

# The "Good Faith Exception" Cases: Reasonable Exercises in Futility

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## INTRODUCTION

In two of its last decisions of the 1983 term, the Supreme Court dropped the first shoe in the curtailment of the exclusionary rule. In the companion cases of *United States v. Leon*<sup>1</sup> and *Massachusetts v. Sheppard*,<sup>2</sup> the Court held that the exclusionary rule no longer "bar[s] the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."<sup>3</sup>

This article does not propose to reargue the underlying assumption of these decisions—that current fourth amendment law is defective in that criminals go free (or at least that important evidence is suppressed) because of technical or minor mistakes made by the police in attempting to conform search warrants to the complex body of fourth amendment law. This assumption has already been discussed in detail by commentators who anticipated the Court's decision.<sup>4</sup> The question addressed here is whether the

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1. 104 S. Ct. 3405 (1984).

2. 104 S. Ct. 3424 (1984).

3. *Leon*, 104 S. Ct. at 3409.

4. Compare Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 CRIM. JUST. ETHICS 35 (1982); Coe, *The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction*, 10 GA. L. REV. 1 (1975); Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1981) (in favor of the "good faith exception") with Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551 (1984); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 333-59 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Sachs, *The Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875 (1982); 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) (against the exception). Some of the main arguments raised by these commentators, as well as by the dissenters in *Leon*, are as follows: (1) deterrence is not the only function of the exclusionary rule; it also protects the integrity of the courts and is the very essence of the fourth amendment; (2) the rule deters even "good faith violations" by giving police an incentive to be well-trained and careful; and (3) the "good faith exception" encourages ignorance and poor training on the part of the police. As is discussed below, see *infra* text accompanying notes 43-45, the second and third arguments are probably not applicable to *Leon* and *Sheppard* because of the Court's adoption of the "uniquely narrow" conception that good faith is an objective standard based on the "reasonably well-trained police officer." See LaFave, *supra*, at 347.

Court has dealt effectively with the problems of the fourth amendment by creating a good faith exception to the exclusionary rule in cases involving warrants. As the oxymoronic title to this article indicates, the Court deserves only faint praise for its efforts.

### I. THE EXERCISES

A detailed exegesis of the facts of these cases is not necessary. In *Leon*, an anonymous informant of unproven reliability told the police that two individuals were selling narcotics from their residence in Burbank, California. The police conducted an extensive investigation which led them to obtain a search warrant for three residences and several automobiles. In the ensuing searches, narcotics were found. The courts below held, and the Supreme Court assumed *arguendo*, that the warrants were invalid as lacking in probable cause because the information on which they were based was stale. The district court also found that the officer who obtained the warrant was acting in "good faith."<sup>5</sup>

In *Sheppard*, the police acquired probable cause to search the respondent's residence for evidence of a murder. Because no other application form was available, the warrant application was drawn up on a form for controlled substance searches. Although this problem was pointed out to the judge, and he informed the police that he would make the necessary changes, the warrant, as issued, authorized a search for controlled substances. It did not authorize a search for the murder evidence and did not incorporate the affidavit which set forth the items that were the subject of the search. The police took the warrant and the affidavit to the respondent's residence, limited the search to the items specified in the affidavit, and found incriminating evidence. The Supreme Court, finding that the question of whether the search must be invalidated because of these defects was a "fact-bound issue of little importance,"<sup>6</sup> again assumed that the search was constitutionally defective and accepted the finding of the courts below that the police had acted in good faith.<sup>7</sup>

The majority held in *Leon* that where the police have acted in reasonable good faith reliance on a warrant issued by a neutral and detached magistrate, evidence obtained thereby will not be excluded even if the warrant is later declared invalid. The Court made it clear, however, that it was talking about "objective reasonableness." Mistakes by the police, whether in "good faith" or not, which a "reasonably well-trained" police officer would not have made, may still lead to exclusion.<sup>8</sup>

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5. United States v. Leon, 104 S. Ct. 3405, 3409-11 (1984).

6. Massachusetts v. Sheppard, 104 S. Ct. 3424, 3428 n.5 (1984).

7. *Id.* at 3427-29.

8. See *Leon*, 104 S. Ct. at 3421 n.23.

Justice Blackmun, concurring in the opinion, emphasized his view that the decisions were "provisional":

If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.<sup>9</sup>

Justice Brennan, joined by Justice Marshall, dissented, citing *Weeks v. United States*<sup>10</sup> for the proposition that to admit evidence seized in violation of the fourth amendment is tantamount to striking the amendment from the Constitution.<sup>11</sup> Justice Brennan pointed out that since the exclusionary rule was not originally based on a deterrence rationale, the fact that it may fail to deter police violations in certain cases is irrelevant. The purpose of the exclusionary rule is not to deter police misconduct but to insure that the government derives no benefit from the use of illegally obtained evidence. Therefore, once it is determined that evidence has been illegally obtained, the evidence cannot be used, regardless of the good or bad faith of the seizing officer.<sup>12</sup>

The rationale for the Court's decisions in *Leon* and *Sheppard* is this: the cost of the exclusionary rule is high because it mandates suppression of evidence in many cases, particularly drug cases.<sup>13</sup> Moreover, the deterrent effect of the exclusionary rule, its major purpose, is unsubstantiated, and in any event, "the rule can have no substantial deterrent effect" in cases where the police have acted pursuant to a warrant which they believe to be valid.<sup>14</sup> Consequently, there is no point in applying the exclusionary rule in

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9. *Id.* at 3424 (Blackmun, J., concurring).

10. 232 U.S. 383 (1914).

11. 104 S. Ct. at 3430, 3434.

12. *Id.* at 3435-38. Justice Stevens, dissenting in *Leon* and concurring in *Sheppard*, argued that the "good faith exception" issue should never have been reached in these cases. Rather, in *Sheppard*, the technical problems with the warrant were not sufficient to render it invalid. In *Leon*, an application of the less technical probable cause standard announced in *Illinois v. Gates*, 462 U.S. 213, *reh'g denied*, 104 S. Ct. 33 (1983), would probably have resulted in a finding that the warrant was valid and that the case should have been remanded for reconsideration in light of *Gates*. 104 S. Ct. at 3447.

