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Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint

Wayne R. LaFave
University of Illinois

COMPUTERS, URINALS, AND THE FOURTH AMENDMENT: CONFESSIONS OF A PATRON SAINT

*Wayne R. LaFave**

It was a stark and dormy night.[1]

This is neither a Lyttonish[2] Spoonerism,[3] a Jabberwockian[4] galimatias, nor an embarrassing typo missed by an astigmatic editor. It is instead a carefully chosen exordium, one expected to perform well its proper function, that is to say, "to awaken the interest of . . . readers."[5]

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* David C. Baum Professor of Law Emeritus and Center for Advanced Study Professor of Law Emeritus, University of Illinois. B.S. 1957, LL.B. 1959, S.J.D. 1965, University of Wisconsin.

1. If you find this sentence nonsensical, please so advise Jerry Israel and tell him to pay me ten dollars. *See* Wayne R. LaFave, *Some Random Thoughts from a Distant Collaborator*, 94 MICH. L. REV. 2431, 2436 n.17 (1996).

2. For law students and others perplexed by this word, I should explain that I refer to the immortal Baron Edward G.E.L. Bulwer-Lytton, a prolific novelist who in his otherwise obscure 1830 novel entitled *Paul Clifford* penned the extraordinary and now famous opening line: "It was a dark and stormy night." Lytton's creation of this remarkable proem is celebrated each and every year with a competition to see who can out-Lytton the other contestants in creating a gripping opener. *See* SAN JOSE MERCURY NEWS, May 18, 1994, at 1B, 5B. I may enter this article in the next competition.

3. For law students and others perplexed by this word, I should explain that the reference is to those delightful malapropisms that originated with the immortal William Archibald Spooner, a distinguished Anglican clergyman and warden of New College, Oxford. Spooner, a nervous man, was given to mixing up his words so that the initial letters or syllables of two or more words were reversed. For example, on one occasion the good Reverend concluded a wedding ceremony by saying to the groom, "It is kisstomary to cuss the bride." Such expressions became known as Spoonerisms. *See* ALBERT G. JOHNSON, JR., SPOONERISMS AND OTHER HOME GROWN HUMOR (1986).

For law students and others perplexed by the word malapropism, I could explain that it refers to the ridiculous misuse of words in the fashion of the character named Mrs. Malaprop in the immortal Richard Sheridan's 1775 comedy *The Rivals*. But I won't, as this has to stop somewhere!

4. For law students and others perplexed by this word, I should explain that it comes from the title of the nonsense poem *Jabberwocky*, which appears in the immortal Lewis Carroll's delightful and timeless children's book *Through the Looking Glass*.

That word is "immortal," not "immoral." *But see* Adam Gopnik, *Wonderland — Lewis Carroll and the Loves of His Life*, *in* NEW YORKER, Oct. 9, 1995, at 82 (book review).

5. WEBSTER'S NEW DICTIONARY OF SYNONYMS 463 (1984). It sometimes goes by other names, as in Michael O'Donoghue, *How To Write Good*, *in* LAUGHING MAT-

The two adjectives in that perplexing proem were uppermost in my mind on the evening in question, when I sat in my office putting the wraps on this article. "Stark" because it was a night during which I had managed to revise the piece to accomplish a "blunt unadorned style or treatment"[6] of my subject; and "dormy" because it was a night in which my labors would allow me, as with a golfer so situated,[7] to bring my efforts to a favorable conclusion.

Outside my office, on the other hand, Lytton's own exordium[8] was apt. And thus, just as others have done,[9] I can appropriate it here: It was a dark and stormy night. Those circumstances — beneficial in so many

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TERS 292, 293 (Gene Shalit ed., 1987): "The 'grabber' is the initial sentence of a novel or short story designed to jolt the reader out of his complacency and arouse his curiosity, forcing him to press onward. For example: 'It's no good, Alex,' she rejoined, 'Even if I did love you, my father would never let me marry an alligator.' "

It is beyond question that an attention-grabbing exordium is the hallmark of any publication that both is well written *and* becomes well read. *See* GEORGIANNE ENSIGN, GREAT BEGINNINGS: OPENING LINES OF GREAT NOVELS (1996); O'Donoghue, *supra,* at 293. That being the case, it is apparent why I was so careful in selecting the seven words that begin this article: I am hoping that this piece will escape the fate of most law review articles, which typically are read only by the author, the author's close relatives, and the poor saps who have to edit them for the law review. (I resemble that remark — Ed.)

The exordium set out at the beginning of this article won out only after I considered and rejected several other possibilities. I was always greatly impressed with the famed *incipit* in *Moby Dick,* but somehow "Call me Wayne" didn't have the same punch. I also gave serious attention to the advice to professional writers I recall reading somewhere — that it is necessary at the outset to tie into those subjects readers are most interested in, such as celebrity, sex, and religion. I thus almost settled on: "My God, O.J., why don't you make a clean breast of it?" But I couldn't figure out how to segue from that to the Fourth Amendment.

6. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2226 (1981).

7. "Dormy" is a golfing term not ordinarily known by one with my limited skills on the links, for it refers to "being up as many holes as remain to be played." *Id.* at 675.

8. *See supra* note 2.

9. The most public and persistent appropriation of Lytton's words has been by a sometime author and all-time canine who works from the roof of his dog house. *See, e.g.,* CHARLES M. SCHULZ, BEING A DOG IS A FULL TIME JOB 73 (1994); CHARLES M. SCHULZ, MAKE WAY FOR THE KING OF THE JUNGLE 89 (1995). As remarkable as it may seem, Snoopy's writings in this vein on one occasion provided the basis for an appellate court to decide what interpretation should be given to the language of an insurance contract. *See* ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 22 Cal. Rptr. 2d 206, 216 n.42 (Ct. App. 1993).

Indeed, Lytton's curtain raiser occasionally has been appropriated by appellate courts summarizing the relevant facts of the case below, sometimes with attribution, *see* Abbott v. Allstate Ins. Co., 507 So. 2d 905 (Ala. 1987), but usually without, *see* United States v. Betancourt-Arretuche, 933 F.2d 89, 91 (1st Cir.), *cert. denied,* 502 U.S. 959 (1991); Allied Chem. Corp. v. Hess Tankship Co., 661 F.2d 1044, 1046 (5th Cir. Unit A. Nov. 1981); Burrows v. Nash, 259 P.2d 106, 111 (Or. 1953).

ways to those in the legal profession[10] — persisted, and finally the storm increased in its violence and intensity. Then a bolt of lightning struck just a few feet from my window. Both I and my computer, on which I had been pounding the entire evening, were jarred about a foot off our respective pedestals. The computer — but fortunately not me — emitted an intense green glow for about a minute, causing me to fear that the poor thing had passed on.[11] However, it had not only survived, but also appeared to have enjoyed a moment of complete independence from me. At the top of the screen, in that space I had reserved for the yet unchosen title of my article, there now appeared a line of typescript reading "Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint."[12] Ignoring the machine's self-serving sense of priorities, I quickly realized that I had been provided with that which had heretofore eluded me: a nearly perfect[13] title for this article. It performed the essential function of leaving anyone who scrutinized the *Review*'s table of contents virtually in the dark about the subject matter of this piece!

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10. This is because, as appellate courts have noted, a night that is "dark and stormy" often gives rise to events that become a profitable basis for litigation. This is most frequently the case as to motor vehicle accidents. *See Abbott*, 507 So. 2d at 905; Summit Township Road Dist. v. Hayes Freight Lines, 194 N.E.2d 682, 684 (Ill. App. Ct. 1963); Sebastian v. Wood, 66 N.W.2d 841, 845 (Iowa 1954); Davis v. Lord, 61 A.2d 519, 520 (N.H. 1948); Charmley v. Lewis, 729 P.2d 567, 568 (Or. 1986); Roylance v. Davies, 424 P.2d 142, 149 (Utah 1967) (Crockett, C.J., dissenting); Pollard v. Wittman, 183 P.2d 175, 178 (Wash. 1947). But it is also the case as to accidents involving trains, *see, e.g.*, St. Louis-S.F. Ry. v. Simons, 176 F.2d 654, 658 (10th Cir. 1949); Minninger v. New York Cent. R.R., 109 N.E.2d 104, 106 (Ind. Ct. App. 1952); and ships, *see, e.g., Allied Chem. Corp.*, 661 F.2d at 1046; United States v. M/V Santa Clara I, 887 F. Supp. 825, 829 (D.S.C. 1995); as to worker's compensation accidents, *see, e.g.*, Northern Corp. v. Saari, 409 P.2d 845, 846 (Alaska 1966); and as to criminal activity such as drug smuggling, *see, e.g., Betancourt-Arretuche*, 933 F.2d at 91; *cf.* Hutchens v. McClure, 269 P.2d 473, 474 (Kan. 1954) ("dark and stormy weather"); Estate of Baldinger v. Ann Arbor R.R., 127 N.W.2d 837, 840 (Mich. 1964) ("a dark, overcast, stormy morning"); Case v. Northern Pac. Terminal Co., 160 P.2d 313, 316 (Or. 1945) ("a dark and stormy morning").

11. Since I have never been able to fathom the workings of these modern devices, I was not quite sure what harm the electronic surge might have inflicted. But I feared the worst. I was sure that the hardware had melted, that the software had frozen, and that all essential parts (e.g., clutch, distributor, tweeter, woofer) had been permanently disabled.

12. I should point out that this is not the first time that I have had a computer play tricks on me. *See* Wayne R. LaFave, Mapp *Revisited: Shakespeare, J., and Other Fourth Amendment Poets*, 47 STAN. L. REV. 261, 263 (1995).

13. But not absolutely perfect, for it lacked any of the popular buzzwords such as "deconstruction" and "hermeneutics." *See* Andrew J. McClurg, *The World's Greatest Law Review Article*, A.B.A. J., Oct. 1995, at 84. But it did have the obligatory colon, and admirably performed its principal function described in the text following.

At least the title indicates that the article is somehow concerned with "the Fourth Amendment," though for anyone who knows me or is at all familiar with my work, that piece of information hardly would come as a revelation. The fact of the matter is that I almost *always* write about the Fourth Amendment; I am in an academic rut so deep as to deserve recognition in the *Guinness Book World of Records*. Search and seizure has been my *cheval de bataille* during my entire time as a law professor and even when I was a mere law student.[14] And over that substantial period, I have peppered or salted — depending on your taste — the law reviews with a not insubstantial number of Fourth Amendment commentaries.[15] Replowing the same ground for so long presents special challenges, which is why in recent years I have had to resort to grotesque phantasmagoria,[16] polysyllabical sesquipedalianism,[17] amphigoric analecta,[18] and even serendipitous cyberspatial sciolism[19] in an effort to present a fresh approach.

