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Gates, “Probable Cause,” “Good Faith,” and Beyond

Yale Kamisar*

Illinois v. Gates1 was the most eagerly awaited constitutional-criminal procedure case of the 1982 Term. I think it fair to say, however, that it was awaited a good deal more eagerly by law enforcement officials and the Americans for Effective Law Enforcement than by defense lawyers and the American Civil Liberties Union. As it turned out, of course, the Gates Court, to the disappointment of many, did not reach the question whether the exclusionary rule in search and seizure cases should be modified so as not to require the exclusion of evidence obtained in violation of the fourth amendment when it is obtained in the “good faith” belief or “reasonable belief” that the challenged search or seizure was consistent with the fourth amendment.2 Nevertheless, the Gates decision is impor-

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This Article grew out of the John F. Murray Lecture I delivered at the University of Iowa College of Law on April 8, 1982. Because the lecture was given before the Supreme Court handed down its decision in Illinois v. Gates, 103 S. Ct. 2317 (1983), this Article is more a replacement for, than a revision of, the April 1982 lecture. At several places in the Article I have drawn freely on the remarks I made at the Fifth Annual Supreme Court Review and Constitutional Law Symposium on September 23-24, 1983. See 34 CRIM. L. RPTR. (BNA) 2081, 2098-2100 (Nov. 2, 1983).

I am greatly indebted to Thomas Y. Davies, Project Director of the American Bar Foundation; Professor Wayne R. LaFave of the University of Illinois College of Law; and Judge Charles E. Moylan, Jr., of the Court of Special Appeals of Maryland, for allowing me to read, and profit by, drafts of their forthcoming articles on Gates and related matters. I am also indebted to the many law professors who contributed significantly to this Article by communicating with me about various underlying issues: Francis A. Allen, Edward H. Cooper, Joseph D. Grano, Jerold H. Israel, Phillip E. Johnson, Wayne R. LaFave, Wade H. McCree, Jr., Silas J. Wasserstrom, and James B. White.

1. 103 S. Ct. 2317 (1983). Justice Rehnquist wrote the opinion of the Court. Justice White wrote a long opinion concurring in the judgment. Justice Brennan (with whom Justice Marshall joined) and Justice Stevens (with whom Justice Brennan joined) filed separate dissents.

2. Although the “good faith” test is the popular name for the oft-proposed modification of the exclusionary rule, the Court did not use this term when it restored the Gates case to the calendar for reargument. It requested the parties to address the question whether the exclusionary rule “should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.” Id. at 2321.

As this Article went to press, the Court had scheduled arguments in two new cases raising the “good faith”-“reasonable belief” issue in the search warrant context: Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), cert. granted, 103 S. Ct. 3534 (1983); United States v. Leon, 701 F.2d 187 (9th Cir.), cert. granted, 103 S. Ct.
tant in its own right for it substantially dismantled the prevailing analytical structure for determining probable cause—the so-called “two-pronged test.”

How much difference the Gates decision will make in the operation of the warrant procedure, and whether it signals the abandonment of the “two-pronged test” in warrantless as well as warrant cases, remains to be seen. How Gates’ soft standard for upholding search warrants (and perhaps warrantless searches and seizures as well) will affect the proposal to adopt a “good faith” or “reasonable belief” exception to the exclusionary rule also remains to be seen. I believe Gates has an important bearing on this issue. I think its emphasis on the practical, flexible, and fluid nature of the “probable cause” standard substantially weakens the case for a “good faith” or “reasonable belief” test generally. Moreover, I think the Gates case totally obviates the need for such a test, if there ever was one, in the warrant context. A “good faith” or “reasonable belief” test by any other name is still a “good faith” or “reasonable belief” test, and as I read Gates the Court essentially adopted such a test in the warrant context.

I. ON THE MEANING AND SCOPE OF ILLINOIS V. GATES

Because the circumstances that gave rise to the search of the Gates automobile are viewed so differently by various members of the Court, and because I do not find the behavior of the Gates couple nearly as “suspicious” or “unusual” as the Court and concurring Justice White regard it, I think the facts are worth considering with some care.

A. How Accurate Was the Letter Writer?

On May 3, 1978 the Bloomingdale (Illinois) Police Department received a handwritten letter by mail from an anonymous person. (The word “anonymous” is used in different ways. The letter writer was not a person who was known to the police, but whose identity was withheld; rather, this person was unknown even by the police.) The unknown person wrote:

This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live [at a specified place]. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time

3535 (1983). A third case, raising the issue in a no-warrant situation, had been set for argument but was dismissed when the defendant died: Colorado v. Quintero, cert. dismissed, 104 S. Ct. ___ (1983).

3. See infra text accompanying notes 20-93.
Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.

They brag about the fact they never have to work, and make their entire living on pushers.

I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.4

Detective Mader of the Bloomingdale Police Department decided to pursue the tip. He learned that an “L. Gates” had made a reservation on a May 5th flight to West Palm Beach. Drug agents later reported that Mr. Gates flew to West Palm Beach as scheduled, took a taxi to a nearby Holiday Inn, and went to a room registered to one Susan Gates. The next morning, Gates and a woman (it turned out to be his wife) left the motel and, to use the description contained in Detective Mader’s affidavit, drove “northbound on that interstate highway commonly used by travelers to the Chicago area”5 (between twenty-two and twenty-four hours driving time away). At that point, when the Gates couple had just left the West Palm Beach area, Detective Mader, setting forth the foregoing facts in an affidavit, sought and obtained a warrant to search the Gates’ Bloomingdale residence and their car.

Some thirty-six hours after he had flown out of Chicago, Gates and his wife returned to their home in Bloomingdale, driving the car in which they had left West Palm Beach twenty-two hours earlier. The Bloomingdale police were waiting for them. A search of the trunk of their car turned up 350 pounds of marijuana. A search of their home produced more marijuana, as well as weapons and other contraband.

The Court did not dispute the Illinois courts’ conclusion that, standing alone, the anonymous letter would not provide the basis for a magistrate’s determination that there was probable cause to believe contraband would be found in the Gates’ car and home. Nevertheless, applying a “flexible,” “practical, common-sense,” “totality of the circumstances” test (more about this later), the Court concluded that the corroboration of the anonymous letter writer’s predictions by independent police work established the requisite “probable cause.”6

In the course of its opinion, the Court observed that “[t]he letter writer’s accurate information as to the travel plans of each of the Gates was of a character likely obtained only from the Gates themselves, or from someone familiar with their . . . travel plans.”7 Despite what the Court

4. The letter is quoted in full in the opinion of the Court. 103 S. Ct. at 2325 (emphasis added).
6. See 103 S. Ct. at 2334-36.
7. Id. at 2335 (emphasis added).
said or suggested, however, the letter writer did not prove to be completely accurate about the travel plans of each of the Gateses.

First, Sue Gates—who, by the way, for all the officers knew might have been in Florida for a month before her husband joined her—did not, as the letter writer predicted, “drop the car off” and “fly back” alone. She drove back with her husband. This discrepancy is hardly a quibble. As dissenting Justice Stevens pointed out, the discrepancy made the Gates’ behavior seem a good deal less unusual than the informant had predicted it would be. It would indeed have been odd if, as the anonymous letter writer had predicted, Sue had driven to Florida, left the car, and flown right back just before, or shortly after, her husband arrived. But it is not unusual for a person to “fly to Florida, meet a waiting spouse, and drive off together in the family car.”

Second, the letter writer had predicted an itinerary that always kept one spouse home in Bloomingdale, which is understandable if “they have over $100,000.00 worth of drugs in their basement.” But, as it turned out, the couple was actually together over a thousand miles away from home. This fact casts doubt on the hypothesis that they kept a large quantity of drugs in their home and therefore did not want to leave it unguarded.

The Court also called attention to the corroboration of the letter’s prediction that a short time after flying to Florida, Lance would drive the car north toward Bloomingdale. The letter writer, however, had predicted that shortly after arriving in a Florida city, Lance would return home by car, not simply drive the car in a northerly direction. The police tried to bridge this gap by stating in their affidavit that the morning after Lance arrived in West Palm Beach, the couple had set out upon “that interstate highway commonly used by travelers to the Chicago area.” The Court, per Justice Rehnquist, described the couple’s departure in almost identical fashion. But as Justice Stevens noted, “the same highway is also commonly used by travelers to Disney World, Sea World, and Ringling Brothers and Barnum and Bailey Circus World. It is also the road to Cocoa Beach, Cape Canaveral, and Washington, D.C.”

As it turned out, after the magistrate issued the warrant, the Gateses did drive all night to Bloomingdale. And it is unusual for a couple to make a twenty-two hour nonstop drive from West Palm Beach, Florida to Bloom-

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8. See id. at 2360 n.1 (Stevens, J., joined by Brennan, J., dissenting). The anonymous note stated that Sue Gates would drive down to Florida on May 3, several days before her husband flew down. See id. at 225.
9. See id. at 2360 (Stevens, J., dissenting).
10. Id. at 2360 n.3 (Stevens, J., dissenting).
11. See id. at 2360 (Stevens, J., dissenting).
12. See id. at 235.
13. See supra note 5 and accompanying text.
14. Gates and an unidentified woman “drove northbound on an interstate frequently used by travelers to the Chicago area.” 103 S. Ct. at 2326.
15. Id. at 2360 n.3 (Stevens. J., dissenting).
ingdale, Illinois only a few hours after one spouse had flown to West Palm Beach—but this fact was not known by the magistrate when he issued the warrant. This unusual behavior, therefore, could not be considered in evaluating the warrant.\(^{16}\)

Moreover, when Lance Gates made a reservation on a flight to West Palm Beach, he used his own name and gave an accurate phone number.\(^{17}\) Nor is there any indication that Lance did any of the things drug couriers are supposed to do, or commonly do, such as pay for the plane ticket in cash, carry no luggage, or improperly fill out baggage tags.\(^{18}\) Thus, Justice Stevens concluded, and Justices Brennan and Marshall agreed, that the search warrant was invalid even under the Court’s newly announced “totality of the circumstances” test.\(^{19}\) But I am getting ahead of my story.

### B. The “Two-Pronged Test”

Applying the test that had governed these cases until the decision in *Gates*, the so-called “two-pronged” Aguilar-Spinelli test,\(^{20}\) three levels of Illinois courts had concluded that the warrant was not based on probable cause.\(^{21}\) Now, what do I mean by the “two-pronged” Aguilar-Spinelli test?

A central proposition in warrant procedure is that the determination of probable cause is to be made by the magistrate or another judicial officer, not the law enforcement officer who seeks the warrant. To assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry, affidavits cannot be conclusory. It is obviously not enough simply to state: “affiant believes that probable cause exists

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16. In *United States v. Ross*, 456 U.S. 798 (1982), a case handed down a year after the Illinois Supreme Court rendered its decision in *Gates*, the Court made it clear that if the police have probable cause to believe a car contains contraband, they may carry out a warrantless search of the entire vehicle, including the trunk and containers found therein. *Id.* at 824-25. Thus, as dissenting Justice Stevens noted in *Gates*, 103 S. Ct. at 2361 (Stevens, J., dissenting), the car search may have been valid under *Ross* if the police had probable cause after the Gateses returned home. Justice Stevens thought the preferable resolution of *Gates* was to “simply vacate the judgment of the Illinois Supreme Court and remand the case for reconsideration in the light of . . . *Ross.*” *Id.* at 2362 (Stevens, J., dissenting).

17. *See* 103 S. Ct. at 2360 n.2 (Stevens, J., dissenting).

18. *See* id. (Stevens, J., dissenting).

19. *See* id. at 2361-62 & n.8 (Stevens, J., dissenting); *id.* at 2351 (Brennan, J., joined by Marshall, J., dissenting). On the other hand, concurring Justice White concluded that the search warrant was valid even under the pre-*Gates* “two-pronged test.” *See* id. at 2347-50 (White, J., concurring).


21. The circuit judge of DuPage County quashed the search warrant and suppressed the evidence seized pursuant to it, and all three judges of the Second District of the Illinois Appellate Court, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980), and a 5-2 majority of the Supreme Court of Illinois, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), agreed that the warrant was not based on probable cause.
to search [certain specified premises]." Nor is it enough to state that the
"affiant has received reliable information from a credible person and does
believe that drugs are being kept at [certain premises]."

If the magistrate is to perform his detailed function and not be a rub-
ber stamp, the affidavit must inform the magistrate of the underlying cir-
cumstances which led the officer to conclude that the informant was credible
and obtained the information in a reliable way. Only in this way, or so
the Court emphasized in *Aguilar and Spinelli*, can the magistrate make the
properly independent judgment about the persuasiveness of the facts relied
upon by the officer to show probable cause.23

These considerations gave rise to the two-pronged test: An affidavit
based on an informer's tip, standing alone, cannot provide probable cause
for issuance of a warrant unless the affiant-officer states the reasons that
led him to conclude that the informant is probably credible or generally
trustworthy, or that the information is "reliable" on this particular occa-
sion (the "veracity" prong) and unless the affiant states the reasons that
led him to conclude that the informer obtained the information in a reliable
way ("the basis of knowledge" prong).24 The two prongs or elements have
an independent status; they are analytically severable.25 The officer's oath
that the informant has often furnished reliable information in the past
establishes general trustworthiness, but it is still necessary that the "basis
of knowledge" prong be satisfied—the officer must explain how the in-
formant claims to have come by the information in this case.

If the conclusory allegations of a police officer, presumably trustworthy
or personally known by the magistrate to be trustworthy, are insufficient
to establish probable cause, the conclusory allegations of a generally
trustworthy informant must be insufficient as well. If it is not enough for
an honest police officer to state a belief that gambling equipment or drugs
are located in a certain building without setting forth the reasons for this

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*See generally* 1 W. *LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMEND-
MENT § 3.3(a) (1978); Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*,
19 Md. App. 507, 313 A.2d 847 (Ct. Spec. App. 1974), also is considered a leading discus-
sion of the *Aguilar-Spinelli* test. The Gates majority seemed to consider the *Stanley*
opinion its prime exhibit of the unduly rigorous and excessively technical analysis of informants'
tips generated by the two-pronged test. *See* 103 S. Ct. at 2327 n.4, 2327-28 & n.5, 2329
n.8, 2331.

23. *See Spinelli*, 393 U.S. at 412-16; *Aguilar*, 378 U.S. at 110-15; *see also* Giordenello
v. United States, 357 U.S. 480, 486 (1958); *Nathanson v. United States*, 290 U.S. 41,
46 (1933).

24. *See* W. *LAFAVE, supra note 22, § 3.3(a), at 501-03; Moylan, *supra* note 22, at
747-52.

25. Justice Harlan, the author of *Spinelli*, underscored this point in his dissenting
opinion in United States v. Harris, 403 U.S. 573, 592 (1971) (Harlan, J., joined by Douglas,
belief, it is not enough for an honest informant simply to state the same
conclusory belief.\textsuperscript{26}

The converse is also true. Even if the informant states how he ob-
tained the information which led him to conclude that gambling equip-
ment is in a certain building, it is still necessary to establish the infor-
mant’s “credibility” or general trustworthiness. The possibility remains
that the information might have been fabricated. The requirement that
the magistrate independently assess the general trustworthiness or honesty
of the informant does not vanish when the source of the tip indicates that
\textit{if true} the information is trustworthy.\textsuperscript{27} In short, under the two-pronged
test, a strong showing on one prong does not compensate for a deficient
showing on the other.

The most common way to satisfy the “veracity” prong is to point
to the informant’s “track record”—he has provided accurate informa-
tion to the police a number of times in the past.\textsuperscript{28} If the informant’s track
record cannot be sufficiently established, it may be possible to satisfy the
veracity prong by showing that the accusation was a declaration against
the informant’s penal interest.\textsuperscript{29}

The surest way of satisfying the “basis of knowledge” prong is for
the informant to declare that he personally has seen the facts asserted and
is passing on first-hand information.\textsuperscript{30} If the informant’s information is
hearsay, he may establish good reason for believing it—for example, the
informant’s hearsay comes from one of the participants in the crime in
the nature of a declaration against interest.\textsuperscript{31}

The basis of knowledge prong also may be satisfied in an indirect
fashion. The tip may describe the suspect’s criminal activity in such great
detail that the magistrate reasonably may conclude that the informant “is
relying on something more substantial than a casual rumor circulating
in the underworld or an accusation based merely on [the suspect’s] general
reputation.’\textsuperscript{32} That is, the magistrate reasonably may infer that the in-
formant gained the information in a reliable way. The “self-verifying
detail” approach does not have much to commend it, especially compared
to an explicit statement of the basis of the informant’s knowledge.\textsuperscript{33} In
any event, it should be utilized only with respect to the basis of knowledge

\begin{footnotes}
\footnotetext{26}{See Gates, 103 S. Ct. at 2350 (White, J., concurring); Spinelli, 393 U.S. at 424
(White, J., concurring); see also Moylan, supra note 22, at 773.}
\footnotetext{27}{United States v. Harris, 403 U.S. 573, 592 (1971) (Harlan, J., dissenting); see
also infra text accompanying note 35.}
\footnotetext{28}{See 1 W. LAFAVE, supra note 22, § 3.3(a), at 502; Moylan, supra note 22, at 758-60.}
\footnotetext{29}{See United States v. Harris, 403 U.S. 573, 579-80 (1971) (discussed in 1 W.
LAFAVE, supra note 22, § 3.3(a), at 922-35); see also Moylan, supra note 22, at 761-62.}
\footnotetext{30}{See Spinelli, 393 U.S. at 425 (White, J., concurring).}
\footnotetext{31}{See id. (White, J., concurring).}
\footnotetext{32}{Id. at 416 (Harlan, J.); see also id. at 417; id. at 425 (White, J., concurring).}
\footnotetext{33}{See 1 W. LAFAVE, supra note 22, § 3.3(c), at 546-47.}
\end{footnotes}
prong, not the veracity prong. As an oft-quoted Maryland court put it in Stanley v. State:

[T]he "self-verifying detail" technique cannot repair a defect in the "veracity" prong. The notion that great detail implies personal observation rather than the overhearing of barroom gossip, presupposes an honest informant. If the informant were concocting a story out of the whole cloth, he could fabricate in fine detail as easily as with rough brush strokes. Minute details tell us nothing about "veracity." 35

C. May Police Corroboration Overcome Deficiencies in Either or Both "Prongs"?

If the veracity and basis of knowledge prongs are not satisfied in any of the ways described above, is that the end of the story? Not at all, Justice White tells us, in his self-styled "summary" of the Aguilar-Spinelli rules:

If a tip fails under either or both of the two prongs, probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports "both the inference that the informer was generally trustworthy and that he made his charge on the basis of information obtained in a reliable way." 36

Not so, say Professor Wayne LaFave and Judge Charles Moylan, perhaps the two leading commentators on the law of search and seizure. They maintain that the "corroboration" or "independent verification" technique cannot repair a deficiency in the basis of knowledge prong, only one in the veracity prong. 37 Nevertheless, I share Justice White's view that independent police corroboration can "cure" a deficiency in either or both prongs.

