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## Gates, Leon and the Compromise of Adjudicatory Fairness: (Part I)-A Dialogue on Prejudicial Concurrences

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# GATES, LEON, AND THE COMPROMISE OF ADJUDICATIVE FAIRNESS (PART I): A DIALOGUE ON PREJUDICIAL CONCURRENCES

JOEL JAY FINER\*

[A] member of the Supreme Court must lay upon himself a self-denying ordinance. . . . He may not talk about the future. The future is what we make of it, and is here almost as we speak.<sup>1</sup>

All judges in lively controversies are "more or less prejudiced." But between that "more or less" lies the whole kingdom of the mind; the differences between the "more or less" are the triumphs of disinterestedness, they are the aspirations we call justice.<sup>2</sup>

## INTRODUCTION

On July 5, 1984 the Supreme Court in *Leon v. United States*<sup>3</sup> held that where law enforcement officials execute a search warrant issued in violation of the dictates of the fourth amendment but act in the "good-faith," "objectively-reasonable" belief that the warrant was constitutionally valid, the fruits of the search should not (with a few exceptions) be excluded from evidence under the exclusionary rule of *Weeks v. United States*<sup>4</sup> and *Mapp v. Ohio*.<sup>5</sup> Except for the application of the *Weeks* exclusionary rule itself to the states in *Mapp v. Ohio*, the *Leon* decision was the most significant development in exclusionary rule jurisprudence in the past seventy years.

On June 8, 1983, in *Illinois v. Gates*,<sup>6</sup> the Supreme Court, after calling for and receiving briefs and arguments on the issue of whether the exclu-

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<sup>1</sup> G. HELLMAN, BENJAMIN N. CARDOZO: AMERICAN JUDGE 271, 292 (1940), quoted in Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 635 (1962).

<sup>2</sup> FELIX FRANKFURTER ON THE SUPREME COURT 78 (P. Kurland 1970).

<sup>3</sup> 104 S.Ct. 3405 (1984).

<sup>4</sup> 232 U.S. 383 (1914).

<sup>5</sup> 367 U.S. 643 (1961).

<sup>6</sup> 462 U.S. 213 (1983).

sionary rule should be modified, concluded, for reasons of jurisdiction and prudence, that it could not reach that question in that case. The facts in *Gates* were that the police obtained a search warrant on the basis of a letter from an anonymous informant charging the defendant with engaging in interstate drug trafficking and asserting that the defendant kept drugs in his Illinois home. Under then existing fourth amendment doctrine—the *Aguilar* and *Spinelli* test (at least as interpreted by many lower courts, including the Illinois Supreme Court in *Gates*)—a warrant could not be validly issued on the word of an anonymous informant unless there was some evidence indicating the basis of the informant's knowledge (how he or she came by the reported information) and some evidence to justify the conclusion that the informant was truthful or, alternatively, the informant's information was reliable.<sup>7</sup> The *Gates* majority opinion concluded that the observations of law enforcement officers of Lance Gates' activities, together with the information in the tip, were insufficient to satisfy the *Aguilar-Spinelli* requirements for probable cause. The Court found those requirements unduly restrictive, however, and overruled *Aguilar* and *Spinelli*. The five Justices joining the majority applying a reformulated test of probable cause,<sup>8</sup> found that the warrant was properly issued, and, reversing the Illinois Supreme Court, upheld the conviction.

Justice White separately concurred in *Gates*.<sup>9</sup> He concluded that the warrant was validly issued *even under the Aguilar and Spinelli restrictions*, restrictions which he found to be valid.

An additional and extensively elaborated basis for Justice White's vote to uphold Gates' conviction was his belief that the fourth amendment exclusionary rule should be modified to admit evidence that was the product of a search warrant obtained and executed by the police in the good faith, objectively-reasonable belief that their action was constitutionally valid.

This two-part Article is about certain qualities of fairness—those qualities that although subtle, are central to the idea and spirit of justice in adjudication. This Article is about how those qualities were subverted in the process by which the doctrine of *United States v. Leon* became law.

A fair hearing is more than the sum of its parts. It requires an attitude of detachment, a spirit of neutrality, a commitment to listen receptively to the arguments contending for acceptance. The central, significant attributes that sum up the idea of a fair hearing are the capacity and the willingness of a judge to approach a case with an open mind. This two-part Article advances the thesis that the *Leon* majority was *unable* and

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<sup>7</sup> See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

<sup>8</sup> 462 U.S. at 238-39.

<sup>9</sup> *Id.* at 246.

*unwilling* to accord a fair hearing to the arguments in favor of retention of the seventy year-old *Weeks* doctrine requiring exclusion of evidence unconstitutionally obtained by law-enforcement officers.

Part I of the Article—A Dialogue On Prejudicial Concurrences—published herein, suggests that several members of the *Leon* majority (particularly its author, Justice White) were *unable* to impartially adjudicate the constitutional question because of pre-decisional gratuitous opinions (from the bench) on the subject. More specifically, the Dialogue explores the virtually unquestioned assumption that a judge cannot sensibly or meaningfully be criticized for being “prejudiced” or “partial” on matters of law.

Part II, to be published in a later issue, argues that even viewed independently of prior prejudicial concurrences, the majority opinion in *Leon* manifested an *unwillingness* to accord the parties and the nation a fair adjudication, demonstrating both “aggressive prosecutorialism” (e.g. agenda-driven pursuit of crime-control values) and a “willful refusal to listen” (e.g. to acknowledge, respond to or treat with reason and candor, rather than by peremptory dismissal or transparently evasive rationalizations) the views advanced by counsel before the Court and expressed in the body of legal scholarship addressing the relevant questions. These flaws were further manifested in the *Leon* majority’s gratuitous “reaching out” to make law, its unilateral adversarialism, its result-determining manipulation of the burden of appellate argument, its dubious assumptions about the prevailing values motivating magistrates who review search warrant applications, its attempts at computational derivations of net constitutional justice (“cost-benefit analysis”), and its indifference to the probable repressive consequences of the quasi-demagogic atmospherics, if not the literal substance of the opinion.

A central thesis of Part II is that if the performance of our adjudicatory system has fallen short of fulfilling the high expectations of “procedural due process” it may well be substantially due to a failure of an essential mediating factor between *pro forma* procedural safeguards and substantive justice. That factor is the earnest undertaking, by an adjudicator of a *commitment to listen* to not-insubstantial arguments legitimately before the Court. Part II attempts partial elaborations of the concept of “aggressive adjudication”<sup>10</sup> and the ideas of “duty to listen actively”<sup>11</sup> and “will-

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<sup>10</sup> The use of the adjective “aggressive” to describe a court’s judicial disposition derives from the excellent article by Professor Stone. Stone, O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition, 19 GA. L. REV. 15 (1984). Among the judicial behaviors that fall within my proposed definition of a judicially aggressive opinion are the following: failure to acknowledge or respond to an important contention, dismissing a contention peremptorily, advancing false and sweeping generalizations, declaring an unprovable proposition to be the case merely because the contrary cannot be demonstrated, denying an allegation that was never made, and falsely stereotyping the party’s philosophy.

<sup>11</sup> When the Supreme Court grants a party a hearing (i.e., briefing and oral presenta-

ful deafness," finding *United States v. Leon* an unusually fertile source of illustrative material.

In reaching his conclusions in *Gates* regarding the good-faith exception to the exclusionary rule, Justice White advanced numerous contentions and assertions about the rationale, importance, impact, and limits of the exclusionary rule: The rule, being a "remedy" rather than "a personal constitutional right,"<sup>12</sup> is not to be applied to situations which produce greater costs than benefits.<sup>13</sup> The exclusion of probative evidence of guilt is itself a high cost;<sup>14</sup> and because of the exclusionary rule, a significant number of felony cases in general, and an even greater percentage of drug cases in particular,<sup>15</sup> are lost, because declined for prosecution. The rule deters reasonable police investigation,<sup>16</sup> imposes a tremendous burden on the federal and state judicial systems,<sup>17</sup> and undermines public confidence in, and respect for, law.<sup>18</sup> In view of such costs, those who would retain the exclusionary rule "must bear a heavy burden of justification."<sup>19</sup> Since the deterrent efficacy of the exclusionary rule cannot be empirically demonstrated,<sup>20</sup> particularly in situations where the police act in the good-faith—i.e., "of objectively reasonable" belief that their actions are constitutional<sup>21</sup> (such "objective-reasonableness" being *prima facie* present where a search warrant has been issued by a neutral magistrate<sup>22</sup>)—the rule should not ordinarily be applied in such situations. The deterrence or punishment of magistrates who might invalidly issue search warrants is not the function of the exclusionary rule, Justice White declared.<sup>23</sup>

Thirteen months after issuing his concurrence in *Gates*, Justice White authored the majority opinion in *Leon*.<sup>24</sup> That opinion expressed most of the points made by Justice White the year before, and added nothing lending further weight to his recent identical legal conclusion.<sup>25</sup>

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tion), it impliedly agrees to read and listen to the contentions proffered by the party: to listen is to maintain a state of intellectually active receptivity to all non-frivolous contentions.

<sup>12</sup> 462 U.S. at 257.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 257, n.13.

<sup>16</sup> *Id.* at 258.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 257-58.

<sup>20</sup> *Id.* at 259-60.

<sup>21</sup> *Id.* at 260-61.

<sup>22</sup> *Id.* at 262.

<sup>23</sup> *Id.* at 262-63.

<sup>24</sup> 104 S.Ct. 3405.

<sup>25</sup> See text accompanying *infra* note 120.

## PART I: PREJUDICIAL CONCURRENCES: A DIALOGUE

Gratuitous, comprehensive and conclusive declarations of law *in concurring opinions* have come to be taken for granted for so long by observers of the Supreme Court that one hesitates to question the propriety or prudence of the practice, save that the risk of confessing one's ignorance of learned explanations may be outweighed by the value to the decisional process of articulating these felt improprieties.

Were I Mr. Leon, or Mr. Sheppard,<sup>26</sup> (or one of their attorneys), or a legally unsophisticated, yet ethically sensitive observer of the passing judicial scene (perhaps contemplating attendance at a law school), I would find it difficult to understand how Mr. Leon could receive a fair adjudication of the legal issues his case presented when four Justices in earlier concurrences or dissents had publically asserted that the exclusionary rule should not be applied where the police had acted in good-faith and/or in reasonable belief that their action was consistent with the requirements of the fourth amendment.<sup>27</sup>

What follows, in a dialogic form, is an exploration of the idea of *prejudicial* concurrences, with particular emphasis on the concurrence of Justice White in *Illinois v. Gates*, in light of his opinion for the majority thirteen months later in *Leon*.

**NAIVE OBSERVER:** When he wrote the *Leon* opinion, Justice White had recently written what seemed like a gratuitous concurrence in a case where he spelled out, point by point, in no uncertain terms, how the law should be interpreted in a situation just like Mr. Leon's, even though not one of the other Justices in that earlier case addressed the subject (indeed the majority explicitly decided not to decide it),<sup>28</sup> and even though the *Leon* and *Sheppard* cases were on the immediate horizon.<sup>29</sup> Now that's one of the reasons why I've decided to go to law school—so I could have explained to me how parties before the Supreme Court, before *any* court, can receive a fair and impartial hearing from Justices who have made up their minds as to how a case should be decided before the briefs are even filed.

**LEARNED LAWYER:** You are of course correct in perceiving that it is wrong, indeed professionally unethical<sup>30</sup> and even unlawful,<sup>31</sup> for a judge

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<sup>26</sup> *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1984), was a companion case with *Leon*.

<sup>27</sup> See *infra* note 86. There was also an ambivalent pre-confirmation statement by a fifth now-sitting Justice, Sandra Day O'Connor. See *infra* notes 56-60 and accompanying text.

<sup>28</sup> *Gates*, 462 U.S. at 224.

<sup>29</sup> The *Leon* case was docketed on March 29, 1983, over two months prior to the decision in *Gates*. 52 U.S.L.W. 3807 (1983). Certiorari in *Leon* was not granted until June 27, 1983. 103 S.Ct. 3535 (1983).

<sup>30</sup> ABA CODE OF JUDICIAL CONDUCT Canon 3(c)(1)(1972) (hereinafter cited as the CODE) states the following: "A judge should disqualify himself in a proceeding in which his impar-

to be prejudiced, partial or biased<sup>32</sup> in the matter before him; he or she must not only be neutral and detached, i.e., impartial, but must appear to be impartial as well.

Where you go wrong is in your notion that a judge can be improperly prejudiced or biased *about the law* and in your evident assumption that a party has a right to a hearing on questions of law generally and before the United States Supreme Court in particular.

If you will allow me to proceed to elaborate upon these and other verities known to all true students of the law, you will be enlightened and edified and need not ever be troubled again by your unfortunate confusion.

You see, it is not an appellate court's function to decide the law as a trial court or jury decides the facts; it is not its function to decide which of two legal positions contended for by the parties is more "probative."<sup>33</sup> Courts, particularly the Supreme Court, can and do consult their understanding of the law (and even of legislative facts),<sup>34</sup> regardless of what or whether the parties (by their attorneys) actually argue.