13. The Court cited Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of Lost Arrests*, 1983 AM. B. FOUND. RESEARCH J. 611, which analyzes the studies of exclusionary rule effects. Davies found that the operation of the rule results in non-prosecution or non-conviction of between 0.6% and 2.35% of individuals arrested for felonies, depending on the study consulted. The Court observed that "the small percentages . . . mask a large absolute number of felons who are released" because of the exclusionary rule. 104 S. Ct. at 3413 n.6. Davies notes that prosecutors in California reported rejecting only 117 of 68,632 (0.17%) felony robbery arrests between 1978 and 1982 because of illegal searches. Davies, *supra*, at 623. In general, it is "possessory crimes" on which the exclusionary rule will have the greatest impact. *Id.* at 619-23. The same California study found that 2.4% of felony drug arrests were rejected because of illegal searches. *Id.* at 619.

14. 104 S. Ct. at 3413 n.6.

such cases. Indeed, it "may well 'generate disrespect for the law and the administration of justice' " to do so.<sup>15</sup>

A brief examination of this facially appealing syllogism is in order. The first prong of the Court's rationale, its assessment of the costs of the exclusionary rule, is based on the most recent and most thoughtful statistical analysis available. However, the statistics offered by the Court relate to the exclusionary rule generally and do not address the number of cases which have been lost where the police acted in good faith reliance on a *warrant*.<sup>16</sup> There is every indication that the number is miniscule. It is well-known that far more evidence is obtained through warrantless seizures—such as automobile searches, stops and frisks, and searches incident to arrest—than by means of warrants.<sup>17</sup> In cases where warrants are issued, the evidence is rarely suppressed, and when it is suppressed, it does not necessarily result in dismissal or acquittal.<sup>18</sup> Finally, it is impossible to determine the number of warrant cases where evidence is currently suppressed in which the police have acted in "reasonable good faith," such that the result will be different after *Leon* and *Sheppard*.

In addition to this argument for the minor impact of these cases based on past practices, the decision last term in *Illinois v. Gates*<sup>19</sup> makes it even less likely that, in the future, courts will find a "good faith" mistake by the police. In *Gates*, the Court eliminated any technical requirement for probable cause and, instead, merely required the magistrate to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>20</sup> It would seem that in the majority of cases where a trial court found that a warrant did not live up to this lenient definition of probable cause, the court

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15. *Id.* at 3413 (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

16. In addition, no study has been (nor could be) conducted to determine the only truly significant information about the exclusionary rule—the number of people who are protected from illegal searches by the operation of the rule.

17. See, e.g., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 230, commentary at 521 (Proposed Official Draft 1975) and sources cited therein. But see Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. TEX. L.J. 559, 569 (1982) (noting that warrant use did increase considerably following *Mapp v. Ohio*, 367 U.S. 643 (1961)).

18. A recent study found that in 350 cases that resulted from issued search warrants, a motion to suppress was granted in 17 (about 5%). However, only one of these cases was dismissed; 12 of the 17 still resulted in convictions. The authors concluded that relaxation of the exclusionary rule in warrant cases would have little impact. Van Duizend, Sutton & Carter, Review Draft of The Search Warrant Process: Preconceptions, Perceptions, and Practices at 2-32, 2-34 table 2-19, 2-41 table 2-23, 4-8, 8-11 (Williamsburg, Va. National Center for State Courts, 1983) [hereinafter cited as Van Duizend, Review Draft], cited in Davies, *supra* note 13, at 664-65. As of this writing, the Van Duizend study has been withdrawn from distribution. However, the findings in that study confirm the author's own conclusion reached from his experience as a prosecutor—successful motions to suppress in warrant cases are unusual.

19. 462 U.S. 213 (1983).

20. *Id.* at 238.

could not then conclude that the police had a reasonable good faith belief that the warrant was valid. Thus, a case such as *Leon* normally would not be decided on the basis of the "good faith exception," but rather on the basis that there was a valid warrant.<sup>21</sup> By doing away with technical requirements for probable cause in *Gates*, the Court has already largely eliminated the problem of "technical" defects in warrants which *Leon* purports to solve.<sup>22</sup> However, *Leon* does sweep more broadly than *Gates*. Warrant defects other than lack of probable cause—such as failure to incorporate the affidavit (as in *Sheppard*) and overly broad warrants—also fall under the "good faith exception," although they are not affected by *Gates*.<sup>23</sup>

The second prong of the Court's rationale is that the deterrent effect of the exclusionary rule can have no impact where the police have relied with reasonable good faith upon the magistrate's warrant. Even assuming that deterrence is the principal justification for the exclusionary rule,<sup>24</sup> as the Court has held in recent years, such a conclusion is not necessarily justified. Whatever the impact of the exclusionary rule on deterring police illegality in particular cases, unquestionably the rule has resulted in improved training and police awareness of fourth amendment requirements.<sup>25</sup> As such awareness

21. As Justice Stevens pointed out in dissent, had *Leon* been remanded for reconsideration in light of *Gates*, the courts would almost surely have found the warrant valid. 104 S. Ct. at 3447. Concurring in *Sheppard*, Stevens remarked that "our precedents construing the particularity requirement of the Warrant Clause unambiguously demonstrate that this warrant [was valid]." *Id.* at 3349-50.

22. As Justice Brennan observed in his dissent:

[I]t is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid under the new *Gates* standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" . . .

*Id.* at 3445-46.

23. Professors Kamisar and LaFave both criticized the anticipated decision in *Leon* by arguing that to apply a "reasonable good faith" exception to the *Gates* concept of probable cause, which is itself based essentially on reasonableness and good faith, is "(in)defensible—and . . . incomprehensible." Kamisar, *supra* note 4, at 589; see LaFave, *supra* note 4, at 354-59. I don't read *Leon* as creating a "double dilution." See Kamisar, *supra* note 4, at 589. As discussed in the text, a "reasonable" police mistake as to the broad *Gates* standard of probable cause is, indeed, virtually incomprehensible and therefore will not usually be found by the courts, except in cases similar to *Leon*, where the *Gates* standard was not applied. In the context of probable cause determinations, the two eases accomplish the same thing. But as discussed in the text, *Leon* covers many more situations besides probable cause determinations and is readily comprehensible in those other contexts.

24. It has frequently been pointed out that the original justification for the exclusionary rule offered in *Weeks*, 232 U.S. 383, was not deterrence but that the integrity of the courts should not be compromised by the use of illegally obtained evidence. *Id.* at 392. For example, Chief Justice (then Judge) Burger once noted that "[t]he idea of deterrence may be lurking between the lines of the [*Weeks*] opinion but [it] is not expressed." Burger, *Who Will Watch the Watchman?*, 14 *Am. U.L. Rev.* 1, 5 (1964).

