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## Gates, Leon, and the Compromise of Adjudicative Fairness (Part II): Of Aggressive Majoritarianism, Willful Deafness, and the New Exception to the Exclusionary Rule

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*GATES, LEON, AND THE COMPROMISE OF  
ADJUDICATIVE FAIRNESS (PART II): OF AGGRESSIVE  
MAJORITARIANISM, WILLFUL DEAFNESS, AND THE NEW  
EXCEPTION TO THE EXCLUSIONARY RULE*

JOEL JAY FINER\*

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The human understanding when it has once adopted an opinion (either as being the received opinion or as being agreeable to itself) draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises or else by some distinction sets aside and rejects; in order

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that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate.<sup>1</sup>

## I. INTRODUCTION

Part I examined in a dialogue form the idea that Justice White and other members of the *Leon* majority had prejudged issues of law in earlier cases—precommitted themselves in violation of their duty of impartiality—by elaborating in detailed, cohesive, comprehensive opinions, reasons why existing law was incorrect and had to be changed to permit a “good-faith, objective police reasonableness” exception to the exclusionary rule. These prejudgments precluded fair consideration of the merits in *Leon*.<sup>2</sup>

Beyond that, the *Leon* opinion itself, considered in view of the arguments of counsel and the scholarship in currency, evinced an agenda-driven precommitment to its outcome; evinced in a way subject to the criticism that the *Leon* majority disregarded a fundamental obligation of an adjudicator, *the duty to listen to* (not necessarily to heed) contentions in behalf of the outcome ultimately rejected.

In a widely discussed article, University of Chicago Professor, Geoffrey Stone<sup>3</sup> advances the thesis that the 1983 Term of the Supreme Court marked the beginning of an “historic shift”<sup>4</sup> in the Court’s approach to civil liberties issues.<sup>5</sup> Among other portentous findings, Stone found that,

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<sup>1</sup> F. BACON, NOVUM ORGANUM BOOK I 73-74 (1620) quoted in W. BISHIN & C. STONE, LAW, LANGUAGE AND ETHICS 340 (1972).

<sup>2</sup> Finer, GATES, *LEON and the Compromise of Adjudicative Fairness (Part I): A Dialogue on Prejudicial Concurrences*, 33 CLEV. ST. L. REV. 707 (1984-85).

<sup>3</sup> Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15 (1984).

<sup>4</sup> *Id.* at 16.

The shift is due, in part, to a more general shift in our national politics and attitudes. It is increasingly common these days for national leaders to describe minorities once thought to need special protection, as mere ‘interest groups’ grasping for political power. The prevalence of this view appears to legitimate the Court’s aggressive majoritarianism.

*Id.* at 22-23.

<sup>5</sup> Stone examined the Court’s record in cases raising traditional “civil liberties” issues, i.e., decisions interpreting the first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendments. *Id.* at 16-17. Among his findings were the following conclusions about the 1983 Term:

(a) The Court in the 1983 Term sided with the government in more first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendment cases than in any term in the Court’s history.

(b) Despite a consistently increasing caseload, the Court in the 1983 Term sided with the individual in fewer first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendment cases than in any term in the past quarter-century.

(c) Perhaps most important, the Court in the 1983 Term sided with the government in a higher percentage of first, fourth, fifth, sixth, seventh, eighth,

in 1983, the Court decided 85% of “non-easy”<sup>6</sup> civil liberties cases in favor of the government.<sup>7</sup> “The era of moderation is over,” Stone concluded.<sup>8</sup> The era of “aggressive majoritarianism” is under way.<sup>9</sup> The Court’s performance the following term (October Term, 1984) suggests that in certain respects Professor Stone’s case was overstated.<sup>10</sup>

This Article will offer an elaboration of the idea of judicial “aggressiveness” (which Professor Stone, by and large, leaves undefined) through examination of the majority opinion in *United States v. Leon*<sup>11</sup> and its application in *Massachusetts v. Sheppard*.<sup>12</sup> It will also advance the thesis that the majority in *Leon* exhibited a particular kind of aggressiveness—*willful deafness*.<sup>13</sup>

## II. JUDICIAL AGGRESSIVENESS

### A. Professor Stone’s Thesis

Professor Stone has this to say about “majoritarianism”:

This is a “majoritarian” Court. Or, perhaps more precisely, it is a “nonminoritarian” Court. It is a Court that sees the Constitution through the eyes of mainline America. It seeks to restore to the “majority” its right to assert its will, even in those areas in which minority interest are most seriously threatened. It is insensitive, or at least unempathetic, to those most in need of its protection.<sup>14</sup>

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and fourteenth amendment cases than in any term in the past half century, with the sole exception of the 1983 Term, when the Court was in the throes of dismantling economic substantive due process. *Id.* at 17-18.

<sup>6</sup> The “easy” cases factored out were those decided unanimously or with only a single dissent. *Id.* at 18.

<sup>7</sup> *Id.* at 18. Stone acknowledges that not all decisions for the individual and against the government can be deemed pro-civil liberties, but finds such anomalies (e.g., affirmative action decision in favor of the state; eminent domain decisions in favor of the individual) relatively infrequent and not appreciable in affecting the statistics. *Id.* He also acknowledges the possibility that some part of the trend reflected in the 1983 Term is due to the Court’s effort merely to hold the line against increasingly activist lower court judges; he, however, concludes that “many of the Court’s decisions in the 1983 Term break sharply with the Court’s own precedents or with a substantial consensus of opinion in the lower courts.” *Id.* Thus Professor Stone does not consider increased activism by lower court judges to have a substantial impact on the statistics. *Id.*

<sup>8</sup> *Id.* at 19.

<sup>9</sup> *Id.* at 22.

<sup>10</sup> See Lauter, *The Supreme Court Slows its Conservative Shift*, Nat’l L.J., July 15, 1985, at 5.

<sup>11</sup> 104 S. Ct. 3405 (1984).

<sup>12</sup> 104 S. Ct. 3424 (1984).

<sup>13</sup> See *infra* notes 30-48.

<sup>14</sup> Stone, *supra* note 3, at 19.

### 1. Majoritarianism

While Stone's observations seem accurate, vis-a-vis the actions of this Court in certain areas of the law, the term "majoritarian" as a descriptive or predictive concept warrants greater elaboration.

Majoritarianism might be taken to convey any of the following:

- a) the Court cynically votes according to and because of what it perceives to be the vote desired by the majority of citizens;
- b) the Court's philosophy of separation of powers and/or electoral government persuades itself that when the majority has expressed its preference, that preference must not be thwarted by the courts (absent, perhaps, some extraordinary showing of destruction, or imminent destruction, of a core civil liberty); or
- c) the Court is voting to uphold majority preferences because they happen to coincide with the Court's substantive constitutional interpretations.

Whether some or all of the majority of the Court are at a), b), or c) is a subject I will not investigate here since it is not of great moment to the theses herein. It is worth noting, however, that there is little indication that these Justices are described by a), i.e., that they merely follow the election returns. There is little about these Justices to suggest that they are abandoning their historic charge to the howling winds of the political moment.

To the extent the Court's majority is at b), the Frankfurterian philosophy of judicial deference to democratic majorities, the Court's seemingly schizophrenic activist-conservative approach is explainable. The activism comes not from failure to defer to other, more democratic, institutions but from "unconservative" disrespect for judicial precedents.<sup>15</sup> These tend to be precedents, however, that thwart the power of elected organs of government to effectuate the preferences of majorities—precedents that interpret the Constitution, and which thus cannot be undone by the more representative branches of government.<sup>16</sup> There is then arguably a consistency between the advocates of restraint in Warren Court days and judicial activists today, a shared philosophy of "power to the majority."

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<sup>15</sup> Federal Judge Richard Posner writes that it does not make sense for a conservative judge to treat all liberal precedents as sacrosanct. He opines, "[A] good liberal judge gives little weight to precedents that are not liberal, but a good conservative judge gives great weight to all precedents, liberal as well as conservative." Posner declares that "[i]f this view is accepted, and the judiciary is dominated by successive waves of liberals and conservatives, the law will necessarily grow more liberal even if the number of liberal and conservative judges is the same in the long run." R. POSNER, *THE FEDERAL COURTS* 217 (1985).

<sup>16</sup> The difference in practical effect between positions a) and b) is not substantial. Position a) is essentially unprincipled and oriented toward short term. Position b) reflects a very well-considered, credibly motivated, and rationally defensible school of constitutional jurisprudence. Position b) would also justify distinguishing between transient and durable majorities.

Or is there? Is this Court truly majoritarian in the sense of commitment to Frankfurterian deference to electoral preferences? Consider how some or all of the Justices in today's majority would have voted on the constitutionality of FDR's early New Deal legislation given the state of substantive constitutional doctrine at the time. Contemplating this point leads to my third hypothesis, i.e., some or all of the present majority on the Court are primarily motivated by their conservative substantive readings of the Constitution (or personal philosophies, if you will), rather than fidelity to the principles of *stare decisis* or institutional deference to representative branches. The dominant theme is a selective conservatism that more often than not coincides with contemporary majority views, but on not insignificant issues, and from time to time, goes its own way.

To the extent that the Court's value preferences are increasingly shared by greater or more vocal majorities, such increased popular support may make it easier for the Court to actualize its philosophy through its opinions and votes.

While, as we have seen, the term 'majoritarian' is not free of ambiguity, I will use it in the general sense conveyed by Professor Stone, i.e., construing the constitution presumptively to permit majorities to impose their own social values on minorities, at least in areas of civil liberties in general,<sup>17</sup> and criminal due-process, in particular. Reading the cases—the five cases that best capture the Court's attitude and tone—through Professor Stone's critical sights, one does find a judicial deference (if not an obeisance) to governmental interest and a trivialization of civil liberties interests, barely recognizable in our constitutional traditions.<sup>18</sup>

## 2. Aggressive Majoritarianism

More interesting, because new to our terminology, is Professor Stone's characterization of the Burger Court's practices as "aggressive majoritarianism." Does the term connote judicial "improprieties" independent of the Court's "majoritarianism"? Is it less defensible to be an "aggressive" Court than it is to be an "activist" Court? Professor Stone does not pursue, at any length, his characterization and insight. Aside from brief and penetrating critiques which do not purport to distinguish the Court's "aggressiveness" from its "majoritarianism," Professor Stone observes only that:

The Court has entered an era of aggressive majoritarianism.

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<sup>17</sup> *But see* *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985); *Grand Rapids v. Ball*, 105 S. Ct. 3216 (1985)(both decisions showing that a majority of the Court is unwilling to uphold efforts that seek to bring about "accommodation" of majority religious values).

<sup>18</sup> The present "majority" is more accurately described as right-wing activists than practitioners of judicial restraint. It is by no means clear whether President Reagan's conservative followers favor judicial activism, even in pursuit of conservative values. See Barnes, *Reagan's Full Court Press*, *THE NEW REPUBLIC* 16, 17 (June 10, 1985).

The aggressiveness is evident in the pattern of its decisions. Just as the Court in the Warren era aggressively exercised its jurisdiction to select a docket that would enable it actively to pursue its "agenda," the Court in the 1983 Term followed a similar course. It is no "accident" that the Court sided with the government in more than 85% of its "non-easy" civil liberties decisions.<sup>19</sup>

There are, however, some common threads in Professor Stone's critique of particular cases—threads we can use in discerning more particularly the pattern of the Court's aggressiveness. For example, in discussing *Lynch v. Donnelly*,<sup>20</sup> in which the Court upheld, against a first amendment challenge, a city's sponsorship and public display of a creche, Stone points out one "extraordinary assertion" by the Court<sup>21</sup> as well as an "out-of-hand" dismissal of the claim that the "effect on minority religious groups . . . is to convey the message that their views are not similarly worthy of public recognition."<sup>22</sup>

In discussing *Members of City Council v. Taxpayers for Vincent*,<sup>23</sup> in which the Court upheld the application of a city's ban on posting signs on public property to political campaign posters attached to public utility poles, Stone notes the Court's *overstatement of the government's interest and understatement of the individual's interest*. Indeed, the Court ignored the unique importance of this means of political expression.<sup>24</sup> Stone concludes that the Court gave "short shrift to [the] central first amendment insight" that ways must be preserved for unconventional means of communication to be expressed to further "the poorly financed causes of little people."<sup>25</sup> In the fourth amendment area, Professor Stone finds *Hudson v. Palmer*<sup>26</sup> even more illustrative of his thesis than *Leon*.

In *Hudson*, the Court, rejecting the view of every court of appeals that had addressed the question in the past decade, held that 'prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells.' The Court defended this result on the ground that society would insist that the prisoner's expecta-

<sup>19</sup> Stone, *supra* note 3, at 22.

<sup>20</sup> 104 S.Ct. 1355 (1984).

<sup>21</sup> Specifically, Stone asserted "that the city's sponsorship of the creche was designed, not 'to express . . . a particular religious message,' but to further the legitimate 'secular purpose' of celebrating the Christmas holiday." Stone, *supra* note 3, at 19 (quoting *Lynch*, 104 S. Ct. at 1363).

<sup>22</sup> *Id.* Ironically, perhaps, religious freedom seems to have become an area where the Court has restrained the imposition on minorities of the majority's values. See *supra* note 17.

<sup>23</sup> 104 S. Ct. 2118 (1984).

<sup>24</sup> Stone, *supra* note 3, at 20.

<sup>25</sup> *Id.* at 21 (emphasis added)(quoting *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943)).

<sup>26</sup> 104 S. Ct. 3194 (1984).

tion of privacy always yield to . . . the paramount interest in institutional security.<sup>27</sup>

Professor Stone's strongest criticism of the Court's process is directed at the Courts utilization of cost-benefit analysis,<sup>28</sup> particularly in *United States v. Leon*.<sup>29</sup> Some of the problems with a cost-benefit approach to civil liberties adjudication will be considered below.

### B. *Judicial Aggressiveness and the Duty to Listen*

I suggest that judicial aggressiveness differs from judicial activism in that an aggressive opinion is one that shows profound disrespect for the legal position of the losing party. The most significant mark of such disrespect is a Court's *willful refusal to listen* to the contentions of the party it is ruling against—that is, notwithstanding a party's right to be heard (once review has been granted), an aggressive opinion betrays the Court's corresponding duty to listen.

Willful deafness is a major component of aggressiveness. Recognition of a duty to listen would fortify the value of formally fair processes, processes which Professor Tribe and others have found inadequate, for other reasons, as a foundation of constitutional jurisprudence.<sup>30</sup> While this Article will not undertake a systematic development of a full-blown theory of a judicial duty to listen, certain ideas about it are worth considering.

When the Supreme Court grants the right to file briefs and make oral arguments it is implicitly agreeing to read and listen to the contentions proffered by the parties. Being more than an arbiter between contending litigants, the Court must also "listen" to arguments that have currency in the community of constitutional commentators.

To listen is to maintain a state of relatively open-minded, alert, intellectually active receptivity toward all non-frivolous contentions. While justices cannot be expected to hear with the value-neutrality once expected of psychoanalysts, they can with effort approach the "evenly

<sup>27</sup> Stone, *supra* note 3, at 21 (quoting *Hudson*, 104 S. Ct. at 3201, 3202)(footnotes omitted).

<sup>28</sup> Stone, *supra* note 3, at 23-29.

<sup>29</sup> 104 S. Ct. at 3405.

