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The Good Faith Exception to the Exclusionary Rule: A Panel Discussion

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THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE—A PANEL DISCUSSION

INTRODUCTION

The following is a transcript of a panel discussion concerning the newly created good faith exception to the exclusionary rule. This forum was presented by the Student Bar Association of Whittier College School of Law on October 2, 1984.* Given the recent Supreme Court decisions which impact heavily on this area, the Whittier Law Review decided this topic would be of particular interest to our readers.

From its inception, the exclusionary rule has attracted both legal and philosophical commentary. The underlying justifications and ultimate effects of the rule require careful thought and precise legal analysis. Therefore, it is with deep pride and appreciation that we share the thoughtful insight and preparation of these panelists.

In an effort to present a balanced presentation, both scholars and practitioners were chosen, exhibiting various views and convictions. In order to preserve these views, it was our decision to leave them, where possible, in their original form.

This forum was moderated by Judge Larry Fidler of the Los Angeles Municipal Court. Judge Fidler is past President of the Criminal Court Bar Association and also past Chairperson of the Criminal Justice section of the Los Angeles Bar Association. Panelists included: Ms. Joan Howarth, Police Practice Attorney for the Los Angeles chapter of the American Civil Liberties Union; Mr. Curt Livesay, Director of Central Operations for the Los Angeles District Attorney's Office; Professor Gerald Uelmen, Professor of Law at Loyola Law School, and past President of the California Attorneys for Criminal Justice; and Mr. Geogory Wolff, of the Los Angeles City Attorney's Office.

* We wish to extend special thanks to Ms. Pamela Kaplan of Whittier College School Law, Class of 1985, for her efforts in coordinating this forum.
Again, we thank each panelist for illuminating what is today an uncharted issue—the good faith exception to the exclusionary rule.

BACKGROUND

It is axiomatic that one's rights are hollow if they carry no remedy for their protection. The exclusionary rule represents a remedy by which one's constitutional rights may be protected.1 Simply stated, the rule forbids the use of any evidence gained through "illegal" state action.2

The rule purportedly serves three distinct ends. First, it deters "illegal" state conduct—conduct violative of one's constitutional rights.3 Second, it preserves "judicial integrity" by inhibiting the courts from becoming "accomplices in the willful disobedience of a Constitution they were sworn to uphold."4 Finally, it may "minimize[e] the risk of seriously undermining popular trust in government"5 by demonstrating to the public that government may not benefit by its unconstitutional conduct.

The rule was first adopted by the United States Supreme Court in Boyd v. United States.6 Here, the Court stated: "The great end for which men entered into society was to secure their property."7 The Court presumably believed this end best achieved by adoption of the exclusionary rule. The Court reasoned that the privilege against self incrimination, embodied in the fifth amendment, was not different from one's right against "unreasonable" searches and seizures under the fourth amendment.8 Reading the two amendments together, the Court fashioned an exclusionary rule that the fifth amendment on its face provides, but one not literally within the language of the fourth amendment. The holding in Boyd, however, was short-lived. In

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1. See, e.g., Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (for the proposition that without such a remedy "the fourth amendment [is reduced] to a form of words"); Wolf v. Colorado, 338 U.S. 25 (1949)(Rutledge, J., dissenting) (for the proposition that "the amendment without the [rule] is a dead letter").

2. This prohibition covers evidence or testimony gained by "means violative of the fourth, fifth, or sixth amendments." See, C. WHITEBREAD, CRIMINAL PROCEDURE 14 (1980).


8. "We are unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." Id. at 633. See also, W. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 7 (1978).
Adams v. New York, the Court essentially overruled its earlier precedent.

It was not until 1914 that the Court again embraced the fourth amendment exclusionary rule. In United States v. Weeks, the Court held the rule applicable to the federal government. Forty-five years later, in Wolf v. Colorado, the Court held the fourth amendment applicable to the states; however, the Court allowed each state to adopt its own remedy for fourth amendment violations. The dissent argued that there was but one remedy for fourth amendment violations—the exclusion of evidence. The reasoning of the dissent was finally vindicated in 1961. In that year the Court decided Mapp v. Ohio.

