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A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with United States v. Leon

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NOTES

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I. INTRODUCTION

The fourth amendment to the United States Constitution commands that the right of individuals to be secure against unreasonable searches shall not be violated. The amendment further provides that a search warrant must be supported by probable cause and particularly describe the place to be searched and items to be seized.[1] The United

1. U.S. CONST. amend. IV. The amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

States Supreme Court has held that the only effective means of enforcing this mandate is to suppress all evidence seized pursuant to a search warrant that violates the fourth amendment because it lacks either particularity or probable cause.[2] Difficult questions arise, however, when a warrant contains some clauses that are constitutionally sufficient, meeting both the particularity and probable cause requirements, and some clauses that are constitutionally deficient. Should a court suppress all the evidence seized pursuant to the warrant because of the defect, admit all of the evidence because of the constitutional clauses, or apply an intermediate standard—sever the warrant to admit the evidence seized pursuant to constitutional portions while suppressing the evidence attributable to unconstitutional portions? What impact, if any, should proof of the executing officer's good faith reliance on the validity of the warrant have on the court's decision? Should this good faith reliance cure the defects in the warrant, allowing the fact-finder to consider all the evidence, illegally as well as legally obtained? And finally, if the officer's reliance on the partially invalid warrant is determined not to be objectively reasonable, should this finding be grounds for suppression of the evidence seized under the valid portions?

These questions arise when the modern doctrine of redaction[3] is considered in light of the Supreme Court's recent pronouncement of a good faith exception to the exclusionary rule in *United States v. Leon*.[4] "Redaction" is a procedure employed by a reviewing court to excise the severable portions of a warrant that are constitutionally invalid for lack of probable cause or particularity. This method preserves evidence seized pursuant to the valid portions of the warrant.[5] Although the Supreme Court has not addressed the propriety of redaction or the effect of the *Leon* decision on redaction, the Court's position on these issues is fairly easy to predict in light of the Court's recent pro-government deci-

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2. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that in state trials the fourteenth amendment requires exclusion of evidence seized in violation of the fourth amendment); Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that in federal trials the fourth amendment requires suppression of evidence obtained through an illegal search and seizure).

3. Except for a few cases decided in the 1920s discussing by implication the concept of redaction, only modern cases have addressed directly the propriety of severance. The leading state case adopting severance is Aday v. Superior Court of Alameda County, 55 Cal. 2d 789, 362 P.2d 47, 13 Cal. Rptr. 415 (1961).

4. 468 U.S. 897 (1984).

5. United States v. Christine, 687 F.2d 749, 754 (3d. Cir. 1982). A court should follow three steps in redacting a warrant: (1) divide the warrant into separate clauses; (2) evaluate each individual clause to determine whether it meets both the particularity and the probable cause requirements of the fourth amendment; (3) suppress the evidence seized pursuant to the clauses that fail to meet the fourth amendment requirements and admit all other probative evidence. *See id.* at 759-60; Comment, *Redaction—The Alternative to the Total Suppression of Evidence Seized Pursuant to a Partially Invalid Search Warrant*, 57 TEMP. L.Q. 77, 93 (1984).

sions.[6] However, in state criminal cases based upon state constitutions or statutes, courts may reject the Supreme Court's restrictive federal constitutional interpretations.[7] Indeed, many state courts have provided greater protection to their citizens' privacy rights by construing their constitutional provisions more liberally than the Supreme Court has construed the United States Constitution.[8]

This Note first examines the process and propriety of redaction. Part III analyzes the reasoning behind and criticisms of the Supreme Court's interpretation of the exclusionary rule and pronouncement of a good faith exception in *United States v. Leon*. Part IV explores how the redaction and *Leon* doctrines interrelate in the case of partially invalid search warrants. Part V examines the reaction of state courts to *Leon* and concludes that redaction sometimes will be useful in admitting reliable evidence that *Leon* would suppress. More importantly, redaction effectively can suppress evidence obtained pursuant to invalid portions of a warrant that *Leon* would admit. In this way, redaction allows state courts to provide greater privacy protection to their citizens while achieving the law enforcement goal of admitting all evidence legally obtained.

II. The Process and Propriety of Redaction

Under the traditional view of the exclusionary rule, if a magistrate makes one technical mistake in issuing a search warrant, all the evidence obtained pursuant to the otherwise valid warrant must be suppressed at trial, and, as a result, the criminal may go free.[9] To avoid the severe remedy of complete suppression in such cases, courts increasingly have applied the rules of redaction. State courts that have considered the issue almost uniformly have adopted this practice.[10] Most federal courts have followed this trend, with eight federal appellate

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6. See, for example, Illinois v. Gates, 462 U.S. 213 (1983), in which the Court lessened the probable cause standard for issuance of warrants to require affirmance of the magistrate's judgment if the judicial officer merely had a "substantial basis" for concluding that a "fair probability" exists that evidence will be found. *Gates* overruled the strict "two-pronged" standard, which required a finding of both the informant's "reliability" and "basis for knowledge." *See* Spinelli v. United States, 393 U.S. 410 (1969).

7. *See infra* notes 214-16 and accompanying text.

8. *See, e.g.*, State v. Novembrino, 200 N.J. Super. 229, 243, 491 A.2d 37, 45 (1985).

9. Professor LaFave notes the severity of exclusion in this situation. He comments that "it would be harsh medicine indeed" if a warrant issued essentially in compliance with the fourth amendment must be invalidated *in toto* simply because the magistrate made a minor error in the language of the warrant. 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 258 (2d ed. 1987).

10. For a collection of state cases adopting severance, see United States v. Giresi, 488 F. Supp. 445, 459 n.17 (D.N.J. 1980), and Comment, *supra* note 5, at 81 n.27.

courts expressly adopting redaction.[11] Courts consider redaction primarily because of its appeal as a fair alternative to suppression of all reliable evidence when only a portion of the warrant is invalid.[12] Courts accept redaction as a constitutionally proper doctrine on two grounds: the doctrine comports with the requirements of the fourth amendment, and the procedure is consistent with the underlying purposes of the exclusionary rule.[13]

The fourth amendment's commands are twofold. The amendment requires a search warrant to satisfy both particularity and probable cause elements.[14] The Supreme Court has held that to satisfy the particularity requirement, the warrant must describe the place to be searched and the items to be seized in sufficient detail to leave nothing to the discretion of the officer executing the warrant.[15] Most courts find that the particularity requirement is satisfied if the officer executing the warrant can identify the items sought with reasonable certainty.[16] In order to meet the probable cause requirement, a magistrate must find it probable[17] that the items to be seized will be evidence of criminal activity and that they will be found at the place to be searched.[18]

The Framers' purpose in drafting the fourth amendment was to prohibit indiscriminate searches and seizures conducted pursuant to

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11. The United States Court of Appeals for the Third Circuit coined the term "redaction" in United States v. Christine, 687 F.2d 749 (3d Cir. 1982). Other courts have used the terms "severance," "partial suppression," or "severability" to describe the process. *See* United States v. Cook, 657 F.2d 730 (5th Cir. Unit A 1984); United States v. Fitzgerald, 724 F.2d 633 (8th Cir.), *cert. denied*, 466 U.S. 950 (1983); Sovereign News Co. v. United States, 690 F.2d 569, 576 (6th Cir.), *cert. denied*, 464 U.S. 814 (1982); United States v. Riggs, 690 F.2d 298, 300 n.5 (1st Cir. 1982); United States v. Christine, 687 F.2d 749, 754 (3d Cir. 1982); United States v. Freeman, 685 F.2d 942, 952 (5th Cir. 1982); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982); United States v. Torch, 609 F.2d 1088 (4th Cir.), *cert. denied*, 446 U.S. 957 (1979); Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971), *rev'd on reh'g on other grounds*, 502 F.2d 419 (D.C. Cir. 1974).

12. *See, e.g.*, cases cited *supra* note 11.

13. *See* United States v. Leon, 468 U.S. 897 (1984).

14. U.S. CONST. amend. IV (see *supra* note 1 for pertinent text of the fourth amendment).

15. United States v. Christine, 687 F.2d 749, 752 (3d Cir. 1982) (quoting United States v. Marron, 275 U.S. 192 (1927)).

16. *See, e.g.*, United States v. Cook, 657 F.2d 730, 733 (5th Cir. Unit A 1981); State v. Knoll, 116 Wis. 2d 443, 450, 343 N.W.2d 391, 395, *cert. denied*, 469 U.S. 837 (1986). Professor LaFave states that a literal reading of the *Marron* standard would mean that few warrants would pass the test. Only descriptions so detailed that the officer could not mistake one object for another could meet such a particularity threshold. 2 W. LAFAVE, *supra* note 9, at 234. Courts allow a more general description when the property to be seized could not be expected to have more precise characteristics. United States v. Davis, 589 F.2d 904 (5th Cir.), *cert. denied*, 441 U.S. 950 (1979).

17. The Supreme Court has held that although mere suspicion is insufficient, probable cause requires less evidence than is necessary for a criminal offense conviction. *See* Brinegar v. United States, 338 U.S. 160, 175 (1949); *see also* United States v. Ventressa, 380 U.S. 102, 107 (1965).