<sup>30</sup> Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063, 1064 (1980) (arguing that a "full theory of substantive rights and values" is also necessary). Compare *id.* with J. ELY, *DEMOCRACY AND DISTRUST* 87 (1980)(arguing that "the selection . . . of substantive values is left almost entirely to the political process.") For a classic article finding a similar approach of a Burger Court majority in another opinion declining to apply the exclusionary rule, as seeking "to prevail" rather than "persuade," see Ely & Dershowitz, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198 (1971). Phillip Kurland made similar accusations of the Warren Court and urged the newly appointed Burger Court to "seek to persuade rather than to coerce." P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* xxv (1970).



suspended attention” Freud recommended to psychoanalysts “in the face of all that one hears.”<sup>31</sup> Justices, being human, cannot be expected to approach arguments *tabula rasa*, nor would it be a good thing if they could.<sup>32</sup> Being men and women of integrity, good faith, and learning, however, judges need not fit the image of jurists that critical legal studies portray.<sup>33</sup>

On the contrary, judges can approach a hearing (and read a brief) as something more than a formality, or worse, an inconvenience on the path to ultimate conscious or subconscious imposition of their psychological, social, economic or moral preconceptions. Justice Frankfurter’s description of a judge’s task is still a model worthy of pursuit and emulation:

To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one’s own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate power.<sup>34</sup>

It is the struggle for detachment—that commitment to the search, that implies active listening. Active listening will not assure a particular result, and thus might not satisfy a need for a substantive constitutional jurisprudence,<sup>35</sup> but it will go much further toward assuring a fair result than the wonders to which pro forma adherence to procedural safeguards alone has been credited with.<sup>36</sup>

It is active listening that is a prerequisite to just judging. While a full development of a concept of active listening would require some effort at verbally identifying the mixture of objectivity and subjectivity that is attainable and desirable, identifying manifestations of the *refusal* to listen is not nearly as difficult. While a full elaboration even of the latter would require formulation of criteria for distinguishing between re-

<sup>31</sup> Recommendations to Physicians Practicing Psychoanalysis (1912) quoted in J. MALCOLM, *PSYCHOANALYSIS: THE IMPOSSIBLE PROFESSION* 26 (1980).

<sup>32</sup> See J. FRANK, *COURTS ON TRIAL* 413 (1950).

<sup>33</sup> See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1705-10, 1723-24 (1976); Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFFALO L. REV. 205, 219-20 (1979); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 62-66, 119-30; see, e.g., Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

<sup>34</sup> *Rochin v. California*, 342 U.S. 165, 172-72 (1952).

<sup>35</sup> See Tribe, *supra* note 30, at 1065-72.

<sup>36</sup> “It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law.” Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 179 (1951)(Douglas, J., concurring).

sponses characteristic of willful deafness and responses vulnerable to other criticisms, it can at least be said that refusal to listen is manifested, *inter alia*, by the failure to respond to, and/or the failure to offer reasons for rejecting, facially worthy contentions of the losing party.

One can also ask whether the "response" looks like an effort to persuade or is no more than a determination to prevail.<sup>37</sup> Had the situation been such that the substantive issue (whether it was appropriate to recognize a "good faith" or "objective police reasonableness" exception to the exclusionary rule in a search warrant situation) was reviewed by a more detached Court, such a Court might well have genuinely "listened" to the contentions against such an exception and written a different and rationally defensible (if not wholly persuasive) opinion adopting such an exception.

As we will see, however, the *Leon* opinion is replete with manifestations of willful deafness to the contentions pointing away from the destination the majority quite evidently had in mind all along.

Regarding judicial "aggressiveness" generally, the judicial behaviors that fall within the criteria proposed above include 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 could not be demonstrated; denying an allegation that was never made; falsely stereotyping the party's philosophy or ideology; trivializing the importance and/or exaggerating the costs of a claimed right; and utilizing any rhetorical or analytical device that operates as a smokescreen—that gives the appearance, and only the appearance (at first blush), of seriously addressing the contentions advanced by the losing party. More generally, an aggressive opinion is one which reads like a spuriously professional, one-sided brief—that is, a brief which fails to acknowledge and deal with arguments that favor the adversary.

I propose to show in the pages which follow that the profound disrespect which characterizes an aggressive court bespeaks more than a failure of manners or of courtly courtesies. It both constitutes and reflects a breakdown in the deeply-rooted processes by which rational and responsive justifications are offered as explanations to losing litigants and as guidelines for those who are to apply and follow the law. It involves a dangerous contamination of judicial processes with ideological infiltrates.

The following discussion of *United States v. Leon*<sup>38</sup> will, where appropriate, highlight the aggressiveness, and particularly the willful deafness, manifested by that opinion. Pervading that opinion, beyond the Court's refusal to listen to some of Leon's important arguments, are sweeping peremptory rejections of other contentions by Leon and by

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<sup>37</sup> I am not, of course, suggesting that the duty to listen implies a duty to assent.

<sup>38</sup> 104 S. Ct. at 3405.

commentators generally urging retention of the exclusionary rule in its pre-*Leon* form. The opinion is replete with out-of-hand dismissals, offering unreasoned conclusions rather than the genuine, if sometimes inconclusive, answers that the exercise of judgment demands. These conclusions of the *Leon* majority are often preceded by language that expressly or more often implicitly imposes the burden of persuasion on the party urging retention of what had been good legal doctrine for seventy years:<sup>39</sup> “we are not convinced that this is a problem of major proportions,”<sup>40</sup>; “there exists no evidence suggesting”<sup>41</sup>; “we discern no basis, and are offered none”<sup>42</sup>; “we cannot conclude that”<sup>43</sup>; “we find such arguments speculative”<sup>44</sup>; “[n]or are we persuaded that”<sup>45</sup>; “the argument . . . is unpersuasive”<sup>46</sup>; “[w]e have no reason to believe . . .”<sup>47</sup> Such burden-shifting argumentative stratagems often substituted for affirmative demonstrations of the soundness of the Court’s views.

“A judge who is not fully convinced . . . may choose to bury his doubts. . . . Even positive and certain language in the opinion may have psychological roots in the need to cover up the writer’s doubts.”<sup>48</sup> It seems as though the distinguished late Chief Justice of Illinois, Walter Schaefer, might have presciently been describing the *Leon* majority when he stated:

When you get through you see, you swing in, you swing in hard. The matter that was extremely close, extremely doubtful to you, becomes an “argument without merit,” you know—and “the contention is unsound, and so on . . . .”<sup>49</sup>

### III. LEON AND SHEPPARD

#### A. Introduction

On July 5th, 1984, the Supreme Court held, in *United States v. Leon*, that, when police officers armed with a defective search warrant never-

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<sup>39</sup> *Cf. id.* at 3412 (costs and benefits of preventing use of exclusionary sanction must be weighed).

<sup>40</sup> *Id.* at 3418 n.14.

<sup>41</sup> *Id.* at 3418.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 3419.

<sup>45</sup> *Id.* at 3422.

<sup>46</sup> *Id.* at n.25.

<sup>47</sup> *Id.* at 3423.

<sup>48</sup> C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, *THE LEGAL PROCESS* 358.

<sup>49</sup> *Id.* at 358-59.

theless conduct a search in the good-faith reasonable belief that the warrant is valid, the fruits of such a search are not suppressible under the fourth amendment's "exclusionary rule."<sup>50</sup> In so holding, Justice White's opinion for the six justice majority made certain findings and conclusions explicit, while leaving implicit a number of potentially even more significant assumptions.

Among the express conclusions reached by the *Leon* Court was that the costs of applying the exclusionary rule (a number of failed or declined criminal prosecutions) far exceeded the benefits (an unlikely and/or "unprovable" deterrent effect), where the police were "not unreasonable" in relying on a warrant.<sup>51</sup> No less interesting than the Court's explicit holdings, and potentially of a significance reaching well beyond the fate of particular applications of the exclusionary rule, were certain assumptions implicit in Justice White's opinion for the Court, e.g., that a "cost-benefit" approach was consistent with the Court's historic functions, that such an approach did not itself impose unacceptable costs, that Courts had the institutional capacity to carry out a cost-benefit analysis, and that cost-benefit technique was correctly applied to the "data" before the Court. The Court found also that the decisions of magistrates who review applications for search warrants were outside the rationale and the reach of the exclusionary rule.<sup>52</sup>

The Court made an assumption, more a procedural device than a belief, that the warrants in *Leon* and *Massachusetts v. Sheppard*<sup>53</sup> were not valid.<sup>54</sup> Making this assumption was "aggressive" behavior, perhaps the

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<sup>50</sup> The exclusionary rule, adopted by the Court in *Weeks v. United States*, 232 U.S. 383 (1914), and *Mapp v. Ohio*, 367 U.S. 643 (1961)(applicable to state courts) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)), forbids courts from accepting as evidence against a criminal defendant, physical or testimonial evidence that has been obtained by the government by means which violate the strictures of the fourth amendment, i.e., by unreasonable searches and seizures.

Whether the exclusionary rule is part of the fourth amendment or bears some other relation to it has been the subject of scholarly controversy since *Wolf v. Colorado*, 338 U.S. 25 (1949)(the Court declined to apply the exclusionary rule to state courts while declaring that state law enforcement agencies were bound by the substantive precepts of the fourth amendment). See, e.g., Rader, *Legislating a Remedy for the Fourth Amendment*, 23 So. Tex. L. J., 585, 597-607 (1982)(discussing Supreme Court interpretations of the fourth amendment). For more than a decade the Court has treated the rule as a Court-designed remedy for enforcement of the fourth amendment. (*United States v. Calandra*, 414 U.S. 338 (1974)(holding the exclusionary rule inapplicable to evidence presented to a grand jury and declaring the rule to be "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved." *Id.* at 348).

<sup>51</sup> *Leon*, 104 S. Ct. at 3421.

<sup>52</sup> *Id.* at 3418-19.

<sup>53</sup> 104 S. Ct. 3424 (1984).

<sup>54</sup> Although it undoubtedly is within our power to consider the question whether probable cause existed . . . , that question has not been briefed or argued; and it

paradigm factor for Professor Stone who sees the *Leon* Court as “exercis[ing] its jurisdiction to select a docket that would enable it actively to pursue its ‘agenda’.”<sup>55</sup>

In *Leon* (and *Sheppard*), by making the debatable assumptions it did about the invalidity of the warrants, the Court was able to reach out and write, or rewrite, some law. Justice Stevens protested that the majority had ignored traditional prudential rules, to decide an issue, and to adopt a major revision of fourth amendment doctrine.<sup>56</sup>

### B. *The Leon Facts*

Albert Leon was indicted in 1981, with several other defendants, on drug conspiracy charges. The police had searched their homes and their cars and seized large quantities of marijuana, methadone, and cocaine. These searches were “authorized” by warrants issued largely on the basis of sworn affidavits prepared by the police and asserting that unnamed informants of unknown trustworthiness had made certain accusations against the defendants.<sup>57</sup>

The principal informant had given very stale information, claiming only that he had witnessed a drug sale and observed a shoebox full of cash at the home of a co-defendant five months earlier.<sup>58</sup> Although the

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also within our authority, which we choose to exercise, to take the case as it comes to us, accepting the Court of Appeals’ conclusion that . . . probable cause was lacking under the prevailing legal standards. See this Court’s Rule 21.1(a).

*Leon*, 104 S. Ct. at 3412.

<sup>55</sup> Stone, *supra* note 3, at 22.

<sup>56</sup>

It is . . . disturbing that the Court chooses one case in which there was no violation of the fourth amendment, [under *Gates v. Illinois*, which may or may not have been retroactively applicable to *Leon*] and another in which there is grave doubt on the question, in order to promulgate a “good faith” exception to the fourth amendment’s exclusionary rule. . . . *The Court seems determined to decide these cases on the broadest possible grounds*; such determination is utterly at odds with the Court’s traditional practice as well as any principled notion of judicial restraint. Decisions made in this manner are unlikely to withstand the test of time.

*[W]hen the Court goes beyond what is necessary to decide the case before it, it can only encourage the perception that it is pursuing its own notions of wise social policy rather than adhering to its judicial role. I do not believe the Court should reach out to decide what is undoubtedly a profound question concerning the administration of criminal justice before assuming itself that this question is actually and of necessity presented by the concrete facts. . . .*

*Leon*, 104 S. Ct. at 3447-48 (Stevens, J., dissenting) (citations omitted)(emphasis added).

<sup>57</sup> 104 S. Ct. at 3409-10.

<sup>58</sup> *Id.* at 3409-10. The informant told police that two persons known to him as “Armando and Patsy” were selling large amounts of controlled substances, methaqualone and cocaine, out of their residence at 620 Price Drive in Burbank, California, and that he had seen a sale and a shoebox containing a large amount of cash. He asserted that the shoebox belonged to “Patsy” and that both offenders usually kept only small quantities of drugs at their residence, storing the rest at another place in Burbank. *Id.*

warrant application indicated some of the activities the police had observed (such as suspects coming and going from houses that were possibly being used for drug transactions), they had not seen anything fatally incriminating.<sup>59</sup> Therefore, "probable cause," at least as then understood,<sup>60</sup> was lacking and the seizure of the evidence from Leon's home was unconstitutional.<sup>61</sup> Given the exclusionary rule, the evidence could not be used against Mr. Leon in a criminal prosecution.<sup>62</sup>

### C. *The Sheppard Facts*

A woman was beaten to death by blows to her head, and her body was badly burned and left in a vacant lot in the Roxbury section of Boston. Osborne Sheppard, a boyfriend, was questioned by the police, as were several of his friends, regarding his whereabouts when the crime occurred. A car that Sheppard had borrowed was validly searched and bloodstains and pieces of hair were found, as well as strands of wire

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<sup>59</sup> See *id.* at 3411 (the facts setting forth the basis of the informant's knowledge were 'fatally stale'). Police maintained surveillance of the Price Drive residence which they learned belonged to Armando Sanchez and Patsy Stewart. They observed a car driven by Ricardo Del Castillo, who was once arrested for possession of 50 pounds of marijuana, arrive at the Price Drive home, and the driver enter the home and soon leave and drive away carrying a small paper sack. His probation records indicated that he listed Leon's telephone number as that of his employer. *Id.* at 3410.

Alberto Leon was believed to be heavily involved in illegal importation of drugs, and a confidential informant of unproven reliability had told Glendale police prior to this investigation that Leon stored large quantities of methaqualone at his Glendale residence. During the present investigation, Burbank police learned that Leon was living at a Burbank address, 716 South Sunset Canyon, in Burbank. *Id.*

The officers observed considerable comings and goings with respect to respondent's automobiles at the two Burbank residences and a third residence, a condominium at 7902 Via Magdalena, and the carrying of small packages, by various people, some of whom had some prior involvement and/or suspected involvement with illicit drugs. *Id.*

<sup>60</sup> "Probable cause," that is, prior to the decision in *Illinois v. Gates*, 462 U.S. 213 (1983), which reduced considerably the burden the government had to bear in applying for a search warrant. See Kamisar, *Gates*, "Probable Cause," "Good Faith," and *Beyond*, 69 IOWA L. REV. 551 (1984), for a discussion of "probable cause" after the *Gates* decision.

<sup>61</sup> *Leon*, 104 S. Ct. at 3411.

<sup>62</sup> So held the United States Court of Appeals for the Ninth Circuit in *Leon v. United States*, 701 F.2d 187 (9th Cir. 1983). The Ninth Circuit concluded that the information provided by the informant was inadequate under the then controlling "two-pronged" test of *Aguilar v. Texas*, 378 U.S. 108 (1964) (overruled by *Gates*, 462 U.S. 213). *Leon*, 104 S. Ct. at 3411 (citing Court of Appeals' unpublished opinion). As to the Price Drive residence, the affidavit failed to establish the informant's credibility, and, to the extent that it articulated facts indicating the basis of the informant's knowledge of criminal activities, such information was fatally stale.

