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NOTES

Errors in Good Faith: The *Leon* Exception Six Years Later

*It is perhaps unfortunate, but nonetheless inevitable, that the broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases.*¹

In the 1984 case *United States v. Leon*,² the Supreme Court revised the exclusionary rule, carving out a major exception. The old exclusionary rule had forbidden the use at trial of evidence against a defendant if it had been obtained in violation of that defendant's fourth amendment rights against unreasonable search or seizure. Under the revised rule, if the police officer requesting the warrant by which the disputed evidence was seized reasonably could have believed that the warrant was properly issued under the fourth amendment, then the evidence would be admitted even if the warrant in fact was defective under fourth amendment standards.³ The exception had been proposed by Justice White in his *Stone v. Powell*⁴ dissent in 1976, and many academics had foreseen it with consternation, warning of the dismantling of the Warren Court's reading of constitutional protections for the accused.⁵ Both the Court and commentators anticipating the decision dubbed this the "good faith" exception.⁶

A torrent of commentary, most of it highly critical, followed the release of the *Leon* decision. The legion of critics, often merely echoing the forceful dissents of Justices Brennan, Marshall, and Stevens, argued that the majority in *Leon* gutted the fourth amendment's protections based on faulty reasoning and unfair demands for evidence.⁷

1. *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3108 (1989) (Blackmun, J.).

2. 468 U.S. 897 (1984).

3. *Leon*, 468 U.S. at 926.

4. 428 U.S. 465, 538 (1976) (White, J., dissenting).

5. See Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551 (1984); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982); Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

6. *Leon*, 468 U.S. at 924, 925; see articles cited *supra* note 5.

7. For criticisms that go beyond those made in the dissenting opinions in *Leon*, see, e.g., Y. Kamisar, Prepared Remarks at the U.S. Law Week's Constitutional Law Conference (Sept. 14, 1984) (on file with the *Michigan Law Review*) [hereinafter *Prepared Remarks of Yale Kamisar*]; LaFave, "The Seductive Call of Expediency": *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 901-11; Mertens & Wasserstrom, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 87-88 (1984); see also White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1281-82 (1983).

Professor Wayne LaFave argued persuasively that the good faith exception, when combined with the newly revised probable cause test of *Illinois v. Gates*,⁸ produced "a form of incomprehensible double counting."⁹ As Justice Brennan explained in his dissent: "Because [the good faith exception and the relaxed probable cause test] overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable"¹⁰ Many commentators felt that, having substantially lowered the probable cause standard in *Gates*, the innovation in *Leon* was unnecessary and confusing.¹¹

In an analysis of *Leon* defending its result, Professor Donald Dripps nevertheless criticized almost every line of Justice White's majority opinion.¹² His most telling observation was that the Court here recognized a constitutional violation "to which no sanction attaches, [and therefore] the *Leon* majority refused to treat the Fourth Amendment as law."¹³ While commentary was divided on the question prior to the decision in *Leon*, most of the post-decision writing has been critical.¹⁴

(rejecting as an impossible task any balancing of the deterrent "costs" and "benefits" of the exclusionary rule and therefore finding such balancing nothing more than a disingenuous rationale for decisions resting on "prior dispositions or unarticulated intuitions that are never justified"). One critic of *Leon* nevertheless finds fault with Justice Brennan's cost/benefit analysis critique. Aleschler, *Close Enough for Government Work: The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 346-51.

8. 462 U.S. 213 (1983). *Gates* lowered the threshold for the finding of probable cause needed to support issuance of a search warrant. Under the pre-*Gates* standard, the affidavit of the officer seeking a search warrant based on an informer's tip had to reveal the "basis of knowledge" of the informant (how she got the information reported to the officer) and provide support for the informant's "veracity" in general or "reliability" in this particular case. See *Gates*, 462 U.S. at 228-29; see also Spinelli v. United States, 393 U.S. 410 (1969); 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT ch. 3 (2d ed. 1987); Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974). *Gates* described the new standard as a "totality-of-the-circumstances," "common-sense, practical" inquiry whether there is probable cause to believe that evidence of a crime is to be found in a given place. 462 U.S. at 230. Justice Rehnquist's opinion explained that the officer's "affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause," which itself is a judgment that there is a "fair probability that contraband or evidence of crime will be found in a particular place." 462 U.S. at 238-39. So the new standard may be cast as requiring a "substantial basis" for a "fair probability" that a search of the indicated place will produce evidence of a crime.

9. LaFave, *supra* note 7, at 924.

10. *Leon*, 468 U.S. at 958 (Brennan, J., dissenting).

11. This was a main point in Justice Stevens' *Leon* dissent. 468 U.S. at 961; see also Prepared Remarks of Yale Kamisar, *supra* note 7, at 26; Mertens & Wasserstrom, *supra* note 7, at 95-98, 122-23.

12. Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986).

13. Dripps, *supra* note 12, at 935. Professor Dripps continued: "*Leon* teaches that Fourth Amendment violations do not matter. Such an evaluation betrays the fundamental principle of constitutionalism, which is after all that the Constitution states the law." *Id.* at 936. For a general response critical of Professor Dripps' reaction to *Leon*, see Duke, *Making Leon Worse*, 95 YALE L.J. 1405 (1986).

14. For pre-*Leon* support for the good faith exception, see Jensen & Hart, *The Good Faith*

Given this vast literature on the good faith exception, little room appears to exist for additional commentary on the propriety of the decision, its theoretical weaknesses or strengths, or what further changes in constitutional criminal procedure it forebodes. This Note will not add to the many voices complaining of the Court's misconstruction of the grounding of the exclusionary rule, nor of its crabbed notion of deterrence. Instead, it accepts, *arguendo*, the propriety of the exception and its underlying purpose, and then examines the six-year experience with the revised rule. The proliferation of reported applications of the good faith exception since its adoption in 1984¹⁵ now allows an analysis of the rule that investigates how well understood the change has been and whether the exception is being used to admit evidence that properly (even under *Leon*) should be suppressed.¹⁶ This Note examines a set of application errors committed by state and lower federal courts since 1984. Part I briefly describes the exclusionary rule and *United States v. Leon*.¹⁷ Part II then presents examples of types of errors made by courts applying the good faith exception.¹⁸ Finally, Part III discusses the factors that combined to increase the incidence of application error for this rule and suggests possible remedial tactics.¹⁹ It argues that much of the responsibility for the mistakes must rest with the mislabeled and complex exception crafted in *Leon*, and that the exclusionary rule's goal of deterrence would best be served by the pre-*Leon* rule which, because it retained a simple, inviolate exclusionary sanction in its central application, would more often be properly enforced.²⁰

Restatement of the Exclusionary Rule, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982); Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1414 n.396 (1977); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEXAS L. REV. 736 (1972). For post-*Leon* criticism, see sources cited *supra* note 7. Dripps, *supra* note 12, is an attempt to offer a revised rationale for the *Leon* result, and to that extent is a positive review of the decision.

15. Citations to *Leon* in SHEPARD'S UNITED STATES CITATIONS (Supp. 1986-1988) now number well over 500.

16. The examples of application error set forth in Part II are the product of an unstructured search through lower court opinions citing *Leon*. No attempt has been made to compile statistics on the percentage of applications of the good faith exception that in fact misapply it, nor to compare in any thorough way the relative error rates of *Leon* applications with those of other rules in criminal procedure. It has been enough for the present purposes to investigate the applications of this rule and to observe what seems to be a high incidence of application error. The errors stand on their own even if, as is not likely the case, the rate of misapplication of the good faith exception is not higher than that for other rules in criminal procedure or elsewhere in the law. Their existence and the structural reasons for their continued presence are sufficient reason for action regardless of the relative error rates.

17. See *infra* text accompanying notes 21-62.

18. See *infra* text accompanying notes 63-159.

19. See *infra* text accompanying notes 160-94.

20. See *infra* text accompanying notes 163-68; see also *infra* note 23.

I. THE EXCLUSIONARY RULE AND THE GOOD FAITH EXCEPTION

The Supreme Court first announced the exclusionary rule in 1886 in *Boyd v. United States*,²¹ and reiterated it in a procedural context in 1914 in *Weeks v. United States*.²² The rule provides that the government may not use evidence against a defendant that it gained in violation of that defendant's fourth amendment rights.²³ The early cases²⁴ held that the rule was a part of the fourth amendment. In later cases, the Court vacillated between the alternate propositions that the rule was merely a prudential, judicially created protection,²⁵ and that it was constitutionally mandated.²⁶ The 1961 case *Mapp v. Ohio*,²⁷ which imposed the rule on the states, arguably grounded the rule in the Constitution.²⁸ But by 1965, the Court had dispelled any remaining debate over how it viewed the rule with its decision in *Linkletter v. Walker*.²⁹ That case, by once again resting the exclusionary rule on the empirical basis of its deterrent effect, cut the rule's necessary linkage to the Constitution.³⁰

The debate over the constitutional grounding of the exclusionary rule has a parallel couched in policy terms. Suppression of illegally obtained evidence has been defended primarily on two grounds: that to use such evidence would taint the judicial process with the stain of unconstitutionality, and that exclusion would serve to deter police actions infringing those rights.³¹ *Linkletter*, therefore, disavowed not

21. 116 U.S. 616 (1886), *overruled*, *Fisher v. United States*, 425 U.S. 391, 407-08 (1976), and *Andresen v. Maryland*, 427 U.S. 463 (1976).

22. 232 U.S. 383 (1914).

23. *Weeks*, 232 U.S. 383. The rule as applied in *Weeks* covered use of illegally obtained evidence by the government in its case-in-chief against the defendant whose rights had been violated by the search. This is the "central application" of the exclusionary rule, and it is this application that was disturbed in *Leon*. The scope of the exclusionary rule's application to other stages of the criminal justice process has been a topic of considerable debate in the courts. See *United States v. Calandra*, 414 U.S. 338 (1974) (exclusionary rule inapplicable in grand jury proceeding); *Giordenello v. United States*, 357 U.S. 480 (1958) (applying exclusionary rule to sentencing proceedings); *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968); Mertens & Wasserstrom, *supra* note 5, at 386-89.

24. *Boyd*, *Weeks*, and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

25. See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974); *Linkletter v. Walker*, 381 U.S. 618 (1965); *Wolf v. Colorado*, 338 U.S. 25 (1949).

26. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

27. 367 U.S. 643 (1961).

28. *Mapp*, 367 U.S. 643. Scholars are in vigorous disagreement over whether one may properly read *Mapp* as endorsing the constitutionally mandated view of the exclusionary rule. For a review of the debate (and a strong argument that *Mapp* did endorse that view), see Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 621-27 (1983).

29. 381 U.S. 618 (1965).

30. *Linkletter*, 381 U.S. at 636. See Kamisar, *supra* note 28, at 627-34.

31. See, e.g., Kamisar, *supra* note 28, at 627-34; Mertens & Wasserstrom, *supra* note 5, at 389-406; see also Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974) (arguing for a third view: a defendant has a personal constitutional right not to have illegally seized evidence admitted against him).

only the constitutional grounding of the rule, but also its "judicial integrity" policy justification. That case, along with later renderings such as *United States v. Calandra*,³² established that the only reason for exclusion was to deter police misconduct.³³ Working from this narrowed purpose for the exclusionary rule, justices, judges, scholars and lawyers began arguing that in cases where the officers involved believed they had complied with the procedures mandated by the fourth amendment, exclusion would not deter the mistakes and therefore the evidence should be admissible.³⁴ In *United States v. Leon*³⁵ the Supreme Court adopted this reasoning, with some modifications.