18. Carroll v. United States, 267 U.S. 132, 162 (1925). For an articulation of the standard a reviewing court must follow in evaluating a magistrate's probable cause determination, see *supra* note 6.

general warrants.[19] A general warrant authorizes a general exploratory search through an individual's possessions.[20] In *United States v. Christine*[21] the Third Circuit stated five functions of the particularity and probable cause elements of the warrants clause:[22] (1) the probable cause requirement protects citizens from unreasonable invasions of privacy and unfounded criminal charges;[23] (2) the neutral and detached magistrate's determination of the justification to search prevents unnecessary searches;[24] (3) the particularity requirement restrains the scope of the search;[25] (4) the warrant requirement gives notice of the authority, necessity, and scope of the search to the individual subject to the intrusion;[26] and (5) the warrant itself provides a record for subsequent judicial review.[27]

The *Christine* court concluded that redaction comports with each of the five purposes that the warrant clause advances.[28] First, according to the court, redaction retains the protection against unjustified invasions of privacy because only evidence seized pursuant to the constitutionally valid portion is admitted.[29] Second, redaction advances the objective of interjecting a judicial officer between the citizen and the law enforcement officer because the court may redact only those warrants properly issued by magistrates.[30] Third, because redaction preserves only evidence seized pursuant to those clauses that particularly describe the items seized, it does not approve or induce intrusions

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19. Payton v. New York, 445 U.S. 573, 583 (1980). In colonial days, customs officials obtained writs of assistance giving them complete discretion to search for goods imported in violation of British tax laws. *Id.* at 583 n.21.

20. *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

21. 687 F.2d 749 (3d Cir. 1982).

22. *Id.* at 756 (summarizing the functions of the warrant clause as articulated by other courts).

23. *Id.* at 756 (finding that the warrant clause reconciles the citizen's interest "in being safeguarded from rash and unreasonable interferences with privacy and from unfounded charges of crime" with the community's interest in "fair leeway for enforcing the law") (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

24. *Christine*, 687 F.2d at 756; *see also* McDonald v. United States, 335 U.S. 451, 455 (1948) (finding that the warrant clause requires that a neutral and detached judicial officer weigh the need to invade privacy against the need to enforce the law).

25. *Christine*, 687 F.2d at 756; *see also* Walter v. United States, 447 U.S. 649, 656 & n.7 (1980) (finding that a warrant's specific terms limit the scope of intrusion).

26. *Christine*, 687 F.2d at 756; *see also* United States v. Chadwick, 433 U.S. 1, 9 (1977) (stating that a warrant informs an individual whose property is to be searched of the executing officer's authority and of the necessity of and limits on the search).

27. *Christine*, 687 F.2d at 756-57; *see also* Whiteley v. Warden, 401 U.S. 560, 565 n.8 (finding that a warrant serves as the basis for evaluating information that an officer presented to a magistrate at the time the warrant was sought).

28. *Christine*, 687 F.2d at 758.

29. *Id.*

30. *Id.*

outside the proper scope of the search.[31] Fourth, the valid portions of the warrant that remain after redaction notify the individual whose privacy is invaded by the search of the officer's authority and the necessity and limits of the search.[32] Finally, redaction has no effect on the creation of a record for future judicial review.[33]

Courts adopting redaction conclude that, in addition to adequately serving the goals of the warrant clause, the redaction doctrine is consistent with the purposes of the judicially created exclusionary rule.[34] The justifications for the exclusionary rule are, primarily, deterrence of police conduct that violates the fourth amendment[35] and, secondarily, preservation of judicial integrity.[36] Application of the exclusionary rule requires a pragmatic balancing of the incremental benefits the rule provides with the social cost of excluding highly probative evidence from criminal trials.[37] By redacting a warrant to preserve validly obtained evidence while excluding illegally seized evidence, the goals of deterrence and judicial integrity are achieved with little cost. Because the court suppresses evidence the officer obtained outside the constitutional scope of the warrant, redaction deters officers from engaging in general searches. Redaction, then, is analogous to the courts' treatment of overreaching. Overreaching occurs when an officer seizes evidence beyond the scope authorized by the magistrate in a valid warrant.[38] In redaction, as in overreaching, courts suppress only evidence not validly obtained.[39] Although both overreaching and redaction subject individuals to privacy invasions by searches that extend beyond constitutional authorization, courts find that the social need to introduce validly seized

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31. *Id.*

32. *Id.*

33. *Id.*

34. The exclusionary rule is a remedy requiring that evidence seized in violation of the fourth amendment be excluded from trial. The rule is not a constitutional right of individuals but is based on the Supreme Court's supervisory authority over the lower federal courts. Stone v. Powell, 428 U.S. 465, 485-86 (1976).

35. *Id.* at 486.

36. Although Supreme Court decisions allude to the "imperative of judicial integrity," suggesting that suppression of illegally obtained evidence prevents contaminating the integrity of the judicial process, they also demonstrate that this concern has limited force. The Court has qualified the judicial integrity argument by failing to take the logical extension of this argument, which would call for the exclusion of highly probative evidence whenever illegally seized, even in grand jury proceedings, for impeachment purposes, and in cases where the defendant fails to object. *Id.* at 484-85.

37. *Id.* at 487-88; *see also* United States v. Calandra, 414 U.S. 338, 349 (1974) (refusing to extend the exclusionary rule to grand jury proceedings because the possible injury to the function of the grand jury outweighed the uncertain incremental deterrent effect).

38. United States v. Christine, 687 F.2d 749, 758 (3d Cir. 1982); *see also* United States v. Cook, 657 F.2d 730, 735 n.5 (5th Cir. Unit A 1981); United States v. Giresi, 488 F. Supp. 445, 460 n.18 (D.N.J. 1980); People v. Mangialino, 75 Misc. 2d 698, 707-09, 348 N.Y.S.2d 327, 338-39 (1973).

39. *Christine*, 687 F.2d at 758.

evidence in order to prosecute criminal activity outweighs these limited intrusions.[40]

The propriety of redaction is further established by the restrictions on its application that ensure that fourth amendment policies are not compromised. Courts utilize redaction only when the warrant is found not to be essentially general in nature.[41] Thus, redaction cannot be used to save minor clauses in a warrant that authorizes a highly intrusive privacy violation.

Courts have opposed redaction as being inconsistent with the mandates of the fourth amendment. In *In Re Lafayette Academy*[42] the court reasoned that if the fourth amendment is to protect the privacy rights of individuals, courts must apply it to the whole search.[43] Redaction, therefore, is unconstitutional because it selectively applies the fourth amendment's particularity and probable cause mandates.[44] This argument fails to consider, however, that in redacting a warrant, the court tests each clause for compliance with the fourth amendment. Thus, redaction subjects the whole warrant to a constitutional evaluation.[45] With invalid clauses stricken, the properly redacted warrant ensures that only evidence seized in compliance with the fourth amendment will be admitted at trial.[46] Moreover, if the search authorized by the warrant is essentially general in nature, redaction would not be an available alternative, and all evidence would be suppressed.[47]

Other courts oppose redaction as being inconsistent with the fourth

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40. "The cost of suppressing *all* the evidence seized, including that seized pursuant to the valid portions of the warrant, is so great that the lesser benefits accruing to the interests served by the [f]ourth [a]mendment cannot justify complete suppression." *Id.* (emphasis in original).

41. In Aday v. Superior Court of Alameda County, 55 Cal. 2d 789, 362 P.2d 47, 13 Cal. Rptr. 415 (1961), the court made the following, often quoted comment:

> [W]e do not mean to suggest that invalid portions of a warrant will be treated as severable under all circumstances. We recognize the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirement of particularity, and that wholesale seizures might be made under them, in the expectation that the seizure would in any event be upheld as to the property specified. Such an abuse of the warrant procedure, of course, could not be tolerated.

Id. at 797, 362 P.2d at 52, 13 Cal. Rptr. at 420. Other courts similarly express the limitation. *See, e.g., Christine*, 687 F.2d at 754 (finding that "[r]edaction is inappropriate when the valid portions of the warrant may not be meaningfully severable from the warrant as a whole"); *Cook*, 657 F.2d at 735 n.6 (denying redaction when valid parts are "included by the Government as a pretext to support an otherwise unlawful search and seizure"); *Gerisi*, 488 F. Supp. at 459 (holding that severance is improper when a warrant is "facially general in nature").

42. 462 F. Supp. 767 (D.R.I. 1978), *aff'd on other grounds*, 610 F.2d 1, 6 (1st Cir. 1979).

43. 462 F. Supp. at 772.

44. *Id.*

45. *See* Comment, *supra* note 5, at 90 (arguing that redaction is consistent with fourth amendment mandates).

46. *See supra* note 5 and accompanying text.

47. *See supra* note 41 and accompanying text.

amendment because it creates a fiction by treating one search as two, by upholding a legal search under the valid portions, and by voiding an illegal search under the invalid portions.[48] These courts misinterpret the focus of redaction.[49] Rather than comparing the search with fourth amendment requirements, a redacting court scrutinizes the warrant, which must be sufficiently valid in order to qualify for redaction.[50]

Another criticism of redaction is that it allows a reviewing court to exceed its judicial role by rewriting the warrant.[51] However, because the redacting court merely is excising invalid portions while preserving the valid portions the court is not writing any of its own language into the warrant. Nor is the court significantly altering the overall warrant because the warrant already has surpassed a threshold test of significant validity.[52]

A final argument against redaction is that it may encourage law enforcement officers to seek warrants that authorize searches beyond the scope of probable cause.[53] Redaction critics fear that because the officer knows that at least the evidence obtained pursuant to the valid portions of the warrant will be admitted, the officer will search broadly, hoping that the redacting judge will admit items that would not have been seized had the warrant been issued properly. The officer then could assert that the evidence seized under the overbroad warrant was found in plain view during the search for the particular items. This argument is easily answered, however, because when redaction is restrictively and properly administered, the redacting court's scrutiny ensures that the fourth amendment protection against general warrants is preserved.[54]

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48. Courts making this criticism include United States v. Hatfield, 461 F. Supp. 57, 58 (E.D. Tenn. 1978), *rev'd on other grounds*, 599 F.2d 759 (6th Cir. 1979), and United States v. Burch, 432 F. Supp. 961, 964 (D. Del. 1977), *aff'd*, 577 F.2d 729 (3d Cir. 1978).