Recently, in United States v. Leon, the Court reevaluated the expansive scope of the rule. In Leon, the Court held that if an officer, in "good faith," relies upon a warrant, the fact that the warrant may later be deemed invalid will not preclude the use of evidence obtained during its execution.

Thus today, we face an issue similar to the one faced in Adams, nearly eighty years ago: Should the exclusionary rule be abolished? Only time can dictate whether history will repeat itself. The question we must address is—"should it?"

**DISCUSSION**

MS. HOWARTH: Since I am from the American Civil Liberties Union, most of you will not be surprised to hear that I think that the good faith exception to the exclusionary rule is a disaster, and incorrect. Therefore, I think the recent Leon decision is wrong, and I support strongly the analysis of Justices Brennan and Marshall, who dissented.

Professor Kamisar from Michigan said: "It is not really a good

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10. "The law does not concern itself with the method whereby a criminal is brought to bar, or... with the means whereby evidence against him has been obtained." *Id.* at 592.
12. *Id.* at 398.
14. *Id.* at 28.
15. *Id.*
16. *Id.* at 44, (Murphy, J., dissenting).
17. 367 U.S. 643.
19. *Id.* at 3421.
faith exception; it is a reasonable mistake exception’; 21 and I would say that the point of the dissent by Justices Brennan and Marshall is that it is not just an exception to the exclusionary rule, it is an exception to the fourth amendment itself. Basically, what we are talking about is a reasonable mistake exception to the fourth amendment, and I think that we should not be in the business of making that kind of exception.

We do not have a reasonable mistake exception to the fifty-five-mile-per-hour rule. If you do it, you cannot say: “Well, my speedometer said I was only going fifty-five, and it is a reasonable mistake.”

We do not have a reasonable mistake exception to drunk driving, and I think that the Civil Liberties Union believes that the fourth amendment is important enough that we should not be creating this kind of exception to it either.

The issue really is, what does it mean to have the fourth amendment? What does it mean that we have put that kind of value on the right to be secure in our homes, secure in our papers from unreasonable searches and seizures?

It is obvious to us all that this has become a real hot political issue. We have a serious crime problem. We have politicians campaigning on law and order. We have widespread public agreement that we need to do something about crime. My position is that the good faith exception to the exclusionary rule is not the place to start doing something about crime. The fourth amendment and the other amendments in the Bill of Rights are setting up definite restrictions on the activities of police and we cannot ignore that.

It would be foolish for me to try and minimize the fact that it is much more difficult to gather evidence if you are working within the confines of the Bill of Rights; however, we should all value the importance of knowing that we do have security in our homes; that we are protected by the fourth amendment.

We must understand that for those of us such as myself, who are middle class, we can feel pretty secure because we are not subjected to police abuse in the same way that other people, other segments in the society, are. It would be irresponsible of me not to mention the fact that I am overloaded with phone calls every day from people who are being stopped and harassed at the airport, bus stop, super-

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market, confronting police officers in ways that are infringing on their privacy and infringing on their lives.

The exclusionary rule is not merely a judicially created remedy. Although it is the current Supreme Court's view, I think that it is a mistake. I think that Justice Brennan is absolutely correct; the fourth amendment is given meaning by the exclusionary rule, that the exclusionary rule is essentially a personal constitutional right that all of us have.

JUDGE FIDLER: Mr. Livesay would you like to proceed.

MR. LIVESAY: It is, indeed, a pleasure to appear in your school tonight and especially on this panel with such distinguished colleagues.

Whether Ms. Howarth and I disagree philosophically with the majority of Leon or not, there are certain basic accepted principles. One such principle is that the fourth amendment does not contain its own provision for self-execution. That is, it does not contain a provision that precludes the use of evidence obtained in violation of its commands. The majority in Leon accepted this.

The question that we face is one of balancing, and the majority did exactly that. In eloquent terms for a few pages, they talked about a general proposition of the importance being displaced by the urgency—those are my words, not theirs—the substantive being displaced by the expedient. We face those problems every day. It is a balancing test.

Let us speak of the ultimate cost of the exclusionary rule, that is suppressing evidence, not having evidence admitted that is probative, reliable, and fairly conclusive.