As LaFave himself observes, in Draper v. United States 38 "the corroboration about which the Court spoke was used to overcome a deficiency with respect to what later became [the] 'basis of knowledge' prong in Aguilar." 39 The Aguilar Court itself recognized at the outset that "an entirely different case" would have been presented had the results of a police surveillance of defendant's premises been added to the application for a search warrant. 40

34. Id.
36. 103 S. Ct. at 2347-48 (White, J., concurring) (quoting Spinelli, 393 U.S. at 417) (emphasis added).
39. 1 W. LAFAVE, supra note 22, § 3.3(a), at 506; see also id. § 3.3(f), at 552.
40. 378 U.S. at 109 n.1.
This statement suggests—and Justice Harlan's "opinion of the Court" in *Spinelli* clearly assumes—that independent investigative efforts may overcome deficiencies in either or both prongs:

If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered. [The magistrate] must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*’s tests without independent corroboration? . . . A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer’s tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar*’s requirements when standing alone.42

Professor LaFave is well aware that Justice Harlan’s opinion in *Spinelli* "suggest[s] that some greater degree of corroboration could have established inferentially the requisite basis of knowledge."

He maintains, however, that "there was not a fifth vote for this position."44 One response to LaFave's contention is that, counting the three dissenters (Justices Black, Stewart, and Fortas), who concluded that the corroboration of the tip did establish the requisite basis of knowledge, there were at least seven votes for "this position." Indeed, dissenting Justice Fortas thought it plain that

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41. Although Justice Harlan's opinion in *Spinelli* is designated as the "opinion of the Court," it is unclear whether it is for the point under discussion. See infra text accompanying notes 44-54.

42. 393 U.S. at 415-16; see also Whiteley v. Warden, 401 U.S. 560 (1971), in which Justice Harlan, speaking for a 6-3 majority, observed:

This Court has held that where the initial impetus for an arrest is an informer's tip, information gathered by the arresting officers can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone [citing *Draper* and *Spinelli*]. But the additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in *Draper* itself, were in the process of committing the felony.

*Id.* at 567.

43. 1 W. LaFAVE, supra note 22, § 3.3(f), at 562. I would put it more strongly. Justice Harlan pointed out that "[t]he tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation," 393 U.S. at 416, but then addressed the question whether "the patent doubts *Aguilar* raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts." *Id.* at 417. But what would be the point of considering whether the FBI's independent investigative efforts established that the informer "had made his charge against Spinelli on the basis of information obtained in a reliable way," *id.*, if the "independent verification" technique cannot repair a deficiency in the "basis of knowledge" prong?

44. 1 W. LaFAVE, supra note 22, § 3.3(f), at 562.

45. 393 U.S. at 430-31 (Black, J., dissenting); *id.* at 438 (Fortas, J., dissenting). "For substantially the reasons stated by my Brothers Black and Fortas," dissenting Justice Stewart also thought the challenged warrant "was supported by a sufficient showing of probable cause." *Id.* at 439 (Stewart, J., dissenting).
every one of the eight Justices who participated in the case adhered to "this position":

The majority acknowledges [that] its reference to a "two-pronged test" should not be understood as meaning that an affidavit deficient in these respects is necessarily inadequate to support a search warrant. Other facts and circumstances may be attested which will supply the evidence of probable cause needed to support the search warrant. On this general statement we are agreed. Our difference is that I believe such facts and circumstances are present in this case, and the majority arrives at the opposite conclusion.47

Professor LaFave’s point, of course, is that although Justice White concluded his separate opinion by "join[ing] the opinion of the Court and the judgment of reversal, especially since a vote [to uphold the search warrant] would produce an equally divided Court," he, in effect, rejected the view that a greater degree of independent verification could have established inferentially the requisite basis of knowledge. As LaFave read Justice White’s Spinelli opinion when he published his treatise six years ago (and as Justice Brennan, dissenting in Gates, read White’s Spinelli opinion50), Justice White took the position that corroboration of certain details in a tip could satisfy only the veracity, not the basis of knowledge prong.

According to LaFave (and more recently, Justice Brennan), Justice White, interpreting Draper quite differently than did Justice Harlan, viewed the corroboration of Draper’s arrival time, dress, and gait as satisfying or reinforcing the informant’s veracity, not his basis of knowledge. If sufficiently detailed, an “honest” informant’s tip could “verify itself”—could establish that the informant had acquired the information in a reliable way—but corroboration of certain details in a tip could not accomplish this verification.

It cannot be denied that this is a plausible way to read Justice White’s Spinelli opinion, but it is not the only way. Justice White’s main thrust in Spinelli simply may have been to explore and to underscore “the tension” between Draper and the Aguilar-Spinelli line of cases.52 He maintained, for example, that although Justice Harlan “seemingly embrace[d]” Draper in the course of invalidating the Spinelli search warrant, the Draper approach, if faithfully applied, would lead to the opposite result.53 Nevertheless, in

46. Justice Marshall took no part in the consideration or decision of the case. Id. at 420.
47. Id. at 438 (Fortas, J., dissenting) (emphasis added).
48. Id. at 429 (White, J., concurring).
49. 1 W. LAFAVE, supra note 22, § 3.3(f), at 562-63.
50. See 103 S. Ct. at 2353-55 (Brennan, J., dissenting).
51. See 393 U.S. at 424-27 (White, J., concurring).
52. See id. at 427-28 (White, J., concurring).
53. Id. at 428-29 (White, J., concurring).
the end, "'[p]ending full-scale reconsideration of [Draper], on the one hand, or of the Nathanson-Aguilar cases on the other," Justice White did "join the opinion of the Court." 54

Whatever Justice White said (or meant to say) in his Spinelli concurrence, 55 he now says:

I did not say that corroboration could never satisfy the basis of knowledge prong. My concern was, and still is, that the prong might be deemed satisfied on the basis of corroboration of information that does not in any way suggest that the informant had an adequate basis of knowledge for his report. If, however, as in Draper, the police corroborate information from which it can be inferred that the informant's tip was grounded on inside information, this corroboration is sufficient to satisfy the basis of knowledge prong. . . . The rules would indeed be strange if, as Justice Brennan suggests, . . . the basis of knowledge prong could be satisfied by detail in the tip alone, but not by independent police work. 56

Whatever Justice White meant in his Spinelli concurrence, I think he was right when he said what he did in his Gates concurrence. The rules would indeed be strange if a magistrate reasonably could infer from the amount of detail in a wholly uncorroborated tip that the informant had acquired the information in a reliable way—that the informant was "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation" 57—but could not arrive at the same conclusion on the basis of independent police work that "developed significant corroboration or other 'probative indications of criminal activity' along the lines suggested by the informant." 58 Police surveillance that uncovers suspicious activities along the lines suggested by the tip would seem to provide "a basis for probable cause far more solid than a routine recitation meeting the tests of Aguilar" 59—let alone the "self-verifying detail" contained in a wholly uncorroborated tip. 60 Indeed, it has been argued forcefully that police cor-

54. Id. at 429 (White, J., concurring).
55. As strange as this may seem, a Justice does not always have the last word on what he believes he said (or meant) in an earlier case. For example, see Justice Frankfurter's dissenting opinion in Elkins v. United States, 364 U.S. 206, 237-38 (1960) (Frankfurter, J., dissenting), explaining what he meant in Wolf v. Colorado, 338 U.S. 25 (1949); and Justice Brennan's dissenting opinion in Kirby v. Illinois, 406 U.S. 682, 691-705 (1972) (Brennan, J., dissenting), explaining what he meant in United States v. Wade, 388 U.S. 218 (1967).
56. 103 S. Ct. at 2349 n.22 (White, J., concurring) (emphasis original).
57. See supra note 32 and accompanying text.
58. United States v. Canieso, 470 F.2d 1224, 1231 (2d Cir. 1972) (Friendly, J.) (quoting Rebell, The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards, 81 YALE L.J. 703, 716 (1972) (emphasis original)).
59. Id. at 1231.
60. See supra text accompanying note 33.
roboration of an undisclosed informant’s tip should be mandatory, not merely “remedial.”

The rules also would be strange, I think, if police corroboration of an informant’s story could remedy a deficiency in the veracity prong—no Supreme Court opinion “question[s] such use of corroborating facts, and rightly so”—but not a deficiency in the basis of knowledge prong. Judge Moylan and Professor LaFave (relying heavily on Moylan’s reasoning), disagree. They believe that the different treatment of the two Aguilar prongs makes good sense. Observes Judge Moylan:

Verifying the truth of part of a story does nothing either to ascertain the story’s source or to check the informant’s perhaps invalid conclusions. . . .

An informant who does not speak from personal knowledge may well be passing on an amalgam of underworld rumor and barroom gossip. If that be true the verification of one contributing rumor would do nothing for the “veracity” of other contributing rumors. An informant may have made, moreover, innocent observations and then received incriminating information from a third party lending inculpatory color to those observations. Merely verifying the informant’s innocuous observations does nothing to verify the crucial third party who supplied the damning catalyst.

An informant may, furthermore, be leaping to an erroneous conclusion on the basis of innocent or ambiguous observations. Independent verification of an ambiguous factual premise cannot allow an informant to draw an invalid conclusion therefrom. The full premises must be set forth from which the judge may construct his own ultimate syllogism. Even a “credible” informant may engage in bizarre flights of logic, which is precisely why the judge must know just what the informant saw and heard and must not buy an informant’s bare conclusions.

I readily agree that merely verifying one aspect of the informant’s story or merely corroborating a few “innocuous details”—that is, commonly known facts or easily predictable events such as the identify of the suspect’s girl friend, the make and color of his car and its license plate number, the number of his home phone, and the bar he frequently

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62. 1 W. LAFAVE, supra note 22, § 3.3(f), at 556.
63. See infra note 65 and accompanying text.
64. 1 W. LAFAVE, supra note 22, § 3.3(f), at 562-63. Professor LaFave points out, however, that “the prevailing view is to the contrary.” Id. at 563.
visits—would not (at least, should not) suffice to remedy a deficiency in the basis of knowledge element. But such minimal corroboration would not (or should not) remedy a deficiency in the veracity prong either.\(^6^6\)

What, however, if independent police work has developed “significant corroboration or other ‘probative indications of criminal activity along the lines suggested by the informant,’” \(^6^8\) or strongly indicates that the informant possesses “a knowledge of the inner workings of the [suspects’] system,”\(^6^9\) or indicates that the informant has “some personal pipeline to the suspect’s scheme, rather than ‘public’ information available to the world at large”?\(^7^0\) To be sure, the risk that the informant is (to use Judge Moylan’s language) passing on “underworld rumor” or “barroom gossip” or engaging in “bizarre flights of logic” cannot be wholly eliminated by independent verification, but why does it have to be? Both Professor LaFave and Judge Moylan agree that independent verification of an undisclosed informant’s tip can remedy a deficiency in the veracity prong,\(^7^1\) but the risk that the informant is lying cannot be—and need not be—wholly eliminated. It is enough that the risk “has been sufficiently reduced by corroborative facts and observations.”\(^7^2\) Why, then, cannot the risk that the informant is merely relying on “a casual rumor circulating in the underworld or an accusation based merely on an individual’s general reputation”\(^7^3\) be sufficiently reduced by the same method?

What does it mean to say that the independent verification technique cannot repair a defect in the basis of knowledge prong? One would think

66. See, e.g., United States v. Montgomery, 554 F.2d 754, 757-58 (5th Cir. 1977); United States v. Tuley, 546 F.2d 1264, 1271-74 (5th Cir. 1977) (Godbold, J., dissenting); United States v. Myers, 538 F.2d 424, 429-30 (D.C. Cir. 1976) (Leventhal, J., dissenting); Rebell, The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards, 81 YALE L.J. 703, 715-20 (1972); cf. Spinelli, 393 U.S. at 414 (Defendant’s “travels to and from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones.”).

67. See 1 W. LAFAVE, supra note 22, § 3.3(f), at 560. Corroboration of the innocent detail does not negate the possibility that the informant is lying about other incriminating facts, for a clever informer wishing to harass an innocent person by a police search might lace his report with detail about the other’s activities to give the report an appearance of credibility.


68. See supra note 58 and accompanying text.

69. United States v. Anderson, 500 F.2d 1311, 1316 (5th Cir. 1974).

70. United States v. Tuley, 546 F.2d 1264, 1273 (5th Cir. 1977) (Godbold, J., dissenting).

71. See 1 W. LAFAVE, supra note 22, § 3.3(f), at 556-61; Moylan, supra note 22, at 777-78, 779.

72. 1 W. LAFAVE, supra note 22, § 3.3(f), at 557 (quoting Comment, Informer’s Word as the Basis for Probable Cause in the Federal Courts, 53 CALIF. L. REV. 840, 842 (1965)) (emphasis added).

73. Spinelli, 393 U.S. at 416.
it means that no amount of corroboration" can cure this defect in the informant’s story—that a tip suffering from such a defect and police observations insufficient in themselves to show probable cause cannot add up to probable cause. But this is not so, and Professor LaFave concedes that it is not—but he does so most begrudgingly.

If police observations fall short of demonstrating probable cause in and of themselves but give rise to a “strong suspicion” of criminal activity, LaFave observes that the inadequate tip “may be taken into account” to raise the police observations to the level of probable cause. But in such instances, cautions LaFave, the police observations do not “bridge the gap” between the inadequate informant’s tip and probable cause; rather, it is the imperfect tip that “bridges the gap” between the police observations and probable cause. LaFave recognizes that the result in a particular case may be the same whether one views the independent police work as supplementing or corroborating a tip lacking an adequate showing on the basis of knowledge or whether (as he does) one views the inadequate tip as supplementing or corroborating the police observations stimulated by the tip, but, he maintains, “more is involved here than a matter of semantics.”

Suppose that when Lance Gates flew to West Palm Beach drug agents saw four men, two of whom the agents knew from past experience to be narcotics dealers, meet him at the airport. Or suppose that shortly after arriving at the West Palm Beach Holiday Inn, Lance and his wife had dinner at a nearby restaurant with four men, two of whom drug agents knew to be narcotics dealers. Merely meeting or talking to known narcotics dealers hardly makes it probable that the suspect is engaged in the narcotics traffic. In Sibron v. New York an officer saw the defendant “talking to a number of known narcotics addicts over a period of eight hours,” but the Court concluded that these observations produced “[n]othing resembling probable cause.” Indeed, concurring Justice Harlan maintained that “association with known criminals . . . does not, entirely by itself, create suspicion adequate to support a stop.”

74. “No amount of corroboration” means information that is short of police observations sufficient in themselves to establish probable cause. When this point is reached, the independent police work has developed beyond mere corroboration to a showing of probable cause entirely apart from the informant’s tip and the tip becomes a redundancy. See 1 W. LAFAVE, supra note 22, § 3.3(f), at 566; Moylan, supra note 22, at 778.
75. See 1 W. LAFAVE, supra note 22, § 3.3(f), at 566-70.
76. See id. at 566.
77. See id. at 566-67.
78. See id. at 569.
79. This is my language, not LaFave’s, but I think it is a fair description of his analysis.
80. 1 W. LAFAVE, supra note 22, § 3.3(f), at 567-68.
82. Id. at 62.
83. Id. In Sibron the police did not overhear the conversations or see anything pass between the defendant and the known addicts. This is also true of the cases I pose.
84. Id. at 73 (Harlan, J., concurring).
deny, however, that allegations in the application for the search warrant that drug agents had seen Lance Gates consorting with drug dealers at the airport or at a restaurant, when combined with the statements contained in the anonymous tip, would add up to probable cause that Lance had traveled to West Palm Beach to “make a buy.”

In the cases hypothesized above, it does matter that the police did not merely corroborate a few innocuous details unrelated to the criminal scheme, but significantly corroborated the suspect’s criminal activity along the lines suggested by the tip. Why, however, does it matter whether the police observations raised the tip to the level of probable cause or whether the tip raised the police observations to the requisite level? I prefer to ask the question the way Justice Harlan did in Spinelli: “Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar’s tests without independent corroboration?”

Do the facts and circumstances developed by independent police work “permit the suspicions engendered by the informant’s report to ripen into a judgment that a crime was probably being committed”? At one point, Justice Harlan did describe the government’s claim alternatively:

[F]ollowing the reasoning of the Court of Appeals, the Government claims that the informant’s tip gives a suspicious color to the FBI’s reports detailing Spinelli’s innocent-seeming conduct and that, conversely, the FBI’s surveillance corroborates the informant’s tip, thereby entitling it to more weight.

But all this proves, I think, is that insisting that police corroboration cannot repair a deficiency in the basis of knowledge prong, but conceding that the deficient tip can raise the facts and circumstances uncovered by the police to the level of probable cause, is a matter of semantics.