25. As one prosecutor put it, "[i]n my state *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years." *The Exclusionary Rule Bills: Hearings Before the Subcomm. on Criminal Law of the Comm. of the Judiciary, United States Senate on S. 101, S. 751 and S. 1995, 97th Cong., 1st & 2d Sess.* 41 (1982) (testimony of Stephen Sachs, Attorney General of Maryland).

increases, "reasonable good faith mistakes" should decrease.<sup>26</sup> Removing the exclusionary incentive for police training, indeed, perhaps creating a disincentive for police to be well-informed, would not be a salutary development. However, by adopting the objective standard of the good faith of the "reasonably well-trained police officer," the Court has eliminated this problem as long as it does not allow slackened training programs to influence its view of what constitutes "reasonably well-trained."<sup>27</sup> Also, as long as the exclusionary rule remains in effect for the major category of cases—warrantless searches—such training is not likely to be abandoned.

It has been argued that the practical impact of these cases will be quite small. Nevertheless, their doctrinal impact is significant. By tolerating, through non-exclusion, police intrusions upon constitutionally protected rights of the citizenry, the Court has indeed rendered decisions of major import. However, these cases do not emasculate the search warrant requirement, as the dissenters imply. The essential features of a warrant—that it be based on probable cause<sup>28</sup> and be issued by a neutral and detached magistrate—still remain. Moreover, since these opinions will probably increase warrant use by the police, they will enhance the most important aspect of the warrant: that is, that it forces the police to stop, think, write down their evidence, and submit it to someone else for approval.<sup>29</sup> Aside from the obvious salutary effect that those requirements have in curbing police impetuosity, they also make it more difficult for the police to fabricate probable cause on the basis of what was found instead of what was actually known in advance.

The result of the opinion, in most cases,<sup>30</sup> will simply be to shift the final decision as to the validity of the warrant from the trial and appellate courts to the magistrate. Arguably, that is where it should reside, since only the magistrate is in a position to actually prevent (rather than simply try to deter in future cases) the violation of an individual's fourth amendment rights. Since there has been reliance by the police on the magistrate's approval of the warrant, suppression at trial does not, as the dissenters argue,<sup>31</sup> merely put the police back where they would have been had they not violated the fourth amendment in the first place. Had the magistrate refused the warrant application as inadequate, they could, in the normal case, have obtained more evidence to support it and resubmitted it to the magistrate. By the

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26. See *infra* text accompanying notes 79-80 for a discussion of why this assumption will not be borne out if the law is too complex for police to follow.

27. Having opened up this issue, the Court will now undoubtedly be called upon to prescribe what constitutes "reasonable training" for the police.

28. *Gates*, 462 U.S. at 238 (redefining probable cause).

29. Normally this "someone else" is not just the magistrate, but is a prosecutor as well. See TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME 114 (1967); Van Duizend, Review Draft, *supra* note 18, at 2-7, 2-8. This is important because, exclusionary rule or not, the prosecutor will have to defend the warrant at the hearing on the motion to suppress and will not want to be in the position of defending an invalid warrant.

30. But see *infra* text accompanying notes 39-42.

31. 104 S. Ct. at 3436-37 & n.8, 3457.

time the trial judge invalidates the warrant, it is too late. Thus, from a law enforcement viewpoint, and in certain respects from the viewpoint of a civil libertarian,<sup>32</sup> it makes sense to place the final decision in most cases in the hands of a competent magistrate.<sup>33</sup>

For this shifting of responsibility to work, the newly responsible party, the magistrate, must be equal to the task. In *Shadwick v. City of Tampa*,<sup>34</sup> the Court held that it was appropriate for non-attorney court clerks to issue arrest warrants for municipal ordinance violations. The Court has not addressed the issue of the qualifications required to issue search warrants in criminal cases.<sup>35</sup> Currently, thirty-nine states allow such issuance by non-attorney magistrates.<sup>36</sup> Since the determination of factors such as probable cause, specificity, and staleness requires interpretation of a very complex body of law, making such determinations is an inappropriate task to give to court clerks and other functionaries who, in many states, receive little training and need have only a high school diploma or be "literate."<sup>37</sup> If the Court is going to place principal reliance on magistrates to guard civil liberties against police overreaching, then it is critical that the Court require that these officials be trained and competent as well as "neutral and detached."<sup>38</sup>

Another problem with placing the decision to issue a warrant in the hands of the magistrate is that it eliminates, with some exceptions,<sup>39</sup> review which

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32. That is, by encouraging warrant use, the decision will tend to cut down on warrantless searches by the police.

33. Justice Brennan's endorsement of the virtues of the "neutral and detached magistrate" in cases such as *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301-02, 309-10 (1967), seems inconsistent with his dissenting opinion in *Leon* which suggests that placing primary reliance on that official to protect our fourth amendment rights represents a gutting of fourth amendment protections. See 104 S. Ct. at 3444-45. If magistrates are competent, then we should have no fear of relying on them; if they are not, then the warrant requirement is an empty formality that should have been abandoned long ago.

34. 407 U.S. 345 (1972).

35. In his concurring opinion in *Gates*, Justice White emphasized the narrowness of the holding in *Shadwick*, 407 U.S. 345, and indicated that an untrained person should not have the responsibility of issuing search warrants. *Gates*, 462 U.S. at 263-64 n.17. White stated that, to issue such warrants, "an individual must be capable of making the probable cause judgments involved." *Id.* at 264 n.17. The majority in *Gates*, however, seemed less concerned, simply observing that warrants are frequently issued by non-lawyers "who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'" *Id.* at 235.

36. A survey of state statutes by the respondent's attorneys in *Leon* produced the figure of 39 states. Brief for Respondent at 12, A-1 to -3, *United States v. Leon*, 104 S. Ct. 3405 (1984).

37. For example, in North Carolina warrants may be issued by clerks of court and assistant and deputy clerks of court who have no minimum educational requirements. N.C. GEN. STAT. § 7A-180(5) (1981). See also MASS. ANN. LAWS ch. 218, § 33 (Michie/Law. Co-op. Supp. 1983). One study concluded that since the "application of appropriate legal standards is often a critical factor in issuing search and arrest warrants" this function should be handled by attorneys whenever possible. L. SILBERMAN, NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY 110-11 (1979).

38. Of course, insuring that magistrates are trained and competent is a separate issue from whether the exclusionary rule should be cut back, but now that the cutback has occurred, the issue of magistrate competence takes on even greater significance.

39. Of course, non-"good faith" searches can still lead to exclusion, and the illegality of "good faith" searches can be assessed by the trial court.

checks arbitrary action by judges in every phase of the juridical process. As the Court pointed out in *Franks v. Delaware*,<sup>40</sup> it is the *ex parte* nature of the warrant process that is the reason for review.<sup>41</sup> The magistrate's decision, while reviewable,<sup>42</sup> may not usually be overturned in the sense that wrongly seized evidence will be excluded. Still, if one agrees with the Court's assumption that deterrence is the purpose of exclusion, and if deterrence does not work in these cases, then excluding the evidence would simply be shutting the barn door after the horse is gone.

