Journal of Criminal Law and Criminology

Volume 77 | Issue 3 Article 1

1987

Limiting Leon: A Mistake of Law Analogy

Robert L. Misner

0091-4169/86/7503-507
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 77, No. 3

Printed in U.S.A.

CRIMINAL LAW

LIMITING *LEON*: A MISTAKE OF LAW ANALOGY

ROBERT L. MISNER*

I. INTRODUCTION

The debate on the advisability of creating a good faith exception to the exclusionary rule smoldered for years in the dissenting and concurring opinions of the Supreme Court,[1] only to reach full flame in the pages of criminal procedure commentaries[2] just prior to the Supreme Court's decision in *Illinois v. Gates*.[3] Although the promise of a good faith exception to the exclusionary rule did not reach fruition in *Gates*,[4] advocates of such an exception merely had to wait an additional term of court before their wishes came true. The Court's decisions in *United States v. Leon*[5] and *Massachusetts v. Sheppard*[6] created an exception to the exclusionary rule and held that illegally seized evidence could be used in the prosecution's case if police officers seized the evidence "in objectively reasonable reliance on a subsequently invalidated search warrant."[7] Cases decided after *Leon* have begun to establish certain patterns and it appears that some of the worst fears of the dissenting Justices in *Leon* are coming true.[8] Commentators on *Leon* and *Sheppard* have brought to

* Dean, Willamette University College of Law. J.D., University of Chicago, 1971; A.B., University of San Francisco, 1968. The author acknowledges the assistance of Kelley Buntjer, Arizona State University College of Law, Class of 1988, and the support of Streich, Lang, Weeks & Cardon of Phoenix, Arizona.

1 *See, e.g.*, United States v. Leon, 468 U.S. 897, 913 n.11 (1984)(citing cases).

2 1 W. LAFAVE, SEARCH AND SEIZURE § 1.2, at 3-4 (Supp. 1986)(citing several articles).

3 462 U.S. 213 (1983).

4 *Id.*

5 468 U.S. 897 (1984).

6 468 U.S. 981 (1984).

7 *Leon*, 468 U.S. at 922.

8 *See, e.g., infra* note 57.

the surface many of the practical and theoretical difficulties in *Leon*.[9] Some commentators have concluded that both *Leon* and *Sheppard* make sense only if viewed as part of a process that will eventually overrule *Mapp v. Ohio*.[10] Curiously enough, an argument missing from the debate over the good faith exception is the analogy of that exception to the substantive criminal law's mistake of law defense. This missing argument has caused the debate to lose both a sense of history and a sense of consistency within the criminal law. Opponents of a good faith exception have failed to capitalize on the historic common law view that a mistake of law by a police officer or anyone else does not excuse the conduct.[11] Proponents of the good faith exception have failed to take *Leon*'s good faith exception and analogize it to the Model Penal Code's limited mistake of law defense which excuses an act which was done pursuant to a court order.[12]

Ironically, the analogy of the good faith exception to a limited mistake of law defense permits reasonable limitations to be placed upon *Leon*[13] while at the same time acknowledging that *Leon* is perhaps fatally flawed.[14] The analogy dictates that *Leon* not be extended to warrantless searches.[15] In addition, such an analogy, while bringing some degree of symmetry to the substantive and procedural criminal law, also provides a way to reconcile such cases as *Michigan v. De Fillippo*[16] with the mainstream of fourth amendment case law. Finally, the analogy confronts directly a problem too long ignored: to what extent are decisions by magistrates "real" court decisions?[17] For example, was *Shadwick v. City of Tampa*,[18] which up-

---

9 *See, e.g.*, W. LAFAVE, *supra* note 2, at 10-36; Dripps, *Living with* Leon, 95 YALE L.J. 906 (1986).

10 367 U.S. 643 (1961). *See, e.g.*, Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405, 1422 (1986); LaFave, *"The Seductive Call of Expediency:"* United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 930; Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial*, 22 AM. CRIM. L. REV. 85, 85-93 (1984).

11 *See infra* text accompanying notes 69-104.

12 *See infra* text accompanying notes 114-23. Even before *Leon* was decided, Professor Kamisar warned that a good faith exception may only be a battle in the "war of attrition" against the exclusionary rule. Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 614 (1984).

13 *See infra* text accompanying notes 163-265.

14 *See infra* text accompanying notes 139-62.

15 Many authors have expressed fear that *Leon* may be merely a step toward expanding the good faith exception to warrantless cases. *See, e.g.*, W. LAFAVE, *supra* note 2, at 33-34; Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 298-99 (1985).

16 443 U.S. 31 (1979).

17 *See infra* text accompanying notes 201-24.

18 407 U.S. 345 (1972).

held the constitutionality of the issuance of arrest warrants by non-lawyer court clerks, wrongly decided in light of *Leon* and the unreviewability of constitutional decisions which *Leon* seems to authorize?

II. *LEON* AND THE ANALOGY TO MISTAKE OF LAW

A major purpose of the substantive criminal law is to induce external conformity to rules. The purpose of the law is to force compliance with a set of norms.[19] The criminal law achieves this standard setting function mainly through notions of retribution and deterrence.[20]

The refusal to allow generally a mistake of law defense is seen as necessary so that the parameters of rights will be learned and respected.[21] Even if the transgressor is unaware of the illegality or immorality of his act, and consequently is incapable of being specifically deterred from his act by the threat of punishment, the person must be punished so that the proper standard of conduct will be learned and respected by others.[22] The criminal law has generally refused to elevate specific deterrence of the individual above its goal of general deterrence and general education[23] and therefore has, in the main, rejected the notion that mistake of law excuses conduct.[24]

The exclusionary rule is intended to serve a similar, standard-setting function. In *Leon*,[25] and in cases preceding *Leon*,[26] the Supreme Court held that the sole function of the exclusionary rule is to deter illegal police conduct and thereby " 'safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.' "[27] Consequently, an analysis of *Leon* in light of the criminal law's treat-

---

19 *See* Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 21 (1957).

20 *See, e.g.*, Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176, 179 80 (1952).

21 Hall, *supra* note 19, at 18-23.

22 J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382-83 (2d ed. 1960).

23 *See* J. SMITH & B. HOGAN, CRIMINAL LAW 54-55 (3d ed. 1973).

24 One must be careful to distinguish those situations in which knowledge of the law is an element of the offense. When knowledge is an element, a conviction can only be sustained if the prosecution has proved it. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 357-60 (1972).

25 468 U.S. 897 (1984).

26 For a discussion of the development of the justification for the exclusionary rule away from the concept of judicial integrity, see W. LAFAVE, *supra* note 2, § 1.1, at 17-20 (1978).

27 *Leon*, 468 U.S. at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

ment of mistake of law should give some insight into the way in which *Leon* may be applied and limited.

The analogy of the doctrine of ignorance or mistake of law to the good faith exception developed in *Leon* is not complete, however, because punishment for a violation of a criminal statute is most often addressed directly to the actor and punishment is only rarely imposed in a vicarious fashion. The "punishment" associated with the exclusionary rule is directed against the state and the state is "punished" for the actions of its agent. Only in an incidental way can it be said that the officer is personally punished.[28]

III. THE GOOD FAITH EXCEPTION IN *LEON*

In its 1984 Term, the Supreme Court delivered opinions in two companion cases which created a good faith exception to the exclusionary rule. The decisions, which eschewed traditional constitutional decision making technique,[29] may be intended as harbingers of the ultimate demise of the exclusionary rule in its entirety.[30]

In *United States v. Leon*,[31] a facially valid search warrant was issued by a state superior court judge. Large quantities of drugs were found in a number of separate locations and seized pursuant to the warrant.[32] The evidence was suppressed in "a close case" by the federal district court[33] and the suppression was upheld by a divided

---

[28] Traditionally the criminal law has been somewhat loath to impose criminal sanctions against corporations or corporate executives for actions by employees. The tide has seemed to turn in favor of such criminal accountability. *See, e.g., Sentencing Commission Ponders How to Punish Organizations*, 39 Crim. L. Rep. (BNA) 2243-44 (June 25, 1986).

[29] It is probable, though admittedly not certain, that the Court of Appeals would now conclude that the warrant in *Leon* satisfied the Fourth Amendment if it were given the opportunity to reconsider the issue in the light of *Gates*. Adherence to our normal practice following the announcement of a new rule would therefore postpone, and probably obviate, the need for the promulgation of the broad new rule the Court announces today.

Leon, 468 U.S. at 961-62 (Stevens, J., dissenting).

[30] Ten years ago in *United States v. Calandra*, I expressed [in dissent] the fear that the Court's decision "may signal that a majority of my colleagues have positioned themselves to reopen the door [to evidence secured by official lawlessness] still further and abandon altogether the exclusionary rule in search and seizure cases." Since then, in case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete. That today's decision represents the *pièce de résistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated a result that had previously been thought to be foreclosed.

Leon, 468 U.S. at 928-29 (Brennan, J., dissenting)(footnote and citations omitted).

[31] 468 U.S. 897 (1984).

[32] *Id.* at 901-02.

[33] *Id.* at 903.

panel of the Ninth Circuit.[34] After the Ninth Circuit affirmed the lower court's decision, but before the case was heard in the Supreme Court, the Supreme Court decided *Illinois v. Gates*,[35] which spared probable cause determinations from the more rigorous analysis required by the Court under *Aguilar v. Texas*[36] *and Spinelli v. United States* and adopted a "totality of circumstances" test.[37] The Supreme Court acknowledged that it was within its power to consider *Leon* under the new "totality of circumstances" test[38] and therefore avoid the good faith issue.[39] The Supreme Court, however, jumped at the opportunity to create a new good faith exception. The Court in *Leon* held that the "exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[40] Suppression remains an appropriate remedy if (1) the magistrate was misled by the affidavit either intentionally or recklessly;[41] (2) the magistrate in issuing the warrant "wholly abandon[s] his judicial role";[42] (3) no

---

34 United States v. Leon, 701 F.2d 187 (9th Cir. 1983), *rev'd*, 468 U.S. 897 (1984).

35 462 U.S. 213 (1983).

36 378 U.S. 108 (1964).

37 393 U.S. 410 (1969).

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

39 *Id.*

40 *Id.* at 900.

41 *Id.* at 923. This exception to the *Leon* standard was first recognized in Franks v. Delaware, 438 U.S. 154 (1978). In *Franks*, the Court held that

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56. Thus, if the false statements are excluded and the remaining information is insufficient to establish probable cause, the good faith exception is inapplicable, and the fruits of the search must be suppressed. *Id.* at 156.

This exception has been invoked in several cases, including United States v. Reivich, 610 F. Supp. 538 (W.D. Mo. 1985), *rev'd*, 793 F.2d 957 (8th Cir. 1986); United States v. Boyce, 601 F. Supp. 947 (D. Minn. 1985); Stewart v. State, 289 Ark. 272, 711 S.W.2d 787 (1986); State v. Horton, 207 N.J. Super. 555, 504 A.2d 801 (1985).

In *Reivich*, the district court first determined that the affidavit lacked probable cause for the issuance of the search warrant. The court refused to apply *Leon* because the officers failed to include information in the affidavit regarding inducements given certain witnesses for their information. "[Detective] Sweeten displayed, at the very least, reckless disregard for the truth of said affidavit." 610 F. Supp. at 545.

42 *Leon*, 468 U.S. 897, 923 (1984). The Court cites Lo-Ji Sales v. New York, 442 U.S. 319 (1979), as an illustration of intolerable judicial conduct. In *Lo-Ji Sales*, an investigator presented two reels of "obscene" film from defendant's adult bookstore to the Town Justice in order to procure a search warrant. The Town Justice agreed that the film was "obscene" and issued the search warrant. *Id.* at 321.