Let us forget about hypothetical corroboration of the anonymous letter and look at the Gates facts themselves. The Gates dissenting Justices (Brennan, joined by Marshall, and Stevens, joined by Brennan) had no quarrel with the Illinois Supreme Court’s conclusion that the anonymous letter satisfied neither the basis of knowledge nor the veracity prong. Indeed, the Gates dissenters maintained that the warrant was invalid even under the Court’s newly announced and less rigorous “totality of the circumstances” test. Justice Stevens recognized, however, that the twenty-two hour nonstop drive from West Palm Beach to Bloomingdale, “only a few hours after Lance had flown to Florida”—a fact not known to the magistrate when he issued the search warrant—“provided persuasive evidence that [the Gateses] were engaged in illicit activity.” Thus Justice

85. 393 U.S. at 415; see supra note 42 and accompanying text.
86. 393 U.S. at 418.
87. Id. at 415.
88. 103 S. Ct. at 2361-62 & n.8 (Stevens, J., dissenting); id. at 2351 (Brennan, J., dissenting).
89. Id. at 2360 (Stevens, J., dissenting).
Stevens would have vacated the judgment and remanded the case to consider whether, in light of Ross, the police had probable cause to make a warrantless search of the car after the Gateses returned to Bloomingdale.90

Why did Justice Brennan join the Stevens opinion? The two-pronged test applied to warrantless searches as well as to those conducted pursuant to a warrant.91 If the anonymous letter failed to satisfy the basis of knowledge prong and if, as Justice Brennan maintained, “corroboration of certain details in a tip” could not overcome a defect in the basis of knowledge prong,92 what would be the point of remanding the case to ascertain whether the police had probable cause to conduct a car search after the Gateses returned home?

When viewed in isolation—that is, entirely apart from the statements contained in the anonymous letter—the Gates couple’s itinerary (including the nonstop drive back to Bloomingdale) fell short of probable cause, and by more than a “little bit.”93 How, then, could a tip that lacked an adequate showing of the basis of knowledge and the corroborating facts (including the Gates’ nonstop drive home)—insufficient in themselves to establish probable cause—add up to probable cause?

D. The Illinois Supreme Court’s Application of the Aguilar-Spinelli Test

Citing the writings of Professor LaFave and Judge Moylan, the Illinois Supreme Court observed that the courts “are not in agreement on the question of whether partial corroboration, combined with an informant’s tip, may cure a deficiency in either prong of the Aguilar test.”94 But LaFave and Moylan are emphatic that police corroboration may cure a deficiency in the veracity prong.95 These two commentators do balk at the notion that police corroboration may remedy a deficiency in the basis of knowledge prong, but LaFave recognizes that “the prevailing view is to the contrary.”96 Indeed, although LaFave supports Judge Moylan’s reasoning in Stanley v. State,97 he calls the Stanley case “unique for its rejection” of the view that “a basis of knowledge defect can be remedied by partial corroboration.”98

90. Id. at 2362 (Stevens, J., dissenting).
91. See 1 W. LAFAVE, supra note 22, § 3.3(a), at 501; Moylan, supra note 22, at 752-54.
92. “Spinelli stands for the proposition that corroboration of certain details in a tip may be sufficient to satisfy the veracity, but not the basis of knowledge, prong of Aguilar.” 103 S. Ct. at 2355 (Brennan, J., dissenting).
93. Cf. 1 W. LAFAVE, supra note 22, § 3.3(f), at 566 (informant’s story, although lacking basis of knowledge, may supply “little bit more” needed to elevate other information to level of probable cause).
94. 85 Ill. 2d at 390, 423 N.E.2d at 893.
95. 1 W. LAFAVE, supra note 22, § 3.3(f), at 561-62; Moylan, supra note 22, at 758.
96. 1 W. LAFAVE, supra note 22, § 3.3(f), at 563.
97. See id. at 562-63.
98. Id. at 562.
Moreover, as pointed out in the previous section, LaFave acknowledges that in some instances a defective tip may raise police observations of suspicious behavior to the level of probable cause. At least when police corroboration constitutes what might be called the "dominant element" of probable cause—arguably the situation in Gates—that corroboration (although insufficient in itself to permit a search) when coupled with the imperfect tip can add up to probable cause.

The Illinois Supreme Court saw no need to resolve the question whether partial corroboration could remedy deficiencies in either or both prongs of the Aguilar test since "the nature of the corroborating 'evidence' in this case would satisfy neither [prong]." Why not? Because "the corroborative evidence here was only of clearly innocent activity" and the corroboration of such activity "is insufficient to support a finding of probable cause"—citing, and citing only, Whiteley v. Warden.

"Innocent" or "clearly innocent" activity is an elusive term infused with several meanings. The corroboration of "public or innocuous facts" (for example, the kind of car the suspect drives, an apartment number, or a phone number) only "shows that the informer has some familiarity with the suspect's affairs." Such corroboration only justifies an inference that the informant is "not a total liar," not that criminal activity may be afoot. Corroboration of the details in the informant's report is significant only to the extent that it tends to give substance and verity to the report that the suspect is engaged in criminal activity; the informant's "reliability as a describer in the abstract... is really not what Spinelli and Aguilar are concerned with."

The Whiteley case does not, as the Illinois Supreme Court apparently thought, stand for the proposition that corroboration of "innocent activity" cannot bolster an inadequate tip. Whiteley tells us only that the verification of "innocent activity" that does not tend to confirm criminal activity along the lines suggested by the tip cannot bolster an inadequate tip. Whiteley tells us that information independently obtained by the police "can be used to sustain a finding of probable cause for an arrest that could not adequately be supported by the tip alone," but in order to do so the police-

99. See supra text accompanying notes 74-87.
100. See id.
101. 85 Ill. 2d at 390, 423 N.E.2d at 893 (emphasis added).
102. Id., 423 N.E.2d at 893.
104. United States v. Tuley, 546 F.2d 1264, 1272 (5th Cir. 1977) (Godbold, J., dissenting).
108. 401 U.S. at 567 (emphasis added).
obtained information "must in some sense be corroborative of the in-
former's tip that the arrestees committed the felony or . . . were in the process of
committing the felony."\textsuperscript{109}

The information obtained by the police in \textit{Whiteley} failed to clear even
this low hurdle, but the information gathered by the police in \textit{Gates} surely
did clear the hurdle. In \textit{Whiteley}, "the very most" the police-obtained in-
formation "tended to establish" was that the informant "knew [the
suspects] and the kind of car they drove."\textsuperscript{110} In \textit{Gates}, on the other hand,
although the anonymous letter writer proved to be inaccurate in one im-
portant respect (Sue Gates did not drop off the car in Florida and fly back
alone\textsuperscript{111}), the story "had been corroborated in major part by [Detective]
Mader's efforts."\textsuperscript{112}

In \textit{Gates} the facts obtained through the independent investigation of
Mader may have been "intrinsically innocent,"\textsuperscript{113} but they were hardly
"innocuous." They "at least suggested that the Gates were involved in
drug trafficking."\textsuperscript{114} In \textit{Whiteley} there was no nexus between the cor-
roborated details and the alleged crime; in \textit{Gates} there certainly was.

Suppose Detective Mader had verified the informant's report in every
essential respect. Suppose that (1) Sue Gates had driven to West Palm
Beach, dropped off the car, and flown back to Illinois a few hours before
her husband boarded a plane for Florida and then (2) the morning after
he had arrived in West Palm Beach Lance made a twenty-two hour nonstop
drive back home, and that all this had been known to the magistrate before
he issued the warrant. Would probable cause to search have been
established under the \textit{Aguilar-Spinelli} test? Very few, I think, would answer
in the negative. (I certainly would not.) If the anonymous letter writer's
report were as impressively corroborated as hypothesized above, surely
the corroborated tip would have been "as trustworthy as a tip which would
pass \textit{Aguilar}'s tests without independent corroboration."\textsuperscript{115}

But how would the Illinois Supreme Court have responded to the
hypothetical posed above? The Illinois Supreme Court's discussion of "the
corroboration of innocent activity" is so cryptic in \textit{Gates} that one cannot
answer this question with any assurance. Although I find much to quarrel
with in Justice Rehnquist's opinion in \textit{Gates}, I agree that "[i]n making
a determination of probable cause the relevant inquiry is not whether par-
ticular conduct is 'innocent' or 'guilty,' but the degree of suspicion that
attaches to particular types of noncriminal acts.\textsuperscript{116}" The Illinois Supreme
Court, however, seemed so "hung up over the fact that the details of the

\textsuperscript{109}. \textit{Id.} (emphasis added).
\textsuperscript{110}. \textit{Id.}
\textsuperscript{111}. \textit{See supra} text accompanying notes 8-10.
\textsuperscript{112}. \textit{Gates}, 103 S. Ct. at 2335.
\textsuperscript{113}. \textit{Cf.} United States \textit{ex rel.} Cunningham \textit{v. Follette}, 397 F.2d 143, 145 (2d Cir.
\textsuperscript{114}. \textit{Gates}, 103 S. Ct. at 2334.
\textsuperscript{115}. \textit{Spinelli}, 393 U.S. at 415.
\textsuperscript{116}. 103 S. Ct. at 2335 n.13.
informant's story that had been verified had all been innocent details?"117 that there is reason to think that even on the facts supposed above, it still would have balked at finding probable cause.

E. The Gates "Totality of the Circumstances" Test: Does It Raise Some of the Same Problems Generated by the Pre-Miranda "Voluntariness" Test?

Even on the basis of the facts actually presented to the magistrate, concurring Justice White thought the results of the police investigation of the Gateses permitted the suspicion engendered by the informant's letter "'to ripen into a judgment that a crime was probably being committed.' "118 And, unlike the majority, Justice White did not discard, but rather applied the two-pronged Aguilar test.119 He thought the behavior of the Gateses was sufficiently "suspicious" to give rise to an inference that the informant was credible and had obtained the information in a reliable way.

But the Court, per Justice Rehnquist, was not interested in working out an answer under the two-pronged test. It thought it "wiser to abandon the existing probable cause structure"120 in favor of a "totality of the circumstances" analysis that downgrades the veracity and basis of knowledge elements and makes them only "relevant considerations."121 Under the totality of circumstances approach, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision, whether given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."122

The task of a reviewing court, the Gates majority makes plain, is even more modest—"simply to ensure that the magistrate had a 'substantial basis for . . . conclu[ding]' that probable cause existed."123 In other words,

118. 103 S. Ct. at 2348 (White, J., concurring) (quoting Spinelli, 393 U.S. at 418).
119. See id. at 2347-50 (White, J., concurring).
120. Id. at 2332.
121. Id. at 2329. Earlier in its opinion, the Court "agree[d] with the Illinois Supreme Court that an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report." Id. at 2327. But it disagreed that "these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply." Id. at 2327-28. Rather, these elements "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause.'" Id. at 2328. At another point, the Court observed that "[u]nlike a totality of circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the 'two-pronged test' has encouraged an excessively technical dissection of informants' tips." Id. at 2330 (footnote omitted).
122. Id. at 2332 (emphasis added).
123. Id. (quoting Jones v. United States, 362 U.S. 257, 271 (1960)) (emphasis added).
the warrant is to be upheld as long as there is a "substantial basis" for a "fair probability" that evidence will be found in a particular case. Not much, is it?

This "flexible, easily applied standard," the Court assured us, "will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does [the two-pronged approach]." How flexible, and how wide-ranging this test will be remains to be seen. The totality of circumstances approach does not limit what circumstances are to be considered relevant. It has been suggested, for example, that the next step may be that the requisite degree of probability should depend on the circumstances of the severity of the crime being investigated and the intensity of the privacy interest being invaded.

True, under the Gates approach the magistrate is supposed to take into account the veracity and basis of knowledge elements, along with other factors. It is also true, however, that in pre-Escobedo, pre-Miranda days when the "flexible"—I would say amorphous, elusive, and largely unreviewable—"totality of the circumstances"—"voluntariness" test prevailed, the courts were supposed to take into account the failure to advise a suspect of his rights, the denial of a request to contact an attorney, refusal to permit communications with friends, and the duration and conditions of detention—indeed, "all the circumstances attendant upon the confession." Almost everything was relevant, but almost nothing was decisive. "Apart from direct physical coercion... no single default or fixed combination of defaults guaranteed exclusion..."

We now know, however, that in applying the totality of the circumstances test for the admissibility of confessions the courts did not—and did not have to—take the aforementioned factors into account very

124. Id.
125. See The Supreme Court, 1982 Term, 97 Harvard L. Rev. 70, 184 n.60 (1983).
128. "In resolving the issue [of the 'voluntariness' of a confession] all the circumstances attendant upon the confession must be taken into account." Reck v. Pate, 367 U.S. 433, 440 (1961); see also Schneckloth v. Bustamonte, 412 U.S. 218 (1973), in which the Court, looking back on its 30 pre-Escobedo fourteenth amendment due process confession cases, recalled:

The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion... While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they were not in and of themselves determinative.

Id. at 226-27.
much. We now know too that Supreme Court "voluntary" confession cases "[c]ountenancing quite significant pressures can be cited without difficulty, and the lower courts may often have been yet more tolerant."\textsuperscript{130} In other words, the "fluid" and "flexible" totality of the circumstances-voluntariness test accommodated law enforcement interests to a much greater extent than it accommodated what the Gates majority called "private interests."\textsuperscript{131}

At one point the Gates majority declined to decide whether the affidavit submitted to the magistrate in the Spinelli case would have passed muster under its new totality of the circumstances test. It "would not be profitable" to decide this question, observed the Court, because "[t]here are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another."\textsuperscript{132} Reading this statement made me wince—for this, of course, was the very problem with the pre-Escobedo, pre-Miranda test for the admissibility of confessions. Because there were so many variables in the "voluntariness equation" that one determination that a confession was "voluntary" seldom served (to borrow the Gates Court's language) as "a useful 'precedent' for another," the test left police interrogators and trial courts with little, if any, guidance—indeed, "virtually invited" trial courts "to give weight to their subjective preferences"\textsuperscript{133} and "discouraged active review even by the most conscientious appellate judges."\textsuperscript{134}

F. How Persuasive Are the Reasons Given for Abandoning the "Two-Pronged Test"?

What reasons did the Gates Court give for abandoning the approach that had been utilized for the previous decade and a half? Probable cause was said to be "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."\textsuperscript{135} But it hardly can be said that the two-pronged test had reduced probable cause to "a neat set of legal rules." And the test did provide a framework—a structure—for probable cause inquiries that still allowed sufficient room for application of common sense and assess-

\textsuperscript{130} Id. at 509 (Harlan, J., dissenting) (footnote omitted).


\textsuperscript{132} 103 S. Ct. at 2332 n.11.

\textsuperscript{133} Schulhofer, Confessions and the Court (Book Review), 79 Mich. L. Rev. 865, 870 (1981).

\textsuperscript{134} Id.

\textsuperscript{135} 103 S. Ct. at 2328.
ment of the particular facts of the particular case. If, as the Court claimed, some lower court decisions reflected an unduly rigid application of the test, the Court could have disapproved such an approach; it need not have dismantled the test's basic structure.

Another reason advanced by the Court for abandoning the two-pronged test was that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation" and that warrants "long have been issued by persons who are neither lawyers nor judges." But this point seems to cut the other way. Because nonlawyers are so often involved in the initial probable cause determination, there is a need for a test that provides more guidance than a totality of circumstances approach. As dissenting Justice Brennan pointed out, the two-pronged standard "help[ed] to structure probable cause inquiries." By stressing the independent importance of the veracity and basis of knowledge elements and by identifying various ways in which each requirement could be satisfied, the now discarded test provided laypersons, police, and magistrates with a useful framework within which to operate. By toppling this structure, the Court has increased the risk that probable cause determinations will be based more on the predilections of those in the front lines and less on established principles.

As for the Gates Court's point that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review," it never did—at least it was not supposed to—under the Aguilar-Spinelli approach, and both cases said as much. Still another reason given by the Court for adopting the totality of circumstances test was the fear that if affidavits are subjected to greater scrutiny the "police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the warrant clause that might develop at the time of the search." But the Court has long expressed a strong preference for the warrant procedure (although it must be said that too often it has not practiced what it has preached) and in the oft-quoted 1965 Ventresca case it maintained that "when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

136. See id. at 2357-58 (Brennan, J., dissenting); see also LaFave, Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew), 74 CRIM. L. & CRIMINOLOGY 1171 (1983).
137. See 103 S. Ct. at 2350-51 & n.26 (White, J., concurring); see also LaFave, supra note 136, at ___ n.102.
138. 103 S. Ct. at 2330 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)).
139. Id.
140. Id. at 2358 (Brennan, J., dissenting).
141. See id. at 2350-51 (White, J., concurring); see also LaFave, supra note 136, at ___.
142. 103 S. Ct. at 2331.
143. See Spinelli, 393 U.S. at 419; Aguilar, 378 U.S. at 111.
144. 103 S. Ct. at 2331.
Moreover, if the Court truly is concerned that the police are avoiding, or may too readily avoid, the search warrant route, it must be said that it has manifested this anxiety in strange ways. For example, in *Schneckloth v. Bustamonte*,146 probably the most important "consent search" case decided to date, the Court, as the usually restrained language of the commentary to the *Model Code of Pre-Arraignment Procedure* described it, drove "an enormous hole through the warrant requirement."147

As the Gates majority itself suggests,148 the easiest and most propitious way for the police to avoid the warrant procedure (and the other problems presented by the fourth amendment) is to obtain a "consent" to what otherwise would be an illegal search or seizure. As a practical matter, therefore, the potency of the warrant requirement (and the scope of the protection furnished by the fourth amendment generally) varies greatly depending upon how easy or difficult it is for the government to establish consent. Ten years ago in *Schneckloth*, the Court made it easy. (And all four members of the Gates majority who also sat on the Court ten years ago joined the Schneckloth opinion.149)

*Schneckloth* tells us that when the government seeks to justify a search on consent grounds, it need not demonstrate a "knowing and intelligent" waiver of fourth amendment rights—this strict standard of waiver is reserved for those rights designed to preserve a fair trial.150 The government need demonstrate only that the consent to an otherwise impermissible search "was in fact voluntarily given, and not the result of duress or coercion, express or implied."151 According to *Schneckloth*, then, a person may effectively consent to a search even though he was never informed—and the government has failed to establish that he was aware—of the right to refuse the officer's "request." One need not be protected from loss by ignorance or confusion, only from loss through coercion.152 After *Schneckloth*, the criminal justice system, in some important respects at least, can (to borrow a phase from *Escobedo*) "depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."153