The facts in *Leon* were straightforward and favorable for those arguing for a good faith exception. A California Superior Court Judge issued a warrant in September, 1981 authorizing searches of two houses, a condominium, and two cars, all connected to suspected drug traffickers. The judge based the warrant on a facially valid affidavit

32. 414 U.S. 338 (1974). Professor Kamisar provides the following analysis of the evolution of the exclusionary rule's underlying rationale to its state in *Calandra*:

The "deterrence" rationale and its concomitant "interest-balancing" bloomed in *United States v. Calandra*. The *Weeks* rule and the famous Brandeis-Holmes *Olmstead* dissents, which illuminated the rationales for the *Weeks* rule (although they did not succeed in extending the rule to police behavior that was merely unlawful or "unethical," not unconstitutional), appear to have been based on what has been called the "one-government" conception" or the "unitary" model of a government and a prosecution." This model "sees all the events in a criminal prosecution as parts of a single transaction for which government is ultimately responsible." According to this model, "[i]t is just as important to the fourth amendment whether a court takes account of the fruits of a search as it is whether the intrusion that discovered the evidence was lawful." But in ruling that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained in violation of the fourth amendment, the *Calandra* Court embraced what has been called the "fragmentary" model of a prosecution." This model "separates the police intrusion against which the individual has a fourth amendment right from the proceedings at trial in which the question is merely one of remedy — not a personal remedy for the victim but a collective remedy for the broader social problem." According to this model, a court acts as "a neutral conduit of the evidence"; it is under no duty to exclude evidence merely because it has been unlawfully, or even unconstitutionally, obtained.

Kamisar, *supra* note 28, at 638-39 (citations omitted) (emphasis in original); see also J.B. WHITE, JUSTICE AS TRANSLATION 203-14 (1990).

33. Beyond the judicial integrity rationale, controversy abounds about suppression's efficacy as a deterrent of police misconduct. See, e.g., *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 415-18 (1971) (Burger, C.J., dissenting); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973). The most recent contribution to the debate is a heartening study undertaken in Chicago that reached the following conclusions:

Chicago's narcotics officers are virtually always in court when evidence is suppressed in their cases; they always eventually understand why the evidence was suppressed; and this experience has caused them to use warrants more often and to exercise more care when conducting warrantless searches. The study also demonstrates that judicial suppression, and the actions that police officials take in response to suppression, "punish" officers for conducting illegal searches.

Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017-18 (1987).

34. See Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting); *United States v. Williams*, 622 F.2d 830, 842-43 (5th Cir. 1980); see also *supra* note 14.

35. 468 U.S. 897 (1984).

which had been reviewed by several Deputy District Attorneys.³⁶ The problem was simply that the evidence set out in the affidavit to support probable cause to search was, in the judgment of the district court, "as consistent with innocence as . . . with guilt."³⁷ More particularly, the officers knew that people with drug arrest records had been seen entering and leaving these sites with paper bags; that a "confidential informant of unproven reliability" had reported that the defendants were selling cocaine and methaqualone from one of the residences; that another informant of unproven reliability had reported that one of the defendants kept a large supply of methaqualone at the other residence; and that officers had observed what the Supreme Court described as "a variety of other material . . . and . . . relevant activity" at the residences, the condominium, and the two automobiles.³⁸ The district judge stated that while he was certain the officer requesting the warrant believed the affidavit presented information sufficient to establish probable cause, the officer's judgment was incorrect.³⁹ Since the Ninth Circuit had not adopted the good faith exception requested by the government, the district judge granted the defendants' suppression motion.⁴⁰ The Ninth Circuit affirmed the refusal to adopt the good faith exception,⁴¹ and the United States petitioned the Supreme Court for review solely on that question.⁴²

The Supreme Court reversed the Court of Appeals in an opinion by Justice White.⁴³ The Court held that where it was "objectively reasonable" for an officer to believe that a warrant application was proper with respect to fourth amendment requirements, and where the execution was in all respects proper, the fact that the magistrate⁴⁴ erred in issuing the warrant would not lead to exclusion of the evidence against the defendant whose fourth amendment rights had been violated.⁴⁵

36. *Leon*, 468 U.S. at 901-02.

37. *Leon*, 468 U.S. at 903 n.2.

38. *Leon*, 468 U.S. at 901-02.

39. *Leon*, 468 U.S. at 904 n.4. This probable cause determination was made prior to the Supreme Court's revision of the standard in *Illinois v. Gates*, 462 U.S. 213 (1983). The *Leon* opinion has been criticized as unnecessary given that the affidavit may well have passed muster under the new "totality of the circumstances" test. See *Prepared Remarks of Yale Kamisar*, *supra* note 7, at 26 (quoting *Leon*, 468 U.S. at 961 (Stevens, J., dissenting)).

40. 468 U.S. at 903 n.3. Not all of the evidence was suppressed. The district court found that none of the defendants had standing to challenge the search of the condominium, which they had set up solely in order to run their illicit business and in which none of them had the legitimate expectation of privacy recognized in their residences and cars. 468 U.S. at 903 n.3.

41. *United States v. Leon*, 701 F.2d 187 (9th Cir. 1983).

42. *Leon*, 468 U.S. at 905.

43. Justice Blackmun concurred separately, Justice Brennan and Justice Marshall dissented, and Justice Stevens dissented separately.

44. The opinion discussed "magistrates" instead of "judges" despite the facts of *Leon* because warrants are usually issued by magistrates. See Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1176 n.13 (1987).

45. *Leon*, 468 U.S. at 926.

The Court's reasoning started with the observation that "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" ⁴⁶ Given that premise, using evidence obtained in violation of fourth amendment rights does not mean the courts themselves are violating the fourth amendment. With the judicial integrity argument repudiated, the Court moved to the deterrence rationale. It observed that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."⁴⁷ As Justice White asserted in the majority opinion, the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates."⁴⁸ Because the judicial officers have no stake in obtaining convictions or even arrests, the "threat of exclusion thus cannot be expected significantly to deter them."⁴⁹

The Court emphasized that a police officer must be reasonable in her belief that the warrant application was one a magistrate properly could authorize under the fourth amendment. If this were not the case, it would be unreasonable for her to rely on the warrant that the magistrate mistakenly issued, and exclusion would then deter her error. Four exceptions to the good faith exception were noted in Justice White's majority opinion. It would be unreasonable for an officer to rely on a magistrate-approved warrant (1) where the affidavit given the magistrate contained knowing or reckless falsities; (2) where the magistrate abandoned his neutral and detached role; (3) where the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable";⁵⁰ and (4) where the warrant itself was facially deficient.⁵¹ These are all situations, reasoned the Court, in which any reasonably well-trained officer would recognize

46. *Leon*, 468 U.S. at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)). This reasoning contrasts with Professor Dripps' telling observation that *Leon* creates the unconscionable oddity of an admitted constitutional violation that has no remedy at law. See Dripps, *supra* note 12, at 935-36.

47. *Leon*, 468 U.S. at 921.

48. *Leon*, 468 U.S. at 916.

49. *Leon*, 468 U.S. at 917. For an assessment of the ability of magistrates to perform the role *Leon* assumes they do perform, see generally Goldstein, *supra* note 44. Professor Goldstein, following logic more than the Supreme Court's reasoning, notes that if trial courts were carefully to review the determinations of magistrates (especially those not law-trained) and suppress evidence obtained pursuant to warrants the magistrates mistakenly had issued, the end result would be better-trained magistrates and better police compliance with the fourth amendment. *Id.* at 1177-88. His proposals, while impeccable on logical and policy grounds, simply do not fit with the expressed assumptions of the *Leon* Court.

50. *Leon*, 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

51. *Leon*, 468 U.S. at 923. The listing of explicit exceptions to the exception raises the question whether those listed were meant to be exclusive. Logically, they should not be. Any analogous situation that meets the unreasonable-to-rely test should take the case out of the exception and back into the rule.

that the apparent compliance with the fourth amendment was chimerical, and not to be relied upon.

Leon's companion case, *Massachusetts v. Sheppard*,⁵² helps illustrate the workings of the good faith exception. In *Sheppard*, the police had probable cause to suspect that the defendant had murdered his girlfriend, and presented their information to a judge. The officers made their presentation on a Sunday, when the local court was closed, and thus they had difficulty finding a warrant application form. They finally found one printed for a different district and designed for "controlled substance" searches. The officer in charge altered the application form to reflect the type of evidence he was seeking and the proper district, and took it and his affidavit to the residence of a judge. He told the judge of the problem with the form, and that the warrant would have to be checked. The judge told the officer that he would make, and then that he had made, the requisite changes to the warrant form, and he issued the warrant. The officer then executed the warrant, found incriminating evidence, and arrested the defendant Sheppard. At a suppression hearing, the defendant's attorney argued that since the judge had not changed the printed text of the warrant form, which thus still indicated it was a warrant for "controlled substances," the officers had executed a warrant for which there was not probable cause, and therefore the evidence had been seized in violation of the fourth amendment and must be suppressed.⁵³

The Massachusetts trial court admitted the evidence based on the officer's objectively reasonable good faith reliance on the warrant, and the defendant was convicted at trial.⁵⁴ On appeal, the Massachusetts Supreme Judicial Court refused to adopt the proposed good faith exception to the exclusionary rule.⁵⁵ In the Supreme Court, the case fell within the new rule approved the same day in *Leon*, and the Court affirmed Sheppard's conviction.⁵⁶ The Court examined the record and concluded that since the officer told the judge what changes would need to be made to the warrant form, the judge said he would make them, the officer watched the judge make changes to the form, and the judge told the officer the warrant was now properly altered, it was reasonable for the officer to rely on that warrant and to carry out the search.⁵⁷ The Court asserted that "there is little reason why [the officer] should be expected to disregard assurances that everything is all right, especially when he has alerted the judge to the potential

52. 468 U.S. 981 (1984).

53. *Sheppard*, 468 U.S. at 984-87.

54. *Sheppard*, 468 U.S. at 987.

55. *Sheppard*, 468 U.S. at 987.

56. *Sheppard*, 468 U.S. at 987-88.

57. *Sheppard*, 468 U.S. at 986 n.3, 989.

problems.”⁵⁸ Therefore the evidence produced by the warrant was admissible and the conviction could stand.

The rule that emerges from these two decisions focuses on deterrence of police misconduct. The Court’s idea of deterrence is a narrow one: “If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, . . . it must alter the behavior of individual law enforcement officers or the policies of their departments.”⁵⁹ The Court argued that even if the exclusionary rule does deter some police misconduct, “it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.”⁶⁰ Quoting its earlier decision in *Michigan v. Tucker*,⁶¹ the Court wrote:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.⁶²

While the Supreme Court desires deterrence, the next Part of this Note argues that state and lower federal courts, in applying the good faith exception, have often misunderstood the new rule, interpreting it in ways that sanction admitting evidence obtained via conduct that is both deterrable and worthy of deterrence.

II. EXAMPLES AND EXPLANATIONS OF ERROR

The good faith exception to the exclusionary rule crafted in *Leon* is now an often-invoked tenet of criminal procedure doctrine. It has been applied in every circuit and adopted by many states.⁶³ The expe-

58. *Sheppard*, 468 U.S. at 990. In this situation, even if the officer had carefully read the warrant and noticed that the text still contained the “controlled substances” language, it would be reasonable for him to assume that the magistrate had seen that text and judged the warrant sufficient nevertheless.