A very distinguished jurist, the late federal appellate judge, Jerome Frank, eloquently conveyed the idea that judges do hold, and are expected to hold, views about the law—often strong and deep views. His observations are worth quoting at some length:

Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. To live is to have a vocation, and to have a vocation is to have an ethics or scheme of values, and to have a scheme of values is to have a point of view, and *to have a point of view is to*

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tiality might reasonably questioned."

<sup>31</sup> See 28 U.S.C. § 455 (1982).

<sup>32</sup> The precepts of Canon 3(C)(1), *supra* note 30, are closely related to those of CODE Canon 2(A): "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Emphasis added). Public confidence in the impartiality of the judiciary would normally be undermined where that "[partiality] might reasonably be questioned." CODE Canon 3(C)(1), i.e., where there is even the appearance of impropriety. CODE Canon 2 (Commentary).

<sup>33</sup> Cf. Hyneman, *Administrative Adjudication*, 51 POL. SCI. Q. 383, 516 (1936).

<sup>34</sup> See *infra* note 125.



have a prejudice or bias . . . . An "open mind," in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding, roughly to the psychiatrist's description of the feeble-minded.

The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.<sup>35</sup>

The idea of a judge being "prejudiced" about the law has been refuted by the experts. For example, Professor Kenneth Culp Davis, in an early edition of his *Treatise on Administrative Law*, states that "[b]ias in the sense of a crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification."<sup>36</sup> Indeed, when the current revision of the Code of Judicial Conduct was drafted, the original draft-revision called for disqualification when a judge "had a fixed belief concerning the merits" of a case.<sup>37</sup> The draftsmen were, however, persuaded to substitute the present "standard of personal bias or prejudice for [the original] formulation."<sup>38</sup>

Professor Wayne Thode, Reporter to the ABA Committee on the Code of Judicial Conduct, explained the change of language:

The Committee was confronted, however, by the interpretations of many able judges and law professors that [the proposed revisions] would require a judge to disqualify himself if he had a fixed belief about the law applicable to a given case . . . . This . . . was not intended; indeed, the Committee recognized the necessity and the value of judges having fixed beliefs about constitutional principles and many other facets of the law.<sup>39</sup>

Thus, under the present rule, while personal bias or prejudice requires

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<sup>35</sup> J. FRANK, *COURTS ON TRIAL* 413 (1950)(quoting from his opinion in *In re J.P. Linahan & Co.*, 138 F.2d 650, 651 (2d Cir. 1943)).

<sup>36</sup> 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 12.01, at 131 (1958)(emphasis added). In this regard see *Tuttle v. Tuttle*, 46 N.D. 79, 181 N.W. 888 (1921): "the mere fact that a judge entertains, or even has expressed, an opinion upon some question of law does not disqualify him on the ground of bias or prejudice." *Id.* at 91, 181 N.W. at 908. See also *BLACK'S LAW DICTIONARY* 147, 1061-62 (5th ed. 1979)(where "bias" and "prejudice" are defined as "used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved").

<sup>37</sup> Note, *Justice Rehnquist's Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106, 113 (1973)(quoting the *Reporter's Notes to the Code of Judicial Conduct* (unpublished at 34)).

<sup>38</sup> *Id.* at 113-14 (citing the *Reporter's Notes* at 35). See W. THODE, *REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT* (1973).

<sup>39</sup> THODE, *supra* note 38, at 61, quoted in 13A C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURES* § 3542, at 570-71 (2d ed. 1984).

disqualification a fixed belief concerning a principle of law does not.<sup>40</sup>

And surely you must take as authoritative the declaration by the Supreme Court itself on this matter:

[no] . . . decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law.<sup>41</sup>

My other point about a judge's right, if not a duty, to have a view as to "what the law is," is that our legal system is premised on courts applying the law that exists (absent a good reason to do otherwise). Requiring that each judge approach a case without a fixed opinion regarding the law is contrary to the concept of law itself; or at least it clashes directly with the central common-law doctrine of *stare-decisis*, requiring judges ordinarily to apply today what yesterday they or their predecessors declared to be the law. Thus, a prejudgment regarding the law is a positive attribute.<sup>42</sup> As one writer noted: "the adjudicator who has given much thought and study to a particular legal problem, and has thereby at least partially prejudged the issues involved, would seem to be preferred to the judge who has not developed the basis for a prejudgment."<sup>43</sup>

More recently, Justice Rehnquist declined to recuse himself from a case raising issues identical to those on which he had expressed his views "as an expert witness for the Justice Department on the subject of statutory and constitutional law"<sup>44</sup> in testimony before a Senate Subcommittee. Concededly, he had "expressed an understanding of the law . . . which was contrary to the contentions of respondents in [the case presently before him]."<sup>45</sup> Justice Rehnquist asserted reasons why a Justice should not be disqualified from sitting in a case raising a particular legal question on which he had expressed "a public view [prior to assuming the Bench] as to what the law is or ought to be."<sup>46</sup>

On the propriety of participating in such a case, Justice Rehnquist declared:

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<sup>40</sup> Note, *supra* note 37, at 114. See generally Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 757-58, nn. 91-94 (1973).

<sup>41</sup> *F.T.C. v. Cement Institute*, 333 U.S. 683, 702-03 (1948). The *Cement Institute* opinion is discussed *infra* at the text accompanying notes 77-85.

<sup>42</sup> 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 19.2 (2d ed. 1980) ("A judge may have a bias [prejudice] on a question of law because he decided the question in a previous judicial opinion; the judge who has the most biases in this sense may be the best judge." *Id.* at 375.)

<sup>43</sup> Comment, *Prejudice and the Administrative Process*, 59 NW. U. L. REV. 216, 219 n.9 (1964).

<sup>44</sup> Memorandum of Justice Rehnquist, *Laird v. Tatum*, 409 U.S. 824, 825-26 (1972).

<sup>45</sup> *Id.* at 826.

<sup>46</sup> *Id.* at 830. See also *id.* at 831-39 where Justice Rehnquist described other situations in which Justices had publicly expressed views on legal issues and thereafter participated in the Court's resolution of such issues.

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not, by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. *Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.*<sup>47</sup>

**NAIVE OBSERVER:** It still looks to me as if Justice White and some of the others were merely giving the parties' counsel an opportunity to say a few final words before their arguments were rejected.

**LEARNED LAWYER:** Well, perhaps three years of law school will straighten you out about this. Come back after you have earned your J.D.; if you still have problems we will continue our discussion.

*Three years and a bar examination later.*

**RECENT LAW SCHOOL GRADUATE (FORMER NAIVE OBSERVER):** Frankly, we didn't spend much time on this in law school, and it wasn't even among those inexcusably obscure questions inevitably included on the bar examination, so maybe that's why Justice White's concurrence in *Gates* still seems improper. I realize that nothing in federal law<sup>48</sup> or the ABA

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<sup>47</sup> *Id.* at 835 (emphasis added). Justice Rehnquist asserted, in terms of propriety (not disqualification), that for a nominee to the bench (unlike a citizen who makes statements prior to nomination)

to express any but the most general observations about the law would suggest that, in order to obtain favorable consideration of his nomination, he deliberately was announcing in advance, without benefit of judicial oaths, briefs, or arguments, how he would decide a particular question that might come before him as a judge.

*Id.* at 836 n.5. Justice Rehnquist seems to be saying that it is unethical to appear to be currying favor. His statement also implies, however, the perceived unethicality of prejudicial proclamation on particular legal issues that might later come before the witness as judge.

<sup>48</sup> The federal statutes that directly relate to judicial ethics are few. *See generally* 28 U.S.C. §§ 47, 144 and 455 (1982). Recusal of a Supreme Court Justice is legally governed principally by 28 U.S.C. § 455, which provides:

Any Justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Disqualification is "mandatory" for the categories of "substantial interest," prior "material witness," and "has been of counsel." *Rehnquist Memorandum*, 409 U.S. at 828-29; *see also* 28 U.S.C. § 455(e). "Substantial interest" is usually interpreted to mean a pecuniary or other beneficial interest. *See, e.g.,* U.S. v. Bell, 351 F.2d 868, 878 (6th Cir. 1965), *cert. denied*, 383 U.S. 947 (1966). *But see* Adams v. U.S., 302 F.2d 307 (5th Cir. 1962): "The interest

Code of Judicial Conduct<sup>49</sup> directly prohibits any sort of statement from the bench by a judge regarding his or her views about the law.

Nevertheless, I'm sure you realize that certain related matters have not been without controversy over the years. I refer to extra-judicial statements by members of the Supreme Court.<sup>50</sup> Although Justices have been making extra-judicial statements about the law since the Court's early years, judges and commentators have expressed disapproval of the practice. For example, Justice Frankfurter declared at a Harvard Law School banquet (in response to a request to comment about an article about the Supreme Court): "I do not want to talk about any matters connected with the Supreme Court."<sup>51</sup> At the same proceeding he said:

I do not think that any member of the Supreme Court should talk about contemporaneous decisions. Because of the nature of the adversary process, an adjudication should be made on the basis of arguments to come before the Court in a particular case. And comments by a member of the Court on these opinions, in public or in private, of what an opinion may mean are, from my point of view, hostile to the full play of the adversary process.<sup>52</sup>

One of the more austere versions of this ethical principle was expressed by Justice Cardozo, who explained: "[A] member of the Supreme Court must lay upon himself a self-denying ordinance."<sup>53</sup> On the same subject Justice Cardozo said, in a letter to a cousin declining a request to speak to her organization:

You have no idea of the inhibitions that hedge the soul—the pure undefiled soul—of a Justice of the Supreme Court. He may not talk about events of the day. They may indicate his judgment as to problems that may come before him as a judge! He may not talk about the past. The past is the parent of the present and has given it its shape and mold! He may not talk about the future. The future is what we make of it, and is here almost as we speak. Well, the result is that I don't make speeches anywhere—not even at bar associations."<sup>54</sup>

Moreover, it is the common practice of candidates and nominees for federal judgeships to decline to give specific views regarding issues of law that might come before the Court. Justice O'Connor, for example, in her

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that any lawyer has in pushing his case to a successful conclusion." *Id.* at 310.

<sup>49</sup> See *infra* text accompanying notes 64-69.

<sup>50</sup> See Westin, *supra* note 1.

<sup>51</sup> PROCEEDINGS IN HONOR OF MR. JUSTICE FRANKFURTER 10 (Harvard Law School Occasional Pamphlet No. 2; 1960), *quoted in* Westin, *supra* note 1, at 634.

<sup>52</sup> *Id.* at 11, *quoted in* Westin, *supra* note 1, at 660.

<sup>53</sup> G. HELLMAN, *supra* note 1, at 271.

<sup>54</sup> *Id.* at 292.

confirmation hearings before the Senate Judiciary Committee, declined to indicate her probable vote on particular issues of law that might be presented to the Court. In response to questions soliciting her views on *Roe v. Wade*,<sup>55</sup> for example, she testified: "I do not believe that, as a nominee, I can tell you how I might vote on a particular issue which may come before the Court."<sup>56</sup> She said also that she would not endorse or criticize earlier decisions, because they might again come up to the Court.<sup>57</sup>

While Justice O'Connor did express the general view that some "examples of the application of the [exclusionary] . . . rule [were] . . . unfortunate," and perhaps by negative inference suggested her notions as to the appropriate applications of the rule,<sup>58</sup> "she emphasized that she was therein expressing her personal views [and that they] have no place in the resolution of legal issues."<sup>59</sup> She also steadfastly declined to comment on particular cases.<sup>60</sup>

A recent issue of the American Bar Association Journal<sup>61</sup> discusses the procedures employed by some members of the Senate Judiciary Committee (including sending an eight page questionnaire to the candidate) for determining the constitutional philosophy of potential nominees to the federal judiciary. Relating the experience of a particular candidate, Joseph Rodriguez, the Journal states that he "repeatedly stressed that it *would be inappropriate for him to comment on issues that might come before him as a federal judge.*"<sup>62</sup> Rodriguez wrote, in response to a question about *Roe v. Wade*: "[T]here could also be a more serious appearance of impropriety if it seems that I have pledged to take a particular view of the law . . . [a]n essential ingredient of justice is the appearance of justice. The called-for response could affect that appearance."<sup>63</sup>

Moreover, the ABA Code of Judicial Conduct suggests that the ethical aspiration of appearance of "impartiality" may apply to pre-judgment of legal issues as well as evidentiary disputes, notwithstanding a judge's understandable possession of a jurisprudential value system and even fairly definite views on particular legal questions. For the Code states that a judge may not obtain the advice of a legal expert unless "[the judge] gives notice to the parties of the person consulted and the substance of the

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<sup>55</sup> 410 U.S. 113 (1973).

<sup>56</sup> Christian Science Monitor, Sept. 11, 1981, at 3 (reporting the testimony given September 9, 1981).

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.* at 8.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 71 A.B.A.J. 60 (Aug. 1985).

<sup>62</sup> *Id.* at 64 (emphasis added).

<sup>63</sup> *Id.* (emphasis added)

advice, and affords the parties reasonable opportunity to respond.”<sup>64</sup> This tells us, does it not, that the same ethics codifiers who found no fault in judges who approached litigation with “fixed belief[s] about the law applicable to a given case” at least recognized that *adjudicative responsibilities include responsibilities to resolve issues of law*?<sup>65</sup> Furthermore, under Canon Five, a judge may “write, lecture, teach and speak on non-legal subjects,” as long as “such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.”<sup>66</sup> Under Canon Four, a judge may “speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice”<sup>67</sup> only if consistent with two constraints: 1) “in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him,”<sup>68</sup> and 2) the limitations of Canon Five.<sup>69</sup> Since issues that “may come before” a judge includes issues of law, the Code seems to recognize and disapprove of the possibility of pre-adjudication utterances that render a judge improperly partial on *matters of law*!