But the other words in my title are less revealing. For example, who is this "patron saint" there referred to? It is me, as I discovered back in 1988 when, while digging through the advance sheets for Fourth Amendment minutiae, I discovered a case in which I was characterized as "the patron saint of the Fourth Amendment."[20] I rather liked that appellation and looked forward to springing it on my colleagues and friends at the earliest opportunity. Unfortunately, in the in-

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14. On occasion, even these student pieces have surfaced in later years and have then been identified as having been authored by "Professor LaFave." *See, e.g.*, United States v. Robinson, 471 F.2d 1082, 1107 (D.C. Cir. 1972) (en banc), *revd.*, 414 U.S. 218 (1973). How fortunate I was, then, that my law school mentor, Professor Frank Remington, kept my feet to the fire until I got those student works up to snuff. *See* Wayne R. LaFave, *Frank Remington: The Man and His Work*, 1992 WIS. L. REV. 570, 573-74.

15. Rigid adherence to law review protocol would necessitate a cataloguing here of each and every one of these pieces, including those I have completely forgotten about. I have decided to forgo such a laundry list, however, on the theory that its absence will make me appear humble. Anyway, I can sneak in references to some of them in other footnotes.

16. Wayne R. LaFave, *A Fourth Amendment Fantasy: The Last (Heretofore Unpublished) Search and Seizure Decision of the Burger Court*, 1986 U. ILL. L. REV. 669.

17. Wayne R. LaFave, *Pinguitudinous Police, Pacyhermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729.

18. LaFave, *supra* note 12.

19. Wayne R. LaFave, *Surfing as Scholarship: The Emerging Critical Cyberspace Studies Movement*, 84 GEO. L.J. 521 (1996).

20. Juarez v. State, 758 S.W.2d 772, 784 (Tex. Crim. App. 1988) (Clinton, J., dissenting). Because this appears in a dissenting opinion, I hasten to add that it is part of a statement noting that I was quoted at length in the majority opinion. It should not be erroneously assumed, therefore, that the majority at some point asserted that I was *not* a saint, patron or otherwise.

tervening years I have never found just the right opportunity to work it into the conversation, which is why my sainthood has until now remained a deep, dark secret.

Perhaps I should have left it that way, for what I originally perceived as a significant milestone in my professional development has become instead a millstone around my neck. The title "patron saint" is not a mere honorific, for such a person is charged with the awesome responsibility of supporting and protecting the person or thing that is the patronee. But if you look at what has happened during my watch, it is apparent that I have been a resounding failure in this regard. Certainly my fellow Fourth Amendment buffs are of that view, for the very titles of their writings lament a "shrinking"[21] (indeed, "incredibly shrinking"[22]) and even "dying"[23] Fourth Amendment that has been subjected to such "attack,"[24] "emasculation,"[25] "dismantling,"[26] "pruning,"[27] "erosion"[28] (even "steady erosion"[29]), "freezing,"[30] "descent,"[31] "fall"[32] and even "junking"[33] that it has become a "casualty"[34] or

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21. Robert Angell, Note, California v. Acevedo *and the Shrinking Fourth Amendment*, 21 CAP. U. L. REV. 707 (1992).

22. Silas J. Wasserstrom, *The Incredibly Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

23. K.S. Berk, Recent Development, State v. Landry: *Is the Fourth Amendment Dying?*, 67 TUL. L. REV. 323 (1992).

24. Craig Steven Michalk, Case Comment, Alabama v. White, 110 S. Ct. 2412 (1990): *The Supreme Court's Latest Attack on Fourth Amendment Protections Against Warrantless Searches*, 16 T. MARSHALL L. REV. 333 (1991).

25. Jessica Forbes, Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221 (1987).

26. Lynn S. Searle, Note, *The "Administrative" Search from* Dewey *to* Burger: *Dismantling the Fourth Amendment*, 16 HASTINGS CONST. L.Q. 261 (1989).

27. Duncan Simpson, Casenote, California v. Greenwood: *The Pruning of the Fourth Amendment*, 35 LOY. L. REV. 549 (1989).

28. Amy B. Beller, Comment, United States v. MacDonald: *The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 HOFSTRA L. REV. 407 (1991).

29. Kathleen M. Ghreichi, Note, James v. Illinois: *An Unexpected Departure from the Steady Erosion of the Fourth Amendment Exclusionary Rule*, 22 U. TOL. L. REV. 839 (1991).

30. Sean R. O'Brien, Note, United States v. Leon *and the Freezing of the Fourth Amendment*, 68 N.Y.U. L. REV. 1305 (1993).

31. Jon Gavenman, Comment, Florida v. Riley: *The Descent of Fourth Amendment Protections in Aerial Surveillance Cases*, 17 HASTINGS CONST. L.Q. 725 (1990).

32. Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383 (1991).

33. John S. Morgan, Comment, *The Junking of the Fourth Amendment:* Illinois v. Krull *and* New York v. Burger, 63 TUL. L. REV. 335 (1988).

34. Christian J. Rowley, Note, Florida v. Bostick: *The Fourth Amendment — Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601.

"victim"[35] to which we can "say goodbye,"[36] at least absent much-needed "resuscitating."[37] And that brings me to the word "confessions" in the present article's title; it refers to my forthright acknowledgment here and now that I have failed miserably in my tutelary obligations.

I tried! There is, after all, my own trail of law review articles (feeble attempts, perhaps, to prevent or at least forestall the unfortunate consequences chronicled above). And there is also my multivolume *Search and Seizure* treatise, the work that actually prompted the conferral of sainthood upon this humble servant. Published in its three-volume first edition in 1978, its four-volume second edition in 1987, and its five-volume third edition in 1996, the treatise by its growth might be thought to reflect a corresponding broadening of Fourth Amendment rights. But in fact, as noted earlier, those rights seem to be diminishing.[38] The growth of the treatise, then, says more about the phenomenon of treatise-writing[39] than about the Fourth Amendment itself: clearly, I have been writing more and more about less and less.

This movement to less and less, it seems to me, is attributable to several disturbing trends in the Supreme Court's Fourth Amendment jurisprudence. For one thing, the varieties of police conduct to which the Court deems the Amendment to be applicable are unrealistically circumscribed. Second, as to that conduct to which the Amendment *does* apply, the evidentiary grounds — whether probable cause in the traditional sense or some lesser standard — have been softened or dimin-

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35. Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986).

36. Thomas L. Liotti & Henry R. Fasano, *Pretext Without Precedent — Say Goodbye to the Fourth Amendment*, 67 N.Y.ST. B.J., Jan. 1995, at 40.

37. Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991).

38. Which has prompted some, such as my colleague Don Dripps, who takes no small delight in torturing me, to question why the treatise has not evaporated down to a single volume.

39. Professor Anthony Amsterdam has recounted

> the progress of the apocryphal author of the celebrated treatise called *Jones on Easements*. The first sentence of the first edition began: "There are fourteen kinds of easements recognized by the law of England." But the work was well received, and the author labored to produce a second edition, in two volumes, which necessarily began: "There are thirty-nine kinds of easements." After the author's death, the treatise was scrupulously updated by his literary scions and now appears in a solid 12-volume sixth edition beginning with the sentence: "It is impossible to say how many kinds of easements are recognized by the law of England."

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 374-75 (1974).

ished unnecessarily. Warrants are now deemed unnecessary in a great many instances in which no exigency is present, but without a principled explanation for abandoning the earlier doctrine that prior judicial approval of searches and seizures is strongly preferred. Finally, the principal device for enforcing the Amendment, the exclusionary rule, has been narrowed unrealistically because of a rather distorted view by the Court of the deterrence function.

I have elaborated on each of those four trends on prior occasions,[40] and shall not undertake to do so again here. Rather, I shall follow a more focused approach now, as I want to examine closely two cases from the Term ended in 1995 that illustrate the course that the Supreme Court has taken. These cases, *Arizona v. Evans*[41] and *Vernonia School District 47J v. Acton*,[42] involved, respectively, the fourth and second of the trends briefly described above. In *Evans*, the exclusionary rule was pulled back one more notch by a holding that it does not apply in the case of an illegal arrest attributable to the negligence of a court clerk.[43] In *Acton*, drug testing without individualized suspicion was upheld upon a purported showing of need that, in fact, was much weaker in both kind and degree than that deemed sufficient in the Court's earlier decisions.[44]

For those of you still perplexed about the words "computers" and "urinals" in this article's title, I can now also reveal that the first of these cases concerns nonperformance at a computer, and the second nonperformance at a urinal. How? Read on!

COMPUTERS, CLERKS, AND THE EXCLUSIONARY RULE

In *New Jersey v. T.L.O.*,[45] the Supreme Court unequivocally established that public employees other than law enforcement officers are also subject to the proscriptions of the Fourth Amendment. But this decision gave rise to another question that had theretofore rarely surfaced in the appellate cases:[46] Even if such persons are subject to the Fourth Amendment, does it follow that the exclusionary rule is an appropriate

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40. *See* Wayne R. LaFave, *The Fourth Amendment: "Second to None in the Bill of Rights,"* 75 ILL. B.J. 424 (1987); Wayne R. LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061 (1987).

41. 115 S. Ct. 1185 (1995).

42. 115 S. Ct. 2386 (1995).

43. *Evans*, 115 S. Ct. at 1189.

44. *Acton*, 115 S. Ct. at 2396.

45. 469 U.S. 325 (1985).

46. Most likely because its very existence seemed to be denied by the Supreme Court, which in the main "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to

sanction when they violate the Fourth Amendment? Because the search at issue in *T.L.O.* was then found to be reasonable, the Court carefully avoided expressing any opinion on this question as to high school administrators, even though that issue had prompted the original grant of certiorari.[47]

That certain nonpolice government actors are not in such need of deterrence as to be appropriate objects of the exclusionary sanction was a critical assumption by the Supreme Court in developing the "good faith" exception to the exclusionary rule. In *United States v. Leon*,[48] holding admissible evidence obtained in execution of a facially valid search warrant grounded in an affidavit later found to be lacking probable cause, the Court ruled that "the extreme sanction of exclusion" was "inappropriate."[49] There was no need to deter the police where, as here, they had in good faith relied upon the warrant, and there was also no need to deter the warrant-issuing judiciary, for "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment."[50] By similar reasoning, the Court later held in *Illinois v. Krull*[51] that exclusion was unnecessary when police searched in reasonable reliance upon statutory authorization. This time the Court stressed that there was "nothing to indicate that applying the exclusionary rule to evidence seized pursuant to the statute prior to the declaration of its invalidity will act as a significant, additional deterrent"[52] on legislators enacting such statutes. This "*Leon* framework," as the Court put it, was next used in the first case receiving principal attention here, *Arizona v. Evans*,[53] where again the police conducted the actual search but the assumed Fourth Amendment violation[54] was attributable to the conduct of a court clerk.