Although the officers' made an independent investigation this did not corroborate the details of the informant's declarations or cure the staleness problem. *Id.*

As to the Sunset canyon home, the affidavit failed to state the basis for the informant's conclusion regarding to Leon's criminal activities, and contained no information demonstrating the informant's reliability.

similar to wire strands found on or near the victim's body.<sup>63</sup>

The police then applied for a warrant to search Sheppard's home. The warrant application stated the probable cause, gave Sheppard's residence as the place to be searched, and stated in detail the items the police were looking for, such as "similar type wire and rope that match those on the body of [the victim] . . . , men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim."<sup>64</sup>

Because it was Sunday, the local court was closed. After looking for the proper warrant form, the police detective, O'Malley, could find only a preprinted form entitled "Search Warrant—Controlled Substance." Detective O'Malley deleted the term "Controlled Substance" in one place, but not in another place, where the objects of a drug search ("controlled substances and related drug paraphernalia") were indicated.<sup>65</sup>

The judge, who reviewed and approved the warrant application at his home, told Detective O'Malley that he would make the necessary changes. Perhaps because he was in a hurry to return to the quiescence of his Sunday, he made some errors, the principal one being the failure to substitute the names of the objects for which the search was actually authorized, e.g., the wire, the blunt instrument, the bloody clothing, for the pre-printed reference to drugs and drug paraphernalia.<sup>66</sup> The officers, assuming all along that their warrant was valid and without troubling to peruse it, searched Sheppard's residence. The scope of the search and items seized were limited to those specified in the application.<sup>67</sup> They found a pair of blood-stained boots, blood stains on the concrete floor, women's earrings with bloodstains on them, a bloodstained envelope, men's jockey shorts and women's leotards with bloodstains on them, as well as three types of wire and a woman's hairpiece belonging to the victim.<sup>68</sup>

The Supreme Judicial Court of Massachusetts overturned Sheppard's conviction for first degree murder because it found that the warrant, being wholly inaccurate in its description of the items to be seized, was invalid.<sup>69</sup>

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<sup>63</sup> *Sheppard*, 104 S. Ct. at 3426.

<sup>64</sup> *Id.* at 3427.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 3428.

<sup>68</sup> At first blush the facts seem to justify the condemnation of the exclusionary rule, by law and order advocates, as a "legal technicality" that allows vicious killers to walk the streets. The crime indeed was terrible. The search warrant, however, might well have been valid. See *Leon*, 104 S. Ct. at 3446-47 (Stevens, J., dissenting)("official seizure cannot be both 'unreasonable' and 'reasonable' at the same time.")

<sup>69</sup> *Sheppard*, 104 S. Ct. 3424. The Framers arguably demanded specificity for three reasons: a) to limit the places authorities could look; b) to limit the things they could look for; and c) to notify the home's occupant of these limitations. Compare *Leon*, 104 S. Ct. at 3446 (Stevens, J., dissenting) (*Sheppard* warrant was valid, in light of the police

#### D. In the Supreme Court

*Leon* and *Sheppard*, companion cases, were both announced on July 5th, 1984, but *Leon* was the technical occasion for the formulation of the new exception to the exclusionary rule while Mr. Sheppard was the first defendant after Mr. *Leon* to whom the formulation was applied.<sup>70</sup> The Solicitor General of the United States<sup>71</sup> and the Attorney General of Massachusetts argued to the Court that even if the particular warrants were defective, law enforcement authorities had, in each case, acted in "good faith."<sup>72</sup> They wanted to know, in essence, why, given the absence of misbehavior by police,<sup>73</sup> they, and the public, should be punished by suppression of perfectly good, *i.e.*, probative, evidence—evidence possibly necessary to convict a drug smuggler in federal court and a vicious killer in state court.<sup>74</sup> The Court thus had before it an opportunity several members had sought for several years:<sup>75</sup> a chance to consider recognizing a "good-faith" exception to the exclusionary rule.

#### E. The Opinion of Justice White for the Majority

The Court stated the question before it as follows:

[W]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in-chief of evidence obtained by officers acting in reasonable reliance on a

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knowledge of, and compliance with, the intended limits of their authorization, and Mr. Sheppard's absence from the premises at the time of the search, thus the inapplicability of the notification rationale) *with Leon*, 104 S. Ct. at 3430 (Brennan, J., dissenting)(*Sheppard* warrant was invalid).

<sup>70</sup> *Sheppard*, 104 S. Ct. at 3426.

<sup>71</sup> The Solicitor General did not actually submit a brief on the merits in *Leon*; he simply referred to the brief he filed the previous term in *Illinois v. Gates*, 462 U.S. 213 (1983).

<sup>72</sup> The Solicitor General, in his petition for certiorari, expressly declined to seek review of the Ninth Circuit's finding that the warrant was invalid. *Leon*, 104 S. Ct. at 3412.

<sup>73</sup> In this case there was no blundering constable (or rough and lawless street cop). Using or echoing the language of Mr. Justice Cardozo, counsel for prosecutorial agencies have been increasingly posing the rhetorical question: must the criminal go free because the constable has blundered? Perhaps Cardozo's question has been so often repeated by attorneys for governments because it so poetically trivializes police practices invasive of privacy, liberty and personal security. Blundering constables bring to mind the keystone cops or Charlie Chaplin, not tough, imposing street-wise cops.

<sup>74</sup> *Lee, The Supreme Court's 1983 Term: Individual Rights, Freedom, and the Statute of Liberty*, 19 GA. L. REV. 1, 11 (1984).

<sup>75</sup> Chief Justice Burger and Justices White, Powell, and Rehnquist had previously urged modification and/or reconsideration of the exclusionary rule. *See, e.g.*, *Illinois v. Gates*, 462 U.S. 213, 246 (1983)(White, J., concurring); *Scheneckloth v. Bustamonte*, 412 U.S. 218, 261-71 (1983)(Powell, J., concurring); *California v. Minjares*, 443 U.S. 916 (1979)(Rehnquist, J., dissenting from denial of stay); *Stone v. Powell*, 428 U.S. 465, 496 (1976)(Burger, C.J., concurring); *id.* at 536 (White, J., dissenting); *Brown v. Illinois*, 422 U.S. 590, 609-12 (1975) (Powell, J., concurring in part).



search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.<sup>76</sup>

Justice White reiterated the now routine, but hardly compelling, assertion that the exclusionary rule is not a necessary corollary of the fourth amendment, nor a personal right of the accused; rather, it is a judicially created remedial device, a mechanism designed by the Court to enforce the fourth amendment.<sup>77</sup> This position rejects the contention, advanced by several leading scholars and jurists, that an exclusionary rule is essential to preserve the judicial integrity of courts which are asked by the government to receive constitutionally contaminated evidence.<sup>78</sup>

Much of the opinion was devoted to ostensible application of a cost-benefit analysis to the issue of whether the exclusionary rule should bar evidence seized by officers acting in objectively reasonable reliance on a warrant issued by a magistrate. Conceding that it had "not recognized any form of good-faith exception<sup>79</sup> to the Fourth Amendment exclusionary rule," the Court declared that

the balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us . . . [O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief.<sup>80</sup>

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<sup>76</sup> *Leon*, 104 S. Ct. at 3409.

<sup>77</sup> *Id.* at 3412.

<sup>78</sup> Professor Stone's comments on the court's characterization of the exclusionary rule are worth considering:

This view, which has gained support in the last decade, directly contradicts the traditional conception of the rule as an "essential part" of the fourth amendment. Although the Court's recharacterization of the rule is justified neither by logic nor history, it has enabled the Court to convert a central constitutional principle into a mere technicality the utility of which turns entirely on its capacity to "deter."

Stone, *supra* note 3, at 27 (citations omitted). See also James White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1280 (1983).

<sup>79</sup> The concepts of "good-faith" and "reasonableness" are not necessarily logically or functionally synonymous. See Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. LAW & CRIMINOLOGY 635 (1978). Nevertheless, the Court adopts a single meaning for both terms—i.e. an objectively reasonable basis for the police concluding that they possess a valid warrant. If, however, some police were in subjective bad faith in applying for a warrant, the objective reasonableness of the police who execute the warrant cannot save the fruits of the search from suppression. *Leon*, a 104 S. Ct. at 3420, 3422. The Court used the terms interchangeably, may create important problems of interpretation. See, e.g., LaFave, "The Seductive Call of Expediency": *United States v. Leon, Its Rationale and Ramifications*, 1984 ILL. L. REV. 895.

<sup>80</sup> *Leon* 104, S. Ct. at 3416 (emphasis added). The Court had cited cases in which it had declined to apply the exclusionary rule because it found that the jeopardy to law

Concluding, *inter alia*, that the exclusionary rule cannot be expected to deter objectively reasonable<sup>81</sup> reliance by law enforcement officers on a search warrant, and should not be used to effectuate such deterrence, the Court held that evidence seized by police who reasonably rely on a warrant is admissible in the prosecution's case-in-chief.<sup>82</sup>

In certain, specified, circumstances evidence must still be excluded notwithstanding the issuance of a search warrant.<sup>83</sup>

1) where the affiant swore to a deliberate or reckless falsehood in the warrant application;

2) where the magistrate wholly abandoned his or her judicial role;

3) where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, and

4) where the face of the warrant is so deficient that "executing officers cannot reasonably assume it to valid."<sup>84</sup>

Finding none of these exceptions to the new exception applicable here, the Court concluded that "*the extreme sanction of exclusion*" was inappropriate.<sup>85</sup>

*Leon* seems destined to be one of those cases that take on a life of their own; such cases assume an importance far beyond their actual logical

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enforcement values could not be justified by any likely significant increase in deterrence of violations of fourth amendment rights. *See, e.g.,* *United States v. Janis*, 428 U.S. 433 (1976)(defendant could not challenge the use of unlawfully seized evidence against him in the prosecution's case in chief, where the defendant was not the victim of the police illegality); *Stone v. Powell*, 428 U.S. 465 (1976)(defendant-police victim could not challenge his state conviction in habeas corpus); *United States v. Calandra*, 414 U.S. 338 (1974)(defendant who was also a victim of a police illegality could not challenge the use of tainted evidence by a grand jury); *Walder v. United States*, 347 U.S. 62 (1954)(defendant-police victim could not challenge the use of the tainted evidence to impeach his testimony).

Significantly, no cases were cited, because there were none, in which the Court permitted illegally-seized evidence to be used against a criminal defendant in the case-in-chief of the prosecution at his or her criminal trial in which he or she had been the victim of the illegal search or seizure that yielded such evidence.

<sup>81</sup> Reliance is not "objectively reasonable" where "a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 104 S. Ct. at 3421 n. 23.

<sup>82</sup> *Id.* at 3419.

<sup>83</sup> For a brilliant analysis of the meaning and probable effect of the Court's exceptions to its "good-faith, objective-police-reasonableness" exception to the exclusionary rule, see *LaFave, supra* note 79, at 911-29.

<sup>84</sup> *Id.* at 3421-22 (citations omitted). Restating the exclusionary situations regarding searches with warrants, the Court declared, in its concluding paragraph: "In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 3423.

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

significance, a real life importance which transcends even symbolism. The implicit repudiation of fourth amendment values in *Leon*, and the manner in which it was accomplished, make this case of far greater significance than cases before and after in which the Burger Court set aside convictions because of Fourth Amendment violations, sometimes even employing stirring language about the significance of the fourth amendment.<sup>86</sup> The political and journalistic attention given to this case has no small bearing on its probable signal effect and its ideological and behavioral impact.<sup>87</sup>

In the pages which follow I will examine more closely first, the matter of magistrates and the exclusionary rule, *i.e.*, the ruling that the exclusionary rule applies only to the police, who seek and execute warrants, not to magistrates, who issue warrants and second, the Court's use of cost-benefit analysis. Throughout, this study will observe various aspects of *Leon* that might substantially undermine the appreciation of an allegiance to fourth amendment values the Court still ostensibly expects from those government agents dedicated to enforcement and application of our laws. Manifestations of aggressiveness and deafness will be highlighted.

#### IV. ARE WARRANT-ISSUING MAGISTRATES EXEMPT FROM THE OPERATION OF THE EXCLUSIONARY RULE?

##### A. *The Contentions Urged and the Majority's Conclusion*

Counsel for *Leon* argued that a good-faith exception to the warrant requirement would, contrary to precedent,<sup>88</sup> immunize from any meaningful review, a magistrate's broad discretion.<sup>89</sup>

Judicial review is necessary, *Leon* argued, because, among other reasons, many magistrates in this country are not attorneys, yet must

<sup>86</sup> See, *e.g.*, *Steagald v. United States*, 451 U.S. 204 (1981):

Whatever practical problems remain . . . cannot outweigh the constitutional interest at stake. Any warrant requirement impedes to some extent the vigor with which the Government seeks to enforce its laws, yet the Fourth Amendment recognized this restraint is necessary in some cases to protect against unreasonable searches and seizures. . . . The additional burden imposed on the police by a warrant requirement is minimal. In contrast, the right protected—that of presumptively innocent people to be secure in their houses from unjustified forcible intrusions by the government—is weighty.

*Id.* at 222.

<sup>87</sup> See *infra* notes 231-36 and accompanying text.

<sup>88</sup> Brief for Respondent at 9, *Leon*.

<sup>89</sup> See *Gates*, 462 U.S. 213 (1983). The *Leon* brief noted that the Supreme Court had "consistently upheld the necessity of review of the warrant process." Brief for Respondent at 9 (citing *Franks v. Delaware*, 438 U.S. 154, 184-85 (1978) (Rehnquist, J., dissenting); *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (dicta: holding overruled in *Illinois v. Gates*, 462 U.S. 213 (1983)).

apply the law to their factual findings in an *ex parte* setting<sup>90</sup> and because the state of the law regarding the meaning of “reasonableness” required for probable cause provides little guidance to magistrates.<sup>91</sup>

Leon further argued that the potential for judicial review and the possibility of suppression were strong incentives for magistrates to apply strictly the probable cause standard.<sup>92</sup> An advisory opinion as to a magistrate’s mistake would have no effect on him,<sup>93</sup> and removal from office was not a meaningful alternative remedy.<sup>94</sup>

Finally, Leon argued that, absent judicial review, more magistrates, particularly those who are not attorneys, are likely to succumb to law enforcement pressures (virtually the only pressures in *ex parte*, nonreviewable proceedings) to become “rubber-stamps”<sup>95</sup> for law enforcement.

The Court’s specific conclusions regarding the application of the exclusionary rule to magistrates engaged in the “warranting process” commend themselves with less than compelling force. Consider the Court’s analysis (or conclusions):

To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas,<sup>96</sup> their reliance is

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<sup>90</sup> Brief for Respondent at 10-13.

<sup>91</sup> *Id.* at 13.

<sup>92</sup> *Id.* at 15 (citing Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L. J. 365 (1981), and citing *United States v. Karathanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976)).

<sup>93</sup> Quoting from a widely-cited law review article by the late Justice Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983):

[I]f the fourth amendment’s probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates in a meaningful way that warrants based on something less than probable cause are not to be tolerated ....[It is argued that] reviewing courts could determine whether a search warrant was supported by probable cause even if a good faith exception were adopted. There are constitutional questions about this approach, but let us assume that courts may admit evidence obtained in reasonable good faith while declaring that the warrant pursuant to which it was obtained was not supported by probable cause. Where this is done, the magistrate may receive an opinion, perhaps years after signing the warrant, informing him that a mistake was made. But there is no incentive—apart from a professional desire to comply with the fourth amendment—for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.