LEARNED LAWYER: May I interrupt this disquisition with a small observation?

RECENT LAW GRADUATE: How small?

LEARNED LAWYER: Just to disabuse you of some dubious legal reasoning in your very last point: to read the impartiality requirement of Canon 4A as going beyond prevention of fact-partiality, person-partiality or outcome-partiality (from corrupt motives), is to commit the sin of begging the question.

RECENT LAW GRADUATE: While it is possible to read these vague and noble phrases, lines which at once invite and reveal question-begging, as consistent with only a narrow notion of “partiality”—i.e., one that refers only to adjudicative facts, or to a pre-existing bias for or against parties, witnesses or attorneys—it seems just as reasonable to conclude that the drafters of these provisions at least contemplated a duty of “impartiality” that could be improperly compromised by a judge’s extra-judicial statements about the law.

LEARNED LAWYER: You’ll have to be more persuasive than that. For one thing, if extra-judicial statements about the law are unethical a great

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<sup>64</sup> CODE Canon 3(A)(4).

<sup>65</sup> And to resolve them, at least, by providing the parties a fair opportunity to address any outside influence regarding the legal issue in question.

<sup>66</sup> CODE Canon 5.

<sup>67</sup> *Id.* at Canon 4(A).

<sup>68</sup> *Id.* at Canon 4.

<sup>69</sup> *Id.* at Canon 4 (Commentary).

number of Justices throughout the years have misbehaved.<sup>70</sup> Certainly Justice Cardozo's precepts on this matter were far more austere than the attitudes of all but the most rigidly "ethical" judges.

Just six years ago, more than half of the Court's members took to the lecture circuit,<sup>71</sup> explaining to all who would listen each Justice's views regarding a controversial decision<sup>72</sup>—one that some observers read as forbidding the press from attending criminal trials where the trial judge declared that allowing the press access would jeopardize the fairness of the trial.<sup>73</sup>

Why, the present Chief Justice himself declared, shortly after being confirmed, that: "All the talk of outside activities is totally irrelevant to the administration of justice. Far from withdrawing I intend to accelerate my activities."<sup>74</sup>

More important, young counsellor, the situations you refer to are so obviously distinguishable that I wonder how you managed to persuade those law professors to hand you a diploma. Justice White did not express his views *in advance* of judicial proceedings but *in the course* of judicial proceedings! We are speaking not of *extra-judicial* statements, but of *judicial* statements!

RECENT LAW GRADUATE:      *Judicial but not judicious.*

LEARNED LAWYER:      WHAT? You'd better explain yourself.

RECENT LAW GRADUATE:      Yes, *I do* think your distinction is important.

LEARNED LAWYER:      All right then.

RECENT LAW GRADUATE:      It is important because *gratuitous declarations of law, accompanied by comprehensive elaboration of reasons (with ostensible documentation), expounded from the Bench, regarding a legal issue that is pending or impending is probably more questionable than most extra-judicial statements in terms of a Justice's proper functioning in the case to come.* Extra-judicial statements are rarely as compre-

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<sup>70</sup> See generally Westin, *supra* note 1.

<sup>71</sup> Carellig, Associated Press, Sept. 7, 1979, AM Cycle, Washington Dateline.

<sup>72</sup> The case being "explained" was *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), where the Court, in a 5-4 decision, stated that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.* at 391. The case involved a trial court's exclusion, with the consent of the attorneys, of the press from a pre-trial hearing.

<sup>73</sup> In the following Term, the Court upheld, under the first amendment, the right of the public and the press to attend criminal trials. *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

<sup>74</sup> N.Y. Times, July 2, 1969, at 1, col. 7. For a comprehensive and insightful analysis of Chief Justice Burger's understanding of his role as chief administrator of the Courts of the United States see Landever, *Chief Justice Burger and Extra-Case Activism*, 20 J. PUB. L. 523, 525-31 (1971).

hensive, as elaborate, or as unequivocal and conclusive in tone and temper as Justice White's *Gates* concurrence. Extra-judicial declarations rarely lock a Justice in as much as the type of declaration Justice White made in *Gates*. And thus, they rarely present to the party and to the public in a later case a so-called hearing that is nothing more than a charade—a foregone conclusion with regard to the supposed “open-mindedness” of one or more Justices.

The problem for Mr. Leon and Mr. Sheppard was arguably greater than it would have been had Justice White made these statements at a Bar Association function, or even in a law review article.

LEARNED LAWYER: I don't understand.

RECENT LAW GRADUATE: So far as Justice White's probable vote was concerned, because the *Gates* concurrence was an official pronouncement from the bench, that thirteen-month-old opinion probably had an impact on him akin to the force of law.

A public statement, from any forum or platform, unlike unexpressed views, is, and operates as, a commitment to an outcome. It operates as a commitment in that it is difficult to retract without public embarrassment. It operates also as a mind-set, a psychological locking-in of reasoning processes and conclusions.<sup>75</sup> It is also a commitment to self that has a very strong tendency to be self-enforcing, without necessary awareness of that commitment as a motivating factor of the later decision. Indeed, I would not at all be surprised to find, somewhere in the literature of experimental psychology, that writing one's reasons down tends to fix them in one's mind as well as on one's writing paper. And on the least subtle level, consistency is presumably of great importance to a judge, particularly with regard to a declaration he uttered from the bench just thirteen months earlier.

Moreover, there is an important sense in which such a declaration is not “responsible.” A Justice who writes a gratuitous concurrence is not immediately responsible for any consequences, for it rarely has immediate consequences. It makes little or no difference to the parties,<sup>76</sup> and scarcely, if at all, effects controlling legal doctrine. When the expression

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<sup>75</sup> See D. WICKENS AND D. MEYER, *PSYCHOLOGY* 276-85 (1961). See also E. TOLMAN, *PURPOSE BEHAVIOR IN ANIMALS AND MEN* (1932): “[O]nce set up, a system [set] probably does as much harm as it does good. It serves as a sort of sacred grating behind which each novice is commanded to kneel in order that he may never see the real world save through its interstices.” *Id.* at 394. See also *Craig v. Harney*, 331 U.S. 367 (1947) where Justice Frankfurter stated, “[i]t has not been unknown that judges persist in error to avoid giving the appearance of weakness and vacillation.” *Id.* at 392.

<sup>76</sup> Admittedly a party may receive additional psychological satisfaction, beyond a victory, from a concurring Justice's assertion of a particular reading of the law or from his declared preference for an even more favorable disposition. The satisfaction does not seem comparable in magnitude to the sense of futility and the feeling of manifest injustice generated in parties who are told that the game is lost before the players take the field.



of words and ideas is detached from any manifest consequences, the author may not write with an appropriate sense of ethical weightiness. Words come easily, and tend to be less deliberated when they do not obviously and immediately effectuate significant results. Yet those words, unencumbered by the constraints of immediate impact, can, as I've submitted, ultimately play a profoundly important role in the resolution of prudential and substantive issues subsequently confronting the author-later-to-become-decision-maker.

So the fact that a declaration of law was uttered from the bench, far from sanctifying it, significantly aggravates the probability that the author of the pre-decisional opinion will have an investment in his or her public stand and increases the likelihood that the parties will perceive, usually correctly, that regarding at least one Justice, the law, (which is at its weakest strength no less than an open subject for judicial consideration, and at its core presumed to be dictated by precedent), is closed by that Justice's pre-judgment—and here a *prejudgment that controlling precedent is not to control!*

At the later "hearing" (including consideration of briefs) can we expect the pre-judging Justice to hear any sounds other than the "reverberating clang" of his own recent, public, and conclusive pronouncement?

LEARNED LAWYER: Whatever the theoretical validity of your points, which I do not concede in any event, don't you think that the Supreme Court rejected, once and for all, the notion of such an animal as "improper law-partiality" in the *Cement Institute* case? Your earlier response to my reference to that decision evaded that case's central teaching.

The Court was reviewing a circuit court opinion that had set aside an FTC cease and desist order against the Cement Institute, consisting of seventy-four corporations in the cement industry. The Institute had been charged with violating the Federal Trade Commission Act and the Clayton Act by restraining trade through the employment of a multiple basing point pricing system.<sup>77</sup> The Portland Cement industry had asked the Commission to disqualify itself because several members of the Commission had issued reports to, and testified before, congressional committees, to the effect that, in their opinion, "the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act."<sup>78</sup> The Supreme Court decided this issue "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations."<sup>79</sup>

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<sup>77</sup> 333 U.S. 683, 688-89.

<sup>78</sup> *Id.* at 700.

<sup>79</sup> *Id.*

The Court found that "this belief did not disqualify the Commission."<sup>80</sup> The fact that the Commission had first entertained such views as the result of its *ex parte* investigations did not mean, according to the Court, that when the Commission later held hearings at which the industry had a chance to present its case "the minds of [the Commission's] members were irrevocably closed on the subject of the respondents' basing point practices."<sup>81</sup>

Interestingly, the Court observed that

[i]f the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another . . . . Thus experience acquired from their work as Commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress.<sup>82</sup>

Finally, as I tried to point out earlier, the Court stated in no uncertain terms that it would not be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law.<sup>83</sup> The Court said "[i]n fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsion in this respect than a court."<sup>84</sup>

RECENT LAW GRADUATE: Admittedly, it would seem that the spirit of the case is antithetical to my questioning of an adjudicator's right to have and express opinions about the law—indeed, even about the law as applied to certain facts not yet before the tribunal.

Nonetheless, your assertion of the *Cement Institute* case essentially defeats an argument I did not advance. I speak not of "due process of law," but of a prudential admonition that a Justice promulgate and apply a "self-denying ordinance."

Examine the *Cement Institute* case more closely, if you will. It is of some significance that the Court did not overlook the fact that the Commission was "making studies and filing reports *in obedience to congressional command*."<sup>85</sup> Of more importance, the Commission was presumed to be acting as a whole. And, in forming their pre-adjudication views, they

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 701.

<sup>82</sup> *Id.* at 702 (citations omitted).

<sup>83</sup> *Id.* at 702-03.

<sup>84</sup> *Id.* at 703.

<sup>85</sup> *Id.* at 701 (emphasis added).

were fulfilling their institutional mission by acquiring the expertise Congress expects of administrative agencies.

Courts are performing *their* role when they advance the understanding or development of law as they (the majority of judges or Justices whose views dictated the outcome) explain the results they decree; that is, render an authoritative explanation of the law as it is explicated.

Justices speaking outside the majority do not advance the development of the law: their views *bind no successors to the particular seat on the bench, let alone later majorities*.

**LEARNED LAWYER:** Look. You are challenging what is part and parcel of the judicial process— i.e., the right of a judge to state his or her views, to provide an explanation for his or her vote. By the time *Leon* came before the Court three other Justices had expressed their views from the bench on the question in opinions that were not part of the “the law” in the sense that the Justices’ vote in those cases was not necessary for a majority and the Justices’ opinions proposing an exception to the exclusionary rule were not necessary to produce a holding.<sup>86</sup> This practice is common enough to cause me to hesitate to attest to your qualifications when down the road you apply for membership in the bar of the Supreme Court of the United States.

**RECENT LAW GRADUATE:** I suppose that is one way to settle an argument.<sup>87</sup> But where is it written that what would be an impropriety *off* the bench is always and necessarily justifiable when done *from* the bench? The matters of how and when a Justice exercises his or her powers in electing to write an opinion on a question should be no more immune from ethical criticism than any other judicial behavior that might unfairly harm vital interests of litigants and of the law.

**LEARNED LAWYER:** Your “unfairly” begs the question.

**RECENT LAW GRADUATE:** Criticism accepted, in part. Ultimately, one’s view of the “unfairness” of law-partiality turns on one’s concept of a court as adjudicator and one’s views on whether the propriety of a Justice’s gratuitously addressing and declaring himself or herself on any legal

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<sup>86</sup> See *Stone v. Powell*, 428 U.S. 465, 536 (1976) (White, J., dissenting); *Stone*, 428 U.S. at 501 (Burger, C.J., concurring); *States v. Peltier*, 422 U.S. 531, 542 (1975) (Rehnquist, J.); *Brown v. Illinois*, 422 U.S. 590, 611-12 (1975) (Powell, J., concurring). See also *California v. Minjares*, 443 U.S. 916 (1979) (Rehnquist, J., dissenting from denial of stay); *Schneekloth v. Bustamonte*, 412 U.S. 218, 261-71 (1983) (Powell, J., concurring).

<sup>87</sup> See J. ELY, *DEMOCRACY AND DISTRUST* 48 (1980) wherein the author, under the section entitled “Natural Law,” offers the following quotation:

“Well, what may seem like the truth to you,” said the seventeen-year old bus driver and part-time philosopher, “may not, of course, seem like the truth to the other fella, you know.”

THEN THE OTHER FELLOW IS WRONG, IDIOT!”

P. ROTH, *THE GREAT AMERICAN NOVEL* 19 (1973).

question in any manner is beyond legitimate question.