49. Comment, *supra* note 5, at 90.

50. See United States v. Christine, 687 F.2d 749, 759 (3d Cir. 1982), in which the court argues that upholding a search by comparing the evidence seized against the fourth amendment requirements renders the magistrate's intervention a mere formality and violates the notification principle. Redaction does not raise these concerns because it focuses on a duly issued, valid warrant.

51. Comment, *supra* note 5, at 90; *see also* Brief for Appellee at 14, United States v. Christine, 687 F.2d 749 (3d Cir. 1982).

52. *See supra* note 41 and accompanying text.

53. United States v. Fitzgerald, 724 F.2d 633, 637 (8th Cir.), *cert. denied*, 466 U.S. 950 (1983).

54. The Eighth Circuit reached this conclusion, stating:

> We believe, however, that careful administration of the [redaction] rule will afford full protection to individual rights. First, magistrates must exercise vigilance to detect pretext and bad faith on the part of law enforcement officials. Second, courts should rigorously apply the exclusionary rule to evidence seized pursuant to the invalid portions of the warrant. Third, items not described in the sufficiently particular portions of the warrant will not he admissible unless it appears that (a) the police found the item in a place where one would reasonahly

Although many commentators have criticized redaction, its value in the preservation of evidence cannot be underestimated. Magistrates and law enforcement officials unavoidably will make mistakes in drafting search warrants. Redaction provides courts with a necessary tool to remedy such mistakes and thereby preserves probative evidence seized from an otherwise legal search.

III. Good Faith Exception to the Exclusionary Rule

A. United States v. Leon: *Holding and Rationale*

In *United States v. Leon*[55] the Supreme Court faced the issue of whether the exclusionary rule should be modified to allow the admission of evidence seized under a search warrant subsequently held to be invalid if the executing officer reasonably relied on the warrant's validity. Justice White, writing for the six-to-three majority,[56] announced a good faith exception to the exclusionary rule.[57] The Court limited its holding to those cases in which the police officer's reliance on the constitutional sufficiency of the warrant is objectively reasonable.[58] Under the Court's limitation, suppression remains the appropriate remedy in four scenarios.[59] First, the good faith exception will not apply if the police officer knew or should have known that the affidavit contained false statements that misled the magistrate issuing the warrant.[60] Second, suppression will apply if the issuing magistrate "wholly abandoned" his role as a neutral and detached judicial officer.[61] Additionally, the good faith exception is improper when an officer's reliance on the warrant is unreasonable because the warrant lacks the requisite "indicia of probable cause."[62] Finally, suppression is still appropriate if the warrant fails

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have expected them to look in the process of searching for the objects described in the sufficiently particular portions of the warrant . . . and (c) the other requirements of the plain view rule—inadvertent discovery and probable cause to associate the item with criminal activity—are met.

Id.

55. 468 U.S. 897 (1984).

56. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined Justice White. Justice Blackmun filed a concurring opinion. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Justice Stevens filed a separate dissenting opinion.

57. *Id.* at 922.

58. *Id.* at 920 & n.20. The Court stated that this "modification in objective reasonableness . . . retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Id.* at 920 n.20 (quoting Illinois v. Gates, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring)). The Court emphasized that "[t]he objective standard . . . requires officers to have a reasonable knowledge of what the law prohibits." *Id.*

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

60. *Id.*; *see, e.g.*, Franks v. Delaware, 438 U.S. 154 (1978).

61. *Leon*, 468 U.S. at 923; *see, e.g.*, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

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

to particularize the place to be searched or the items that are the subject of the search, again rendering the officer's reliance unreasonable.[63]

The majority reasoned that the exclusionary rule is a judge-made rule and not a constitutional guarantee;[64] thus, failure to exclude illegally seized evidence is not a constitutional violation.[65] Concluding that the exclusionary rule is not constitutionally mandated, the Court applied a cost-benefit approach to determine when the exclusionary rule should be inapplicable to evidence seized in good faith reliance on a warrant subsequently found to be defective.[66] The Court concluded that the costs of excluding probative evidence from trial when law enforcement officials have acted in good faith clearly outweigh the benefits of protecting the fourth amendment rights of the accused.[67]

The Court recognized the deterrence of law enforcement misconduct as the sole benefit derived from the exclusionary rule.[68] The Court stated that the exclusionary rule was not intended to punish a magistrate's error[69] because excluding evidence seized pursuant to an improperly issued warrant will not deter a magistrate.[70] The Court contended that the application of the exclusionary rule to suppress illegally seized evidence could not cure a violation of an individual's constitutional rights.[71] A proposition implicit in the Court's reasoning is that after a defendant's fourth amendment rights have been violated, the rights guaranteed by that amendment can be restored only by deterring police

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concurring in part)).

63. *Id.*

64. *Id.* at 906 (citing United States v. Calandra, 414 U.S. 338, 354 (1974)). This view contradicts the Supreme Court's earlier interpretation of the exclusionary rule as a constitutional mandate. *See* Mapp v. Ohio, 367 U.S. 643 (1961). Commentators who ascribe to this "fragmentary" view of the exclusionary rule contend that the court acts as an independent conduit for evidence, "laundering" the "taint" from the illegal seizure as it enters the courtroom. *See* Schrock & Welsh, *Up From* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 255-56 (1974).

65. *Leon*, 468 U.S. at 910.

66. *Id.*

67. *Id.* at 913.

68. *Id.* at 908.

69. *Id.* at 916. The Court stated that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id.*

70. The Court concluded that magistrates are not deterred by the threat of exclusion because, as neutral judicial officers removed from the law enforcement function, magistrates have "no stake in the outcome of particular criminal prosecutions." Moreover, exclusion does not serve a meaningful purpose in informing magistrates of their mistakes or in discouraging repeated error. *Id.* at 916-17.

71. *Id.* at 906. The Court stated: "The [exclusionary] rule . . . operates as 'a judicially created remedy designed to safeguard [f]ourth [a]mendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

misconduct.[72] A police officer who acts in good faith will not be deterred when the evidence is excluded because he has not engaged in misconduct.[73] The Court reasoned that an officer generally cannot be expected to question the magistrate's judgment on the sufficiency of a warrant.[74] In effect, then, good faith on the part of the officer who violated defendant's constitutional rights precludes the defendant's right to a remedy because granting the remedy will not further the goal of deterrence.[75] Turning to the case at bar, the Court perfunctorily held that the police officer acted in good faith and that his reliance on the invalid warrant was objectively reasonable.[76] All of the illegally seized evidence, therefore, was admissible at trial.[77]

B. *Flaws in the* Leon *Court's Rationale*

The *United States v. Leon* decision has been the subject of much recent controversy.[78] Opponents of the decision contend that apart from the adverse consequences that flow from the decision, the Court's rationale is seriously flawed for several reasons. Critics contend that the Court's questionable logic can be explained only as a means to achieve a policy-oriented result.[79]

One of the major criticisms of the *Leon* decision is that adoption of a good faith exception to the exclusionary rule was unnecessary. This argument stems from the Court's recent relaxation of the probable cause standard in *Illinois v. Gates*,[80] which makes a good faith exception redundant and illogical.[81] In *Gates*[82] the Supreme Court held that

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72. *Id.* at 935 (Brennan, J., dissenting).

73. *Id.* at 918-23 (majority opinion).

74. *Id.* at 921.

75. *See* State v. Novembrino, 200 N.J. Super. 229, 243, 491 A.2d 37, 45 (1985) (rejecting *Leon* on state constitutional grounds because a good faith exception "would violate a long-standing tradition . . . of providing meaningful remedies for major constitutional violations").

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

77. *Id.*

78. *See, e.g.*, Bacigal, *An Alternative Approach to the Good Faith Controversy*, 37 MERCER L. REV. 957 (1986); Note, *A Reasonable Good Faith Exception to the Exclusionary Rule: No Longer Letting the Criminal Go Free Because the Magistrate Has Blundered*, 50 Mo. L. REV. 401 (1985); Case Comment, *Criminal Procedure—Search and Seizure: The Good Faith Exception to the Exclusionary Rule—How Should Tennessee Decide?*, 14 MEM. ST. U.L. REV. 549 (1984).

79. *See infra* notes 126-32 and accompanying text.

80. 462 U.S. 213 (1983).

81. Comment, *Exclusionary Rule—The Good Faith Exception Is the Result of Constitutional Amnesia*, Leon, 1985 S. ILL. U.L.J. 113, 127; *see also Leon*, 468 U.S. at 958 (Brennan, J., dissenting) (indicating that, "[g]iven the relaxed standard for assessing probable cause established . . . in *Illinois v. Gates*, . . . the Court's newly fashioned good-faith exception . . . will rarely, if ever, offer any greater flexibility for police than the *Gates* standard already supplies" (citation omitted)).

82. 462 U.S. at 213.

a magistrate may properly issue a warrant if, under the totality of the circumstances in the affidavit, there is a fair probability that seizable evidence will be uncovered.[83] Under this standard, a court reviewing a magistrate's probable cause determination must uphold the decision if the magistrate had a substantial basis for concluding that probable cause existed.[84] Thus, before the good faith exception to the exclusionary rule can admit evidence that the *Gates* standard would otherwise suppress, a reviewing court must find that a warrant lacks a substantial basis for concluding that there is a fair probability that seizable evidence would be found. But, at the same time, the reviewing court must find that an officer's reliance on that invalid warrant was objectively reasonable.[85] According to Justice Brennan in dissent,[86] finding a case in which there is a need for the good faith exception after *Gates* will be virtually impossible.[87] Objectively reasonable reliance on an objectively unreasonable warrant is an illogical concept.[88]

An additional flaw in the *Leon* Court's reasoning is the Court's failure to offer any empirical evidence to support conclusively the need for an exception to the exclusionary rule.[89] The Court admitted that no empirical data was available to prove the necessity of the exception to the exclusionary rule.[90] Despite this inconclusiveness, the *Leon* Court gave the good faith exception implicit approval by placing the burden of proving the exclusionary rule's deterrent effect on its proponents.[91]

Critics also assert that the majority violated the language and intent of the fourth amendment by narrowly construing the purposes served by the exclusionary rule in order to give credence to a good faith exception.[92] In the Court's early articulation and expansion of the ex-

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83. *Id.* at 238. The court stated that "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

84. *Id.* at 238-39.