In *Evans*, a police officer stopped the defendant in January of 1991 for a traffic violation and then entered his name into a computer data terminal located in his patrol car. When the computer indicated that

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that violation." *Evans*, 115 S. Ct. at 1192 (referring specifically to the Court's approach in Whiteley v. Warden, 401 U.S. 560 (1971)).

47. *See T.L.O.*, 469 U.S. at 327.

48. 468 U.S. 897 (1984).

49. 468 U.S. at 926.

50. 468 U.S. at 916.

51. 480 U.S. 340 (1987).

52. 480 U.S. at 352.

53. 115 S. Ct. 1185, 1193 (1995).

54. The State conceded that Evans's arrest violated the Fourth Amendment, so the Court "decline[d] to review that determination," 115 S. Ct. at 1189 n.1, namely, that an arrest is unreasonable when made in response to a computer entry of an outstanding warrant that is in error because a court clerk failed to communicate the quashing of that warrant to the law enforcement authorities.

there was an outstanding misdemeanor warrant for Evans's arrest, the officer placed him under arrest and incident thereto found a bag of marijuana in the car. Testimony at the suppression hearing established that an arrest warrant had issued on December 13, 1990, because Evans had failed to appear to answer for several traffic violations, but that on December 19, 1990, a justice of the peace ordered the warrant quashed when Evans then appeared in court. The standard procedure in such a case was for a justice court clerk to inform the sheriff's office that the warrant had been quashed, so that the sheriff's office then could remove the warrant from its computer records; this practice apparently was not followed in Evans's case.[55] The trial court granted Evans's motion to suppress because the State had been at fault in failing to quash the warrant. The state court of appeals reversed on the ground that the exclusionary rule was inapplicable to public employees "not directly associated with the arresting officers or the arresting officers' police department."[56] The state supreme court in turn reversed the appellate court's decision.[57]

Then it was the Supreme Court's turn. After surveying earlier decisions of the Court supporting the proposition that the exclusionary rule's application is "restricted to those instances where its remedial objectives are thought most efficaciously served,"[58] the *Evans* majority said:

> Applying the reasoning of *Leon* to the facts of this case, we conclude that the decision of the Arizona Supreme court must be reversed. The Arizona Supreme Court determined that it could not "support the distinction drawn . . . between clerical errors committed by law enforcement personnel and similar mistakes by court employees," and that "even assuming . . . that responsibility for the error rested with the justice court, it does not follow that the exclusionary rule should be inapplicable to these facts."
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> This holding is contrary to the reasoning of *Leon* . . . and *Krull.* If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon,* the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. Second, respondent offers

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55. As the Supreme Court noted, "there was no indication in respondent's file that a clerk had called and notified the Sheriff's Office," and "the Sheriff's Office had no record of a telephone call informing it that respondent's arrest warrant had been quashed." 115 S. Ct. at 1188.

56. State v. Evans, 836 P.2d 1024, 1027 (Ariz. Ct. App. 1992) (citing United States v. Leon, 408 U.S. 897, 916 (1984)).

57. *See* State v. Evans, 866 P.2d 869 (Ariz. 1994).

58. *Evans,* 115 S. Ct. at 1191.

> no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. . . .
>
> Finally, and most important, there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.
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> If it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer. As the trial court in this case stated: "I think the police officer [was] bound to arrest. I think he would [have been] derelict in his duty if he failed to arrest." . . . There is no indication that the arresting officer was not acting objectively reasonably when he relied upon the police computer record.[59]

The reasoning in the *Leon* case is extremely vulnerable on several different levels and from several different perspectives.[60] Because *Evans* purports to follow that reasoning, certainly the rationale of *Evans* is no less shaky. Indeed, the *Evans* case, if anything, has even less going for it than *Leon;* one could even fully accept the holding in *Leon* and still conclude that the *Evans* decision is dead wrong, as Justice Stevens noted in dissent:

> The *Leon* Court's exemption of judges and magistrates from the deterrent ambit of the exclusionary rule rested, consistently with the emphasis on the warrant requirement, on those officials' constitutionally determined role in issuing warrants. Taken on its own terms, *Leon*'s logic does not

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59. 115 S. Ct. at 1193-94 (alterations to quotations in original) (citations omitted) (quoting *Evans,* 866 P.2d at 871; Joint Appendix at 51, *Evans,* 115 S. Ct. 1185 (No. 93-1660) [hereinafter Joint Appendix]). This quotation is from the majority opinion of the Chief Justice. Justices O'Connor, Souter, and Breyer, concurring, opined that in cases such as this it still could be questioned whether the police "acted reasonably in their reliance *on the recordkeeping system itself.*" 115 S. Ct. at 1194. Justices Souter and Breyer, in another concurrence, emphasized that the Court had not yet determined whether, at least in this context, "our very concept of deterrence by exclusion of evidence should extend to the government as a whole, not merely the police." 115 S. Ct. at 1195. Justice Stevens, dissenting, disagreed generally on the merits. *See* 115 S. Ct. at 1197. Justices Ginsburg and Stevens, in another dissent, focused primarily on the question of whether there was a basis for the Court to assert jurisdiction in this case, but also questioned the majority's assumptions about what effect exclusion would have in this kind of case. *See* 115 S. Ct. at 1200 & n.5, 1201-02.

60. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.3 (3d ed. 1996).

> extend to the time after the warrant has issued; nor does it extend to court clerks and functionaries, some of whom work in the same building with police officers and may have more regular and direct contact with police than with judges or magistrates.[61]

This distinction was appreciated by the state supreme court, which cogently noted that while "it may be inappropriate to invoke the exclusionary rule where a magistrate has issued a facially valid warrant (a discretionary judicial function) . . . it is useful and proper to do so where negligent record keeping (a purely clerical function) results in an unlawful arrest."[62] By comparison, the Rehnquist opinion in *Evans* unequivocally asserts that it would not be "useful and proper" to exclude the evidence in that case because exclusion would (1) neither deter clerks from such errors (2) nor alter the behavior of arresting officers. Closer analysis of the latter two assertions and the assumptions apparently underlying them serves to demonstrate further what is wrong with the *Evans* rationale.

First, the *Evans* majority seems to say that exclusion is not necessary to deter clerks because there is nothing to deter. Why? Because there is no basis for concluding that "court employees are inclined to ignore or subvert the Fourth Amendment."[63] If, as seems the case, the word "inclined" is being used here in its usual sense of reflecting one's state of mind, the Court's reasoning appears to include the notion that deterrence cannot operate upon instances of inaction by inadvertence. But this is not so. As the Ginsburg opinion in *Evans* put it, the suggestion "that an exclusionary rule cannot deter carelessness, but can affect only intentional or reckless misconduct[,] . . . runs counter to a premise underlying all of negligence law — that imposing liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care."[64]

Nor is the Court's assumption correct as a matter of Fourth Amendment theory. In stating that "court employees" — in contrast, apparently, to the police — are not "inclined to ignore or subvert the Fourth Amendment," the implication is that these court employees, who, the Court reminds us, are not "engaged in the often competitive enterprise of ferreting out crime,"[65] hardly are motivated to undertake calculated intrusions upon Fourth Amendment interests and consequently are unworthy objects of the exclusionary rule and its deterrence

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61. *Evans*, 115 S. Ct. at 1196 (citation omitted).
62. State v. Evans, 866 P.2d 869, 872 (Ariz. 1994).
63. *Evans*, 115 S. Ct. at 1193.
64. 115 S. Ct. at 1200 n.5 (Ginsburg, J., dissenting).
65. 115 S. Ct. at 1193 (citing Johnson v. United States, 333 U.S. 10, 14 (1948)).

function. But surely the exclusionary rule should not be so limited, as certainly many more violations of the Fourth Amendment are the result of carelessness than of deliberate misconduct. And just as surely the exclusionary rule is directed logically at those more common types of violations; as it was put in *Stone v. Powell,* the exclusionary rule demonstrates "that our society attaches serious consequences to violation of constitutional rights," and thereby encourages public officers whose actions bear on the making of searches and seizures "to incorporate Fourth Amendment ideals into their value system."[66] To put the proposition another way, if the exclusionary rule, as stated in *United States v. Johnson,*[67] provides an "incentive to err on the side of constitutional behavior," then it is an appropriate tool for preventing carelessness by court clerks.

Second, in asserting that exclusion of evidence on the facts of *Evans* "would not sufficiently deter future errors"[68] of the same kind, part of the Court's thinking seems to be that future errors will be so infrequent that there is virtually nothing to deter. This is highlighted by the fact that in the very same paragraph the Court sets out the testimony of the chief clerk to the effect that "this type of error occurred once every three or four years."[69] But the relevance and accuracy of the Court's assumption are certainly open to question. For one thing, it is curious at best to explain the withdrawal of the exclusionary rule in terms of the expected infrequency of its application. As Justice Stevens points out in his dissent, "even if errors in computer records of warrants were rare, that would merely minimize the cost of enforcing the exclusionary rule in cases like this."[70] For another, it is by no means apparent that such errors are so rare that their recurrence need not be deterred. As Justice Stevens also notes, the chief clerk "promptly contradicted herself"[71] and admitted that three other errors of the same kind occurred the very same day that Evans's warrant notice was not canceled. This fact means, he cogently adds, that there was "slim evidence on which to base a conclusion that computer error poses no appreciable threat to Fourth Amendment interests."[72] From a broader perspective — nationwide, and not just in the "particular court"[73] about

66. 428 U.S. 465, 492 (1976).
67. 457 U.S. 537, 561 (1982).
68. *Evans,* 115 S. Ct. at 1193.
69. 115 S. Ct. at 1193 (citing Joint Appendix, *supra* note 59, at 37).
70. 115 S. Ct. at 1197 (Stevens, J., dissenting).
71. 115 S. Ct. at 1196 (Stevens, J., dissenting).
72. 115 S. Ct. at 1196-97 (Stevens, J., dissenting).
73. 115 S. Ct. at 1196 & n.3 (Stevens, J., dissenting) (internal quotation marks omitted) (quoting Joint Appendix, *supra* note 59, at 37).

which the chief clerk testified — there is reason to believe that illegal arrests attributable to computer error are no small problem.[74] It is thus fair to conclude, as did Justice Ginsburg, that "Evans' case is not idiosyncratic."[75]

The *Evans* majority's reliance upon the supposed insignificant number of such computer errors is objectionable for another reason: it fails to take into account the dimensions of the risk to Fourth Amendment values that even a single such error creates. When at a particular time and place a particular police officer unreasonably interprets the observed circumstances and makes an arrest that ought not have been made, that is bad enough, but at least it is a single event with rather narrow time-place-occasion dimensions. But a mistake of the kind at issue in *Evans* is quite a different matter — "computerization greatly amplifies an error's effect," as "inaccurate data can infect not only one agency, but the many agencies that share access to the database."[76] Such errors can result in the object of the erroneous information being arrested repeatedly,[77] and make that individual a "marked man" subject to illegal arrest "anywhere," "at any time," and "into the indefinite future."[78]

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74. Cases of this genre are reaching the appellate courts with increasing frequency. And they are doubtless only the tip of the iceberg; surely there are many more evidence-producing illegal arrests caused by erroneous computer records that are disposed of at the trial level. Even that does not reflect the total dimensions of the problem, for certainly in this context the supposition of Justice Jackson is especially apt — "that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating . . . about which courts do nothing, and about which we never hear." Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

75. *Evans*, 115 S. Ct. at 1199 (Ginsburg, J., dissenting).