59. *United States v. Leon*, 468 U.S. 897, 918 (1984). Justice White dismissed as “speculative” the argument that suppression of evidence tainted by technical errors in police procedure would deter such errors in the future. Justice White also dismissed as speculative the argument that if the police were to learn that their affidavits, even if approved by magistrates, must overcome possible further judicial review, they would raise their own standards for their affidavits. *Leon*, 468 U.S. at 918.

60. *Leon*, 468 U.S. at 919.

61. 417 U.S. 433 (1974).

62. *Leon*, 468 U.S. at 919 (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)).

63. See, e.g., *United States v. Thornton*, 746 F.2d 39 (D.C. Cir. 1984); *United States v. Butler*, 763 F.2d 11 (1st Cir. 1985); *United States v. Buck*, 813 F.2d 588 (2d Cir. 1987); *Gluck v. United States*, 771 F.2d 750 (3d Cir. 1985); *United States v. Edwards*, 798 F.2d 686 (4th Cir. 1986); *United States v. Gant*, 759 F.2d 484 (5th Cir. 1985); *United States v. Savoca*, 761 F.2d 292 (6th Cir. 1985); *United States v. Hornick*, 815 F.2d 1156 (7th Cir. 1987); *United States v. Sager*, 743 F.2d 1261 (8th Cir. 1984); *United States v. Whiting*, 781 F.2d 692 (9th Cir. 1986); *United*

rience with the doctrine over the past six years allows an investigation of its application by state and lower federal courts that may discern systematic problems or tendencies caused by the rule as formulated in *Leon*. This Part sets forth a series of errors found in an unstructured search of applications of the *Leon* rule.⁶⁴ All of the examples reveal conceptual misunderstandings by the applying courts of the good faith exception. Most are application errors that resulted in admittance of evidence that, under *Leon*, should not have been admitted. Some of the cases discussed below, while revealing fundamental misunderstandings of *Leon* by the lower courts, involve evidence that properly was admitted on grounds independent of the misapplied *Leon* rule. These cases, nevertheless, illustrate the prevalence, and the systemic underpinnings, of misunderstandings of the good faith exception.

After first setting forth two examples representative of basic misconceptions of the *Leon* rule, this Part considers several types of application errors in more detail. They are: cases where officers seeking, obtaining, and executing warrants had no authority to do so; cases involving searches pursuant to overbroad warrants; decisions validating warrants under *Leon* by relying on the subjective knowledge of the executing officers to limit the scope of the searches; and cases admitting evidence via *Leon* where the evidence was obtained using facially deficient warrants.

A. Two General Examples

The following two cases are illustrative of the basic misconceptions that lead to errors by lower courts when applying the good faith exception to the exclusionary rule. The first case presents a subjective good faith/objectively reasonable reliance confusion; the second, a sanctioning of ignorance beyond that of a reasonably well-trained officer.

States v. Cardall, 773 F.2d 1128 (10th Cir. 1985); United States v. Accardo, 749 F.2d 1477 (11th Cir. 1985); Sadie v. State, 488 So. 2d 1368 (Ala. Crim. App. 1986); State v. Edwards, 154 Ariz. 8, 739 P.2d 1325 (Ariz. Ct. App. 1987); Stewart v. State, 289 Ark. 272, 711 S.W.2d 787 (1986); People v. Ruiz, 217 Cal. App. 3d 574, 265 Cal. Rptr. 886 (Cal. Ct. App. 1990); State v. Moise, 522 So. 2d 1023 (Fla. Dist. Ct. App. 1988); State v. Wood, 457 So. 2d 206 (La. Ct. App. 1984).

64. The research underlying this Note did not, of course, turn up only erroneous applications of the good faith exception. For examples of proper applications in the face of difficult fact situations, see United States v. Bowling, 900 F.2d 926 (6th Cir. 1990) (While searching pursuant to a warrant, the executing officers learned that the same premises had just been searched via consent and no evidence had been found. The court ruled that the officers must then have returned to the magistrate for a new finding of probable cause before continuing the warrant search; no good faith exception on these facts.); United States v. Collins, 830 F.2d 145 (9th Cir. 1987) (officers reckless in preparing their affidavit; suppressed); United States v. Reivich, 610 F. Supp. 538, 545 (W.D. Mo. 1985) ("By failing to include the information regarding inducements offered [the informants] for their information [the officer preparing the affidavit] displayed, at the very least, reckless disregard for the truth of said affidavit."); People v. Rivera, 190 Cal. App. 3d 1591, 236 Cal. Rptr. 116 (1987) (affidavit so lacked a showing of probable cause that it was unreasonable for the officers to rely on it).

*United States v. Giancarli*⁶⁵ involved a telephone warrant.⁶⁶ Coleman Ramsey, an agent for the Drug Enforcement Agency (DEA), received information late at night about a cocaine lab in a house in Miami. Wanting to proceed against the illegal lab but unable to meet a magistrate in person, he telephoned the duty magistrate and got authorization to search the house. The magistrate neglected to swear Agent Ramsey before taking down the facts that supported his probable cause determination, but neither man noticed this error. When the agent returned the warrant to the magistrate the next morning, he brought the lack of swearing to the magistrate's attention and was then sworn. The defendant moved to suppress the evidence, alleging that the warrant was improper because the affiant had not sworn to the truth of his report.⁶⁷ The district court denied the suppression motion on two grounds: the *Leon* good faith exception to the exclusionary rule and a rule excusing technical violations of Federal Rule of Criminal Procedure 41.⁶⁸

The court reasoned that because Agent Ramsey "was unaware of the lack of swearing at the time of the warrant application, . . . [h]is reliance upon the facial validity of the warrant was objectively reasonable."⁶⁹ But it is impossible that Ramsey *reasonably* was unaware that he had not been sworn by the magistrate. *Leon* made clear that subjective good faith, an honest belief that one has made no error, is insufficient to satisfy the new exception.⁷⁰ If Agent Ramsey had thought about the question, he would have been aware that he had not been sworn. That he did not think about the question does not validate his reliance on the warrant. Excusing Agent Ramsey's mistake on a good

65. 617 F. Supp. 551 (S.D. Fla. 1985).

66. FED. R. CRIM. P. 41(c)(2) provides for a "Warrant upon oral testimony" to encourage officers to seek authorization for their actions despite a need to proceed rapidly with the search. The officer telephones a magistrate and reads him the contents of the "duplicate original warrant" that the officer has prepared. The magistrate copies down the contents to form the "original warrant." After questioning the officer further, if necessary, the magistrate authorizes the officer to execute the warrant, using the duplicate original. Both of them sign the magistrate's name on their copies of the warrant, and the magistrate notes the exact time of issuance on his original copy.

If possible, the telephone call is to be recorded, otherwise it is to be transcribed by a stenographer or by the magistrate in longhand.

Rule 41(c)(2)(D) states: "When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant." It is this swearing requirement that is at issue in *Giancarli*.

67. *Giancarli*, 617 F. Supp. at 552. In other words, the affiant was not an affiant.

68. *Giancarli*, 617 F. Supp. at 552-54. The alternative basis for denial of suppression was a rule from *United States v. Loyd*, 721 F.2d 331, 333 (11th Cir. 1983), adopted from the Ninth Circuit's rule set out in *United States v. Stefanson*, 648 F.2d 1231 (9th Cir. 1981). See also *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975). This rule is discussed *infra* note 108.

69. *Giancarli*, 617 F. Supp. at 553.

70. *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) ("We emphasize that the standard of reasonableness we adopt is an objective one.").

faith exception basis tells Ramsey he *need not know* he is to be sworn when he "swears out an affidavit." He should know this, because it is part of Rule 41. A "reasonably well-trained police officer"⁷¹ would know and would not be excused if he forgot.

Equally importantly for the *Leon* rule, this is a police error as well as a magisterial one. There is no reason to let the police officer, who should know of the swearing duty, ignore the deficiency just because the magistrate, whose errors are "undeterrable,"⁷² also makes the same mistake. If the cocaine were suppressed, this officer and his future counterparts would understand not just that they must swear out the facts to the magistrate, but that they are to take the procedural rules seriously. Even the limited notion of deterrence approved by Justice White would be served by suppression here, because the message to police officers would be a broad one: procedure is important, and officers are responsible for knowing and following the rules laid down.

The second flaw in the reasoning here is that the court grounded its finding of objectively reasonable reliance on the warrant's "facial validity."⁷³ The duplicate original warrant⁷⁴ that Agent Ramsey made out and executed was, on its face, valid. But to call it facially valid as a way of justifying his reliance on it seems to miss the point of the Supreme Court's exception for facially deficient warrants. That exception seems to mean that when the officer has no excuse not to have known that the warrant was deficient, the officer may not reasonably rely on the warrant. Here, when the officer made out the warrant himself and could not reasonably avoid knowing that he had not sworn out his statement to the magistrate, arguing that the warrant showed no flaw to Agent Ramsey when he read it over adds nothing to his reasonableness. The analogue to his failure to take an oath is a failure to sign his affidavit, which would be a facial deficiency. The court's argument does not support applying the good faith exception here, because the reason behind the facial deficiency exception would be served by suppression.⁷⁵

The second general example is *State v. Wood*,⁷⁶ in which a Louisi-

71. *Leon*, 468 U.S. at 926. The Supreme Court has not set forth in any detail what a reasonably well-trained officer is expected to know. But expecting an officer to understand the general parameters of his authority and details such as that one must be sworn when one "swears out an affidavit" seems entirely reasonable.

72. See *Leon*, 468 U.S. at 916.

73. *Giancarli*, 617 F. Supp. at 553.

74. See *supra* note 66.

75. The importance of this example is that it reveals a fundamental misunderstanding of the good faith exception, not that the technical error involved in this case necessarily merited a reversal of the conviction.

76. 457 So. 2d 206 (La. Ct. App. 1984). For a discussion of *Wood*, see Dripps, *supra* note 12, at 931.

ana court adopted the *Leon* good faith exception under its own constitution. Purporting to apply the *Leon* reasoning, the Louisiana court approved "objectively reasonable" reliance on a warrant based on an affidavit the court admitted came nowhere near compliance with the probable cause standard. The affidavit provided that the affiant believed "various narcotics, marijuana and other drug paraphernalia, and also a 5200 Poulan chain saw with a bow bar" were in defendant's house trailer and barn.⁷⁷ The basis for this belief was that the affiant "received information from two (2) confidential informants that the above listed items have been seen at the above location. These two (2) informants have found [sic] to be very reliable in past investigations."⁷⁸ This affidavit does not come close to establishing either probable cause or a reasonable basis for belief in the existence of probable cause.⁷⁹

The Louisiana court conceded that the affidavit did not establish probable cause, listing the following four reasons. First, nowhere does the affidavit state that either the affiant or the confidential informants ever saw the listed items on the premises indicated. The affidavit "states only that the informants gave information that the items 'were seen' without stating who saw them."⁸⁰ Second, the affidavit established no temporal connection between the purported sightings of the contraband and the filing of the warrant application.⁸¹ Third, the affidavit provided absolutely no basis for determining the reliability of the two confidential informants, contrary to probable cause law even after the decision in *Illinois v. Gates* and its "totality of the circumstances" test.⁸² And finally, "the affidavit provides no facts to connect the chain saw to any criminal activity whatsoever."⁸³

Despite these serious and obvious flaws, the Louisiana court held that the affidavit was "not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"⁸⁴ Therefore, under the *Leon* analysis, the officer's reliance on the warrant was reasonable and the evidence was properly admitted. That the court could not point to a single element of the affidavit that would support any belief in probable cause did not deter it from the conclusion it thought *Leon* condoned.⁸⁵

77. *Wood*, 457 So. 2d at 208.