*Id.* at 1403 (footnote omitted).

<sup>94</sup> Brief for Respondent at 19-20.

<sup>95</sup> *Id.* at 16-19.

<sup>96</sup> The Court referred to three areas where deference to the warrant-issuing magistrate has been found inappropriate: 1) where the affidavit-application for the warrant was knowingly or recklessly false; 2) where the magistrate failed to perform his duties in a neutral and detached manner, but merely served as a rubber stamp for the police; and 3) where the warrant failed to indicate a substantial basis for concluding that probable cause existed. *Leon*, 104 S. Ct. at 3417-18. Justice White noted for the Court that “[o]nly in the

misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.<sup>97</sup>

Here the Court begs at least one question, *i.e.*, whether the exclusionary rule *punishes* or might be “designed” to punish. The rationale for the exclusionary rule, at least the limited rationale recognized by the majority, is inhibition and deterrence of constitutional transgressions.<sup>98</sup> The inhibition, however, does not arise from fear of punishment but by virtue of the Rule’s devaluation of the illicitly acquired object<sup>99</sup> and by motivation of those desirous of convictions to comply or to bring about compliance by those within their charge.<sup>100</sup> Violation carries no personal penalties.<sup>101</sup> To the extent that magistrates want to see the fruits of the warrants they issue produce convictions, the exclusionary rule should deter the issuance of warrants that could not survive a pre-trial suppression motion.<sup>102</sup>

The more important question actually requiring an answer, or at least thoughtful consideration in pursuit of an answer, is, not whether magistrates are to be punished by an exclusionary rule, but whether the objective of the exclusionary rule is served or disserved by treating magistrates—*governmental agents who at times cause the violation of constitutional rights*—as outside the *rationale* underlying the exclusionary rule. To exclude magistrates from the ambit of the rule would appear to contradict the lessons of history, since magisterial violations of privacy and property were the very “mischief which gave . . . birth”<sup>103</sup> to the fourth amendment.

The majority further concluded:

Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amend-

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first of these three situations, however, has the Court set forth a rationale for suppressing evidence obtained pursuant to a search warrant; in the other areas, it has simply excluded such evidence without considering whether Fourth Amendment interest will be advanced.” *Id.* at 3418.

<sup>97</sup> *Id.* at 3418. The Court used almost identical language in *Sheppard*: “[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges.” *Sheppard*, 104 S. Ct. at 3429 (quoting *Illinois v. Gates*, 462 U.S. at 263 (1983)(White J., concurring)).

<sup>98</sup> See *supra* note 97. And the majority certainly does not advocate “punishment.”

<sup>99</sup> See Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 431 (1974)(devaluing the object’s worth “makes it less of an incitement”).

<sup>100</sup> See generally the discussion of the concept of systemic deterrence in Mertens & Wasserstrom, *supra* note 92.

<sup>101</sup> This is a point frequently made by critics of the exclusionary rule when they point to the fact that under the Rule both the guilty defendant and the transgressing police officer go free.

<sup>102</sup> See discussion *infra* notes 167-73 and accompanying text.

<sup>103</sup> *Weems v. United States*, 217 U.S. 349, 373 (1910).

ment or that lawlessness among these actors requires application of the extreme sanction of exclusion.<sup>104</sup>

This assertion simply ignores considerable documentation of the practice of rubber-stamping warrant applications by a not-inconsiderable number of magistrates.<sup>105</sup> While Justice White asserts in the text that "there exists no evidence," he is less sweeping in the rejection of the claim in the accompanying footnotes. There he states:

Although there are assertions that some magistrates become rubber stamps for the police and others may be unable effectively to screen police conduct [citing articles]<sup>106</sup> . . . we are not convinced that this is a problem of major proportions. [citing four works]<sup>107</sup>

The first cited work, while somewhat dated, does support the thesis that magistrates generally do take care in reviewing applications for search warrants.<sup>108</sup>

The second cited work discusses the effect of a good-faith exception on *judges who must adjudicate a pre-trial motion to suppress*. It is thus not responsive to the argument that many warrant-issuing magistrates possess and use rubber-stamps. (The thrust of the cited material is that under a system that permits a good-faith exception to the exclusionary rule, judicial review will be no less effective a safeguard against trial judges who too-readily deny a suppression motion.)<sup>109</sup>

The third cited work, a working paper by Professor Philip Johnson, advocated abolition of the exclusionary rule where the police obtained warrants without misleading the magistrate. Professor Johnson stated that he knew of no evidence for the assumption that lawlessness among federal magistrates is a pervasive problem akin to police lawlessness,

<sup>104</sup> *Leon*, 104 S. Ct. at 3418 (footnote omitted).

<sup>105</sup> Indeed, the Court cited the following works (which it deemed unconvincing): 2 W. LAFAYE, SEARCH AND SEIZURE A TREATISE ON THE FOURTH AMENDMENT § 4.1 (1978); Kamisar, *Does (Did)(Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?* 16 CREIGHTON L. REV. 565, 569-71 (1983); Schroeder, *Detering Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L. J. 1361, 1412 (1981). Rubber-stamping and magistrate shopping are discussed *infra* notes 137-36 and accompanying text.

<sup>106</sup> See *supra* note 105.

<sup>107</sup> *Leon*, 104 S. Ct. at 3418 n.14 (citations omitted)(see *supra* note 100 for the works cited). When the Court asserts that it is "not convinced that this is a problem of major proportions," does it mean to question the findings that some magistrates are rubber-stamps for law enforcement, or does it mean to assert that this is not a major problem because most magistrates are not law enforcement puppets?

<sup>108</sup> L. TIFFANY, D. McINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 119 (1967).

<sup>109</sup> Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1414 n.396 (1977).

requiring a remedy of this sort with its well known costs and disadvantages.<sup>110</sup>

Professor Johnson's proposal was heavily influenced by the fact that federal courts have considerable supervisory and disciplinary powers over the conduct of federal magistrates<sup>111</sup> (whereas they have no such powers over state and local law enforcement authorities). The *Leon* majority made no reference to the fact that Professor Johnson proposed his innovation only for the federal courts "[f]or the present time . . . given the difficulty of supervising the quality of magistrates and their performance in the fifty states."<sup>112</sup>

The fourth authority was a preliminary version of an important recent study of the search warrant process as it operates in seven representative American cities.<sup>113</sup> It will be examined below for the light it sheds on the soundness of applying the exclusionary rule where a magistrate, but not the police, transgresses the fourth amendment.<sup>114</sup>

The majority mischaracterized one of Leon's most important arguments (*i.e.*, that the prospect of judicial review is a strong incentive for many magistrates to comply with fourth amendment requirements) by simply denying what was not alleged: the existence of widespread "lawlessness" among judges.<sup>115</sup> Justice White categorically asserted that there was no evidence to suggest that magistrates are inclined to ignore or subvert the fourth amendment, a denial that even a casual acquaintance with the literature would demonstrate was incredible.<sup>116</sup>

There is a myopic aspect to the dogmatism that asserts that rubber-stamping is not a problem. Were rubber-stamping endemic to our system,

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<sup>110</sup> Johnson, *New Approaches to Enforcing the Fourth Amendment* 8-10 (Working Paper, Sept. 1978), quoted in Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 229-30 (5th ed. 1980) [hereinafter *MODERN CRIMINAL PROCEDURE*].

<sup>111</sup> *MODERN CRIMINAL PROCEDURE*, *supra* note 110, at 230.

<sup>112</sup> *Id.* Professor Johnson did suggest that in time, as their quality and supervision improved, it would be appropriate to extend his proposal to state magistrates. *Id.*

<sup>113</sup> R. VAN DUIZEND, L. SUTTON & C. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* (1984) [hereinafter cited as *THE SEARCH WARRANT PROCESS: PERCEPTIONS*].

<sup>114</sup> See *infra* notes 151-66 and accompanying text. I am assuming that the fourth amendment is violated only when there is some degree of unreasonableness somewhere along the line of governmental involvement. That matter was not discussed by the Court because, given its approach to the problem, only police reasonableness or unreasonableness is relevant.

If the fourth amendment contemplates the possibility of violations notwithstanding reasonable behavior all around by (magistrate and police—arguably a self-contradictory assumption), then consider whether it would have been more sensible to retain the exclusionary rule except where it could be demonstrated that the magisterial error was reasonable. The Court actually came closer to holding that the exclusionary rule would operate where, *inter alia*, the defendant could demonstrate that the magistrate's action was culpably unreasonable.

<sup>115</sup> See *supra* text accompanying note 104.

<sup>116</sup> *Leon*, 104 S. Ct. at 3418. See *infra* text accompanying notes 137-74.

today, the Court's case would, in a significant respect, be stronger, for it might be argued that the exclusionary rule is inefficacious regarding wrongful issuance of search warrants, so retention of the rule, with its consequent costs, is unjustified. If however, many magistrates do take pains to scrutinize warrant applications, might not a significant part of the explanation lie in their concern over the fate of the evidence seized under the warrant, and over the accompanying judgment, by a reviewing court, about their own decisional competence?<sup>117</sup> That is to say, if the improper issuance of search warrants is *not* a major problem today, how can it be so categorically denied that the exclusionary rule has something to do with our good fortune?<sup>118</sup>

The Court continued, "[t]hird, and most important, *we discern no basis, and are offered none, for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.*"<sup>119</sup>

The Court said the exclusionary rule would have no more deterrent efficacy against judicial error than against violations by individual officers.<sup>120</sup> Moreover, any systemic effect within the law enforcement system would have no judicial analogue.<sup>121</sup> The Court concluded:

Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the fourth amendment, encourage them to repeat their mistakes, or lead to the granting all colorable warrant requests.<sup>122</sup>

The majority gave no serious reply to the point that exempting magistrates from the exclusionary rule would immunize a magistrate's broad discretion from judicial review. It did not acknowledge the argument that there were over 10,000 non-attorney magistrates,<sup>123</sup> let alone

<sup>117</sup> See *infra* notes 170-73 and accompanying text.

<sup>118</sup> It is interesting to note that the Respondent's Brief in *Leon* did not contend that rubber-stamping was endemic among magistrates.

<sup>119</sup> *Leon*, 104 S. Ct. at 3418 (footnote omitted)(emphasis added).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 3418-19 (footnote omitted). The Court's conclusion on this matter was quoted at some length because the arguments are important and not readily severable.

<sup>123</sup> L. SILBERMAN, *NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY* 25, 29 (1979).



examine the significance of that fact, *e.g.*, the necessity of judicial clarification of legal terms. Moreover, the majority barely acknowledged that it was acting in the face of considerable precedent.<sup>124</sup>

The last quoted section of the opinion is best understood by the language of absolutism which introduced it—the declaration that the Court knows and has been shown “no basis” for believing that the prospect of judicial invalidation of a magistrate’s decision to issue a warrant with the concomitant loss of the evidence seized will have a significant deterrent effect on the issuing magistrate. *With this manipulation of the argumentative burden*, the Court “resolves” a question that could have been as persuasively “resolved” by the following (hypothetical) language:

We know of no facts or reasons, and are shown none, to refute the common sense understanding that magistrates and judges who issue warrants *care whether other judges affirm or invalidate their decisions*, perhaps even more than police officers care about ruling on suppression motions, *since invalidation of a warrant is a negative evaluation by one co-profession of the performance of another, in an environment where other co-professionals are contemporaneously aware of the judgment, and in which the “overruled” judge or magistrate continues his or her activities.*

In other words, contrary to the majority’s sweeping assertions, I suggest that *deterrability* of judicial non-feasance or misfeasance, where virtue cannot always be assumed to be its own reward *might well lie in the meaning of being overruled within the judges’ own personal and professional-adopted value system.*

The majority opinion in *Leon* exemplifies Chancellor Bacon’s words concerning a closed mind: it “neglects,” if not “despises,” some of *Leon*’s arguments, and “by some distinction sets aside and rejects [others], in order that . . . the authority of its former [predetermined] conclusions may remain inviolate.”<sup>125</sup>

The Court’s reference (twice) to the “extreme sanction of exclusion” and to the absence of “lawlessness” among magistrates and judges brought the level of discourse clearly within the ambit of political rhetoric, perhaps just short of the point of inflammatory demagoguery. Indeed a leading scholar has characterized parts of Justice White’s Opinion as apparently embracing “the kind of cock-eyed characterization which previously had been found almost exclusively in the least sophisticated anti-exclusionary diatribes.”<sup>126</sup>

The opinion was peremptory, in the original meaning of the word—“utterly destructive.” It was utterly destructive of the traditional at-

<sup>124</sup> See *supra* notes 89, 92, 93 & 105.

<sup>125</sup> W. BISHIN & C. STONE, *supra* note 1.

<sup>126</sup> LaFave, *supra* note 79, at 905.

tributes of common law and constitutional adjudication, *i.e.*, responsive and at least a minimally rational articulation of justifications for a judicial decision.

Having examined the majority's purported refutation of the contention that the warranting process is embraced by the rationale of the exclusionary rule, it seems appropriate to consider some constitutional and pre-constitutional history.

*B. Historical Background to the Warrant Requirement and Recent Studies on the Warrant Application Process*

1. HISTORICAL BACKGROUND

The fourth amendment was a response to excesses by Crown magistrates in the issuance of warrants.<sup>127</sup> In colonial times British judicial officers outraged the colonists by issuing "Writs of Assistance" that empowered Crown Officers to search and seize in their own complete discretion anyone's home and break and open any door, container or object in the home, where the Officer had the merest suspicion or hunch that some evidence or violation of the customs regulations might possibly be found. Indeed, nothing could prevent maliciously-rooted invasions of the peace, privacy and property interest in one's home. This pernicious judicial practice—the issuance of open-ended licenses to trespass upon and invade, if not destroy, domestic tranquility was, understandably, profoundly resented by the colonists.<sup>128</sup>

James Otis denounced the Writs of Assistance in 1791<sup>129</sup> as "villanies"

<sup>127</sup> N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-78(1970)

<sup>128</sup> See, *e.g.*, J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* (1966); T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969).

<sup>129</sup> The legal historian, Julius J. Marke, tells the story of these outrages, and the colonists' reaction to them. Slightly recast, but intended to capture the magnetic power of Professor Marke's historical tale, here is what happened:

The year: 1761. The place: Boston. The occasion: A legal argument before the Crown's Council Chamber over the use of the despised Writs of Assistance against the colonists' merchant community. The Man of the Hour: James Otis; brilliant scholar, firebrand, patriot. Otis, representing sixty-three merchants challenging the practice of issuing these Writs. The Writs as noted above, were general authorizations to search for and seize unspecified items; and issued without benefit of any sworn testimony, and without "articulable suspicion" that anyone committed or possessed evidence of any particular crime.