85. *See,* Comment, *supra* note 81, at 127.

86. *Leon*, 468 U.S. at 928 (Brennan, J., dissenting).

87. *Id.* at 958. Justice Brennan explained that this is so "[b]ecause the two standards overlap so completely." *Id.*

88. *Id.* at 958-59.

89. Comment, *supra* note 81, at 127. In his *Leon* dissent, Justice Brennan characterizes the majority's conclusions as "inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data." *Leon*, 468 U.S. at 942 (Brennan, J., dissenting).

90. *Leon*, 468 U.S. at 918 (majority opinion). Professor Oaks, author of the most extensive study of available data on the exclusionary rule, concludes that there is no empirical substantiation or refutation of the rule's deterrent effect. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 706-09 (1970).

91. Comment, *supra* note 81, at 127.

92. *See Leon*, 468 U.S. at 935-36 (Brennan, J., dissenting); *id.* at 979 (Stevens, J., dissenting in *Leon* and concurring in *Sheppard*); Note, *The Good Faith Exception to the Exclusionary Rule:*

clusionary rule, the Court portrayed the branches of government as essential components of a single prosecution network.[93] The Court read the fourth amendment as restricting government as a whole in order to maintain the integrity of the criminal justice process and to prevent the government from benefitting from constitutional violations.[94] Underlying the Court's earlier opinions was the conclusion that the admission of evidence obtained in violation of the fourth amendment constituted a constitutional wrong independent of the initial seizure.[95] In the 1960 case of *Elkins v. United States*[96] the Court asserted that a conviction based on illegally obtained evidence makes the court an accomplice in disobedience of the law.[97] Critics of *Leon* contend that this unitary view[98] of the exclusionary rule expressed in the Court's earlier decisions is the correct interpretation of the fourth amendment and reject the *Leon* Court's reliance on the fragmentary view[99] as a distortion of the rule's intended purposes.[100] According to the fragmentary theory expressed in *Leon*, for purposes of the exclusionary rule, the judiciary plays an inconsequential role in the criminal justice process.[101] Acting as a mere neutral conduit for evidence, the judiciary does not violate the rights of the accused by allowing illegally seized evidence to be introduced at trial.[102]

In his dissent to *Leon*, Justice Brennan criticized the majority's adoption of the fragmentary view of the exclusionary rule. He argued that the Court's emasculation of the judiciary's role in safeguarding fourth amendment rights of the accused renders those safeguards

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United States v. Leon *and* Massachusetts v. Sheppard, 27 B.C.L. REV. 609, 629-31 (1986); Comment, *supra* note 81, at 128-29.

93. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 393 (1914); *see also* Mapp v. Ohio, 367 U.S. 643 (1961) (finding that the exclusionary rule is required in state courts when state officials seize evidence in violation of fourth amendment).

94. *Weeks*, 232 U.S. at 393.

95. *Id.* at 398; *see also* Note, *supra* note 92, at 617.

96. 364 U.S. 206 (1960).

97. *Id.* at 223 (citing McNabb v. United States, 318 U.S. 332, 345 (1943)).

98. *See, e.g.*, Note, *supra* note 92, at 610 & n.12. Under the "unitary" model of prosecution, "[t]he purpose of the [exclusionary] rule is to restrain the government as a whole in its attempts to discover and punish law-breakers." *Id.* at 610. "[B]y excluding evidence 'the court stops the entire government, of which it is a part, from consummating a wrongful course of conduct—a course of conduct begun hut by no means ended when the police invade the defendant's privacy.' " *Id.* at 610 n.20 (quoting Schrock & Welsh, *supra* note 64, at 257-60).

99. *See* Note, *supra* note 92, at 610 & n.11.

100. *See supra* note 92.

101. Note, *supra* note 92, at 610 n.11.

102. *Id.* According to the fragmentary view, "Whatever 'taint' may have accrued from the illegal seizure is 'laundered' as it passes through the hands of the judiciary." *Id.*; *see also Leon*, 468 U.S. at 906 (finding that the admission of evidence obtained in violation of the fourth amendment " 'work[s] no new Fourth Amendment wrong' " (quoting United States v. Calandra, 414 U.S. 338, 354 (1974))).

meaningless.[103] Justice Brennan asserted that courts cannot avoid responsibility for the means by which evidence is obtained.[104] He asserted that the police in their evidence-procurement role are linked inextricably to the courts in their evidence-admitting role because each is equally capable of circumventing an individual's fourth amendment rights.[105]

Justice Stevens in his dissent to *Leon* agreed that the majority's fragmentary analysis was incorrect in viewing the courts and police as separate entities in the criminal justice process.[106] Justice Stevens also implied that courts, in admitting illegally seized evidence, may be more culpable than law enforcement officials who made the initial privacy intrusion. He argued that if illegally seized evidence is admitted, then the court becomes the "motivating force" in the fourth amendment violation.[107] Thus, when the judiciary recognizes a good faith exception to admit illegally obtained evidence, courts become constitutional violators by admitting the fruits of an unreasonable search and seizure.[108]

Critics of the *Leon* decision not only dispute the Court's fragmentary view of the exclusionary rule but also condemn the premise on which that view is founded. The *Leon* Court explained that the exclusionary rule serves as a restraint only on law enforcement because the sole purpose of the exclusionary rule is deterrence of official misconduct.[109] A dissenting Justice Brennan argued that the Court's logic is flawed because it considers only one comparatively minor aspect of the recognized deterrent purposes of the exclusionary rule.[110] Justice Brennan contended that the majority misinterpreted the deterrence rationale behind the exclusionary rule because the rule was not created to

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103. *Leon*, 468 U.S. at 936 (Brennan, J., dissenting). Justice Brennan stated:

> [C]ertainly nothing in the language or history of the [f]ourth [a]mendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed. It is difficult to give any meaning at all to the limitations imposed by the [a]mendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The [a]mendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained.

Id. at 933-34 (Brennan, J., dissenting) (footnotes omitted).

104. *Id.* at 932 (Brennan, J., dissenting).

105. *Id.* at 938.

106. *Id.* at 976-78 (Stevens, J., dissenting in *Leon* and concurring in *Sheppard*).

107. *See id.* at 978.

108. *See* Note, *supra* note 92, at 631, in which the author states: "Just as it makes no difference to the victim whether his constitutional right has been invaded by a federal agent or a state official, it would not matter to him whether his rights were violated by a policeman or a judge." *Id.* (footnotes omitted).

109. 468 U.S. at 916.

110. *See id.* at 953 (Brennan, J., dissenting).

punish law enforcement officials who do not follow fourth amendment procedures.[111] Justice Brennan pointed out that the Court had recognized in its earlier decisions[112] that the proper function of the exclusionary rule is to promote institution-wide compliance with the fourth amendment.[113] Under this institutional view, the serious consequences that result when the exclusionary rule is imposed initiate an overall educational effect.[114] Police department policy-makers are encouraged to carefully formulate policies in strict compliance with fourth amendment constraints.[115] In a recent exhaustive study of the deterrent effect of the exclusionary rule, the author similarly concluded that institutional reforms that reinforce adherence to the fourth amendment by individual police officers are directly dependent on strict application of the exclusionary rule.[116] The author determined that the exclusionary rule acts as an institutional deterrent, motivating the police department, the state attorney general's office, and the courts to adopt programs and procedures that ensure compliance with the fourth amendment.[117]

Proponents of this institutional view of the exclusionary rule claim that even when the individual police officer acts with a reasonable, yet mistaken, belief that the warrant is constitutional, imposition of the exclusionary sanction still will have a significant long term deterrent effect.[118] Consistent exclusion of evidence in these situations necessarily

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111. *Id.* Justice Brennan stated that "what the Court overlooks is that the deterrence rationale for the rule is not designed to be, nor should it be thought of as, a form of 'punishment' of individual police officers for their failures to obey the restraints imposed by the [f]ourth [a]mendment." *Id.*

112. Justice Brennan quoted Stone v. Powell, 428 U.S. 465, 492 (1976), in which the Court stated: "[O]ver the long term, [the] demonstration [provided by the exclusionary rule] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate [f]ourth [a]mendment ideals into their value system." *Leon*, 468 U.S. at 954 (Brennan, J., dissenting) (quoting State v. Powell, 428 U.S. 465, 492 (1976)).

113. *Leon*, 468 U.S. at 954 (Brennan, J., dissenting). Justice Brennan notes that Justice Stewart authored an article that identified the exclusionary rule as "designed to produce a 'systematic deterrence.'" *Id.* at 953 n.12 (quoting Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1400 (1983)).

114. *Leon*, 468 U.S. at 954-55 (Brennan J., dissenting). Justice Brennan stated that "[i]t is only through such an institutionwide mechanism that information concerning [f]ourth [a]mendment standards can be effectively communicated to rank-and-file officers." *Id.* at 954.

115. *Id.* at 954-55.

116. Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1054 (1987) (study based on extensive interviews with Chicago narcotics officers documenting the significant deterrence effects the exclusionary rule serves).

117. *Id.* at 1017.

118. *Leon*, 468 U.S. at 955 (Brennan, J., dissenting).

would encourage police departments to warn their officers that they cannot assume automatically that a warrant is valid simply because it has been issued by a magistrate.[119] Officers would be instructed in applying for warrants to devote significant attention to preparing affidavits replete with information to meet stringent probable cause standards and to review the warrant carefully for constitutional defects when it is issued.[120] In contrast, if a good faith exception is available, critics claim that police departments will be far less concerned with educating their officers about fourth amendment prohibitions.[121] As a result, the *Leon* decision severely reduces the incentive for police to follow the procedures that the Constitution requires and encourages police ignorance of the law.[122]

Finally, opponents of the *Leon* decision contend that even if the exclusionary rule's singular function is to deter police misconduct, the Court wrongly applied its own cost-benefit test in determining that, in the good faith context, the costs of exclusion greatly outweigh the deterrent benefits.[123] Available data demonstrates that the majority overstated the costs associated with suppression of evidence.[124] Empirical evidence shows that cases rarely are dropped for prosecution and that defendants seldom are acquitted as a result of exclusionary rule problems.[125] This data leads to an often asked question: what was the majority's real motive in proclaiming a good faith exception?

Commentators explain the *Leon* majority's decision as an attempt to prevent the loss of convictions on fourth amendment grounds.[126] Critics contend that the Court, in effect, rewrote the Constitution to delete the probable cause requirement by denying a remedy to persons

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* Justice Brennan warns that because the good faith exception removes "any incentive to err on the side of constitutional behavior," police are encouraged "to adopt a 'let's-wait-until-it's-decided' approach" when the warrant the officer requests is of questionable constitutionality. *Id.*; *see also* Comment, United States v. Leon: *Fourth Amendment Rights Eroded to Pre-Constitutional Status*, 20 NEW ENG. L. REV. 317, 335 (1985) (warning that "[l]ess than honest police officers could manipulate the *Leon* standard in order to facilitate the apprehension of criminals").

123. *See Leon*, 468 U.S. at 951 (Brennan, J., dissenting); Note, *supra* note 92, at 632.

124. *Leon*, 468 U.S. at 950-51 (Brennan, J., dissenting). Justice Brennan cites a series of recent studies in which researchers measured the actual costs of the exclusionary rule. For example, he cites a study prepared at the request of Congress by the General Accounting Office stating that only 0.2% of all felony arrests are declined for prosecution because of the potential for exclusion of evidence. *Id.* (citing REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 14 (1979)).

125. *Id.* at 950-51 n.11 (Brennan, J., dissenting).

126. This approach explains why the court did not remand *Leon* under *Gates* as commentators claim the court should have done. Note, *supra* note 92, at 637; *see also supra* notes 74-80 and accompanying text.

whose fourth amendment rights were violated by an improper search.[127] To facilitate more criminal convictions, the Court either could have further emasculated the fourth amendment probable cause requirement or narrowed the scope of the exclusionary rule.[128] Rather than directly attack the Constitution, the majority took the less controversial approach and denied a remedy for fourth amendment violations.[129] The result is the same, however, because a right without a remedy is form without substance.[130] Denying the exclusionary remedy to an accused whose fourth amendment rights have been violated by an officer who relied on a warrant lacking probable cause adds a good faith exception to the explicit and unconditional probable cause requirement of the Constitution.[131] The Court does not have the power to alter the Constitution by substituting its own value judgments for that of the Framers. In adopting the fourth amendment, the Framers expressed that the protection of fourth amendment rights is of greater importance than the creation of a slightly more efficient criminal prosecution system.[132] This judgment is made on principle and is not susceptible to a cost-benefit analysis of police behavior.[133] The *Leon* Court implicitly disagreed with the Framers' principle and, as a result, overturned long-standing constitutional principles in the guise of "good faith" and "cost-benefit" scrutiny.[134] As the Court earlier expressed in the case of *Terry v. Ohio*,[135] subjective good faith can render the protections of the fourth amendment meaningless and subject to the discretion of the police.[136] In Justice Stevens' words, the *Leon* majority's evisceration of the Framers' intent through removal of fourth amendment protections may be characterized as "the product of Constitutional amnesia."[137]

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127. *See* Comment, *supra* note 81, at 124 (noting that the *Leon* court acknowledged that the warrant lacked probable cause, but admitted the illegally seized evidence, concluding that "the good faith exception is not an exception to the exclusionary rule; it is an exception to the explicit probable cause standard of the fourth amendment").

128. Note, *supra* note 92, at 637.

129. *Id.*

130. *Id.* (recognizing that "the distinction between directly attacking a textual right and denying a remedy is specious").

131. Comment, *supra* note 81, at 124.

132. *Id.* at 128.

133. *Id.* The author analogized the principle underlying the exclusionary rule to the requirement of proof beyond a reasonable doubt in a criminal prosecution. In criminal trials, some criminals go free because of insufficient evidence. Our society, however, values protecting the innocent from an overzealous criminal prosecution system more than increasing the quantity of criminal convictions. *Id.* at 128-29.

134. *See id.*

135. 392 U.S. 1 (1968).

136. *Id.* at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).

137. *Leon*, 468 U.S. at 972 (Stevens, J., dissenting in *Leon* and concurring in *Sheppard*). Justice Stevens stated:

C. *Adverse Consequences of the* Leon *Decision*

While there is very little empirical evidence to establish what impact *Leon* has, in fact, had upon the criminal justice system,[138] commentators assert that a number of adverse consequences invariably flow from the decision.[139] A chief consequence of the *Leon* decision is to insulate from effective review the magistrate's decision to issue warrants.[140] The good faith exception sends an unequivocal message to magistrates that mistakes made when reviewing warrant applications are of virtually no consequence because an incorrect decision will not preclude admission of evidence if the police relied in good faith on the warrant.[141] Because the incentive carefully to review warrant applications is diminished, magistrates inevitably will devote less care and attention to their important constitutional role.[142]

The complete insulation of the magistrate's probable cause determination from subsequent judicial review creates a dangerous "super magistrate."[143] As a result, courts are virtually powerless to fulfill their role as an essential safeguard of fourth amendment protections.[144] As recently as *Illinois v. Gates*,[145] Justice Rehnquist, speaking for the ma-

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> In short, the Framers of the [f]ourth [a]mendment were deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a warrant not hased on probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable." The Court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia.

Id.

138. In a study of the deterrent effects of the exclusionary rule conducted subsequent to the United States v. Leon decision, the author concludes:

> [T]he Court's decision in *Leon* threatens to undermine the institutional responses to the exclusionary rule and the consistently correct search behavior they have fostered. These reforms were created to make certain that a search warrant was sufficiently grounded in probable cause. *Leon* may make this elaborate apparatus unnecessary. Some police officials helieve that, in the next "era of declining resources," the institutional reforms created in response to the exclusionary rule may be in danger.

Comment, *supra* note 116, at 1054; *see also Leon Has Little Practical Impact on Law Enforcement Practices, Study Finds*, 42 Crim. L. Rep. (BNA) 2359 (1988) (citing a recent study by the Police Executive Research Forum concluding that the good faith exception's impact on police search warrant practices has been largely symbolic so far and predicting that *Leon*'s effects will become significant in the future, however, as law on the good faith exception develops).

139. *See, e.g.*, Note, *supra* note 92, at 634-39.

140. *Leon*, 468 U.S. at 956 (Brennan, J., dissenting).

141. *Id.*

142. *Id.* Justice Brennan stated: "Although the Court is correct to note that magistrates do not share the same stake in the outcome of a criminal case as the police, they nevertheless need to appreciate that their role is of some moment in order to continue performing the important task of carefully reviewing warrant applications." *Id.*

143. Note, *supra* note 92, at 634.

144. *See id.; see also supra* notes 85-99 and accompanying text.

145. 462 U.S. 213 (1983).

jority, emphasized that courts have a continuing obligation to ensure that warrants are based on constitutionally sufficient affidavits.[146] Justice Rehnquist and the rest of the *Leon* majority seem to have forgotten this command.[147]

The lack of effective review is even more dangerous because of the minimal training and qualifications required of magistrates. A great number of states do not require magistrates to have any legal training; some states merely require a high school diploma, while others simply require literacy.[148] The *Leon* decision puts great trust in the discretion these magistrates exercise in deciding whether the constitutional requirements are met sufficiently to permit a warrant to issue. In many cases, however, the magistrate has had no legal instruction and cannot exercise this discretion with knowledge of what the law commands. Because the good faith exception shields these magistrates' decisions from subsequent review, the protection against conviction based on illegally seized evidence is weakened.[149]

Another problem arising from judicial deference to magistrates' decisions is the practice of "magistrate shopping."[150] Because a police officer knows that the magistrate's signature on a warrant is enough to preserve illegally seized evidence, the officer may be tempted to seek out the magistrate with the most lenient standards.[151] In this scenario, the probable cause requirement is reduced to obtaining the signature of a lenient magistrate.[152]

Because the good faith exception shields a magistrate's probable cause determination from subsequent judicial review, critics fear that *Leon* freezes the development of fourth amendment law.[153] Despite the majority's assertion that *Leon* does not prevent courts from reviewing the defendant's fourth amendment claim before addressing the good faith issue,[154] practicality and precedent suggest a contrary finding. Federal courts with crowded dockets cannot be expected to decide complicated fourth amendment issues when the evidence is nevertheless admissible.[155] The companion case to *Leon*, *Massachusetts v.*

146. *Id.* at 239.