The Town Justice, however, personally accompanied the officers to the bookstore to

reasonably trained officer would rely on the warrant;[43] or (4) the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[44]

In order to understand the good faith exception and the four exceptions to the exception, it is necessary to understand the Supreme Court's view of the deterrent effect of the exclusionary rule. Justice White, writing for the majority, debunked the notion that the exclusionary rule is "a necessary corollary of the Fourth Amendment"[45] and concluded that "[t]he rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment

---

perform an ad hoc, piece-by-piece obscenity determination. *Id.* at 322-23. Each item deemed obscene was amended into the existing search warrant. *Id.* at 324. In suppressing the evidence, the Court stated that the Town Justice's actions

> did not manifest the neutrality and detachment demanded of a judicial officer when presented with a warrant application. . . . He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation. . . . [H]e was not acting as a judicial officer but as an adjunct law enforcement officer.

Id. at 326-27. *See, e.g.*, Stewart v. State, 289 Ark. 272, 711 S.W.2d 787 (1986)(good faith rule not applicable when judge signed pad of 50 blank arrest warrants and authorized his clerk to issue the warrants on her own after reading the affidavit); United States v. Freitas, 610 F. Supp. 1560 (N.D. Cal. 1985); United States v. Guarino, 610 F. Supp. 371 (D.R.I. 1984); Jauregui v. Superior Court, 179 Cal. App. 3d 1160, 225 Cal. Rptr. 308 (1986).

[43] *Leon*, 468 U.S. 897, 923 (1984). *See, e.g.*, Rand v. State, 484 So. 2d 1367 (Fla. Dist. Ct. App. 1986)(affidavit insufficient because it failed to allege specifically when drugs were observed on defendant's premises; good faith exception inapplicable because deputy executing warrant knew it was facially deficient, therefore any reliance was unreasonable); United States v. Hale, 784 F.2d 1465 (9th Cir.), *cert. denied*, 107 S. Ct. 110 (1986); United States v. Washington, 782 F.2d 807 (9th Cir. 1986); United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985); United States v. Mayer, 620 F. Supp. 249 (D. Utah 1985); United States v. Burke, 613 F. Supp. 576 (N.D. Ga. 1985), *rev'd*, 784 F.2d 1090 (11th Cir.), *cert. denied*, 106 S. Ct. 2901 (1986); Jauregui v. Superior Court, 179 Cal. App. 3d 1160, 225 Cal. Rptr. 308 (1986); Howard v. State, 483 So. 2d 844 (Fla. Dist. Ct. App. 1986); Sims v. State, 483 So. 2d 81 (Fla. Dist. Ct. App. 1986); State v. Ross, 471 So. 2d 196 (Fla. Dist. Ct. App.), *cert. denied*, 106 S. Ct. 312 (1985); Collins v. State, 465 So. 2d 1266 (Fla. Dist. Ct. App. 1985); State v. Robinson, 371 N.W.2d 624 (Minn. Ct. App. 1985); State v. Connard, 81 N.C. App. 327, 344 S.E.2d 568 (1986); State v. Thompson, 369 N.W.2d 363 (N.D. 1985); Miller v. State, 703 S.W.2d 352 (Tex. Ct. App. 1985).

[44] *Leon*, 468 U.S. at 923. *See, e.g.*, *Ex Parte* State, 476 So. 2d 632, 634 (Ala. 1985)(affidavit, which "consist[ed] solely of the affiant's conclusion that the named individual committed an offense, without setting forth the facts upon which the conclusion is based, [is] fatally defective"; officer's reliance on arrest warrant was thus unreasonable; good faith exception inapplicable); United States v. Granger, 596 F. Supp. 665 (W.D. Wis. 1984), *cert. denied*, 106 S. Ct. 1232 (1986); Herrington v. State, 287 Ark. 228, 697 S.W.2d 899 (1985); Vasquez v. State, 491 So. 2d 297 (Fla. Dist. Ct. App. 1986); Stabenow v. State, 495 N.E.2d 197 (Ind. Ct. App. 1986); Blalock v. State, 476 N.E.2d 901 (Ind. Ct. App.), *vacated*, 483 N.E.2d 439 (Ind. 1985); State v. Saddler, 490 So. 2d 1155 (La. Ct. App. 1986); Adkins v. State, 675 S.W.2d 604 (Tex. Ct. App. 1984); State v. Adkins, 346 S.E.2d 762 (W. Va. 1986); State v. Brady, 130 Wis. 2d 443, 388 N.W.2d 151 (1986).

[45] *Leon*, 468 U.S. at 905-06.

rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.' "[46] The Court seems unsure of the type of deterrence it is seeking. On the one hand, the Court stated that the exclusionary rule "must alter the behavior of individual law enforcement officers or the policies of the departments."[47] Yet, on the other hand, the Court noted that "[w]e have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment."[48] The Court's initial statements justify the decision in *Leon* under a rather curious form of general deterrence, and the Court seems not quite sure whether deterrence should center on the individual officer, the officer's department or police officers generally.[49] The Court concludes in *Leon* that when "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope[,]. . . . [i]n most such cases[] there is no police illegality and thus nothing to deter."[50]

One might ask why there is no police illegality if it is determined later that there was no probable cause to search. Has not a person's constitutional right been violated? Why is this not "police illegality"? In a very subtle sleight of hand the Supreme Court narrows the purpose of the exclusionary rule. The deterrent effect of the exclusionary rule is now directed to "police misconduct rather than to punish the errors of judges and magistrates."[51] Although an "illegality" occurs when the police search without a valid warrant, it is not *police* illegality, and therefore it is not illegality which is to be deterred by the exclusionary rule. A police officer's task is not to second- guess the magistrate. It is the magistrate's responsibility to issue search warrants. " 'Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the

---

46 *Id.* at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

47 *Id.* at 918.

48 *Id.*

49 *See* Wasserstrom & Mertens, *supra* note 10, at 117-22.

50 *Leon*, 468 U.S. at 920-21.

51 *Id.* at 916. *See* Alschuler, *"Close Enough for Government Work:" The Exclusionary Rule after* Leon, 1984 SUP. CT. REV. 309, 351-57; LaFave, *supra* note 10, at 906-09; Wasserstrom & Mertens, *supra* note 10, 105-12. *See also* Sadie v. State, 488 So. 2d 1368, 1378 (Ala. Crim. App. 1986)("overbroad search was due to the investigators' failure to obtain and provide the most detailed information possible about the premises for which they were requesting a warrant. . . . Where the error does not fall on the issuing magistrate, but rather on the officers, the exception does not apply"; the exclusionary rule acts to deter this type of police misconduct). *See also* United States v. Mount, 757 F.2d 1315 (D.C. Cir. 1985); State v. Johnson, 110 Idaho 516, 716 P.2d 1288 (1986); People v. Joseph, 128 Ill. App. 3d 668, 470 N.E.2d 1303 (1984); State v. Varvil, 686 S.W.2d 507 (Mo. Ct. App. 1985).

law. . . .' Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."[52] If there is illegality, it is illegality permitted in good faith by the issuing magistrate. But the exclusionary rule, in the Court's opinion, has little impact upon the decisions of the magistrate.[53]

Without any real support for its conclusion, the Court simply removes the exclusionary rule as a mechanism to prompt the magistrate to enforce fourth amendment rights.[54] The exclusionary rule no longer is intended to force compliance to the fourth amendment by all state officials, but is now only effective to deter police officials from committing fourth amendment violations.

But what is painfully missing from the Court's discussion in *Leon* is any real discussion of how the system can insure that the magistrate will perform his now virtually unreviewable duties.[55] In a footnote, the Court offers its single hope for containing errant magistrates: " 'It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar misconduct in the future by magistrates.' "[56] The Supreme Court does not deny that illegality has occurred, and in fact, the Supreme Court calls on appellate courts to review the underlying fourth amendment issues even though their decision will not impact the

---

[52] *Leon*, 468 U.S. at 921 (Burger, C.J., concurring)(footnote omitted)(quoting Stone v. Powell, 428 U.S. 465, 498 (1976)).

[53] Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

Id. at 917 (footnote omitted). *See* Alschuler, *supra* note 51, at 318-22. *But see* Dripps, *supra* note 9, at 916.

[54] *Leon*, 468 U.S. at 916.

[55] In a footnote, Justice White indicates that federal magistrates may be removed for incompetency. *Id.* at 917 n.18. It is difficult to believe that removal from office will be an effective way to supervise the issuance of warrants. For discussions of the unreviewability of the magistrate's decision see Bradley, *supra* note 15, at 292-93; Dripps, *supra* note 9, at 907. In fact, one study has concluded that " 'a magistrate who turn[s] down a significant number of warrant applications would not last long on the bench.' " Wasserstrom & Mertens, *supra* note 10, at 110 n.188 (quoting R. Van Duizend, L. Sutton & C. Carter, The Search Warrant Process: Preconceptions, Perceptions and Practices ch. 7 § 2 (undated & unpublished manuscript)(available through National Center for State Courts)).

[56] *Leon*, 468 U.S. at 916-17 n.15 (quoting Commonwealth v. Sheppard, 387 Mass. 488, 506, 441 N.E.2d 725, 735 (1982), *rev'd*, 468 U.S. 981 (1984)).

admission of evidence in the cases before them.[57] A person's constitutional right to privacy, therefore, is to be safeguarded by the hope that an appellate court will review search and seizure cases notwithstanding its awareness that the outcome of the case will be unaffected by its decision. Justice White predicted that courts may resolve the underlying fourth amendment question before turning to the issue of good faith if "reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors."[58] This solution was Justice White's attempt to answer the argument that a good faith exception will "freeze Fourth Amendment law in its present state."[59] The case law supports what common sense tells us busy courts will do: appellate courts will not always decide the good faith issue and often will refuse to issue advisory opinions on the underlying fourth amendment issue.[60] But even if Justice White were correct, his solution apparently does not preserve the exclusionary remedy in cases in which the magistrate is unaware of the appellate court's guidance or chooses not to follow the appellate court's decision.

---

57 *Id.* at 925. Many courts have adopted a two step process: (1) Did the affidavit establish probable cause for the issuance of the warrant? If not, then (2) is *Leon* applicable? *See, e.g.,* United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984), *cert. denied,* 470 U.S. 1006 (1985); United States v. Steerwell Leisure Corp., 598 F. Supp. 171, 174 (W.D.N.Y. 1984)(*Leon* does not mean trial courts should neglect making probable cause determinations).

However, some courts have eliminated the first step, i.e., have refused to make the probable cause determination and have proceeded straight to the good faith exception. *See* United States v. Accardo, 749 F.2d 1477, 1481 (11th Cir. 1985)("The question here is not the legal validity of the warrant but the reasonableness of the officers' reliance on it."), *cert. denied,* 106 S. Ct. 314 (1985); United States v. Breckenridge, 782 F.2d 1317 (5th Cir.), *cert. denied,* 107 S. Ct. 136 (1986); United States v. Gant, 759 F.2d 484 (5th Cir.), *cert. denied,* 106 S. Ct. 149 (1985); United States v. Fama, 758 F.2d 834 (2d Cir. 1985); State v. Wildes, 468 So. 2d 550 (Fla. Dist. Ct. App. 1985); State v. Ebey, 491 So. 2d 498 (La. Ct. App. 1986); State v. Green, 478 So. 2d 583 (La. Ct. App. 1985). The Fifth Circuit has adopted the rule that a probable cause determination should be conducted only if the case represents a " 'novel question of law.' " United States v. Maggitt, 778 F.2d 1029, 1033 (5th Cir. 1985)(quoting Illinois v. Gates, 462 U.S. 213, 264 (1983)(White, J., concurring)), *cert. denied,* 106 S. Ct. 2920 (1986).

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

59 *Id.* at 924.