The exclusionary rule, as someone has eloquently summarized in the handout provided for this panel, basically is aimed at three purposes: to prevent the courts from becoming accomplices to constitutional violations; to ensure the government cannot profit by its illegal conduct; and to deter future illegal police action. The exclusionary rule, in my experience, helps accomplish all three purposes and, as a matter of fact, it does deter future illegal practices by the police.

Now, Ms. Howarth is concerned, and so am I, about illegal police conduct that does not result in the seizure of evidence that later may be suppressed as a sanction against the conduct. Those are the
cases where the police allegedly acted illegally, seized the evidence, and a case is never presented to the prosecutor, at least one is never filed.

The remedy is left in other areas, not suppression. Suppression of the use of the evidence of a criminal case is only a small part of the spectrum of remedies, and it is that small part of the spectrum that we are addressing tonight.

In the case of *Leon* and the good faith exception to the exclusionary rule, I basically would say that as a public prosecutor, I favor the good faith exception. The one in *Leon* is very, very limited. The facts of the situation occurred in the federal district court based upon an activity by the Burbank Police Department pursuant to a warrant issued by a superior court judge. In *Leon*, there is intervention, a judicial conclusion between the officers and the person searched.

The district court judge determined that the reality for the search warrant did not suffice as a statement of probable cause. Given that, and stipulating for a moment that it did not, the majority in *Leon* concluded that reasonable persons may differ on the quantum of evidence or information it takes to reach a level of reasonable cause.

Once a magistrate does that—and there is nothing to show that the officers, by fraud, or other conduct on their part, did anything but rely upon the judge's finding and carry out a judge's order—we should not penalize the police for that conduct.

We have a judge intervening, and reaching a conclusion, which means that the courts really are not accomplices to some constitutional violation. What else can you ask if there is no showing that the judge did anything but make a call based on the evidence before him, a matter about which reasonable persons could differ?

The government cannot profit by his "illegal conduct." What is illegal about the officer relying on a valid court order? And, what about the reliance? Would it deter future illegal police action? There is not much deterrence when you ask officers to go to a judge and get a ruling, they obtain that ruling, and you then malign them.

In short, I believe that the good faith exception is appropriate, and for tonight's purposes, I would suggest that the good faith exception should be expanded not only to cover the fourth amendment but also the fifth and sixth amendments.

JUDGE FIDLER: Thank you, Mr. Livesay.

Professor Uelmen, my former law school Dean.
PROFESSOR UELMEN: I think Ms. Howarth's point about
any one of us being the victims of an illegal search is especially
poignant since we are talking about the Leon decision right here in
Los Angeles County, where it took place. What the Leon case
presented was three victims of a concededly unlawful police search,
and the court started from that premise—that this was an illegal war-
rant, that the officers had illegally entered three houses in Burbank
and conducted a search. However, the Court said: "We are going to
permit the evidence to be admitted despite the illegality of that
search."

Several years ago, it occurred to me that a disproportionate
number of the constitutional landmark cases in search and seizure
arise right here in Los Angeles County. I was curious whether that
was because L.A.P.D. does not have much respect for the fourth
amendment, or whether it was because L.A. defense lawyers make so
many motions to suppress.

I actually set out on a journey to locate the landmarks where
many of these cases had occurred. I had a fantasy that these
landmarks should be recognized. I wanted to put a plaque on Char-
lie Katz's telephone booth: "Anyone who enters here," in the im-
mortal words of Justice Stewart, "shuts the door behind him and
pays the toll, is entitled to assume that the words he utters into the
mouthpiece will not be broadcast to the world." 22

I did find a telephone booth up on Sunset Boulevard, but I suf-
f ered the same disappointment that Superman suffered in a recent
movie by discovering that the booth no longer has a door. It is one
of these new open-air telephones, so it appears that the Supreme
Court is getting plenty of help in dismantling the protection of the
fourth amendment. The telephone company is helping, and so are
the morons who are going around removing the doors from toilet
booths.

I prefer to characterize Leon not as creating a good faith excep-
tion, but as creating a warrant exception. I think it is really impor-
tant to recognize that what the Court is really saying is that all you
need, in order to show good faith, is that the officer went to a judge
and got a search warrant. Then the burden is on the defendant to
show that the warrant was so bad that any reasonable police officer
would realize that any judge who would sign such a warrant had to
be an airhead.