147. Note, *supra* note 92, at 635.

148. *Id.* (citing a 1979 study estimating that 14,000 magistrates in the United States are not attorneys).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 636.

153. *Id.* at 637.

154. *Leon*, 468 U.S. at 925.

155. Note, *supra* note 92, at 638 (citing Brief for Respondent at 27, United States v. Leon, 468 U.S. 897 (1984)). For cases overlooking the fourth amendment issue by directly addressing the good faith exception, see United States v. Washington, 797 F.2d 1461 (9th Cir. 1986); United

Sheppard,[156] followed this practical approach, postponing consideration of the fourth amendment issue until after the Court determined whether the good faith exception applied. The *Sheppard* Court refused to decide the merits of the fourth amendment claim and dismissed it as being of little importance.[157]

Some commentators recognize that the most compelling criticism of the good faith exception is that it dangerously weakens the probable cause mandate of the fourth amendment.[158] When *Leon* is applied in conjunction with the lenient *Gates* standard,[159] the result is a "double dilution" of the probable cause requirement.[160] Critics fear that this application would allow mere suspicion to take the place of probable cause as a basic requirement for obtaining a search warrant.[161] Warrants based on mere suspicion, however, are exactly what the Framers of the fourth amendment strived to prohibit.[162] The good faith exception creates a dangerous potential for rendering obsolete the basic constitutional safeguards regarding search and seizure.[163]

Although the *Leon* majority announced four exceptions to the application of the good faith doctrine,[164] recent cases suggest that these exceptions are disfavored and rarely utilized. The cases indicate a general reluctance on the part of courts to find the good faith doctrine inapplicable. This reluctance is evidenced by the use of restrictive language when discussing the four exceptions. The Tenth Circuit recently stated in *United States v. Cardall*[165] that the good faith exception is inapplicable only when underlying documents are "devoid of factual support" and the officer's reliance is "wholly unwarranted."[166] The Fifth Circuit[167] recently echoed the Tenth Circuit's limiting language, stating that in order for one of the exceptions in *Leon* to apply, the warrant must be a "bare bones" list of "wholly conclusory statements" or "devoid of factual support."[168] Similarly, the Ninth Circuit[169]

States v. Gant, 759 F.2d 484 (5th Cir.), *cert. denied*, 106 S. Ct. 149, 107 S. Ct. 1957 (1985).

156. 468 U.S. 981 (1984).

157. *Id.* at 988 n.5.

158. *See, e.g.*, Note, *supra* note 92, at 636.

159. *See supra* note 6.

160. Note, *supra* note 92, at 636.

161. Comment, *supra* note 122, at 339.

162. *Id.*; *see also* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

163. Comment, *supra* note 125, at 339.

164. *See Leon*, 468 U.S. at 923 (1984).

165. 773 F.2d 1128 (10th Cir. 1985).

166. *Id.* at 1133.

167. United States v. Maggitt, 778 F.2d 1029 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2920 (1986).

168. 778 F.2d at 1036.

stated that the *Leon* exceptions to the good faith exception do not apply to an illegal warrant if it is not plainly evident that the magistrate had no authority to issue the warrant.[170]

An analysis of recent judicial treatment of each of the four explicit exceptions to the good faith doctrine articulated in *Leon* shows how rarely the exceptions are used to suppress evidence that *Leon* would otherwise admit. First, the Supreme Court, citing *Franks v. Delaware*,[171] held that suppression is appropriate if a warrant is based on knowingly or recklessly made falsehoods in the affidavit.[172] Some courts, however, have held that the *Franks*-based exception does not require suppression in every case in which an officer includes deliberate or reckless falsehoods in an affidavit. Rather, these courts impose a materiality requirement under which evidence is admitted despite the falsehoods if sufficient contents other than the misrepresentations establish probable cause under the extremely lenient *Gates* standard.[173] Thus, an officer may be able to include falsehoods in an affidavit in order to persuade a magistrate to authorize a search that he otherwise would not allow, and the evidence will not be suppressed if the rest of the affidavit indicates probable cause.

Second, the *Leon* court stated that the good faith doctrine does not apply if the magistrate "wholly abandoned his judicial role."[174] Subsequent cases demonstrate that proving such abandonment is difficult.[175] In *United States v. Hendricks*[176] the Ninth Circuit found that a warrant to search a house for a suitcase lacked probable cause because the issuing magistrate knew that the item was not inside the premises to be searched.[177] Nevertheless, the court rejected the defendants' claim that

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169. United States v. Freitas, 800 F.2d 1451 (9th Cir. 1986).

170. *Id.* at 1457.

171. 438 U.S. 154 (1978).

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

173. *See, e.g.*, United States v. Kovac, 795 F.2d 1509, 1512 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 951 (1987); State v. Schaffer, 107 Idaho 812, 822, 693 P.2d 458, 468 (Idaho Ct. App. 1984) (finding that the *Leon* decision "did not intend to create a blanket exception for every case exhibiting a *Franks* problem"). *But see* United States v. Boyce, 601 F. Supp. 947 (D. Minn. 1985) (stating that if a reviewing court finds a reckless or intentional misstatement in an affidavit, suppression is required regardless of materiality).

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

175. *See* United States v. Sager, 743 F.2d 1261 (8th Cir. 1984) (rejecting the defendant's claim that the affidavit was so deficient that any magistrate issuing a warrant in reliance on it would he acting merely as a rubber stamp, and holding that although the affidavit was insufficient to establish probable cause, the magistrate did not abandon his judicial role), *cert. denied*, 469 U.S. 1217 (1985); *see also* United States v. Harper, 802 F.2d 115, 120 (5th Cir. 1986) (asserting that the good faith exception was appropriate despite the defendant's contention that the warrant was issued on a "bare bones" affidavit).

176. 743 F.2d 653 (9th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985).

177. 743 F.2d at 654-56. The magistrate issued a prospective warrant authorizing Drug En-

the good faith exception should be inapplicable. Although the court acknowledged that the magistrate abdicated to the investigating officers an important judicial function, probable cause determination, the court held that this abdication did not constitute the necessary abandonment of his judicial role.[178]

Under the third exception, evidence must be suppressed if a warrant is so "facially deficient" in failing to meet the particularity requirements that an officer cannot presume it to be valid.[179] The Supreme Court failed to apply this exception in *Massachusetts v. Sheppard*.[180] In *Sheppard* the warrant was a form warrant for controlled substances that did not mention the items sought in the homicide investigation nor those items that eventually were seized.[181] *Sheppard*, because it appears to fit within this third exception, indicates that the allegedly limiting principles announced in *Leon* are a spurious pretext to further the objective of diluting fourth amendment safeguards.[182] A recent case illustrating this concern is *United States v. Anderson*,[183] in which the court rejected a "facial deficiency" exception to the good faith doctrine after finding virtually no distinction between the facts at issue and the facts in *Sheppard*.[184] In *Anderson* the warrant described the items to be seized as merely "property obtained in violation of the penal laws of this state or any other state."[185] Despite the court's acknowledgement that the warrant was facially deficient, the court nevertheless admitted the items seized under the good faith doctrine.[186]

The final exception, when an affidavit is "so lacking in indicia of probable cause" that no official could reasonably rely on the warrant,[187]

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forcement Administration (DEA) officials to search when they believed the suitcase had arrived at the house. The court recognized that "[b]y issuing such a warrant, the magistrate abdicates to the DEA agents an important judicial function—the determination that probable cause exists to believe that the objects are currently in the place to be searched." *Id.* at 655.

178. *Id.* at 656.

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

180. 468 U.S. 981 (1984) (the companion case to *Leon*).

181. *Id.* at 985-86. One commentator warns that if the "facial deficiency" exception does not apply to prevent operation of the good faith exception in *Sheppard*, a case which factually falls squarely within the exception, it is doubtful that the exception ever will be utilized. Note, *supra* note 92, at 639. *But see* United States v. Strand, 761 F.2d 449 (8th Cir. 1985) (holding that officers could not reasonably rely on a warrant invalidated because of insufficient particularity).

182. *See* Note, *supra* note 62, at 639 (stating that "*Sheppard* demonstrates that the good faith exception is a pretext to effectuate the Burger Court's objective of squeezing the life out of the fourth amendment").

183. 618 F. Supp. 1335 (D.D.C. 1985).

184. *Id.* at 1341-42.

185. *Id.* at 1337.

186. *Id.* at 1342.

187. *Leon*, 468 U.S. at 923 (1984) (citations omitted).

has been met with equal disfavor and disuse.[188] In the recent case of *United States v. Savoca*[189] the Sixth Circuit rejected a claim for suppression of illegally seized evidence pursuant to this exception. The warrant authorized the search of a motel room for evidence of a bank robbery that the defendant allegedly had committed.[190] The search clearly was without probable cause, for three reasons: (1) the motel room was not connected to the defendant other than by his having been "seen" there; (2) the motel was located over 2,000 miles from the robbery; and (3) the affidavit did not specify the amount of time that had passed since the crime.[191] In short, the defect was a lack of nexus between the place to be searched and the evidence sought.[192] Nevertheless, the court held that a reasonably well trained officer could have relied on the validity of the warrant.[193] Reasoning that some cases have upheld such "skeletal" affidavits, the court concluded that a reasonably well trained officer could be aware of such decisions and might conclude that the warrant at issue was not invalid.[194] This logic is dangerous because it seems to substitute reliance on what is reasonable with reliance on what has been tolerated, seriously reducing the court's ability to find an affidavit "unreasonably lacking in indicia of probable cause."