78. *Wood*, 457 So. 2d at 208.

79. See *Illinois v. Gates*, 462 U.S. 213 (1983); W. LAFAYE, *supra* note 8, at ch. 3 *passim*; see also *supra* note 8.

80. *Wood*, 457 So. 2d at 208.

81. *Wood*, 457 So. 2d at 208.

82. 462 U.S. 213 (1983); see also *supra* note 8.

83. *Wood*, 457 So. 2d at 209.

84. *Wood*, 457 So. 2d at 210.

85. *Wood*, 457 So. 2d at 210. The court attempted to demonstrate that the affidavit was not of the "bare bones" variety disparaged by the *Leon* majority, but can hardly be deemed success-

The Louisiana court's decision, while purporting to apply and adopt *Leon*'s good faith exception to the exclusionary rule, failed to understand the new rule. It appears to have been led astray by the message sent by *Leon* to lower courts: minor violations of the fourth amendment are to be excused via the new good faith exception. Under a proper *Leon* analysis, the question is whether a reasonably well-trained officer could maintain an objectively reasonable belief in the existence of probable cause based on that affidavit. The proper analysis yields a clear "No," and any other answer produces a contorted good faith exception that effectively abolishes the warrant requirement by gutting the probable cause standard. *State v. Wood* is a misapplication of the *Leon* principles.

B. *Lack of Authority To Request or Execute a Warrant*

The following cases involve warrants issued to applicants who had no legal authority to apply for or execute them. The courts admitted the disputed evidence via the good faith exception, holding that the applicants reasonably relied on the magistrates' authorizations. These are results not condoned by *Leon*.

In *United States v. Segovia-Melgar*,⁸⁶ Immigration and Naturalization Service (INS) agents obtained a warrant to search an apartment in Washington, D.C., culminating a six-month investigation into the counterfeiting of green cards and social security cards. Upon searching the apartment, they arrested four defendants for possession of false U.S. identification documents.⁸⁷ Despite the warrant, these agents had no authority to enter or to arrest the defendants.

The Immigration and Nationality Act⁸⁸ gives INS agents "the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens."⁸⁹ INS agents may detain and deport aliens, but these are not criminal law enforcement acts.⁹⁰ Because the warrant in *Segovia-Melgar* authorized a search for evidence of violations of a criminal stat-

ful in that effort. The court pointed to the fact that there was an allegation that contraband was seen at a particular place, and that the informants were alleged to have been "very reliable in past investigations." 457 So. 2d at 210. But neither of those factors takes this affidavit out of the "bare bones" category. See, e.g., *United States v. Barrington*, 806 F.2d 529 (5th Cir. 1986) (warrant for motel room drug search said only that affiant "received information from a confidential informant" who was "known to Captain Phil Soloman and has provided information in the past that has led to arrest and convictions"; because the affidavit did not specify what the information was, it was a bare bones affidavit).

86. 595 F. Supp. 753 (D.D.C. 1984).

87. *Segovia-Melgar*, 595 F. Supp. at 754.

88. 8 U.S.C. §§ 1101-1525 (1988).

89. 8 U.S.C. § 1357(a)(4) (1988).

90. *Segovia-Melgar*, 595 F. Supp. at 755-56 (citing *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1218 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1981)).

ute,⁹¹ the INS agents had no authority to accept and execute it.

The defendants challenged the admission of the forged documents on this basis. While the court admitted the agents had no authority, it excused their conduct and denied the suppression motion based on the *Leon* exception. The court considered the exceptions to the good faith exception⁹² and found none of them satisfied.⁹³ It then stated that there was no "evidence that either the INS agents or the magistrate were aware of any uncertainty as to the authority of the INS agents to search for evidence of violations of the False Identification [and] Crime Control Act."⁹⁴ That finding satisfied the court that the good faith exception applied to this case. Yet the court's statement means that the agents (and the magistrate) were subjectively unaware of their lack of authority, while *Leon* explicitly provides that subjective good faith is not enough.⁹⁵ If the agents should have known the limits of their authority, their actual ignorance will not excuse them.

The question, then, is whether it was reasonable for the INS agents to be unaware that they could not execute process issued for suspected violation of the criminal laws of the United States. From one perspective, the mistake is easily understood. The agents were investigating the forging of alien registration cards, so the violations connected logically with the other duties of the INS. But, especially when they will be intruding on citizens' privacy, government agents should know what the law allows and what it forbids. The logical connection was not enough to prompt Congress to expand the scope of INS authority, and it is unreasonable for the courts to allow the agents to exceed their authority or to be ignorant of the limited circumstances in which they have power to search citizens' homes.

Segovia-Melgar illustrates the impact on the reasoning and reaction of courts when fourth amendment violations occur yet produce probative evidence. The court here called this violation "nonculpable" and reasoned that the deterrent purpose of the exclusionary rule would not be served by suppression.⁹⁶ Yet this case presents clearly deterrable acts by the INS agents. Suppressing the green cards, which were the focus of the lengthy investigation, would drive home to those agents and their compatriots the limits of their authority and the need

91. *Segovia-Melgar*, 595 F. Supp. at 754. The statute is the False Identification and Crime Control Act of 1982, 18 U.S.C. § 1028 (1988). It nowhere refers to aliens, the conduct of whom is the only proper focus of INS agent activity.

92. See *supra* text accompanying notes 50-51.

93. *Segovia-Melgar*, 595 F. Supp. at 757.

94. *Segovia-Melgar*, 595 F. Supp. at 757.

95. *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) ("We emphasize that the standard of reasonableness we adopt is an objective one.").

96. *Segovia-Melgar*, 595 F. Supp. at 758.

for them to know the law regulating their activities.⁹⁷ Invasion of citizen privacy with all the force of government behind the agents is a serious undertaking, and such intrusions based upon insufficient authority threaten the values embedded in the fourth amendment. By misapplying the good faith exception in this way, the court is encouraging officers to remain ignorant of their authority. This was not a "nonculpable" violation, and it was not nondeterrable.

The Ninth Circuit evidenced the same misunderstanding of the *Leon* rule in *United States v. Luk*,⁹⁸ which involved a Department of Commerce agent who, like the INS agents in *Segovia-Melgar*, sought, obtained, and executed a search warrant in ignorance of her lack of authority to carry out any of these steps. At the time she obtained and executed the warrant to search Luk's home for evidence of illegal export activities, agent Doris Koplick was not a "federal law enforcement officer" for the purposes of Federal Rule of Criminal Procedure 41(a), which provides: "A search warrant authorized by this rule may be issued by a federal magistrate . . . upon request of a federal law enforcement officer or an attorney for the government."⁹⁹ The majority in *Luk* found the Rule 41 violation a technical one, excusable under its own rule for such violations.¹⁰⁰ Additionally, the majority stated that even if it found the violation one requiring suppression in a normal case, here the good faith exception saved the evidence. This ruling reveals a misunderstanding of the *Leon* rule.

That Agent Koplick conferred with an Assistant United States Attorney during her investigation and received no warning from either that prosecutor or the magistrate who issued the warrant does not make her reliance reasonable. The dissent argued:

There is a very strong policy basis for limitations upon the authority to request a search warrant. . . . Giving the authority to intrude upon a citizen's home is a solemn and serious act. Where the power of the government is to be marshalled to command entry into a private home — to command, and, if not obeyed, to break, and enter the close — is a heavy exercise of public process; it ought to require . . . strict compliance with the Constitution, with governing statutes and with rules of implementation. *This goes for issuance no less than execution.* Our rules aim to assure us not only that there is a public need to invade, but that execution of that duty is entrusted only to those special government officers who are seasoned, informed about the business of entry, search and

97. See Comment, *supra* note 33, at 1033-49 (study detailing deterrent and educational effect of suppression on Chicago narcotics officers).

98. 859 F.2d 667 (9th Cir. 1988).

99. FED. R. CRIM. P. 41(a).

100. *Luk*, 859 F.2d at 673. The court, reviewing the magistrate's findings *de novo*, decided that "[t]he record does not show either that the actual request for the warrant came from Assistant United States Attorney Rossbacher or that Rossbacher asked the magistrate to issue the warrant to Agent Koplick." *Id.* On the rule for technical violations of Rule 41, see *infra* note 108.

seizure, and who have been explicitly designated by the Attorney General of the United States.¹⁰¹

The majority claimed that Judge Poole, dissenting, had missed the issue: "Even if Koplick should have known that she had no authority to request the search warrant, it is not clear that she should be presumed to have known that [the Assistant United States Attorney's] directions and his actions did not satisfy the Rule 41 request requirement."¹⁰² But if she should have known about her lack of authority to request a warrant, the prosecutor's assurances and the magistrate's inattention do not excuse her ignorance. She showed good faith, certainly, but that is not enough under *Leon*. It seems reasonable for her to rely on the magistrate for close rulings on the difficult question of probable cause, and the good faith exception exists to sanction precisely that type of reliance. The question of Koplick's statutory authority to request a warrant, however, is different. It has a clear, unambiguous answer that relates to the contours of Agent Koplick's own job. It is thoroughly reasonable to expect her to know the limits of her own authority and therefore thoroughly unreasonable to excuse her ignorance in this case.

Justice White, in *Leon*, wrote that "[i]t is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it. . . ."¹⁰³ Koplick's mistake tainted the warrant, so the proper execution will not save it. Suppression in such a case will deter such errors in the future.

*United States v. Freeman*¹⁰⁴ is the most recent example of misapplication of the good faith exception to warrants issued to officers ineligible to accept them, and it displays the same misunderstanding of the good faith exception seen in *Segovia-Melgar* and *Luk*. The situation in *Freeman* was as follows. Thomas Ley, a special agent with the Missouri Department of Revenue but not a "peace officer" within the meaning of the Missouri statutes authorizing applications for search warrants,¹⁰⁵ applied for, received, and executed a warrant to search

101. *Luk*, 859 F.2d at 680-81 (Poole, J., dissenting) (emphasis added); see also *United States v. Whiting*, 781 F.2d 692, 698 (9th Cir. 1986) ("*Leon* does not apply to search warrants issued to people who are not permitted to obtain such warrants").

102. *Luk*, 859 F.2d at 676. Given the majority's finding that there was *no evidence* to support the magistrate's finding that the Assistant United States Attorney (AUSA) requested the warrant, its later argument that Agent Koplick reasonably could assume that the AUSA's actions satisfied the Rule 41 requirements does not follow. That the AUSA thought the warrant should issue, and should issue to Koplick, cannot provide Koplick a basis for a reasonable belief that Rule 41 was satisfied.

103. *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984).

104. 897 F.2d 346 (8th Cir. 1990).

105. See Mo. Rev. Stat. §§ 542.261, .276.1 (1986).

Section 542.276.1 reads: "Any peace officer or prosecuting attorney may make application under section 542.271 for the issuance of a search warrant."