76. 115 S. Ct. at 1199 (Ginsburg, J., dissenting). Justice Ginsburg continued:

> The computerized databases of the FBI's National Crime Information Center (NCIC), to take a conspicuous example, contain over 23 million records, identifying, among other things, persons and vehicles sought by law enforcement agencies nationwide. NCIC information is available to approximately 71,000 federal, state, and local agencies. Thus, any mistake entered into the NCIC spreads nationwide in an instant.

115 S. Ct. at 1199 (Ginsburg, J., dissenting) (citations omitted).

77. *See, e.g.*, Finch v. Chapman, 785 F. Supp. 1277 (N.D. Ill. 1992) (misinformation long retained in NCIC records resulted in plaintiff being arrested and detained twice); Rogan v. Los Angeles, 668 F. Supp. 1384 (C.D. Cal. 1987) (as a result of misinformation in computer records, plaintiff was wrongfully arrested four times, three times at gunpoint, after traffic stops in Michigan and Oklahoma).

78. In *United States v. Mackey*, discussed in Judith J. Rentschler, Note, *Garbage In, Gospel Out*, 28 HASTINGS L.J. 509 (1976), the court stated:

> Because of the inaccurate listing in the NCIC computer, defendant was a "marked man" for the five months prior to his arrest, and, had this particular identification check not occurred, he would have continued in this status into the indefinite future. At any time . . . a routine check by the police could well result

The *Evans* majority ignores all of this and as a consequence misses a compelling reason why this is an inauspicious occasion for withdrawing the exclusionary sanction. Given "the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible," the "benefits of more efficient law enforcement mechanisms" carry with them a "burden of corresponding constitutional responsibilities"[79] that ought not be trivialized by withdrawal of the exclusionary rule. The Arizona Supreme Court had it right: "As automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such circumstances, the exclusionary rule is a 'cost' we cannot afford to be without."[80]

Third, yet another aspect of the *Evans* majority's no-deterrence-of-clerks theme is the notion that such officials simply are not deterable, at least by this kind of sanction. The point, as they put it, is that the "threat of exclusion of evidence could not be expected to deter such individuals" because "they have no stake in the outcome of particular criminal prosecutions."[81] If this rationale sounds familiar, it is because the Court has used it before, most notably in *Leon* as to warrant-issuing judges. It made no sense there, for the characterization of such a judge as a "neutral and detached magistrate" hardly means that he is so disinterested in his responsibilities as to not be fazed by the prospect that an erroneous decision on his part could adversely affect a future criminal prosecution. Much the same point can be made here. It is doubtless true that there are some public employees whose duties are so far removed from the criminal justice system and so seldom an occasion for uncovering evidence of criminal conduct that the risk of evidence suppression will never have occasion to influence their conduct.[82] But surely a court clerk whose responsibilities include ensuring that law enforcement records are kept current is not so situated. Such an individual is a part of the criminal justice system, and as such hardly can be totally disinterested in how that system works — including whether his own derelictions might cause evidence to be suppressed and perpetrators to be released.

> in defendant's arrest, booking, search and detention. . . . Moreover, this could happen anywhere in the United States where law enforcement officers had access to NCIC information. Defendant was subject to being deprived of his liberty at any time and without any legal basis.

United States v. Mackey, 387 F. Supp. 1121, 1124 (D. Nev. 1975).

79. *Evans*, 115 S. Ct. at 1195 (O'Connor, J., concurring).

80. State v. Evans, 866 P.2d 869, 872 (Ariz. 1994).

81. *Evans*, 115 S. Ct. at 1193.

82. *See, e.g.*, cases discussed *infra* note 174.

But even if the level of deterrence that can be achieved vis-à-vis court clerks is limited somewhat, it hardly follows that *Evans* was decided rightly. For one thing — as will be elaborated a bit later, because it relates most directly to the *Evans* majority's most egregious error in analysis — such lack of deterrence is hardly determinative, as the proper focus is upon systemic deterrence rather than deterrence of a particular actor in the criminal justice system. For another, as important as deterrence is, it should not be the exclusive determinant of the exclusionary rule's dimensions. Exclusion also serves as a means "of assuring the people — all potential victims of unlawful government conduct — that the government will not profit from its lawless behavior."[83] Put another way, it may be said that exclusion is appropriate precisely because it places the government in the same position as if it had not conducted the illegal search and seizure in the first place.[84] Such return to the status quo ante is especially compelling in the present situation, where the actual facts known within the criminal justice system prior to the arrest and search make it apparent that those actions lacked even a remotely arguable justification, meaning that the acquisition of evidence of the arrestee's criminality cannot be characterized as anything but a complete windfall. Even if the exclusionary rule must be trimmed at the edges à la *Leon,* so that the prosecution rather than the defendant wins in certain instances of close-case illegality — for example, when the search warrant affidavit is sufficiently close to showing probable cause that the police were justified in relying on the magistrate's mistaken conclusion that probable cause was present — it hardly follows that the defendant also should lose in cases like *Evans,* where the quashed warrant totally deprives the arrest and search of any legitimacy.

Finally, even if none of the foregoing criticisms of *Evans* are deemed compelling, there remains one more characteristic of the majority opinion that demonstrates the error of the Court's holding. This fundamental defect is that the *Evans* majority confines the exclusionary rule's deterrence function within much too narrow a compass. The Court looks only at the deterrence of "court clerks" and "the arresting officer"[85] and then concludes there is no deterrence to be had on the facts of *Evans.* Instead, the Court ought to have occupied itself with the matter of systemic deterrence: whether exclusion could be expected to

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83. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

84. *Cf.* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 COLUM. L. REV. 1365, 1400 (1983).

85. *Evans,* 115 S. Ct. at 1193.

influence changes in the criminal justice system that would eliminate or greatly reduce future illegal arrests on phantom warrants.

One consequence of the *Evans* majority's narrow focus is that the Court has drawn a rather bold line between the police and nonpolice actors in the system, when in real life no such line exists. As a general matter, it is fair to say that our processes of criminal justice are best understood if viewed as they actually are: a system of interlocking stages and agencies, rather than discrete bits and pieces.[86] This is particularly true as to the matters here under consideration, as Justice Ginsburg's dissent in *Evans* so aptly illustrates:

> In this electronic age, particularly with respect to recordkeeping, court personnel and police officers are not neatly compartmentalized actors. Instead, they serve together to carry out the State's information-gathering objectives. Whether particular records are maintained by the police or the courts should not be dispositive where a single computer database can answer all calls. Not only is it artificial to distinguish between court clerk and police clerk slips; in practice, it may be difficult to pinpoint whether one official, *e.g.*, a court employee, or another, *e.g.*, a police officer, caused the error to exist or persist. Applying an exclusionary rule as the Arizona court did may well supply a powerful incentive to the State to promote the prompt updating of computer records.[87]

Moreover, if such an artificial distinction is avoided, then it becomes more apparent that the necessary incentive need not come from the court clerks themselves, or even from their immediate judicial or administrative supervisors. It might just as logically, if not more logically, come from the police. Justice Stevens has it right then when he suggests in his dissent that "[w]e should reasonably presume that law enforcement officials, who stand in the best position to monitor such errors as occurred here, can influence mundane communication procedures in order to prevent those errors."[88]

If the police *can* do so, the next question is whether the application or nonapplication of the exclusionary rule in *Evans*-type situations — where a warrant check is run incident to a traffic stop, an arrest is made because the computer indicates that there is an outstanding warrant, but it is later learned there is no warrant — has anything to do with whether they *will* do so. The answer is yes, as can been seen by assessing the competing incentives upon the police regarding the timely and accurate updating of their computer records. While Justice Ginsburg's

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86. *See* Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision Makers, in* DISCRETION IN CRIMINAL JUSTICE 1, 9-12 (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

87. *Evans*, 115 S. Ct. at 1200 (Ginsburg, J., dissenting).

88. 115 S. Ct. at 1196 (Stevens, J., dissenting).

analysis quoted above speaks of the exclusionary rule as providing an incentive to prevent such illegal arrests, that is not quite correct. Rather, it is properly said, as the Court put it in *Elkins v. United States*,[89] that the exclusionary rule deters Fourth Amendment violations by "removing the incentive to disregard it." Thus, if we want to identify an incentive on the police department to seek greater accuracy in their computer records and thus fewer illegal arrests, it would be more appropriate to focus upon certain pragmatic considerations, such as that the police can best conserve their scarce patrol resources if officers do not spend their time, including all the postarrest processing ordinarily required, making unnecessary arrests pursuant to nonexistent warrants.

Although that might not seem like a powerful incentive, it probably is good enough if there is not a more compelling incentive pulling in the direction of *not* doing anything to minimize the chances of such illegal arrests. If and only if the exclusionary rule is inapplicable here, there is likely to be such a countervailing incentive: such an illegal arrest will sometimes provide a substantial windfall in the form of evidence of ongoing criminality by the arrestee, just as in *Evans*. Though it might be contended that the chance of occasional windfalls would not be enough to make the police disinterested in greater oversight of the clerks to keep the records straight, I doubt it. Those doubts are strengthened by the fact that the potential for similar windfalls already has had a profound influence upon police policymaking. Police agencies all across the country have adopted the tactic of using traffic stops, sometimes for the most insignificant of violations, as a device for seeking out drugs and weapons whenever possible, such as when the detained driver can be induced to consent to a vehicle search or when a record check provides an apparent basis for arrest and an incidental search.[90] In the context of such programs, a higher level of illegal arrests because of

89. 364 U.S. 206, 217 (1990) (citing Eleuteri v. Richman, 141 A.2d 46, 50 (N.J.), *cert. denied*, 358 U.S. 843 (1958)).