As Otis declaimed, (speaking for five hours): any house, shop, cellar, warehouse, or room could be arbitrarily entered, and, if the colonist resisted, breaking open "doors, chests, trunks, and other packages" was permitted. Otis further protested that whether government agents "break through malice, or revenge, no man, no Court can inquire." Mockingly bitter he exclaimed "What a scene does this open! Every man, prompted by revenge, ill-humor, or wantonness to inspect the inside of his neighbor's house may apt a Writ of Assistance . . . ."

that he would defend against to his dying day, and as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book."<sup>130</sup> These Writs, he charged, were weapons "that placed the liberty of every man in the hands of every petty officer."<sup>131</sup> John Adams, who had heard Otis' argument<sup>132</sup> wrote of it fifty years later: "then and there the child Independence was born."<sup>133</sup>

This historical focus on magistrates who abuse their warrant-issuing powers (or who are vested with excessive issuance powers) is reflected in the second clause of the fourth amendment: "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>134</sup>

*This provision speaks to magistrates.* When a magistrate has authorized a search in violation of the mandate of this clause, the citizen will have suffered an invasion of his or her constitutional rights; the commandment, in its original and central meaning, will have been broken.<sup>135</sup>

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Otis was later portrayed by John Adams as a "flame of fire." And the noted legal historian Catherine Bowen pictured him thus: "there was violence in him and magnetism; the room felt it instantly. He was almost frightening; one had the feeling he might do or say something monstrous." J. MARKE, *VIGNETTES OF LEGAL HISTORY* 241-57 (1965).

<sup>130</sup> *Id.* at 256.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 252.

<sup>133</sup> *Id.* at 257.

<sup>134</sup> U.S. CONST. art. IV, cl. 2. Out of the unhappy experience with Writs of Assistance, and General Warrants, used not only during the colonial times but throughout English history to oppress religious liberty and political opposition to tyrannical regimes, came not only the fourth amendment to the Constitution of the United States but very similar, and often identical provisions, in the Constitutions of every state in the union.

For a discussion of the Framers' concern about General Warrants and Writs of Assistance, see Amsterdam, *supra* note 99, at 410. For a general history of the role of these warrants in the early jurisprudence of the fourth amendment see *id.*, J. LANDYNSKI, *supra* note 128, 30-48, and N. LASSON, *supra* note 127, 51-78.

<sup>135</sup> Two interpretations of the fourth amendment have competed for historical and juridical recognition: one version holds that the fourth amendment expresses no preference for warrants, but merely specifies the preconditions for obtaining a warrant. Under that view the "reasonableness" clause is controlling and warrants are required only if and when the dictates of reasonableness demand it. See, e.g., T. TAYLOR, *supra* note 128, at 23-24 (asserting that the Court had "stood the fourth amendment on its head" by finding the warrant clause to predominate.) The other historical view, and the one held (or at least routinely recited) by a majority of Justices is that a warrant *requirement* is the major point of the fourth amendment. See, e.g., N. LASSON, *supra* note 127.

Thus, under the controlling view warrants are presumptively required and searches and seizures are presumed to be per se constitutionally unreasonable unless executed with a warrant and a case must be made for any particular exception wherein it is claimed that a search or seizure without a warrant should be permitted. The number and pervasiveness of the recognized exceptions to the warrant requirement cast no small doubt on the meaningfulness of this often verbalized presumption in favor of warrants.

That the police also have the pernicious capacity to violate the precepts of the fourth amendment is obviously of great contemporary importance, but that fact does not detract from the significance of judicial non-compliance with the fourth amendment, both in the past and in contemporary situations where magisterial powers and dispositions jeopardize our liberties.

This juridical capacity to deny rights granted by the Constitution is indicative of the necessity of understanding the exclusionary rule as pertaining to governmental, not merely to "prosecutorial-law enforcement" illegalities. As Justice Brennan, dissenting in *Leon* observed: "[T]he [Fourth] Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected."<sup>136</sup>

## 2. STUDIES ON THE WARRANT PROCESS

Is the Court correct in asserting that judges and magistrates involved in the warranting process are essentially neutral and detached?<sup>137</sup> That there is nothing to suggest that magistrates are "inclined to ignore or subvert the Fourth Amendment?"<sup>138</sup> Unfortunately, there is evidence that some magistrates are indeed so inclined.<sup>139</sup> Studies of the process of warrant application and issuance have revealed that some magistrates perfunctorily sign warrants for varied reasons and under varied circumstances. Sometimes warrant applications are presented while judges are trying cases or holding hearings on other matters, and the clerk, or even a law enforcement official, hands the judge the papers;<sup>140</sup> some magistrates and judges simply conceive of the task as a "relatively ministerial"

<sup>136</sup> *Leon*, 104 S. Ct. at 3432. Justice Brennan's observation is directed at the action of the court that admits illegally seized evidence. As this Article contends, that observation is no less valid, or significant, regarding magistrates who issue the defective warrants in the first place.

<sup>137</sup> See *supra* notes 104 & 122 and accompanying text.

<sup>138</sup> *Leon*, 104 S. Ct. at 3418.

<sup>139</sup> See *e.g.*, W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 34 (1965); LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 992 (1965); R. VAN DUIZEND, L. SUTTON & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES: AN EXECUTIVE SUMMARY, at 47-48 (1984) [hereinafter cited as THE SEARCH WARRANT PROCESS: SUMMARY]; Spritzer, *Electronic Surveillance by Leave of Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 190-91 (1969); H. SCHWARTZ, TAPS, BUGS, AND FOOLING THE PEOPLE 23 (1977), cited in Kamisar, *supra* note 105, at 570 n.32.

<sup>140</sup> LaFave, *Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Practices*, 30 MO. REV. 391, 412 (1965); THE SEARCH WARRANT PROCESS: SUMMARY, *supra* note 139, at 18-19, 47.

one.<sup>141</sup> In one recent study over 10% of the magistrates surveyed actually asserted the propriety of rubber-stamping prosecutorial requests for warrants.<sup>142</sup> (And, in a post-*Leon* denial of certiorari the Court allowed to stand the affirmance of the judicial issuance of a warrant notwithstanding the magistrate's testimony that he did not even read the application.)<sup>143</sup>

Many magistrates are not attorneys.<sup>144</sup> Magistrates in not insignificant numbers are ideologically predisposed toward law enforcement objectives,<sup>145</sup> sometimes completely abdicating control to the police or prosecutor's<sup>146</sup> office, at times finding it otherwise appropriate to "rely heavily on the prosecutor."<sup>147</sup> Many have served in the law enforcement branch and are more likely to have a "crime control" orientation than a "due process" orientation.<sup>148</sup>

Professor Anthony Amsterdam's perspective, quoted herein, is valuable, although there is at least one challenger.<sup>149</sup>

<sup>141</sup> LaFave & Remington, *supra* note 139, at 994.

<sup>142</sup> THE SEARCH WARRANT PROCESS: PERCEPTIONS, *supra* note 113, at xvi.

<sup>143</sup> *McCommon v. Mississippi*, 106 S. Ct. 393 (1985) (Brennan, J., joined by Marshall, J., dissenting).

<sup>144</sup> See *supra* note 123 and accompanying text.

<sup>145</sup> Professor Anthony Amsterdam painted a picture of the criminal justice system that describes, in no uncertain terms, the harsh and prejudicial realities confronting most persons charged with crime throughout this country. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970).

<sup>146</sup> W. LAFAVE, *supra* note 139, at 34 (a study of magistrates' practices in reviewing arrest warrants found no applications to have been denied). Applications for federal wiretapping warrants have approached a 100% issuance rate. Notwithstanding the strict legal requirements for a wiretapping warrant, at hearings before the "National Wiretap Commission" in 1977,

prosecutor after prosecutor, particularly on the state level, testified that judges rarely exercise any meaningful control. From 1969 through 1976, only 15 applications have been denied, out of 5,563 federal and state applications. . . . One prosecutor told the National Wiretap Commission, "I have not found one judge who takes the time to read an *ex parte* application."

H. SCHWARTZ, *supra* note 139, at 23. See also R. CLARK, *CRIME IN AMERICA* 265-77 (1971).

<sup>147</sup> LaFave & Remington, *supra* note 139, at 994-95.

<sup>148</sup> See generally, H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968); Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

When was the last time a candidate, in an electoral campaign for magistrate or criminal court judge, promised, "I will see that every defendant before me receives every constitutional protection due him!" Far more probable is "Its time to declare war on crime!" or "I'll put criminals behind bars where they belong"(shamefully finessing the promise of our system that before one can be deemed a criminal or put behind bars, he or she must be convicted by methods that fully comport with the safeguards guaranteed by federal and state constitutions).

<sup>149</sup> See Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, *supra* note 104, at 1421-22 n.433 (1977)(the author's experiences and discussions suggest that trial judges come from varied backgrounds and have a variety of perspectives.)

Let there be no mistake about it. To a mind-staggering extent—to an extent that conservatives and liberals alike who are not criminal trial lawyers simply cannot conceive—the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal aspect. . . . Only a few appellate judges can throw off the fetters of their middle-class backgrounds—. . . their attitudes engendered as lawyers before their elevation to the bench, by years of service as prosecutors or as private lawyers for honest, respectable business clients—and identify with the criminal suspect instead of the putative victim of the suspect's theft, mugging or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing the criminals to book.<sup>150</sup>

In a recent and already well-regarded study of the search warrant process,<sup>151</sup> discussed at greater length below, the authors found that “it was the nearly universal perception among police officers, prosecutors, and judges in all of our cities that very few applications are turned down by magistrates. . . .”<sup>152</sup> A dubious (but not blatantly unreasonable) warrant application, presented to a chosen, “right-thinking” magistrate will assure the police and prosecution that they will be issued a weapon “that place[s] the liberty of every man in the hands of every petty officer.”<sup>153</sup>

Why are some magistrates so quick on the stamp, barely supervising the process? Former Yale Law School Dean, Abraham Goldstein, hypothesizes:

The American judge assumes that he is to react to matters presented to him and that if initiatives are to be taken, counsel will take them. . . . Even when only one side is represented, as with warrants . . . the American judge tends in practice to be reactive. He has come to rely on the parties and their counsel to define and develop issues.<sup>154</sup>

The only party before a magistrate on a search warrant application is

<sup>150</sup> Amsterdam, *supra* note 145, at 792.

<sup>151</sup> The study was published in two documents: 1) detailed presentation of the findings, with some analysis, conclusions, recommendations, along with anecdotal material (THE SEARCH WARRANT PROCESS: PERCEPTIONS, *supra* note 113); and 2) a summary of the research (THE SEARCH WARRANT PROCESS: SUMMARY, *supra* note 139).

<sup>152</sup> THE SEARCH WARRANT PROCESS: PERCEPTIONS, *supra* note 113, at 137.

<sup>153</sup> J. MARKE, *supra* note 129, at 256.

<sup>154</sup> Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1024 (1974).

the prosecution, the only facts before the magistrate are the prosecution's facts, and the only arguments the magistrate hears, if any, are the prosecution's arguments.<sup>155</sup>

Magistrates and judges, like other governmental agents having power to affect and deny liberty, cannot be insulated from meaningful review of their actions and remain under law. There are, of course, barriers to applying law to officials at various levels, but they are not insurmountable. The less visibility a wielder of governmental power has, and/or the less impact his unlawful acts have on those who exercise influence in or on the body politic, the greater the need for judicial review of his determinations.

Still another reason why more, not less, attention must be paid to the work of magistrates is the sheer and inexorable "busy-ness" of most urban magistrates.<sup>156</sup>

A recent major study (conducted by the National Center for State Courts) of the process of warrant application review finds that attitudes and practices of magistrates vary considerably. This examination of the warrant process as it operated in several cities of representative significance is rich in empirical data, interviews of magistrates, judges, police and attorneys, and colorful and revealing anecdotal material.<sup>157</sup>

What does this empirical undertaking tell us about judicial compliance with the constitutional criteria for issuing warrants, and what implications does it have for the arguments regarding the wisdom or necessity of applying the exclusionary rule to invalid "with-warrant" searches?

The National Center study found that while many magistrates and judges are neutral and detached,<sup>158</sup> seeing themselves and their values as differing from police and prosecutorial attitudes,<sup>159</sup> "some [were] not."<sup>160</sup> Not only do attitudes differ among magistrates but an individual mag-

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<sup>155</sup> Dean Goldstein's observations about the susceptibility of magistrates to the perspective of the single party before them becomes even more significant when one learns that over 10,000 magistrates in 59 court-systems in 39 states who possess power to issue search warrants are not even attorneys. See *supra* note 123. Such non-attorney judges and magistrates are even more likely to defer to the views of law-enforcement personnel presenting warrant applications for "review" and signature, and in any event, as the Supreme Court in *Gates* recognized, are quite unlikely to appreciate the dictates of the legal framework within which their factual determinations are to be made (such magistrates "certainly do not remain abreast of each judicial refinement of the nature of 'probable cause'." *Gates*, 462 U.S. at 235).

<sup>156</sup> See THE SEARCH WARRANT PROCESS: PERCEPTIONS, *supra* note 151, at 31, where the authors found that the median time spent on reviewing search warrant applications is two minutes and twelve seconds, 10% of such applications having been reviewed in one minute or less.

<sup>157</sup> THE SEARCH WARRANT PROCESS: PERCEPTIONS, *supra* note 151.

<sup>158</sup> THE SEARCH WARRANT PROCESS: SUMMARY, *supra* note 151, at 43-44.

<sup>159</sup> THE SEARCH WARRANT PROCESS: PERCEPTIONS, *supra* note 151, at 64.

<sup>160</sup> THE SEARCH WARRANT PROCESS: SUMMARY, *supra* note 151, at 43.

istrate's detachment might vary depending on the crime and circumstance.<sup>161</sup>

Some of the findings tend to cast doubt on the idea of judicial neutrality and detachment. For example, warrant applications (which are employed in a relatively small percentage of cases)<sup>162</sup> were rejected in only 8% of the cases filed<sup>163</sup> and the average time spent by judges and magistrates reviewing warrant applications was two minutes and forty-eight seconds.<sup>164</sup>

The researchers found that magistrate-shopping is indeed practiced by search-warrant applicants.<sup>165</sup> "The extent of the problem varies, but when the procedures used in a city permit selection of the magistrate who will review a warrant, judge-shopping occurs."<sup>166</sup>

Accepting for a moment the regulatory efficacy of the exclusionary rule as its sole constitutional justification, what bearing does this study have on that question?

An 8% rate of denials of warrant applications might well indicate virtual collusion between magistrates and police. It might, on the other hand, indicate that warrant applications are carefully prepared and subjected to internal police and/or prosecutorial scrutiny before presentation to a magistrate.<sup>167</sup> The short average time magistrates devote to reviewing warrant applications does not mean rubber stamps are always used, or even that they are always used by any particular judge. They well may be. But it would be more meaningful to know something about how much time is needed for adequate review of a warrant-application; whether applications for warrants in certain types of cases deserve greater time and whether greater time is given in such cases.

While the statistics inspire considerably less than complete confidence in the fidelity of our magistrates to their constitutional commitments, the relevant question, (again accepting for argument's sake, deterrence as

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<sup>161</sup> *Id.* at 43-44.

<sup>162</sup> *Id.* at 43.

<sup>163</sup> *Id.* "Based on our observations and interviews, the rate of outright rejection is extremely low. Most of our police interviewees could not remember having a search warrant application turned down. The estimates by our judicial interviewees varied on the number of rejections from almost never to about half. Of the 84 warrant proceedings observed, 7 resulted in denial of the application (8 percent)." *THE SEARCH WARRANT PROCESS: PERCEPTIONS* *supra* note 151, at 32.

<sup>164</sup> *Id.* at 31. 10% of reviews took less than one minute; 65% of reviews took 2.5 minutes or less; 90% of reviews, less than 5 minutes. *Id.*

<sup>165</sup> *THE SEARCH WARRANT PROCESS: SUMMARY*, *supra* note 151, at 44.