Section 542.261 defines "peace officer" as follows: "As used in sections 542.261 to 542.296

the defendant's premises. He found license plates that had been illegally altered and stolen car parts. Agent Ley did not inform the state court judge reviewing the warrant application that he was not a "peace officer," and the form he signed stated that he was such an officer.¹⁰⁶ At the ensuing suppression hearing, Ley's testimony was ambiguous on the question whether he had known of the extent of his authority to apply for and execute a search warrant.¹⁰⁷

The Eighth Circuit, after some extended preliminary observations,¹⁰⁸ concluded that "the magistrate found that Ley, although unauthorized to apply for and execute a search warrant, carried out the application and execution in good faith, believing he possessed authority to do so. This finding is not clearly erroneous."¹⁰⁹ While that factual finding likely was not "clearly erroneous," the test applied by the magistrate is obviously one of subjective good faith and therefore the ruling on the good faith exception is flawed. That Agent Ley thought he had authority to apply for a warrant is insufficient under *Leon*, and an officer may reasonably be expected to know the contours of his job authorization. By sanctioning the faulty analysis of the magistrate and district court, the Eighth Circuit in *Freeman* misapplied the good faith exception.

and section 542.301, the term 'peace officer' means a police officer, member of the highway patrol to the extent otherwise permitted by law to conduct searches, sheriff or deputy sheriff."

106. As noted in *Freeman*, 897 F.2d at 347 n.3 (quoting Appellant's Appendix at 7):

[T]he return and inventory form completed by Ley read in part: "I, Thomas F. Ley, being a peace officer within and for the aforesaid County, to-wit: St. Charles, do hereby make return to the above and within warrant as follows"

107. His testimony was: "I was not familiar. I didn't know that I could carry out the function of not making a return on a search warrant. That's all I can testify to." *Freeman*, 897 F.2d at 347 (quoting Motion Hearing Transcript at 9).

108. The central ground for affirming the defendant's conviction was not the application of the good faith exception to the exclusionary rule, but rather the invocation of another doctrine that denies the significance of minor procedural errors in the application, issuance, or execution of search warrants.

This doctrine, based on *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975), is sometimes called the fundamental/nonfundamental test. See *United States v. Luk*, 859 F.2d 667, 671 (9th Cir. 1988) ("Only a 'fundamental' violation of [FED. R. CRIM. P.] 41 requires automatic suppression, and a violation is 'fundamental' only where it, in effect, renders the search unconstitutional under traditional fourth amendment standards. Violations of Rule 41 which do not arise to constitutional error are classified as 'non-fundamental.'"); *Freeman*, 897 F.2d at 350. Where a procedural or technical violation is deemed "non-fundamental," suppression is warranted only when "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abusive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *Burke*, 517 F.2d at 386-87 (footnote omitted).

The *Freeman* court, finding the lack of authority a "nonfundamental" error, applied the *Burke* test and ruled that the defendant had suffered neither prejudice nor a constitutional violation. Therefore the evidence was not suppressed. 897 F.2d at 350. This analysis is not universally accepted, see *United States v. Shorter*, 600 F.2d 585, 588-89 (6th Cir. 1970); *United States v. Whiting*, 781 F.2d 692, 698 (9th Cir. 1986), but regardless of the alternative grounds offered by the court in *Freeman*, the analytical error discussed in the text to follow remains.

109. *Freeman*, 897 F.2d at 350.

These cases¹¹⁰ involve situations where the officers requesting the warrants had no authority to do so. The warrants issued to government officials whom the democratic process had not picked out as eligible to invade citizens' privacy. That is a result not sanctioned by the *Leon* exception.

C. Overbroad Warrants

This section considers a type of application mistake that is increasingly uncommon, but nevertheless instructive to examine. Six federal circuits have considered whether the good faith exception should apply to a warrant that is overbroad on its face. Three have indicated that it can be reasonable for an officer to rely on such a warrant. The balance of the circuits presented with the question have ruled that such reliance is not reasonable. This section argues that the latter reading of *Leon* is correct.

The Eleventh Circuit's decision in *United States v. Accardo*¹¹¹ was the first appellate decision approving reliance on an overbroad warrant. The court reversed a 1982 suppression order that had been based on the overbreadth of a warrant authorizing a search for "all corporate records," finding the officer's reliance reasonable under the circumstances shown in the record.¹¹² The case was, however, remanded for a hearing on the good faith question.¹¹³ A more recent Second Circuit decision, *United States v. Buck*,¹¹⁴ held that a warrant it found overbroad was saved by the good faith exception for two reasons. First, the record showed a good deal of effort by the officers to comply with the fourth amendment.¹¹⁵ This fact, showing subjective good faith, combined with what the court called the "unsettled" condition of the particularity law in the circuit when the events occurred, convinced the court that it was reasonable for the officers to rely on the warrant authorizing them "to seize any papers, things or property of any kind relating to previously described crime."¹¹⁶ The third example is an Eighth Circuit case, *United States v. Faul*.¹¹⁷ The defendant in *Faul* claimed that the warrant involved was overbroad, and the court disagreed. But in a footnote it stated that "even if the warrant were invalid," the good faith exception would save the evidence.¹¹⁸

110. *United States v. Segovia-Melgar*, 595 F. Supp. 753 (D.D.C. 1984); *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988); and *United States v. Freeman*, 897 F.2d 346 (8th Cir. 1990); see also *United States v. Whiting*, 781 F.2d 692 (9th Cir. 1986).

111. 749 F.2d 1477 (11th Cir. 1985), cert. denied, 474 U.S. 949 (1985).

112. *Accardo*, 749 F.2d at 1481.

113. *Accardo*, 749 F.2d at 1481.

114. 813 F.2d 588 (2d Cir. 1987).

115. *Buck*, 813 F.2d at 592-93.

116. *Buck*, 813 F.2d at 590.

117. 748 F.2d 1204 (8th Cir. 1984).

118. *Faul*, 748 F.2d at 1220 n.11.

These interpretations of *Leon* are important for their acceptance of the idea that officers *could* rely on an overbroad warrant.¹¹⁹ Despite the Second Circuit's warning in *Buck* that police officers would no longer be able to rely on warrants as overbroad as the one there in question, it did not rule out finding reliance on other warrants less obviously overbroad to be reasonable.

These rulings seem wrong. Because one of the exceptions to the good faith exception concerns warrants that are facially deficient, a warrant that is overbroad cannot be a basis for reasonable reliance.¹²⁰ Officers must read the warrant prior to executing it, and if they review one that authorizes a general search for "any things relating to previously described crimes," there is no reason to let them carry out that search. It is not unreasonable to expect the police to know that the fourth amendment requires warrants particularly to describe the place to be searched and the things to be seized. Suppression in these cases will impress on the police the importance of reading the warrant and considering how broad their authorization actually is. Neither of these actions require any burdensome amount of time and, as a matter of sound policy, both should be done regularly.

In contrast to the rulings in the above cases, three other circuits have found that a "reasonably well-trained officer should know that a warrant must provide guidelines for determining what evidence may be seized."¹²¹ The First, Ninth, and Tenth Circuits have each agreed on the rule that reliance on facially overbroad warrants is not reasonable.¹²² The rule is limited somewhat by the efforts of the police to get reassurance from the issuing magistrate about the technical sufficiency of the warrant. If, as in *Massachusetts v. Sheppard*,¹²³ the officer questions the magistrate about the propriety of the warrant as to a specific matter, it will be reasonable for her to rely on the warrant, given the Supreme Court's statement that "[i]n the ordinary case, an officer cannot be expected to question the magistrate's . . . judgment that the form of the warrant is technically sufficient."¹²⁴ But as the Ninth Circuit properly noted in *United States v. Spilotro*, when "a more precise

119. These cases may have little precedential value even in their own circuits, for the comments in *Faul* are mere *dicta*. *Accardo* resulted in a remand for further fact finding, and *Buck* announced that after publication of that decision, "police officers may no longer invoke the reasonable-reliance exception to the exclusionary rule when they attempt to introduce as evidence the fruits of searches undertaken on the basis of warrants containing only a catch-all description of the property to be seized." 813 F.2d at 593 n.2. Yet, as noted in the text, none shied from the notion that overbroad warrants could reasonably be relied upon.

120. *United States v. Leon*, 468 U.S. 897, 923 (1984).

121. *United States v. Leary*, 846 F.2d 592, 609 (10th Cir. 1988).

122. See *United States v. Fucillo*, 808 F.2d 173 (1st Cir. 1987); *United States v. Spilotro*, 800 F.2d 959 (9th Cir. 1986); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985); *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988).

123. 468 U.S. 981 (1984). See *supra* text accompanying notes 52-58 (discussing *Sheppard*).

124. *Leon*, 468 U.S. at 921.

description of the items sought was possible,"¹²⁵ the officer may not rely on the general warrant.

The trend in these cases clearly is toward acceptance of the view that facially overbroad warrants may not be saved by the good faith exception.¹²⁶ That is the proper direction, because it is the reading of *Leon* and *Sheppard* that is most faithful to the stated purposes of the rule. It avoids the weakness of the opposite position, which relies too much on the quote in *Leon* from Chief Justice Burger's concurrence in *Stone v. Powell*: "Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."¹²⁷ A fuller examination of the *Leon* opinion reveals the active role the Court expects police officers to play, before and after the warrant issues.¹²⁸

D. *The Subjective Knowledge of the Executing Officers*

The fourth amendment requires that search warrants "particularly describe[]" what is to be seized and where it is to be found. The following cases treat the question whether an officer may save, via the good faith exception, the validity of a warrant that is insufficiently particular on its face by her independent knowledge of the intended scope of the warrant.

In *United States v. Kepner*,¹²⁹ the Third Circuit held that when an officer's affidavit contains more particular information about what evidence should be seized than the warrant does, the fact that the affiant executes the warrant will save it from failing for overbreadth. *Kepner* involved an investigation into the payment of benefits to a union officer in violation of the Taft-Hartley Act.¹³⁰ The affidavit in support of the application for a warrant to search the defendant's apartment related the connection between what was likely to be found there and the suspected violations. The application form, however, which was transcribed onto the warrant, neglected to establish that connection. The

125. *Spilotro*, 800 F.2d at 964. The warrant contained no specific identification of the alleged criminal activities in connection with which the items were sought. The only reference was to evidence showing violation of any one of thirteen statutes, some of which were general.

126. *But see* *United States v. Burke*, 718 F. Supp. 1130 (S.D.N.Y. 1989). *Burke* admitted evidence obtained pursuant to a warrant that the Ninth Circuit found overbroad (*see* *Center Art Galleries — Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989)), reasoning that since the Second Circuit in its 1987 decision in *United States v. Buck*, 813 F.2d 558 (2d Cir. 1987) ruled that the particularity law in the Circuit was "ambiguous" up to that point, the warrants issued in 1985 were still protected by that ruling.

127. *Stone v. Powell*, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring), *quoted in* *United States v. Leon*, 468 U.S. 897, 921 (1984).

128. *Leon*, 468 U.S. at 922-23; *see also* Goldstein, *supra* note 44, at 1183-87 (discussing shortcomings of magistrates in many jurisdictions).

129. 843 F.2d 755 (3d Cir. 1988).

130. *Kepner*, 843 F.2d at 756-57. The Taft-Hartley Act is codified at 29 U.S.C. §§ 151-187 (1988). *Kepner* involved a violation of 29 U.S.C. § 186.

affiant, Agent Chance, led the team executing the warrant, and he carefully controlled the execution of the search to keep it within the narrower scope that he understood the affidavit to have established.¹³¹ In finding that it would still admit the evidence, despite the possible overbreadth of the warrant, the court relied on the knowledge of Agent Chance to show that the warrant in fact did not authorize too broad a search.¹³² The court concluded that, "since . . . the search was conducted with great care so as not to exceed the perceived scope of the warrant, there is no basis for a finding of bad faith in the execution of the warrant."¹³³ Using this subjective knowledge of the affiant to save a warrant misapplies the *Leon* rule because the exception is only for objectively reasonable reliance.