I think it is ironic that *Leon* is going to present us with the real test of whether the exclusionary rule does have a deterrent effect. We have been debating for years whether police behavior is actually affected by what the Supreme Court says about the fourth amendment. I think *Leon* is going to demonstrate beyond any doubt that police behavior is affected. We are going to see a lot more police officers getting a lot more search warrants because of the *Leon* decision.

What is wrong with that? Well, I think the thing that is wrong with it is that police officers are getting warrants to avoid the fourth amendment. The warrant will give them absolute insurance that we do not have to worry about whether they have probable cause or whether the warrant describes the premises to be searched with sufficient particularity. We will just assume that without any further inquiry. So, I think what *Leon* does, is place in great jeopardy the protection of the fourth amendment which requires that a warrant be based on probable cause and describe the premises to be searched and the items to be seized with particularity.

I think the warrant in *Leon* is a perfect casebook example of the principle that the answer you get to a question depends on how you ask it. The problem with *Leon* is—the way Justice White asked the question—is the purpose of deterring police misconduct served by excluding evidence seized pursuant to a warrant that the officer in good faith thinks is valid? Any idiot is going to answer that question “no.”

Obviously, if that is the purpose of the fourth amendment, that purpose is not going to be served. The flaw is his assumption as to the narrow purpose of the fourth amendment exclusionary rule, that is, that its only purpose is to deter unlawful police conduct. Justice White very succinctly stated three assumptions that he was making. What I would like to do is look at each of those assumptions because I think each of them is flawed; each of them is an inaccurate assumption of fact.

Justice White said: “To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates, their reliance is misplaced.” First, he says, the exclusionary rule is designed to deter police misconduct rather than punish the errors of judges and magistrates.”

Secondly, he says, “there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the fourth amendment.”
And finally, he says, "there is no basis for believing the exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate."

Let us look at each of those assumptions. First, is it true that the exclusionary rule is designed only to deter police misconduct and not to deter misconduct by judges or magistrates? I think that assumption ignores the history of the fourth amendment. History clearly discloses that the framers of the fourth amendment were less concerned with bumbling constables than with overzealous magistrates.

For example, take the case of one of my favorite historical characters, John Wilkes. This case arose in England in 1763, when a London newspaper accused King George III of complicity in dishonest negotiations over the recently concluded Treaty of Paris, and the King was furious when he saw that newspaper. He called the Secretary of State in, and he said: "Find the people that published this."

His Secretary of State issued a warrant, and that warrant commanded four officers of the Crown to go out, find whoever was publishing this rag, grab them and bring them back, and that is exactly what they did. They went into houses. They called in blacksmiths to break open locked bureaus. They rounded up fifty suspects, and among them was John Wilkes, my hero.

John Wilkes was kind of a rakish member of the British Parliament, who used his prosecution to rally opposition to the government. His prosecutor was another interesting historical character, the Earl of Sandwich, after whom the sandwich is named. Actually the Sandwich Islands of Hawaii were, at one time, named after the Earl as well. The Earl was assigned to prosecute Wilkes, and he taunted him by saying: "You will die either of the pox or on the gallows." To which Wilkes responded: "That depends, my Lord, whether I embrace your mistress or your principles."

Wilkes was released on a claim of parliamentary privilege. When his case came before Lord Chief Justice Camden, believe it or not, the argument presented by the Crown was that the officers who executed the warrant, went into Wilkes' house, and seized both his papers and him, should be immune, because even if the warrants were invalid, they were acting in good faith under government orders. Lord Camden responded to that argument by stating: "The

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common law does not understand that kind of reasoning, nor do our books take notice of any such distinction."

Wilkes won a judgment of $4,000 against the Crown. He became London’s idol and was subsequently elected Lord Mayor of London, much to the King’s chagrin. His cause was also championed in Parliament by William Pitt. In Wilkes’ defense, Pitt made his immortal comment:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail, its roof may shake, the winds may blow through it, the storm may enter, the rain may enter, but the King of England may not enter. All his force dares not cross the threshold of the ruined tenement.

You may be asking what does all this have to do with the fourth amendment. It has a hell of a lot to do with the fourth amendment, for the colonists who drafted the fourth amendment were intimately familiar with all of the characters involved in Wilkes’ prosecution. All those characters became heroes, although they never set foot in America.