The late Professor Alexander Bickel, a towering scholar of the Court, wrote (commenting on the Warren Court) that:

[Regarding] [t]he criticism of the Court that [it] . . . is too political. . . . If it means that the Court should make no decisions that can in any sense be deemed political, but should follow some certain body of rules called Constitutional Law, the answer is that The Law as so conceived is a myth, it does not exist, and hence the Court, in order to function at all, must make law rather than simply follow it. Therefore, it must make what are bound to be, in a sense, political decisions.

But if the criticism means that the Court's occasions and modes of policymaking should be different from those of the elected organs of government, then the criticisms is well-taken. It means, then, not that this has been a political court but that it has in some instances been wrongly political, that it has been political *after the fashion* of a legislature or an executive rather than a court.<sup>88</sup>

In making oral argument in *Gideon v. Wainwright*,<sup>89</sup> attorney Abe Fortas eloquently conveyed to the Court his conception of what is minimally central to the idea of a "trial." While the essential components of Justice Fortas' idea of a *fair trial* are not directly relevant to the problem before us, his approach to the problem is compelling—*locate the deepest and most commonly held understanding of the fundamental attributes of a court functioning as court. It will guide a jurist toward the correct determination of what is minimally necessary to at least approximate justice under our adversary system.* Thus, in contending that a fair criminal trial required legal representation of the defendant, as well as the state, Mr. Fortas said to the Justices:

A criminal court is not properly constituted . . . under our adversary system of law, unless there is a judge, and unless there is a counsel for the prosecution, and unless there is a counsel for the defense. Without that, how can a civilized nation pretend that it is having a fair trial, under our adversary system, which means that counsel for the state will do his best, within the limits of fairness and honor and decency, to present the case for the state, and counsel for the defense will do his best, similarly, to present the best case possible for the defendant and from that clash there will emerge the truth.

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<sup>88</sup> Bickel, *Is the Warren Court Too "Political?"* N.Y. Times, Sept. 25, 1966 (Magazine) at 130 (emphasis added).

<sup>89</sup> 372 U.S. 335 (1963).

That is our concept. And how can we say, how can it be suggested that a court is properly constituted, that a trial is fair, unless those conditions exist?<sup>90</sup>

Is not a distinguishing mark of the *judicial* process, even of an activist judicial process, the resolution of adverse contentions regarding factual and legal issues, *such resolution being reached only after such contentions are urged upon the Court by the opposing parties or their counsel*? In other words, is not one of the minimal attributes of a court acting, in Professor Bickel's words, "after the fashion of a . . . court" the disinterested "hearing"<sup>91</sup> of arguments from the parties at risk of judgment prior to final resolution of the controversy? A court that renders a ruling resolving a real, concrete controversy between honestly contending parties, without having received proof of fact or arguments of law from the parties or their attorneys, and having the capacity and willingness to fairly "listen" to the contentions, would be blatantly treating the dispute as an occasion or opportunity to make or apply law, and the participants as incidental to the Justices' ideological or doctrinal agenda.

LEARNED LAWYER: Hold your argument right there. Since you now have made clear that your contention depends on the existence of the right to a hearing before the Supreme Court, I can see how your benighted state of confusion can be cured.

You should know, first, that no one has a right to a hearing in the United States Supreme Court: for one thing, whether or not the Court accepts a case for review (whether before it on certiorari or on appeal) is, in actuality, if not clearly in law, almost entirely a matter for its discretion.<sup>92</sup> For another, the Court not infrequently decides cases without even receiving briefs or hearing oral arguments from the parties.<sup>93</sup> And the Justices have decided quite a few cases on points of law not even raised in the arguments.<sup>94</sup>

As the same Professor Bickel you've quoted once opined, unlike

courts of general jurisdiction which sit as primary agencies for the peaceful settlement of disputes, and, in a more restricted sphere, as primary agencies for the vindication and evolution of the legal order . . . [and] must . . . resolve all controversies within their jurisdiction because the alternative is chaos, [the Supreme Court's role] *is not primarily to settle disputes between parties,*

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<sup>90</sup> 57 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 615 (P. Kurland and G. Casper 1975).

<sup>91</sup> See *infra* notes 99-101 and accompanying text.

<sup>92</sup> See *infra* note 96 and accompanying text.

<sup>93</sup> See *infra* notes 97-102 and accompanying text.

<sup>94</sup> One of the most consequential decisions was *Mapp v. Ohio*, 367 U.S. 643 (1961); see the discussion *infra* notes 103-13 and the accompanying text.

*but to render an additional, principled judgment on what has already been authoritatively ordered.* Its interventions are by hypothesis exceptional and limited, and they occur, not to forestall chaos, but to revise a pre-existing order that is otherwise viable and was itself arrived at through normal procedures. *Fixation on an individual's right to judgment by the Supreme Court is, therefore, largely question-begging.*<sup>95</sup>

RECENT LAW GRADUATE: Yes, of course I realize that no party has a right to have its case reviewed by the Supreme Court. Even when cases reach the Court through the process of "appeal"<sup>96</sup> rather than certiorari, the Court sometimes disposes summarily—i.e., without either oral argument or plenary briefing—of appeals which meet jurisdictional requirements, and also dismisses some certiorari petitions which *have* been granted. Nevertheless, where the Court *does* undertake to decide the case on the merits,<sup>97</sup> scholars<sup>98</sup> and some Justices,<sup>99</sup> have argued, persuasively, I submit, that the Court is obliged to afford a "hearing" (in the sense of receiving at least written, if not oral, arguments<sup>100</sup> on the merits of the controversy).

While my case against Justices unnecessarily rendering themselves "law-partial" regarding a major revision of legal or constitutional doctrine

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<sup>95</sup> A. BICKEL, *THE LEAST DANGEROUS BRANCH* 173 (1962) (emphasis added).

<sup>96</sup> See R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 317-27 (discussing appeals), 362-68 (discussing writs of certiorari) (5th ed. 1978).

<sup>97</sup> Summary disposition of "appeals" are "on the merits." *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). The precedential value of such summary dispositions is unusual: they bind lower courts but not the Supreme Court. See STERN & GRESSMAN, *supra* note 96, at 327-36; see, e.g., *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976). This suggests a partial recognition that a case only partially argued and only inattentively "heard" is a case not strong or credible enough to be given the full weight of a precedent that binds the Supreme Court.

What is of interest to the present thesis, however, is the *summary* nature of the decision. Oral arguments are not heard and briefing of the issues is less than plenary. While the present thesis deals with the right to law-impartial Justices regarding any aspect of adjudication, it also suggests—though the thesis is not dependent on it—that it is a matter of questionable fairness to dispose of a case without permitting the parties to present arguments.

<sup>98</sup> See *Brown, Forward: Process of Law*, 72 HARV. L. REV. 77, 82-93 (1958); see also Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279, 282-84 (1959), and compare with *The Supreme Court: 1960 Term*, 75 HARV. L. REV. 40, 92-99 (1961).

<sup>99</sup> See, *Brennan, State Court Decisions and the Supreme Court*, 31 PENN. BAR ASSN. Q. 393, 403 (1960); see also *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), where Justice Harlan commented that a reversal on a petition of certiorari "without the benefit of an opposing brief or oral argument can scarcely be regarded as a precedent of much significance." *Id.* at 379, n.8 (Harlan, J. dissenting); *Wyrick v. Fields*, 459 U.S. 42, 52 (1982) ("I cannot . . . agree that summary reversal is proper in a case that involves a significant issue not settled by our prior decisions.") (Marshall, J., dissenting); *Maggio v. Fulford*, 462 U.S. 111, 121 (1983) (Marshall, J., dissenting).

<sup>100</sup> See *Brown*, *supra* note 98, at 94.

hovering on the horizon (e.g., at issue in a pending or impending case) does not rest on the notion that there is a right to a hearing, surely there is much to be said, consistent with, and supportive of, my thesis for recognizing such a right, when a case is to be decided on the merits—that is, when parties before the Court are “at risk of judgment”:

[S]ummary reversal on certiorari papers appears in many cases to raise serious question whether there has not been decision without that hearing usually thought due from judicial tribunals. Anguished or indignant complaints to that effect in fruitless petitions for rehearing (as they are formally styled) seem not without justification.<sup>101</sup>

[I]f the Court exercises its discretionary jurisdiction to deal with issues of national significance, almost by definition those issues warrant, if they do not require, more than summary consideration. If the Court chooses to exercise a more individualized function with respect to selected cases, it is not thereby relieved of following procedures which provide both fairness to litigants and conditions conducive to informed and considered decision.<sup>102</sup>

It is, I submit, a valid, and, in the present context, ironic, criticism of *Mapp v. Ohio*,<sup>103</sup> that the decision, holding that the states were bound to apply the *Weeks* exclusionary rule,<sup>104</sup> thus overruling the then twelve year old decision in *Wolf v. Colorado*,<sup>105</sup> was rendered without benefit of

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<sup>101</sup> *Id.* at 80.

[Does not] the Court . . . pay a disproportionate price in public regard when it defeats counsel's reasonable expectation of a hearing, based upon the Court's own rules. If the Court exercises its certiorari jurisdiction to deal with problems of national legal significance, it hardly needs demonstration that such matters warrant hearing on the merits. If the Court chooses to exercise its discretionary jurisdiction to act as a Court of Selected Error, there is still the matter of a fair and adequate procedure to determine when error exists. If summary decision on the merits is warranted, the category of cases in which it is appropriate must not be much broader than those in which the decision below is “clearly erroneous.”

*Id.* at 82.

<sup>102</sup> *Id.* at 94.

<sup>103</sup> 367 U.S. 643 (1961). The story of the transformation of the *Mapp* case from a first amendment problem to the Court's profoundly new understanding of the meaning of fourth amendment rights in state courts is dramatically related in MODERN CONSTITUTIONAL LAW 118-44(R. Cortner & E. Lytle, ed. 1971).

<sup>104</sup> *Weeks v. United States*, 232 U.S. 383 (1914)(holding that evidence seized by federal law enforcement agents in violation of the fourth amendment could not be admitted into evidence in a criminal prosecution of a defendant who was victimized by the invalid search and seizure).

<sup>105</sup> 338 U.S. 25 (1949)(holding that although state law enforcement officers were bound by the behavioral restrictions of the fourth amendment, the federal Constitution did not require state courts to exclude evidence obtained by state officers in violation of the fourth amendment).

either briefs or oral arguments on the issue from the parties<sup>106</sup> (who had primarily briefed the issue of the validity of the obscenity statute under which Ms. Mapp had been convicted).<sup>107</sup>

The parties had not urged the overruling of *Wolf* or the application of the *Weeks* exclusionary rule to evidence proffered in state courts obtained by unconstitutional searches and seizures.<sup>108</sup> Indeed, during oral

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<sup>106</sup> The American Civil Liberties Union and its Ohio affiliate joined in a brief amicus curiae in the U.S. Supreme Court. The brief primarily attacked the statute under the first amendment and the right to privacy, and the statutory classifications and exemptions as violative of the equal protection clause. The applicability of the *Weeks* exclusionary rule was mentioned only in the following concluding paragraph:

This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in State criminal proceedings. We are aware of the view that this Court has taken on this issue in *Wolf v. Colorado*, 338 U.S. 25. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof not be admissible in state criminal proceedings.

Brief Amici Curiae on behalf of the American Civil Liberties Union and Ohio Civil Liberties Union at 20, *Mapp*.

The brief for the State of Ohio did mention *Wolf*, but simply by way of ruling out the relevance of defendant's assertion that a proper search warrant had not been secured. The state's brief could not conceivably be said to have adequately addressed the issue of whether *Wolf* should be reconsidered. See Brief of Appellee on the Merits at 10, *Mapp*.

An even more egregious example of the Court deciding and opining arguably in disregard of its inherent institutional obligations was *Snepp v. United States*, 444 U.S. 507 (1980). In that case, the Court rendered a 6-3 summary reversal, *sans* full briefing or oral arguments on the merits of significant issues regarding a) the rights of a former CIA employee to publish a book about intelligence operations, without complying with the terms of an employment agreement requiring submission of manuscripts for prepublication clearance by the CIA, and b) the remedies available to the Agency where an employee violates the terms of his agreement. Holding that punitive damages were an inappropriate and inadequate remedy, the Court imposed a constructive trust on Mr. Snepp's profits from his book.

The issue of remedy was raised however, only in the cross-petition by the Justice Department for certiorari, filed in order "to bring the entire case up in the event the Court granted Snepp's certiorari petition." G. GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW*, 1136-37 n.3 (3d ed. 1981).

Justice Stevens (joined in dissent by Justices Brennan and Marshall) objected to the Court's extraordinary procedure, asserting that "certiorari having been granted, the issue surely should not be resolved in the absence of full briefing and argument." 444 U.S. at 511 (1980)(emphasis added).

<sup>107</sup> The Ohio Supreme Court found the obscenity statute invalid because of its impact on freedom of speech and press. *State v. Mapp*, 170 Ohio St. 427, 432-33, 166 N.E.2d 387, 390-91 (1960). However, under the OHIO CONST. art. IV, § 2 an Ohio law cannot be found unconstitutional unless at least all but one Ohio Supreme Court Justice concur, or the Ohio Supreme Court is affirming a court of appeals. Accordingly, Ms. Mapp's conviction was affirmed, notwithstanding a 4-3 vote for invalidating the statute. *Id.* at 434, 166 N.E.2d at 391.