As a contrast that will help make this point, consider *United States v. Fuccillo*¹³⁴ and *Russell v. United States*.¹³⁵ The First Circuit in *Fuccillo* ruled that officers who knew that a warrant could be made more particular than it had been could not reasonably rely on that warrant. In applying for warrants to search warehouses and retail outlets for stolen women's clothing, the affiant in *Fuccillo* failed to inform the magistrate of factors known to him which would have properly limited his search if incorporated into the warrant. Instead the officers executed a facially overbroad warrant and seized substantial quantities of material for which they had presented no probable cause in their warrant application.¹³⁶ *Russell*, on the other hand, approved reliance by the executing officer on his independent knowledge of the scope of a warrant to limit his search. *Russell* involved a mistake in issuing the warrant, so that the officer, upon executing it, discovered that the detailed description of the items to be seized that was in only one part of the affidavit was not attached to the warrant as intended by the magistrate. The officer, however, knew the intended scope of the warrant and confined his search to the items actually mentioned in that part of

131. *Kepner*, 843 F.2d at 757. The affidavit read: "24. Further, I have probable cause to believe that such search will result in the seizure of personal items of Kepner such as clothing, documents, records, diaries, and correspondence that establish his use and control of the condominium unit as well as his illegal receipt of the prohibited benefits." 843 F.2d at 757. "The accompanying application form, however, used somewhat broader language, referring merely to the 'documents, records and personal effects of Thomas Kepner, Mary Brown, and Robert Brown.'" 843 F.2d at 757. The warrant contained the latter, broad language.

132. The court held that the warrant was sufficiently particular with respect to one defendant and did not decide the question with respect to the other since the government had conceded overbreadth there. *Kepner*, 843 F.2d at 762-63. But the court also assumed that the warrant had been overbroad, as its conclusion shows. "Whether because the warrant was valid, or because it was executed in good faith, allowing the testimony in this case is not likely to encourage future misconduct by the police." 843 F.2d at 764.

133. *Kepner*, 843 F.2d at 764.

134. 808 F.2d 173 (1st Cir. 1987).

135. 649 F. Supp. 1402 (N.D. Miss. 1986).

136. *Fuccillo*, 808 F.2d at 176-77.

the affidavit.¹³⁷ In admitting the evidence via the good faith exception, the court was obviously impressed with the subjective good faith of the officer.¹³⁸

The situation in *Kepner* is analogous to those in *Fuccillo* and *Russell*. In each, the courts considered what effect an officer's knowledge of details not present in the warrant would have on the validity of that warrant. The question is whether *Leon* condones admitting evidence obtained under a warrant when that warrant itself was overbroad but the affiant knew what the magistrate had intended.

One could argue that the answer depends on the results of the case, as possibly the results in *Kepner* and *Fuccillo* turned on the fact that in *Kepner* the affiant oversaw the execution and in *Fuccillo* most of the executing officers lacked the limiting knowledge of the affiant and so seized irrelevant and unintended evidence.¹³⁹ But for two reasons, the subjective knowledge of the affiant should not cure a warrant defect even when the affiant is the executing officer.

First, *Leon* emphasizes the objective nature of the reasonable reliance test. Whether the officer thought the warrant complied with the fourth amendment is not the correct inquiry under this rule. Rather, the question is whether it was understandable for a reasonably well-trained officer to think that these actions comported with the fourth amendment.¹⁴⁰ Under this analysis, the thoughts of the executing officer (absent bad faith)¹⁴¹ should be irrelevant to the determination of what it was reasonable for an officer to do. Therefore the inquiry that validated the searches in *Kepner* and *Russell* should have stopped once a lack of bad faith was found.

Second, if the rule is interpreted to approve reliance on the subjective knowledge of the executing officers, it will foster the creation of warrants for which probable cause does not exist. In all three of these cases, the warrants on their faces would not have guided an agent who lacked the affiants' particular knowledge. All of these warrants, not just that in *Fuccillo*, easily could have been executed by officers other than the affiants,¹⁴² and invasions of protected rights such as those in *Fuccillo* could have occurred. On this point, the Supreme Court has stated that the particularity requirement "makes general searches under [warrants] impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, noth-

137. *Russell*, 649 F. Supp. at 1404.

138. *Russell*, 649 F. Supp. at 1408.

139. See *Kepner*, 843 F.2d at 757; *Fuccillo*, 634 F. Supp. at 362-63.

140. *United States v. Leon*, 468 U.S. 897, 926 (1984). See *United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988) ("An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge."); *United States v. Burke*, 613 F. Supp. 576 (N.D. Ga. 1985).

141. See Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982).

142. See *infra* note 149 (discussion of warrants executed by officers other than the affiant).

ing is left to the discretion of the officer executing the warrant.”¹⁴³ The situations in both *Kepner* and *Russell* left substantial discretion to the executing officers, and for that reason a rule that fosters creation of invalid warrants is an imprudent one.

Certainly courts could adopt the rule noted above, in which the search is valid if the executing officer properly curtails his search based on his knowledge of its intended scope, and invalid if the search exceeds the intended bounds. But such a rule would lead, indirectly but with certainty, to the creation of more invalid warrants than the rule favored here. If officers knew that overbroad warrants would never provide evidence with which to get a conviction, they would not execute warrants that they knew or suspected to be overbroad. Instead, they would return to the magistrate for a properly drawn version. With the rule favored here, fewer overbroad warrants would be executed partly because fewer overbroad warrants would ever be issued. If overbroad warrants were simply not issued, then they could not be executed by officers lacking the limiting instructions meant to be included on the face of the warrants. Magistrates who were corrected by officers returning with overbroad warrants would learn in the process and would less often approve overbroad warrants in the future. And officers who received warrants they suspected were overbroad would, given the exclusionary sanction as a deterrent, focus on the scope of the authorization given on the face of the warrant.

Because admitting the fruits of overbroad warrants if properly executed would lead to more fourth amendment violations than otherwise, and because suppression in these cases would teach officers a simple rule — they must have the proper authorization and limitation in the warrant or attached to it — a rule against the validation of facially overbroad warrants by the subjective limiting knowledge of the executing officers is the better course. This consideration, combined with *Leon*'s teaching that a subjective inquiry is insufficient to provide the “good faith” needed, leads to the conclusion that suppression is appropriate in these cases.

The cases in this section reveal an error in interpretation of *United States v. Leon*¹⁴⁴ in that lower courts are impressed with the subjective good faith of the executing officers. *Leon* instructs the courts that this subjective good faith is irrelevant.¹⁴⁵ The courts succumb to this error both because the obvious good faith of the officers seems to satisfy the “good faith” exception and because the effects of the violations seem so minor compared to the costs of excluding the evidence.

143. *Marron v. United States*, 275 U.S. 192, 196 (1927), quoted in *United States v. Fuccillo*, 634 F. Supp. 358, 360 (D. Mass. 1986).

144. 468 U.S. 897 (1984).

145. *Leon*, 468 U.S. at 919 n.20.

E. *Facially Deficient Warrants*

One of the exceptions to the good faith exception is for warrants "so facially deficient — i.e., in failing to particularize the place to be searched or the things to be seized — that the executing officers cannot reasonably presume it to be valid."¹⁴⁶ In the following cases, courts decided that evidence obtained pursuant to facially deficient warrants would be admissible via the *Leon* good faith exception.

The appeal in *United States v. Bonner*¹⁴⁷ involved a warrant to search a residence for evidence of drug use. The magistrate found probable cause and issued a warrant that described the property and residence in some detail. Having sent the officers off with the warrant, however, the magistrate realized he had omitted the address of the premises to be searched. He issued a second warrant with the address included and sent it to the DEA agents who were waiting for it at the search site, having halted their search upon hearing from the magistrate that they needed a different warrant.¹⁴⁸ One issue on appeal from the convictions for amphetamine manufacture was the propriety of admitting into evidence the fruits of the search under the first warrant. The panel split on the question of the validity of the warrant without the address,¹⁴⁹ but agreed that in any event the evidence was saved by the good faith exception. While the majority noted the application of the *Leon* rule in fairly cursory fashion, the dissent followed the proper reasoning almost to its correct conclusion.

The dissenting judge first observed that since the executing officers could not, from the face of the first warrant, have "deduce[d] with reasonable certainty even the state or municipality in which the premises authorized to be searched were located, . . ."¹⁵⁰ the first warrant seemed to fall within the exception to the good faith exception for facially deficient warrants. Despite that exception in *Leon*,¹⁵¹ however, the dissenting judge in *Bonner* decided that as the facts in *Leon's*

146. *Leon*, 468 U.S. at 923; see also *supra* text accompanying notes 50-51.

147. 808 F.2d 864 (1st Cir. 1986).

148. *Bonner*, 808 F.2d at 865-66.

149. Judges Torruella and Bownes ruled that the warrant's particular description of the premises to be searched, complete with "Bonner" on the mailbox in front of the house, and the familiarity of the executing officers with the premises from their surveillance efforts on the case, provided sufficient particularity under the fourth amendment. *Bonner*, 808 F.2d at 866-67. Judge Carter, in dissent, correctly argued that the warrant was insufficiently particular:

A magistrate's assumptions, if we may assume that they were in fact made, as to the identity of the officers who will execute a warrant or as to what particular knowledge such officers may have as to the identity of the property intended by the officer applying for the warrant to be searched is not in logic or law an adequate substitute for the safeguard of a facially sufficient warrant. In pragmatic terms, such assumptions before or after the fact of execution of the warrant are lame and ineffective safeguards.

808 F.2d at 870 (Carter, J., dissenting); see also *In re Lafayette Academy, Inc.* 610 F.2d 1, 4-5 (1st Cir. 1979).

150. *Bonner*, 808 F.2d at 870 (Carter, J., dissenting).

151. *United States v. Leon*, 468 U.S. 897, 923 (1984).

companion case, *Massachusetts v. Sheppard*,¹⁵² were "nearly identical"¹⁵³ to the operative facts in *Bonner*, the application of the good faith exception in *Sheppard* governed the case before him.

Contrary to the dissent's conclusion in *Bonner*, the facts from *Sheppard* are not "nearly identical" with those in *Bonner*. In *Sheppard*, the officer applying for the warrant pointed out the facial invalidity problems to the issuing judge and was assured, after changes had been made to the warrant form, that none of those particularity problems remained.¹⁵⁴ In contrast, the officers in *Bonner* did not point out to the issuing magistrate any specific flaws in their warrant application and received no specific assurances from the magistrate about the sufficiency of the warrant despite any perceived problems. Certainly the fact that the magistrate issued the warrant was a general assurance that the officers had a valid instrument. But *Leon* expressly held that the mere fact of issuance of a warrant would not justify reliance by the executing officers.¹⁵⁵ It is the purpose of the facial deficiency exception-to-the-exception to force some assessment of the sufficiency of the warrant by the executing officers even after the warrant has been approved by a magistrate. In *Sheppard*, even when the executing officer re-read the warrant after it had been signed by the magistrate and found some remaining references to "controlled substances," he reasonably could have assumed that the warrant as modified by the magistrate was sufficient under the fourth amendment because exactly those fears had been addressed by the magistrate when the officer brought them to his attention at the application stage. In *Bonner*, the officers should have read the warrant, and if they had done so they would have realized that it listed no address. An analogy to *Sheppard* would lie only if the officers in *Bonner* had approached the magistrate with a warrant form they knew had no address for the premises to be searched, asked the magistrate if such a warrant was sufficient under the fourth amendment, and received specific assurances that indeed the warrant was proper.¹⁵⁶ The facts of *Bonner* are different, and do not come within the good faith exception to the exclusionary rule.