Nor is this all. Aside from consent searches (if that is considered an

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147. *MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE* § SS 240.2 commentary at 537 (1975).
148. *See supra* text accompanying note 144.
149. Although he joined Justice Stewart's opinion of the Court in *Schneckloth*, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, also wrote a concurring opinion. 412 U.S. at 250 (Powell, J., concurring). Although he, too, joined in the opinion of the Court, Justice Blackmun also wrote a brief concurring opinion. *Id.* at 249 (Blackmun, J., concurring).
150. *See id.* at 236-46.
151. *Id.* at 248.
152. *See id.* at 231-33, 248-49.
exception), the largest single exception to the warrant clause is the search incident to a lawful arrest. This exception alone "outnumber[s] manyfold searches covered by warrants." 154 But in New York v. Belton 155 the Court greatly broadened the "search incident" exception (at least in automobile settings). 156 (Again, all four members of the Gates majority who also sat on the Court two years ago joined the Belton opinion. 157) Whether or not there is probable cause to believe a car contains evidence of crime, as long as there are sufficient grounds to make a lawful "custodial arrest" of the vehicle's occupants—even though the occupants are handcuffed, standing outside the car, and surrounded by officers—Belton holds that the police may conduct a warrantless search of the entire "interior" or "passenger compartment" of the car (including closed containers found within that zone). 158

Nor is this all. Another major exception to the warrant requirement is the Carroll doctrine, 159 often called the "automobile exception." 160 As it was originally understood, and for most of its life, the Carroll doctrine permitted police to search a car without a warrant only when there were both (1) probable cause to believe that the car contained evidence of crime and (2) "exigent circumstances" that made it impractical to obtain a warrant. 161 In the 1970's, however, the Court significantly expanded the doctrine by virtually eliminating the "exigent circumstances" 154. T. Taylor, Two Studies in Constitutional Interpretation 48 (1969).
157. Justice Rehnquist joined Justice Stewart's opinion of the Court, but also wrote a brief concurring opinion. 453 U.S. at 463 (Rehnquist, J., concurring).
158. See Kamisar, The "Automobile Search" Cases: The Court Does Little to Clarify the "Labyrinth" of Judicial Uncertainty, in J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1980-81, at 69, 89-92 (1982). As concurring Justice Stevens emphasized, Belton not only permits vehicle searches in the absence of a warrant, but also in the absence of probable cause to believe the vehicle contains contraband or evidence of crime. Thus, warned Justice Stevens, an arresting officer may find reason to take a minor offender into custody "whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation." Robbins v. California, 453 U.S. 420, 452 (1981) (Stevens, J., dissenting) (Justice Stevens concurred in Belton for the reasons stated in his dissent in Robbins. See Belton, 453 U.S. at 463 (Stevens, J., concurring)).
160. I share Judge Moylan's view that the "automobile exception" is a sloppy term for the Carroll doctrine, because many valid warrantless searches are not based on this doctrine at all, but rather on some other exception to the warrant requirement—e.g., "searches incident to arrest" or "inventory searches." See Moylan, The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label, 27 Mercer L. Rev. 987, 1012-15 (1976).
PROBABLE CAUSE AND GOOD FAITH

requirement. As a result, the doctrine essentially became a "probable cause" exception to the warrant requirement for automobiles. Then, in the 1982 Ross case, the Court further extended the Carroll doctrine—and dramatized its potency—by utilizing it to uphold the warrantless search of a "movable container" found in a locked car trunk. (The five Justices who made up the Gates majority all joined the Ross opinion.)

In light of such cases as Schneckloth, Belton, and Ross, it is hard to take seriously the Gates majority's expression of concern that if the two-pronged test were not abandoned, "the police might well resort to warrantless searches." The Court (and, more specifically, most of the Justices who made up the Gates majority), it does not seem unfair to say, has already given the police all the encouragement they need in this regard.

To return to the Gates case, still another reason the Court offered in defense of its totality of the circumstances approach was the view that anonymous tips, "particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise 'perfect crimes,'" yet the Aguilar-Spinelli standard "leaves virtually no place for anonymous citizen informants." As a leading authority on the law of search and seizure has retorted, however, "[i]t is not a matter of no place or a place, but rather of exactly what [the place of the anonymous informant] should be." Unless it can be shown that the tip came from an honest or reliable person who acquired the information in the particular case in a reliable way—and there is "no basis for treating anonymous informants as presumptively reliable" nor "for assuming that the information [they provide] has been obtained in a reliable way"—an arrest or search should not be permitted on the basis of the tip. It is worth recalling, as former Justice Potter Stewart has recently observed: "The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon prob-

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162. See id. at 74-80.
163. See id.
165. But the Ross Court reaffirmed the rule that despite probable cause to believe that they contain evidence of crime, movable closed containers located in a public place (for example, a bus depot) ordinarily may not be opened and searched without a warrant. See id. at 809-12.
166. Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and O'Connor joined Justice Stevens' opinion of the Court, but Justices Blackmun and Powell also wrote brief concurring opinions. Id. at 825 (Blackmun, J., concurring); id. at 826 (Powell, J., concurring).
169. 103 S. Ct. at 2332.
170. Id.
171. LaFave, supra note 136, at 172. 103 S. Ct. at 2356 (Brennan, J., dissenting).
able cause is that police officers who obey its strictures will catch fewer criminals.'"173

Of course, if the anonymous tip is sufficiently supplemented by independent police investigation, then the police are permitted to make a search or seizure. The police need not observe criminal behavior—information that significantly corroborates the informer's tip that the suspect is engaged in criminal activity along certain lines may suffice.174 Moreover, even if a tip, standing alone or partially corroborated, does fall short of probable cause it still has a place in law enforcement—it still may contribute to the solution of crime—by prompting a police investigation, or further investigatory work, that does establish that requisite probable cause.

In this regard, it is worth recalling what the anonymous letter said: "I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often."175 Out of the mouths of babes and anonymous informants sometimes comes wisdom. As the anonymous letter suggested, more patience might have enabled the police not only to satisfy the two-pronged test with respect to the Gates couple, but also to apprehend some of those "big drugs dealers" as well.

"The strictures that inevitably accompany the 'two-pronged test' did impede the task of the Bloomingdale police, but only because they terminated their pursuit of the tip when they did."176 But what compelled them to quit at the point they did? Why was it necessary for Detective Mader to make his move (that is, to apply for a search warrant) the moment the Gates couple left the West Palm Beach Holiday Inn and "drove northbound on an interstate frequently used by travelers to the Chicago area"?177 As Professor LaFave has pointed out:

Because the letter alleged an ongoing criminal scheme which was unlikely to terminate and which involved not only repeated travels by the two suspects but also recurrent visits to their house by drug dealers, the police were hardly confronted with a "now or never" kind of situation. Numerous avenues of investigation were open to them.178

173. 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, 1393 (1983). The exclusionary rule, to be sure, has caught heavy fire for this state of affairs, but again to quote Justice Stewart: "[T]his criticism is properly reserved for the fourth amendment. The exclusionary rule places no limitations on the actions of the police. The fourth amendment does." Id.

174. See supra text accompanying notes 108-17; see also supra text accompanying notes 80-93.

175. Gates, 103 S. Ct. at 2325 (emphasis added).

176. Cf. id. at 2331 ("The strictures that inevitably accompany the 'two-pronged test' cannot avoid seriously impeding the task of law enforcement . . . .").

177. Id. at 2326.

178. LaFave, supra note 136, at _____. For example, the police might have waited to
One might retort, of course, that Gates grew out of an atypical situation and that the peculiar facts of this case do not discredit the general proposition that "[t]he strictures that inevitably accompany the 'two-pronged test' cannot avoid seriously impeding the task of law enforcement." But the Gates Court cited only three state appellate decisions for this sweeping statement. To point to the overly rigid application of a rule in a few instances, however, is scant justification for abandoning the rule itself. If it were sufficient justification, then neither the parol evidence rule, nor the hearsay rule, nor any other familiar rule could withstand attack.

The Gates majority's impression or assumption that the Aguilar-Spinelli standard is bound to "seriously impede" police work bears little, if any, resemblance to the picture that emerges from the National Center for State Courts' (NCSC) recently completed study of the operation of the warrant process in seven cities. As Thomas Y. Davies, Project Director of the American Bar Foundation, says of this study in a recent article:

[A]lthough the Aguilar-Spinelli requirements were in effect during the entire period of the warrant process study, that study reports no evidence that they imposed any practical obstacle for warrant applications. To the contrary, the warrant process study found that most of these warrant applications contained boilerplate allegations written to meet Aguilar-Spinelli, that warrant applications were seldom rejected for this reason (or any other reason), and that warrant searches were seldom the subject of successful motions to suppress (for this reason or any other reason). Indeed, the warrant process study reports that a number of trial judges interviewed who had experience with warrant applications expressed fears that the alleged informant information was "manufactured" by the police.
F. How Much Difference Will the Gates Case Make?

For valid reasons or for unsound ones, the Gates Court has dismantled the two-pronged test. How much difference this development will make in the operation of the warrant procedure remains to be seen. Gates does undermine the "independent status" of the veracity and basis of knowledge elements,183 but does it totally destroy their independent status? Gates does permit a deficiency in one element to be overcome by a strong showing of the other,184 but does it permit a gross deficiency (or an almost total deficiency) in one element to be overcome by a strong showing of the other?

Something is left of the pre-Gates approach. The magistrate is not completely free to draw inferences at will. A "wholly conclusory" or "merely conclusory" statement that furnishes the magistrate "virtually no basis at all for making a judgment regarding probable cause" still will be insufficient.185 The magistrate's action "cannot be a mere ratification of the bare conclusions of others."186 "But when we move beyond the 'bare bones' affidavits present in cases such as Nathanson and Aguilar," the Court tells us, "this area simply does not lend itself to a prescribed set of rules, like that which had developed from Spinelli. Instead, [a] flexible, common-sense standard . . . better serves the purposes of the Fourth Amendment's probable cause requirement."187

Thus, as concurring Justice White read the majority opinion, and he may well be right, the Court holds that "if an affidavit contains anything more [than 'bare conclusions'] it should be left to the issuing magistrate to decide, based solely on 'practical[ity]' and 'common sense,' whether there is a fair probability that contraband will be found in a particular place."188 Consequently, continued Justice White, "the question whether the probable cause standard is to be diluted is left to the common-sense judgments of issuing magistrates."189

If the Gates majority did intend such a drastic result, it deserves strong criticism. It is about as difficult to be against "flexibility," "practicality," and "common sense" as it is to be against the flag, motherhood, and apple pie, but as dissenting Justice Brennan observed:

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183. See 103 S. Ct. at 2327-28, 2332-33.
184. Id. at 2329.
185. See id. at 2332.
186. Id.
187. Id. at 2332-33.
188. Id. at 2350 (White, J., concurring).
189. Id.(White, J., concurring).
Neither the [Aguilar-Spinelli] standards nor their effects are inconsistent with a "practical, nontechnical" conception of probable cause. Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reliable way by a credible person, he has ample room to use his common sense and to apply a practical, nontechnical conception of probable cause. . . . It is no justification for rejecting [the Aguilar-Spinelli standards] that some courts may have employed an overly technical version of [them].

As pointed out earlier, a detailed description of the alleged wrongdoing or a claim of first-hand observation should not compensate for the lack of any assurance that the informant is truthful. As Judge Charles Moylan has put it, "the direct allegation of firsthand knowledge or the detail that implies firsthand knowledge have nothing to do with an informant's veracity (a liar could allege firsthand knowledge or fabricate in great detail as easily as could a truthful speaker)."

Conversely, as also noted earlier, a strong showing, even an overwhelming showing, of general trustworthiness should not compensate for the failure to explain how the informant acquired the information in this particular case. To quote Judge Moylan again, "the qualities that demonstrate a person's truthfulness have nothing to do with demonstrating the basis of his knowledge on a particular occasion (demonstrably truthful persons can be the bearers of hearsay, rumor, gossip, or 'bare conclusions' as surely as can be liars)." If—as seemed to be universally agreed (at least prior to Gates) and as Justice White emphasized in his concurring opinion in Gates—the unsupported assertions or belief of even an officer known by the magistrate to be honest and experienced does not satisfy the probable cause requirement, how can a similar assertion or belief by an honest informant pass muster?

It is possible to read Gates more cheerfully than does Justice White (and myself, up to this point). It is possible to read the case as saying

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190. Id. at 2357-58 (Brennan, J., dissenting).
191. See supra text accompanying notes 25 & 27.
195. See 103 S. Ct. at 2350 (White, J., concurring).
196. The Gates majority never responds to this point, but in the first draft of his analysis of the Gates case, Mr. Andrew P. Solomon of the Harvard Law Review suggested a possible answer: The reasons the presumptive reliability of police officers is not in itself sufficient to offset any "basis of knowledge" deficiency in their affidavits may be the implicit assumption that such a deficiency in the case of the police (but not private citizens) evidences the absence of any adequate basis of knowledge or deliberate concealment. This suggestion, however, was dropped from the final version of the Gates analysis, see The Supreme Court, 1982 Term, 97 HARV. L. REV. 70, 177 (1983), because no authority could be found to support it.
that a strong showing of the veracity element still may not overcome an almost total failure to establish the basis of knowledge element (or even a gross deficiency on this element) and vice versa. That is, Gates conceivably could stand for the proposition that only when a certain threshold of supporting facts is reached on each element—only when the affidavit sets forth a decent amount of underlying circumstances of each element—will an "overkill" or an unusually strong showing of one element compensate for the deficiency on the other. Thus, at one point, after observing that "a deficiency in one [element] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other," the Gates majority continues as follows:

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary. Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case. This passage suggests that while, say, "ten units" of underlying circumstances of each element were once necessary, not one or two units, but rather five or seven still are required—and that only when the threshold number of units of each element are presented to the magistrate can a deficiency in one be overcome by a strong showing of the other. But this one passage in the Court's opinion cannot be read in isolation. And when read in light of the entirety of the majority opinion, the view suggested by this passage—that Gates still requires a substantial threshold of supporting facts on each element of the Aguilar-Spinelli standard—strikes me as improbable.

The example of an unusually reliable informant who fails, in a particular case, to present thoroughly the basis of his knowledge, and the other examples cited by the Court are, I am afraid, only supposed to be obvious and graphic examples of what the Court considers the unduly rigid and excessively technical nature of the standard that it is abandoning. To limit the impact of Gates to what the Court deems the most poignant examples of the need for a more "flexible," more "practical, common-sense" approach than that which had developed from Aguilar and Spinelli is, I believe, to mistake the "advocacy" in the Gates opinion for its scope.

197. 103 S. Ct. at 2329.
198. Id. at 2329-30 (citations omitted) (emphasis added).
I may be wrong (and I hope I am), but even a test that requires the government to attain only a certain threshold of supporting facts on both the veracity and basis of knowledge elements seems inconsistent with the Court's manifest desire to free the magistrate to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. 199

I find it hard to believe that the Court rejected the view that the veracity and basis of knowledge elements "should be understood as entirely separate and independent requirements to be rigidly exacted in every case" 200 only to preserve a "pint-sized version" of these elements as separate and independent requirements to be exacted in every case—only to require that another set of "specific 'tests' " (albeit somewhat less demanding ones) "be satisfied by every informant's tip." 201

Informants' tips, I think the Gates majority would say, come in too "many shapes and sizes" and from too "many different types of persons" 202 to require even a quasi-"two-pronged test." I think the Gates majority would say that a semi-compartmentalized, semi-fluid two-pronged test contains as many (or even more) "built-in subtleties" 203 as a fully-compartmentalized test, and might encourage "an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate" 204 as much as (or even more than) a fully compartmentalized test. 205

A final question about Gates: Suppose the moment Sue and Lance Gates had set out on "that interstate highway commonly used by travelers to the Chicago area" the West Palm Beach police (in constant communication with the Bloomingdale police) had stopped the Gates couple's vehicle and subjected it to a warrantless search under the Carroll doctrine. 206 In other words, given the prior use of the two-pronged test in warrantless as well as warrant cases, does Gates signal the abandonment of the test in both contexts?

199. Id. at 2332.
200. Id. at 2327-28.
201. "The totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." Id. at 2328 (footnote omitted).
202. Id.
203. Cf. id. at 2331 (built-in subtleties of two-pronged test unlikely to assist magistrates in making probable cause determinations).
204. Id. at 2330 (footnote omitted).
206. See supra text accompanying notes 159-66.
The answer is not clear. Some of the reasons the Court advanced for abandoning the *Aguilar-Spinelli* test obviously apply only to warrant cases: implementing "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant"\(^{207}\) and "encouraging recourse to the warrant procedure"\(^{208}\) by interpreting affidavits in a "common-sense" rather than a "hypertechnical" manner\(^{209}\) and by paying "great deference" to a magistrate's probable cause determination.\(^{210}\) Moreover, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."\(^{211}\)

Other reasons given for scrapping the two-pronged test in the search warrant context, however, seem to apply *a fortiori* to at least some no-warrant settings as well. The *Gates* Court points out "that affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation' " and that "'[t]echnical requirements of elaborate specificity . . . have no proper place in this area.' "\(^{212}\) But searches incident to warrantless arrests (searches that often must be made quickly in order to protect the arresting officer and to prevent the destruction of evidence), searches and seizures made in "hot pursuit" of a suspect or designed to obtain "evanescent" evidence, or otherwise carried out under exigent circumstances making compliance with the warrant requirement unfeasible\(^{213}\) are *always* conducted "by nonlawyers in the midst and haste of a criminal investigation."

Although the *Gates* Court asserts that search warrant applications are "normally drafted by nonlawyers," in many jurisdictions this may not be so. According to the NCSC draft report, for example, in five of the seven cities studied, prosecuting attorneys directly participated in the warrant application process in the bulk of cases, sometimes virtually writing the affidavits.\(^{214}\) When "exigent circumstances" excuse the need to ob-

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207. 103 S. Ct. at 2331.
208. Id.
209. Id. (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)).
210. Id. (quoting *Spinelli*, 393 U.S. at 419).
211. Id. (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)); see also Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 Mich. L. Rev. 221, 253 (1975) ("people often expect the police to have a warrant and are more likely to cooperate when they see that the police do have the authorization of a magistrate").
212. 103 S. Ct. at 2330 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)).
tain a warrant, however, "nonlawyer" police officers obviously act on their own.