60 Some commentators have predicted that appellate courts would be very reluctant to review search and seizure cases and write advisory opinions. *See, e.g.,* Wasserstrom & Mertens, *supra* note 10, at 110-12. *See supra* note 57. However, appellate courts have been more willing than might have been expected to review the fourth amendment question before deciding the issue of the good faith exception. *See* United States v. Savoca, 761 F.2d 292 (6th Cir.), *cert. denied,* 106 S. Ct. 153 (1985); United States v. Hendricks, 743 F.2d 653 (9th Cir. 1984), *cert. denied,* 470 U.S. 1006 (1985); United States v. Barker, 623 F. Supp. 823 (D. Colo. 1985); Toland v. State, 285 Ark. 415, 688 S.W.2d 718, *cert. denied,* 106 S. Ct. 311 (1985); State v. Bernie, 472 So. 2d 1243 (Fla. Dist. Ct. App. 1985); State v. Murphy, 693 S.W.2d 255 (Mo. Ct. App. 1985).

The Court permits the application of the good faith exception in those situations in which the magistrate has not "abandoned his detached and neutral role."[61] Does a magistrate wholly abandon his judicial role if he is unaware of recent appellate decisions or chooses to distinguish away a particular court opinion? Even if his failure to keep current were held to be an abandonment of his judicial role, under the Supreme Court's view of the purpose of the exclusionary rule, one has to doubt whether exclusion of evidence is the proper remedy for the magistrate's error. If the exclusionary rule is truly effective only to alter police behavior, whether the magistrate has "wholly abandoned his judicial role" should only be relevant to exclusion if it appears to the police officer (the person to be deterred) that the magistrate has failed to act "magisterially." In such circumstances, "no reasonably well trained officer should rely on the warrant."[62] Unless a state uses its own constitution or statutes to fashion an exclusionary remedy different from that of the United States Supreme Court,[63] the federal constitutional right requires the application of the exclusionary rule only if the actions of the magistrate are objectively unreasonable in the eyes of the officer. As the Court wrote in *Sheppard*:

> [w]hatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.[64]

Again, the oddity of the Court's decision comes to the fore: the magistrate's decision to issue a warrant guarantees that evidence seized pursuant to that warrant may be used unless the magistrate's mistake is so obvious that it would be recognizable by the officer on the beat. In effect, a magistrate's decision is "reviewable" only by the officers who sought the warrant![65] As the Court stated in *Sheppard*,

> An error of constitutional dimensions [sic] may have been committed

---

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

62 *Id.* at 923.

63 Some states have rejected *Leon* under their state constitution. *See* State v. Novembrino, 200 N.J. Super. 229, 491 A.2d 37 (1985); People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985); State v. Grawien, 123 Wis. 2d 428, 367 N.W.2d 816 (Ct. App. 1985). *See also* Stringer v. State 491 So. 2d 837 (Miss. 1986)(Robertson, J., concurring). Texas also rejected *Leon* in an arrest warrant situation, basing its rejection upon a state criminal procedure statute. Polk v. State, 704 S.W.2d 929 (Tex. Ct. App. 1986).

64 Massachusetts v. Sheppard, 468 U.S. 981, 989-90 (1984)(footnote omitted).

65 This also appears to be the conclusion reached by Professor Alschuler, *supra* note 51, at 342, and by Professor LaFave, *supra* note 10, at 917.

with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges."[66]

The creation of the good faith exception to the exclusionary rule in *Leon* and *Sheppard* must be viewed in the context of the reliance of an officer upon the judicial decision of a magistrate in issuing a search warrant. Although subsequent cases may read *Leon* and *Sheppard* for the broader proposition that a balancing test must be used in every case[67] to weigh the perceived deterrent effect against the harm to society when relevant information is excluded, *Leon* and *Sheppard* appear to mirror the policy considerations found in mistake of law cases with which the criminal law has wrestled for centuries. If *Leon* and *Sheppard* are to guide fourth amendment jurisprudence, the mistake of law analogy dictates that at the very least the good faith exception must be limited to searches incident to warrants.[68]

IV. MISTAKE OF LAW DEFENSE

A. GENERAL PRINCIPLES AND RATIONALE OF THE COMMON LAW

Few principles in the criminal law are more firmly and consistently espoused than *ignorantia juris, quod quisque tenetur scire, neminem excusat.*[69] The common law has applied the principle that ignorance or mistake of law is no defense in varied situations, including those in which the actor's asserted lack of knowledge of the law was clearly out of step with the knowledge of the law in the general community.[70] The common law has also relied on the principle in situations in which the actor's ignorance was more understandable[71] and has even applied the principle in situations in which the actor could not have known the law.[72] In some situations ignorance or mistake of law may negate the statutorily defined *mens rea* requirement of a crime.[73] Even in jurisdictions in which mistake of law is irrelevant to

66 *Sheppard*, 468 U.S. at 990 (quoting Illinois v. Gates, 462 U.S. 213, 263 (1983)(White, J., concurring in judgment)).

67 *Leon*, 468 U.S. at 906-07.

68 *See infra* text accompanying notes 162-200.

69 4 W. BLACKSTONE, COMMENTARIES *27. "The rule that 'ignorance of the law will not excuse' is deep in our law." Lambert v. California, 355 U.S. 225, 228 (1957)(citation omitted). "The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation." United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971).

70 *See, e.g.*, Hall, *supra* note 19, at 20.

71 *See, e.g.*, R. v. Esop, 7 Car. & P. 456, 173 Eng. Rep. 203 (O.B. 1836).

72 *See, e.g.*, R. v. Bailey, Russ. & Ry. 1, 168 Eng. Rep. 651 (1800).

73 Hall & Seligman, *Mistake of Law and Mens Rea*, U. CHI. L. REV. 641 (1941).

issues of guilt, ignorance or mistake of law is viewed as a proper factor to be considered in sentencing.[74]

The existence of the principle that ignorance or mistake of law is no defense is easy to document; it is somewhat more difficult to determine the rationale for the rule in its application. A number of justifications for the common law proposition that ignorance or mistake of law is no defense have been offered. Blackstone, who traced the development of the doctrine back to Roman law,[75] justified the principle on the basis that everyone is presumed to know the law. "For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defense."[76]

Blackstone's justification for the rule has been rejected by most commentators.[77] For example, Glanville Williams, after an extensive survey of the vast literature opposed to Blackstone's justification, concluded that "[t]he idea that the vast network of governmental controls can be known by everyone is today more ludicrous than ever."[78] Similar opposition to Blackstone is found in the writings of Jerome Hall.[79]

Austin explained the rule on the basis of the difficulty of disproving a person's ignorance.[80] Holmes answered Austin by pointing out that disproving a person's ignorance is no more difficult than many issues faced by courts.[81]

More cogent justifications for the principle center around the educative, standard-setting function of the criminal law.[82] Holmes' predilection for objective liability justified his rejection of a mistake of law defense:

> The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the

---

74 R. PERKINS, CRIMINAL LAW 925 (2D ED. 1969); J. SMITH & B. HOGAN, *supra* note 23, at 54. *See* United States v. Barker, 546 F.2d 940, 965 n.31 (D.C. Cir. 1976)(Leventhal, J. dissenting).

75 W. BLACKSTONE, *supra* note 69, at *27.

76 W. BLACKSTONE, *supra* note 69, at *27.

77 Glanville Williams summarizes some of the more telling rejections of Blackstone:

> Lord Mansfield drily remarked that "it would be very hard upon the profession, if the law was so certain, that everybody knew it"; and Maule J. is credited with the observation that "everybody is presumed to know the law except His Majesty's judges, who have a Court of Appeals set over them to put them right."

G. WILLIAM, CRIMINAL LAW: THE GENERAL PART 290 (2d ed. 1961)(footnotes omitted).

78 *Id.*

79 J. HALL, *supra* note 22, at 376.

80 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 497 (3d ed. 1869).

81 O.W. Holmes, THE COMMON LAW 48 (1881).

82 *See supra* note 19.

> general good. . . . It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.[83]

Jerome Hall expounded on the use of the normative function for rejecting the mistake of law defense:

> Now comes a defendant who truthfully pleads that he did not know that his conduct was criminal, implying that he thought it was legal. This may be because he did not know that any relevant legal prohibition existed (ignorance) or, if he did know any potentially relevant rule, that he decided it did not include his intended situation or conduct (mistake). In either case, such defenses always imply that the defendant thought he was acting legally. If that plea were valid, the consequences would be: whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, *i.e. the law actually is thus and so*. But such a doctrine would contradict the essential requisites of a legal system, the implications of the principle of legality.[84]

In short, "[t]he criminal law represents an objective code of ethics which must prevail over individual convictions."[85]

LaFave and Scott also suggest that accepting a mistake of law defense would conflict with the principle of legality. That principle requires that "rules of law express objective meanings which are declared by competent officials."[86] Allowing an individual to determine the content of the law is opposed to the notion of a properly promulgated law equally binding upon all.

The common law, therefore, has concluded generally that ignorance or mistake of law will neither justify nor excuse the violation of the criminal law. The need to set community standards requires that the law not excuse conduct even if the actor did not realize that his actions were prohibited. The actor's mistake or ignorance may be considered in regard to punishment, but only if a reduced sentence would not undermine the required educative effect of the criminal law. Surely to reward an individual for being ignorant of the law would be counterproductive. There is, however, a subset of cases in which the common law has had difficulty applying its general proposition that ignorance or mistake of law is no defense. Of particular relevance here is the issue of how the law should judge

---

83 O.W. HOLMES, *supra* note 81, at 48.

84 J. HALL, *supra* note 22, at 382-83.

85 J. SMITH & B. HOGAN, *supra* note 23, at 56.

86 W. LAFAVE & A. SCOTT, *supra* note 24, at 364.

criminal actions performed after the actor has received advice concerning the legality of his actions.

B. RELIANCE UPON AN INTERPRETATION OF THE LAW

The common law infrequently has been faced with situations in which a criminal defendant sought advice as to an act's legality from a government official, private counsel or other source before committing the criminal act. The case law has remained fairly consistent in denying a defense of reliance upon the advice of private counsel.[87] However, the few courts which have wrestled with the prosecution of a defendant who has relied on the advice of a public official have reached differing results. These cases tend to fall into three general fact patterns. First, there are those cases in which the defendant was indiscriminate in seeking out a public official for advice. For example, in *Jones v. State*,[88] the defendant was convicted of operating his saloon on election day. The defendant sought to justify his actions on the ground that an officer told him he could open his saloon after the polls had closed.[89] In upholding the conviction the court concluded that "[i]gnorance of a law cannot be pleaded in justification of its violation."[90] Courts have consistently rejected the mistake of law defense in cases within this first category.[91]

Second, there are those cases in which a defendant seeks advice from an official who arguably has some special responsibility for enforcing or administering the law. Often these cases result in an acceptance of the defense of reliance upon the governmental advice. In *Raley v. Ohio*,[92] Raley was brought before the Ohio Un-American Activities Committee to answer questions about subversive activities in the labor movement. The Committee told Raley that he had a right to remain silent under the privilege against self-incrimination afforded by the Ohio Constitution.[93] Raley was eventually prosecuted for not responding to the Committee's question and his conviction was affirmed by the Ohio Supreme Court.[94] The Ohio

87 *See, e.g.*, State v. Western Union Telegraph Co., 12 N.J. 468, 97 A.2d 480, *appeal dismissed*, 346 U.S. 869 (1953); Crichton v. Victorian Dairies, [1965] V.R. 49 (Vict. Sup. Ct. 1964).

88 32 Tex. Crim. 533, 25 S.W. 124 (Crim. App. 1894).

89 *Id.* at 534, 25 S.W. at 124.

90 *Id.*, 25 S.W. at 124.

91 *See* State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

92 360 U.S. 423 (1959).