Other courts have expressed difficulty in applying the "indicia of probable cause" exception to *Leon*, especially in light of the already lenient probable cause standard announced in *Illinois v. Gates*. In *State v. Schaffer*[195] the court recognized the difficulty of finding an affidavit so deficient that no basis for probable cause exists under *Gates*, yet upon which an officer could reasonably rely.[196] The *Schaffer* court

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188. *See, e.g.*, United States v. Edwards, 798 F.2d 686, 690-91 (4th Cir. 1986) (finding evidence to be admissible under *Leon* even though the search warrant was based almost entirely on an informant's tip and that no information was provided concerning the informant's reliability and credibility); United States v. Maggitt, 778 F.2d 1029, 1036 (5th Cir.) (rejecting the contention that the "lacking of indicia" exception should apply while recognizing that the affidavit "arguably failed to set forth an adequate basis upon which to determine the reliability and credibility of informant's information"), *cert. denied*, 106 S. Ct. 2920 (1985). *But see* Crittenden v. State, 476 So. 2d 626 (Ala. Crim. App. 1983), *aff'd* 476 So. 2d 632 (Ala. 1985) (finding that officers were not entitled to rely on a magistrate's determination of probable cause based on a "bare-bones" affidavit); State v. Thompson, 369 N.W.2d 363, 372 (N.D. 1985) (stating that the reliance on a magistrate's authorization was unreasonable when the affidavit merely described "a most tenuous and conclusory" suggestion of criminal conduct).

189. 761 F.2d 292 (6th Cir. 1985).

190. *Id.* at 294.

191. *Id.* at 294-95.

192. *Id.* at 295.

193. *Id.* at 298.

194. *Id.* at 297.

195. 107 Idaho 812, 693 P.2d 458 (Idaho Ct. App. 1984).

196. *Id.* at 812, 693 P.2d at 468. The court stated:

> We confess that we are unsure how this quantum of evidence compares to the level needed to support a probable cause determination under *Gates*. It splits a fine hair indeed to say that

correctly recognized that the exceptions to *Leon* rarely will be employed because of the breadth of the *Leon* holding and other decisions diluting the fourth amendment, such as *Gates* and *Sheppard*. One commentator warns that opening the way to discretionary enforcement of the good faith exception creates "a slippery slope with limitless potential for abuse."[197]

IV. Effect of Leon on the Application of Redaction

Returning to the questions raised at the outset of this Note, what effect should and does a good faith exception to the exclusionary rule have on the propriety of redacting an illegal search warrant containing severable valid clauses? This inquiry can be made by analyzing two distinct scenarios. First, when the good faith doctrine is inapplicable, so that suppression remains an appropriate remedy because the court finds that one of the four exceptions to *Leon* applies, may a court nevertheless utilize redaction to admit evidence seized pursuant to any valid portions of the warrant? Second, when the facts of the case are within the good faith doctrine as announced in *Leon*, should the officer's good faith compel the court to ignore redaction and admit all the evidence seized despite severable invalid clauses? Or, should the court sever the invalid portions and admit only legally seized evidence despite the officer's good faith reliance?

A. *When* Leon *Commands that "Suppression . . . Remains an Appropriate Remedy"*

The Supreme Court in *Leon* articulated four situations in which the good faith exception to the exclusionary rule is inapplicable and

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the evidence is so deficient there is no "substantial basis" to find probable cause under a "totality of circumstances," but that the evidence still is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."

197. Note, *supra* note 92, at 639; *see also* United States v. Washington, 797 F.2d 1461 (9th Cir. 1986). In *Washington* the warrant authorized seizure of records depicting sales of cocaine, but the defendant claimed that the affidavit only established probable cause to search for evidence of use of cocaine. The court recognized that "[t]his distinction between sale and use is critical because a warrant pertaining to drug sales would permit the officers to search through [defendant's] papers, while a warrant restricted to drug use would not." *Id.* at 1467-68. Nevertheless, the court avoided the fourth amendment claim and simply held that the evidence was admissible even if probable cause was lacking because reliance on such a warrant was "objectively reasonable." *Id.* at 1474. This case arguably fits within the "lacking of indicia of probable cause" exception to *Leon*, but the court did not address this possibility. The danger of the decision is the potential snowball effect on invocation of the plain view doctrine. The court admitted papers seized outside the scope of the warrant because they were found in plain view of the search for evidence of drug sales, but acknowledged that if the warrant had been limited to a search for drug use, the prostitution evidence would not have been admissible. *Id.* at 1468-69.

suppression remains appropriate.[198] In holding that suppression of illegally seized evidence is required in those four instances, the Court did not consider whether something less than total suppression would be permissible if the warrant was severable and contained valid clauses. Nevertheless, considering the Court's sympathy with the prosecution stance in *Leon* and other decisions that liberalize requirements for admission of evidence against criminals,[199] the Court is likely to endorse redaction in this situation. The Court predictably would conclude that the mere fact that *Leon*'s good faith doctrine cannot admit the evidence does not preclude admission by another avenue.

However, because a warrant must be so egregiously deficient before one of the four exceptions to *Leon* applies,[200] redaction often will be inappropriate in these situations. Redaction cannot be used to save minor valid clauses in an essentially general warrant.[201] This limitation serves to prevent an abuse of the warrant process. If redaction were allowed in such cases, officers would try to obtain overly broad warrants, knowing that they could rely on redaction later if the reviewing court found the warrant to be too general. Similarly, the instances in which the good faith doctrine does not apply aim to prevent abuse of warrants. If the good faith doctrine were to apply when reliance on the warrant is not objectively reasonable, officers would try to obtain warrants with little or no justification, knowing that they later could rely on the magistrate's authorization if the warrant subsequently was found to be invalid.

Nevertheless, cases may exist in which one of the four exceptions to *Leon* makes the good faith doctrine inapplicable while redaction remains a viable alternative. In such a case, "objectively reasonable reliance" on the warrant is not justified because of one or more egregiously invalid clauses in the warrant, yet the warrant, considered as a whole, contains substantial valid clauses that render the warrant not "essentially general." The Ninth Circuit faced this situation in *United States v. Washington*,[202] in which the court invalidated two sections of a search warrant that authorized the seizure of articles that would establish the financial status of the defendant and connect the defendant to other persons, regardless of any possible criminal connection.[203] The court held that these two clauses were so unconstitutionally overbroad that they precluded an officer's objectively reasonable reliance on their

198. *Leon*, 468 U.S. at 923.
199. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (relaxing the probable cause standard).
200. *See supra* notes 59-63 and accompanying text.
201. *See supra* note 41 and accompanying text.
202. 797 F.2d 1461 (9th Cir. 1986).
203. *Id.* at 1473.

provisions.[204] The court reasoned that the articles seized pursuant to the invalid clauses must be suppressed under the "facially deficient" exception to *Leon*.[205] However, the court asserted that the evidence seized pursuant to the valid portions of the warrant remained admissible.[206] The court, in effect, redacted the warrant despite the taint of the egregiously invalid clauses.

The United States District Court for the District of Columbia, in the recent case of *United States v. Nader*,[207] similarly concluded that redaction is available even when the good faith exception is inapplicable. The warrant at issue was not broken into clauses, unlike the warrant in *Washington*, but merely listed seizable items.[208] The court held that the first six items on the list were described with particularity,[209] but found the search to be illegal as to the seizure of items pursuant to the broad description, "other photographs, magazines, writings and documents which are evidence of violations of Title 18 U.S. Code sections 1461 and 1462."[210] According to the court, this language was unconstitutional because it gave the officer discretion to determine what was obscene and provided little guidance as to what should be seized.[211] The court held that because this language in the warrant was so "facially deficient," the good faith exception was inapplicable.[212] Alternatively, the court considered redaction and concluded that it properly could sever the general provisions of the warrant and uphold the warrant to the extent of the six particularly described items.[213]

Although these two decisions deal only with the "facially deficient" exception to *Leon*, the same rationale applies in cases arising under one of the remaining three exceptions. If a court finds a clause to be "so lacking of indicia of probable cause" that an officer could not reasonably rely on its validity, the clause should be stricken and the remaining portions upheld, provided that the warrant as a whole is not unsupported by probable cause. If the reviewing court finds that the magistrate "wholly abandoned his judicial role," the court should then look further to determine what portions of the warrant were affected by this abandonment. If the issuance is a general abdication of the magistrate's constitutional duty, redaction would, of course, be inappropriate be-

204. *Id.*
205. *Id.*
206. *Id.*
207. 621 F. Supp. 1076 (D.D.C. 1985).
208. *Id.* at 1080.
209. *Id.* at 1081.
210. *Id.* at 1080-81.
211. *Id.*
212. *Id.* at 1084 (quoting *Leon*, 468 U.S. at 923 (citation omitted in original)).
213. *Id.* at 1085.

cause it would permit an abuse of the warrant process in this context. However, if the abandonment is only related to one or more minor portions of an essentially valid warrant, redaction would be desirable. Finally, even if the court were to find that the officer recklessly or intentionally included falsehoods in the affidavit, redaction still would be appropriate to excise only those clauses authorized pursuant to the misinformation, provided that the warrant generally is based on truth.

In these instances, redaction is desirable to admit probative, legally obtained evidence to aid the prosecution. Redaction also is appropriate because it accomplishes this goal without sacrificing the fourth amendment protections that the *Leon* exceptions strive to safeguard. Even when the *Leon* doctrine is inapplicable, no rational justification exists for requiring suppression of all evidence seized pursuant to a warrant containing severable valid clauses. When redaction is properly applied—that is, when it is applied only after the warrant as a whole is found not to be essentially invalid—the concerns expressed by the *Leon* court are not present. Application of redaction in such cases will not lead to an abuse of the warrant process. Rather, redaction restores the status quo. It places the prosecution and defense in the position they would have been in had there been no illegal search. If the state had not conducted the unlawful portion of the search, it would not have had the evidence that redaction suppresses for use at trial. Redaction is necessary to allow the prosecution to use probative evidence that the prosecution would have been entitled to had there been no constitutional violation.