Indeed, the reading of *Sheppard* found in *Bonner* would eliminate all meaning for the facial deficiency exception to the *Leon* rule. If officers can rely in "good faith" on warrants that are facially invalid merely because the warrants have been issued by a magistrate with

152. 468 U.S. 981 (1984). See *supra* text accompanying notes 52-58.

153. *Bonner*, 808 F.2d at 870 (Carter, J., dissenting).

154. *Sheppard*, 468 U.S. at 986.

155. *Leon*, 468 U.S. at 922-23.

156. Indeed, even on those facts the warrant would be so facially invalid that no reasonably well-trained officer should be able to rely on it, regardless of any assurances offered by any magistrate.

facial errors intact, then the requirement that the warrant not be "facially deficient,"¹⁵⁷ set forth by the *Leon* majority, would be read out of the rule. It is neither necessary nor prudent to read *Sheppard* to mandate the result accepted by *Bonner*, and therefore the evidence in *Bonner* should have been suppressed.

A case similar to *Bonner* is *State v. Kleinberg*.¹⁵⁸ In *Kleinberg*, the Nebraska Supreme Court admitted via the good faith exception evidence seized pursuant to a facially deficient warrant, basing its decision primarily on affidavits from all the executing officers assuring the court that *none of them had read the warrant* before they executed it and found the incriminating evidence at issue in the case. The warrant was meant to authorize the search of the defendant's car, but on its face it authorized only a search of the defendant himself. The officers searched the car, found marijuana, and arrested the defendant. At the suppression hearing, the officers all submitted affidavits stating that they had not read the warrant before searching the car and therefore did not know of the error. The Nebraska Supreme Court found this a sufficient showing to satisfy the *Leon* good faith test, and admitted the evidence.

The court here confused subjective with objective good faith, as this Note has shown other courts have done. Moreover, the Nebraska Supreme Court ignored the clear import of the facial deficiency exception-to-the-exception. Given such a rule, the officers must read each warrant before executing it; otherwise they will not be able to catch the facially deficient warrants before the illegal searches have been carried out. In *Kleinberg*, the court was faced with explicit assurances that none of the officers had read the warrant before they executed it, and to rule as that court did simply ignores and hence destroys the protections the Supreme Court meant to leave intact even after *Leon*.¹⁵⁹

This Part has presented examples of the types of errors found in a search of applications of the *Leon* good faith exception. While not all reveal errors that resulted in admission of evidence that would not otherwise have been admitted, most of the errors did have that effect. The others were noted to show the difficulties the rule poses for the state and lower federal courts. The next Part offers an explanation of the sources of these errors, and suggests possible remedial steps for the future.

157. *Leon*, 468 U.S. at 923.

158. 228 Neb. 128, 421 N.W.2d 450 (1988).

159. 468 U.S. 897 (1984).

III. THE WHY AND WHEREFORE

*You will want cause and effect. All right.*¹⁶⁰

— Thomas Pynchon

As illustrated in Part II, state and lower federal courts have often misapplied the good faith exception to the exclusionary rule. This Part argues that the high incidence of misapplication can be attributed, in large part, to the combined effect of three factors: the general understanding of the significance of the *Leon* decision, the label attached to the exclusionary rule exception, and the intricacies of the revised rule. It concludes that achieving the goals of the exclusionary rule and supporting the values underlying the fourth amendment requires at least some revision and clarification of the *Leon* rule and more likely its outright rejection.

United States v. Leon pierced what had been thought to be a fixed barrier: it admitted some fruits of illegal searches into evidence in the trial of the defendant whose fourth amendment rights had been violated by the search. The flood of commentators did not rail against the precise degree of the change in the rule so much as they mourned the passing of the inviolability of what had been its essence.¹⁶¹ The essence of *Leon* is its loosening of the exclusionary rule's strictures *to some degree at the center of its application*; how much looser is a detail swamped by the significance of the central message: a broken barrier in fourth amendment jurisprudence.

This emphasis on the fact of the breakdown of an important barrier rather than on the amount of barrier left intact is evident in Justice Brennan's dissent in *Leon*.¹⁶²

It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the *pièce de résistance* of the Court's past efforts [to demolish the exclusionary rule] cannot be doubted, for today the Court sanctions the use in the prosecution's case-in-chief of illegally obtained evidence against the individual whose rights have been violated — a result that had previously been thought to be foreclosed.¹⁶³

Justice Brennan is emphasizing the innovation *Leon* is to fourth amendment doctrine, and for all the majority's assurances that the result follows from precedent and the narrow purpose of the exclusionary rule, those members of the Court recognized that the central significance of the decision was this fundamental shift of which the

160. T. PYNCHON, *GRAVITY'S RAINBOW* 663 (1973).

161. See *Prepared Remarks of Yale Kamisar*, *supra* note 7, at 13-16, 20.7 *et seq.*; Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287 (1985); LaFave, *supra* note 7, at 910.

162. Justice Brennan's dissent is to the Court's decisions in the companion cases of *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

163. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

dissenters complained.¹⁶⁴

Most commentators also saw *Leon*'s central importance in this way. Professor Wayne LaFave noted that "such earlier cases as [*Callandra* and *Stone*] . . . were all grounded in the postulate that the exclusionary rule, applicable in a criminal prosecution when illegally seized evidence is offered, *need not also be invoked* in certain other contexts where no significant *additional* increment of deterrence is deemed likely."¹⁶⁵ This general understanding of the *Leon* decision means that when courts, faced with briefs arguing that *Leon* applies to the present case, consider what *Leon* did, they think about a relaxation of the exclusionary rule standards, and only afterwards about the details of the new rule. This reaction is natural, because it is a true description of *Leon*'s import. And it is similar to the general identifications judges and lawyers make with many important cases. But with *Leon* the popular understanding combined with other factors to increase the incidence of application error, fostering the notion that *Leon* meant "minor" fourth amendment violations were not cause for suppression, rather than that only *certain* minor fourth amendment violations were not cause for suppression.

The second factor adding to the incidence of misapplication is the label attached to the new exception. Prior to the *Leon* case, the idea of an exception for good faith efforts by police officers to comply with the dictates of the fourth amendment had often been suggested. Justice White, dissenting in *Stone v. Powell*¹⁶⁶ in 1976, argued for a "good faith" exception of a type broader than that adopted eight years later in *Leon*.¹⁶⁷ Picking up on this hint, some commentators started writing about the propriety of a "good faith" exception, not always distinguishing between the reasonable reliance type of exception eventually adopted in *Leon* and one that would also excuse an officer's mistaken subjective good faith, and not always confining the exception they advocated to the search warrant context.¹⁶⁸ Common to all discussions of the proposed exception was the term "good faith," a label with unfortunate connotations in light of the version adopted in *Leon*. *Webster's Third New International Dictionary* defines "good faith" as "a state of mind indicating honesty and lawfulness of purpose."¹⁶⁹ That

164. See *Leon*, 468 U.S. at 906.

165. 1 W. LAFAVE, *supra* note 8, § 1.3(b), at 50 (first emphasis added). For other similar observations about the significance of the *Leon* decision, see Mertens & Wasserstrom, *supra* note 7, at 90.

166. 428 U.S. 465 (1976).

167. White suggested an exception broader than one just for search warrants. *Stone*, 428 U.S. at 538 (White, J., dissenting).

168. See Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 2 CRIM. JUS. ETHICS 35, 38-39 (Summer/Fall 1982); Israel, *supra* note 14, at 1408-13; Schroeder, *Detering Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1981); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736 (1972).

169. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

is a subjective notion, and therefore the good faith label is inappropriate for an exception intended to validate only objectively reasonable reliance on a search warrant.

The dynamic that produced the *Leon* decision included the speculation prior to 1984 about the suggested exception, and all of that discussion called the proposal a "good faith" exception. So when the Court finally sanctioned a version of that idea, the terminology was almost unavoidable. The government's brief in *Leon* acknowledged the danger of the subjective connotations of "good faith," explicitly disavowing that term and substituting "reasonable mistake" instead.¹⁷⁰ But Justice White's majority opinion, while taking great pains to emphasize that this exception would be available only for "objectively reasonable"¹⁷¹ reliance on a search warrant, nevertheless did use the "good faith" language. Even if the opinion had not contained that term, even if it had stated, "This is not the long-awaited good faith exception, this is something fundamentally different, a reasonable reliance¹⁷² exception," the good faith label would still have attached itself to the case in the minds of some of Justice White's audience. But outright disavowal of the good faith terminology and exclusive use of an alternative label in the opinion would have had a significant effect on the way in which state and lower federal courts would understand the rule. The label is not only misleading, it points careless courts in the more damaging of wrong directions. It encourages them to think of the exception as one for well-meaning, honest police officers, rather than for well-informed and thinking officers who cannot be expected to question a magistrate's judgment on fine points of law.

The third factor that has fostered misapplication is the intricacy of the exclusionary rule now that the reasonable reliance exception has been carved out. The "old" exclusionary rule read, essentially, "if the evidence is tainted,¹⁷³ then suppress it from use in the prosecution's case-in-chief." With the *Leon* exception, the rule became, "if the evidence is tainted, then suppress it from use in the prosecution's case-in-chief *only if* doing so will deter police misconduct." This change is more significant than it at first seems to be. It introduces new uncertainty about when the rule will apply, producing an excess of discretionary leeway in a rule meant to constrain decisionmakers in the criminal justice system. To discern the significance of this change, we must consider the workings of the old and new rules as they affect lower court decisions.

170. Brief for the United States at 53-54 n.19, *United States v. Leon*, 468 U.S. 897 (1984) (No. 82-1771), *quoted in Prepared Remarks of Yale Kamisar, supra* note 7, at 20.8.

171. *Leon*, 468 U.S. at 926.

172. The "reasonable reliance" term is the most suitable of the available alternatives. It has been used already by some courts. *See, e.g., United States v. Buck*, 813 F.2d 588, 592 (2d Cir. 1987).

173. "Tainted" is shorthand for "seized in violation of the fourth amendment."

Rules seemingly can be of two types: firm, fixed dictates that inexorably determine outcomes, or mild "rules of thumb" that serve as signposts to normally preferred results.¹⁷⁴ But a rule of thumb is, in an important sense, not a rule. To follow a rule is to do an act because of the rule; one acts not because, in this instance, doing what the rule says carries out the purpose of the rule, but just because the rule says to do so. As Professor Frederick Schauer explains:

What makes formalism formal is this very feature: the fact that taking rules seriously involves taking their mandates as reasons for decision independent of the reasons for decision lying *behind* the rule. If it were otherwise, the set of reasons considered by a decisionmaker would be congruent with the set of reasons behind the rule, and the rule would add nothing to the calculus. Rules therefore supply reasons for action *qua* rules. . . . Refusal to abstract the rule from its reasons is not to have rules.¹⁷⁵

Most rule application looks to the aims of the rule as a guide for when it should be used, but this process gives the rule-applier an added level of discretion over how the rule will work in practice. Often the very purpose of having a rule is to control the decisionmaker addressed by the rule, to keep him from reconsidering questions already settled by the rulemaking body; and therefore a rule that by its very nature is loose and unconstraining is ill-suited to the control function it is meant to serve.¹⁷⁶ According to Professor Schauer:

[W]hat most arguments for rulelessness share is a focus on disabling certain classes of decisionmakers from making certain kinds of decisions.