93 "No person shall be compelled, in any criminal case, to be a witness against himself." OHIO CONST. art. I, § 10.

94 State v. Morgan, 164 Ohio St. 529, 133 N.E.2d 104 (1956), *vacated and remanded*, 354 U.S. 929 (1957), *adhered to*, 167 Ohio St. 295, 147 N.E 2d 847 (1958), *aff'd in part and rev'd in part sub nom.* Raley v. Ohio, 360 U.S. 423 (1959).

Supreme Court held that the privilege was not available to Raley and that "neither ignorance of the law nor a mistake in its interpretation affords a valid defense."[95] The witness knew or is presumed to know the law and "cannot be heard to say in one breath that he knows enough of the law to claim the privilege against self-incrimination and in the next breath that he knows nothing of the immunity statute, or that he has misconstrued it."[96] In reversing Raley's conviction, eight members of the United States Supreme Court held:

> While there is no suggestion that the Commission had any intent to deceive the appellants, we repeat that to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the state—convicting a citizen for exercising a privilege which the state clearly told him was available to him.[97]

In *Cox v. Louisiana*,[98] the Supreme Court relied upon *Raley* to overturn convictions of demonstrators who had demonstrated "near" a courthouse.[99] The convictions were reversed because the "highest police officials of the city, in the presence of the Sheriff and Mayor" told the demonstrators that they could meet if they remained 101 feet from the courthouse steps.[100]

Perhaps the most famous case falling in the category of mistake of law defenses arising from advice from a public official is *United States v. Barker*,[101] one of the Watergate cases. In *Barker*, the defendants Barker and Martinez argued successfully to the Court of Appeals for the District of Columbia Circuit that they were entitled to a jury instruction on a limited mistake of law defense.[102] Two judges adopted the basic premise that Barker and Martinez should be able to defend charges that they conspired to violate the civil rights of Daniel Ellsberg's psychiatrist by proving that they had relied upon the authority of E. Howard Hunt to authorize the break-in. Although the two judges in the majority took slightly different approaches to the mistake of law issue,[103] both judges relied upon

---

95 *Id.* at 544, 133 N.E.2d at 115.

96 *Id.*, 133 N.E.2d at 115.

97 Raley v. Ohio, 360 U.S. 423, 438 (1958).

98 379 U.S. 559 (1965).

99 *Id.* at 571.

100 *Id.*

101 546 F.2d 940 (D.C. Cir. 1976).

102 *Id.* at 945.

103 Judge Wilkey relied upon a broader theory of mistake of law which would allow the defense if a defendant could prove (1) facts justifying reasonable reliance upon an official's apparent authority and (2) a legal theory on which to base a reasonable belief that the official possessed such authority. *Id.* at 949. Judge Merhige relied more closely on the official interpretation doctrine of the Model Penal Code. *Id.* at 955 57.

Hunt's past CIA experience with the defendants and Hunt's relationship to Erlichman and the White House from which he had at least apparent authority to issue orders for the burglary.[104]

The third category of mistake of law defenses are those cases in which a defendant acts upon the advice or opinion of a public official whose duty it is to interpret the law. It is this category of cases which is most directly relevant to an analysis of *Leon*, in which the police officer relied upon an official interpretation of the fourth amendment by a magistrate.

C. RELIANCE UPON AN *OFFICIAL* INTERPRETATION OF THE LAW

1. The Common Law Cases

Reliance upon an official interpretation of the law surfaces in the common law in two major fact patterns. The first pattern is exemplified by *State v. Davis*[105] and involves reliance upon non-judicial opinions regarding the substance of the law. Davis was convicted of accepting a job of airport manager at a time when he was a member of the County Board of Supervisors. Prior to accepting the position, Davis sought advice from the Corporation Counsel and the Assistant District Attorney,[106] both of whom approved Davis' acceptance of the position. Davis was convicted of violating a Wisconsin statute, but his conviction was overturned by the Wisconsin Supreme Court:

> [W]e do not fault the general rule. . . that ignorance of the law shall provide no defense. . . . It is our opinion that a blind application of such a rule would violate the principle of "fundamental fairness" implicit in our jurisprudence system. The prosecution of an individual who relies on the legal opinion of a governmental official who is statutorily required to so opine would, in our opinion, impose an unconscionable rigidity in the law.[107]

The Wisconsin Supreme Court, in keeping with the intention of the Model Penal Code, limited the mistake of law defense to reliance

---

104 In dissent, Judge Leventhal strongly criticized the application of the official interpretation doctrine and its variants to the Watergate burglars.

> The official misstatement of law defense embodies a fundamental requirement that the erroneous interpretation be made by an official in fact possessing the power to make a binding interpretation; it is wholly inapplicable to a case like this, of a claim of reliance on a government official in an area in which he has no power to interpret. And it is a blatant incongruity to stretch an escape clause for mistakes of law arising in the innately public business of official interpretations of law to immunize a secret conference for planning a stealthy entry into a private home or office.

Id. at 969 (Levanthal, J., dissenting).

105 63 Wis. 2d 75, 216 N.W.2d 31 (1974).

106 *Id.* at 79, 216 N.W.2d at 32-33.

107 *Id.* at 81-82, 216 N.W.2d at 34.

upon "the legal opinion of a governmental officer whose statutorily created duties include the rendering of legal opinions as to actions of specific individuals or groups."[108] This qualification placed upon the mistake of law defense by the Wisconsin Supreme Court was precisely the missing qualification which caused Judge Leventhal to dissent in *Barker*.[109] Although this first fact pattern is not directly analogous to *Leon*, it will be useful later in the discussion of limitations to be placed upon *Leon*.

A second pattern is formed by those cases in which an actor has relied upon a statute or a judicial decision which subsequently is determined to be unconstitutional, illegal or wrong. This fact pattern is directly analogous to the *Leon* problem. In terms of reliance upon judicial decisions, two issues have risen. The first issue is whether it is reasonable to rely upon a lower court decision which has not yet reached the highest appellate court.[110] Appellate courts have generally found such reliance to be reasonable.[111] The second issue is whether one can reasonably rely on a court decision in a case in which the actor was not a party.[112] The case law has generally held that reliance upon a lower court decision, even by a non-party, is reasonable and will be accepted as a defense to a criminal prosecution.[113]

2. *The Model Penal Code Approach*

In its attempt to resolve issues raised in the official interpretation category, the Model Penal Code has tended to follow the common law and has adopted limited exceptions to the basic principle that mistake of law is no defense. It is these exceptions which are helpful in analyzing *Leon*. Section 2.04(3), "Ignorance or Mistake as a Defense," provides:

> (3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:
>
> . . .
>
> (b) [the defendant] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body

108 *Id.* at 82, 216 N.W.2d at 34.
109 546 F.2d at 969 (Levanthal, J., dissenting).
110 *See, e.g.*, State v. O'Neil, 147 Iowa 513, 126 N.W. 454 (1910).
111 *See, e.g.*, Hall & Seligman, *supra* note 73, at 671-73.
112 State v. Black, 177 Ind. App. 588, 598-99, 380 N.E.2d 1261, 1268 (1978).
113 *See* W. LAFAVE & A. SCOTT, *supra* note 24, at 367.

> charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.[114]

Although the Model Penal Code provision was drafted with "some statutory and decisional support, . . . [t]here was much contrary authority."[115] The Model Penal Code formulation of a limited mistake of law defense is clearly intended not to apply to category one cases such as *Jones v. State*[116] and clearly intended to apply to category three cases such as *Davis*.[117] Whether the provision applies to cases such as *Barker* "is left to interpretation."[118]

Although many states have relied generally upon the Model Penal Code in statutory revisions[119] or in fashioning judicial opinions,[120] section 2.04(3) has not been universally embraced. Even though some revised criminal codes have incorporated subsection 3(b) in its entirety,[121] and some courts have adopted subsection 3(b) by decision,[122] other states have made rather serious changes to the Model Penal Code proposal. Arizona, for example, specifically rejected subsection 3(b) and allows a mistake of law defense only if the conduct was authorized by the direction of a court.[123]

3. Rationales for the Common Law and Model Penal Code Approaches to Reliance Upon Official Interpretation

Three separate but interrelated reasons support the adoption of a mistake of law defense in situations in which the actor relied upon an official statement of the law: 1) the lack of culpability of the actor; 2) the "entrapment" of the actor by the state; and 3) the need to encourage actors to seek official guidance.

Some sources justify the limited mistake of law defense on the basis that the actor who relies upon an official statement of the law is not a person upon whom the criminal law should operate—the person is not criminally culpable for his acts. The commentary to the Model Penal Code makes this point:

> All of the categories dealt with in the formulation involve, for the most part, situations where the act charged is consistent with the en-

---

114 MODEL PENAL CODE § 2.04 (Official Draft 1962).

115 MODEL PENAL CODE § 2.04 comment (Rev. Comment 1985).

116 32 Tex. Crim. 533, 25 S.W. 124 (Crim. App. 1894); *see supra* text accompanying notes 88-90.

117 63 Wis. 2d 75, 216 N.W.2d 31 (1974); *see supra* text accompanying notes 105-08.

118 MODEL PENAL CODE § 2.04 comment (Rev. Comment 1985).

119 *Id.*

120 *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422 (1978).

121 *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 52(4)(A) (1982); N.J. REV. STAT. § 2c:2-4(c)(1) (1982).

122 *See, e.g.*, Ostrosky v. State, 704 P.2d 786, 792 (Alaska Ct. App. 1985).

123 ARIZ. REV. STAT. ANN. § 13-402 (1978).

> tire law-abidingness of the actor, where the possibility of collusion is minimal, and where a judicial determination of the reasonableness of the belief in legality should not present substantial difficulty. It is hard, therefore, to see how any purpose can be served by a conviction. And obviously the defense afforded by this section would normally be available to a defendant only once; after a warning he can hardly have a reasonable basis for belief in the legality of his behavior.[124]

The culpability rationale has been used to justify the formulation of section 609 of the Final Report of the National Commission on Reform of Federal Criminal Laws.[125] The official commentary to section 609 explains the rationale for the rule:

> Section [609] provides a defense (unless a law expressly provides otherwise) for a person (a) who has taken affirmative steps to assure himself that conduct in which he proposes to engage will not violate the law and (b) who, as a result of having taken such steps and in reliance on whatever information he may already have had, believes reasonably and firmly that the conduct will not violate the law. Such a person should not incur criminal liability. With respect to the law, his conduct is not culpable, within the framework of a system of definite positive laws. He has done all that can reasonably be expected to conform his conduct to the law. There is no room for deterrence in such circumstances without either imposing on persons an unreasonable burden to study the law or, in effect, limiting their conduct more broadly than the criminal law intends to do.[126]

Section 610 was not adopted by Congress in the Crime Control Act of 1984.[127]

Judge Bazelon, in circumstances such as *Barker*, would equate the rationale for a limited mistake of law defense as not significantly departing from the principle of "conventional morality which finds recognition in the defense of mistake of fact."[128] Bazelon concludes that "[t]o effect retribution upon an individual without consideration of his state of mind seems too barbarous for discussion and in any event the law has moved beyond retribution as a prime justification for the criminal sanction."[129]

As Fletcher notes, however, the Model Penal Code defense can-

---

124 MODEL PENAL CODE § 2.04 comment (Revised Comment 1985).

125 U.S. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 52-53 (1971).

126 1 U.S. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, WORKING PAPERS ON THE UNITED STATES NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 139 (1970).

127 In State v. Lang, 378 N.W.2d 205 (N.D. 1985), the court relied upon § 610 to deny a mistake of law defense where the defendant had urged that his mistake of law was based upon a legal brief filed in a separate case.