There are several avenues of attack upon warrants that remain open after *Leon* and *Sheppard*. It is important to realize, however, that one such avenue is not lack of good faith by the police, as that term is normally understood. Rather, the Court makes it clear that it "eschew[s] inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant."<sup>43</sup> Since "good faith" is, by definition, a *subjective* standard,<sup>44</sup> the Court has read good faith out of its "reasonable good faith" test and actually has adopted the purely objective "reasonable mistake" test urged by the government in its brief.<sup>45</sup> While this is generally good, in that it does not encourage the police to be ignorant of the law, it may cause the Court trouble in cases where the police are too knowledgeable.

Suppose an FBI agent, up-to-date on the most recent decision of a liberal Supreme Court in 1990, realizes that his warrant application is inadequate under that decision but is ordered by his superior to submit it to the magistrate anyway. The magistrate approves it and evidence is seized. At the hearing on the motion to suppress, the agent candidly testifies that he, being unusually abreast of Supreme Court developments, was aware of the defect but that most policemen would not be. Under a purely objective approach, the evidence could not be excluded, since a "reasonably well-trained officer would [not] have known that the search was illegal."<sup>46</sup> As

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40. 438 U.S. 154 (1974). Much of the discussion in *Franks* regarding the need for judicial oversight of magistrates' decisions through the exclusionary rule has presumably been overruled by *Leon*.

41. *Id.* at 169.

42. The Court makes it clear that a court hearing the exclusionary motion can still decide the question of the propriety of the search even if exclusion is barred by the finding of "good faith." *Leon*, 104 S. Ct. at 3422.

43. *Id.* at 3421 n.23.

44. The Fifth Circuit recognized this in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981) (the original "reasonable good faith" exception case).

45. Brief for the United States at 19, 78-81, *United States v. Leon*, 104 S. Ct. 3405 (1984); *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984); *Colorado v. Quintero*, 657 P.2d 948 (Colo.), *cert. granted*, 463 U.S. 1206, *cert. dismissed*, 464 U.S. 1014 (1983) (the government submitted one brief for all three cases) [hereinafter cited as Brief for the United States]. See also Reply Brief for the United States at 1, 22-25, *United States v. Leon*, 104 S. Ct. 3405 (1984).

46. *Leon*, 104 S. Ct. at 3421 n.23. Professor Kamisar has solved this problem: "It is plain that the subjective *good* faith of the officer will not save him if he fails the 'reasonably trained officer test,' but unless symmetry is a virtue in itself I do not think it follows that the subjective *bad* faith of the officer should be disregarded." Y. Kamisar, *The Court's Growing Hostility to the Exclusionary Rule: Leon, Sheppard and Lopez-Mendoza* (prepared remarks of Yale Kamisar at the U.S. Law Week's Constitutional Law Conference, September 14, 1984) (on file at Indiana University Law Library, p. 20.11).



this example suggests, the possibilities for litigation over the question of whether the police acted in "objective good faith" are virtually endless. Suppose a police department directive, explaining the most recent Supreme Court warrant requirements, has been disseminated to the precincts, but has not yet been discussed with the line officers. Are the policemen who unwittingly violate this directive acting in "objective good faith" or not? Does it matter if this police department was unusually quick or slow to respond to the Supreme Court decision? Does it matter if the requirement announced by the Court was difficult to understand or difficult to implement?

A problem more likely to arise is that of the "reasonably well-trained" officer who, while not *knowing* that a warrant is defective, entertains serious doubts about it or is indifferent or careless as to its validity. The Court's resolution of what will surely be a common problem after *Leon* is contradictory. As noted, at one point the Court limits the inquiry to "whether a reasonably well-trained officer would have *known* that the search was illegal."<sup>47</sup> Later, the Court includes reckless, as well as knowing, mistakes of fact in the affidavit as grounds for exclusion.<sup>48</sup> Questions then arise as to whether negligent mistakes of fact and negligent or reckless mistakes of law will be grounds for exclusion after *Leon*. Suppose the police, in good faith confusion, state in the affidavit that probable cause is based on information from "an informant who has given reliable information in the past that has led to two prior convictions." In fact, this informant, Louie Smith, has never given information; the police were thinking of the known-to-be-reliable Louie Schultz. The information from this untested informant is clearly insufficient to establish probable cause. Should the evidence obtained pursuant to this warrant be suppressed? To say that the police acted in good faith reliance on the magistrate's decision, when that decision was defective due to police negligence, would be to miss the point of the deterrence rationale. The *Leon* Court would permit exclusion where it "will further the purposes of the exclusionary rule."<sup>49</sup> In a passage from *Michigan v. Tucker*,<sup>50</sup> which the Court cited with approval in *Leon*,<sup>51</sup> it was recognized that "[t]he deterrent purpose of the exclusionary rule assumes that the police have engaged in willful, or at least negligent, conduct."<sup>52</sup>

Since carelessness certainly can be deterred by appropriate sanctions, it is sensible to continue to include such conduct within the exclusionary remedy. Thus, police who are negligent as to the facts or the legal requirements arguably still face suppression after *Leon* since they are making mistakes that the reasonably well-trained officer would not, or should not, make. It

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47. *Leon*, 104 S. Ct. at 3421 n.23 (emphasis added). See also *supra* text accompanying note 7.

48. *Leon*, 104 S. Ct. at 3421-22.

49. *Id.* at 3419.

50. 417 U.S. 433 (1974).

51. 104 S. Ct. at 3419.

52. *Tucker*, 417 U.S. at 447 (emphasis added).

follows that *Leon* will have major impact in cases where the law is so confused that the most a reasonably well-trained police officer could be expected to do would be to put the decision to search in the hands of the magistrate.<sup>53</sup> In cases where the police could reasonably be expected to have prepared a better affidavit, *Leon* does not save them.<sup>54</sup>

Consider, for example, the case of *United States v. Gardner*.<sup>55</sup> In that case the warrant authorized a search for "all firearms and ammunition," but the court found that "probable cause existed, if at all, to search solely for a .38 caliber pistol that was allegedly used in an armed robbery and murder."<sup>56</sup> The police found (apparently not in plain view) a sawed-off shotgun which the court excluded on the ground that the warrant was overbroad.<sup>57</sup> After *Leon*, since the search for a shotgun need not exceed the scope of the search for a pistol, this arguably was a "reasonable" defect which should not require exclusion.