More generally, if (as the Gates Court believes) "[t]he strictures that inevitably accompany the 'two-pronged test' cannot avoid seriously impeding the task of law enforcement"215—if (as the Gates Court believes) "anonymous tips seldom could survive a rigorous application of either of the Spinelli prongs"216—would not the wiser course be to abandon the test in no-warrant as well as warrant settings? If, as the Court tells us, "[w]e are convinced that this flexible, easily applied [totality of the circumstances] standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the [two-pronged] approach,"217 why not achieve this better accommodation of competing interests in all search and seizure contexts?

In part III of its opinion, the Gates Court embarked on an explanation of why it preferred a totality of the circumstances standard to "any rigid demand that specific 'tests' be satisfied by every informant's tip."218 The Court began by quoting the oft-quoted language of Brinegar v. United States219—a case that involved a warrantless automobile search under the Carroll doctrine:

Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a "practical, nontechnical conception." [Brinegar, 338 U.S. at 176]. "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."
[Id. at 175].220

The Court next turned to language in United States v. Cortez221—a case that involved not simply warrantless activity but not even the assessment of probable cause222—to the effect that when appraising police conduct the evidence collected "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."223 "As these comments illustrate," continued the Gates Court—referring to comments made in two cases involving warrantless applications for warrants [in Michigan] are often reviewed by a member of the prosecutor's staff or a senior police official before being presented to a magistrate.

215. 103 S. Ct. at 2331.
216. Id. at 2332.
217. Id.
218. Id. at 2328.
220. 103 S. Ct. at 2328.
222. The Gates Court recognized that the "stop" in Cortez required only "particularized suspicion," but deemed its observation in that case "also applicable to the probable cause standard." 103 S. Ct. at 2328.
223. Id. (quoting Cortez, 449 U.S. at 418).
police activity—"probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules."224 After noting that "[i]nformants' tips doubtless come in many shapes and sizes from many different types of persons,"225 the Court proceeded to quote from a third case involving warrantless police activity (and, again, one that involved a "stop and frisk" and thus did not require probable cause):

As we said in Adams v. Williams, . . . "Informants' tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation."226

Near the end of part III of its opinion, the Gates Court turned to, and discussed extensively, Draper v. United States227—a case involving a warrantless arrest and a search incident to that arrest—calling it "the classic case on the value of corroborative efforts of police officials."228 The tip in Draper (a pre-Aguilar-Spinelli case), noted the Court, "might well not have survived the rigid application of the 'two-pronged test' that developed [subsequently].'"229

Does any of this sound like the Gates Court intended, or is willing, to limit its abandonment of the Aguilar-Spinelli test to the search warrant setting? Gates did involve the validity of a search warrant and the opinion does contain some language indicating that the decision is, or should be, limited to such cases. Moreover, the Gates majority does quote the familiar language in United States v. Ventresca230 to the effect that in determining whether an affidavit establishes probable cause "the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants" (although this language is tucked away in a footnote).231 Thus, it is no great feat to make a plausible argument that Gates is, or should be, limited to the search warrant context. But it will be a great feat, I think, to convince the Court that handed down Gates that its decision is, or should be, so limited.

224. Id.
225. Id.
226. Id. at 2328-29 (citations omitted). At this point the Court noted that "[t]he diversity of informants' tips, as well as the usefulness of the totality of the circumstances approach to probable cause, is reflected in our prior decisions on the subject." Id. n.7. The Court then discussed three of its prior cases, but the one of the three discussed most extensively, Ker v. California, 374 U.S. 23 (1963), involved a warrantless search of an apartment incident to a warrantless arrest.
228. 103 S. Ct. at 2334.
229. Id. at 2334 n.12.
230. See supra note 145 and accompanying text.
231. See 103 S. Ct. at 2331 n.10 (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)).
II. THE GATES CASE'S BEARING ON THE PROPOSED "REASONABLE, GOOD FAITH BELIEF" EXCEPTION TO THE EXCLUSIONARY RULE

In Gates, Justice White was the only member of the Court to address the question whether there should be a "good faith" or "reasonable belief" (or a "reasonable, good faith") exception to the exclusionary rule. Reiterating the views he had advanced in his Stone v. Powell dissent, Justice White "continue[d] to believe that the exclusionary rule is an inappropriate remedy where law enforcement officials act in the reasonable belief that a search and seizure was consistent with the Fourth Amendment."233

Both in his Gates concurrence234 and in his Stone dissent,235 Justice White found support for his views in the "good faith" test that governs "constitutional tort" cases. When sued by the alleged victim of an illegal search or seizure (in section 1983 actions against state officials and in Bivens actions against federal police) the officer has a defense if he can establish that he had a good faith belief that his conduct was lawful and that his belief was "reasonable."236 As Judge Jon Newman has observed, however,

234. See id. at 2347 (White, J., concurring).
235. See 428 U.S. at 540-42 (White, J., dissenting).
236. In Pierson v. Ray, 386 U.S. 547 (1967), the plaintiffs, clergymen who had been arrested for violating a "breach of the peace" statute (held unconstitutional four years later) when they attempted to use segregated facilities, brought an action under 42 U.S.C. § 1983 against the arresting officers, seeking damages for deprivation of their civil rights. A jury decided in their favor. On appeal, the Fifth Circuit held that the state officers would be liable for an "unconstitutional arrest—even if they acted in good faith and with probable cause in making an arrest under a statute not yet held invalid," Id. at 550. The Fifth Circuit believed, as the Supreme Court described it, that "this stern result was required by Monroe v. Pape, 365 U.S. 167 (1961)." Id. at 550-51. The Supreme Court disagreed. It sustained the officers' contention that they should not be liable "if they acted in good faith and with probable cause in making an arrest under a statute . . . [they] reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." Id. at 555. Pierson, therefore, did not involve an arrest that was unlawful because the officer lacked probable cause or otherwise misjudged the extent of his arrest power, but rather "an arrest unlawful only in the sense that it was for a crime defined in a substantive statute later invalidated." LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U. Pitt. L. Rev. 307, 343 (1982). "Thus 'good faith' [or 'reasonable belief'] in the context of Pierson meant only reliance on a duly enacted statute." Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 459 (1978). Indeed, it seems that Pierson did not involve a fourth amendment violation at all. As pointed out in Mertens & Wasserstrom, supra note 182 (discussing Michigan v. DeFillippo, 443 U.S. 31 (1979), also discussed in infra note 292), "an arrest that in some sense violates another constitutional provision—because the underlying criminal statute is invalid—does not, for that reason alone, also violate the fourth amendment." Id. at 434. In such a case, and Pierson appears to have been such a case, the officer's conduct is lawful because he "had probable cause at the time of the arrest, not because he acted in good faith. Probable cause at the time of arrest does not dissipate because a substantive criminal statute is later construed differently or held unconstitutional." Id. at 425 (em-
the "good-faith"-"reasonable belief" defense "was imported into section 1983 rather casually from the common law, has been extended uncritically, and operates in practice at best to create confusion and at worst to defeat legitimate claims."237

In Stone, Justice White argued for the admissibility of illegally seized evidence in a criminal case "[w]hen law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds."238 In Gates, however, he dropped the subjective element of the "reasonable, good faith" test:

I would measure the reasonableness of a particular search or seizure [under the proposed "reasonable, good faith" or "reasonable belief" modification of the exclusionary rule] only by objective standards. Even for warrantless searches, the requirement should be no more difficult to apply than the closely related good faith test which governs civil suits under 42 U.S.C. § 1983.239

But the "good-faith"-"reasonable belief" test has turned out to be

238. 428 U.S. at 540 (White, J., dissenting).
239. 103 S. Ct. at 2347 (White, J., concurring). As Justice White noted, in Harlow v. Fitzgerald, 457 U.S. 800 (1982), because "substantial costs attend the litigation of the subjective good faith of government officials," id. at 816, the Court defined "essentially in objective terms," id. at 819, the "qualified" or "good faith" immunity federal officials enjoy in suits seeking damages against them. 103 S. Ct. at 2347 (White, J., concurring). Such officials are now "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. Although it received much less attention than Nixon v. Fitzgerald, 457 U.S. 731 (1982), decided the same day, "Harlow is by far the more practically significant case, for it greatly reduces the exposure of most government officials to civil suit." The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 223 (1982). "Although Harlow turned on the qualified immunity of federal executive officials, the Court strongly implied [457 U.S. at 818 n.30] that state officials facing constitutional claims under § 1983 will benefit from the revised immunity standard." Id. at 227 n.7. But the Court "did not explicitly mention local officials or § 1983 suits based on statutory violations." Id.
PROBABLE CAUSE AND GOOD FAITH

quite difficult to apply in the tort context. "One is confronted," reports Professor LaFave, "with a mishmash of cases, so tangled by comparison that one would be inclined to compliment Medusa's hairdresser."240 Indeed, argues LaFave, the confusion produced by the "good faith"-"reasonable belief" test in the tort cases "is alone strong reason to question any proposal to intrude it into thousands upon thousands of criminal case suppression hearings."241

Nor is the elimination of the subjective element of the tort defense likely to improve matters. What constitutes "good faith" in the tort context is not easy to say, but the concept is at least comprehensible. I am not sure the same can be said for the other element of the tort defense—what might be called "reasonable grounds to believe there were reasonable grounds to believe" that a crime had occurred (or was occurring) or that evidence of crime would be found in a particular case although there were not really reasonable grounds to believe that this was so. This concept "involves nearly circular reasoning that promotes confusion"242 and it contains an elusive distinction that is extremely difficult to grasp.243 As Judge Newman has pointed out:

To make out his case, [a person bringing an action for an arrest in violation of his fourth amendment rights] must establish that a reasonably prudent police officer, under all the circumstances would not have had probable cause to believe that he had committed a crime. Then . . . the officer still has a defense if he acted in good faith and has a reasonable belief in the validity of his action, that is, if he reasonably believed that he did have probable cause. But if the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the defense mean? Surely the officer could not reasonably believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.244

The notion that an officer may "reasonably" search on the basis of apparent facts that would not have led "a reasonably discreet and prudent" officer to search245—or that officers may "reasonably" arrest in

240. LaFave, supra note 236, at 344.
241. Id.
243. See id. at 461.
244. Id. at 460; see also Mertens & Wasserstrom, supra note 182, at 454: "[B]ecause reasonableness is already built into the concept of probable cause, . . . to recognize the possibility of a 'reasonable mistake' as to probable cause would be to acknowledge the possibility of an officer acting out of a 'reasonable unreasonable belief.'" Id.

To show probable cause it is not necessary that the arresting officer should have
circumstances when "prudent men in the shoes of these officers" would not have seen enough to make an arrest—is even harder to grasp in light of Gates.

The Gates Court stressed that "probable cause" is a "practical, common-sense" concept, a "flexible, easily applied standard," and a "fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules." The Court made it fairly clear, I think, that "probable cause" is something less than "more-probable-than-not" (although how much less is anything but clear). Indeed, at one point the Court told us that "probable cause requires only a probability or substantial chance of criminal activity."

How could the officer have reasonably misapplied a "flexible, easily applied standard"? How could the officer have reasonably made the wrong "practical, common-sense judgment"? How could the officer have had a "reasonable, good faith" belief that probable cause existed if it turns out that the totality of circumstances did not add up to even a "substantial chance of criminal activity"?

before him legal evidence of the suspected illegal act. . . . It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched.

Id. 246. See Henry v. United States, 361 U.S. 98, 102 (1959): Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense had been committed . . . . We turn then to the question whether prudent men in the shoes of these officers [referring to Brinegar v. United States, 338 U.S. at 175] would have seen enough to permit them to believe that petitioner was violating or had violated the law.

Id. 247. 103 S. Ct. at 2322. 248. Id. 249. Id. at 2328. 250. At one point in its discussion of probable cause the Court observed that "[f]inely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision." Id. at 2330. It then quoted Spinelli, 393 U.S. at 419, to the effect that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." 103 S. Ct. at 2330. Immediately thereafter, the Court referred to § 210.1(7) of the Model Code of Pre-Arraignment Procedure. The commentary to this section points out that the term "reasonable cause" was used rather than the constitutional language ("probable cause") "in order to avoid the possible implication that 'probable cause' requires a standard of 'more-probable-than-not,' which the Reporters rejected." See MODEL CODE OF PRE-ARRAINMENT PROCEDURE § 210.1(7) commentary at 499 (1975). In maintaining that the Illinois Supreme Court erred in thinking that "the corroboration of innocent activity" was insufficient to support a finding of probable cause, 103 S. Ct. at 2335 n.13, the Court recalled that "all of the corroborating detail established in Draper . . . was of entirely innocent activity." Id. (emphasis added). "This," it continued, "is perfectly reasonable. As discussed previously, probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Id. (emphasis added). 251. 103 S. Ct. at 2335 n.13 (emphasis added).
To impose a "good faith" or "reasonable belief" exception on Gates' soft standard for upholding search warrants strikes me as even less defensible—and even more incomprehensible. After Gates it does not require very much to issue a warrant, but it takes even less to uphold one on review. All that is needed is a "substantial basis" for a "fair probability"—or "substantial chance"—"that contraband or evidence of a crime will be found in a particular place."^252

"[T]he case dearest to the hearts of those advocating the 'good faith' [or the 'reasonable belief'] exception [is one] where evidence is found in execution of an arrest or search warrant later determined to have been improperly issued by the magistrate."^253 But the Gates case so dilutes the standard for issuing, and for upholding, warrants that it essentially adopts the "good faith" or "reasonable belief" theme in the warrant context. Indeed, if one puts together and takes seriously the language used in Justice Rehnquist's opinion for the Court in Gates—whether the magistrate had a "substantial basis" for a "substantial chance" that criminal activity existed or that evidence of crime would be found—the Gates standard for upholding a warrant on review seems even lower than a "reasonable, good-faith" test.

To impose a "reasonable belief" exception on top of this already diluted standard surely would amount to a double dilution.^254 To say that evidence obtained pursuant to a warrant should be admissible even though the police lacked a "substantial basis" for a "substantial chance" of criminal activity as long as they had a reasonable belief that they had a "substantial basis" for a "substantial chance" would be to promulgate an almost mind-boggling standard. However semanticists might explain it or wherever mathematicians might place it on a scale of one to a hundred, it surely would approach "the 'subjective' good faith approach condemned by the Supreme Court nearly twenty years ago in Beck v. Ohio."^255

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252. See id. at 2332, 2335 n.13.
253. LaFave, supra note 236, at 352; see also Gates, 103 S. Ct. at 2344 (White, J., concurring). "The argument for a good-faith exception is strongest . . . when law enforcement officers have reasonably relied on a judicially-issued search warrant." Id.
254. Although Justice White regards an officer's reliance on a judicially-issued search warrant as an especially strong case for applying a "good-faith" exception to the exclusiory rule, see 103 S. Ct. at 2344 (White, J., concurring), even he would not apply such an exception when the material presented to the magistrate is "so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue." Id. at 2346 (White, J., concurring). But if the material presented to the magistrate failed to provide so much as a "substantial basis" for a "substantial chance" that criminal activity existed or that contraband would be found, would the material presented not be so lacking in probable cause "that no well-trained officer could reasonably have thought that a warrant should issue"? Why is it necessary or desirable to give the police any more room for mistakes than the ample leeway Gates already gives them when they act pursuant to a warrant?
255. See Stewart, supra note 173, at 1401:
[If the ["reasonable, good faith" belief] proposal is to tolerate searches and seizures where, despite the deference given to the magistrate's determination
III. THE INAPPLICABILITY OF THE "CONSTITUTIONAL TORT" CASES AGAINST INDIVIDUAL OFFICERS

Although I fail to see how an officer who applies for a warrant may be said to have reasonably believed that he had probable cause when the issuing magistrate's probable cause determination fails to satisfy even the very low standard for review set forth in Gates, the situation may be different when several officers are involved in the chain of events. Suppose Officer A applies for a search warrant although he lacks even a "substantial basis" for a "fair probability" that contraband will be found in the place described. Suppose nevertheless that the magistrate improperly issues the warrant. Suppose further that Officer B, who played no role in the application for the warrant and who has no idea that Officer A's affidavit was inadequate, searches the designated place and finds contraband. Whatever may be said for Officer A, did not Officer B act "reasonably"?

From his limited perspective he certainly did. Thus, we are not inclined to criticize Officer B, let alone make him respond in damages. But the exclusionary rule does not, and is not designed to, "punish" the individual officer. Rather it is "aimed at affecting the wider audience of all law enforcement officials and society at large."256

Up to this point, I have treated the "constitutional tort" cases and the exclusionary rule cases interchangeably, for I find difficult and confusing in any context the notion that an officer who lacks "reasonable grounds" to make a search or seizure still may reasonably believe that he did have reasonable grounds. But there are not a few situations (especially when several officers are involved at various points along the way), and I did not mean to suggest otherwise, when an individual officer's "understandable" or "reasonable" conduct should protect him from personal liability but still not permit the use of illegally seized evidence in a criminal prosecution.

Whiteley v. Warden257 comes readily to mind. There the arresting officers acted on the basis of a radio bulletin that a warrant was out for the defendants' arrest. They neither knew nor had any reason to know that the affidavit underlying the arrest was inadequate. "Certainly police

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256. United States v. Peltier, 422 U.S. 531, 556-57 (1975) (Brennan, J., joined by Marshall, J., dissenting); see also id. at 557 (Brennan, J., dissenting) ("the exclusionary rule, focused upon general, not specific, deterrence, depends not upon threatening a sanction for lack of compliance but upon removing an inducement to violate Fourth Amendment rights"); infra note 266.

officers called upon to aid other officers in executing arrest warrants," observed the Court, "are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." 

There is no doubt, therefore, that if a civil action had been brought against them the arresting officers would have been, and should have been, protected from personal liability. But the issue presented in Whiteley was the admissibility in a criminal prosecution of evidence seized during a search incident to a challenged arrest. In this setting the Court had little trouble concluding that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." 