90. *See* Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 117-21. This is not to suggest that every traffic offense, no matter how minor, is dealt with in this way. Rather, this procedure is reserved for those the police on a "hunch" believe might be in possession of drugs or weapons, but the basis for the hunch is seldom made visible in such a way that would afford the defendant a basis for challenging the police action. These hunches are based upon a variety of factors, including the race of the driver. *See, e.g.*, United States v. Roberson, 6 F.3d 1088 (5th Cir. 1993) (state trooper, after noticing van had four black occupants, stopped vehicle because driver failed to signal a lane change where no other moving vehicle was in sight), *cert. denied*, 114 S. Ct. 1230 (1994). No wonder, then, that "[t]here's a moving violation that many African-Americans know as D.W.B.: Driving While Black." Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 59.

clerical errors is likely to appear advantageous rather than disadvantageous if there is no risk that the windfall evidence will be suppressed, especially since the nature of the illegality will be such that the arresting officer cannot be faulted for having made those arrests. Indeed, after *Evans* the police will in no sense be troubled by the thought that these windfalls are being gained only at the cost of violating the constitutional rights of citizens, for arrests made upon false computer records no longer will be viewed as illegal arrests. This is because, as the Supreme Court fully recognized in *Terry v. Ohio*, "admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence."[91] No wonder, then, that after *Evans* there is little likelihood that police agencies aggressively will seek better recordkeeping about outstanding warrants.

URINALS, STUDENTS, AND SUSPICIONLESS SEARCHES

The Supreme Court dealt with public school searches for the first time in *New Jersey v. T.L.O.*[92] In upholding a search by a high school administrator of a student's purse, the Court concluded that a proper "accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law."[93] Rather, the Court continued, the legality of such a search should depend simply on its reasonableness both in terms of justification and scope:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[94]

However, the Court also intimated that a school search *without* individualized suspicion would pass muster if the "privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to

91. 392 U.S. 1, 13 (1968).
92. 469 U.S. 325 (1985).
93. 469 U.S. at 341.
94. 469 U.S. at 341-42 (footnotes omitted) (quoting *Terry*, 392 U.S. at 20).

assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.' "[95]

When the Court later had occasion to deal with drug testing of students in *Vernonia School District 47J v. Acton*,[96] this turned out to be the case. At issue in *Acton* was a drug-testing program established by the school district upon a determination that there had been a sharp increase in drug use by students and that athletes were the leaders of the drug culture. Under the program, students wishing to play sports were allowed to participate only if they and their parents consented to the testing of those students. The athletes were tested at the beginning of the season for their sport, and in addition each week of the season ten percent of the athletes were selected at random for further testing. The testing was done under circumstances that limited the intrusion on privacy, and the test results were made available only to a few school officials. The *only* use of a positive test result was that the student was tested again, and if a second positive result was obtained the student was required to opt for either a six-week assistance program, including weekly urinalysis, or suspension from athletics, except that repeat offenders were given only the second option. When seventh-grader James Acton refused to perform as required at the urinal, he was denied participation in his school's football program. He and his parents then filed suit for declaratory and injunctive relief. The district court denied the claims, but the court of appeals reversed.

The *Acton* majority's[97] balancing process, resulting in the conclusion that the above-described program "is reasonable and hence constitutional,"[98] consisted of an assessment of three factors: (1) "the nature of the privacy interest upon which the search here at issue intrudes";[99] (2) "the character of the intrusion that is complained of";[100] and (3) "the nature and immediacy of the governmental concern at issue here, and the efficacy of the means for meeting it."[101] As for the first factor, the Court concluded that it was dealing with a situation as to which there was clearly a "decreased expectation of privacy."[102] In large measure, this involved nothing more than a straightforward application of

95. 469 U.S. at 342 n.8 (quoting Delaware v. Prouse, 440 U.S. 648, 655 (1979) (quoting Camara v. Municipal Court, 387 U.S. 523, 532 (1987))).

96. 115 S. Ct. 2386 (1995).

97. The Court split 6-3; Justice Scalia wrote for the majority; Justice O'Connor for the dissenters.

98. *Acton*, 115 S. Ct. at 2396.

99. 115 S. Ct. at 2391.

100. 115 S. Ct. at 2393.

101. 115 S. Ct. at 2394.

102. 115 S. Ct. at 2396.

T.L.O.: drawing upon the conclusion in that case that "a proper educational environment requires close supervision of schoolchildren,"[103] the *Acton* majority reiterated that those children may be subjected to "a degree of supervision and control that could not be exercised over free adults."[104] But another consideration was also deemed important here: "Legitimate privacy expectations are even less with regard to student athletes."[105] After all, "school locker rooms . . . are not notable for the privacy they afford."[106] Moreover, students who choose to participate in athletics "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally," much "like adults who choose to participate in a 'closely regulated industry.' "[107]

As for the second factor, the character of the intrusion at issue, the Court in *Acton* stressed the "relative unobtrusiveness"[108] of this testing process, which the Court had previously held constitutes a search within the meaning of the Fourth Amendment.[109] First of all, there was "the manner in which production of the urine sample is monitored," which in the instant case occurred under conditions "nearly identical to those typically encountered in public restrooms."[110] As for what was disclosed, the Court stressed that the tests "look only for drugs" and that the results "are disclosed only to a limited class of school personnel who have a need to know" and "are not turned over to law enforcement authorities or used for any internal disciplinary function."[111] Although the requirement that students "identify *in advance* prescription medications they are taking" in order to provide a basis for spotting false positives was "some cause for concern,"[112] the Court dismissed this problem with the explanation that it was not established that such advance disclosure was unavoidable.[113]

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103. New Jersey v. T.L.O., 469 U.S. 325, 339 (1985).

104. *Acton*, 115 S. Ct. at 2392.

105. 115 S. Ct. at 2392.

106. 115 S. Ct. at 2392-93.

107. 115 S. Ct. at 2393.

108. 115 S. Ct. at 2396.

109. *See* Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989).

110. *Acton*, 115 S. Ct. at 2393 (citing *Skinner*, 489 U.S. at 626). As the Court elaborated, "male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering." 115 S. Ct. at 2393.

111. 115 S. Ct. at 2393.

112. 115 S. Ct. at 2394.

113. The Court noted that while such advance disclosure was the practice, it was not required by the written policy of the District, and added that "when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst." 115 S. Ct. at 2394.

As for the third factor, the need side of the balancing test, the *Acton* majority began with the cogent observation that this government interest did not have to meet some "fixed, minimum quantum of governmental concern," but merely had to be "*important enough* to justify the particular search at hand,"[114] considering the degree of its intrusiveness.[115] "Deterring drug use by our Nation's schoolchildren," the Court reasoned, was "at least as important" as the interest served by the drug testings previously upheld by the Court, especially when it is considered that "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."[116] Moreover, because the program at issue was limited to school athletes, there was also the need to respond to "the risk of immediate physical harm to the drug user or those with whom he is playing his sport."[117] The record in this case, the *Acton* majority added, reflected "the immediacy of the District's concerns"[118] regarding those problems. And the efficacy of the means the District had adopted to respond to those concerns was "self-evident," for by the testing they were "making sure that athletes do not use drugs" and indirectly were treating the broader "drug problem largely fueled by the 'role model' effect of athletes' drug use."[119]

In general terms, at least, there is no reason to quarrel with the analysis summarized above. Use of the balancing test *is* appropriate here, and it *is* fair to conclude that the specific factors in the balance here — (1) a "decreased expectation of privacy" by student athletes, (2) the "relative unobtrusiveness" of the testing process, and (3) the "severity of the need" met by that testing — collectively support a regime of drug testing.[120] Even the three dissenters in *Acton* agree on these points.[121] But that leaves unresolved what is truly the central and

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114. 115 S. Ct. at 2394-95.

115. The Court apparently deemed it necessary to emphasize this point because in its prior drug-testing cases it had characterized the government interest motivating the search as "compelling." Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 628 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989).

116. *Acton*, 115 S. Ct. at 2395.

117. 115 S. Ct. at 2395.

118. 115 S. Ct. at 2395.

119. 115 S. Ct. at 2395-96.

120. *See* 115 S. Ct. at 2396.

121. Except in one respect. On the matter of need in this particular case, as reflected by the record made below, they agree that "the record in this case surely demonstrates there was a drug-related discipline problem in Vernonia of 'epidemic proportions,' " but find that the "evidence of a drug-related sports injury problem at Vernonia, by contrast, was considerably weaker." 115 S. Ct. at 2406 (O'Connor, J., dissenting) (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

most difficult issue in *Acton:* whether the constitutionally permissible testing on such facts is the blanket-random scheme that was used, or instead testing of particular students on a reasonable suspicion basis as the objecting student, Acton, claimed. The majority responded to that claim in these words:

> We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. Respondents' alternative entails substantial difficulties — if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.[122]

The most objectionable aspect of this passage is the violence that it does to established Fourth Amendment doctrine. The *Acton* majority treats random testing and testing upon reasonable suspicion as being essentially the same, perhaps slightly different in *degree,* but not different in *kind.*[123] But in point of fact, the two are quite different in kind, which is why the Supreme Court and the lower courts theretofore had required at least individualized suspicion to justify a search, except in exceedingly rare instances in which circumstances much more compelling than those in the instant case were present.

If one begins with what might be called mainstream criminal law enforcement — that is, where there is no room for the "special needs" analysis often used in assaying inspections and regulatory searches — it is clear that blanket and random searches for evidence of crime are un-

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Also, the dissenters cogently note that student Acton, who refused to consent to such testing and then challenged the procedures in court, was at that time in grade school, and that if there existed a drug problem at that level "one would not know it from this record." 115 S. Ct. at 2406 (O'Connor, J., dissenting).

122. 115 S. Ct. at 2396 (citations omitted).

123. As the *Acton* dissenters said of the majority opinion: "Far from acknowledging anything special about individualized suspicion, the Court treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative — that is, an alternative that officials may bypass if the lesser intrusion, in their reasonable estimation, is outweighed by policy concerns unrelated to practicability." 115 S. Ct. at 2402 (O'Connor, J., dissenting).

questionably impermissible under the Fourth Amendment. And thus in *Carroll v. United States*,[124] holding the warrantless search of a vehicle unreasonable because of the absence of probable cause, the Court declared: "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."[125] As the *Acton* dissenters elaborated, this *Carroll* view is "well-grounded in history" and is alive and well today, so that "it remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime."[126]

Admittedly, the *Carroll* doctrine standing alone does not settle the tough question in *Acton*, for the drug testing at issue there was hardly an instance of mainstream criminal law enforcement. Rather, it was Fourth Amendment activity of a different kind, just as with the various other special situations often characterized as inspections or regulatory searches. What all of these situations have in common is that the Supreme Court and lower courts have engaged in a process of "balancing the need to search against the invasion which the search entails"[127] and, when "special needs"[128] so tipped the scales, have permitted some sort of departure from the traditional probable cause requirement. Those departures have been of two different kinds — (1) requiring only lesser individualized suspicion or (2) requiring no individualized suspicion but

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124. 267 U.S. 132 (1925).