Pittsburgh, Pennsylvania, was named after Pitt. Camden, New Jersey, was named after Lord Camden; Wilkes-Barre, Pennsylvania, was named after Wilkes. Also, generation after generation of Americans named their children after John Wilkes, until one of his namesakes became one of the greatest villains of American history by assassinating Abraham Lincoln.

It was to avoid the issuance of warrants, like the one that was issued in Wilkes’ case, that the fourth amendment was drafted to specifically require that warrants particularly describe the persons to be seized, the papers to be seized, and the places to be searched. I think by removing the teeth of the amendment, the Supreme Court has, in *Leon*, weeded out this protection from the fourth amendment.

The second assumption that I quarrel with, made by Justice White in his *Leon* decision, was that there exists no evidence that judges and magistrates are inclined to ignore or subvert the fourth amendment. I do not think Justice White had to look very hard to find that kind of evidence. In fact, I found it in a report published in the Spring 1984 State Court Journal, published by the National Center for State Courts.24 This article, a review of the search warrant process by Van Duizend, Sutton, and Carter, is based on an

extensive study of search warrants issued in seven American cities in 1983—they came to some startling conclusions.

First of all, they discovered that in these seven rather large cities, a majority of the search warrants were being issued by just a few judges. In one city, they found that over half the search warrants were being issued by one judge, so they started inquiring: “Well, why are these particular judges issuing all the warrants?” The explanation they got from the police was: “Well, we pick the judges who will give us the least hassle in issuing a warrant.”

They actually sat and watched the judges review the warrants, and they concluded that the median time that a magistrate spent reviewing an affidavit in an application for a warrant was two minutes and twelve seconds. What does that tell you about whether there is any evidence that judges and magistrates are inclined to ignore or subvert the fourth amendment?

I think it suggests that there is a lot of judge-shopping going on and there is a lot of rubber-stamping going on in the issuance of search warrants. *Leon* has eliminated the only protection we have against this activity—having another judge look at the validity of the warrant that was issued.

The third assumption that Justice White makes is that there is no basis to believe the exclusionary rule will have a significant deterrent effect on the issuing judge or magistrate. I find that to be a startling statement. In effect, what he is saying is that judges do not care if their rulings are reversed by higher courts. That certainly does not jibe with my experience. I think most judges know and care a lot about whether their decisions are reversed by a higher court. They are certainly more concerned than police officers are with the fate of their judicial decisions.

We have now given up the only means of control we have over these judges. They are not subject to civil liability. The judges are immune; they cannot be sued for their misbehavior in issuing a warrant that should not have been issued.

Finally, I think this reasoning is also flawed because it ignores the role of prosecutors in the warrant issuance process. The police officer ordinarily does not go directly to the judge with a warrant application. He or she goes to a prosecutor, who reviews that application, and the deterrent of the exclusionary rule does affect the behavior of prosecutors. This is also overlooked in Justice White’s analysis.

So, in making all three of these assumptions, I find that the
Court is ignoring studies which document serious shortcomings in the issuance of search warrants. They are closing their eyes to history. They are closing their eyes to the reality of the world in which we live—search warrants are routinely rubber-stamped.

We can add a few more landmarks now to Charlie Katz's telephone booth here in Los Angeles County. Three very ordinary homes in Burbank might also have a plaque placed on the door. Certainly, Justice White assumes that these were the residences of drug dealers. We are all safer now because they were searched. Maybe we should all sleep more soundly knowing that search warrants will only be issued to search the homes and offices of criminals. However, I think every student of history—as lawyers and law students, that should certainly include everyone in this room—should sleep a little more restlessly, realizing that it is the King who decides who is a criminal suspect. The John Wilkeses will always be with us, and their bedrooms might also be searched under these warrants. The King can now cross their threshold with a search warrant in one hand and the good faith exception to the exclusionary rule in the other.

JUDGE FIDLER: All right, Mr. Greg Wolff.

MR. WOLFF: I believe it was almost inevitable that a good faith exception to the exclusionary rule would be created, and the reason for this is that the primary purpose for the exclusionary rule simply is not served by suppressing evidence where the search is conducted in good faith. The exclusionary rule, I believe, is a judicially created remedy to enforce the protections of the fourth amendment. There is no constitutional right to have evidence suppressed. I do not find that in the language of the Constitution nor do I find that in the language of past fourth amendment cases.