<sup>108</sup> Ms. Mapp's attorneys argued, aside from the constitutional invalidity of the Ohio obscenity statute, that the search and seizure was so shocking as to require exclusion of the



argument, counsel for Ms. Mapp was asked by the Court whether he sought reversal of *Wolf v. Colorado*. He disavowed any intent to seek reversal of *Wolf* and adhered to the contentions in his brief,<sup>109</sup> contentions that sought to bring the conduct of the police within the *Rochin* doctrine.<sup>110</sup>

The Attorney-General of Ohio, in his petition for rehearing, protested the unfairness of losing both the case and an issue of profound consequence to the future of state law enforcement *without having been given a meaningful opportunity to address the Court on the matter*: "The judgment imposing for the first time the *Weeks* federal exclusionary rule upon the States, is a judgment that has been rendered without affording the appellee a fair and full opportunity to be heard."<sup>111</sup>

In the *Mapp* decision itself, Justice Harlan, dissenting in an opinion joined by Justices Frankfurter and Whittaker, objected to the majority having "reached out" to overrule *Wolf*, and pointed out that the validity of the obscenity statute "was the principal issue which was decided by the Ohio Supreme Court, which was tendered by appellant's Jurisdictional Statement, and which was briefed and argued in this Court."<sup>112</sup>

In a note to Justice Clark (the author of the *Mapp* majority), Justice Stewart, who ultimately voted with the majority for reversal of the obscenity conviction, expressed "surprise" at the proposed opinion and urged that "[i]f *Wolf* is to be reconsidered, *I myself would much prefer to do so only in a case that required it, and only after argument of the case by competent counsel and a full Conference discussion*."<sup>113</sup>

Thus the historic holding that the exclusionary rule must be followed by the states was ethically flawed, whatever its doctrinal merits or demerits. And, I submit, *United States v. Leon*, the case establishing the first major departure from *Mapp*, was also tainted by a related distortion of adjudicative processes, a distortion in the form of the *Gates* concurrence.

LEARNED LAWYER: You seem to have conveniently overlooked the fact that Justice White's opinion in *Gates* was informed by adversarial

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evidence under the "shock the conscience" test employed in *Rochin v. California*, 342 U.S. 165 (1952). The Ohio Supreme Court found *Rochin* inapplicable because the evidence had not been seized "from defendant's person by the use of brutal or offensive physical force against defendant." 177 Ohio St. at 431, 166 N.E.2d at 389-90.

<sup>109</sup> 55 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1165-66 (P. Kurland and G. Casper 1975).

<sup>110</sup> See *supra* note 108.

<sup>111</sup> Petition for Rehearing of the Attorney-General of Ohio, *Mapp*, as quoted in MODERN CONSTITUTIONAL LAW, *supra* note 103, at 140.

<sup>112</sup> 367 U.S. at 673-74 (Harlan, J., dissenting).

<sup>113</sup> B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 396, n.21 (1983)(quoting from a memorandum from Potter Stewart to Tom Clark, May 1, 1961, at 811 (Tom C. Clark Papers, Tarlton Law Library, University of Texas)(emphasis added).

processes; the parties in *Gates* were ordered to, and did, present full briefing and argumentation of the issue of whether a "good-faith" exception to the exclusionary rule should be recognized by the Court.

RECENT LAW GRADUATE: Yes. Your point is not without significance. Yet it is not clear that the issue had the benefit of full (or any) conference consultation among the Justices on the merits in *Gates*; or that pertinent discernible legislative facts were unchanging; or, for that matter, that lawyers or parties should be treated as fungible—indeed, a client's choice of counsel might be influenced by the nature of the anticipated issue. Furthermore, the fact that the issues were eventually briefed and argued fully in *Gates* (at the request of the Court) both explains and supports my contention that Justice White rendered what would or could have been a full-blown decisional opinion in *Gates* had the Court not ultimately found the issue improperly before it.

All other things equal, Justice White's prior exposure to adversarial argumentation meant that he approached the *Leon* adjudication with a more informed but nevertheless (loudly) pronounced bias. Perhaps this might weigh against consideration of self-recusal in *Leon*. But my grievance is with Justice White's decision to write that gratuitous concurrence. The litigants—Mr. Leon and Mr. Sheppard—were still faced with a Justice, who, far from being neutral and detached, had, just nineteen days before voting to listen to their arguments, unequivocally committed himself not to apply controlling law to the fact situations occurring in their cases.

In any event, I'm sure you can see the difference between the fact that no one has a right to be heard and the duty of members of a judicial tribunal to be impartial where they *have* afforded the parties the right (or privilege) of a hearing and thus put them and the nation at a risk of judgment.

A final iteration of my main point: the issue in *Leon* was an issue of law. The purpose of the hearing—i.e., the briefs and the oral arguments—was to resolve the issue of law. Fundamental judicial ethics require that a judge be impartial regarding the matter at issue between the parties—the matter that he or she is being called upon to decide. A judge's mind must be open concerning any question that is open and being addressed by the parties. Or, if you find such a proposition untenable regarding matters of settled law addressed to lower court judges, it is surely realistic to expect that a Supreme Court Justice has not revealed his mind to be closed on a question of law that is pending or impending as an open question before the Court.

Perhaps these prudential precepts are not obvious, and in any event there may be, indeed there are, justified exceptions to these principles, so further elaboration is warranted.

That the principle I am asserting is applicable to law-partiality as well as to fact-partiality is implicit in 28 U.S.C. § 47:

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

Characterizing the Supreme Court's approach to this statute, a leading treatise comments that the Court "has recognized that the purpose of the statute is to make certain that the reviewing court will be constituted of judges uncommitted and uninfluenced by having expressed or formed an opinion in the lower court."<sup>114</sup>

Now, since an appeal is not a review of a factual determination, doesn't this rule reflect some concern that a judge who has declared his view of the law cannot be impartial in determining the same legal issue in a later case?<sup>115</sup> And isn't the problem aggravated when the opinion expresses a view openly contrary to the extant law?

**LEARNED LAWYER:** Are you questioning the sound arguments for distinguishing between fact-prejudice and law-prejudice advanced by such legal luminaries as Jerome Frank, Kenneth Culp Davis, and the members of the American Bar Association Committee who drafted the Code of Judicial Conduct?

**RECENT LAW GRADUATE:** Justice White's statement in *Gates* was not a mere indication of "social attitudes" or of an "attitude," a "preconception," "slant," "point of view" or "unconscious influence" (to recall Judge Frank's terms).<sup>116</sup> One can readily acknowledge, with Justice Rehnquist, that a Justice's mind is not, and should not be, a "complete tabula rasa."<sup>117</sup> Of course, Justice Rehnquist made sense in asserting that a judge is not expected to approach a case with a total absence of preconceptions on the legal issues he or she must decide. But one can and must accept all that *without endorsing the very opposite of it*.

Certainly Jerome Frank did not endorse the translation of predilections, preconceptions, or biases into law.<sup>118</sup> He did not urge judges to hasten to adopt hard preferences, let alone to announce them in advance of hearings. He spoke of judges having conscious and subconscious leanings toward certain results; trying out the relevant legal material to see if it fits. If the material did not fit his leanings, a judge who voted his pref-

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<sup>114</sup> 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3545, at 595 (2d ed. 1984)(emphasis added).

<sup>115</sup> But see *id.* at 568 ("Disqualification is not required [under the federal code] because the judge has definite views as to the law of a particular case." *Id.*). Nor is disqualification required under 28 U.S.C. § 144 when a judge has expressed certain views on the general subject before him, *Rosquist v. Soo L. Railroad*, 692 F.2d 1107 (7th Cir. 1982), or had researched the legal issue in advance and was therefore able to make an immediate ruling. *U.S. v. Crowell*, 586 F.2d 1020 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

<sup>116</sup> See *supra* note 35 and accompanying text.

<sup>117</sup> See *supra* note 47 and accompanying text.

<sup>118</sup> See J. FRANK, LAW AND THE MODERN MIND 133-34 (1935).

erence would be either crazy or bad.<sup>119</sup>

Far from being a statement of his judicial philosophy, his legal values, his predilections or his tentative, provisional notions about directions the law should take, Justice White's opinion in *Gates* regarding the good-faith exception to the exclusionary rule was unequivocal in its declaration of the existence of an exception to the exclusionary rule. It was a comprehensive, point by point elaboration of his rationale for reading a good-faith exception into the exclusionary rule in the specific situation where a magistrate issues a defective search warrant based on an erroneous finding of probable cause, but where the police are not unreasonable in believing that the search was consistent with the dictates of the fourth amendment. It included virtually all the points he was to make one year later in *Leon*—the discussion of the purposes of the exclusionary rule, the "cost-benefit analysis"<sup>120</sup> with ostensible documentation, the purported refutation of some of the claims contrary to his conclusions (indeed, the *Gates* concurrence rested on some points that were omitted from the *Leon* opinion), the imposition of the burden of persuasion on the party advocating retention of the exclusionary rule, citation to virtually all the same legal and other authorities, and explication of situations involving search warrants where the exclusionary rule should be retained.

Look again at your distinction between law and fact; it is, I admit, of some importance in some circumstances. It does not, however, free a judge to have decided before hearing arguments. Consider: A juror is said to be the final authority on the facts. The final authority. Nevertheless, jurors are not free to discuss the facts among themselves before all the evidence is in—before they have heard the full presentations of both sides. So even the supreme and final judge of the matter may not determine the matter, in our adjudicatory system, before the adjudicatory process has had a chance to fulfill its mission—to bring to the attention of the decider the material each adversary believes will persuade the decider to resolve the matter in dispute in the interests of that adversary.<sup>121</sup> The decider in our adjudicatory system is essentially both passive and neu-

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<sup>119</sup> *Id.* at 100-18.

<sup>120</sup> Indeed, this analysis was based in significant part on misleading statistics that were later clarified in the Brief for *Leon*, at a time, however, when it was too late to change Justice White's mind (the locked-in phenomenon). See *infra* notes 131-39 and accompanying text.

<sup>121</sup> See Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 494-96 (1980). The article is an incisive analysis and generally vigorous defense of the threatened values of the adversary system. Several of those virtues are equally as worthy reasons for respecting the adversarial qualities of the appellate (law-adjudication) process (e.g., it promotes "litigant and social acceptance of the decisions rendered by the courts." *Id.* at 526). See also Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L. J. 713 (1983).

tral;<sup>122</sup> both qualities imply open-mindedness and receptivity. "The adversary system utilizes a neutral decision maker who adjudicates disputes *after* they have been aired by the adversaries in a contested proceeding. This decision maker is expected to suspend judgment until the conclusion of the contest."<sup>123</sup> For the same reason that Justices rarely announce during oral arguments that they have made up their minds, they should not announce their conclusions gratuitously, especially when a case requiring resolution of the issue is on the horizon.

The argument for not questioning a judge's right to have a pre-judgment about the law is partly based on the idea that challenging pre-adjudication commitment to legal values is challenging "consistent and rational functioning by the judiciary."<sup>124</sup> Even if that objective (based essentially on the recognition that *stare decisis* itself involves reiteration and application of previous statements of law) were disserved by a rule that would demand Justice White's recusal in *Leon*, the stated objective has very little bearing on the propriety of his elaborate and gratuitous advocacy, in *Gates*, of a good-faith exception to the exclusionary rule. And I cannot emphasize enough that Justice White was, by his own admission, *not explicating extant constitutional doctrine*—the law—but *declaring allegiance to a major modification of the authoritative understanding of the operation of the exclusionary rule*.

LEARNED LAWYER: What you have been saying does indeed trouble me somewhat—that is, it seems that the received wisdom regarding "law-partiality" is inconsistent with the equally venerable precept that an adjudicator should have an open mind regarding the issue being adjudicated. Yet, if a judge were open-minded about the law, there would be no law! Judicial commitment to the law, certainly to articulated pre-existing law, is at the very heart of the common law tradition. Not only is there no such thing as judicial prejudice regarding the law: there is also no such thing as judicial prejudice regarding "legislative facts,"<sup>125</sup> for those are part of the law, and, like the law, not a matter for determination by trial. Doesn't this accepted notion demonstrate that prejudice has to do with issues to be resolved at an evidentiary hearing—a trial?

RECENT LAW GRADUATE: It seems to me as though you've asserted a point, not demonstrated it.

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<sup>122</sup> Landsman, *supra* note 121, 29 BUFFALO L. REV. at 499-500.

<sup>123</sup> *Id.* at 490-91.

<sup>124</sup> Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 757 (1973).

<sup>125</sup> The term is used to mean facts not to be resolved by a jury in determining what transpired between the parties and what relevant mental states the participants possessed, but rather facts to be utilized by a court in the interpretation and formulation of legal, statutory or constitutional doctrine. They are facts of the sort presented in a "Brandeis Brief." See *Finer, Psychedelics and Religious Freedom*, 19 HASTINGS L.J. 667 (1967).