<sup>166</sup> *Id.*

<sup>167</sup> *THE SEARCH WARRANT PROCESS: PERCEPTIONS*, *supra* note 151, at 22-25. 97.7% of applicants for search warrants fell within the category of police agencies, rather than prosecutorial or other agencies. *Id.* at 26. Yet, prosecuting attorneys directly participated in a substantial number of cases, reviewing police drafts and at times actually drafting the affidavits.



the central purpose of the exclusionary rule) is whether the rule makes a difference. Changes in other variables have made a comparison of pre-*Mapp* with post-*Mapp* rates of denial of warrant applications an unprofitable avenue of research.<sup>168</sup> Moreover, even today, records are rarely kept of rejected applications.<sup>169</sup> (I shall argue, more relevant than a consequentialism that focuses on the question whether there should be an exclusionary rule, would be an effort to comprehend the effect, both instrumental and symbolic, of a decision that the existing rule in the warrant situation shall in effect be repealed.)

What is to be made of the facts that a) suppression motions are made far less frequently when defense attorneys are confronted with the fruits of a search *with a warrant* than where evidence obtained *without a warrant* is offered<sup>170</sup> and b) motions to suppress the former were granted in only 5% of the cases filed.<sup>171</sup> Might the last-mentioned figure indicate that warrant-issuing magistrates were employing not rubber-stamps but legitimate seals of authentication and authorization?

Or does it mean that judges who rule on suppression motions are strongly predisposed to uphold searches where (and because) the police took the trouble to resort to the warrant process? Or perhaps, membership in the judicial fraternity has something to do with it.<sup>172</sup> Certainly the attitude of judges who pass on suppression-motions is an important element of a complete analysis of the efficacy of the exclusionary rule, since it is through the action of those judges that the rule's regulatory impact on magisterial motivations might be realized.<sup>173</sup>

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<sup>168</sup> Former New York City Police Commissioner Michael Murphy, writing about the impact of *Mapp* on practices of the Police Department of the City of New York recalled: "Before [*Mapp*], nobody bothered to take out search warrants. [Before *Mapp*] the U.S. Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?" N. Y. Times, April 28, 1965, at 50. See also Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939 (1966).

<sup>169</sup> THE SEARCH WARRANT PROCESS: SUMMARY, *supra* note 151, at 56.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* The 17 motions granted in warrant-related cases represented 12% of all cases in which such motions were filed. *Id.*

<sup>172</sup> Trial judges may not have the same degree of detachment and disinterestness regarding fellow trial judges as appellate judges have come to have regarding judges performing different functions at a lower level of the judicial system.

<sup>173</sup> My focus has been on the magistrate or judge reviewing warrant-applications. *Leon* may make the decision to issue a warrant review-proof (where the exceptions to the new exception do not apply). The decisions of a judge reviewing a motion to exclude evidence, on the other hand, are subject to an appellate review process. This process is, of course, rendered less meaningful, to the extent a) the trial court's decision rests on factual determinations (see generally A. DERSHOWITZ, *THE BEST DEFENSE* (1982)); and b) the legal criteria are vague and/or substantively broad, such as the criteria set down in *Gates*, for determining probable cause. Moreover, even greater deference is given the trial judge who

Whether or not rubber-stamping is endemic; whether or not it can correctly be said that the search warrant process is effectively in the hands of law-enforcement authorities, it cannot be denied, by one familiar with the research,<sup>174</sup> that there is at least a strong disposition on the part of many magistrates to give agents of law enforcement the authorization they request for finding proof of crime. The *Leon* majority's denial of this fact was further evidence of willful deafness.

The majority's implicit denial of Leon's claim that repeal of the rule will make it more likely that magistrates will succumb to law enforcement pressures is aggravated by an assertion that either reflects and/or assumes a state of naivety disturbing in its implications: "Limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications. We doubt that magistrates are more desirous of avoiding the exclusion of evidence obtained pursuant to warrants they have issued than of avoiding invasions of privacy."<sup>175</sup>

Given these observations, a crime control advocate might contend: "However you read the practices of magistrates, the exclusionary rule is a bad bargain. If magistrates do indeed promiscuously satisfy police desires, the rule is not working. What's the point of keeping it? And, if magistrates do indeed respect privacy, the rule is unnecessary. Add the fact that a not insignificant number of felons who escape conviction because of the rule are charged with violent crimes<sup>176</sup> and it is quite clear that the Rule is doing more harm than good." This view, and the quite different majority view both try to have their cake and eat it too.

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upholds a warrant as being supported by probable cause (see *Gates*, 462 U.S. at 235-36) than is given a trial court on most issues of appellate review.

It is interesting that Justice Brennan, in contending that judges are within the meaning of the exclusionary rule, referred only to judges who rule on suppression motions. Yet, it is the *issuance* of a warrant that principally concerns the fourth amendment.

<sup>174</sup> See *supra* notes 108-15 & 137-67 and accompanying text.

<sup>175</sup> *Leon*, 104 S. Ct. at 3419 n.18. Is the Court so out of touch as the quotation suggests? Perhaps some strategic end is served by affirming the virtues of fellow judges, albeit, lowly and unsung magistrates. The Late Professor Fred Rodell of Yale Law School might have been more to the point: "spinach!" *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 45 (1936) (in which the iconoclastic professor found just two things wrong with legal writing: the style and the content). The real motive for law review articles, Rodell asserted, was not a desire to illuminate legal issues but a desire to get better jobs for law students and raises for law professors. Declaring that law journals were "spinach" he announced that he would have nothing more to do with them. *Id.* By and large he kept that promise although he was occasionally lured back to write short pieces, usually tributes to lawyers and judges. In Professor Charles Alan Wright's recent memorial tribute to Professor Rodell, he included a bibliography which lists 95 works published by Rodell, exclusive of book reviews, only 20 of which were in law reviews. *Goodbye to Fred Rodell*, 89 YALE L. J. 1455, 1462-64 (1980).

<sup>176</sup> Twenty-one percent of the cases in which search warrants were sought involved crimes of violence, a greater percentage than previously thought. THE SEARCH WARRANT PROCESS: SUMMARY, *supra* note 151, at 43.

### C. Conclusion

The degree of result orientation in the majority opinion is manifest: the favored result being trivialization of the value of the exclusionary rule, consistent with its idealized view of magistrates and small-court judges. The majority might have asserted that magistrates are not influenced by the exclusionary rule so whether they rubber stamp or not makes no difference. The majority could have acknowledged substantial rubber-stamping and said that to the extent that such rubber-stamping exists the exclusionary rule is obviously ineffective and thus cannot justify the great social costs of lost convictions. Instead, the majority denied what everybody knows—that rubber stamping is a real and at least moderately serious phenomenon, and asserted *not only that magistrates obey the Constitution but that they do so uninfluenced by the existence of the exclusionary rule.*

Although there is considerable disagreement about the extent of magistrate shopping and rubber-stamping, as has been shown, the latest major study found that there are many magistrates who do *not* rubber-stamp. It is foolish to assert without proof that the fate of the warrant, the fate of the evidence, the fate of the prosecution, or the fate of the magistrates' reputations have nothing to do with the motivations of magistrates who *are* faithful to their constitutional commitments. And if, as appears to be the case, there are troublesome levels of rubber-stamping, is it not quite possible that the exclusionary rule has failed to have influence because of excessive leniency by reviewing trial judges, particularly in adjudicating factual disputes, and excessive deference to trial judges by appellate courts, on questions of probable cause (a deference that the Supreme Court has enhanced)<sup>177</sup> as well as factual determinations?

In any event, no consideration was given to the likely impact of the *Leon* doctrine on existing levels of compliance. Might not even magistrates concerned about privacy rights of citizens take a new cue from the Supreme Court's message of minimalization of the significance of privacy rights in our society? The elimination of one motive for magistrate compliance might have a deleterious effect, not only upon its own inhibitory force, but upon the inhibitory force of other related motives.

And the very existence of the exclusionary rule surely conveys something about the significance of the search warrant process:

[W]hile we do not assume that United States magistrates or state officials authorized to issue search warrants are necessarily prone to act as the "rubber stamp[s] for the police" condemned in *Aguilar v. Texas . . .*, the exclusionary rule's effect of making them

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<sup>177</sup> See *Illinois v. Gates*, 462 U.S. 213 (1983).

*aware that the decision to issue a search warrant is a matter of importance not only in regards to the constitutional rights of the person to be searched, but also with regard to the success of any subsequent criminal prosecution, may well induce them to give search warrant applications the scrutiny which a proper regard for the fourth amendment requires.*<sup>178</sup>

While the exclusionary rule's operational impact on motivation for compliance with the Constitution may function differently in the case of judges and magistrates than it does in the case of police, the pre-trial suppression hearing is the only institutional check on the magistrate's decision—the only review the decision to issue a warrant is likely ever to undergo. Providing the occasion to review warrants is a major function the Warrant Clause serves.<sup>179</sup> Indeed, as recently as 1983 in *Illinois v. Gates*,<sup>180</sup> the Supreme Court spoke of the importance of courts continuing "to conscientiously review the sufficiency of the affidavits on which warrants are issued to assure that magistrates do not abdicate their duties."<sup>181</sup>

One should not be surprised to find, in view of the *Leon* decision's removal of almost any reason for a magistrate to be concerned about admissibility of evidence seized under his or her authorization (*i.e.* warrant), an increase in the number of defective warrants, (albeit by an unknowable figure)<sup>182</sup> issued particularly by magistrates formerly inhibited by concern for facilitating convictions.

One would also not be surprised to learn that the increased prospect of lackadaisical review of warrant applications eventually reduces or eliminates careful preparation and the use of screening systems by law enforcement agencies prior to presenting search warrant applications to magistrates, a practice now generally followed (albeit at varying levels of thoroughness).

Professor Mertens and Wasserstrom, commenting shortly before the *Leon* decision on the absence of recent appellate decisions in the District of Columbia invalidating search warrants, inferred:

The reason surely is an effective system for the issuance of warrants that can, in no small measure, be attributed to the exclusionary rule. The magistrate is surely more careful because

<sup>178</sup> *United States v. Karathanos*, 531 F.2d 26, 33 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976)(emphasis added).

<sup>179</sup> *See United States v. Christine*, 687 F.2d 749, 756-57 (3rd Cir. 1982). *See also*, White, *supra* note 78, 1282 n.32.

<sup>180</sup> *Gates*, 462 U.S. 213.

<sup>181</sup> *Id.* at 239 (emphasis added).

<sup>182</sup> *Cf. Leon*, 103 S. Ct. at 3413 n.6, where Justice White, in assessing the costs of the exclusionary rule, asserted that it was not the percentage, but the absolute number of lost convictions that was significant.

he knows that his probable cause determinations may be reviewed on a motion to suppress. . . . The police, moreover, have less incentive to engage in "magistrate-shopping" in an effort to present their warrant applications to the most lenient magistrate available.

It would be particularly wrong-headed to repeal the exclusionary rule in this area. . . . It appears that the exclusionary rule, and its actual cost in lost evidence is the main stream of an effective warrant requirement.<sup>183</sup>

Finally, a particularly significant negative consequence likely to flow from *Leon* is the subversion of "any efforts to reform the deficiencies in the warranting process" [including educating or re-educating the possessors of those unsavory stamps, encouraging more stringent prosecutorial review prior to applications and "rectification of the problem of judge-shopping"]<sup>184</sup>

## V. MASKING AGGRESSIVENESS WITH COST-BENEFIT ANALYSIS

### A. Introduction

A "high" point of the Court's "aggressive" majoritarianism was its resort to a so-called cost-benefit analysis as the tool for resolution of the profound controversy over constitutional meaning. For here the Court revealed in its tone, temper, technique, and willful deafness to counter-arguments, its pre-occupation with laying down the law in the service of crime-busting, a value nowhere assigned to the Court or otherwise enshrined in our Constitution.

Taking at its starting point the very dubious premise that the meaning and measure of the exclusionary rule is limited to its deterrent efficacy,<sup>185</sup> the Court asked, in effect, the rhetorical question: Can it be

<sup>183</sup> Mertens & Wasserstrom, *supra* note 92, at 365, 342, 456-57.

<sup>184</sup> THE SEARCH WARRANT PROCESS: SUMMARY, *supra* note 151, at 56 (emphasis added). The authors claim that several solutions are "practically and logistically possible." They suggest monitoring of judicial caseloads by a single administrative judge, assigning the task of warrant review to a single judge for protracted periods, and, where telephonic applications for warrants are authorized, using an equitable, even random system of assignments. *Id.*

<sup>185</sup> See *Kamisar*, *supra* note 105, at 598-600. Neither *Weeks v. U.S.*, 232 U.S. 383 (1914), nor any Supreme Court opinion for the next thirty-five years suggested that the exclusionary rule was in any way rooted in or justified by its efficacy as a deterrent of invalid searches and seizures. See *Kamisar*, *supra* note 60, at 610; *Kamisar*, *How We Got the Fourth Amendment Exclusionary Rule and Why We Need It*, 1 CRIMINAL JUSTICE ETHICS 4, 8 (1982).

As Professor Tribe observes "[t]he exclusion of illegally seized evidence was instead deemed compelled by a direct constitutional command thought by the *Weeks* Court to be implicit in the fourth amendment itself: that courts not enter judgments of conviction based upon government action that violated a defendant's right to be 'secure' from 'unreasonable

proven that the grave social evil of letting criminals like Mr. Leon and Mr. Sheppard go unpunished is paying off, in terms of preventing reasonable police officers from searching with technically defective warrants. By presenting the issue in such a manner, the Court committed multiple sins:

1) It imposed the burden of proof on the proponents of a constitutional value, thereby favoring the proponents of a lesser, state interest.

2) It required proof of unascertainable factors—the incidence of non-events, and the exclusionary rule's responsibility for such non-events,<sup>186</sup> thereby determining the outcome prior to any purported analysis.

(There is no way to determine that the rule works or that it does not work . . . or even that it works 35% of the time or 68% or whatever. . . . Those who want rigorous proof must be disappointed, unless, of course, they have assigned the burden of proof to their opponents. Then they will be delighted.)<sup>187</sup>

3) It trivialized, indeed virtually ignored, the importance of the constitutional protection against unreasonable searches and seizures including searches and seizures conducted without warrants issued in compliance with explicit constitutional requirements.

4) It exaggerated the costs of the exclusionary rule<sup>188</sup> thus exaggerating the costs of compliance with the fourth amendment itself. (Recent writings have shown that opposition to the exclusionary rule is often simply opposition to the strictures imposed by the fourth amendment

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searches and seizures.” *Constitutional Calculus: Equal Justice or Economic Efficiency?* 98 HARV. L. REV. 592, 607-08 (1985).

Notwithstanding these observations, my critique of the *Leon* opinion does not turn on the validity or invalidity of the Court's selection of “deterrence” as the exclusive rationale for the exclusionary rule.

<sup>186</sup> It is a commonplace insight that issues are often decided by virtue of allocations of burdens of proof. The “assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative.” Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L. J. 329, 332-33 (1973). Perhaps the most familiar example of controversy involving, *inter alia* burdens of proof, is the debate over capital punishment. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 347-54 (1972)(Marshall, J., concurring).

It is also well-understood that one who bears (or is made to bear) the burden of proving a negative, is at a serious disadvantage. “It is never easy to prove a negative.” *Elkins v. United States*, 364 U.S. 206, 218 (1960). This is particularly the case where proof is demanded of the causal relation between a threatened sanction and the incidence of non-occurrences of prohibited events. See *Furman*, 408 U.S. 238; see also materials cited in Kamisar, *supra* note 105, at 612 n.369.

<sup>187</sup> Canon, *Ideal and Ideology in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L. J. 559, 572 (1982).