. . . [T]hose who have jurisdiction to improve on yesterday also have jurisdiction to make things worse. [Rules] give up some of the possibility of improvement in exchange for guarding against some of the possibility of disaster.¹⁷⁷

Court opinions, and especially Supreme Court opinions, often serve as rules.¹⁷⁸ Perhaps their main function as rules is to control the decisionmaking of lower courts and other actors in the legal system.¹⁷⁹

174. This is, of course, an oversimplification. If indeed rules can be understood at all, the degree of clarity that they each manifest is likely to vary on a continuum, rather than in a clean dichotomy.

175. Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988) (footnote omitted).

176. It is exactly this function of rules which Professor LaFave has in mind when he advocates construction of clear-cut rules to govern police work under the fourth amendment. See LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127 [hereinafter "Case-by-Case Adjudication"]; LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982); cf. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

177. Schauer, *supra* note 175, at 539, 542. Professor Schauer does not claim that rule-based decisionmaking is always superior to a reasoned jurisprudence, but he does argue that rules can work better in some situations.

178. See Schauer, *Opinions as Rules* (Book Review), 53 U. CHI. L. REV. 682, 683, 686 (1986).

179. See Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication*

Especially in areas as controversial as constitutional criminal procedure, the usual practice is for the Supreme Court to set rules of conduct for the police and prosecutors, rules which the lower courts are to enforce as strictly as possible. This is a basic tenet of the structure of the legal hierarchy, and it is explained in this fashion by Professor Schauer: "part of the understanding of many Americans about constitutionalism includes within that understanding the expectation that lower court judges, when the mandates of a Supreme Court case are linguistically clear, will quite simply 'Just do it.'"¹⁸⁰

Whether or not it is possible for *any* rule to work in an efficaciously formulaic way,¹⁸¹ the revised exclusionary rule cannot do so. Prior to the *Leon* decision, the exclusionary rule applied without exception to illegally obtained evidence the prosecution sought to use in its case-in-chief. Once a lower court had resolved that the evidence was tainted, it could not allow it to be used against the defendant at trial. The new exclusionary rule removes that absolute barrier. The new rule has a twist: it explicitly looks back at its own purpose. The formalist model of rules, on which the control of lower courts is in large part based, requires that the rule-applier attempt as much as possible to ignore the reasons behind the rule. Abstracting the rule from the reasons behind it would here mean *ignoring* part of the rule itself. To apply the revised rule, a court must consider whether suppression in a given case will deter police misconduct in the future. But that process forfeits much of the control that motivated the imposition of the rule in the first place. The more the application of a rule requires or allows the decisionmaker to look to the purpose of the rule, the less constraining force the rule will have on the decision.

Under the old exclusionary rule, doubtless there was some uncer-

in the *Criminal Process*, 24 WM. & MARY L. REV. 335, 336 (1983); LaFave, "Case-by-Case Adjudication," *supra* note 176; McGowan, *Rulemaking and the Police*, 70 MICH. L. REV. 659 (1972) (advocating role for police in drafting of rules to control them); cf. Alschuler, *supra* note 176.

180. Schauer, *Rules, The Rule of Law, and The Constitution*, in 6 CONSTITUTIONAL COMMENTARY 69, 79 (1989). Professor Schauer gives the following example:

There are obviously cases in which the purposes behind *Miranda v. Arizona* would not be served (and might even be frustrated) by giving a *Miranda* warning, but we are wary of having the cop on the beat make this determination. Instead, something in us wants to say, "Just do it" to the police officer, for we fear that the authority to determine whether *Miranda's* justifications are applicable in a particular case will in practice result not in a furtherance but in a frustration of that purpose.

Id. (citation omitted). Likewise, the careful and hotly debated balance that is the *Leon* exception should not be left in the hands of lower court judges; when at all possible, they too should "Just do it."

181. See generally L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 201 (G. Anscombe trans. 2d ed. 1958) ("no course of action could be determined by a rule, because every course of action can be made out to accord with the rule"); S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 822 (1983).

tainty about when a lower court was supposed to suppress evidence. That uncertainty arose from debate over what amounted to a fourth amendment violation in the gathering of the evidence in question; it remains even under the reasonable reliance exception, because the exception assumes the evidence was obtained in violation of the fourth amendment. The *Leon* revision creates a new, added layer of imprecision. Because the rule's scope depends on an analysis of its own purpose, the strict and rigid nature of the rule — its *ruleness* — disappears to a large degree.

The deficiency this Note finds present in the *Leon* rule was expressed in another way by Justice Scalia in a recent speech. Justice Scalia's topic, in his speech *The Rule of Law as a Law of Rules*,¹⁸² was "the dichotomy between general rules and personal discretion within the narrow context of *law that is made by the courts*."¹⁸³ His main purpose was to distinguish the application of general rules to facts from the application of a reasonableness or "totality of the circumstances" test to a set of facts. In the former case, Scalia asserted that "when, in writing for the majority of the Court, I adopt a general rule, . . . I not only constrain lower courts, I constrain myself as well."¹⁸⁴ In the situation where the Court announces a totality of the circumstances test, Scalia acknowledged that it would not be the Supreme Court's judgment and application of the new test that defined its contours, but rather that of the lower federal and state courts. He asserted that in these situations, courts are really acting as factfinders and not as law appliers; they have great discretion and therefore reduced legitimacy. Scalia's conclusion was to urge that

the *Rule of Law*, the law of *rules*, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as factfinders than as expositors of the law.¹⁸⁵

While recognizing the usefulness of totality of the circumstances tests in some contexts, this Note argues that where, as here, rules exist to constrain lower court decisions, the rules adopted ought to be equal to the task. The *Leon* revision of the exclusionary rule effected a change in the nature of that rule as it applies at trial; it is now flexible in a fundamental and disabling way, and is therefore inappropriate for a rule meant effectively to constrain the actions of lower court judges.¹⁸⁶ Assuming the Supreme Court is serious in its desire to deter

182. Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

183. *Id.* at 1176 (emphasis in original).

184. *Id.* at 1179.

185. *Id.* at 1187 (emphasis in original).

186. This is not to say that any rule structured so as to foster discretion in the rule-applier is therefore flawed. Rather, in this context, translating carefully balanced considerations of consti-

police misconduct by means of the exclusionary rule, and assuming also that the rule as formulated by the Supreme Court is meant to control and constrain the lower courts in their actions on this subject, the revised exclusionary rule is an ineffective and flawed mechanism.

Despite widespread pessimism at the time *Leon* was decided that the majority Justices were not truly committed to the exclusionary rule as an element of the criminal justice process, Justice White's opinion does speak of the deterrent effect of the rule. The opinion gives no indication that he intended to lessen the seriousness with which the Court's order, "suppress evidence in certain circumstances," be obeyed. It now seems that his commitment to deterrence was genuine, for just last Term he joined Justice Brennan's majority opinion in *James v. Illinois*.¹⁸⁷ In reversing the Illinois Supreme Court's extension of the impeachment exception to the exclusionary rule, Justice Brennan stated that the Illinois court's approach would "significantly weaken the exclusionary rule's deterrent effect on police misconduct" because the occasions for introducing illegally obtained evidence at trial would "vastly increase."¹⁸⁸ "So long as we are committed to protecting the people from the disregard of their constitutional rights during the course of criminal investigations, inadmissibility of illegally obtained evidence must remain the rule, not the exception."¹⁸⁹ The fact that Justice White joined this opinion supports the assumption that the *Leon* decision was not meant as merely a stepping-stone to entire elimination of the exclusionary rule. His position in *James* confirms that the seriousness with which *Leon* did take the exclusionary rule, when it applied, should not be underestimated. Therefore the inefficacy of the *Leon* exception as a rule that will constrain lower court judges is a problem in need of correction.

CONCLUSION

Not all of the errors in application of *Leon* stem from the causes identified here. But this Note argues that the incidence of error is higher than it would be had the three factors discussed above been avoided. The problems caused by these factors could be rectified by several, progressively ambitious, remedies. One is simple advocacy.

tutional policy by the Supreme Court into guidelines for lower court applications, rules that are designed to constrain are proper. Rules that, by looking back at their own purpose, lose their "ruleness," are nearly useless for this constraining task.

187. 110 S. Ct. 648 (1990).

188. *James*, 110 S. Ct. at 654, 655. The impeachment exception allows introduction of illegally obtained evidence at trial to impeach the testimony of a defendant. It predates *Leon*, but is qualitatively different from that exception's introduction of illegally obtained evidence at trial. At least as confined by *James v. Illinois*, the exception allows impeachment use of tainted evidence only when the defendant himself chooses to take the stand; the good faith exception has no such defense-controlled characteristic.

189. *James*, 110 S. Ct. at 655.

Lawyers making suppression motions must carefully articulate the steps in the analysis that the court must follow properly to apply the reasonable reliance exception to the exclusionary rule. Lawyers should condemn as misguided any precedents cited against them that reveal the types of application errors demonstrated above. Another step would be for the Supreme Court to take a reasonable reliance exception case and address the legal community on the label point. It could repudiate all use of the "good faith" label, as a way to drive home to the lower courts the crucial limitations on the exception established in *Leon*. And most radically, but also most effectively, the Court could repeal the exception entirely. Justice Blackmun, in his *Leon* concurrence, emphasized that his vote for the exception was a provisional one, subject to change if the existence of the new rule led to "a material change in police compliance with the Fourth Amendment."¹⁹⁰ This Note has not presented Justice Blackmun with evidence of such lessened police compliance with the Constitution's commands. But it has, based on an observed prevalence of what it argues is systematically induced error, presented any Justices whose votes, like Justice Blackmun's, were at all provisional with a reason for concluding that the experiment has failed. The nature of the change made in *Leon*, even if properly understood as a reasonable reliance exception, is one that seriously dilutes the ability of the exclusionary rule to achieve the purpose that *Leon* posits for it.

Many voices have, in recent years, complained that criminal procedure doctrine has become too complex for courts and police officers to administer.¹⁹¹ That may well be true. But the simplification should not be, as is sometimes suggested, an elimination of the exclusionary rule,¹⁹² or its further erosion by more and more complicated exceptions.¹⁹³ Rather, the exclusionary rule should be kept intact for its deterrent and educational effects.¹⁹⁴ In pursuit of these goals, the exclusionary rule should be returned to its pre-*Leon* state. *Leon* reaffirmed that the goal of the exclusionary rule is deterrence of police

190. *Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

191. See, e.g., Alschuler, *supra* note 176, at 287; OFFICE OF LEGAL POLICY, U.S. JUSTICE DEPT., REPORT TO THE ATTORNEY GENERAL ON THE SEARCH & SEIZURE EXCLUSIONARY RULE (1986), reprinted in 22 U. MICH. J.L. REF. 573 (1989).

192. Oaks, *supra* note 33; Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

193. The "reasonable" good faith test used in *Leon* has now been extended to third-party consent searches where the police reasonably believed the consenting party had authority to allow the search but are later found to have been mistaken. *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990). The difficulties in divining objectively reasonable reliance discussed in this Note will likely appear in cases applying this extension of the rule.

194. See Comment, *supra* note 33.

misconduct, but the *Leon* exception's existence seriously undermines that very aim.

— *David Clark Esseks*