But what if there is probable cause to believe that a defendant stole a color television set and the warrant which specifies "all contraband" leads the police to look in a dresser drawer where they find marijuana? On one hand, the police have relied on the magistrate's warrant. But on the other hand, the police drafted the warrant and this is clearly a case in which "exclusion will further the purposes of the exclusionary rule"—that is, it will encourage the police to be more careful in the future.<sup>58</sup> The difficulty with *Sheppard* and *Leon* as guides for future decisions is that in those cases the police "took every step that could reasonably be expected of them."<sup>59</sup> Indeed, one could have simply found that the warrants in those cases were

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53. As discussed *infra* text accompanying notes 79-93, this is simply an attempt by the Court to escape censure for its own inability to construct a coherent body of fourth amendment law.

54. "Reasonably should have known" is the standard for tort liability of governmental officials in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982), upon which the Court relied in establishing its reasonable good faith standard in *Leon*, 104 S. Ct. at 3421 n.23.

55. 537 F.2d 861 (6th Cir. 1976). In searching for cases to which the *Leon* test can be applied, one is struck by the paucity of reported decisions in which search warrants have been struck down. The annotations in the *United States Code Annotated* under "search under invalid warrant" and "particular warrants as invalid" report only 15 cases in federal and state courts for the period 1973-84.

56. *Id.* at 862.

57. *Id.*

58. Consider also *People v. Potwara*, 48 N.Y.2d 91, 397 N.E.2d 361, 421 N.Y.S.2d 850 (1979), where a lay magistrate issued a warrant to seize obscene materials on the basis of an affidavit which stated, without more, that the judges in a different jurisdiction had declared various magazines obscene. No copies of the magazines or certificates from the other judges accompanied the warrant. The New York Court of Appeals unanimously struck down the warrant on the ground that the magistrate had failed to conduct a "full and searching inquiry into the facts on which the warrant application is based." *Id.* at 95, 397 N.E.2d at 364, 421 N.Y.S.2d at 853. *Leon* seems to indicate that the exclusionary rule should not apply here if the police were reasonable in assuming that their warrant application was adequate, yet this is a case where application of the rule will surely have the effect of improving police performance in the future.

59. The Court so held in *Sheppard*, 104 S. Ct. at 3429.

proper.<sup>60</sup> But what of police behavior which, while not “substantial and deliberate” misconduct, clearly falls short of sound police work? As discussed, *Leon* suggests that exclusion is appropriate in cases where a court concludes that the probable cause determination was based on negligently misstated facts or where it was reasonable to expect the police to have conducted a more thorough investigation, or to have drafted a better warrant application. Since such misconduct is negligent, it cannot be considered objectively “reasonable.”

The above argument assumes a critical point about *Leon*. That is, when the Court speaks of the good faith of the police, it is talking about their good faith *before going* to the magistrate and not about their good faith *after* they have received the warrant. Even in a case where the police had serious doubts about the validity of the warrant and therefore took it to the most notorious “rubber stamp” magistrate in the jurisdiction, it would be difficult to dispute the claim that a reasonable police officer had a good faith belief in its validity *after* a higher authority had approved it. If this were the test, even the most patently defective warrant would escape exclusionary censure. Given the pains that the Court took in *Leon* to insure that truly bad warrants may still be subject to attack, it would make no sense to allow the fact of the issuance of the warrant to paper over reservations that the police had, or should have had, as to its validity.

Also open to challenge are the neutrality and detachment of the magistrate, including his or her tendency to act as a “rubber stamp,” but again, only in a case “in which exclusion will further the purposes of the exclusionary rule” (i.e., deter police misconduct).<sup>61</sup> The Court makes it clear that previous rejection of a warrant application by a different magistrate casts doubt on the good faith of the police.<sup>62</sup> Repeated application to a magistrate who is known to “rubber-stamp” warrants should also cast doubt on police good faith. Thus, the competence and past record of the magistrate may fairly be questioned by defense attorneys challenging good faith. Police who repeatedly return to a magistrate who has a record of issuing defective warrants should expect their good faith to be in serious question when they seek to defend yet another defective warrant issued by that magistrate.<sup>63</sup>

The last avenue of attack suggested by the Court is where the warrant itself is valid but a mistake occurs in its execution. This will only lead to exclusion if it was *unreasonable* to believe the search was authorized by the

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60. Justice Stevens so argued in dissent. 104 S. Ct. at 3448-50.

61. *Leon*, 104 S. Ct. at 3416-19.

62. *Id.* at 3421 n.23.

63. I recognize that only in rare cases will a court be willing to brand a fellow judicial officer as a “rubber stamp,” thus rendering that magistrate’s defective warrants more open to challenge than others. However, it should be regarded as entirely consistent with the rationale of *Leon* that, in deserving cases, such an argument should succeed. When police go out of their way to deal with a magistrate with a “rubber stamp” reputation, their good faith should be in serious question.

warrant<sup>64</sup> (in contrast to the previous law where any search exceeding the scope of the warrant was unacceptable).<sup>65</sup> Besides overly broad searches, there are various possibilities for mistakes in the execution of warrants, as opposed to their preparation. For example, there can be delays in execution such that a valid warrant becomes stale,<sup>66</sup> unannounced ("no-knock") or nighttime entries when they are not appropriate,<sup>67</sup> and failure to prepare a proper return.<sup>68</sup> Overly broad and stale searches definitely present constitutional problems; the other cases arguably do.<sup>69</sup> The Court is wrong to write off these problems in dictum as being subject to the same "reasonable good faith exception" that covers defects in warrant preparation. By the reasoning of *Leon*, after the magistrate has issued a warrant, defects therein are mistakes by the magistrate, not by the police.<sup>70</sup> Mistakes in execution, on the other hand, are mistakes solely by the *police*, and are frequently in direct violation of the magistrate's command. Thus, these violations are even less excusable than, for example, mistakes by the police in conducting warrantless searches on the street. Confusion as to what the law requires is no justification when a warrant authorizes a search of one house and the police search another, or when a search for stolen refrigerators leads to finding narcotics in the kitchen drawer. However, it is unlikely that such mistakes would be found to be "reasonable" by the Court, so to the extent that the rules governing mistakes in execution have been weakened, the practical impact may be slight.

Since, as discussed earlier, *Leon* and *Sheppard* will not have a great practical impact, one wonders why the Court bothered to render these decisions at all. The likeliest answer is this: as a precursor to the second shoe—a good faith exception for *warrantless* searches.<sup>71</sup> Yet there is much

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64. *Leon*, 104 S. Ct. at 3419 n.19. The Court also makes it clear that a "bare bones" warrant cannot be rendered "reasonable" simply by passing it on to other officers who are ignorant of its questionable origins. *Id.* at 3421 n.24.