The exclusionary rule thus retains its validity only to the extent that it serves the purpose for which it was created. That purpose was not to punish police officers and was not to reward the victims of the constitutional violation. As a punishment, it would be laughingly ineffective and also inappropriate. Suppressing evidence does not work either an economic or physical hardship on a police officer. At most, it offends the officer's pride and maybe his sense of justice.

As recompense to the victim, it suffers from a very serious flaw, in that it benefits only those victims who are ultimately charged with a crime. Victims who are innocent of criminal violations and not
charged are offered no solace whatsoever by the exclusionary rule. Only the potentially guilty can benefit.

The primary purpose of the exclusionary rule is deterrence. It protects fourth amendment rights by reducing the incentive to commit such violations. Its main purpose is to deter future violations. I do not know if you believe it, but the basic issue is whether the exclusionary rule acts as an effective deterrent where a search is conducted in good faith.

*Leon* discussed only the context where a search warrant is issued. In concluding that a good faith exception was appropriate in that circumstance, the pivotal premise of the decision was that the exclusionary rule was meant only to deter police officers, not prosecutors or judges. If this premise is accepted, then certainly *Leon* is correct. If you focus solely on the police officer, there is no reason to suppress evidence where a facially valid search warrant has been issued.

Policemen are not lawyers, and they should not be expected to be lawyers. They do not read each court opinion that comes out, nor do they know every nuance of this complicated area of law. Where an officer like Leon prepares a complete and honest affidavit, has it reviewed by a District Attorney, and then takes it to a judge who issues a warrant, there can be no deterrent effect by later suppressing the evidence. If a higher court later decides that the District Attorney and the judge erred, there is no difference. The officer can not do anything different next time.

Regrettably, the only lesson it teaches the police is that the exclusionary rule is a rather arbitrary game played by lawyers and judges, and this is a dangerous attitude. It engenders disrespect of the legal system and promotes evasion and even lying by those sworn to uphold the law.

Like Professor Uelmen, however, I am troubled by that basic premise in *Leon* that the exclusionary rule is meant only to deter unlawful conduct by police. I do not believe that. The premise used by the court in *Leon* that the exclusionary rule was aimed only at officers first forces the court to use contrived reasoning in addressing the situation where a warrant is clearly not supported by probable cause. *Leon* still held that in that situation, suppression would be appropriate, but the reason they gave is because an officer could not act in good faith when relying on such a warrant that is clearly not supported by probable cause. This turns things upside down.

As I stated before, police officers are not lawyers. Surely, they
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should not be put in a position of being expected to review the actions of a judge issuing a search warrant. The purpose of the warrant requirement is exactly the opposite. It is the judge who is supposed to review the determination of the police officer, whether probable cause exists. If a warrant is wrongly issued, it is the judge's mistake—not the police officer's.

Secondly, the premise that the exclusionary rule was meant only to deter officers is inconsistent with footnote eight in *Leon*, which affirms a rule that suppression will result where a police officer relies on a statute authorizing a warrantless search but that statute is subsequently ruled invalid. Who is deterred in that situation when a statute is later ruled invalid? The police will surely continue in the future to rely on facially valid statutes. In that situation, the mistake is the legislature's, not the police. If suppression is required in that situation, then why not limit it when the judge is the one who erred? *Leon*, unfortunately, does not address that consideration.

I also disagree with the conclusion in *Leon* that suppression has no deterrent effect on judges. The threat that evidence will be suppressed does tend to create a climate of care that does affect both judges and prosecutors who issue warrants and who help in the production of affidavits for warrants. I do not believe this deterrent effect is nearly as strong as it is on officers. I think that Justice White was correct—that it is officers who are primarily limited in the investigation of crime to follow a case through from its inception to its conclusion. They are the ones who would be primarily interested in exclusion, but the knowledge that search warrants will be scrupulously looked at by higher courts does change the attitude of judges and prosecutors. It is a lesser effect, but it still does exist.