<sup>188</sup> See discussion in LaFave, *supra* note 79, at 903-04.

itself.<sup>189</sup> Indeed, much unsophisticated rhetoric does just that. The exclusionary rule is not what restricts police behavior; the substantive prohibitions of the fourth amendment restrict police behavior. It is ultimately the Court's interpretation of the fourth amendment that dictates whether or not a criminal will go free. For it is compliance with the fourth amendment, either through official fidelity to law or by virtue of any system (exclusionary rule or hypothetically effective statutory tort remedy; police review board with disciplinary authority; public prosecutor) that translates constitutional language into an operational reality which keeps evidence of guilt out of prohibited governmental reach.<sup>190</sup>

5) It obscured the Court's subjective rejection of the transcending and non-quantifiable values protected by the fourth amendment behind the seductive contemporary terminology of engineers and planners, convey-

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<sup>189</sup> Compare Stewart, *supra* note 93, at 1393, with Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?* 62 JUDICATURE 215 (1978).

<sup>190</sup> As (the late) Justice Stewart wrote:

Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place. . . . [That] is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, home, and property against unrestrained governmental power.

Stewart, *supra* note 93, 1392-93.

Notwithstanding these insights, it does not follow, as some have suggested (*e.g.*, LaFave, *supra* note 79, at 905-10), that *Leon* in finding the costs of the exclusionary rule too high was necessarily finding the fourth amendment to be an excessive burden on society. For, accepting for the moment the propriety of a cost-benefit approach, the net costs when the exclusionary rule is invoked exceeds the net cost (or net benefit) when there is compliance with the fourth amendment itself. Where evidence is "lost" (never obtained) because of compliance with the fourth amendment there is the benefit of preserved privacy. No home has been wrongfully invaded, no constitutional liberty has been wrongfully violated. This cannot be said where a criminal defendant invokes the exclusionary rule. His personal, or residential privacy has been wrongfully invaded, his freedom of movement has been wrongfully arrested. That wrong cannot be undone. (*See* LaFave, *supra* note 79, at 905-06.) The "benefit" of the fourth amendment's strictures against unreasonable searches and seizures cannot be extended to the police victim. So, finding the net costs of the exclusionary rule unacceptable does not logically, or necessarily mean one must find the cost of obedience to the fourth amendment unacceptable. Would those who see an attack on the exclusionary rule as necessarily an attack on the fourth amendment demand an exclusionary rule in a hypothetical society where fidelity to constitution produced voluntary compliance on 90% of occasions of temptation but adoption of the rule would produce 95% compliance?

Notwithstanding these theoretical observations one cannot read the *Leon* opinion as a product of the same civilization that produced the fourth amendment to the Constitution of the United States. The condemnation of "lost convictions" is global. The message is "lost convictions are intolerable," not "lost convictions are the price we must pay for the enjoyment of our precious liberties, but are too high a price where such benefits, present or future are unprovable." *See infra* text accompanying notes 117-27.

ing a specious exactitude alien to authentic constitutional adjudication.<sup>191</sup>

6) In purporting to weigh negative value against positive value it unjustifiably presumed the existence of some common unit of measure, (e.g. one unconvicted criminal = one uncommitted constitutional violation).<sup>192</sup>

7) Even within its own framework of calculus and consequentialism, it manipulated, distorted and miscalculated the "data" it had before it. For example, in weighing the costs of the exclusionary rule, the Court did not focus, as logic required, on the "particular costs which would be alleviated by the change the Court works in the exclusionary rule."<sup>193</sup>

The majority examined evidence that a certain number of convictions were lost because of exclusion, or because of a prosecutor's dismissal of a case because he or she believed that evidence was illegally acquired. Although the question in *Leon* was whether an exception should be made for reasonable police behavior in seeking and executing a warrant, the "costs" cited by the Court speak not of convictions lost because of good-faith police searches with invalid warrants, but of aggregate convictions lost because of fourth amendment violations of an undifferentiated nature.

Justice White failed to demonstrate how many, if any, convictions were lost because of searches undertaken with defective warrants, or in how many such cases the defects in the warranting process were so obvious that a reasonably well-trained police officer should have noted the flaw, or in how many cases the evidence was tainted because the magistrate abandoned his obligation of neutrality and detachment, or how many convictions were lost because of police or prosecutorial wrongdoing in the preparation of the warrant application.

<sup>191</sup> "... [T]he language of deterrence and of cost/benefit analysis, if used indiscriminately, can have a narcotic effect. It creates an illusion of technical precision and ineluctability." *Leon*, 104 S. Ct. at 3430 (Brennan, J., dissenting).

For all its ostensible deployment of the paraphernalia of the sciences and the method of empiricism, the Court neither proved nor discovered anything about the exclusionary rule. Cf. Cohen, *Restriction of Research with Recombinant DNA: The Dangers of Inquiry and the Burden of Proof*, 51 S. CAL. L. REV. 1081, 1088 (1978) ("Whatever may be suggested by a question, or implied by the terms used in it, or inferred by the hearer from the attitude of the person doing the asking, the interrogative does not express any proposition whatever. It cannot, therefore, be true or false." *Id.*)

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If one must "balance" the "competing interests," how does one do so without measuring imponderables and comparing incommensurables? How does one balance "privacy" or "individual liberty" against the interest in suppressing crime, or "law and order"? Since "privacy" or "individual liberty" and "efficiency" in suppressing crime are different kinds of interests, how can that be compared quantitatively unless the court has "some standard independent of both to which they can be referred"?

Kamisar, *supra* note 60, at 613 (footnote omitted).

<sup>193</sup> LaFave, *supra* note 79, at 904.



Moreover, in assessing the costs of the exclusionary rule Justice White failed to indicate how many of the criminal charges that failed because of the exclusionary rule were replaced by other criminal charges that did lead to convictions. Nor was there any indication of how many and to what extent any of the original charges were overcharges.<sup>194</sup>

8) It gave no consideration to the "costs" it might be imposing by its own decision and decisional processes—*i.e.*, the costs of cost-benefit analysis; the costs of partial repeal of the exclusionary rule, and the costs of the message it was conveying about its own evaluation of fourth amendment values.<sup>195</sup>

The above points do not assert that constitutional values are absolute. They do not claim that weighing state interests against claimed constitutional values is always inappropriate, and they are not meant to suggest that claimed constitutional rights necessarily have a deontological immunity from consequentialist interpretation.

Justice Brennan description of the majority's cost-benefit approach eloquently describes its reckless disdain for the intelligence of its audience and its aggressive disregard of its obligation to reason:

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<sup>194</sup> The Court's understatement of the benefits of the exclusionary rule in the present context is explored at length, *supra*, in the discussion of the exclusionary rule's impact on the behavior of magistrates. The Court's understatement of the impact of the exclusionary rule on police behavior, particularly through its systemic deterrent effect was pointed out by Justice Brennan in dissent:

. . . [T]he chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally . . . It is only through such an institution-wide mechanism that information concerning Fourth Amendment standards can be effectively communicated to rank and file officers.

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual police officers have acted on the basis of a reasonable but mistaken belief that the conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements.

*Leon*, 104 S. Ct. at 3443-44.

Justice White does not directly respond to this point; he does say that "even assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the fourth amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 3419.

Does not this approach transform the law itself? After *Leon* hasn't the law been effectively transformed into a reasonable approximation of the law declared by fourth amendment? Law enforcement officials, once guided by the principles of the fourth amendment are now to strive for an objectively reasonable approximation of constitutionally tolerable behavior.

<sup>195</sup> See discussion *infra* at notes 117-21 and accompanying text.

[T]he Court's opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data . . . it is clear that we have not been treated to an honest evaluation of the merits of the exclusionary rule, but instead have been drawn into a curious world where the "costs" of excluding illegally obtained evidence loom to exaggerated heights and where the "benefits" of such exclusion are made to disappear with a mere wave of the hand.<sup>196</sup>

### B. *Judicial Aggressiveness and Cost-Benefit Analysis*

The Court's "aggressiveness," in terms of non-responsive, peremptory non-reasoned rejection of disfavored arguments is well illustrated in its cost-benefit treatment of a particular asserted benefit of the exclusionary rule—the systematic deterrence of invalid enforcement activity:

One could argue that applying the exclusionary rule in cases where the police failed to demonstrate probable cause in the warrant application deters future inadequate presentations or 'magistrate shopping' and thus promotes the ends of the fourth amendment. Suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause also might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. We find such arguments speculative . . .<sup>197</sup>

Such arguments are no less "speculative" than the Court's implicit counter-assertion that police would not bother to glance at the face of a warrant were the Court to hold that evidence obtained with a warrant obviously defective on its face must be excluded from the proof of guilt.<sup>198</sup>

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<sup>196</sup> *Leon*, 104 S. Ct. at 3430, 3437 (Brennan, J., dissenting).

<sup>197</sup> *Id.* at 3419. Is it not something of a paradox that the Court rejected the case for the exclusionary rule's (unmeasurable) deterrence of police wrongdoing by weighing that "speculative" benefit against the importance of enforcement of the criminal law whose principal objective is (unmeasurable) deterrence?

<sup>198</sup> The Court seems to be asserting that the demands of reasonableness do not include a requirement that the warrant-executing officer even glance at the document he relies on as a license to invade residential privacy. In the ordinary case, an officer cannot be expected to question the magistrate's judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id.* at 3420 (quoting *Stone v. Powell*, 428 U.S. 465, 498 (1976)(Burger, C.J., concurring)).

Here the majority has responded to an argument that was not made and ignored the argument that was made. It was not argued that the officers in *Sheppard* were obliged to second-guess the warrant-issuing judge on a question of law. The argument, not answered by the majority is that the officers could easily have determined the presence of facts that

Professor Stone's insight probably captures the essence of the travesty of *Leon's* cost-benefit approach to constitutional adjudication: "It is a masquerade by which the Court insinuates its undisclosed and unexamined value judgments into the Constitution."<sup>199</sup>

In the final analysis, the cost-benefit analysis was the least responsive, and thus most irresponsible aspect of the *Leon* opinion. By claiming to be compelled by the ineluctable logic of a pre-existing formula, the Court evaded responsibility<sup>200</sup> for the complex, principled, learned, act of responsive judgment its office and its craft has historically demanded of it:

The language of "workability" and social planning obscures or denies the responsibility of the individual judge for the decision he or she is making in the case, by giving it a false scientific form; this, in turn, denies all of us the benefits of a judicial process in which judges acknowledge their ultimate responsibility for their decision, which they are obliged to justify in their opinions, and for which it is their duty to educate their minds by the experience of argument and thought.<sup>201</sup>

Whether a cost-benefit approach is ever appropriate when constitutional<sup>202</sup> or moral values are at stake,<sup>203</sup> the *Leon* majority's use of it as a din to drown the voice demanding reasoned adjudication was willful deafness in the service of aggressive majoritarianism.

## VI. IDEOLOGICAL AND BEHAVIORAL IMPACT OF THE DECISION

In his brief *Leon* argued that "repealing the exclusionary rule" would, because of the popular confusion of the rule with the fourth amendment itself, be taken, in the words of the late Justice Potter Stewart as an indication of our "weakening of our resolve to enforce the dictates of the

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invalidated the warrant—i.e., the erroneous designation of drugs, as the object of the search.

<sup>199</sup> Stone, *supra* note 3, at 29.

<sup>200</sup> The Court "abdicate[d] responsibility for the difficult choices . . . adjudication inevitably entails." Tribe, *supra* note 185, at 597.

<sup>201</sup> White, *supra* note 78, at 1282-83.

<sup>202</sup> See Tribe, *supra* note 185.

<sup>203</sup> It is a matter of debate whether moral and ethical values (i.e. constitutional values) other than of a consequentialist nature can be meaningfully factored into a cost-benefit calculus for solving ethical issues or issues of applied constitutional jurisprudence. See, e.g., Kelman *Cost-Benefit Analysis: An Ethical Critique*, 5 REG. 33 (Jan.-Feb 1981)(questioning whether it is possible to price the unpriceable); Shaw & Wolfe, *Legal and Ethical Critique of Using Cost-Benefit Analysis in Public Law* 19 HOUS. L. REV. 899 (1982). *But see*, De Long, *Defending Cost-Benefit Analysis—Replies to Professor Kelman*, 5 REG. 39-42 (March-April 1981). See, however, Kelman, *Letter to the Editor*, 5 REG. 2, 3 (May-June 1981).

fourth amendment."<sup>204</sup> Indeed, Justice White has recognized the relationship between application of the exclusionary rule and application of the fourth amendment itself.<sup>205</sup>

Notwithstanding the Court's explicit denial of an intention "to signal [its] . . . unwillingness strictly to enforce the requirements of the fourth amendment"<sup>206</sup> and its asserted belief that the new exception "will [not] have this effect,"<sup>207</sup> I submit that almost everything about this case belies those disclaimers. As Justice Stevens forcefully argued, there could hardly be a case less appropriate for Supreme Court review, under traditional standards guiding the Court's discretion to grant review.<sup>208</sup> Furthermore, as Justice Stevens noted, the Court "seem[ed] determined to decide this case on the broadest possible grounds,"<sup>209</sup> "utterly at odds with the Court's traditional practice as well as any principled notion of judicial restraint."<sup>210</sup>

As Professor LaFave has pointed out, "by totally ignoring the likelihood that in *Leon* and many similar cases the warrant would now be upheld by relying on *Gates*, the Court created the erroneous impression that suppression of evidence obtained pursuant to a warrant is a contemporary problem of serious proportions."<sup>211</sup>

Professor LaFave suggests that the *Leon* opinion will have deleterious consequences beyond its holding:

[A]dopting and applying this new good-faith exception in cases like *Leon* and *Sheppard* creates a false sense that the exception produces sensible results in cases which otherwise would have been resolved in the defendant's favor by applying strict, unbending, and unrealistic fourth amendment doctrine. That is, a good-faith exception is bound to look palatable when applied to make evidence admissible in circumstances where that evidence was not acquired in violation of the fourth amendment in the first place!<sup>212</sup>

*The probable consequences disregarded by the Court include the inculcation of the idea that rights assured by the fourth amendment are of little actual significance.* This probability is, I submit, created through several

<sup>204</sup> Stewart, *supra* note 93, at 1386, cited in the Brief for Respondent at 54.

<sup>205</sup> *Gates*, 462 U.S. at 249 n.4. (White, J., concurring).

<sup>206</sup> *Leon*, 104 S. Ct. at 3422. In view of all else in the opinion this disclaimer calls to mind Lord Bryon's lady who, "whispering 'I will ne'er consent'—consented." *Don Juan*, canto I, st. 117 (1818).

<sup>207</sup> 104 S. Ct. at 3422.

<sup>208</sup> 104 S. Ct. at 3446-53.

<sup>209</sup> 104 S. Ct. at 3448.

<sup>210</sup> LaFave, *supra* note 79, at 912.

<sup>211</sup> *Id.* at 912.