65. See 2 LAFAYETTE, SEARCH AND SEIZURE § 4.10(a) (1978). The Court stated that its discussion "assumes . . . that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Leon*, 104 S. Ct. at 3419 n.19.

66. See LAFAYETTE, *supra* note 65, at § 7.7(a).

67. *Id.* §§ 4.7(b), 4.8(g).

68. *Id.* § 4.12(b), (c).

69. See sources cited *supra* notes 66-68 and cases discussed therein.

70. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Leon*, 104 S. Ct. at 3418.

"It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id.* at 3420.

71. The day after the opinions were announced, Professor Kamisar opined that "this will [not] be limited to cases where the police have warrants." Wall St. J., July 6, 1984, at 2, col. 2. He later enlarged upon this statement:

Whether the new exception will be confined to search warrants is uncertain. I doubt that it will be. Running through last week's opinions is a strong skepticism that "the extreme sanction of exclusion," as the Court called it, can "pay its way" as an effective deterrent on official misbehavior unless the underlying Fourth Amendment violations are deliberate or at least substantial.

N.Y. Times, July 11, 1984, at A25, col. 1.

in *Leon* that suggests that this was not the Court's intent and much more to argue that it *should* not be. The fundamental point of *Leon* is that it does no good, by way of deterrence, to exclude evidence obtained on the basis of a reasonable good faith submission to a magistrate because the mistake is that of the magistrate, whereas the exclusionary sanction is aimed at the police.<sup>72</sup> Obviously this line of reasoning is not applicable to the warrantless search, where the mistake is solely that of the police. At least if the quality of magistrates were improved, it would be sensible to shift to them the primary responsibility for deciding whether a search is proper.<sup>73</sup> Under no circumstances is it sensible to shift it to the police. The belief that "officer[s] engaged in the often competitive enterprise of ferreting out crime"<sup>74</sup> should not be empowered to decide whether they have sufficient evidence to conduct a search is a sound principle to which the Court has long adhered. Since in many situations it is not feasible to require that police act pursuant to a warrant, the only current way to deter police misconduct is through a strong exclusionary sanction.

It is true that in some cases the police will try their best and still make a "good faith" mistake as to the law and that exclusion will not deter future "good faith" mistakes. But to conclude from this that the police should not be admonished to try harder is wrong. The problem with allowing for even objectively reasonable good faith mistakes by the police in this area is that it will weaken the deterrent effect of the exclusionary rule. The command, "if you make a mistake you will be penalized," encourages one to try hard not to make a mistake. The qualification that "some mistakes will be excused" encourages one to cut corners in the hope that it will be excused. Given the natural reluctance of the courts to exclude valid evidence, that hope will frequently be a reality. Moreover, the advantage of *Leon*, that it encourages the desirable police behavior of obtaining warrants by treating mistakes in warrant cases more leniently, will be lost if mistakes in warrantless searches are shown the same leniency. The "reasonably well-trained police officer" is a police officer who knows and follows the law; the Court should demand nothing less in cases where no outside endorsement of police activity (i.e., a warrant) is obtained.<sup>75</sup>

## II. THE FUTILITY

This raises a more fundamental concern about *United States v. Leon*,<sup>76</sup> *Illinois v. Gates*,<sup>77</sup> *United States v. Ross*,<sup>78</sup> and all of the other efforts by

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72. See *supra* note 70.

73. See *supra* text accompanying notes 34-40.

74. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

75. As discussed *infra* text accompanying notes 79-80, the Court must deal directly with the fact that fourth amendment law is too confusing for police to follow, rather than promulgating a confused doctrine and then not enforcing it.

76. 104 S. Ct. 3405 (1984).

77. 462 U.S. 213 (1983).

78. 456 U.S. 798 (1982).

the Court in recent years to make fourth amendment law easier for the police to apply. All of these cases are mere band-aids on the gaping wound of fourth amendment law which is so hopelessly confused that tinkering with the "automobile exception," the definition of probable cause, or the exclusionary rule will not help.<sup>79</sup> A decade ago, Professor Weinreb cited the fact that the preceding five terms of the Court had produced sixteen major opinions interpreting the fourth amendment to illustrate his point that it "is a body of doctrine that is unstable and unconvincing."<sup>80</sup> The last five terms have produced *thirty-five* such opinions as the Court struggles ever more frantically to free itself and the police from the mass of contradiction and confusion that is fourth amendment law.<sup>81</sup> Of the seventeen cases decided in the last two years, the Court has never reached the same result as all of the lower courts have and has usually reversed the highest court below,

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79. To bolster the same point about the state of fourth amendment law, the government offered the following observation in *Leon*:

If concrete examples of the problem are necessary one need only look to the Court's decisions in *New York v. Belton* 453 U.S. 454 (1981) and *Robbins v. California* 453 U.S. 420 (1981). The facts of these cases were remarkably similar. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in *Robbins*, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marijuana. In *Belton*, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

When the Court decided these cases, three Justices opined that both searches were legal; three Justices opined that they were both illegal; and three Justices controlled the ultimate decision that the search in *Robbins* was illegal and that in *Belton* legal. It may come as a small consolation to the officer who made the search in *Robbins* that only a year later the decision was overruled in *United States v. Ross* 456 U.S. 798 (1982).

Brief for the United States, *supra* note 45, at 53 n.18.

The government's solution to this problem—abolition of the exclusionary rule—is neither shared by the author nor suggested by common sense.

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

81. Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Leon, 104 S. Ct. 3405 (1984); Segura v. United States, 104 S. Ct. 3380 (1984); United States v. Karo, 104 S. Ct. 3296 (1984); Welsh v. Wisconsin, 104 S. Ct. 2091 (1984); Oliver v. United States, 104 S. Ct. 1735 (1984); United States v. Jacobsen, 104 S. Ct. 1652 (1984); Michigan v. Clifford, 104 S. Ct. 641 (1984); Michigan v. Long, 463 U.S. 1032 (1983); Illinois v. Andreas, 463 U.S. 765 (1983); United States v. Place, 462 U.S. 696 (1983); Illinois v. Lafayette, 462 U.S. 640 (1983); United States v. Villamonte-Marquez, 462 U.S. 579 (1983); Illinois v. Gates, 462 U.S. 213 (1983); Texas v. Brown, 460 U.S. 730 (1983); Florida v. Royer, 460 U.S. 491 (1983); United States v. Knotts, 460 U.S. 276 (1983); Taylor v. Alabama, 457 U.S. 687 (1982); United States v. Johnson, 457 U.S. 537 (1982); United States v. Ross, 456 U.S. 798 (1982); Washington v. Chrisman, 455 U.S. 1 (1982); New York v. Belton, 453 U.S. 420 (1981); Michigan v. Summers, 452 U.S. 692 (1981); Steagala v. United States, 451 U.S. 204 (1981); United States v. Cortez, 449 U.S. 411 (1981); Reid v. Georgia, 448 U.S. 438 (1980) (per curiam); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); United States v. Payner, 447 U.S. 649 (1980); United States v. Mendenthal, 446 U.S. 544 (1980); Payton v. New York, 445 U.S. 523 (1980); United States v. Crews, 445 U.S. 463 (1980); Ybarra v. Illinois, 444 U.S. 85 (1979).