Notwithstanding the notion that legislative facts do not concern the parties<sup>126</sup> and "authoritative assertions"<sup>127</sup> that the process of finding legislative facts is integral to the judicial law-interpretation function, I see determination of legislative facts as a process more alien to courts than the process of interpreting the law as such. The Court sometimes needs the assistance of contending parties *re* legislative facts as much as a factfinder needs adversarial presentations at trial. The Court is notoriously inept when it comes to the facts "out there." Thus the high repute of the Brandeis Brief. Indeed, even a Brandeis Brief may be inadequate to fairly determine legislative facts. An opportunity to at least "impeach, by cross-examination or otherwise," the evidence presented in the brief may better elicit an accurate picture, or so Professor Freund suggested in a classic work.<sup>128</sup> In any event, whether legislative facts are appropriate to an evidentiary hearing or to a Brandeis Brief, they are distinguishable from the "pure law" and thus your reference to them fails to strengthen your critique of my views. Consider: sworn testimony about the meaning of the law is rarely admissible in evidence;<sup>129</sup> on the other hand, testimony bearing on legislative facts may be admitted at trial.

Indeed, your reference to legislative facts calls to mind how a particular type of prejudice from premature announcement of commitment to a change in legal doctrine may harm not only the future litigant before the Court on that issue, but the sound development of the law as well. In some areas "legislative facts" are in a state of flux regarding the facts themselves (e.g. the age a fetus becomes viable) and/or knowledge of the facts (e.g. the harmfulness of marijuana).<sup>130</sup> To rely on the existing state of such "legislative facts" before compelled by the necessity of judgment is to risk commitment to indefensible, because obsolete, doctrine.

Pre-commitment, on the bench, to a particular version of significant legislative facts is particularly undesirable when the empirical evidence is unclear or inconclusive, has only been recently subjected to a wide range of scholarly investigation and it is continually being "updated" by researchers.<sup>131</sup>

Given Justice White's acknowledgement (albeit in *Leon*)<sup>132</sup> of the evolving and early stages of present research into the efficacy of the ex-

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<sup>126</sup> See K. DAVIS, ADMINISTRATIVE LAW TREATISE 146-47 (1980) (where the author draws the distinction between adjudicative facts, i.e., facts concerning immediate parties, and legislative facts, i.e., those facts which are not about a particular party).

<sup>127</sup> P. FREUND, ON UNDERSTANDING THE SUPREME COURT 87-89 (1949).

<sup>128</sup> *Id.* at 89.

<sup>129</sup> MCCORMICK ON EVIDENCE § 12, at 31 (E. Cleary 3d ed. 1984).

<sup>130</sup> See generally *Finer*, *supra* note 125.

<sup>131</sup> At least one relevant and important study on the "costs" of the exclusionary rule was unavailable at the time of the *Gates* concurrence but available to Justice White prior to the *Leon* decision. See *infra* note 138; R. VAN DUIZAND, L. SUTTON & C. CARTER: THE SEARCH WARRANT PROCESS (1983).

<sup>132</sup> See *infra* note 138.

clusionary rule, did he not owe a duty to the eventual litigants to withhold gratuitous personal judgment and wait until their counsel could address matters as significant as the "legislative facts"<sup>133</sup> considered, if not relied on, in *Gates* and *Leon*?

Given the rationale and analytical methodology of Justice White's concurrence in *Gates* and majority opinion in *Leon*, the impropriety of "finding" and giving weight to "legislative facts" before it became necessary to do so was apparent. Justice White, in both opinions, expressed the belief that empirical evidence of the "cost" of the exclusionary rule in terms of "lost convictions" was of some relevance to determining whether the exclusionary rule should be retained where police rely in good faith on a search warrant.<sup>134</sup>

There is evidence that Justice White was misled in *Gates* regarding seemingly high "costs" of the exclusionary rule (regarding "lost" felony convictions in general, but particularly with regard to "lost" convictions for felonies involving drugs.)<sup>135</sup> When the misleading and useless nature of the statistics cited in the *Gates* concurrence (and cited in the Solicitor-General's briefs in both cases)<sup>136</sup> was demonstrated in the brief on behalf of Mr. Leon,<sup>137</sup> Justice White simply shifted ground in *Leon*<sup>138</sup> (without

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<sup>133</sup> See *supra* note 125.

<sup>134</sup> Compare *Gates*, 462 U.S. at 257-58 with *Leon*, 104 S.Ct. at 3142-43.

<sup>135</sup> "The primary cost, of course, is that the exclusionary rule interferes with the truth-seeking function of a criminal trial by barring relevant and trustworthy evidence." *Gates*, 462 U.S. at 257. The foregoing was accompanied by the following footnote:

The effects of the exclusionary rule are often felt before a case reaches trial. A recent study of the National Institute of Justice of felony arrests in California during the years 1976-1979 "found a major impact of the exclusionary rule on state prosecutors" . . . . The study found that 4.8% of the more than 4000 felony cases declined for prosecution were rejected because of search and seizure problems. *The exclusionary rule was found to have a particularly pronounced effect in drug cases; prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems.*

*Id.* at n.13 (citations omitted)(emphasis added).

<sup>136</sup> See Supplemental Brief for the United States as Amicus Curiae at 48-49, *Gates*; Brief for Petitioner at 70, *Leon*; See also Brief for the United States at 69-70, *Massachusetts v. Sheppard*, 104 S.Ct. 3424 (1984).

<sup>137</sup> Petitioner claims that California prosecutors rejected 30% of all felony drug arrests because of search and seizure problems . . . . This was based on samples of only a few hundred cases from two of 21 Los Angeles County Prosecutor's Offices with atypically high search-rejection rates and is totally unrepresentative of the state as a whole . . . . The statewide figure, according to the statewide data source used by NIJ, is less than three percent.

Brief for Respondent at 48, *Leon* (citations omitted). Counsel for Mr. Leon also called the Court's attention to Justice White's misleading reference in *Gates* to the 4.8% figure: "The 4.8% figure is a percentage of *declined* arrests only and is not a useful figure." *Id.* at 47. Finally, even were these figures not otherwise misleading, they did not reveal the influence of California search and seizure law, they were not about or limited to searches with questionable search warrants, and they were otherwise flawed support for Justice White's conclusions in *Gates*.

acknowledgement that he was doing so), evidently finding a quite insignificant, but more accurate, set of certain California data to be just as compelling.<sup>139</sup> Justice White's *Leon* opinion, notwithstanding, his (unacknowledged) correction (by omission) of these particular misuses of statistics, may not say as much about the corrective influence of Leon's arguments, as it does about the uncorrectable impact on Justice White of the *Gates* opinion itself.

The influence of Justice White's pre-judgment/prejudicial concurrence was manifest in his *Leon* opinion, which cited his *Gates* opinion eight times. Indeed, the Solicitor-General appealed to Justice White's gratuitous pre-judgment/prejudicial *Gates* opinion four times in the government's brief in *Leon* and sixteen times in the Justice Department's amicus brief in *Sheppard*!

**LEARNED LAWYER:** It doesn't facilitate rational and cool discussion to repeatedly label Justice White's *Gates* concurrence as "gratuitous." Surely you must know by now that the standards of good legal argument require definition of such a questionable, yet evidently, crucial term.

**RECENT LAW GRADUATE:** By "gratuitous" I mean generally that in the context it was neither justified nor excused. It was unnecessary to any legitimate function of a separate opinion in that situation. Obviously, Justice White was not urging that the majority in *Gates* was in error with regard to the question whether there is an exception to the exclusionary rule. There was no fundamental disagreement regarding an exception to the exclusionary rule between Justice White and the opinion expressed by the majority; the majority decided not to decide that question and no dissent raised it either. Where there is disagreement, there is abundant justification for speaking out.

**LEARNED LAWYER:** You mean you'd muzzle Justices who didn't write or join in a single opinion of the Court?

**RECENT LAW GRADUATE:** I didn't say that. But Justice White's opinion in *Gates*, declaring in great detail his views on the good-faith, reasonable-

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<sup>138</sup> Researchers have only recently begun to study extensively the effects of the exclusionary rule on the disposition of felony arrests. One study suggests that the rule results in the nonprosecution or nonconviction of between 0.6% and 2.35% of individuals arrested for felonies. 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 AM. B. FOUND. RESEARCH J. 611, 621. The estimates are higher for particular crimes the prosecution of which depends heavily on physical evidence. *Thus the cumulative loss due to nonprosecution or nonconviction of individuals arrested on felony drug charges is probably in the range of 2.8% to 7.1%. Id.*

*Leon*, 104 S.Ct. at 3413, n.6 (emphasis added). The figures in the Davies study were a correction of the misleading conclusions by the National Institute of Justice from its California study, cited in Justice White's *Gates* concurrence.

<sup>139</sup> See *supra* notes 132-35 and accompanying text.



ness exception to the exclusionary rule, was arguably gratuitous in several significant respects.

Justice White's elaborate analysis and firmly asserted convictions regarding the propriety or necessity of a good-faith, police-reasonableness exception to the exclusionary rule in search warrant situations, was gratuitous in that *they were not even necessary to explain his own vote in Gates* (a matter, which, ordinarily, of course, the judge alone could determine). In his *Gates* concurrence, Justice White did embrace an alternative ground for voting with the majority. That alternative ground to both the holding and Justice White's advocacy of a good faith exception to the exclusionary rule was that the *Aguilar-Spinelli* requirements were satisfied by the Illinois prosecution in its warrant application.<sup>140</sup> He also concluded that these requirements were constitutionally appropriate, thus disagreeing with the majority's overruling of them. While the discussion of the meaning and application of the *Aguilar-Spinelli* requirements were arguably "gratuitous" in the sense that it was not *strictly necessary* to explain his vote (being an alternative to his declaration of a good-faith exception to the exclusionary rule in warrant situations), it was 1) partially explanatory of Justice White's vote,<sup>141</sup> 2) within the scope of the arguments the majority held were properly before the Court, 3) a relatively narrow interpretation of existing law as it applied to a particular set of facts, 4) more or less oriented to a few cases like the one before him (rather than reflecting a generalized, frequently occurring fact situation), 5) not addressed to a major issue of considerable consequence to our legal system, and 6) not concerned with a question obviously on the Court's immediate horizon.

LEARNED LAWYER: I don't see of what relevance it is to your point that another case was or was not "on the horizon." For one thing, exclusionary rule cases are before the Court every single term, so the issue was as much "on the horizon" when Justice White and others wrote separate opinions in earlier cases as it was in *Gates*; for another, an opinion either

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<sup>140</sup> The *Gates* majority opinion overruled the prior decisions of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). These prior decisions required that when an informant's tip is relied on in a warrant application certain showings must be made (e.g., the informant's reliability, the source of his information, and the strength of independent corroboration). The *Aguilar-Spinelli* test was replaced in *Gates* with a totality-of-the-circumstances approach. It was over the continued validity of *Aguilar* and *Spinelli* that Justice White's *Gates* concurrence disagreed with the majority. *Gates*, 462 U.S. at 267-74.

<sup>141</sup> It has been observed that it is important that a judge explain his vote so that the parties can know that justice has been done. This point rings true when the judge's vote contributed to the outcome. Dissenting opinions have a special role and significance. See *infra* notes 149-54 and accompanying text. Where, however, a judge can explain this view without publicly pre-judging issues of great moment, or where the judge's vote does not contribute to the outcome and the judge is not a protesting dissenter, the importance of the concurrence to the development of the law is tenuous.

is or is not improper, regardless of what and when a question may later come before the Court.

**RECENT LAW GRADUATE:** I consider the fact that the question was on the Court's immediate horizon to be of special significance in weighing the harm apparently done by the *Gates* concurrence, since, for one thing, the prejudicial impact of the statement has less chance to be offset by other teachings of time and experience; and for another, the appearance of pre-judgment would be very strong when the Justice's words are still ringing in the high chamber of the palace of marble.

Here we do not have to speculate that the issue was on the horizon. There was little question that at least five other Justices were eager to take up the issue of the good-faith exception to the exclusionary rule. The Court ordered the parties in *Gates* to brief the issue even though it was not urged or argued below or in the original certiorari petition.<sup>142</sup> Not only did the Court thus go on record as determined to decide the issue, when it found it imprudent to reach the issue in *Gates*, it made it even more clear that it firmly intended to take it up at the first legitimate opportunity, by "apolog[izing] to all" in *Gates*<sup>143</sup> for not addressing the issue. Certiorari was granted in *Leon*<sup>144</sup> just nineteen days after the announcement of decision in *Gates*.

**LEARNED LAWYER:** Your "rules for permissible concurrences" are still quite fuzzy. Suppose Justice White's vote was necessary to constitute a majority in *Gates*. Would his (concurring) opinion regarding an exception to the exclusionary rule be less objectionable? Or would your "ethics of law-impartiality" mandate a concurrence without opinion on the subject?<sup>145</sup> Suppose he had concluded, as he did, that *Aguilar* and *Spinelli*

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<sup>142</sup> The issue of good-faith exception to the exclusionary rule was first raised in a Motion by the State of Illinois for Leave to Amend or Enlarge Question Presented for Review, *Gates* (filed on Feb. 8, 1982). The Court unanimously denied that motion. *Gates*, 455 U.S. 986 (1982).

On October 13, 1982, the parties presented oral argument, which, respecting the Court's ruling, did not address the question of whether an exception for good faith police behavior should be read into the exclusionary rule.

On November 29, 1982, the Court, over the dissent of Justice Stevens (Justices Brennan and Marshall joining), restored the case to calendar for reargument and ordered the parties to address the following question:

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, [citing *Mapp* and *Weeks*], should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

*Gates*, 459 U.S. 1028 (1982).