128 United States v. Barker, 514 F.2d 208, 236 (D.C. Cir.), *cert denied*, 421 U.S. 1013 (1975).

129 *Id.* at 231.

not be totally justified on the culpability of the actor. The Model Penal Code defense excludes total ignorance of the law and reliance upon unofficial advice as defenses even though the reliance may be as reasonable, in some circumstances, as reliance upon an official interpretation.[130] In Fletcher's words, the Model Penal Code is more accurately premised on a notion resembling the defense of reliance upon superior orders.[131] By ignoring many sources of mistaken information justifying a defendant's actions, the Model Penal Code introduces a concept of "reasonableness" and thereby negates a rationale which relies solely on the personal culpability of the actor.

Related to the culpability rationale for the Model Penal Code defense is the entrapment rationale: By relying on official advice, the actor has been trapped into acting. Although one cannot form a firm conclusion concerning the reason why some state legislatures chose to adopt subsection 3(b) of the Model Penal Code while others rejected or substantially amended the provision, a few courts which have relied upon subsection 3(b) have given an insight into their view of the purpose of the subsection. Some recent cases see the mistake of law defense as "the criminal analogue of estoppel."[132] It is unfair to punish an actor who has been "entrapped" by the information provided by a public official. In some ways the actor seems less culpable because he has been encouraged to commit the act. Entrapment, however, includes something in addition to lessened culpability; entrapment includes the notion that it is unseemly for government to act in this way. But the entrapment rationale suffers some of the same difficulties as the culpability rationale. It may be just as unfair to punish a person who is "entrapped" by *any* public official as it is to punish a person who is "entrapped" by an official who falls within the rubric of subsection 3(b).

A third rationale, encouraging people to seek advice from a limited group of public officials, seems best to justify the common law and Model Penal Code's mistake of law defense. It is also this rationale which best justifies the Supreme Court's decision in *Leon*.

In *Ostrosky v. State*,[133] the defendant was convicted of fishing without a valid limited entry permit. In post-conviction relief, Ostrosky successfully had the fishing statute held unconstitutional. Os-

130 G. FLETCHER, RETHINKING CRIMINAL LAW 757 (1978).

131 *Id.*

132 *See, e.g.*, Free Enter. Canoe Renters Ass'n of Mo. v. Watt, 711 F.2d 852, 857 (8th Cir. 1983).

133 704 P.2d 786 (Alaska Ct. App. 1985).

trosky continued to fish.[134] The constitutionality of the fishing statute was eventually upheld by the Alaska Supreme Court,[135] and Ostrosky was tried for his second fishing expedition.[136] In allowing a limited defense based upon Ostrosky's mistake of law as to the fishing violation, the Alaska Court of Appeals held that Ostrosky was entitled to rely upon the trial court's decision that the statute was unconstitutional. "The policy behind this rule is to encourage people to learn and know the law; a contrary rule would reward intentional ignorance of the law."[137] The court of appeals rejected the state's argument that it is unreasonable, as a matter of law, for a person to rely on a decision of a trial court.[138]

In order to accept this rationale of the encouragement of seeking information, one must first posit that society wants to encourage its citizens to seek information from public officials before acting. Society pays a price by acknowledging any form of mistake of law defense but also pays a price, in terms of public perception of fairness, if the law fails to account in some way and in some circumstances for a mistake of law. It is not unfair to punish individuals if society wants to discourage people from seeking information from public officials or warns its citizens that the information is gratuitous and will have no subsequent impact on prosecution. One must posit that encouraging citizens to seek clarification from public officials outweighs any erosion of the authority of the legislature that such a defense may cause. One must also posit that the benefit of the limited mistake of law defense outweighs the benefit which society gains when it encourages persons not to act in those situations in which there is doubt as to the legality of the particular act.

The Model Penal Code chose to encourage citizens to seek legal advice, even though that advice subsequently may be found to be erroneous and therefore in conflict with a legislative decision. The Model Penal Code drafters decided to "reward" the misinformed citizen in a way in which it does not reward the truly ignorant or the person who has sought advice from someone outside the

---

134 *Id.* at 788 89.

135 State v. Ostrosky, 667 P.2d 1184 (Alaska 1983), *appeal dismissed*, 468 U.S. 1204 (1984).

136 Ostrosky v. State, 704 P.2d 786, 789 (Alaska Ct. App. 1985).

137 *Id.* at 791.

138 *Id.* at 792. A similar result can be found in State v. Black, 177 Ind. App. 588, 380 N.E.2d 1261 (1978), in which the Indiana Court of Appeals held that a criminal defendant could rely upon an unappealed trial court judgment striking down a massage parlor ordinance as unconstitutional. A person could rely upon the trial court's decision until "the publication of this opinion" in which the appellate court upheld the regulation of massage parlors. *Id.* at 597, 380 N.E.2d at 1268.

"official" spectrum. In other words, the Model Penal Code rejected a defense that would excuse conduct if the actor was unaware of the illegality of his act or was mistaken as to the illegality of his act because he relied on a reasonable source of information. Rather, the Code adopted a defense which encourages potential actors to seek information from a limited number of sources before acting. By noting the similarity between the mistake of law defense and the good faith exception in *Leon*, and by acknowledging that the mistake of law defense intends to reward persons who seek official advice, one can focus on the wisdom of the Court's decision in *Leon* and suggest ways in which *Leon* should be interpreted.

V. LESSONS LEARNED FROM THE ANALOGY

A. IDENTIFYING A RATIONALE FOR *LEON*

Three possible justifications for the Court's creation of a good faith exception in *Leon* come to the fore when one analyzes *Leon* in terms of the rationales for a limited mistake of law defense in the official interpretation situation. First, it can be argued that excluding evidence when the officer gathered evidence in reliance upon a warrant is punishing the officer undeservedly.[139] Second, excluding evidence when the officer relied on a warrant is unfair, just as it was unfair to punish Raley for contempt after he relied upon official advice.[140] An officer should not be punished because he has received official advice which has entrapped him into conducting an illegal search; it is unseemly for a government to trick persons into violating the law.[141] Third, by acknowledging a mistake of law defense, society encourages persons to seek information before acting and by allowing a good faith exception to the exclusionary rule when the search is pursuant to a warrant, society encourages police to seek official guidance regarding the existence of probable cause.[142]

The justification for a limited mistake of law defense based on a lack of culpability is inapplicable to *Leon* for a number of reasons. First, the exclusionary rule is not a remedy directed personally to the police officer.[143] The exclusionary rule is an institutional rem-

---

139 *See supra* text accompanying notes 110-13.

140 *See* Raley v. Ohio, 360 U.S. 423 (1959); *supra* text accompanying note 16.

141 *See supra* text accompanying note 132.

142 *See supra* text accompanying notes 133-38.

143 It is never totally clear who Justice White believes the exclusionary rule acts on as a deterrent:

> We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. . . . But even assuming that the rule effectively deters some police misconduct and provides incentives for the

edy.[144] It is directed at the state in its prosecutorial function.[145] The due process issues raised by the Supreme Court in *Raley*[146] are simply inapplicable to *Leon*. Unlike *Raley*, in which the actor was led to believe his course of conduct was proper and then was punished for his actions, in *Leon* it is not the actor (the police officer), but rather the state which suffers the consequences of the police officer's actions when the evidence gathered pursuant to an invalid warrant is excluded. It is irrelevant whether the officer exhibits the degree of culpability for which the criminal law seeks punishment. In fact, the officer is not to be punished at all.

The mistake of law analysis of *Leon*, however, shows quite clearly the impact that would be felt if the exclusionary rule were replaced by a remedy directed to the individual police officer.[147] If the remedy for a fourth amendment violation was personal and non-institutional,[148] issues of fairness from *Raley*[149] and issues of reliance from *Ostrosky*[150] would become relevant as to penalties as-

---

law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.

Leon, 468 U.S. at 918.

In dissent, Justice Brennan argues that the exclusionary rule is primarily an institutional remedy:

> The flaw in the Court's argument, however, is that its logic captures only one comparatively minor element of the generally acknowledged deterrent purposes of the exclusionary rule. To be sure, the rule operates to some extent to deter future misconduct by individual officers who have had evidence suppressed in their own cases. But 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 failure to obey the restraints imposed by the Fourth Amendment. . . . Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally. Thus, as the Court has previously recognized, "over 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 Fourth Amendment ideals into their value system." Stone v. Powell, 428 U.S. at 492. It is only through such an institution wide mechanism that information concerning Fourth Amendment standards can be effectively communicated to rank and file officers.

Id. at 953 (Brennan, J., dissenting)(citation omitted).

144 *Id.* (Brennan, J., dissenting). *See* Alschuler, *supra* note 51, at 333; Kamisar, *supra* note 12, at 611.

145 Kamisar, *supra* note 12, at 611.

146 360 U.S. 423 (1959); *see supra* text accompanying notes 92-97.

147 *See generally* 2 W. LAFAVE, *supra* note 2, § 4.11, at 163-84 (1978).

148 Of course hybrid remedies—part institutional and part individual officer—might be developed. Attorney General Meese has recently authorized the government to reimburse Justice Department employees for damages incurred as a result of violations of constitutional rights. Arizona Republic, August 17, 1986, at A6, col.2.

149 360 U.S. 423 (1959); *see supra* text accompanying notes 92-97.

150 *See supra* text accompanying notes 133-38.

sessed against the individual officer. One need merely look to *United States v. Screws*[151] and its progeny[152] to anticipate the difficulties which may result if the primary remedy for fourth amendment violations is directed to the officer in his individual capacity and not in his capacity as a representative of the state.

In a similar vein, the entrapment unfairness rationale for *Leon* must be dismissed. It is not unseemly to suppress evidence as long as the remedy for a violation of the fourth amendment remains institutional and is not addressed to the personal interests of the individual police officer. In fact, one can argue that it is indeed very seemly for a government to provide a review procedure which recognizes the importance of a constitutional right to be free from unreasonable searches and seizures and thereby reinforces the importance of such rights. The government is not entrapping officers to violate the law and then punishing the officer. The government is merely recognizing that its agent (the magistrate) may have committed an error and now the state is providing a remedy for review of that decision. If it is impossible to review the magistrate's decision prior to the search, a post-search review may conclude that the search was illegal. In short, it is not unfair, nor is it unseemly, to deny the state the use of evidence when that evidence has been seized by its agent contrary to law. One may argue that on balance it is unwise to exclude the evidence, but it is not unfair to either the state or the individual officer to do so.

The third justification for *Leon* which emerges from a mistake of law analysis is that by recognizing the good faith exception, one is "encouraging people to learn and know the law."[153] The Court's decision in *Leon* can be seen as a method of encouraging police officers to seek warrants before searches. This reading of *Leon* analogizes a police officer's seeking and executing a warrant to an individual's acting pursuant to a court decision later found to be erroneous.

The educative justification for *Leon* is more convincing than either the reliance or entrapment justifications, but it is not without its problems. The major difficulty with this justification for *Leon* is that it assumes that police need to be encouraged to obtain warrants.[154] Such encouragement would seem unnecessary because the

---

151 325 U.S. 91 (1945). *See* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 61-63 (2d ed. 1986).

152 C. Whitebread & C. Slobogin, *supra* note 151, at 61-63.

153 *See supra* text accompanying notes 133-37.

154 It appears that the Supreme Court still maintains the position it stated in Johnson v. United States, 333 U.S. 10 (1948), that warrantless searches are presumptively uncon-

law presently holds that searches without warrants are presumptively illegal.[155] Therefore, the encouragement that *Leon* can provide is only necessary either in situations where it is unclear whether a warrant is necessary[156] or where there is concern that the police may fabricate facts to justify an exception to the warrant requirement.[157] Also, police may need additional encouragement to seek warrants in those situations in which they presently conduct unconstitutional searches, knowing that standing requirements,[158] the use of the evidence (other than in the prosecutor's case-in-chief)[159] or plea bargaining[160] will make their efforts worthwhile. For *Leon* to be effective as an incentive to secure a warrant, the added benefit of obtaining a warrant must be seen to outweigh the perceived inconvenience of the paperwork and the warrant application process.