125. 267 U.S. at 153-54.

126. *Acton*, 115 S. Ct. at 2398, 2400 (O'Connor, J., dissenting) (citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.5(b), at 551-53 (2d ed. 1987)). Indeed, when it comes to searching for evidence in a mainstream criminal law enforcement context, the Court has not even been willing to tolerate a lesser departure from the probable cause requirement by permitting such a search upon a less substantial degree of individualized reasonable suspicion. *See* Arizona v. Hicks, 480 U.S. 321, 328 (1987) (moving stereo equipment to see serial numbers on back an illegal search; Court rejects dissent's suggestion "that we uphold the action here on the ground that it was a 'cursory inspection' rather than a 'full-blown search,' and could therefore be justified by reasonable suspicion instead of probable cause").

Of course, even in mainstream criminal law enforcement there may arise a need to conduct a search for some reason other than obtaining evidence, and the nature of that reason may be such that it would be nonsensical to require probable cause. Such is the case as to inventory of an arrestee's effects. As the Court has stated: "The probable cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions." South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976).

127. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

128. Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (Blackmun, J., concurring in the judgment) (internal quotation marks omitted) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)).

only a random or other nonarbitrary selection process — but it is the cases in the latter category that deserve attention here. Specifically, it must be asked whether *Acton* is at all like those cases in terms of either the intrusion permitted or the justification for the intrusion.

In some of these cases the nature of the permitted intrusion is different because it is a brief seizure rather than a less-intrusive-than-usual search that was allowed. Thus, in *United States v. Martinez-Fuerte,*[129] *Delaware v. Prouse,*[130] and *Michigan Dept. of State Police v. Sitz,*[131] where the Court manifested its willingness to permit the brief stopping of all traffic at vehicular checkpoints in order to check for illegal aliens, driver's licenses, and intoxicated drivers, respectively, in each instance the Court made it quite clear that it was not authorizing even minor searches of the vehicle, driver, or other occupants.[132] This suggests a greater willingness by the Court to permit minor seizures than so-called minor searches, as is also reflected by the dichotomy in mainstream law enforcement, where police acting on reasonable suspicion are allowed to make minor seizures of persons and things[133] but not minor searches for evidence.[134] Doubtless this reflects a perception by the Court that while it is quite easy to see how a minor seizure can be dramatically different from a full-blown one — compare a brief checkpoint stop with a stationhouse arrest — it is not so apparent that a search can be deemed so minimally intrusive that it should be permitted for that reason alone even absent reasonable suspicion. It thus would seem that *Martinez-Fuerte, Prouse,* and *Sitz* afford little if any support for the result reached in *Acton.* The momentary seizures permitted in those cases were the smallest of Fourth Amendment intrusions, but in *Acton* the search, though somewhat limited in intrusiveness by the commendable procedures followed, was not in the same sense dramatically different in kind from, say, a search of the students' pockets. Indeed, as Justice Scalia, the author of the *Acton* majority opinion, put it on another occa-

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129. 428 U.S. 543 (1976).

130. 440 U.S. 648 (1979).

131. 496 U.S. 444 (1990).

132. As for the alien checkpoint, the Court earlier had made it clear that a search of the vehicle for aliens was not permissible. *See* United States v. Ortiz, 422 U.S. 891 (1975). As for the driver's license checkpoint discussed in *Prouse,* the Court there was considering only "detaining the driver in order to check his driver's license and the registration of the automobile." 440 U.S. at 663. As for the DWI checkpoint, the Court in *Sitz* emphasized it had not authorized "[d]etention of particular motorists for more extensive field sobriety testing." *Sitz,* 496 U.S. at 451.

133. *See* United States v. Place, 462 U.S. 696 (1983); Terry v. Ohio, 392 U.S. 1 (1968).

134. *See* Arizona v. Hicks, 480 U.S. 321 (1987); Ybarra v. Illinois, 444 U.S. 85 (1979).

sion, state-compelled collection and testing of urine, though not the most intrusive of searches, are nonetheless "particularly destructive of privacy and offensive to personal dignity."[135]

What then of the pre-*Acton* cases permitting *searches* without even reasonable suspicion? Admittedly there are various circumstances in which the courts have agreed that such searches may be conducted, most notably, upon the occasion of a border crossing into the country,[136] prior to the boarding of a commercial airliner,[137] in the course of carrying out a housing[138] or business[139] inspection program, in searching prisoners following contact visits,[140] and, at least sometimes, as in *Skinner v. Railway Labor Executives' Assn.*[141] and *National Treasury Employees Union v. Von Raab,*[142] as part of a drug-testing program. But all of those situations are significantly different from that in *Acton,* from the standpoint of one or more of these relevant considerations: (1) the nature of the intrusion; (2) the magnitude of "the special need" being addressed; and (3) the impossibility of responding to that need via an individualized-suspicion test.

The premises-inspection cases are unique because of the impersonal character of the search involved. This is especially true as to the inspection of businesses, when the focus of the search is upon business records, safety equipment, or other materials having to do with the business itself rather than the persons who might be there in an employer or employee capacity. But even as to housing inspections, it may be said, as the Court put it in *Camara v. Municipal Court,*[143] that the inspections are not "personal in nature." The concern of the inspector is directed toward such facilities as the plumbing, heating, ventilation, gas and electrical systems, and toward the accumulation of garbage and debris,[144] and there is no rummaging through the private papers and effects of the householder. By comparison, the type of search at issue in *Acton* is very personal in nature, intruding, as the Court earlier put it in

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135. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting).

136. *See* 4 LAFAVE, *supra* note 60, § 10.5.

137. *See id.* § 10.6.

138. *See id.* § 10.1.

139. *See id.* § 10.2.

140. *See id.* § 10.9.

141. 489 U.S. 602 (1989).

142. 489 U.S. 656 (1989).

143. 387 U.S. 523, 537 (1967).

144. For a detailed account of the objects of inspection under these programs, see David Stahl & James C. Kuhn, Jr., *Inspections and the Fourth Amendment,* 11 U. PITT. L. REV. 256, 264-75 (1950).

Skinner, upon "an excretory function traditionally shielded by great privacy."[145]

Second, many of the situations in which searches are permitted without individualized suspicion are distinguishable from *Acton* because of the magnitude of the risk involved — as the *Acton* dissenters put it, because those searches were responsive to situations in which "even one undetected instance of wrongdoing could have injurious consequences for a great number of people."[146] Such is the case as to building inspections, where even a single safety code violation can cause "fires and epidemics [that] ravage large urban areas";[147] as to airport screening, where even a single hijacked plane can result in the destruction of "hundreds of human lives and millions of dollars of property";[148] and also as to some drug testing, as in *Skinner,* where a single drug-impaired train operator can produce "disastrous consequences" including "great human loss,"[149] and as in *Von Raab,* where a customs official using drugs can cause the noninterdiction of a "sizable" drug shipment and consequently injury to the lives of many, and perhaps a breach of "national security."[150] Although a drug-free educational environment is a significant government interest, it is quite obviously not of the same order as those just mentioned.[151]

Third, and perhaps most important of all, the pre-*Acton* cases allowing a search without individualized suspicion "upheld the suspicionless search only after first recognizing the Fourth Amendment's long-standing preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented."[152] In *Camara,* for example, the Court emphasized that an individualized suspicion standard was impracticable for safety inspections because evidence of code violations ordinarily was not observable from outside the premises. Simi-

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145. *Skinner,* 489 U.S. at 626.

146. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2402 (1995) (O'Connor, J., dissenting).

147. *Camara,* 387 U.S. at 535.

148. United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (internal quotation marks omitted) (quoting United States v. Bell, 404 F.2d 667, 675 (2d Cir. 1972) (Friendly, C.J., concurring)).

149. *Skinner,* 489 U.S. at 628.

150. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670, 674 (1979).

151. This is why the court of appeals, Acton v. Vernonia Sch. Dist. 47J, 23 F.3d 1514, 1526 (9th Cir. 1994), held that the students' privacy expectations were not outweighed by "extreme dangers and hazards" of the type recognized in other contexts as authorizing random testing.

152. *Acton,* 115 S. Ct. at 2401 (O'Connor, J., dissenting).

larly, suspicionless searches of prisoners after contact visits are permissible precisely because the extent of scrutiny necessary to obtain individualized suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford."[153] Similar analysis is to be found in the Court's prior drug-testing cases; in *Skinner,* requiring individualized suspicion for testing train operators after an accident was deemed not feasible because "the scene of a serious rail accident is chaotic,"[154] while in *Von Raab* the point was that a suspicion requirement for the testing of customs officials was impractical because it was "not feasible to subject [such] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments."[155] The border search and airport search cases are obviously distinguishable in like manner, for in each instance the authorities find themselves in essentially a now-or-never situation as to a large volume of travelers who could not feasibly have been subjected to prior scrutiny.[156]

By contrast, there is no comparable justification for allowing school athlete drug tests without individualized suspicion, for, as the *Acton* dissenters ably put it:

> [N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets — students — is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms.
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> . . . The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug-testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use — and thus that would have justified a drug-related search [on reasonable suspicion] under our *T.L.O.* decision.[157]

In other words, because the reasonable suspicion test *is* feasible in those circumstances,[158] there was no room under existing Fourth Amendment

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153. Bell v. Wolfish, 441 U.S. 520, 560 n.40 (1979).

154. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 631 (1979).

155. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1979).

156. By contrast, when authorities have an opportunity for continued surveillance away from the border, a Fourth Amendment intrusion without individualized suspicion is unreasonable, for "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators." United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975).

157. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2403 (1995) (O'Connor, J., dissenting) (citation omitted).

158. Although some of the *Acton* majority's comments quoted earlier are to the effect that the reasonable suspicion approach "may be impracticable," 115 S. Ct. at 2396,

doctrine for either the school board or the Court to opt for the blanket-random search regime.