<sup>143</sup> *Gates*, 462 U.S. at 217.

<sup>144</sup> *Gates* was decided on June 8, 1983. 462 U.S. 213. Certiorari was granted in *Leon* on June 27, 1983. 103 S.Ct. 3535.

<sup>145</sup> Since he would be giving, as he did, an alternative reason for upholding the decision.

should not be overruled, but believed (contrary to his actual views) that the state had not met the preconditions of those cases for demonstrating probable cause: Would his concurrence, declaring his opinion regarding a good-faith exception to the exclusionary rule have then been acceptable, even desirable, or would your ethics of law impartiality limit him to notation of his vote? Should the answer depend on whether his vote was necessary to constitute a majority<sup>146</sup> (on the ground that the parties and the public are entitled to know the principles and rationale supporting the Court's disposition of a case)?<sup>147</sup> How does the notion of impartiality regarding legal doctrine affect the propriety of dicta in opinions of the Court?<sup>148</sup>

Moreover, you speak as if Justice White was thoughtless about the significance of his speaking out in *Gates*. But he explained why there was a need to speak out. He stated that:

The Court's straining not to come to grips with the exclusionary rule issue today may be hard for the country to understand—particularly given earlier statements by some Members of the Court . . . . The issue is central to the enforcement of law and to the administration of justice throughout the Nation. The Court of Appeals for the second largest federal circuit has already adopted such an exception and the new Eleventh Circuit is presumably bound by its decision. Several members of this Court have for some time expressed the need to consider modifying the exclusionary rule . . . and Congress as well has been active in exploring the question . . . . At least one state has already enacted a good faith exception . . . . I see it as our responsibility to end the uncertainty and decide whether the rule will be modified.<sup>149</sup>

You've gone on at some length about non-majority or non-decisional opinions. But what about Holmes and Brandeis, Black and Douglas?

RECENT LAW GRADUATE: They were "Great Dissenters." Did you ever hear the expression "Great Concurrer"?

LEARNED LAWYER: Don't your "prudential" criticisms of non-deci-

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<sup>146</sup> There is also the somewhat meaningless or at least unanswerable question of whose vote is necessary to constitute the majority (e.g., where those favoring a particular disposition are split 3-3 in their rationale.)

<sup>147</sup> It is equally arguable that even when five justices agree on both disposition and rationale, the concurring and/or dissenting views of the other Justices are important to the public's and the parties' understanding of *what the whole Court did and why*.

<sup>148</sup> Cf. Fiss & Krauthammer, *The Rehnquist Court*, New Republic, March 10, 1982, at 14. In referring to Justice Rehnquist's opinions for the majority, the authors state that "he places apparently inconsequential statements unobtrusively in one opinion, only to use them several opinions later—when he makes them seem of central importance to the earlier case and decisive to the case at hand." *Id.* at 16.

<sup>149</sup> 462 U.S. at 253-54 (citations omitted).

sional opinions apply equally to dissents?

**RECENT LAW GRADUATE:** Dissenting opinions play a unique role in our constitutional jurisprudence. They are the voices protesting the outcome or the injustice to the losing party. That is why dissents are so important.

While some have suggested that withholding dissents is itself a special virtue,<sup>150</sup> as Chief Justice Hughes wrote: "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision *may possibly correct the error into which the dissenting judge believes the court to have been betrayed.*"<sup>151</sup>

**LEARNED LAWYER:** You've made a point for me. Isn't it obvious that the quoted words reveal that the Chief Justice had in mind *published opinions which help shape the law of the future, a concept which would encompass concurrences?*

Moreover, you took that old chestnut of a quote out of context. In context, what Chief Justice Hughes said could well be applied to concurrences, particularly to Justice White's opinion. Chief Justice Hughes said—just before the words you've quoted:

[Justices] are not there merely to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence be maintained and recognized than that unanimity should be secured through its sacrifice.

This does not mean that a judge should be swift to dissent, or that he should dissent for the sake of self-exploitation or because of a lack of that capacity for cooperation which is of the essence of any group action . . . . Dissenting opinions enable a judge to express his individuality. He is not under the compulsion of speaking for and thus of securing the concurrence of a majority. In dissent, he is a free lance.<sup>152</sup>

Aren't these points<sup>153</sup> also applicable to concurring opinions?

**RECENT LAW GRADUATE:** Not really. Dissents have the special significance of letting it be known that at least one Justice believes an injustice was done to the losing party. It is important that in *Gates* Justice White was not expressing any feeling that the majority had done an injustice to the losing party or had "betrayed" the true law regarding the exclusion-

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<sup>150</sup> See, e.g., L. HAND, *THE BILL OF RIGHTS* 72-73 (1958); C. AUERBACH, L. GARRISON, C. HURST & S. MERMIN, *THE LEGAL PROCESS* 357-60 (1961); B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* 88 (1983).

<sup>151</sup> C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928)(emphasis added).

<sup>152</sup> *Id.* at 67-68.

<sup>153</sup> See also Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. AM. JUDICATURE Soc'y 104 (1948).

ary rule. The subject of the merits of Justice White's views was simply not addressed by the majority or any other Justice in *Gates*.

LEARNED LAWYER: A concurrence can protest the "injustice" of a majority doctrine to the national legal system. You seem almost sentimentally attached to the "rights" of the parties fortuitously before the Court, a Court which must interpret the Constitution and laws which govern a nation. If, as you concede, there are no prudential limits on dissenting opinions, you can justify such limits on concurring opinions only by focussing on the concerns of parties before the Court; and that might well be at the expense of the interests of sound development of our laws.

More problematic still is your apparent suggestion that Justice White could say the same thing in dissent without warranting your "prudential" criticism. Indeed, he did previously express his reading of a good-faith exception to the exclusionary rule in a dissent in *Stone v. Powell*.<sup>154</sup>

Moreover, wouldn't your argument necessarily label "imprudent" a (hypothetical) pre-*Furman* concurrence, by, for example, Justices Brennan and Marshall, on eighth amendment cruel and unusual punishment grounds, in a capital case that happened to reverse a death sentence on a narrower ground?

RECENT LAW GRADUATE: On matters of prudence, each Justice must weigh prudential considerations against the felt urgency of speaking out.

LEARNED LAWYER: Wasn't Justice White doing just that in *Gates*?

RECENT LAW GRADUATE: With *Leon* on the docket? And *Sheppard*? And numerous other fourth amendment cases inevitably coming up to the Court?

LEARNED LAWYER: There were a lot of death cases coming up to the Court too. Would Brennan and Marshall be required to wait until they were in dissent or until the eighth amendment point was raised?

RECENT LAW GRADUATE: But really, the exclusionary rule is one thing, the death penalty is another. Had Justices Brennan and Marshall voted that way it would have been because they felt the death penalty was unconscionable—an *extreme sanction*.

LEARNED LAWYER: "*Extreme sanction*"? Justice White's very words (twice stated in *Leon*)<sup>155</sup> to describe the exclusionary rule. A Justice who feels so strongly about a matter must be allowed to speak out.

RECENT LAW GRADUATE: Of course a Justice must be "free to speak [his mind]." <sup>156</sup> What I am suggesting are self-adopted prudential con-

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<sup>154</sup> 428 U.S. 465, 536 (1976) (White, J., dissenting).

<sup>155</sup> *Leon*, 104 S.Ct. at 3418, 3423.

<sup>156</sup> Douglas, *supra* note 153, at 107.

straints of time, place and manner—a notion that might resonate with other concepts in the minds of persons “truly learned in the law.”

LEARNED LAWYER: May I say just one thing?

RECENT LAW GRADUATE: By all means.

LEARNED LAWYER: That law school you just attended. Did they teach you Justice Holmes' definition of the law?

RECENT LAW GRADUATE: Uh, oh.

LEARNED LAWYER: The law, Holmes said, is nothing more or less than a prediction of what judges will in fact do.<sup>157</sup> In view of that, how can it be denied that Justice White's concurrence in *Gates* was valuable? A contribution to the growth and understanding of the law? Did it not make it easier for the profession and the public to predict how Justice White at least would cast his vote on the issue when it came before him? Justice White's statement of his views contributed to the development of the law in the sense that Holmes defined the law. It is a service to the law to declare what direction your understanding of the law is taking.

RECENT LAW GRADUATE: I know all that. But for one thing, a definition is not an admonition to anyone to do anything, except that I'll grant that Holmes' definition alerts attorneys to the important basis of sound legal advice to a client.

In the second place, the definition used as justification would license Justices in saying any damn thing they pleased, on the theory that since the law is how they are going to vote they might as well let everyone know at the first opportunity: *sans* briefs, *sans* oral arguments, *sans* strong differences with the rest of the Court, and notwithstanding real, identifiable litigants of the issue waiting in the wings. Holmes' statement, not being normative, was not inconsistent with the later thoughts expressed by Professors Bickel and Freund. As Alexander Bickel taught us: “the Court does not sit to make precatory pronouncements. It is not a synod of bishops, nor a collective poet laureate. It does not sit, Mr. Freund has remarked, ‘to compose for the anthologies.’”<sup>158</sup>

LEARNED LAWYER: I doubt that Professor Bickel would agree with you. Indeed, I think your quote backfires. Professor Bickel was referring to a decision of the Supreme Court (and the Court, mind you, not an opinion of a single Justice) holding impermissible separate schools for black and white students, respectively, an opinion which announced a principle but

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<sup>157</sup> O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 173 (1921). See also Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 863 (1951).

<sup>158</sup> A. BICKEL, *THE LEAST DANGEROUS BRANCH* 246 (1962).

postponed its effectuation.<sup>159</sup> The fact that the Court followed it up with a remedial decision legitimized the first decision, as I read the late Yale Professor.<sup>160</sup>

**RECENT LAW GRADUATE:** Again we disagree. I read it as critical of judicial pronouncements that have extra-legal consequences without the force of law behind them.

Moreover, one of the vital processes of adjudication is collegial exchange of views. It is not clear that Justice White had the benefit of that, since his colleagues did not address themselves to the issue until the following year. And, as I've noted, in writing as comprehensive an opinion in *Gates* as he would later write in *Leon*, he took a position without responsibility for it, without having to bear the consequences of judgment. Perhaps that is one of the reasons he was so careless about the statistics he chose to employ.

**LEARNED LAWYER:** You've still not answered my previous question: *Stone v. Powell*<sup>161</sup> seems to put a part of your thesis to the test. In an opinion by Justice Powell, joined by Justices Stewart, Blackmun, Rehnquist, Stevens and Chief Justice Burger, the Court held that federal habeas corpus relief would not be granted to state prisoners who had unsuccessfully sought, in the state system, application of the exclusionary rule to evidence seized and used against them.<sup>162</sup> The rationale of *Stone* was that federal habeas corpus would contribute little, if anything, to the deterrent efficacy of the exclusionary rule.

Justice White felt, in dissenting, "constrained to say that . . . [he] would join four or more other Justices in substantially limiting the reach of the exclusionary rule . . . ."<sup>163</sup> He declared that he was

of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief.<sup>164</sup>

Justice White then advanced reasons for his proposed limitation on the exclusionary rule.<sup>165</sup>

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<sup>159</sup> *Brown v. Bd. of Educ.*, 345 U.S. 972 (1953).

<sup>160</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also BICKEL, *supra* note 158, at 244-47.

<sup>161</sup> 428 U.S. 465 (1976).

<sup>162</sup> This is true at least where the state prisoner had been given an opportunity for full and fair litigation of their claims by the state system. *Id.* at 494.

<sup>163</sup> *Id.* at 537.

<sup>164</sup> *Id.* at 538.

<sup>165</sup> Among the asserted reasons were that excluding evidence obtained by reasonable police action: a) can have no deterrent effect; b) fails to cure the invasion of the defendant's rights; c) distorts the fact-finding function of trials; and d) "seriously shortchanges the pub-

RECENT LAW GRADUATE: So why have you cited it?

LEARNED LAWYER: To persuade you of the unsoundness of what I take to be your thesis. If *Leon* had followed *Stone* by thirteen months, you would be hard pressed to justify treating *Stone* as non-prejudicial, while treating *Gates* as prejudicial, merely because the former took the form of a dissent and the latter of a concurrence.

Moreover, Chief Justice Burger, while concurring in the majority in *Stone*, wrote a separate concurrence urging restrictions on the exclusionary rule.<sup>166</sup> How do those two opinions compare on your scale of prudence and circumspection? Would you condemn the concurrence but not the dissent?

RECENT LAW GRADUATE: I could easily criticize Justice White's opinion in *Stone* without contradicting what you take to be my thesis regarding distinctions between concurrences and dissents. Justice White's exclusionary rule discussion in *Stone* was not a dissent.

LEARNED LAWYER: Excuse me?