Police may well view *Leon* as reducing the ambiguity of search and seizure law. An officer may bring an application to a magistrate knowing that if the magistrate finds the application faulty, the officer

---

stitutional. Justice Rehnquist, however, has led a fight to return to what he believes is the correct rule of United States v. Rabinowitz, 339 U.S. 56 (1950), which centers on the existence of a search warrant as merely one factor in the analysis of reasonableness. *See* C. WHITEBREAD & C. SLOBOGIN, *supra* note 151, at 136-40.

155 *Johnson*, 333 U.S. 10 (1948). Professor Bradley predicts that *Leon* will increase the use of warrants. Bradley, *supra* note 15, at 292. Studies done before *Leon*, however, indicate that police often go out of their way to avoid applying for search warrants. *See* McCoy, *The Good Faith Warrant Cases—What Price Judge-Shopping*, 21 CRIM. L. BULL. 53, 62-63 (1985).

156 There are many reasons which might lead to police uncertainty as to the need for a warrant. First the fourth amendment case law is continually in a state of flux. For example, in Oklahoma v. Castleberry, 469 U.S. 979 (1985), the Court voted four to four, thereby affirming the Oklahoma Court of Criminal Appeals, that police officers were constitutionally required to obtain a search warrant before the police removed a suitcase from a the trunk of a car in which suspected drugs were located. In addition, state supreme courts appear more willing than ever to interpret their own state constitutions inconsistently with decisions of the United States Supreme Court. *See, e.g.*, State v. Opperman, 247 N.W.2d 673 (S.D. 1976)(rejecting the standard for warrantless automobile inventories); State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984)(rejecting *Gates* standard). Therefore police officers may find that they are subject to two separate bodies of constitutional law regarding search and seizure, thus contributing to their uncertainty.

157 The untruthful police officer may be able to avoid the rigors of the fourth amendment, and this possibility has always caused the system some degree of consternation. *See* Garbus, *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363 (1972); Grano, *A Dilemma for Defense Counsel:* Spinelli-Harris *Search Warrants and the Possibility of Police Perjuring*, 1971 U. ILL. L.F. 405. It may also be true in some situations that magistrates assist the police by "fudging" standards for probable cause. W. LAFAVE, *supra* note 2, at 17. There is also the risk that officers may create an exigency, thus justifying a warrantless search. *See* United States v. Webster, 750 F.2d 307 (5th Cir. 1984).

158 *See* 3 W. LAFAVE, *supra* note 2, § 11.3, at 543-612 (1978).

159 *Leon*, 468 U.S. at 911.

160 Justice White noted this problem. *Id.* at 907 n.6.

will have an opportunity to correct the deficiency. Also, the officer knows that if the magistrate issues a search warrant, the evidence will most likely be admissible at trial since the magistrate's decision is virtually unreviewable. If the police perceive *Leon* as an "insurance policy" against subsequent appellate attack, the decision *will* encourage more warrants and will reduce perjured testimony (e.g., testimony offered to show that there was an exigency justifying a warrantless search). *Leon* may also be an incentive for the officer to secure a warrant if the officer realizes that because of the good faith exception of *Leon* and the relaxed probable cause standards of *Gates*[161] a legally unassailable warrant may be easier to obtain. The state may therefore be in a better plea bargaining position, or the prosecution may be able to use the seized evidence in the prosecutor's case-in-chief. The standing rules, however, still act as a disincentive to the officer to search only on probable cause, whether the search is warranted or warrantless.

The benefit of *Leon* in these limited cases must be balanced against the fact that despite the good faith exception of *Leon*, an individual's constitutional right to be free from unreasonable searches and seizures has been violated with no apparent remedy. The failure to remedy the wrong sends a message to the community regarding fourth amendment rights: certain constitutional rights are limited by the knowledge of the police officer. To this extent, the good faith exception to the exclusionary rule undercuts the standard setting function of the law. In the words of Justice Stevens in *Leon*, the creation of the good faith exception "is to convert a bill of *Rights* into an unenforced honor code."[162]

B. LIMITING THE APPLICATION OF *LEON* TO WARRANTED SEARCHES

If one assumes that there is a need to encourage the police to learn the law by seeking warrants (and therefore *Leon* was correctly decided), the analogous use of the Model Penal Code official interpretation doctrine gives an insight into the limitations which courts should place upon *Leon*. Section 2.04(3)(b) of the Model Penal Code contains four types of official pronouncements which can serve as a basis for a mistake of law defense. In addition to reliance upon "a judicial decision, opinion or judgment,"[163] reliance can be

---

161 462 U.S. 213 (1983); *see supra* text accompanying notes 35-38.

162 *Leon*, 468 U.S. at 978 (Stevens, J., dissenting).

163 MODEL PENAL CODE § 2.04(3)(b)(ii) (Official Draft 1962); *see supra* text accompanying note 114.

reasonably placed upon "a statute or other enactment,"[164] "an administrative order or grant of permission,"[165] and "an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense."[166] If one permits a good faith exception to the exclusionary rule based upon the decision of a magistrate to issue a warrant, the question arises whether the other bases found in section 2.04(3)(b) should, by analogy, be bases for other good faith exceptions. The conclusion of this analysis is that *Leon* must be limited to searches pursuant to a warrant and to a limited number of searches conducted pursuant to statutes later held to be unconstitutional.[167] Courts which issue warrants have been given

---

164 MODEL PENAL CODE § 2.04(3)(b)(i) (Official Draft 1962); *see supra* text accompanying note 114.

165 MODEL PENAL CODE § 2.04(3)(b)(iii) (Official Draft 1962); *see supra* text accompanying note 114.

166 MODEL PENAL CODE § 2.04(3)(b)(iv) (Official Draft 1962); *see supra* text accompanying note 114.

167 *See infra* text accompanying notes 170-78. A number of authors have expressed the fear that *Leon* may be extended to warrantless searches. *See, e.g.*, LaFave, *supra* note 10, at 926-29. Generally, most courts have agreed with this analysis and have refused to extend *Leon* to warrantless searches and seizures. The Ninth Circuit in particular has stated repeatedly that *Leon* does not apply to warrantless searches. "The *Leon* exception, however, is clearly limited to *warrants* invalidated for lack of probable cause and does not create the broad 'good faith' exception the government suggests. . . . The *Leon* rule should therefore not be applied to invalid warrantless searches." United States v. Whiting, 781 F.2d 692, 698 (9th Cir. 1986)(emphasis added). *See* United States v. Miller, 769 F.2d 554 (9th Cir. 1985); United States v. Merchant, 760 F.2d 963 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 3293 (1986). *See also* United States v. Owens, 782 F.2d 146 (10th Cir. 1986); United States v. Morgan, 743 F.2d 1158 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2126 (1985); United States v. Broadhurst, 612 F. Supp. 777 (E.D. Cal. 1985); United States v. Gilley, 608 F. Supp. 1065 (S.D. Ga. 1985).

Most state courts faced with this decision have also refused to extend *Leon* to warrantless searches. As the Illinois Court of Appeals noted, "This limited exception (the good faith exception) to the exclusionary rule, however, was expressly created for searches conducted pursuant to a warrant." People v. Ross, 133 Ill. App. 3d 66, 74, 478 N.E.2d 575, 580 (1985). *See* State v. Martin, 2 Conn. App. 605, 482 A.2d 70 (1984), *cert. denied*, 195 Conn. 802, 488 A.2d 457, *cert. denied*, 105 S. Ct. 2706 (1985); Albo v. State, 477 So. 2d 1071 (Fla. Dist. Ct. App. 1985); People v. Potter, 140 Ill. App. 3d 693, 489 N.E.2d 334 (1986); State v. Blair, 691 S.W.2d 259 (Mo. 1985), *cert. granted*, 106 S. Ct. 784 (1986); State v. Sugar, 100 N.J. 214, 495 A.2d 90 (1985); Walls v. Commonwealth, 2 Va. App. 639, 347 S.E.2d 175 (1986). *See also* W. LAFAVE, *supra* note 2, at 34-36.

Additionally, several courts hint that *Leon* can be extended to plain view consent searches, as well as nontestimonial identification orders. *See* United States v. Gilley, 608 F. Supp. 1065, 1069 (S.D. Ga. 1985)(The *Leon* principle "arguably applies to the consent search, making suppression improper where an officer has searched in good faith reliance on the validity of a consent which he has received."); State v. Welch, 316 N.C. 734, —, 342 S.E.2d 789, 795 (1986)(although defendant was subjected to warrantless blood test, officer relied on nontestimonial identification order, so suppression inapplicable. "We decline to apply the exclusionary rule to this good faith violation of the fourth amendment. To apply the rule here would not serve to discourage police misconduct

the primary function of deciding whether a search may be constitutionally conducted. The independent, neutral magistrate issues an order—the warrant—which is a judgment that there is probable cause to search a particular place for particular items. The decision is made as a "judicial decision, opinion or judgment"[168] even though it may "afterward [be] determined to be invalid or erroneous."[169]

In a limited number of cases, *Leon* should be applied to evidence seized pursuant to a statute later held to be unconstitutional. This corresponds to the second category of the Model Penal Code section 2.04 "reliance upon a statute or other enactment." In cases preceding *Leon*, such as *Michigan v. De Fillippo*,[170] the Supreme Court held that in certain circumstances evidence seized by police pursuant to a statute subsequently declared unconstitutional will not be suppressed.[171] In *De Fillippo*, a defendant was arrested under a Detroit ordinance which made it unlawful for a person stopped under suspicious circumstances to refuse to identify himself. In a search pursuant to the arrest, drugs were found on the defendant.[172] "A prudent officer, in the course of determining whether respondent has committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional."[173] In *Leon*, however, the Court noted the limitations placed upon *De Fillippo*. "We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants."[174]

---

and would only defeat justice for no good reason."); United States v. Owens, 621 F. Supp. 1498 (E.D. Mich. 1985); Simpson v. State, 709 S.W.2d 797 (Tex. Ct. App. 1986).

168 MODEL PENAL CODE § 2.04(3)(b)(ii) (Official Draft 1962); *see supra* text accompanying note 114.

169 MODEL PENAL CODE § 2.04(3)(b) (Official Draft 1962); *see supra* text accompanying note 114. One practical impact of the *Leon* decision is to make all future fourth amendment decisions apply prospectively only. *See* Alschuler, *supra* note 51, at 340 n.98.

170 443 U.S. 31 (1979).

171 *Id.* at 40.

172 *Id.* at 33-35.

173 *Id.* at 37-38. In dissent, Justice Brennan wrote that the good faith of the officer is irrelevant,

> for the dispute in this case is not between the arresting officers and respondent. The dispute is between the respondent and the State of Michigan. . . . Since the state is responsible for the actions. . . of its police, the state can hardly defend against this charge of unconstitutional conduct by arguing that the constitutional defect was the product of legislative action and that the police were merely executing the laws in good faith.

Id. at 42-43 (Brennan, J., dissenting)(citation omitted).