Concluding Thoughts of a Dispirited Patron Saint

It is my judgment, then, that both the *Evans* and *Acton* cases were decided wrongly. The basic error in *Evans* is that the Court has taken an unnecessarily narrow view of the exclusionary rule's deterrence function and thus has failed to see that in terms of systemic deterrence there is good reason to suppress evidence on the facts of that case — the police would then appreciate that no benefits were to be derived from their future failures to ensure that court personnel keep arrest warrant records current. As for *Acton,* the fundamental mistake by the Court was in failing to appreciate that a suspicionless standard for conducting searches is unnecessary when the significant risks of serious physical injury are not present and the opportunities exist for using a reasonable suspicion standard to single out those who ought to be tested. As a result, the Fourth Amendment has suffered two more significant blows.

Some doubtless would challenge that assessment as nothing more than the overblown lament of a rather frustrated patron saint. After all, so this argument might proceed, *Evans* dealt only with an oversight by a civilian clerk employed by the judicial branch of the government in circumstances in which no plausible claim was or could have been made that the police should have engaged in oversight or should have suspected that the recordkeeping system was malfunctioning. And *Acton* did nothing more than uphold the actions of one particular school board that decided to allow random but suspicionless drug tests of athletes when the board found itself confronted with drug-infested schools fueled by the role-model effect of athletes' drug use. Because these two cases had to do with such extraordinarily unique situations not likely to recur with great frequency, the argument continues, no great harm has been done, even assuming *Evans* and *Acton* were wrongly decided. At worst, they represent two minor dents in the Fourth Amendment's armor!

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the case is never really made out. They speculate that parents might not approve "accusatory drug testing" and that teachers might "impose testing arbitrarily" because they are "ill prepared" to spot symptoms of drug abuse. 115 S. Ct. at 2396. But as the dissenters point out, such objections "ignore the fact that such a regime would not exist in a vacuum" because schools "already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing," and also the fact that existing Fourth Amendment doctrine would justify testing of those students who engaged in the kind of "severe disruption" that has "a strong nexus to drug use." 115 S. Ct. at 2402, 2406 (O'Connor, J., dissenting).

I wish I could believe that this were the case, but after decades of close attention to the Supreme Court's Fourth Amendment cases, I cannot bring myself to that conclusion. Too often, what might seem at worst a minor misstep at the time turns out, when viewed from the clearer perspective provided by the passage of time, to have been a step over the cliff. Minor constrictions on the Fourth Amendment often take on broader dimensions when revisited by the Supreme Court. But it is not even necessary for this to happen for the Fourth Amendment to take a major hit in the long run. In terms of what the Fourth Amendment actually means to you and me, we must consider not only the language of the Supreme Court's decisions, but also how that language is thereafter treated by the lower judiciary and by executive and administrative agencies at the operational levels — in this context, police departments and school boards, respectively. As Professor Amsterdam once put it, a pronouncement by the Supreme Court concerning the Fourth Amendment "filters down to the level of flesh and blood suspects only through the refracting layers of lower courts, trial judges, magistrates and police officials," and "in few other areas of law are the filters as opaque as in the area of suspects' rights."[159] No small part of my concern with *Evans* and *Acton* has to do with how these cases will be treated in the days ahead, either by these lesser actors in the system or by the Supreme Court itself, for both of these decisions appear to me to have great potential to overflow their banks.

As to *Evans*, for example, it might be asked whether in future cases involving negligent recordkeeping by court personnel the defendant could ever prevail on the ground that there was a sufficient police perception of a problem with the recordkeeping system that the police could no longer reasonably rely upon it. Certainly that possibility cannot be totally ignored, for the Court in *Evans* did not hold that the exclusionary rule is inevitably inapplicable in these clerk-error cases. Indeed, it might even be asserted that a majority of the Court has made it rather clear that in an *Evans*-type case exclusion is called for if the defendant makes an additional showing that the police, meaning the police agency, not the arresting officer, are at fault. This majority is made up of the two *Evans* dissenters plus the three-Justice group represented by the O'Connor concurrence, where this important limitation on *Evans* is put forward:

> [T]he Court does not hold that the court employee's mistake in this case was necessarily the only error that may have occurred and to which the

159. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 792 (1970).

> exclusionary rule might apply. While the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance *on the recordkeeping system itself.* Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).[160]

But I am not optimistic. This proposition, at best, is likely to be held out as a possible exception to *Evans* should a defendant ever make the requisite showing. But it will be difficult for a defendant ever to make out a factual showing as to what the experience has been with a particular recordkeeping system over time. And if a showing of several prior mistakes emerges, I have a feeling it will be found to fall short of the seemingly high threshold erected by the O'Connor concurrence — that the system "routinely leads to false arrests."[161]

Consider next a case that is factually very similar to *Evans* except that the errant clerk is not an employee of some other agency, such as the court, but rather is an employee of the police department itself. Will *Evans* be extended to such a case? I hope the answer is no, if for no other reason than to keep a bad decision as narrowly confined as possible, but I am not optimistic. Justices Ginsburg and Stevens, albeit speaking in criticism of what the Court has done in *Evans,* assert that "it is artificial to distinguish between court clerk and police clerk slips,"[162] and those words may be thrown back at them later. Also noteworthy is the fact that the O'Connor-Souter-Breyer opinion says that the true question is whether there was reasonable or unreasonable police reliance "on a recordkeeping system, their own or some other agency's."[163] This passage strongly indicates that they do not place significance upon the identity of the errant clerk's employer. The argument on the other side is that when the clerk is also a member of the police department, whether a civilian employee or a uniformed officer, it becomes harder to deny that the police agency itself is in a position to remedy the situation and might well do so if the exclusionary rule is there to remove the incentive to do otherwise.[164] But here as well I

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160. Arizona v. Evans, 115 S. Ct. 1185, 1194 (1995) (O'Connor, J., concurring).

161. 115 S. Ct. at 1194 (O'Connor, J., concurring).

162. 115 S. Ct. at 1200 (Ginsburg, J., dissenting).

163. 115 S. Ct. at 1194 (O'Connor, J., concurring).

164. Consider in this regard that the state court of appeals in *Evans,* which took essentially the same approach as that later adopted by the United States Supreme Court, distinguished State v. Greene, 783 P.2d 829 (Ariz. Ct. App. 1989), where apparently the negligent failure to update computer records to delete a quashed arrest warrant was at-

would not bet the farm that this will be the outcome when this issue is considered by either lower courts or the Supreme Court.

Especially if *Evans* is extended to negligent recordkeeping by police clerks, the question then will doubtless arise whether the exclusionary rule also should be withdrawn from other cases in which the arresting officer reasonably relied on information from other police sources that turned out to be false. This situation would include those cases in which there is an error in a police record, computerized or otherwise, but the mistake is not that of the recordkeepers, but of detectives and other police officials who supplied information for the records. Or, it might even include those cases in which there is no formal recordkeeping involved but the arresting officer innocently relies upon some other police source that falsely asserts that there is a warrant, that grounds to arrest otherwise exist, or that certain facts are then known about a certain crime or suspect. Certainly the answer to this question ought to be no. If police officers lacking reasonable suspicion or probable cause nonetheless may bring about *Terry* stops and full-fledged arrests, respectively, merely by getting some other officer to do the dirty work, and then may use any incriminating evidence obtained incident to such unjustified seizures, the day finally will have arrived when the Fourth Amendment is truly nothing more than "a form of words."[165]

But the possibility of *Evans* being pushed this far cannot be dismissed out of hand in light of some of the things said by the majority in that decision. For one thing, there is the footnote reference to the Solicitor General's amicus argument — not reached by the Court — "that an analysis similar to that we apply here to court personnel also would apply in order to determine whether the evidence should be suppressed if

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tributable to a police department employee. *Greene* was grounded in the conclusion that "the ends of the exclusionary rule would be furthered in an appreciable way by holding the evidence inadmissible because such a holding would tend to deter the South Tucson Police Department from deliberately or negligently failing to keep its paperwork or computer entries up to date." 783 P.2d at 830; *see also* State v. Stringer, 372 S.E.2d 426, 428 (Ga. 1988) (holding that an arrest on a recalled warrant is invalid, and fact that arresting officer acted in good faith makes no difference when, as here, the department "knew or should have known that their information about the bench warrant was incorrect"); People v. Joseph, 470 N.E.2d 1303 (Ill. App. Ct. 1984) (finding that where before arrest warrant had been quashed, arrest was illegal; and that *Leon* "good faith" exception was not applicable here, as the matter within the responsibility and control of police authorities who failed to update their records to accurately reflect defendant's current status); State v. Trenidad, 595 P.2d 957 (Wash. Ct. App. 1979) (stating that warrant had been quashed but dispatcher erroneously told officer valid warrant still was outstanding; and declaring arrest invalid and good faith of arresting officer irrelevant).

165. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (internal quotation marks omitted) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

police personnel were responsible for the error."[166] For another, there is the frightening assertion that the Court's earlier decisions do not resolve that question. As for *United States v. Hensley,*[167] upholding a *Terry* stop made in reasonable reliance upon a flyer issued by another department that possessed reasonable suspicion, that case was dismissed with the observation that because there had been no Fourth Amendment violation there, it did not resolve "whether the seized evidence should have been excluded"[168] had reasonable suspicion at the source been lacking. As for *Whiteley v. Warden,*[169] no similar assertion was possible, as the evidence *had been* suppressed because of the Fourth Amendment violation, i.e., lack of probable cause at the source of a radio bulletin upon which the arresting officer reasonably relied. But *Whiteley* was dismissed summarily on the basis that it was grounded in the now-rejected approach under which "the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation."[170]

My fear, however, is that *Evans* ultimately might work even greater mischief than this. If the point of *Evans,* together with *Leon* and *Krull,* is that when an arresting or searching officer violates the Fourth Amendment and the fault lies with public officials having clerical, judicial, or legislative functions, there is no point to evidence exclusion because those latter officials need not be or would not be deterred, then it certainly may be contended that seizures and searches actually *made* by nonpolice should be treated likewise because once again those persons, unlike the police themselves, are not appropriate objects of the exclusionary rule's deterrent function. Recall that this issue has not yet been ruled upon by the Supreme Court, which noted in *T.L.O.* that the applicability of the exclusionary rule in such cases remains an open question. As for the kinds of nonpolice mentioned in *T.L.O.* — building inspectors, OSHA inspectors, firefighters — nothing in *Evans, Leon,* or *Krull* casts serious doubt upon the applicability of *both* the Fourth Amendment and its exclusionary rule to their investigative activities. After all, they *are* on a fairly regular basis engaged in the competitive enterprise of ferreting out crime or at least quasi-criminal violations, and thus even the somewhat narrower conception of the deterrence function accepted in the aforementioned three Supreme Court decisions has meaning with respect to the actions of those officials.