B. When Leon *Commands that "Application of the Extreme Sanction of Exclusion Is Inappropriate"*

One question that remained unanswered after *Leon* was whether good faith reliance requires admission of all evidence seized pursuant to the original invalid warrant or whether, in the case of severable warrants, redaction may be utilized to suppress evidence seized pursuant to the excised portions. Redacting a severable warrant in this scenario to suppress evidence seized pursuant to invalid clauses seems inconsistent with the logic of *Leon*. The *Leon* Court reasoned that suppression of evidence, even if illegally seized, is inappropriate when an officer relied in good faith on a duly issued warrant because the costs of suppression outweigh the resultant benefits.[214] Thus, *Leon*, because it admits evidence based on an officer's good faith rather than a valid warrant, appears to conflict with the rationales supporting redaction.[215]

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214. *Leon*, 468 U.S. at 913.

215. Professor LaFave in his *Treatise on the Fourth Amendment* notes this contradiction

The Eighth Circuit recently faced the conflict between the good faith exception and redaction, resolving the conflict in favor of redaction. In *United States v. Haley*[216] the defendant objected to the admission of a gun that he claimed the officers had seized pursuant to a search for items in the portions of a warrant that were unsupported by probable cause after the officers had ceased searching for items in the valid clauses.[217] The court rejected the defendant's petition for redaction, stating that because the officers had relied on the warrant in good faith, a further search for the items in the invalid portions was permissible.[218]

V. LEON AND THE STATE COURTS: A CONCLUSION

Despite the United States Supreme Court's decision in *Leon*, which appears to preclude redaction in the scenario of good faith reliance on warrants, state courts that desire to retain the benefits of redaction in all cases of severable warrants nevertheless may choose to do so. However, in order to utilize redaction in the good faith exception context, the state must reject *Leon*. State courts are not required to follow *Leon*, for two reasons.[219] First, *Leon* does not announce any new federal constitutional doctrine.[220] The Court recognized that the exclusionary rule is a judge-made remedy rather than a constitutional right of the aggrieved individual.[221] As such, the good faith exception to the exclusionary rule is only a federal rule of evidence and is not binding on the states.[222] Second, even if *Leon* is perceived to be a new federal constitutional mandate, states consistent with the Supremacy Clause[223] may interpret their own constitutions to afford greater protections for their

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between the process of redaction and the logic of *Leon*. W. LAFAVE, *supra* note 9. In discussing redaction and endorsing it as a sound and desirable procedure, LaFave states that the tainted portion of a severable warrant should be excised to exclude illegally seized evidence. *Id.* at 258. He added a caveat in a footnote stating that under *Leon*'s good faith exception to the exclusionary rule, "the partial invalidity of the warrant is not likely to require exclusion of evidence in any event." *Id.* at 258, n.104.

216. 758 F.2d 1294 (8th Cir.), *cert. denied*, 474 U.S. 854 (1985).

217. *Id.* at 1296-97.

218. *Id.* at 1297; *see also* United States v. Faul, 748 F.2d 1204, 1220 n.11 (8th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985) (denying defendant's motion to suppress evidence seized pursuant to an allegedly invalid clause of a severable warrant. The court noted that even if the clause was invalid, *Leon* would allow admission of the evidence obtained by the officers who reasonably relied on the warrant).

219. Stringer v. State, 491 So. 2d 837, 846-47 (Miss. 1986) (Robertson, J., concurring); *see also* Case Comment, *supra* note 78, at 562-64 (recommending that the Tennessee Supreme Court reject the *Leon* good faith exception on state constitutional grounds).

220. *See Stringer*, 491 So. 2d at 847.

221. *Id.* (quoting *Leon*, 468 U.S. at 906).

222. *Id.*

223. U.S. CONST. art. VI, cl. 2.

individual citizens.[224] A state can make such a determination even when its own constitution contains provisions similar or identical to the federal constitution.[225]

The general effect of *United States v. Leon* on individual fourth amendment protections is representative of the recent era of Supreme Court decisions restricting individual federal constitutional rights.[226] As a result, a growing national trend has emerged among state courts to construe their respective state constitutions to provide greater protection of individual liberties than currently is available under federal law.[227] To date, six states—Minnesota, Mississippi, New Jersey, New York, Texas, and Wisconsin—explicitly have rejected *Leon* on state constitutional grounds.[228]

State courts that reject *Leon* criticize both the Supreme Court's logic and the adverse consequences that predictably will flow from its adoption. These courts assert that the *Leon* Court's reasoning misperceives the function of the exclusionary rule as a deterrent of police misconduct, while ignoring the rule's importance in promoting institution-wide compliance with individual constitutional safeguards.[229] Courts rejecting *Leon* further maintain that because the good faith exception eradicates any meaningful review of probable cause determinations,[230] adoption of the exception encourages violations of individual

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224. *See Stringer*, 491 So. 2d at 847.

225. *See* Case Comment, *supra* note 78, at 562 (citing Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1979)).

226. *Id.* at 561-62.

227. *Id.* at 562. The author quotes Justice Brennan who stated that "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Id.* (quoting Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)).

228. *See* State v. Houston, 359 N.W.2d 336, 339 (Minn. Ct. App. 1984); Stringer v. State, 491 So. 2d 837, 850 (Miss. 1986); State v. Novembrino, 491 A.2d 37 (N.J. Super Ct. App. Div. 1985); People v. Bigelow, 66 N.Y.2d 417, 497 N.Y.S.2d 630, 488 N.E.2d 451 (1985); Polk v. State, 704 S.W.2d 929 (Tex. Ct. App. 1986); State v. Grawien, 123 Wis. 2d 428, 367 N.W.2d 816 (1985); *see also* State v. Taylor, slip. op. No. 86-144-III (Tenn. Ct. Crim. App. 1987) (expressing unwillingness to recognize a good faith exception to the exclusionary rule). *But see* State v. Bolt, 142 Ariz. 260, 689 P.2d 519 (1984); McFarland v. State, 284 Ark. 533, 684 S.W.2d 233 (1985); Mers v. State, 482 N.E.2d 778 (Ind. Ct. App. 1985); State v. Wood, 457 So. 2d 206 (La. Ct. App. 1984); State v. Horsey, 676 S.W.2d 847 (Mo. Ct. App. 1984); State v. Welch, ___ N.C. ___, 342 S.E.2d 789 (1986); State v. Wilmoth, 22 Ohio St. 3d 251, 490 N.E.2d 1236 (1986); Commonwealth v. Melilli, 522 A.2d 1107 (Pa. Super. Ct. 1987); McCary v. Commonwealth, 228 Va. 219, 321 S.E.2d 637 (1984); Patterson v. State, 691 P.2d 253 (Wyo. 1984).

229. *See* Stringer v. State, 491 So. 2d 837, 849 (Miss. 1986) (Robertson, J., concurring). Justice Robertson persuasively argued that the Supreme Court failed to perceive that in cases like *Leon*, it is the magistrate, not the police officer, who violates the defendant's constitutional rights. Thus, the need for the exclusionary rule in such cases is greater, because it is the only practicable means to encourage magistrates to adhere to constitutional mandates in authorizing privacy invasions. *Id.*

230. State v. Novembrino, 200 N.J. Super. 229, 238, 491 A.2d 37, 45 (1985).

constitutional rights.[231] These courts maintain that the most compelling reason to reject *Leon* is the necessity to protect the integrity of the state's criminal justice process.[232]

A state court rejecting the Supreme Court's good faith exception to the exclusionary rule is free to utilize redaction and provide its citizens with the benefits that redaction provides.[233] Redaction restores the status quo by sending the case to trial with the prosecution and the defense in the position each would have been in had there been no unconstitutional search and seizure. As such, redaction promotes institutional compliance with fourth amendment protections, encouraging both police officers and magistrates to comply with constitutional mandates. The integrity of the criminal justice system is preserved when a court redacts invalid portions of a warrant. Whether or not the court adheres to the unitary view, which holds that admission of illegally seized evidence is itself a constitutional violation, redaction maintains public respect for the law by excluding tainted evidence from criminal trials. Moreover, redaction prohibits the freeze of fourth amendment law feared by *Leon* critics because the redacting court must scrutinize the warrant in every case for substantive compliance with the constitution. Finally, redaction provides the necessary vehicle to allow for magistrates' technical mistakes in warrants, while preserving vital evidence seized in an otherwise constitutional search.

For these reasons, many state courts have rejected *Leon* in favor of redaction. These courts assert that the proper focus should be the extent of the invasion of the fourth amendment rights of the accused in an unconstitutional search. An officer's good faith reliance on a warrant cannot cure this violation. Redaction also cannot correct the violation, but at least it provides a remedy for the affected individual. More importantly, redaction discourages future privacy invasions.

When redaction is narrowly and properly applied, it is a desirable solution to the traditional all-or-nothing exclusionary remedy for illegal searches. *United States v. Leon*, on the other hand, seems to call for all-or-nothing exclusion depending solely on whether an officer's reliance on the warrant was objectively reasonable. However, in cases in which one of the four exceptions to *Leon* applies, courts may utilize redaction consistent with *Leon* to admit legally seized evidence that *Leon* would otherwise suppress. In cases in which *Leon* calls for a good faith exception to the exclusionary rule to permit admission of *all* seized evidence, state courts should reject *Leon* in favor of redaction's

231. *Id.*

232. *Id.*

233. *See supra* notes 8-46 and accompanying text.

middle ground approach. By rejecting *Leon* in favor of redaction, states still can use suppression to preserve fourth amendment rights and also admit legally obtained evidence necessary to prosecute criminals.

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