RECENT LAW GRADUATE: It just *looked* like a dissent because it was part of what followed the words "Mr. Justice White, dissenting." Justice White actually voted to uphold the claims of the state prisoners, while the majority rejected them. All the discussion about the exclusionary rule was truly gratuitous in *Stone*. Nothing turned on it; Justice White was not protesting an erroneous outcome. He dissented because he did not accept the majority's conclusion that the substantive constitutional rights reviewable by federal habeas courts regarding *state* prisoner's collateral appeals are less encompassing than the rights reviewable where collateral claims are made by federal prisoners. Your classic dissenting opinions are dissents that assert views opposed to those that moved the majority and disagree with the holding of the case itself. So, paradoxically, were Justice White truly dissenting in the classic sense in *Stone*, *on the matter of a good-faith exception to the exclusionary rule*, he might well have concurred or at least examined the record of the cases for evidence bearing on good faith, or perhaps even remanded the cases for hearings on the presence or absence of good faith on the part of the police.

LEARNED LAWYER: Then why not come right out and say the discussion of the good-faith exception to the exclusionary rule in *Stone* was imprudent of Justice White?

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lic interest." *Id.* at 540-42. The admission of such evidence, Justice White continued, did not inculpate judges in "the mistaken but unintentional and faultless" fourth amendment violations. *Id.* at 540.

<sup>166</sup> The Chief Justice stated that the exclusionary rule should apply only when there has been "egregious, bad-faith conduct." *Id.* at 501.



RECENT LAW GRADUATE: Because there is a sense in which Justice White was acting more prudently by dissenting than he would have been had he concurred and advanced his exclusionary rule position as the sole basis of his concurrence.

LEARNED LAWYER: I take it that you mean that the question of a good-faith exception to the exclusionary rule was not before the Court in *Stone*?

RECENT LAW GRADUATE: That certainly is a factor.

LEARNED LAWYER: A factor? What else do you have in mind?

RECENT LAW GRADUATE: Our discussion has facilitated my realization that *the law sometimes moves and grows by "urgings."* Dicta give us something to think about; they focus our attention on what one or more Justices see as a flaw or possible flaw in our legal or constitutional doctrines. Maybe the urging of a new interpretation is *more* prudent when that urging is *not* backed up by a vote.

LEARNED LAWYER: What about the lack of "responsibility" you spoke of earlier?

RECENT LAW GRADUATE: It is still something to worry about.

LEARNED LAWYER: And how can you justify condemning Chief Justice Burger's *Stone* concurrence or Justice White's *Gates* concurrence?

RECENT LAW GRADUATE: The Chief Justice's separate concurrence was also gratuitous in the sense that it was not necessary for his vote and would not have been a proper basis for his vote, since the issue was not raised.

And Justice White's *Gates* concurrence, although dealing with a point that had been briefed and argued, was announcing a "result" in a pending or impending case, and, like the Chief Justice's *Stone* concurrence, went far beyond the urging of reconsideration of existing doctrine or consideration of new doctrine. Urgings are one thing; declarations of commitment to modifications, particularly major modifications, or reversals, of existing law are another.

I am not concerned with concurrences that offer a different reason for the same disposition as the majority, where the issue is raised and the opinion is necessary to explain the Justice's vote in a way less pre-judgmental than an alternative explanation for that vote. Some concurrences say the plurality or majority rationale is wrong and are the only way the Justice can explain his or her *vote for the same disposition*; some concurrences are protesting nothing in the majority or plurality opinion. Either category can accompany either a vote necessary or unnecessary to produce a majority for a disposition; and where the vote is unnecessary to produce a majority for a particular disposition of a case, the Justice's rationale may or may not be superfluous, i.e., there may or may not be a

majority of other Justices agreeing on another rationale.

**LEARNED LAWYER:** Doesn't the meaning of your ambivalence toward Justice White's *Stone* dissent necessarily embrace concurrences that are not backed by the weight of an operational vote? Aren't such concurrences more justifiable than concurrences that are necessary to produce a majority decision, since, in the latter case, the law of the case includes the iconoclastic Justice's rationale?

**RECENT LAW GRADUATE:** If the rationale is necessary to explain the Justice's vote, then it is not pre-judicial or pre-judgmental or gratuitous. Depending on the case, the opinion may or may not be subject to the criticism that it pronounced upon an issue that was not raised and/or not argued by the parties. Justice White's concurrence in *Gates* would have been more justifiable had he not alternatively asserted a narrower basis for concurring, and subject to little, if any, criticism along the lines I've suggested, were his views on the good-faith exception to the exclusionary rule the *only* basis of his concurrence and there were not at least five other Justices who desired an alternative and narrower rationale.

*Enter: Professor of Law.*

**PROFESSOR OF LAW:** Excuse me, but I could not help overhearing much of this conversation, I've been in the next booth having some coffee and trying to read through these latest advance sheets. Instead, I've found myself meditating upon your thesis, young man.

**RECENT LAW GRADUATE:** What do you think Professor? Am I getting close to the wisest criteria?

**PROFESSOR OF LAW:** Frankly, until your recent exegesis on the typology of separate opinions, justified and unjustified, in concurrence and in dissent, you had me interested. Now you are sounding as one trying to formulate the hair-splitting principles of common law pleadings and apply them to the least legalistic judges in the civilized world—on a matter that lends itself to such divergent sensibilities and subjective judgments, too. Your concerns of law-partiality, or the appearance of law-partiality, are only part of the gestalt of considerations that should inform the intelligence and feelings of a Justice contemplating a separate opinion. On matters as delicate as this, rules or guidelines, even if "logically" capable of formulation, would spoil your contribution. If somehow your ideas found their way into the hallowed chambers and raised the judicial consciousness, *that* would be an accomplishment.

One point. While I understand your reluctance to rest your case on the right to a hearing, I would generally push the case for the right of a party at risk of judgment to a hearing. Argumentation is a significant aspect of responsive and thus, more responsible government. One of the ideas of an open society is an addressable government, addressable regarding matters

of personal justice; addressable regarding formulation of national legal policy. For if the Court is to make national legal policy, a function which we come to accept, then someone with the perspective of an outsider to the judicial bureaucracy, and with a stake in the Supreme Court's decision, must be able to *have a word with it*.

If I may continue my critique. There was an arguably important reason, a reason you failed to address, regarding the dubiety of applying your ideal of appearance of law-impartiality to Justice White's role in *Gates* and *Leon*. While Mr. Leon had juridical standing to urge application of the exclusionary rule, he was hardly deserving of equitable considerations. Reasons analogous to those that led the Court in *Stone v. Powell* to deny federal habeas relief or review to state prisoners asserting state court violations of the *Mapp* exclusionary rule weaken your argument that the law-partiality of Justice White, among other detrimental effects, denied a fair hearing to Mr. Leon. Leon was in no danger of being unfairly convicted—of being found guilty although innocent—by virtue of the Court's recognition of a new exception to the exclusionary rule. The extant conception of the rationale of the exclusionary rule denies the existence of any personal right on the part of the accused. The accused is at best a means to an end beyond determination of his guilt or innocence, that end being the deterrence of official wrongdoing. Other than whether Leon should be the incidental beneficiary of a judicial policy designed to inhibit violations of the fourth amendment, there was no question of Leon facing an unfair trial.

RECENT LAW GRADUATE: But my learned and seasoned adversary never made such an argument.

PROFESSOR OF LAW: Not to call to mind and confront points that might reasonably be thought to call your thesis into question is to practice the worst kind of Unilateral Adversarialism. Even if your opponent should never raise the point, the Court well might, and there's no guaranteeing that you won't first learn of it when reading the opinion rather than during questioning at oral argument. Moreover, you'll find it well worthwhile to ponder your ethical obligations in this area—to the Court and to your adversary—regarding an argument, a case or line of cases, or a statute that your adversary seems to have overlooked.

RECENT LAW GRADUATE: Professor, your points about good lawyering may be well taken, but I question your substantive reservations. They prove too much.

The ideal of fairness to litigants before the Court, one of the bases for my criticism of prejudicial concurrences, rests on their status of being at risk of judgment by the Court. Were the probable guilt of the defendant to determine what is just or fair in securing a conviction in violation of the existing exclusionary rule, or in reviewing such a conviction, *the Court would have long since abolished the harmless error test and re-*

*quired convicted defendants to establish on appeal probable trial prejudice from violations of the exclusionary rule.*

Justice White's declaration of law was, all things considered, an extravagance. It was imprudent. It probably closed his mind to the arguments of Leon, whose presence before the Court, through his attorney, fulfilled a vital function in our judicial system—for himself, for the development of the law of exclusion, and for all litigants whose more appealing claims to individualized justice would be jeopardized by such immediately prior and gratuitous concurrences.

I now realize, however, that were any specific criteria to be offered for the exercise of judgment whether or not to write a particular opinion, they would be entirely self enforcing, as much of the rules and canons of judicial ethics are now anyway. More important, and the reason why I will not offer a formula, is that this is a matter best governed by each Justice's sense of what is appropriate.<sup>167</sup> Perhaps some thoughts offered herein would commend themselves to individual judges and Justices; perhaps many of these ideas would not. Perhaps this discussion would at least "raise the consciousness" of some judges or Justices so as to sensitize them to the problem and encourage them to adopt personal prudential guidelines for rendition of separate opinions. The important thing is to heighten awareness that, in some circumstances at least, separate opinions can harm the process and the legitimate expectations of litigants. To employ a now overused, but still serviceable expression, I am addressing the ethics of aspiration rather than the ethics of duty.<sup>168</sup>

**PROFESSOR OF LAW:** Well, in any event, it seems that all the arguments are now on the table.

**RECENT LAW GRADUATE:** May I close now with some wisdom for the ages? Professor Bickel saw a paradox in the idea that cases of profound national significance must be decided in the context of a concrete case or controversy between parties; yet, the particular interest of litigants are, in

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<sup>167</sup> *Publ. Utilities Comm'n v. Pollack*, 343 U.S. 451 (1952) (where Justice Frankfurter recused himself from a case involving a streetcar company's right to program music into its passenger vehicles because his "feelings were so strongly engaged as a victim of the practice in controversy." *Id.* at 467).

<sup>168</sup> The concepts of morality of duty and a morality of aspiration were brilliantly developed by Professor Lon Fuller. See L. FULLER, *THE MORALITY OF LAW* (1969). The notion of aspirational ethics is also embodied in the A.B.A. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982), which set out two levels of ethical responsibility:

The Ethical Considerations are aspirational in character and represent the objectives towards which every member of the professional should strive . . . .

The Disciplinary Rules, unlike the Ethical Consideration, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

CODE (Preamble and Preliminary Statement).

Bickel's view, relatively unimportant at the Supreme Court level.<sup>169</sup> Well Tocqueville, with whom Professor Bickel was far better acquainted than I, observed how keeping Justices within the traditional constraints on judges everywhere will best protect the legislature against unwise use of the power of judicial review—a peculiarly American institution.<sup>170</sup> I submit that reflection by each Justice upon such traditional constraints will also best protect the development of law generally and best assure fairness to parties.

De Tocqueville observed that a

characteristic of judicial power is, that it pronounces on special cases, and not upon general principles . . . [I]f [a judge] directly attacks a general principle without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority; he assumed a more important, and perhaps a more useful influence, than that of the magistrate; but he ceases to represent the judicial power.

[Another] characteristic of the judicial power is, that it can only act when it is called upon, or when, in legal phrase, it has taken cognizance of an affair. This characteristic . . . may be regarded as essential; the judicial power is, by its nature, devoid of action; it must be put in motion in order to produce a result. When it is called upon to repress a crime it punishes the criminal; when a wrong is to be redressed it is ready to redress it; when an act requires interpretation, it is prepared to interpret it; *but it does not pursue criminals, hunt out wrongs, or examine evidence of its own accord.*<sup>171</sup>

So, as I read him, Tocqueville understood that the power of the Court is soundly limited if it adopts as a maxim, "do not speak until spoken to."

A distinguished critic of judicial activism once referred to the majority in *Mapp v. Ohio* as a Court "intoxicat[ed] with its own power."<sup>172</sup> If you investigate the history of 28 U.S.C. § 47, the provision barring a judge from hearing an appeal from his own decision, you would learn that a proponent of that legislation declared that

[s]uch an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of mature opinion and doubtless a published decision.<sup>173</sup>

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<sup>169</sup> See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

<sup>170</sup> See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 72-75 (R. Heffner ed. 1953).

<sup>171</sup> DE TOCQUEVILLE, *supra* note 170, at 73-74 (emphasis added).

<sup>172</sup> P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 78 (1970).

<sup>173</sup> C. WRIGHT, A. MILLER & E. COOPER, *supra* note 114, at 595.

LEARNED LAWYER: More words of wisdom? And you dare speak of prudence!<sup>174</sup>

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<sup>174</sup> It has been suggested that the *Leon* decision might well be the first step toward a broader "good-faith" exception—one that will eventually encompass police behavior in situations where no warrant has been issued. LaFare "The Seductive Call of Expediency: *United States v. Leon*, Its Rationale and Ramifications, 1984 U. ILL. L. REV. 895, 930-31. However, *Leon* held only that "evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate . . . should be admissible in the prosecution's case-in-chief." 104 S.Ct. at 3416. On the same day that *Leon* was decided, Justice White dissented in a case that rejected a claim that the exclusionary rule applies to civil deportation proceedings—a case involving an unlawful warrantless search. *I.N.S. v. Lopez-Mendoza*, 104 S.Ct. 3479 (1984). Justice White unblinkingly described the *Leon* holding in the following terms: "In *United States v. Leon*, we have held that the exclusionary rule is not applicable when officers are acting in objective good faith." *Id.* at 3493 (White, J. dissenting).