174 *Leon*, 468 U.S. at 912 n.8. *But see* United States v. Peltier, 422 U.S. 531 (1975). In

This limitation placed upon *De Fillippo* is consistent with *Leon* and with the analogous use of section 2.04(3)(b)(1),[175] because the legislature is not the interpreter of the Constitution and therefore cannot alter constitutional safeguards by statute. Yet, the legislature is the definer of criminal conduct which may lead to a police officer's deciding he has probable cause to arrest an individual for a crime defined by the legislature.[176] In *De Fillippo*, the legislature was operating within its area of authority. In cases such as *Ybarra v. Illinois*,[177] in which the legislature tried to define fourth amendment rules, the legislature was not operating within its area of authority, and this evidence should continue to be excluded after *Leon*.[178]

In addition to reliance upon a statute, the Model Penal Code also permits reliance upon an "other enactment"[179] as a basis of a mistake of law defense. It is conceivable, although neither the Model Penal Code's commentary[180] nor the case law[181] give any guidance on the issue, that "other enactment" includes administrative regulations formally adopted through an administrative procedure.[182] If an agency regulation may serve as a basis for a mistake of law defense under section 2.04(3)(b)(iii), may police regulations concerning searches and seizures serve as a basis for a good faith

---

Peltier, the Court refused to suppress evidence seized by Border Patrol agents who acted pursuant to a federal statute later declared unconstitutional. As the Court noted, "It was in reliance upon a validly enacted statute [8 U.S.C. § 1357(9)(3)], supported by longstanding administrative regulations and continuous judicial approval, that Border Patrol agents stopped and searched respondent's automobile." *Id.* at 541. The Court reasoned that judicial integrity was not "offended" because "the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial." *Id.* at 537.

175 *See supra* text accompanying note 114.

176 *See* LaFave, *The Fourth Amendment in An Imperfect World*, 43 U. PITT. L. REV. 307, 349 (1982).

177 444 U.S. 85 (1979). In *Ybarra*, an Illinois statute authorized searches of any persons found on premises searched pursuant to a search warrant. In striking down the statute and ordering that the seized evidence be suppressed, the Court refrained from discussing any issues relating to a good faith reliance by the officer upon the Illinois statute. *Id.* at 90-96.

178 It seems inappropriate considering the *Leon* Court's comments in *De Fillippo* to attempt to characterize a legislature under § 2.04(3)(b)(iv) as a "public officer or body charged by law with responsibility for the interpretation" of the fourth amendment.

179 *See supra* text accompanying note 114.

180 The Model Penal Code Commentary to § 2.04(3)(b)(iii) does not define "other enactment."

181 A search of the case law has found no cases interpreting the provision.

182 "Other enactments" might also include administrative interpretations of rules of evidence, as was the situation in a series of cases recently decided by the Third Circuit. According to Federal Rule of Criminal Procedure 6(e)(3)(C)(i), disclosure of grand jury matters is allowed "when so directed by a court preliminary to or in connection with a judicial proceeding." The Internal Revenue Service (IRS) had used this rule to request disclosure of grand jury transcripts and other documents for use in tax audits against

exception to the exclusionary rule? Some police agencies have promulgated rules which affect the manner in which searches are conducted,[183] and in some situations the Supreme Court has given significance to the fact that the search was conducted pursuant to agency regulations. For example, in inventory cases such as *South Dakota v. Opperman*[184] *and Illinois v. Lafayette*,[185] the Court refuted the notion that the searches could be viewed as pretexts by noting that the searches were conducted pursuant to agency guidelines. Some commentators have argued that great deference should be paid to the rules which police agencies have adopted.[186] Yet, the Court has refused to order the suppression of evidence merely because an otherwise constitutional search violated agency rules.[187]

The fact that an officer has relied upon an agency rule in conducting his search should not serve as a good faith justification for admitting into evidence the fruits of that search.[188] As the Court noted in *De Fillippo*, regarding statutory authorization for searches inconsistent with the fourth amendment, neither a statute nor, presumably, an agency rule can alter procedures which the fourth amendment requires.[189] In addition, there seems to be no need to encourage police officers to obey agency rules by rewarding the officers with a good faith exception to the exclusionary rule. An officer should have professional reasons to operate within the

---

persons under investigation. However, the Supreme Court declared this procedure unconstitutional in United States v. Baggot, 463 U.S. 476 (1983).

The Third Circuit, when faced with three cases where taxpayers challenged the IRS summonses that resulted from the use of this now illegal procedure, relied on *Leon* and *Peltier* in refusing to grant suppression of the evidence seized.

> The conduct by the IRS agents in the cases before us is remarkably similar to the conduct of the police officers in *Peltier* and *Leon*. Here, the IRS agents acted in good faith reliance on a facially valid Rule 6(e) order issued by the United States District Court. Under such circumstances, enforcement of the resultant summonses neither will offend the integrity of the judicial process nor will refusal to enforce them deter future misconduct by IRS agents.

Gluck v. United States, 771 F.2d 750, 758 (3d Cir. 1985)(footnotes omitted); *see also* Caprio v. Commissioner, 787 F.2d 109 (3d Cir. 1986); Graham v. Commissioner, 770 F.2d 381 (3d Cir. 1985).

183 *See* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974). *See generally* Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 222, 222-24 (1975).

184 428 U.S. 364, 372 (1976).

185 462 U.S. 640, 646 (1983).

186 *See, e.g.*, Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810-15 (1970). *See also* Allen, *The Police and Substantive Rulemaking: Reconciling the Principle and the Expediency*, 725 U. PA. L. REV. 62 (1976).

187 United States v. Caceres, 440 U.S. 741 (1979).

188 *See* Dripps, *supra* note 9, at 945-46.

189 *See supra* text accompanying notes 170-87.

guidelines established by his employer.[190] Finally, an officer could seek confirmation of his use of agency rules when he seeks a search warrant from a magistrate, or a police agency could seek confirmation of its guidelines, in certain circumstances, by using state declaratory judgment provisions.[191] However, an agency regulation which defines criminal conduct, such as a regulation of the Internal Revenue Service, may serve as the basis of a probable cause determination, just as the statute in *De Fillippo* served as the probable cause basis for the arrest.

It is also conceivable to characterize police search and seizure regulations as "an administrative order or grant of permission"[192] which is the third Model Penal Code exception category. Although the Model Penal Code Commentary is not very helpful,[193] and the case law is undeveloped as to the meaning of "administrative order or grant of permission,"[194] it is reasonable to assume that the phrases refer to quasi-judicial decisions made by agencies addressing specific fact situations. It is hard to perceive how this subsection is helpful in an analysis of *Leon*.

The final category of section 2.04(3)(b) permits a mistake of law defense based upon the "official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law."[195] Although a prosecutor is often the legal advisor to the police department[196] and is in some ways responsible for the "administration or enforcement" of the fourth amendment, the Constitution has placed the duty of "advising" the police regarding the fourth amendment in the hands of judicial officers.[197] From a practical perspective, a good faith exception founded upon police conduct pursuant to a prosecutor's advice would negate the degree of neutrality required of issuing magistrates by the Court in *Shadwick v. City of Tampa*[198] and would allow a prosecuting agency to benefit from the fruits of an illegal search by insulating the evidence from suppression through an advisory opin-

190 This observation is not valid if the police department either intentionally or unintentionally rewards officers for the number of arrests made as opposed to the number of constitutional arrests made.

191 *See* UNIF. DEC. JUDG. ACT § 1, 12 U.L.A. 111 (1975).

192 *See supra* text accompanying note 114.

193 MODEL PENAL CODE § 2.04 comment (Revised Comment 1985). The commentary to § 2.04, Tentative Draft No. 4 (1955), gives conflicting information regarding the intent of this subsection.

194 A search of the case law has revealed no cases interpreting the provision.

195 *See supra* text accompanying note 114.

196 *See, e.g.*, Israel, *supra* note 183, at 251.

197 *See supra* note 154.

198 407 U.S. 345 (1972).

ion. Although the Court in *Leon* argued that magistrates are not deterred by the suppression of evidence ordered by a trial court,[199] even the Supreme Court would not make that argument concerning prosecutors. In fact, in *Leon*, the application for the search warrant "was reviewed by several Deputy District Attorneys."[200] The prosecuting agency should not be given a mechanism whereby it can avoid constitutional restrictions.

C. ALTERING THE WARRANT PROCESS

1. Magistrate Qualifications

Not only does an analogous use of the mistake of law doctrine argue for a limitation of *Leon* to warranted search cases; the analogy also calls for additional refinements designed to make the issuance of a warrant truly the product of a judicial decision. The refinements require a close scrutiny of magistrates' qualifications and warrant procedures. One might view the exceptions to the good faith rule created by the Court in *Leon* as a start in that direction, as they contain some of the basic hallmarks of a true judicial decision. For example, no court should rule without sufficient available facts and therefore the good faith exception will not apply if the magistrate was recklessly misled. A "rubber stamp" magistrate—a magistrate who abandons his judicial role—is not one who makes judicial decisions. If *Leon*, and the pre-eminence it gives to magistrates' decisions, is to guide search and seizure law, other aspects of the magistrate system need attention.

Fourth amendment jurisprudence is centered on the need for a "neutral and detached" magistrate to determine, before a search is conducted, whether there is probable cause to search.[201] The Court in *Leon* reiterated the constitutional preference for warrants and relied upon its earlier holdings which held that: "a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime."[202]

---

199 *Leon*, 468 U.S. at 917.

200 *Id.* at 902.

201 Shadwick v. City of Tampa, 407 U.S. 345 (1972). As previously suggested, what constitutes the abandonment of a magistrate's judicial role is ill defined. Clearly, the Court has provided examples of the extremes, i.e., the magistrate who actively participates in the seizure of obscene material in an adult bookstore, Lo-Ji Sales v. New York, 442 U.S. 319 (1979), or the magistrate who presigns 50 arrest warrants for distribution by his clerk, Stewart v. State, 289 Ark. 272, 711 S.W.2d 787 (1986).

202 *Leon*, 468 U.S. at 913-14.

As long as the magistrate does not rely on an affidavit which is knowingly or recklessly false,[203] does not act as an "adjunct law enforcement officer,"[204] and does not base probable cause on a "bare bones" affidavit,[205] the practical outcome of *Leon* is to make the magistrate's decision unreviewable.[206] Nothing in the Court's opinion is directed to the serious question of magistrate quality. It is not sufficient that a magistrate is "neutral and detached." A magistrate, particularly a magistrate whose decisions on issues of constitutional law are unreviewable, must be "informed and current" not just "neutral and detached."[207]

The need for an informed magistracy raises the far reaching question of whether our legal system is willing to allow questions regarding constitutional rights to be made by persons with no legal training whose decisions are virtually unreviewable. If the answer is that we are willing to accept such unreviewable decisions on search and seizures issues, we must reconsider the issue of lay magistrates and magistrate qualifications in general raised in *Shadwick v. City of Tampa*[208] and *North v. Russell*.[209] In *Shadwick*, a unanimous Court held that municipal court clerks could constitutionally issue arrest warrants. "These clerks qualify as neutral and detached magistrates for purposes of the Fourth Amendment."[210] "We find no commandment. . . that all warrant authority must reside exclusively in a lawyer or judge."[211] The issuing magistrate must meet two tests: he must be neutral and detached, and "he must be capable of determining whether probable cause exists for the requested arrest or search."[212] Although it might be more desirable to have the decision to issue a warrant made by a judge or a lawyer, such requirements are not constitutionally mandated.[213] However, it must be noted at the time of the Court's decision in *Shadwick*, determinations of probable cause were subject to the scrutiny of *Aguilar-Spinelli*,[214]

---

203 *Id.* at 914.

204 *Id.*

205 *Id.* at 915.

206 *See* Alschuler, *supra* note 51, at 322. *See supra* note 55.

207 For a discussion of magistrates' qualifications and job description, see L. SILBERMAN, NON ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY (1979); Barrett, *Criminal Justice: The Problem of Mass Production*, in THE AMERICAN ASSEMBLY, THE COURT, THE PUBLIC AND LAW EXPLOSION 85, 117-18 (A. Jones ed. 1965).

208 407 U.S. 345 (1972).

209 427 U.S. 328 (1976).

210 *Shadwick*, 407 U.S. at 346.