Coolidge v. New Hampshire is another criminal prosecution that comes to mind. The search warrants in that case were issued by the state attorney general himself, acting as a justice of the peace, even though he was actively in charge of the investigation. Arguably the police who carried out the search were entitled to assume that the state's chief government enforcement officer knew what he was doing. In any event, they were entitled to rely on the fact that the attorney general "was unquestionably authorized as a justice of the peace to issue warrants under then-existing state law." But, because the Attorney General "was not the neutral and detached magistrate required by the Constitution," the Court had little trouble concluding in the context in which the issue arose that "the search stands on no firmer ground than if there had been no warrant at all." (And it was unable to justify the search on any other theory.)

258. 401 U.S. at 568.
259. Id.; see also People v. Ramirez, ___ Cal. 3d ___, 668 P.2d 761, 194 Cal. Rptr. 454 (1983), and cases discussed therein. In Ramirez the arresting officer acted on the basis of what the police computer system indicated was an outstanding bench warrant, but the warrant had in fact been recalled six months earlier and no "independent probable cause" existed to support the arrest. In rejecting the state's argument that the arrest should be upheld because the arresting officer relied in good faith on information communicated to him through "official channels," the court, per Justice Mosk, observed:

Because the recall of the warrant was, or should have been, within the "collective knowledge" of the police, we cannot permit the arresting officer to rely with impunity on his fellow officers' errors of omission, but must impute their accurate knowledge to him.

... In this case ... we focus not on the actions of the arresting officer but on the conduct of law enforcement generally. Suppressing the fruits of an arrest made on a recalled warrant will deter further misuse of the computerized criminal information systems and foster more diligent maintenance of accurate and current records.

Id. at ___, 668 P.2d at 765, 194 Cal. Rptr. at 458.
261. See id. at 447, 450.
262. Id. at 450.
263. Id. at 453.
264. Id.
The infamous Irvine case\textsuperscript{265} illustrates how an individual police officer who participates in a challenged search can act quite "reasonably" (from his limited perspective) even though "the law enforcement profession as a whole"\textsuperscript{266} acts quite outrageously. In Irvine the police made repeated illegal entries into petitioner's home, first to install a secret microphone and then to move it to the bedroom and the bedroom closet, in order to listen to the conversations of the occupants for over a month. Although the Court affirmed a conviction based on the fruits of this misconduct because it had not yet decided to impose an exclusionary rule on the states as a matter of federal constitutional law, Justice Jackson, who wrote the principal opinion, exclaimed that what the police did "would be almost incredible if it were not admitted."\textsuperscript{267}

The record in the Irvine case was sent to the United States Department of Justice for possible federal prosecution of the police officers who had secreted the microphones in the Irvine home. An FBI investigation disclosed, however, that these officers "were acting under orders of the Chief of Police, who in turn was acting with the full knowledge of the local District Attorney."\textsuperscript{268} Moreover, "the law enforcement technique disapproved in [Irvine] appears to have been no more than common police procedure in the county where the conduct took place."\textsuperscript{269}

The facts turned up by the FBI investigation may have been a good reason to protect the particular officers who had installed the microphones in the Irvine home from criminal or civil liability. But they would have constituted a very poor reason for withholding the exclusionary sanction, if such a sanction had been in effect. As Professor LaFave has said, to apply the exclusionary rule when the officer who conducted the search or seizure is individually blameworthy "but not when the violation of the fourth amendment is caused by systemic defects, directly attributable to the institution that has been established to protect the very rights it has


\textsuperscript{266} "The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights." Dunaway v. New York, 442 U.S. 200, 221 (1979) (Stevens, J., concurring).

\textsuperscript{267} 347 U.S. at 132.

\textsuperscript{268} Comment, State Police, Unconstitutionally Obtained Evidence and Section 242 of the Civil Rights Statute, 7 STAN. L. REV. 76, 94 n.75 (1954) (quoting Letter of February 15, 1955, from Warren Olney III, Assistant United States Attorney General). In addition, a provision of the California Penal Code prohibiting the installation or use of a dictograph in any house without the consent of the owner or occupant specifically exempted the use and installation of such devices by a police officer "expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime." "Id. Query whether use of the hidden microphone for over a month was "necessary." In any event, query whether prosecution of the chief of police or the district attorney might have been possible.

\textsuperscript{269} Id. at 93.
transgressed,’ would be to turn the fourth amendment on its head.”

Thus, Justice White seems to have been wide of the mark in *Stone* when, urging a substantial modification of the exclusionary rule “so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief,” he found a strong analogy in the law governing the “constitutional tort” cases: “If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy [when he brings a civil action against the police], it makes even less sense to exclude the evidence solely on his behalf.”

In the first place, the exclusion of evidence in a criminal case is “not a benefit conferred upon the defendant 'solely on his behalf' to compensate him for the prior wrong done to him, as might be said of tort damages.” Rather, “[t]he defendant is, at best, an incidental beneficiary when exclusion occurs for the purpose, as the Supreme Court stated in *Stone v. Powell*, . . . of 'removing the incentive' to disregard the fourth amendment so that 'the frequency of future violations will decrease.'”

In the second place, the reason that the alleged victim of an illegal search or seizure may not recover damages for a “good-faith invasion of his privacy” when he brings an action against a particular officer—the concern that the officer who violated the plaintiff’s rights may have done so because the department inadequately trained him or because his colleagues failed to pass on relevant information to him—has no application when the question presented is whether the exclusionary rule should be invoked. The exclusion of evidence in a criminal case is “not a sanction to which the officer is personally subjected, but rather is one imposed upon the system.”

“Fortunately,” as I have noted elsewhere, “whatever may be said for burglars and many other criminals, police officers are not independent entrepreneurs. Rather, they are members of a law enforcement agen-

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271. 428 U.S. at 538 (White, J., dissenting).
272. *Id.* at 541-42 (White, J., dissenting).
273. LaFave, *supra* note 236, at 346.

[The exclusionary rule] has been criticized for benefiting defendants in a manner often disproportionate to the degree to which their fourth amendment rights were violated. . . . However, this disproportionality is significant only if one conceives of the purpose of the rule as compensation for the victim. Because I view the exclusionary rule as necessary to preserve fourth amendment guarantees, I do not find this criticism persuasive.

*Id.*
275. LaFave, *supra* note 236, at 346.
cy, a structural governmental entity.”276 The exclusionary rule, therefore, does not and need not seek to control police behavior the way the criminal law seeks to control the behavior of the general public, but “through a police department’s institutional compliance with judicially articulated fourth amendment standards”—that is, by “systemic deterrence.”277 Thus, the failure to apply the exclusionary rule in a case in which the offending officer was misinformed or insufficiently trained “would communicate an unmistakable message to ‘the wider audience of law enforcement officials and society at large’ [that] there is really no need to expend either the money or the effort” to ensure that police officers are sufficiently trained and appropriately informed.278

If, for the reasons just discussed, the analogy between the law governing civil actions against individual officers and the proposed modification of the exclusionary rule is a poor one, a better tort analogue is not hard to find—a civil action against the employing municipality itself. Four years after Justice White found support for a “reasonable, good faith” softening of the exclusionary rule in the section 1983 cases,279 the Court held, in Owen v. City of Independence,280 that when there is a basis for suing a governmental entity under section 1983,281 the governmental unit “may not assert the good faith of its officers or agents as a defense to liability.”282 Justice Brennan, who wrote the opinion of the Court (joined by Justice White), maintained that the Court’s result was “compelled both by the legislative purpose in enacting [section 1983] and by considerations of public policy”:283

[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against

277. Mertens & Wasserstrom, supra note 182, at 394; see also id. at 399-401; Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 431 (1974); Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”? 16 Creighton L. Rev. 565, 597 n.204, 659-62 (1983); LaFave, supra note 236, at 319-20, 350-51; Schlag, Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies, 73 J. Crim. L. & Criminology 875, 881-83 (1982); Stewart, supra note 173, at 1400.
278. LaFave, supra note 236, at 347.
279. See supra text accompanying notes 271-72.
281. Under Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978), a local governmental body may be held liable only when the unconstitutional act implements or executes “a government’s policy or custom, whether made by its lawmakers or by those whose edicts may fairly be said to represent official policy.” As Justice Stewart has pointed out, “[s]ince most fourth amendment violations are the result of wrongful actions by individual law enforcement officials, not of unlawful governmental policies, the circumstances under which a governmental body will be held liable for a fourth amendment violation are likely to be rare, indeed.” Stewart, supra note 173, at 1388.
283. Id. at 650.
future constitutional deprivations, as well. . . . The knowledge
that a municipality will be liable for all of its injurious conduct,
whether committed in good faith or not, should create an incen-
tive for officials who may harbor doubts about the lawfulness
of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymak-
ing position to institute internal rules and programs designed
to minimize the likelihood of unintentional infringements on con-
stitutional rights. Such procedures are particularly beneficial in
preventing those "systemic" injuries that result not so much from
the conduct of any single individual, but from the interactive
behavior of several governmental officials, each of whom may
be acting in good faith.284

The Court also had this to say about affording a municipality the
same qualified immunity from liability that previous decisions had con-
ferred on various government officials:

At the heart of [the] justification for a qualified immunity for
the individual official is the concern that the threat of personal
monetary liability will introduce an unwarranted and uncon-
scionable consideration into the decisionmaking process, thus
paralyzing the governing official's decisiveness and distorting his
judgment on matters of public policy. . . . The inhibiting effect
is significantly reduced, if not eliminated, however, when the
threat of personal liability is removed. First, as an empirical mat-
ter, it is questionable whether the hazard of municipal loss will
deter a public officer from the conscientious exercise of his duties.

. . . More important, though, is the realization that considera-
tion of the municipality's liability for constitutional violations is
quite properly the concern of its elected or appointed officials.
Indeed, a decisionmaker would be derelict in his duties if, at
some point, he did not consider whether his decision comports
with constitutional mandates and did not weigh the risk that a
violation might result in an award of damages from the public
treasury. . . . "To criticize section 1983 liability because it leads
decisionmakers to avoid the infringement of constitutional rights
is to criticize one of the statute's raisons d'etre."285

Because proponents of a "good faith" or "reasonable belief" modi-
fication of the exclusionary rule have analogized to the law governing section 1983 actions against individual officers, and the argument has a certain appeal, I have dwelt at some length on why the analogy is a poor one.

284. Id. at 651-52 (citations omitted).
285. Id. at 655-56 (quoting Developments in the Law—Section 1983 and Federalism, 90
HARV. L. REV. 1133, 1224 (1977)) (emphasis original) (citations omitted).
At this point in the Article, however, I do not think I need belabor the point that the law governing tort actions against a governmental entity itself provides a better analogy for exclusionary rule purposes.

As long as he acts in "good faith" or "understandably" or "reasonably," the officer who commits a fourth amendment violation "may go about his business secure in the knowledge that a qualified immunity will protect him," but in these instances sanctions should still be imposed upon "the system." Governmental entities should still be liable for "those 'systemic' injuries that result" and the exclusionary rule should still be invoked in order to give rise to the "systemic deterrence" the rule is supposed to achieve.

IV. THE TRUE "REASONABLE" FOURTH AMENDMENT VIOLATIONS: A LOOK AT THE RETROACTIVITY/PROSPECTIVITY CASES

Opponents of the good faith-reasonable belief proposal point out that "in many instances, reasonable mistakes by law enforcement officials are already tolerated by the fourth amendment." Indeed they are. But sometimes it is no answer to say that the fourth amendment allows room for "some mistakes on [the officers'] part" so long as they are the mistakes of "reasonable men." It is not a satisfactory answer when the officer relies on a presumptively valid statute that purports to authorize the very search or seizure in question, and the statute is subsequently struck

286. Id. at 657.
287. See supra text accompanying note 284.
288. See supra text accompanying notes 276-78.
289. Stewart, supra note 173, at 1401 (emphasis original).
290. For example, reasonable factual mistakes are generally tolerated with respect to whether probable cause existed, or whether exigent circumstances justified a warrantless search, or whether a third party had authority to permit a search of a certain place. See LaFave, supra note 236, at 348-49; Mertens & Wasserstrom, supra note 182, at 428-29; Stewart, supra note 173, at 1401.
291. [All the probable cause definitions or standards] seek to give fair leeway for enforcing the law in the community’s protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Brinegar v. United States, 338 U.S. 160, 176 (1949); see also supra notes 245-46.
292. I put aside those instances when the police make an arrest for violation of a substantive statute or ordinance (e.g., an abortion statute, or an ordinance prohibiting the distribution of leaflets without a permit) and a search of the arrestee turns up drugs, but the regulation is subsequently found unconstitutional. In such situations the arrest and the search incident to it are valid not because the officer acted in "good faith" but because no fourth amendment violations occurred at all. As Michigan v. DeFillippo, 443 U.S. 31 (1979), makes plain, such police action "falls within the traditional definition of probable cause." LaFave, supra note 236, at 349. The officer did not lack probable cause to believe that the person he arrested was violating the substantive law for which he arrested
down. Nor is it a good answer when the officer relies on “a longstanding and widespread practice to which [the] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved,”

and the practice is subsequently overturned.

In such instances (putting aside retroactivity problems and focusing only on the case chosen as the vehicle for invalidating the statute or establishing a new rule), the fourth amendment, until now at any rate, allows no room for mistakes. The evidence is suppressed even though the best-trained and most prudent officer “in the shoes of these officers” would have acted the same way. Indeed, the evidence is suppressed, it might be said, even though “the law enforcement profession as a whole” has acted reasonably.

Payton v. New York provides a good example. There the Court found violative of the fourth amendment a New York statute that authorized police officers to make warrantless entries of private residences in order to effect “routine felony arrests”—that is, “arrests in which there was ample time to obtain a warrant.” When the Court decided Payton, a clear majority of the states that had taken a position on the question still permitted warrantless entries into the home to arrest even in the absence of exigent circumstances, but the trend was in the opposite direction: ten of the twelve state courts that had confronted the constitutional issue had held such warrantless arrests to be invalid; five of the seven United States Courts of Appeals that had considered the issue had expressed a similar opinion. But none of these fifteen state and federal cases had

him simply because the law turned out to be invalid. “[R]eliance on a substantive criminal statute later held unconstitutional does not dissipate a finding of probable cause.” Stewart, supra note 173, at 1401; see DeFillippo, 443 U.S. at 37-38. “[T]hat an arrest that in some sense violates another constitutional provision—because the underlying criminal statute is invalid—does not, for that reason alone, also violate the fourth amendment. DeFillippo holds that the probable cause standard does not incorporate other constitutional protections.” Mertens & Wasserstrom, supra note 182, at 434 (emphasis added); see also supra note 236.

The victim of an arrest under an unconstitutional substantive statute “has the opportunity and incentive to vindicate his rights at the trial for that offense.” Mertens & Wasserstrom, supra, at 426. But an unconstitutional procedural statute—i.e., a statute which by its own terms authorizes arrests or searches that violate the fourth amendment—carries no penalty of its own. Thus, “a victim of police action undertaken pursuant to such a statute... has neither the incentive nor the opportunity to challenge its constitutionality except through a motion to suppress the evidence obtained.” Id. at 427.


See supra note 266; see also supra note 259.


Id. at 574, 583.

See id. at 598-99.

See id. at 574-75, 599-600.
been decided before January 14, 1970, when the arrest in Payton took place.\textsuperscript{300}

Thus, the State of New York forcefully argued that regardless of whether the officers should have obtained an arrest warrant before entering Payton's apartment, their failure to do so should not entitle the defendant to the exclusion of the evidence. For the officers had had ample probable cause to believe the defendant had committed a murder, had entered his apartment during the daytime, and had done so "under the express authority of an 1881 state statute, at a time when neither they nor any other law enforcement official could have had any serious doubts about the legality of following the statute".\textsuperscript{301}

[W]hen the officers entered Payton's apartment to arrest him in January 1970, they were acting in accord with a statute that had been part of New York's living law for almost one hundred years. Neither the officers nor their supervisors had any reason to doubt the legality of the entry. . . . [The evidence] will be barred not because the constable blundered but rather because he followed the law. Lessons like this one breed confusion, cynicism and scorn for law. Obviously, these are not the attitudes that the exclusionary rule should foster. . . .

We are not urging the Court to allow evidence to be admitted whenever officers in "good faith" follow their own precepts, or even the precepts of a lower judicial officer, about what constitutes legal behavior. We are urging a much narrower rule that would admit evidence only when, as in Payton's case:

(1) the police follow an unambiguous pronouncement;
(2) that pronouncement is a statute;
(3) the statute clearly was not designed to evade Fourth Amendment requirements; and
(4) at the time the officers act neither they, their supervisors in the police department, nor the district attorneys with whom they work could have any reasonable doubt about the constitutionality of the officers' conduct under the statute.\textsuperscript{302}

\textsuperscript{300} See Schaefer, Prospective Rulings: Two Perspectives, 1982 Sup. Ct. Rev. 1, 10-11 n.48.
\textsuperscript{301} Brief for Appellee at 81, Payton.
\textsuperscript{302} Id. at 86, 88-89 (emphasis added) (citations omitted); see also Supplemental Brief for Appellee at 11-12.

[1] If prior to entering Payton's apartment, the police officers had consulted legal advisors—within or outside the Police Department—the officers would have been told that as long as they had probable cause to believe that Payton had committed a murder and that he was in his apartment, they could lawfully enter without an arrest warrant, as they did, to effect the arrest.

\textit{Id.}

I think the lawyers for the State of New York made as fine an argument as could be
In reversing Payton's conviction because the fourth amendment prohibits the police from making a warrantless entry into a suspect's home in order to effect a routine felony arrest, how did the Court respond to the state's argument that the exclusionary rule should not be applied when the challenged police conduct was expressly authorized by statute (at least when, as in Payton, the police relied on a longstanding statute that codified a widespread practice and one that they had no reason to believe was unconstitutional at the time they acted)? The Court did not pause to consider the argument (did not deem it worthy of discussion?). On remand from the Supreme Court, however, the New York Court of Appeals did explicitly discuss this argument—and emphatically rejected it.