rendering a total of sixty-one separate opinions in the process.<sup>82</sup> Four of the seventeen cases are plurality decisions.<sup>83</sup> It is readily apparent to anyone who has tried to follow fourth amendment law that not only can the police not understand it, but even the courts, after briefing, arguments, and calm reflection, cannot agree as to what appropriate police behavior should be in a particular case.<sup>84</sup>

Justice Stevens' criticism of *Leon*, that "an official search and seizure cannot be both 'unreasonable' and 'reasonable' at the same time,"<sup>85</sup> should be correct, but in the context of current law it is not. The reasonable policeman or reasonable court will frequently err in its determination that certain behavior does or does not violate the fourth amendment (i.e., is "unreasonable") because no one knows what the law requires. Justice Stevens' point does, however, illustrate the fundamental difficulty with fourth amendment law—its mind-boggling complexity—a difficulty which is only exacerbated by opening up an exception to the exclusionary rule.

Prior to *Leon*, at least one aspect of the fourth amendment calculus was straightforward: if evidence was unconstitutionally seized, it must *always* be suppressed from the prosecution's case-in-chief.<sup>86</sup> Now even that decision can be devilishly complicated, as the following example illustrates. Suppose the police received an anonymous phone call from "a neighbor" accusing *X* of dealing narcotics from his house. (Item 1). An undercover officer goes to the neighborhood and asks a passerby, "Hey, you know where I can

82. *Sheppard*, 104 S. Ct. 3424 (1984), *rev'g* 387 Mass. 488, 441 N.E. 2d 725 (1982); *Leon*, 104 S. Ct. 3405 (1984), *rev'g* 701 F.2d 187 (9th Cir. 1983); *Segura*, 104 S. Ct. 3380 (1984), *aff'g* 697 F.2d 300 (2d Cir. 1982); *Karo*, 104 S. Ct. 3296 (1984), *rev'g* 710 F.2d 1433 (10th Cir. 1983); *Welsh*, 104 S. Ct. 2091 (1984), *vacating* 108 Wis. 2d 319, 321 N.W.2d 245 (1982), *rev'g* 102 Wis. 2d 727, 308 N.W.2d 772 (Wis. Ct. App. 1981); *Oliver*, 104 S. Ct. 1735 (1984), *aff'g* 686 F.2d 356 (6th Cir. 1982), *rev'g* 657 F.2d 85 (6th Cir. 1981); *Jacobsen*, 104 S. Ct. 1652 (1984), *rev'g* 683 F.2d 296 (8th Cir. 1982); *Clifford*, 104 S. Ct. 641 (1984), *aff'g in part and rev'g in part*, No. 58278, slip op. (Mich. App. March 30, 1982); *Long*, 463 U.S. 1032 (1983), *rev'g* 413 Mich. 461, 320 N.W.2d 866 (1982), *rev'g* 94 Mich. App. 338, 288 N.W.2d 629 (1979); *Andreas*, 463 U.S. 765 (1983), *rev'g* 100 Ill. App. 3d 396, 426 N.E.2d 1078 (1981); *Place*, 462 U.S. 696 (1983), *aff'g* 660 F.2d 44 (2d Cir. 1981), *rev'g* 498 F. Supp. 1217 (E.D.N.Y. 1980); *Lafayette*, 462 U.S. 640 (1983), *rev'g* 99 Ill. App. 3d 830, 425 N.E.2d 1383 (1981); *Villamonte-Marquez*, 462 U.S. 579 (1983), *rev'g* 652 F.2d 481 (5th Cir. 1981); *Gates*, 462 U.S. 213 (1983), *rev'g* 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *aff'g* 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980); *Brown*, 460 U.S. 730 (1983), *rev'g* 617 S.W.2d 196 (Tex. Crim. App. 1981); *Royer*, 460 U.S. 491 (1983), *aff'g* 389 So. 2d 1007 (Fla. Dist. Ct. App. 1979); *Knotts*, 460 U.S. 276 (1983), *rev'g* 662 F.2d 515 (8th Cir. 1981).

83. *Segura*, 104 S. Ct. 3380 (5-4 decision) (though not strictly a plurality decision, White, Powell, and Rehnquist, JJ., declined to join in part IV of the Chief Justice's opinion); *Clifford*, 104 S. Ct. 641 (4-1-4 decision); *Brown*, 460 U.S. 730 (4-2-3 decision); *Royer*, 460 U.S. 491 (4-1-4 decision).

84. Justice Powell, concurring in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), referred to the "grey, twilight area, where the law is difficult for courts to apply, let alone for the policeman on the beat to understand." *Id.* at 269.

85. 104 S. Ct. at 3446-47.

86. Well, almost always. See *Michigan v. DeFillippo*, 443 U.S. 31 (1979), for a minor exception. See also *United States v. Havens*, 446 U.S. 620 (1980) (permitting introduction of suppressed materials to impeach defendant's testimony).

score some dope?" The passerby replies, "X's place." (Item 2). Finally, a policeman trespasses on X's property and, pressing his ear to the window pane, overhears X on the phone ordering narcotics from his supplier. (Item 3). The police incorporate these three items into a warrant application and take it to a magistrate who issues a warrant which leads to the police finding narcotics in X's house. The defendant moves to suppress the narcotics. Prior to *Leon*, the judge had to determine whether each of the items constituting probable cause had been constitutionally obtained and then decide whether the legitimately obtained items were sufficient to support the warrant alone.<sup>87</sup> After *Leon*, the calculus is far more complicated, as the following questions illustrate: (1) Assuming that Item 3 was unconstitutionally obtained, does *Leon* force the judge to ignore that violation if it was a "good faith" violation by the police who obtained a warrant? (2) If the judge considers the violation and declares Item 3 excludable, do Items 1 and 2 alone constitute probable cause? (3) If not, must the judge nevertheless admit the evidence on the ground that Items 1 and 2 were at least enough to support a good faith belief in probable cause by the police? (4) Can the judge do this when the magistrate based his decision (on which *Leon* indicates the judge should rely) on Items 1, 2 and 3, and perhaps would not have granted the warrant if he had been presented with only Items 1 and 2?