211 *Id.* at 349.

212 *Id.* at 350.

213 *Id.* at 353-54.

214 Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

and an officer's reliance on a warrant did not make the decision to issue the warrant unreviewable in a subsequent adversarial proceeding.

In *North v. Russell*,[215] North argued that the right to counsel discussed in *Argesinger v. Hamlin*[216] *and Gideon v. Wainwright*[217] was meaningless unless a law-trained judge was required to rule on counsel's arguments.[218] In upholding the constitutionality of Kentucky's two-tier trial court system, Chief Justice Burger relied upon the fact that a person sentenced to imprisonment by a non-law-trained judge had a right to a *de novo* trial before a law-trained judge if the individual chose to exercise that right.[219] In a strongly worded dissent, Justice Stewart argued that a judge ignorant of the law is incapable of performing functions required by the due process clause.[220] Justice Stewart said he could not agree that "these constitutional deficiencies can all be swept under the rug and forgotten because the convicted defendant may have a trial *de novo* before a qualified judge."[221]

In both *Shadwick* and *North*, the Court relied on the fact that decisions by non-law-trained individuals were reviewable. A system which makes such decisions unreviewable must be concerned with the quality of these decisions. An unreviewable system is likely to make the least stringent magistrate the busiest magistrate. An unreviewable system based on police good faith may also mean that prosecutors may no longer screen warrant applications, possibly in part because they may realize that their review might impugn an officer's good faith if the review indicates legal problems with the warrant application.[222] Some court systems, relying on the unreviewability of the magistrate's decision, may even take *Leon* as a signal to hire issuing magistrates who are less law-trained than present magistrates, believing that they will be more readily directed by the police.[223] Although requiring that issuing magistrates be law-trained is no guarantee that a magistrate will be informed and his knowledge current, there is a greater likelihood that this will be

---

215 427 U.S. 328 (1976).

216 407 U.S. 25 (1972).

217 372 U.S. 335 (1963).

218 *North*, 427 U.S. at 334.

219 *Id.* at 335-37.

220 *Id.* at 342 (Stewart, J., dissenting).

221 *Id.* at 345 (Stewart, J., dissenting).

222 *See* Israel, *supra* note 183, at 251; Wasserstrom & Mertens, *supra* note 10, at 114-15. *See also* W. LAFAVE, *supra* note 2, at 20-21; Dripps, *supra* note 9, at 930.

223 Wasserstrom & Mertens, *supra* note 10, at 108-09.

true.[224] There are, of course, costs in requiring that issuing magistrates be law-trained persons, but there are also serious costs when unreviewable decisions on constitutional rights are made by non-law-trained magistrates.

2. *Procedural Changes*

If our legal system is willing to allow unreviewable decisions regarding search and seizure questions to be resolved by non-law-trained persons, care must surely be taken to make magistrate decisions more closely approximate decisions made in other areas. It seems ironic that a magistrate's determination in a fifty dollar collection matter more closely approaches the traditional due process model than a magistrate's decision on the protection afforded by the fourth amendment.[225]

After reading *Leon*, two needed changes spring immediately to mind. First, if the magistrate's decision regarding the scope of fourth amendment rights will be practically unreviewable and the decision will be made in an *ex parte* proceeding, police must have the obligation to present all relevant facts to the magistrate. It can be strongly argued that the *Gates* "totality of circumstances" test already places this requirement upon the police.[226] Therefore, if an officer intends to bolster the reliability of an informant by detailing

---

224 *See* Stringer v. State, 491 So. 2d 837 (Miss. 1986). "Nothing less than 'the integrity of the criminal justice process' is placed in jeopardy in *Leon*. This is particularly so in a state like Mississippi where most judges issuing search warrants have had no formal legal training." *Id.* at 850 (Robertson, J., concurring)(citation omitted)(quoting State v. Novembrino, 200 N.J. Super. 229, 244, 491 A.2d 37, 45 (1985)).

225 *See generally* 511 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2934 (1973).

226 *See* W. LAFAVE, *supra* note 2, at 23. *But see* Point v. State, 102 Nev. 33, 717 P.2d 38 (1986). In *Point*, the defendants argued that the affidavit prepared in support of a search warrant for their home was invalid because the affiant failed to include the fact that the informant was jailed and had a criminal record. This omission, defendant argued, indicated bad faith on the part of the affiant, thereby justifying suppression under *Leon*. In rejecting this argument, the Nevada Supreme Court stated that *Leon* "does not stand for appellant's proposition that the detective's failure to include all facts of which he may have knowledge concerning the character of an informant establishes bad faith of the officer justifying suppression of evidence." *Id.* at 41, 717 P.2d 38, 42-43.

Similarly, in State v. Washington, 482 So. 2d 171 (La. Ct. App. 1986), the court announced that under *Leon*, the "good or the bad faith of the affiant officer becomes relevant only where a search warrant is found defective." *Id.* at 174. Thus even though the court agreed with the defendant that statements contained in the affidavit could have been expressed in a clearer fashion, it refused to examine evidence of the officer's prior, specific search warrant affidavits to determine whether the officer acted in bad faith when signing this affidavit. *Cf.* United States v. Reivich, 610 F. Supp. 538 (W.D. Mo. 1985)(*Leon* inapplicable where the officers failed to include information in the affidavit regarding inducements given to witnesses to obtain information), *rev'd*, 793 F.2d 957 (8th Cir. 1986).

past times in which the informer has been reliable, the officer must also be under a responsibility to relate those times in which the informant was proven to be wrong. If a police officer corroborates his information with additional facts, he must be responsible for detailing those additional facts which do not point toward the reliability and credibility of his informant. A "totality of circumstances" approach can demand nothing less.[227]

Closely related to the "totality of circumstances" requirement as it bears upon police is the need to develop measures to limit magistrate shopping by police officers.[228] Because facts in criminal cases are often developed over time, with additional facts coming to the fore, a finding of "no probable cause" by a magistrate should not be seen as *res judicata* as to future warrant applications in the same case for the same location. However, if reliance upon the judicial opinion to issue a warrant is to be given the same status as a judicial opinion in the mistake of law context, the ability to approach different magistrates until one of the magistrates "gets it right" must be curtailed. Once a determination is made that there exists no probable cause to search, additional judicial resources should not be used unless additional information is gained. A true "totality of circumstances" test should require that once a magistrate has made a "practical, common sense determination" that under the facts before him no probable cause to search exists, the existence of this determination must be relayed to subsequent magistrates who are asked to rule on the existence of probable cause.[229]

3. Reviewability of Magistrates' Decisions

It may well be that our legal system does not know whether it is willing to accept unreviewable decisions made by non-law-trained persons on questions of search and seizure. This seems to be part of the message delivered by Justice Blackmun in his concurring opinion in *Leon*:

> If it should emerge from experience that, contrary to our expectations, the good faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct de-

---

227 This reading of *Gates* conflicts with what Justice Brennan fears will result due to *Leon*. 468 U.S. at 957 (Brennan, J., dissenting).

228 *See* L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 120 (1965). *See also* W. LAFAVE, *supra* note 2, § 1.3, at 39-41 (1978). There is very little empirical data on the scope of this problem. McCoy, *supra* note 155, at 62.

229 *See* Bradley, *supra* note 15, at 297.

mands no less.[230]

The great difficulty of Justice Blackmun's proposal lies in knowing whether the good faith exception in particular, and the role of the non-law-trained magistrate in general, have resulted in a "material change in police compliance with the Fourth Amendment."[231] As noted by Justice Brennan in dissent, it is very difficult to argue for changes in fourth amendment law on the basis of social science research conducted in the area.[232] One may hope otherwise, but Justice Blackmun's appeal for experimentation and documentation probably just delays the choices one must make regarding the qualifications required for issuing magistrates and the impact of unreviewability upon fourth amendment safeguards. It may be that Justice Blackmun's concurrence is merely his way station on the road to further limitation or abandonment of the exclusionary rule.

If it is determined, however, that our legal system is currently not willing to accept unreviewable fourth amendment decisions by non-law-trained persons (or after a few years experience with *Leon* it is determined that our legal system no longer is willing to tolerate unreviewable probable cause determinations), Justice Brennan's dissenting opinion in *Leon* presents a way to reduce drastically the unreviewability of magistrate decisions. *Gates*, he observes, held that "[t]he task of an 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."[233] After noting that the majority would not apply its good faith exception to a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," Justice Brennan concludes that the good faith exception in *Leon* is rather meaningless:

> The task of a reviewing court is confined to determining whether the magistrate had a "substantial basis" for concluding that probable cause existed. Given such a relaxed standard, it is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid under the new *Gates* standard, but at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" under the test announced today. Because the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objec-

230 *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).
231 *Id.* (Blackmun, J., concurring).
232 *Id.* at 942 (Brennan, J., dissenting).
233 *Id.* at 958 (Brennan, J., dissenting).

> tively reasonable; otherwise, we would have to entertain the mind boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant.[234]

In other words, the issue of the informed magistrate may be met by the same method of appellate review that existed after *Gates* but before *Leon*. *Leon* adds nothing to *Gates*, and *Leon* retains appellate review of those cases which do not meet the *Gates* standard.[235]

Whether Justice Brennan is correct in his assessment of *Leon* must await the test of time, but a recognition of the problem of magistrate quality which *Leon* resurrects may convince future courts to look favorably upon Justice Brennan's interpretation of *Leon*. Of course, another method to enable reviewability of a magistrate's decision is for courts to read broadly the exceptions which the *Leon* court created to its own rule.

VI. CONCLUSION

Leon is a questionable decision because it assumes that police officers need encouragement, beyond the constitutional requirements of the fourth amendment, to seek a judicial opinion (a search warrant) that a search is proper. However, assuming that *Leon* is likely to remain the opinion of the Supreme Court, and assuming that *Leon* is not a mere way station on the road to total obliteration of the exclusionary rule, *Leon* must be limited to judicially-warranted searches. Just as the mistake of law doctrine serves as a defense only in those situations in which an actor has sought information from a specific source, the *Leon* good faith exception should apply only when permission to search has been received from the court. In terms of a deterrence analysis, the *Leon* exception should not be expanded in reliance upon specific deterrence of the individual officer.

---

234 *Id.* at 958-59 (Brennan, J., dissenting).

235 *See* W. LAFAVE, *supra* note 2, at 30-33; Alschuler, *supra* note 51, at 322-24; Bradley, *supra* note 15, at 290-91; LaFave, *supra* note 10, at 923-26; Wasserstrom & Mertens, *supra* note 10, at 95-97. The Idaho Court of Appeals commented that *Leon*

> provides such an exception [to the exclusionary rule] when the affidavit or sworn testimony is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." 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 the evidence is so deficient there is no "substantial basis" to find probable cause under the "totality of circumstances," but that evidence is still not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." For the vast majority of situations, it would appear that the Supreme Court in *Gates* and *Leon* has killed one bird with two stones.

State v. Schaffer, 107 Idaho 812, 822, 693 P.2d 458, 468 (1984). *See* Stringer v. State, 491 So. 2d 837, 841 (Miss. 1986)(Robertson, J., concurring); *see also* W. LAFAVE, *supra* note 2, at 15.

The officer who attempts to justify a search on the grounds of permission, other than a search warrant, should not be justified any more than the individual should be excused from criminal liability for his conduct if he has sought guidance from unofficial sources. The criminal law is comfortable with its general deterrence model for the mistake of law defense as modified by an exception which encourages the individual to seek official guidance from a limited number of sources. In the *Leon* situation, the community should feel equally comfortable in relying upon a general theory of deterrence for the exclusionary rule since the remedy of the exclusion of evidence is a remedy directed against the population as a whole as represented by the prosecuting arm of the state. The exclusionary rule should not be concerned with the culpability of the individual police officer.