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166. *Evans,* 115 S. Ct. at 1194 n.5.
167. 469 U.S. 221 (1985).
168. *Evans,* 115 S. Ct. at 1192.
169. 401 U.S. 560 (1971).
170. *Evans,* 115 S. Ct. at 1192.

But there may be other, less obvious cases in which *Evans* will push the Supreme Court or lower courts in the wrong direction. Take, for example, the question that the Court in *T.L.O.* found it unnecessary to answer, whether "the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities,"[171] which even in pre-*Evans* days had produced a split of authority.[172] I believe that *Evans* makes it much easier for courts to answer that question in the negative, though that is not the way this issue *ought* to be resolved. As noted in *State v. Baccino*,[173] the notion that public employees outside law enforcement, like truly private individuals, would not be deterred by an exclusionary rule "may be true in the case of isolated private searches,"[174] but "is inapposite to the situation of a school principal who has a duty to investigate unlawful activity."[175] Moreover, as Justice Stevens pointed out in *T.L.O.*, in "the case of evidence obtained in

171. New Jersey v. T.L.O., 469 U.S. 325, 333 n.3 (1985).

172. *Compare In re* William G., 709 P.2d 1287, 1298 n.17 (Cal. 1985) (holding that evidence seized in a school's illegal search is not admissible in juvenile court — "the exclusionary rule is the only appropriate remedy.") *and Ex rel.* J.A., 406 N.E.2d 958, 960 (Ill. App. Ct. 1980) (declaring that juveniles in delinquency proceedings are entitled to "all constitutional protections against unlawful searches and seizures . . . and . . . the exclusionary rule is also applicable") *and* State v. Mora, 307 So. 2d 317, 320 (La. 1975), *vacated on other grounds sub nom.* Louisiana v. Mora, 423 U.S. 809 (1975), *modified*, 330 So. 2d 900 (La.) (noting that in the presence of an illegal school search "the fruits of such a search may not be used by the State prosecutorial agency as the basis for criminal proceedings"), *cert. denied*, 429 U.S. 1004 (1976) *with* D.R.C. v. State, 646 P.2d 252, 258 (Alaska Ct. App. 1982) (arguing that a search by school officials constitutes "state action" subject to constitutional limitations, but that no suppression was required given "the purpose served by the exclusionary rule," as "enforcement of school regulations . . . provide[s] substantial incentives to 'search' that would not be lessened by the suppression of evidence at a subsequent delinquency proceeding") *and* State v. Young, 216 S.E.2d 586, 591 (Ga.) (noting that although "public school officials are state officers acting under color of law, whose action is therefore state action which must comport with the Fourth Amendment," the exclusionary rule is not applicable "to searches by non-law enforcement persons"), *cert. denied*, 423 U.S. 1039 (1975).

173. 282 A.2d 869 (Del. Super. Ct. 1971).

174. 282 A.2d at 871; *see, e.g.*, People v. Scott, 117 Cal. Rptr. 925 (Ct. App. 1974) (holding that the exclusionary rule is not applicable where airport manager, while looking in car illegally parked by plane for the ignition key or registration certificate, found marijuana; and stressing that while one of his duties was to supervise enforcement of safety regulations at the airport, actual enforcement always was left to law officers, and manager himself did not issue citations or otherwise engage in criminal investigations, and was not seeking evidence of crime at time he looked into the car); Roberts v. State, 443 So. 2d 1082 (Fla. Dist. Ct. App. 1984) (concluding that the exclusionary rule was not applicable when a membership clerk in the alumni office of Florida State University looked in the desk of a fellow employee after receiving several complaints from membership applicants).

175. *Baccino*, 282 A.2d at 871.

school searches, the 'overall educative effect' of the exclusionary rule adds important symbolic force to this utilitarian judgment."[176]

In similar fashion, there is reason to believe that the rule of the *Acton* case likewise will become more expansive over time. While drug testing of students was rare before *Acton* because of doubts as to its legality,[177] and even after *Acton* doubtless will be avoided by many school districts for a variety of reasons,[178] I expect that several school boards will be prompted into action because of community pressures to do so.[179] A careful reading of *Acton* would produce the conclusion that the Supreme Court did no more than say that the constitutional issue is whether the testing program "is one that a reasonable guardian and tutor might undertake,"[180] and that an affirmative answer was proper in that case because of the record regarding the awesome dimensions of the drug problem in the Vernonia School District. But I will bet my shirt such nuances will be lost on some school boards and, indeed, some lower courts, who will interpret *Acton* just as it was often construed by the press — as endorsing the broad proposition that "drug tests don't infringe on students' privacy because student athletes have a

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176. New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part) (quoting Stone v. Powell, 428 U.S. 465, 493 (1976)). He continued:

> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry. If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly. The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights," and that this is a principle of "liberty and justice for all."

469 U.S. at 373-74 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted) (quoting *Stone*, 428 U.S. at 492; 36 U.S.C. § 172 (1982)).

177. "Such programs have been quite rare, a lawyer for the National School Boards Association said today, because school board lawyers have regarded them as constitutionally dubious and an invitation to lawsuits." Linda Greenhouse, *High Court Upholds Drug Tests for Some Public School Athletes*, N.Y. TIMES, June 27, 1995, at A1 (citing Gwendolyn H. Gregory).

178. "But most school officials said they hoped to avoid such programs, because they would rather spend money on education than urine tests, because they did not want to have to assign a staff member to watch athletes urinate and collect the sample or because they found the whole idea of testing offensively invasive." Tamar Lewin, *Despite Ruling, Wide Drug Testing of Students Is Not Foreseen*, N.Y. TIMES, June 28, 1995, at B7.

179. "Several school principals and superintendents said they expected some pressure to do drug testing from parents reluctant to confront their own children about drug use." *Id.*

180. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2397 (1995).

reduced expectation of privacy."[181] School drug-testing programs thus will sometimes be adopted and upheld without a careful assessment of the needs at a particular educational institution.

Another question about *Acton* that is bound to arise is whether it properly may be relied upon to justify blanket-random testing of the student body at large. Significantly, Justice Ginsburg penned a brief concurring opinion in *Acton* stating her understanding of the majority opinion "as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school."[182] She immediately followed that observation with a reference to an airport search case emphasizing that such suspicionless scrutiny is avoidable "by choosing not to travel by air."[183] It is significant that this theme runs through most of the nonsuspicion search cases: the airline traveler, the border crosser, the businessman who elects to undertake a closely regulated business, the employee who elects to take a job necessitating his close scrutiny, all in a sense can be said to have opted for this highly unusual suspicionless search regime.[184] It is also significant that this very point was given considerable emphasis by the *Acton* majority. They stressed that student athletes have "even less" privacy than students generally because in choosing to participate in athletics "they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[185] Extending *Acton* to blanket-random testing of *all* students, then, would be quite a leap, for students generally cannot be said to have elected "voluntarily" to participate in an activity that subjects them to the watered-down Fourth Amendment protections of *T.L.O.* and *Acton.* It is parental pressure and the mandatory attendance laws that ensure that they will be subjected, in the language of *Acton,* to "a degree of supervision and control that could not be exercised over

181. The case was characterized thus in an editorial in *News-Gazette,* (Champaign, Ill.), calling upon school boards to opt for such testing. *See* NEWS-GAZETTE (Champaign, Ill.), June 30, 1995, at A4.

182. *Acton,* 115 S. Ct. at 2397 (Ginsburg, J., concurring).

183. 115 S. Ct. at 2397 (Ginsburg, J., concurring) (internal quotation marks omitted) (quoting United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974)).

184. The notion is not that by electing to engage in that activity the person has impliedly consented to the search, but only that this opportunity to avoid such intense scrutiny is of *some* relevance in making a judgment about the reasonableness of a suspicionless search scheme.

185. 115 S. Ct. at 2393.

free adults."[186] But this leap[187] may well be taken, for doubtless there will be considerable pressure to mandate and uphold the application of blanket-random search procedures to all students when singling out athletes seems irrational, as whenever, like *Acton,* drugs have produced a discipline problem of "epidemic proportions,"[188] but, unlike *Acton,* the problem does not include "particularly those involved in interscholastic athletics."[189]

However, even that is not a complete measure of the harm likely to occur as a result of the *Acton* decision. As noted in the earlier critique of that decision, the Supreme Court went beyond the boundaries of its earlier rulings regarding suspicionless searches in a very significant way. *Acton* is the first case in which the Court has upheld a search of a quite personal nature absent individualized suspicion when the authorities were not confronted with either a now-or-never situation (e.g., as with airport boarding searches) or risks (e.g., aircraft hijacking) far exceeding the absence of a drug-free educational environment. I find it difficult to believe that the Supreme Court will take one step but only one step beyond the pre-*Acton* boundary. Thus another likely legacy of that case is that still other suspicionless search programs will be upheld without a convincing showing that whatever problems are addressed could not be treated adequately within the framework of a reasonable suspicion requirement.

Some may find these prognostications unduly pessimistic. Some may believe I am merely playing the devil's advocate, an unseemly posture for a saint, patron or otherwise. To the latter, I could respond with the Shakespearean retort that I even "seem a saint, when most I play the devil."[190] Or, I could acknowledge frankly that perhaps it is time for me to get out of the patron saint business. I could declare, Mark Twain style, that the reports of my sanctification have been greatly exaggerated, or I simply could adopt the title of patron saint emeritus. But then who *would* be the patron saint of the Fourth Amendment? Well, one

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186. 115 S. Ct. at 2392.

187. Or, perhaps, a half leap. Some have speculated that testing "everyone who participates in extracurricular activities" could be done under *Acton.* Lewin, *supra* note 178, at B7. But this is hardly beyond dispute, for the Court in *Acton* also stressed the loss of privacy that attends participation in sports, which is not a factor as to, say, participation in the school band.

188. *See Acton,* 115 S. Ct. at 2389 (internal quotation marks omitted) (quoting Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

189. 115 S. Ct. at 2389 (internal quotation marks omitted) (quoting *Acton,* 796 F. Supp. at 1357).

190. WILLIAM SHAKESPEARE, KING RICHARD III act 1, sc. 3, line 338 (Cambridge Univ. Press 1954).

might think that this is an assignment that quite naturally belongs to the Supreme Court. If the Court were to take on this task, certainly there could be no better — nor more overdue — first step than to embrace wholeheartedly these words from *Boyd v. United States:*

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound that in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[191]

History has proven the wisdom of this teaching. Had it been followed in the recent past, I am confident that neither *Evans* nor *Acton* would have been decided as it was.

191. Boyd v. United States, 116 U.S. 616, 635 (1886).