 3496 (Stevens, J., dissenting) (citations omitted). A further indication of the Court's willingness to extend the good faith exception can be found in People v. Quintero, 657 P.2d 948 (Colo. 1984), *cert. dismissed*, 78 L. Ed. 2d 719 (1984), the original companion case to *Leon*. In *Quintero*, police made a warrantless arrest under the belief that they had probable cause. The Court would have addressed directly the question of whether the good faith exception applies to warrantless activity, but the case was dismissed because of the death of the respondent. Given the sentiments Justice White expressed in *Lopez-Mendoza* and previously, however, it appears likely that he would have extended the good faith exception to warrantless activity if *Quintero* had been decided by the Court.

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

Gates,[97] the Court replaced the technical *Aguilar-Spinelli* test with the totality-of-the-circumstances test, which is far less precise. In addition, the Court continues to adhere to an imprecise standard in determining whether to apply the fourth amendment. The standard was stated by Justice Harlan when he said that the fourth amendment would protect any expectation of privacy which "society is prepared to recognize as reasonable."[98] Yet the Court "has not completely or consistently explained what it takes to make a privacy expectation reasonable."[99]

In *New York v. Quarles*,[100] a recent case creating a public safety exception to the Miranda warning, the Court again demonstrated that it is not concerned with precise formulas. Justice O'Connor, dissenting in part, pointed out that one of the purposes of the *Miranda* decision was to provide a strict, standardized approach resulting in clarity and precision in the arrest area. "[A] 'public safety' exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand."[101]

The balancing rationale of *Leon* not only leaves room for the Court to extend the good faith exception to warrantless searches, but also provides a basis for applying the exception to non-fourth amendment cases. Clearly, the exclusion of evidence under the good faith exception is currently limited to fourth amendment violations. The Court has distinguished between fourth amendment cases, on the one hand, and fifth and sixth amendment cases, on the other, on a consistent basis. In general, the Court has argued that fourth amendment protections distort the truth finding process, while fifth and sixth amendment protections help insure its reliability.[102] Yet, in its attempt to categorize these constitutional protections, the Court possibly has drawn a distinction without a difference. Where fifth and sixth amendment rights are violated, and the evidence is reliable, the Court has been just as unwilling to apply the exclusionary sanction as it has been in fourth amendment cases.

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97. 103 S. Ct. 2317 (1983).

98. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

99. *See* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 310 (1982).

100. 104 S. Ct. 2626 (1984).

101. *Id.* at 2636 (O'Connor, J., concurring in part and dissenting in part).

102. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 479 (1976) (quoting, in part, Kaufman v. United States, 394 U.S. 217, 224 (1969)):

> [F]ourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter fourth amendment violations by law enforcement officers.'

Two cases decided within weeks of *Leon* support this proposition. In *Nix v. Williams*,[103] a case in which the corpus delecti was discovered as a result of a sixth amendment violation, the Court held that the physical evidence (a corpse) inevitably would have been discovered and therefore held the exclusionary rule inapplicable.[104] In attempting to justify the "inevitable discovery" rationale, the basis for its refusal to apply the exclusionary rule in *Nix*, the Court emphasized the limited deterrent effect the rule would have if the evidence were excluded and the "enormous societal cost of excluding truth in the search for truth. . . ."[105] The language found in the *Nix* decision, which is similar to the balancing language found in fourth amendment cases, suggests that the "inevitable discovery" rationale could be extended to other constitutional areas.[106]

In *New York v. Quarles*,[107] police found a gun partially as a result of a statement obtained in violation of the defendant's Miranda warnings. The Supreme Court held that the gun could be introduced as evidence at trial. Justice Rehnquist, writing for the Court, said that the exclusionary rule should not be applied because of a "public safety" exception to *Miranda*.[108] In creating the public safety exception, Rehnquist emphasized that Miranda warnings are a prophylactic remedy not dictated by the fifth amendment.[109] Once he had rendered Miranda warnings simply a judicially created remedial device, Rehnquist, not surprisingly, justified the public safety exception by using a balancing rationale similar to the one used in *Leon*. He claimed that the societal considerations of public safety outweighed the need for the prophylactic rule of *Miranda*.[110] In both *Nix* and *Quarles*, one case involving the sixth amendment, the other the fifth amendment, the Court found a way to avoid the suppression of reliable evidence. In each case, the costs of excluding reliable evidence outweighed any benefit exclusion might have had on law enforcement activity. With this type of analysis in place, it is only a matter of time before a good faith exception to the exclusion of evidence will be implemented beyond the fourth amendment area.

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103. 104 S. Ct. 2501 (1984).
104. *Id.* at 2512.
105. *Id.* at 2510.
106. *Id.* at 2501.
107. 104 S. Ct. 2626 (1984).
108. *Id.* at 2632.
109. *Id.* at 2631.
110. *Id.* at 2633.

CONCLUSION

Given the trend of the Supreme Court's decisions before *Leon*, the *Leon* opinion comes as no surprise. Nevertheless, the case is significant. Although *Leon* is a small step in the evolution of the balancing approach, it marks the first time the Court has dealt with the exclusionary remedy as it affects the prosecution's case-in-chief. With this barrier overcome, the balancing rationale could be readily applied to all fourth amendment situations and to other constitutional protections when reliable evidence might be excluded.

The Court, recognizing the significance of creating a good faith exception, articulated at least one limitation on this standard, the objective criterion of obtaining a warrant. This article has brought into question the Court's purported concern for an objective standard as well as the objectivity of the standard itself.

The article has also suggested that the good faith exception, in conjunction with the *Gates* decision, will substantially limit appellate review of magistrates' probable cause determinations. This limitation on appellate review will promote forum shopping for magistrates as well as reduce the incentive for careful review of warrant applications by judicial officials. The lack of appellate review is also likely, as Justice Brennan forecasted, to "stop dead in its tracks judicial development of Fourth Amendment rights."[111]

111. United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).