Speaking for a unanimous court on this issue, Judge Sol Wachtler did not deny that the police who entered Payton's apartment without a warrant could hardly be blamed for relying on a nineteenth-century statute made for staying the exclusionary rule in Payton-type circumstances, regardless of whether the officers should have obtained an arrest warrant, but their adversaries were equally able. Payton's lawyers pointed out that appellee's test would require the Court to overrule Stovall v. Denno, 388 U.S. 293, 301 (1967) [quoted in infra note 305] and to depart from long adhered-to principles of constitutional adjudication which afford the prevailing litigant the relief which turns upon the result achieved. Because these principles are sound and the test proposed by appellee unfounded and untenable, appellee's argument is without merit. Reply Brief for Appellants at 7. Continued the appellants:

The specter of a purely prospective ruling, particularly in criminal cases, would effectively preclude important constitutional issues from ever being raised. A non-indigent defendant would not retain an attorney and incur the costs of an appeal if the attorney advised that despite a clear violation of his Fourth Amendment rights, there was no possibility that his conviction could be reversed. A public defender or assigned attorney would, in a world of limited resources, more properly turn his attention to those individuals who could be aided in some concrete fashion. . . .

[Unlike cases raising retroactivity problems] when the validity of a statute is before the Court for the first time and it is determined that the statute is violative of the Fourth Amendment, any inquiry into the good faith of the arresting officers or their superiors is beside the point. For when a legislature passes such a statute, it is obvious that the litigant who is first to challenge its validity has no quarrel with the police but with the legislature which authorized them to violate the Constitution. In such a setting the public interest served by the exclusionary rule is that of deterring legislators from enacting statutes which violate the Fourth Amendment. . . . [W]here, as in the case of the invalid search warrant, the authorization itself violates the Fourth Amendment, the exclusionary rule plays an important role in deterring such authorizations from being made.

Id. at 8-11 (footnote omitted).

Moreover, maintained Payton's lawyers, "besides being unfounded in sound constitutional doctrine, the four-pronged rule appellee proposes is simply unworkable." Id. at 12. And the final branch of the proposed rule—whether any one in the law enforcement hierarchy could have "any reasonable doubt" about the statute's constitutionality—is "least manageable of all." Id. "[T]he holdings of a single court, or even a persuasive law review article, might cause doubts about the validity of legislation. But the inquiry about when such a doubt arose or should have arisen, is a morass into which the courts should not be required to venture." Id. at 13.
that reflected a widespread practice, but pointed out that
the exclusionary rule serves to insure that the State itself, and
not just its police officers, respect the constitutional rights of the
accused. Thus, for instance, evidence will be suppressed if it was
seized by the police pursuant to a [warrant] [or] to an order ex-
pressly authorized by a statute later determined to be unconsti-
cases, of course, the police simply carried out a court order, as
they were bound to do, and the fault lay with other branches
of the government. Nevertheless, the exclusionary rule was held
applicable to deny the State the benefits of its violation of the
defendant's constitutional rights.303

The New York Court of Appeals recognized that "when retroactiv-
ity is at issue, concerns similar to those expressed by the prosecutor may

61, 63-64 (1980); see also LaFave, supra note 236, at 350-51 (state is responsible for actions
of its legislature as well as its police and failure to apply the exclusionary rule when legislature
violates fourth amendment "would create an incentive for future systemic inroads upon
the fourth amendment"); Reply Brief for Appellants, Payton, quoted in supra note 302 (when
legislature itself authorizes police to violate the fourth amendment "the exclusionary rule
plays an important role in deterring such authorizations from being made").

In the case referred to by the New York Court of Appeals, Berger v. New York, 388
U.S. 41 (1967), the Supreme Court struck down New York's electronic surveillance statute
and excluded evidence obtained pursuant to a judicially issued "eavesdrop order" as pro-
vided by the New York statute. Other cases that address this issue include Ybarra v. Illinois,
United States, 413 U.S. 266 (1973), discussed in infra note 304; Coolidge v. New Hamp-
shire, 403 U.S. 443 (1971), discussed in supra text accompanying notes 260-64; and Sibron
v. New York, 392 U.S. 40 (1968). In Ybarra the police possessed a valid warrant authoriz-
ing the search of a small public tavern and the person of the bartender for drugs. But
the police detained and "frisked" a number of persons (including defendant) who hap-
pened to be in the tavern when the search warrant was executed. The frisk of defendant
produced narcotics. In holding the narcotics inadmissible, the Court, per Justice Stewart,
seemed to ignore an Illinois statute that authorized the police to detain and search any
person on premises being searched pursuant to a warrant. At the very end of the opinion,
however, the Court noted that the state law "falls within the category of statutes purpor-
ting to authorize searches without probable cause, which the Court has not hesitated to
hold invalid as authority for unconstitutional searches." 444 U.S. at 96 n.11. The Court
then referred to Berger and most of the other cases cited above.

In his Gates concurrence, Justice White recognized, referring to the Berger-Sibron-Almeida-
Sanchez line of cases, that "we have held that the exclusionary rule required suppression
of evidence obtained in searches carried out pursuant to statutes, not previously declared
unconstitutional, which purported to authorize the searches in question without probable
cause and without a valid warrant." 103 S. Ct. at 2341 n.12 (White, J., concurring).
But "the result in these cases may well be different," he added, "under a 'good-faith'
exception." Id. (White, J., concurring). At another point in his concurrence, however,
Justice White noted that, because a good faith exception to the exclusionary rule might
not provide a sufficient supply of state criminal cases in which to resolve unsettled ques-
tions of fourth amendment law, he "would entertain the possibility of according the benefits
of a new Fourth Amendment rule to the party in whose case the rule is first announced."
be considered important, or in some cases, controlling factors," but "they cannot affect the outcome of the ‘first case’ to decide the substantive point." If the law were otherwise, observed Judge Wachtler, the Supreme Court’s decision in this case, and other decisions in like cases, could not affect Payton’s conviction or the prosecution in which the statute or practice was first challenged. They would only provide guidance for future cases. In a system of government which requires the courts generally to decide only concrete cases and controversies, and to avoid advisory or purely prospective opinions [referring to the language in Stovall v. Denno quoted in supra note 305] this would mean that statutes and widespread practices broadly affecting the rights of accused persons would, ironically, be beyond judicial review for all practical purposes. Thus it is not so much the nature of the exclusionary rule but rather the nature of judicial process and the need to actually resolve a live controversy which requires that the exclusionary sanction be applied in cases which change the law or hold invalid practices which had previously been widely believed to be constitutionally acceptable.

The Supreme Court has certainly proceeded on this basis in the constitutional-criminal procedure area. Over the years the Court has employed an "extraordinary diversity of rules" for locating the "cut-

304. 51 N.Y.2d at 176, 412 N.E.2d at 1291, 433 N.Y.S.2d at 64. At this point, the court cited United States v. Peltier, 422 U.S. 531 (1975), which declined to apply Almeida-Sanchez v. United States, 413 U.S. 266 (1973), retroactively to searches conducted prior to the date of the decision in that case. In Almeida-Sanchez, although Border Patrol agents had relied on a provision of the Immigration and Nationality Act and an accompanying regulation that purported to authorize such searches, the Court held a warrantless automobile search without probable cause some twenty-five air miles from the Mexican border to be violative of the fourth amendment. But the agents in Peltier, emphasized the Court, conducted the car search "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous [lower federal courts'] approval." 422 U.S. at 541.

305. 51 N.Y.2d at 176, 412 N.E.2d at 1291, 433 N.Y.S.2d at 64. At this point, the court cited Stovall v. Denno, 388 U.S. 293 (1967), in which the Supreme Court declined to apply United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), retroactively to lineups or other pretrial confrontations conducted in the absence of counsel prior to the date of the decisions. The Court, per Justice Brennan, recognized that Wade and Gilbert, therefore, were "the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases." 388 U.S. at 301. But the Court deemed that benefit "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases on controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today’s decisions." Id.; see also United States v. Peltier, 422 U.S. 531, 542 n.12 (1975).

306. 51 N.Y.2d at 175, 412 N.E.2d at 1291, 433 N.Y.S.2d at 64.

off point” for application of a law-changing decision. But it has never handed down what might be termed a “purely prospective” or a “prospective-prospective” criminal procedure decision\(^{308}\)—that is, one that announces a new rule governing only future events and transactions. Although \textit{Mapp v. Ohio}\(^{309}\) was applied only to cases still pending on direct review\(^{310}\) and \textit{Katz v. United States}\(^{311}\) and \textit{Chimel v. California}\(^{312}\) were applied only to searches or seizures conducted after the date on which these decisions were handed down,\(^{313}\) “the fact remains that Ms. Mapp and Messrs. Katz and Chimel did obtain relief in the cases which bear their names.”\(^{314}\)

But Dean Francis Beytagh, the author of a leading article on the prospectivity/retroactivity controversy, has challenged Justice Brennan’s admonition in \textit{Stovall} that article III of the Constitution bars purely prospective decision making in constitutional cases. “Cases in which a new rule is adopted but applied in a wholly prospective fashion,” he maintains, “are nonetheless decided on the merits.”\(^{315}\) Although the result in a purely prospective decision would turn on the old rule, not the new one, that fact, insists Beytagh, “does not remove the case from the category of an article III case or controversy.”\(^{316}\) And Justice Walter Schaefer, the author of the most recent article on the prospectivity/retroactivity problem, has pointed out that “the purely prospective judicial opinion does not have all the objectionable characteristics of an advisory opinion.”\(^{317}\) The issue that the court decides in such a case, observes Schaefer, “has not been sent to it by a doubting legislature, perhaps seeking to avoid its own responsibilities. It has arisen in an actual case, brought before the court by adversary parties in the ordinary course of litigation.”\(^{318}\)

A purely prospective ruling, however, recognizes Justice Schaefer, is subject to other objections:

Since the new rule it announces has no effect whatsoever upon the parties to the case, it is technically dictum and so, theoretically at least, it is not binding upon other courts or even, in future cases, upon the court that announces it. . . . The practical


\(^{314}\) Id.


\(^{316}\) Id.


\(^{318}\) Id.
criticism that litigants will not urge the overruling of undesirable precedents if their success will bring no tangible reward is important. It is by no means a complete answer to point to the institutional litigant in civil cases. And in criminal cases a public defender represents an individual defendant and can hardly ethically advocate a result that will not benefit his client.

... Another difficulty with a purely prospective overruling [, although it] has not been recognized in judicial opinions, ... is the psychological fact that the dissatisfaction with the existing rule that is strong enough to produce an overruling decision is usually also strong enough to produce a tangible result in the case at hand.319

Dean Beytagh, however, is not impressed with the argument that pure prospectivity might destroy the incentive to challenge existing constitutional rules. In the common multiple-issue criminal case "counsel makes every argument he can that has a modicum of substance, including some that challenge existing rules."320 Moreover, even assuming single-issue criminal cases in which any new rule would predictably be applied purely prospectively, it is still likely, maintains Beytagh, that constitutional issues pertinent to the case will be raised:

Institutional litigants are interested in having the law changed for the benefit of future cases even though the old rule will be applied in the law-changing decision, and much of the legal representation of criminal defendants is institutional in character. A public defender's office, for example, would have considerable incentive to seek a change in the constitutional rules even though the benefit would accrue only to those involved in later cases.321

Beytagh may be right, but I find more persuasive the counter-arguments of two commentators who have spent most of their professional lives in a public defender's office:

First, any single new development in fourth amendment law is likely to require the litigation of a large number of cases that present the issue. This would far exceed the pool of cases available to any one attorney or office. Second, public defenders are notoriously overworked and do not have time to plan the development of fourth amendment law or to litigate every marginal case raising a key point of law in the hope of ultimately changing the law. Third, personnel changes and turn-over would make the execution of any such strategy difficult at best. Finally, changes in fourth amendment law do not have the kind of effect

319. Id. at 22-23.
321. Id. at 1614.
on the professional life of defense lawyers that, for example, liberalized discovery rules have.\textsuperscript{322}

I have not discussed the retroactivity/prospectivity issue and related problems to the extent I have out of any desire to add to the voluminous literature that already exists on the subject.\textsuperscript{323} I have done so, rather, in an effort to show that the problems pervading this area, although they might be termed "good faith" or "reasonable belief" problems, are significantly different than those that arise—and arise much more frequently—when a police officer misjudges his authority under well-settled fourth amendment principles.

Whether, as in Payton, evidence obtained pursuant to a statute that purports to authorize the very search or seizure in question\textsuperscript{324} (at least when, at the time the challenged police action occurred, the statute reflected prevailing law) should be admitted in the "first case" that holds the statute unconstitutional or whether, more generally, a "change" in fourth amendment law can and should be applied purely prospectively, are what law professors like to call "nice questions." Although the objections to such a course of action are formidable, there is something to be said for applying a dramatic change in the law of search and seizure purely prospectively. (Whether Payton marked such a change is arguable. \textsuperscript{325}) For in such

\begin{footnotesize}
\begin{enumerate}
\item Mertens & Wasserstrom, supra note 182, at 451 n.494; see also 3 W. LaFave, supra note 22, § 11.5(b), at 690 (questioning whether "[a] matter of both ethics and practicality . . . a lawyer can or should be expected to divert a part of his oral and written argumentation to a point which could be of no benefit to his present client"); Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Law and Time, 79 Harv. L. Rev. 56, 61 (1965) (recognition of even "a substantial possibility" of pure prospectivity "will tend to deter counsel from advancing contentions involving novelty or ingenuity and will lead them to focus on other aspects of their cases").
\item This situation is to be contrasted with one in which the police rely on a substantive statute (e.g., an abortion statute), later invalidated because it violates some constitutional provision other than the fourth amendment. No tampering with the exclusionary rule is necessary in such a situation, because if the police reasonably believe a person is violating such a statute the arrest is based on probable cause. See supra note 292.
\item Although the Supreme Court decided as a general proposition that Payton did not mark a "clear break with past" but only resolved an "unsettled" question, United States v. Johnson, 457 U.S. 537, 551 (1982), it is hard to answer this question without specifying what "past" one is talking about—that is, what year the challenged police action occurred. In Johnson, which applied Payton retroactively to cases still pending on direct review, the warrantless entry to effect an arrest occurred in May 1977. By that time the question whether such police action violated the fourth amendment had been expressly
\end{enumerate}
\end{footnotesize}
instances it may be said that not only the particular officers in the case, but the law enforcement profession as a whole acted quite "reasonably." But these "nice questions" are a far cry from those that arise when an officer did not have reasonable grounds to make an arrest under settled precedents but "not too unreasonably" thought he did, or when an officer insufficiently understood his authority to search under settled principles—that is, a reasonably discreet and prudent officer "in his shoes" would not have conducted the search, but this particular officer "understandably misunderstood" his authority to search.

Assuming that the particular litigant whose case was chosen as the vehicle for establishing the new rule must or should get the benefit of it, (a) whether the new rule should apply only to searches and seizures that take place after the date of the decision, as the Court has repeatedly held with respect to decisions marking "a clear break with the past";\textsuperscript{326} or (b) whether a case "resolving unsettled fourth amendment questions" should be "applied retroactively" to all convictions not yet final at the time the case was handed down, as the Court recently told us in United States v. Johnson;\textsuperscript{327} or (c) whether "the retroactive reach" of a case resolving "unsettled questions" should even extend to "those cases that still may raise Fourth Amendment issues on collateral attack"\textsuperscript{328} are also "nice

left open in four Supreme Court opinions. See \textit{id.} at 551. Moreover, by that time a goodly number of state and federal courts had come around to the view that such police action was unconstitutional. See cases cited in Payton v. New York, 445 U.S. 573, 575 nn.3-4 (1980).

\textit{Payton} did not constitute a "clear break" or "sharp break" in the law, the Johnson Court told us, because it did not overrule a past precedent of the Court or "disapprove[] a practice this Court arguably has sanctioned in prior cases," or "overturn[] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." \textit{Id.} at 551.

By the time the Payton case was decided, and probably by the time the police action in Johnson took place, the question whether the police could make a warrantless entry into an arrestee's home had become "unsettled," but at the time the challenged police action occurred in the Payton case itself, back in January 1970, the overwhelming weight of statutory and lower court authority, if not "a near-unanimous body of lower court authority," did approve such police conduct. See \textit{supra} text accompanying notes 298-302.

Moreover, as pointed out in Schaefer, \textit{Prospective Rulings: Two Perspectives}, 1982 \textit{Sup. Ct. Rev.} 1, Johnson's "near-unanimity" requirement "is new, and the Johnson opinion offers no justification for its imposition." \textit{Id.} at 10. Thus, if the Supreme Court had held in a different 1980 case that warrantless entries into homes to effect arrests were unconstitutional and Payton had been the "second case," a forceful argument could be made that the new rule would mark a "clear break" in the law as the law existed in January 1970. See \textit{id.}

It should also be noted that the federal agents whose action was challenged in Johnson did not rely on any procedural statute, but the police in Payton did. They relied on an 1881 state statute that purported to authorize the very police conduct at issue.


\textsuperscript{327} 457 U.S. 537, 561-62 (1982), \textit{discussed in supra note 325}.

\textsuperscript{328} \textit{See id.} at 562. Because \textit{Johnson} arose on direct review the Court saw no need
questions.” Again, however, although not wholly unrelated to the “good faith” proposal, they raise very different questions than those presented in the bulk of cases most likely to be affected by a “good faith” or “reasonable belief” modification of the exclusionary rule—those in which officers fail to apply or misapply relatively clear or settled fourth amendment guidelines and their mistakes are not the mistakes of “reasonable men,” as that term has traditionally been defined in the law of search and seizure.329 (Of course, if the officers’ mistakes were the mistakes of “reasonable men,” as that term has traditionally been defined, they would not need the additional help provided by a “good faith” or “reasonable belief” modification of the exclusionary rule.)