<sup>212</sup> *Id.*

mechanisms implicit in the opinion. First, the *Leon* opinion is in a not insubstantial sense comparable to both the decriminalization of conduct (constitutionalization of forbidden government conduct) and the creation of a new defense to criminal (unconstitutional) conduct. Before *Leon* an illegal search and seizure could not produce evidence usable in a prosecution's case-in-chief against the target of the search, (whether it was a police officer or a magistrate that transgressed the precepts of the fourth amendment). While there is room for argument whether the decriminalization of behavior widely thought to be immoral will be taken as indicative of legislative endorsement of such conduct, and whether creating a new defense of justification or excuse will undermine deterrence of non-justified, non-excused violations, *Leon* may well have those effects, particularly since the thrust of the *Leon* opinion has had considerable public currency; and the tendency to confuse exclusionary rule decisions with substantive fourth amendment interpretation is unmistakable.<sup>213</sup>

Just a few years ago considerable debate raged in legal, philosophical and political circles over the decriminalization of certain behaviors, regarded by the majority as immoral, but having little secular impact beyond the actor's self (e.g., certain sexual relationships between consenting adults, use of "recreational" drugs).<sup>214</sup> One of the arguments made by those opposing decriminalization was that the removal of criminal penalties would be understood as legislative legitimation, if not indeed endorsement, of the once forbidden behavior.<sup>215</sup> The least that can be said is that repeal of a prohibition will leave the perceived moral status of the conduct different from what it would have been had there been no prohibition in the first place. Rupert Cross, in his paper, "Unmaking Criminal Laws" put it this way: whenever the repeal of a criminal law is mooted, it is proper to ask a number of questions, which he lists as follows:

Would the repeal of the relevant law lead to an increase in the

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<sup>213</sup> See *supra* notes 189-90 & 205 and accompanying text.

<sup>214</sup> Compare H.L.A. HART, LAW, LIBERTY AND MORALITY (1963) with P. DEVLIN, THE ENFORCEMENT OF MORALS (1968).

<sup>215</sup> Cf. Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L. J. 987, 1017 (1940):

The reprobative theory will explain why it is difficult to repeal statutes where no one believes that the punishment will have any reformatory effect on the offender or any deterrent effect on others and consequent diminution in the number of offenses. An example of this is the law against suicide. There are also statutes such as those making adultery a crime which the community does not want to see enforced. For the publicity in the matter would do more harm than good. Yet people will not vote to repeal it; for such repeal would look like removing the social disapproval.

See Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 964 (1966). But see Walker & Argyle, *Does the Law Affect Moral Judgements?*, 4 BRITISH JOURNAL OF CRIMINOLOGY 570 (1964).

prohibited practice? Would it weaken the moral condemnation of that practice? Is the prohibited practice harmful to other individuals? Is it actually or potentially harmful to society? Is the practice strenuously condemned by public opinion? And, is the criminal sanction effective?<sup>216</sup>

Here we are dealing with partial repeal of a remedy—a sanction—for violation of the fourth amendment. In this light, consider this analogy:

Assume that for the past seventy years the law in a particular state has treated marital rape as a serious felony, punishable by a lengthy prison sentence.<sup>217</sup> The original (hypothetical) enactment, in 1914, stated that “the purpose of this legislation is to deter the commission of sexual assault within the marriage relationship, a relationship in which the wife has little liberty to avoid sexual coercion by her husband.” Suppose further that in 1 the legislation is repealed. The sponsors of the repeal bill explain it thus:

We find that a) criminal penalties for marital rape are an extreme sanction for conduct often carried out in the good faith and objectively reasonable belief that it is legally justified as a husband’s prerogative and b) it cannot be demonstrated that the criminal penalties are sufficiently efficacious as a deterrent to justify the substantial social costs suffered by loss of husbandly liberties and by prosecutorial invasions of marital privacy. Therefore application of the principles of cost-benefit analysis compels us to repeal the criminal penalties for marital rape [or to create a defense for objectively reasonable mistake as to “husbandly prerogatives”]. The aggrieved wife may repair, of course to her other remedies, which are less destructive of the husband’s liberty, less intrusive of family values and less a perversion of the traditional functions of the criminal law. This repeal [or new defense for marital rape committed in the mistaken but “good faith” belief that it is lawful] is not intended to signal our unwillingness to protect wives against criminal assaults by their husbands and we do not believe that this legislation will have that effect.

Would not such a legislative repeal (or creation of a defense of objective reasonableness) be widely understood as indicative of the legislative belief that marital rape is no longer wrong? Hasn’t the legislature officially deemed sexual assault within marriage as no longer illegiti-

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<sup>216</sup> Quoted in N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* 26 (1970).

<sup>217</sup> Cf. Stallone, *Decriminalization of Violence in the Home: Mediation in Wife Battering Cases*, 2 *LAW & INEQUITY: A JOURNAL OF THEORY AND PRACTICE* 493 (1984).

mate and implicitly found such conduct to be socially and morally “permissible”?

The partial repeal, in *Leon*, is analogous to the marital rape example, in that an important legal instrument for motivating magisterial and police compliance with the highest constitutional dictates has been largely abolished.

The problem with creating an exception to the exclusionary rule is also analogous to the reasons why a proposed new justification or excuse to criminal acts is so staunchly resisted—*i.e.*, because of the threat to the deterrent efficacy of the primary criminal prohibition (such threat coming partly from the risk of actual fraud in asserting the new defense, partly from the risk that potential violators will act on the belief that they can fraudulently assert the defense (*e.g.*, the “battered wife” syndrome), and partly from the undermining of the moral weight carried by the primary prohibition.

It has been noted that *Leon* is susceptible to the reading that a search done in subjective bad faith will be upheld if objectively reasonable.<sup>218</sup> The point here however, is not about what the law of *Leon* permits but what its unstated message conveys. This exemplar of judicial aggressiveness was, I submit, far more significant for its atmospheric than for its precise holding. Having aggressively reached out to take the case primarily as a vehicle to pronounce its contempt for the exclusionary rule, the Court blatantly misused cost-benefit methodology to achieve a preordained result and arbitrarily and summarily disregarded or dismissed the contentions of the defendant. The Court emphasized the “substantial social costs” exacted by the exclusionary rule “as a matter of concern”.<sup>219</sup> It asserted that “unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.”<sup>220</sup> It deplored the objectionable collateral consequence of guilty defendants going free or receiving reduced sentences.<sup>221</sup> It twice referred to exclusion of evidence as an “extreme sanction.”<sup>222</sup> It rejected out-of-hand the arguments for retaining the present rule as “speculative” and “unpersuasive,” after

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<sup>218</sup> LaFave, *supra* note 79, at 913. A more traditional approach would be a two-pronged test—evidence obtained with a defective warrant would be excluded if either a) the officer did not actually and honestly believe that the warrant was valid [or who actually believed the warrant was valid], or b) the officer’s actual and honest belief was not objectively reasonable. See Carrington, *Good Faith Mistakes and the Exclusionary Rule*, CRIM. JUSTICE ETHICS 35, 38 (Summer-Fall 1982). Such approach would deny an officer who acts with actual malice under “objectively reasonable” circumstances, the fruits of his wrongdoing.

<sup>219</sup> *Leon*, 104 S. Ct. at 3413.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 3418, 3423.

arbitrarily imposing "a heavy burden of justification"<sup>223</sup> on those who saw no good reason for disturbing a seventy year old precedent. The Court reached out to take this case although it made no case whatever for the "need" for this particular exception—that is, it failed to show the "substantial social costs" that it asserted.<sup>224</sup> Indeed it proceeded in the face of its opinion a year earlier in *Illinois v. Gates*,<sup>225</sup> an opinion which so diluted the probable cause requirement and so increased the deference reviewing courts must pay to the warrant-issuing magistrate<sup>226</sup> that the probability of future "lost convictions" because of warrants issued without probable cause is below the level of significance. It denounced "indiscriminate application of the exclusionary rule" as productive of "disrespect for the law and the administration of justice."<sup>227</sup> Unquestionably the Court exhibited indifference, if not explicit hostility to the fourth amendment itself.

So the Court virtually declared itself emotionally and ideologically aligned with the warriors against crime, and with those who equate myopic obsession with convictions and disrespect for privacy and liberty as respect for the law. Justice Frankfurter's response to such judicial attitudes seems to the point:

Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war.

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<sup>223</sup> *Id.* at 3413 n.6 (quoting *Gates*, 462 U.S. at 257 (1983)(White, J., concurring)).

<sup>224</sup> With regard to the Court's conclusion that the costs were "substantial," consisting of guilty defendants going free or "receiv[ing] reduced sentences as a result of favorable plea bargains" (*id.* at 3413), Professor LaFave observes "this conclusion is nothing less than a multiple distortion of the magnitude of the costs attributable to the particular segment of the exclusionary rule at issue in *Leon*." LaFave, *supra* note 79, at 904.

The fact is that the most important, and balanced study to date of the existing studies, indicates that the effect of the exclusionary rule, across the board, "on criminal prosecutions is marginal at most." Cases lost because of non-prosecution or non-conviction due to unlawful searches and seizures are 0.6% to 2.35% of felony arrests; search and seizure issues led to 2.8% to 7.1% of all arrests for drug and weapon cases, being "lost." 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 611, 621-622, 679-680. It also concludes, contrary to Justice White's assumption, that "it remains an open question whether that has any material effect on the sentence imposed on the defendant." *Id.* at 669.

In any event Justice White's reference to "substantial costs" could not have been referring to convictions lost because of invalid warrants executed with or without objective reasonableness. As the study for the National Center for State Courts showed, the loss of convictions by reason of invalid search warrants is virtually unheard of. It concluded "there is little to suggest that relaxation of the exclusionary rule is required to facilitate prosecution of cases involving search warrants." THE SEARCH WARRANT PROCESS: PERCEPTIONS *supra* note 113, at 128-29.

<sup>225</sup> 462 U.S. 213 (1983).

<sup>226</sup> See discussion in LaFave, *supra* note 79, at 904-05.

<sup>227</sup> *Leon*, 104 S. Ct. at 3413.



It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed a dirty game in which the "dirty business" of criminals is outwitted by the "dirty business" of law officers. *The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a water faucet.*<sup>228</sup>

The values so clearly manifested in the *Leon* opinion will undoubtedly affect the attitudes of the public and the police.<sup>229</sup> The central theme of *Leon* is that legal obstacles to the conviction of criminals are deplorable. While the obstacle the Court sought to remove in *Leon* was ostensibly of a non-constitutional nature, the Court's significant audiences are unlikely to appreciate the distinction. The Court deplors the freeing of criminals, in the service of fourth amendment values—ergo, crime control advocates might understandably conclude that the precepts of the fourth amendment itself are low on the list of this Court's constitutional values. If the Court cannot bear the cost of lost convictions to enforce the fourth amendment through the exclusionary rule, it might well be assumed that the Court is not particularly ready to accept the price of lost convictions that flows from compliance with the strictures of the fourth amendment itself!

Even if the opinion can be read as less alien to the rights of liberty, privacy, and property than it appears to be, the Court showed little concern about the currency that would inevitably be given to these is that it no longer disapproved of the unconstitutional behavior endorsed by today's loudest political voices. Such an understanding is itself understandable for the Court's silence speaks as loudly as its language bordering on law and order rhetoric.<sup>230</sup> Nowhere did it acknowledge that the precepts of the fourth amendment, the teachings of history, or the dictates of political morality prohibit official invasions of the people's liberty and privacy, absent a warranted warrant or a well-warranted justification for proceeding without a warrant.

Law enforcement personnel and magistrates can hardly escape the conclusion that although *Leon* turned only a few red lights green, many other fourth amendment red lights may now be treated as mere yield signs at most, and temporary yield signs at that. There is scant likelihood

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<sup>228</sup> On *Lee v. United States*, 343 U.S. 747, 758-59 (Frankfurter, J., dissenting)(1952).

<sup>229</sup> Cf. J. FRANK, *THE MARBLE PALACE* 213 (1958).

<sup>230</sup> See LaFave, *supra* note 79, at 905.

that a red light will be perceived when the Court so strongly condemns obstacles that inhibit the single-minded pursuit of criminal convictions. As for the values which the Framers imposed red lights to protect, *i.e.*, a decent respect for liberty, personal and residential privacy, and property, *Leon* so devalued these rights—so discounted the reprehensibility of violating them—that it would be understandable if magistrates and law enforcement officers soon cease expecting or respecting either red lights or stop signs.

It is undeniable that very large political audiences were waiting for the word as to where the Court stood on the conflict between the forces of “law and order” and the advocates of civil liberties. Indeed the Court itself recognized this public expectation when it apologized, a year before *Leon*, for not deciding the issue of a good-faith exception to the exclusionary rule.<sup>231</sup>

As Charles Warren wrote over sixty years ago, in his classic history of the Court:

[T]he effect produced upon contemporary public opinion has frequently been of more consequence than the actual decision itself; and in estimating this effect, regard must be paid to the fact that, while the law comes to lawyers through the official reports of judicial decisions, it reaches the people of the country filtered through the medium of the news-columns and editorials. . . .<sup>232</sup>

Although *United States v. Leon* did not repeal the fourth amendment’s prohibition on issuance and execution of defective search warrants, this is how the press reacted and reported reactions to the opinion: Newsweek—“Reagan’s Days in Court”—“. . . the high court created a ‘good faith’ exception to the rule, one that will allow police to rely upon search warrants that were improperly issued by judges.”<sup>233</sup>

Time Magazine—“by and large, last week’s decision means that if police officers get a warrant, defense attorneys will be unable to persuade trial judges to block the use of the evidence gathered with it.”<sup>234</sup>

Time quoted the then-President of the Association of Trial Lawyers of America as saying: “‘Good faith is just a code word for saying we’re sick and tired of the exclusionary rule,’” and described “‘Atlanta District Attorney Lewis Slayton, by contrast . . . [as] delighted, because this

<sup>231</sup> *Gates*, 462 U.S. 213 (1983)(declining to rule, “with apologies to all,” on the question whether the exclusionary rule should be modified so as to permit introduction of evidence obtained by police “in the reasonable belief [that their conduct] . . . was consistent with the Fourth Amendment” (*Illinois v. Gates*, 459 U.S. 1028 (1982)(order for reargument)) because that question “was not presented to the Illinois courts.” 462 U.S. at 217).

<sup>232</sup> 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 3 (1922).

<sup>233</sup> Newsweek Mag. 57 (July 16, 1984).

<sup>234</sup> Time Mag. 57 (July 16, 1984).

ruling takes the technicality out and gives us more practicality, and that's what we need."<sup>235</sup>

President Reagan's response, upon being told of the decision in *Leon*, was as profoundly revealing as it was brief: "I love it."<sup>236</sup>

## VII. CONCLUSION

It has been suggested that fourth amendment values may ultimately benefit from the *Leon* opinion in that more police officers may seek warrants more often. But the catch-22 in this "blessing in disguise" is that they would be motivated to do so by the knowledge that *Leon* held, in effect, that the constable may freely transgress where the magistrate has blundered unless the constable is even more unreasonable than the magistrate.

But the greatest loss occasioned by *Leon* was not in its debatable impact on the number of unlawful searches. The greatest loss is to the concept of the Court as a neutral and detached adjudicative body, albeit with inevitable values, dispositions and belief systems and with now-acknowledged quasi-political responsibilities. For the *Leon* Court, deaf and distainful of the views of counsel, its dissenting colleagues, and scholarly commentators, exhibited what the late Professor Alexander Bickel once noted "comes as readily to judges as to other able men of good intentions who are in a position to work their will," e.g., "[a] certain habit of command, an impatience to take charge of unruly affairs and impose a solution that seems apt."<sup>237</sup>

Professor Tribe has written that "being heard is part of what it means to be a person."<sup>238</sup> It is here suggested that respecting a duty to listen is part of what it means to be a fair and just adjudicator.

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<sup>235</sup> *Id.*

<sup>236</sup> U.S. News & World Report, 33, 34 (July 16, 1984).

<sup>237</sup> A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 105 (1978).

<sup>238</sup> Tribe, *supra* note 30, at 1070.