*Leon* provides some indication of a solution to only the first of these problems. The good faith exception should not preclude consideration of the pre-warrant evidence-gathering techniques of the police. The questioned police activity, the eavesdropping, was not performed pursuant to a warrant. When the magistrate issued the warrant, he did not endorse past activity; he only authorized future activity.<sup>88</sup> As *Leon* makes clear, the function of the magistrate is to determine "whether a particular affidavit establishes probable cause,"<sup>89</sup> not whether the methods used to obtain the information in that affidavit were legal. The illegal eavesdrop is a warrantless act which cannot be protected by incorporating the information thus obtained into a warrant application. Despite the police's good faith belief in its validity, the warrant is simply the fruit of a (warrantless) poisonous tree and the deterrent purpose of the exclusionary rule would be advanced by excluding Item 3.<sup>90</sup> The Court's recognition that *Leon* does not apply when policeman X passes on illegally obtained information to policeman Y, who then obtains the warrant, would seem to govern this case as well.<sup>91</sup>

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87. LAFAYE, *supra* note 65, at § 11.4(f) and cases cited therein.

88. A "warrant-issuing magistrate is not required to raise, *sua sponte*, possible constitutional problems [in the accumulation of probable cause]." *Id.* (citing *Everhart v. State*, 274 Md. 459, 337 A.2d 100 (1975)).

89. 104 S. Ct. at 3417.

90. *Leon* is based on the principle that it makes no sense to punish the police for what is essentially the magistrate's mistake. If the Court extends the good faith exception to warrantless searches, then this problem will only arise when the original police mistake is in "bad faith."

91. 104 S. Ct. at 3421 n.24 (citing with approval *Whitely v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568 (1971)).



However, when probable cause is based on multiple factors, as it usually is, finding one of these factors invalid (and excludable from the probable cause analysis) does not dispose of the ultimate question of admissibility of the evidence. The magistrate must then consider the remaining elements of probable cause. Of course, if these items independently establish probable cause there is no difficulty.<sup>92</sup> But if they do not, are they sufficient if they would give a reasonable policeman a good faith belief in probable cause? Arguably, the answer is yes under *Leon*, but how can one know that the magistrate would have issued the warrant if he was presented only with Items 1 and 2 (which are concededly inadequate to justify issuance of a warrant)? To admit the evidence is inconsistent with the deterrent purpose of the exclusionary rule, but to exclude it is inconsistent with the "good faith reliance" rationale of *Leon*.

If the Court had the stomach for it, it could make the problems of the fourth amendment *seem* to go away by flatly abolishing the exclusionary rule in warrant (or all) cases. Then there would not have to be a suppression hearing in these cases, and the public would not have to hear the unpleasant details of the police running "roughshod"<sup>93</sup> over the rights, if not the bodies, of criminal suspects. Before *Mapp v. Ohio*<sup>94</sup> there were few search and seizure problems in the courts and many of them in the streets. But the Court recognizes this potential and instead has created only a limited exception to the exclusionary rule which has several exceptions itself. While a few items of evidence will be bumped over from the "excluded" to the "admitted" category, the underlying problem—the lack of clarity regarding what constitutes an unreasonable search or seizure—remains. By creating an exception to the exclusionary rule, which heretofore operated automatically once evidence was found to have been unreasonably seized, the Court has opened up new avenues of litigation and confusion.

By limiting the operation of the exclusionary rule, the Court is simply trying to escape the consequences of its own inability to formulate a doctrine which is sufficiently straightforward to eliminate "reasonable" mistakes by the police in attempting to apply the law. A parable helps illustrate why the Court's current efforts, and the concurrent debate, are misfocused. Suppose there was a sporting contest in which the rules provide "anyone guilty of unreasonable smucking shall be expelled from the game" (the expulsory rule). "Smucking" is defined as jabbing another player "in an area where he has an expectation of privacy," but no one is sure what "unreasonable smucking" is. Everyone is agreed that at least some of the more egregious smucking must be punished and that there is no other effective way to deter such conduct. This rule is unpopular with the fans because it interferes with the game, so the Rules Committee endeavored to set up more detailed

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92. See *supra* note 87.

93. The Court so described the police behavior in *Mapp v. Ohio*, 367 U.S. 643, 645 (1961).

94. *Id.*

standards in order to define more carefully what conduct is prohibited. The standards were as follows: "smucking is permitted under exigent circumstances," and "the expulsionary rule will not apply if the smucking is done in good faith." Unfortunately, this attempt only led to more confusion which the Committee subsequently tried to alleviate by promulgating even more standards and exceptions. Far from clarifying the rules, the newest standards only made the rules more confusing. In response, a group of fans urged abolition of the expulsionary rule, arguing that it is stupid to expel the smucker because a lot of people are thrown out unjustly and that by the time the offender is thrown out, the injury to the smuckee is complete anyway. Others responded: "yes, but that's the only way to deter smucking," or "the integrity of the game demands it."

Studies were conducted to see if expulsion really deterred smucking and to see how often smuckers were thrown out, as if the answer proved something about the efficacy of the rule. (If smuckers are thrown out a lot, does it prove that the rule is bad because it expels many players unjustly or that the rule is desperately needed because there are so many dirty smuckers these days?) In all of the fuss about the expulsionary rule, everybody lost track of the fact that the real problem was the Rules Committee's failure either to define "unreasonable smucking" in such a way that players and referees could readily understand and follow the rules or else to abandon the attempt and simply leave it to the judgment of the referees, on a case-by-case basis, to determine whether smucking was unreasonable, much as a baseball umpire determines what conduct justifies the expulsion of an argumentative manager.

To be sure, defining "unreasonable searches and seizures" clearly is more difficult than defining behavior that occurs in the more narrowly circumscribed confines of a game. Still, to argue that since the rules are difficult to formulate we ought to abolish the *penalty* or create unclear exceptions to the (unclear) rules is a nonsequitor. Certainly the primary focus of attention should be on clarifying the rules rather than on making them increasingly unclear by focusing attention on penalties and exceptions. Until the Court does this, it will continue its Sisyphean task of trying to explain and refine a body of law which, with each attempt at explanation or refinement, only becomes more complex.<sup>95</sup>

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95. For the author's more detailed explication of the problems with fourth amendment law and two proposed solutions, see Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).