To the extent that United States v. Johnson does bear on the proposed “good faith” or “reasonable belief” test, it provides some aid and comfort to those resisting such a test. For in Johnson the government argued, as the Court described it, that “new Fourth Amendment rules must be denied retroactive effect in all cases except those in which law enforcement officers failed to act in good-faith compliance with then-prevailing constitutional norms.”330 Furthermore, the government argued, retroactive application of a decision such as Payton resolving an unsettled question of fourth amendment law, even to cases pending on direct review, “would not serve the policies underlying the exclusionary rule.”331 But a 5-4 majority, per Justice Blackmun, responded:

If, as the government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitely resolving the unsettled question. Failure to accord any retroactive effect to Fourth Amendment rulings would “encourage police or other courts to disregard the plain purport of our decisions and to adopt a let’s-wait-until-it’s-decided approach.”332

The Court’s response to the government’s contention in Johnson seems equally applicable to arguments for a “good faith” or “reasonable belief”

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329. See supra note 291; see also supra notes 245-46.
330. 457 U.S. at 559.
331. Id. at 560.
332. Id. at 561 (quoting Desist v. United States, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting)) (emphasis original).
test in other contexts. "If, as the Court held [in Johnson], [the policies underlying the exclusionary rule] are served by requiring exclusion when police officers make a mistake while acting in a constitutional 'gray area,'" points out former Justice Stewart, "it is clear that the same policies are served when officers act unconstitutionally [albeit 'understandably'] by engaging in conduct that is prohibited under settled fourth amendment precedent."333

Although the Court has indicated otherwise,334 it may well be that when as in Payton (but unlike the situation in Johnson) the police act pursuant to a statute that purports to authorize the very police conduct at issue, especially a longstanding statute reflecting the prevailing law at the time, a change in the fourth amendment law should not be applied retroactively.335 But I do not believe, as Justice White seems to think, that this view "leads inexorably to the more general ['good faith' or 'reasonable belief'] modification of the exclusionary rule."336

The New York officer who—ten years before the Supreme Court’s decision in Payton—conducted a warrantless entry of a suspect’s home pursuant to an 1881 statute that purported to authorize the very practice he engaged in, "reasonably believed" he was acting lawfully337 in a very different sense than an officer who "reasonably" searches on the basis of circumstances that would not have led a "reasonably discreet and prudent" officer to search.338 When an officer acts in conformity with the fourth amendment’s requirements as they existed at the time of the search only to see those requirements change dramatically because of a judicial decision rendered after the event, the police department as a whole—let alone the individual officer—has done all that can reasonably be expected of it. When, on the other hand, an officer "reasonably" or "understandably" thought he had adequate grounds to arrest only to learn that the totality of circumstances did not add up to even "a substantial chance of criminal activity,"339 an incorrectly or inadequately trained officer may have done all that could reasonably be expected of him, but those who run the police department certainly have not.

Nothing useful is to be gained by lumping significantly different types of fourth amendment violations together under the rubric of "good faith" or "reasonable belief." Some fourth amendment violations are a good deal more "reasonable" or "understandable"—or forgivable or

333. Stewart, supra note 173, at 1402-03.
334. See supra note 303.
335. See supra text accompanying notes 298-302; see also supra note 325. It may even be, although there are strong objections to such a course of action, see supra text accompanying notes 303-22, that the invalidation of such a statute should be applied purely prospectively.
337. Cf. id.
338. See supra note 245 and accompanying text.
339. See supra text accompanying note 252.
unavoidable—than others. Some, such as the warrantless entry that occurred in the *Payton* circumstances, stir sympathy and may even call for more relief than the Court has heretofore rendered. Others should leave us unmoved.

An opponent of the "good faith" or "reasonable belief" test should not lightly dismiss the officer who had a hoary judicial precedent or procedural statute suddenly shot out from under him by assuring him that the fourth amendment allows ample room for mistakes. (Not always.) A proponent of the "good faith" or "reasonable belief" test, on the other hand, should not use some of the very difficult but relatively rare situations that arise in the retroactivity/prospectivity cases as "loss leaders" to attract support for a softening of the exclusionary rule across the board.

V. SOME FINAL THOUGHTS: "GOOD FAITH" AND "COST-BENEFIT" ANALYSIS

Part II of Justice White's concurring opinion in *Gates* is a powerful brief for adopting a "reasonable, good faith" exception to the exclusionary rule. Although he would eliminate the "subjective element" of the proposed exception and "measure the reasonableness of a particular search or seizure only by objective standards,"340 and although he would continue to apply the exclusionary rule "when it is plainly evident that a magistrate or judge had no business issuing a warrant,"341 Justice White's arguments seem to outrun his conclusions.

If Justice White "would not presume that a modification of the exclusionary rule will lead magistrates to abdicate their responsibility to apply the law,"342 why presume that abolition of the rule would lead them to do so? If the Court "has never set forth a rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant,"343 and if, as Justice White believes, "the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges,"344 why exclude *any* evidence obtained pursuant to a judicially issued search warrant?

Again, if, as Justice White seems convinced, "when officers perform their tasks in the good-faith belief [as measured by objective standards] that their action comported with constitutional requirements, the deterrent function of the exclusionary rule is so minimal, if not non-existent, that the balance clearly favors the rule's modifications,"345 why is this not also the case when the officer believes in complete good faith that his action comports with constitutional requirements? As Justice White has noted elsewhere, "when the officer is convinced that he has probable cause

340. 103 S. Ct. at 2347 (White, J., concurring).
341. Id. at 2345 (White, J., concurring).
342. Id. (White, J., concurring).
343. Id. at 2344 (White, J., concurring).
344. Id. at 2345 (White, J., concurring).
345. Id. at 2344 (White, J., concurring).
to arrest he will very likely make the arrest.'

Justice White seeks only a modification of the exclusionary rule. He ‘would overrule neither Weeks v. United States nor Mapp v. Ohio.’ But if some of the views Justice White advances and builds upon in Gates are correct, why not overrule those landmark cases? Here, too, as I shall try to show, Justice White’s arguments seem to outrun his limited objective.

In urging a modification of the exclusionary rule, Justice White relied in part on United States v. Calandra, ‘perhaps the most significant post-Mapp decision on the scope of the exclusionary rule.’ In ruling that a grand jury witness may not refuse to answer questions on the ground that they are based on the fruits of an unlawful search, the Calandra Court, per Justice Powell, characterized the exclusionary rule as ‘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.’ As in the case with any remedial device, observed Justice Powell, the rule’s application ‘has been restricted to those areas where its remedial objectives are thought most efficaciously served.’ Thus, whether grand jury questions based on evidence seized in violation of the fourth amendment should be proscribed ‘present[ed] a question, not of rights, but of remedies—a question to be answered by weighing the “potential injury” to the functions of the grand jury against the “potential benefits” of the exclusionary rule in this context.

I share the Calandra dissenters’ way of thinking about the exclusionary rule. I believe that the goals ‘uppermost in the minds of the framers of

346. Stone v. Powell, 428 U.S. 465, 538-39 (1976) (White, J., dissenting) (emphasis added). As Judge Rubin, who opposes a “reasonable, good faith” modification of the exclusionary rule, has pointed out in United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc) (Rubin, J., concurring), if, as a majority of the Fifth Circuit maintains, an officer will not be deterred from an unlawful search if he does not know that it is unlawful, it seems needless to require that his subjective belief also be objectively reasonable: “A policeman who is [acting] in complete subjective good faith is unlikely to stop and ask himself, ‘Am I also reasonable?’ ” Id. at 850 n.4.


350. 414 U.S. at 348.

351. Id., quoted with approval in Gates, 103 S. Ct. at 2340 (White, J., concurring).

352. 414 U.S. at 354.

353. See id. at 349.
the rule” were “enabling the judiciary to avoid the taint of partnership
in official lawlessness” and “assuring the people . . . that the government
would not profit from its lawless behavior, thus minimizing the risk
of seriously undermining popular trust in government.”354 Nowhere in
the foundational *Weeks* case is the exclusionary rule called a “remedy”
and nowhere in the opinion is there any discussion, or even mention, of
the effectiveness of the exclusionary rule versus the effectiveness of tort
remedies, internal self-discipline, or other alternatives. Although few would
suspect this from *Calandra* and other recent majority opinions of the
Supreme Court, the *Weeks* opinion “contains no language that expressly
justifies the rule by reference to a supposed deterrent effect on police
officials.”355

Nor, as various commentators have noted,356 was the idea of deter-
rence expressed for the next thirty-five years—the interim between *Weeks*
and the year of *Wolf v. Colorado*.357 As I recently observed elsewhere:

The Court that decided *Weeks* and the Courts that adhered to
its doctrine in subsequent decades may have expected, or at least hoped,
that law enforcement officials would not be so “impervious, uncaring or ignorant of the search and seizure rules ham-
ered out in our courts” as to be unaffected by them—no doubt
the Court had the same expectations, or at least hopes, about
local public school officials when it decided *Brown v. Board of
Education*—but there is no suggestion in *Weeks* or in the search
and seizure cases handed down over the next thirty-five years
that the exclusionary rule’s survival depends on proof that it is
significantly influencing police behavior.358

354. *Id.* at 357 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting).


of Privacy*, 15 ARIZ. L. REV. 327, 330 (1973); Mertens & Wasserstrom, *supra* note 182, at
379-80.


358. Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather
original); see also *id.* at 599 n.211 (quoting Letter from Judge Herbert Stern to Senator
Judiciary, 97th Cong., 1st & 2d Sess. 806-08 (1982)*):

*I have spent my entire career working within the criminal justice system. . . .
There is no doubt in my mind that the exclusionary rule does in fact deter law
enforcement misconduct at every level. It is simply incredible to suggest that
the police, the FBI, the District Attorney and the United States Attorney are
impervious, uncaring or ignorant of the search and seizure rules hammered out
in our courts. It is, I think, a slander to suggest that our law enforcement
authorities are either so stupid or uncaring that they are unaffected or—if you
will—undeterred by what the courts say they must do, and what they must not do.*

*Id.*
The kind of "cost-benefit" analysis of the exclusionary rule that the Court has employed in recent years does support a "good faith" or "reasonable belief" modification of the exclusionary rule, but it also threatens the very life of the rule itself. In his Gates concurrence Justice White (a) recalls that Calandra and its progeny reflect the view that "the exclusion of evidence is not a personal constitutional right but a remedy, which, like all remedies, must be sensitive to the costs and benefits of its imposition"; (b) maintains that "any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness"; and then (c) reports that "[t]he deterrent effect of the exclusionary rule has never been established by empirical evidence, despite repeated attempts." But if all this is so, why stop with only a modification of the exclusionary rule? Why not abolish the rule altogether?

In the twenty-five years I have written about the exclusionary rule, I have tried to show, even before I ever heard of the term, how judicial rulings significantly affect police conduct by means of what is now called "systemic deterrence." But one of the troubles with the cost-benefit analysis of the exclusionary rule (from the vantage point of the rule's defenders at any rate) is that the empirical terrain favors the rule's critics, "who through the guerilla warfare of pointing to sporadic incidents, can create the dataless impression that the rule fails to deter police

359. United States v. Havens, 446 U.S. 620 (1980) (illegally obtained evidence may be used to impeach not only direct testimony of defendant but also statements first elicited from him on cross-examination); United States v. Ceccolini, 435 U.S. 268 (1978) (exclusionary rule "should be invoked with much greater reluctance" when defense seeks to suppress live-witness testimony rather than an inanimate object); Stone v. Powell, 428 U.S. 465 (1976) (state prisoner may not be granted federal habeas corpus relief on search-and-seizure grounds unless denied opportunity for "full and fair litigation" of claim in state courts); United States v. Janis, 428 U.S. 433 (1976) (rule's deterrent purpose would not be served by excluding evidence, obtained illegally by state police, from federal civil tax proceedings).

As for Calandra's ancestry, it relied on Alderman v. United States, 394 U.S. 165 (1969) (benefits of allowing defendants "standing" to challenge evidence seized in violation of third party's constitutional rights outweighed by further encroachment upon public interest in suppressing crime); see also United States v. Payner, 447 U.S. 727 (1980) (even when government has intentionally manipulated "standing" requirement by deliberately violating fourth amendment rights of third party in order to obtain evidence against defendant, federal court may not use its supervisory power to exclude evidence).

360. 103 S. Ct. at 2342 (White, J., concurring).
361. Id. (White, J., concurring) (emphasis added).
362. Id. at 2343 (White, J., concurring).
misconduct." "The costs of the exclusionary rule are immediately apparent; its benefits are only conjectural." "It is never easy to prove a negative" and "Police compliance with the exclusionary rule produces a non-event which is not directly observable—it consists of not conducting an illegal search." 

In his Gates concurrence, Justice White insists that the exclusionary rule should bear "a heavy burden of justification" and that it should be limited to the circumstances in which "it will pay its way by deterring official lawlessness." But one of the leading empiricists in the area, political scientist Bradley Canon, has recently concluded that this is too great a burden for the exclusionary rule to bear:

There is no way to demonstrate 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.

Another problem with the "deterrence" rationale of the exclusionary rule and its concomitant "interest-balancing"—and a more fundamental one, I think—is that, as Calandra and other cases demonstrate while the simple structure of that rhetoric [of deterrence] is scientific—it is an inquiry into those facts that define the costs and benefits that determine the result—the inquiry can never be performed in an adequate way, and the reality thus is that the decision must rest not upon those grounds, but upon prior dispositions or unarticulated intuitions that are never justified.

365. Mertens & Wasserstrom, supra note 182, at 394.
368. See supra text accompanying note 361.
370. See Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 633-45 (1983). Continues Professor White:

The language of "workability" and social planning obscures or denies the respon-
How could it be otherwise? How does one go about deciding whether the exclusionary rule "pays its way" in a particular setting without giving free play to one's ideas of policy? How does one "price" the beliefs, values, and ideals in the fourth amendment as if they were consumer benefits?

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 they be compared quantitatively unless the court has "some standard independent of both to which they can be referred"?372

If the standard is not to be the fourth amendment—which embodies the judgment that protecting all citizens against unreasonable searches and seizures outweighs society's interest in apprehending and convicting criminals—then what is it to be?373

Finally, if not even the victim of a fourth amendment violation has a "constitutional right" to exclude the evidence—if the use of such evidence "presents a question, not of rights, but of remedies"374—why should the courts "balance" the "costs" and the "benefits"? Does our system of government not "provide a good reason for leaving that decision to more democratic institutions"?375 If the exclusionary rule's application turns on a "pragmatic analysis of [its] usefulness in a particular context,"376 why not "replace judicial with legislative pragmatism"?377

sibility 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 ultimately personal 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.

J.B. White, supra, at 1282-83.


374. See supra note 352 and accompanying text.


377. Linde, Judges, Critics, and the Realist Tradition, 82 YALE L.J. 227, 241 (1972). If one accepts the Calandra majority's way of thinking about the exclusionary rule then, as Professor Monaghan pointed out a decade ago, the great constitutional debate becomes simply a dispute over a policy issue "that turns largely on an evaluation of debatable legislative facts, namely, the most effective way to deter police misconduct." Monaghan, Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 8 (1975).
After all, "[t]he balancing of conflicting interests would seem to be inherently a legislative question for which the judicial process is very ill-adapted. It requires evaluating vast arrays of facts of a kind which are not to be found in the ordinary judicial record—and which will be extremely difficult for the litigants to put there."378 Indeed, after a careful examination of the relevant literature, the Janis Court concluded that each empirical study of the exclusionary rule’s deterrent effect “in its own way, appears to be flawed.”379 Thus, the Court found itself “in no better position” than it had been sixteen years earlier when it had voiced grave doubts that “conclusive factual data [on the exclusionary rule’s deterrent effect] could ever be assembled.”380

I have no doubt that some members of the bench and bar sincerely believe that a “good faith” or “reasonable belief” modification of the exclusionary rule will “make it more acceptable and hence more lasting.”381 But I think not. I think such a modification of the rule will make it look still less like a constitutional rule and bring its ultimate demise one step closer.

Many of the rule’s critics will never rest until they succeed in stamping it out completely. Adoption of a “good faith” or “reasonable belief” exception will not lead them to discontinue their “war of attrition” against the rule. Indeed, it may only embolden them to launch a final assault. Ever since the “deterrence” rationale and its concomitant “interest-balancing” bloomed in the 1974 Calandra case, the exclusionary rule has been sitting under a Sword of Damocles. There it will remain until the rule no longer rests on an empirical proposition but on a principled basis, as it did originally and for much of its life.

“[W]hen deterrence—rather than the protection of the defendant’s right to due process at the hand of the state that seeks to convict him—becomes the basis for exclusion, that shift,” Professor James B. White has noted, “generates an enormous pressure for reduction of the rule: in each case the real cost of the possible release of a guilty defendant is weighed against the merely contingent advantage of the marginal deterrent impact of exclusion in a diffuse and unknown future.”382 Not surprisingly, therefore, in the last decade the Court’s “balancing of competing interests”—in an empirical fog—has led to the conclusion in various

378. Frantz, The First Amendment in the Balance, 71 YALE L.J. 1424, 1443-44 (1962). Professor James B. White has gone so far as to say that the “workability” or “deterrence” approach to the exclusionary rule “involves the Court in a set of judgments that it is incompetent to make, and avoids those more particular judgments that it is its duty to make.” J. B. White, Forgotten Points in the “Exclusionary Rule” Debate, 81 MICH. L. REV. 1273, 1283 (1983).
380. 428 U.S. at 453 (quoting Elkins v. United States, 364 U.S. 206, 218 (1960)).
“peripheral” or “collateral” settings that the exclusionary rule’s “benefits,” if any, would be outweighed by the “costs” it imposes on society.383

But if the Court were to adopt a “good-faith” exception because it was unpersuaded that the benefits of applying the exclusionary rule outweigh the societal costs when the police perform their tasks in the good-faith belief (objectively measured or otherwise) that their action comported with constitutional requirements, the decision would be more significant than Calandra or any of its progeny. For such a decision would take a good-sized bite out of the rule in its central application—the prosecutor’s case-in-chief against the victim of a fourth amendment violation. And it would fray the thread that holds the cost-benefit sword over the exclusionary rule itself.

383.  See supra text accompanying notes 348-53 (discussion of Calandra); supra note 359.