My view, therefore, is that while some form of the good faith exception must logically be made to the exclusionary rule, the holding of *Leon*, that anytime a facially valid warrant is used the good faith exception should apply, is simply too broad.

Ironically, I do disagree with Professor Uelmen. I think the practical effect of *Leon*, at present, is to protect fourth amendment rights. What *Leon* teaches is that if you get a warrant, there is almost no chance suppression will be the result. This encourages officers to get search warrants. Far from being evidence that the officers are trying to circumvent the fourth amendment, the production of search warrants is precisely what the fourth amendment is meant to encourage.

*Leon*, as presently limited to only searches where a search war-
rant was issued, should act to reduce the number of searches and the number of bad searches. I have little doubt, however, that the good faith exception will be extended to warrantless searches as well. The very reasoning of the Leon decision suggests that. What is difficult to predict is on what terms the warrant will be granted.

One thing that Leon did clearly state, however, is that an objective standard must be used, and I think this is very important. A rookie cop's ignorance of the law cannot be an excuse for a bad search. Even an honest mistake by an experienced officer is not objectively reasonable (will not constitute good faith), therefore a good faith exception must be based on objective criteria.

Leon also suggests that the issue of good faith must be considered on an institutional basis. This is very important. Where appropriate, both the individual officer and the police force as a whole must have acted reasonably. This answers, I think, many of the common objections to the so-called good faith exception. For instance, a police force must provide reasonably good training and conduct continuing education concerning the requirements of the fourth amendment. Leon expressly states this requirement.

Another example is that an officer can rely in good faith on official information but only if the police force as a whole keeps that information reasonably accurate and up-to-date. For instance, a police officer can make an arrest if he finds out through official information that an arrest warrant is outstanding. However, if it is later determined that that warrant was actually recalled weeks earlier and, through the negligence of the police force, that was not taken from the system, then suppression should result.

My personal view is that the good faith exception should enlarge or overlap with the concept of reasonableness that is currently well engrained in search and seizure cases. Its practical purpose should be to avoid those occasional rulings, and I do stress that they are occasional, which suppress evidence on overly technical grounds where the officers did act reasonably and little or no deterrent effect will be accomplished. This should be done, I believe, on a case-by-case basis rather than an overall rule or a broad rule as stated in Leon.

Examples of proper application of such a good faith rule, I believe, would include: (1) Allowing evidence to be admitted where an arrest was made pursuant to a statute later found invalid. This is the
stated current federal law. 25 (2) Upholding the search, even though a search warrant supported by probable cause was issued but contained technical defects of which the police were unaware. This is basically the facts of Massachusetts v. Sheppard, 26 the companion case to Leon. (3) Admitting evidence where the arrest warrant involved had been recalled a short-time earlier, and the police were reasonably not made aware of that fact, or where the police search and arrest the wrong person pursuant to a valid warrant and that mistake was objectively reasonable. In those cases, all you are doing is putting a good faith component into the overall analysis of fourth amendment cases.

In conclusion, the good faith exception, in my view, should simply be used on a case-by-case basis to deny suppression where the purposes of the exclusionary rule cannot be served.

JUDGE FIDLER: You have heard all four panelists, I think, express very clear and certainly differing views of the Leon decision. We are now going to ask them to apply their feelings to a fact situation that I believe you have all been given.

PROFESSOR UELMEN: All Leon, of course, holds is that the Federal Constitution will recognize a good faith exception, and the Federal Constitution does not require the suppression of evidence if the officers were acting in good faith reliance on an invalid warrant. But, of course, state constitutions can give greater protection. The issue of whether Leon will be followed in California is closely tied to Proposition Eight. However, we still have not gotten a meaningful interpretation from our State Supreme Court as to what the right to truth in evidence means under Proposition Eight—whether it really does eliminate all the exclusionary rules based on our State Constitution.

We may get an answer to that question in a case that is being argued before the California Supreme Court here in Los Angeles next week. The case that many lawyers are looking to to provide the answers with respect to Proposition Eight is a case called In re Lance W., 27 and that case is being argued here in Los Angeles.

In the context of Proposition Eight, there is a clear exception in that exclusionary rules based on a rule of evidence, relating to privi-

The fifth amendment is an evidentiary privilege, so there have been already some court of appeal decisions declaring that fifth amendment exclusionary rules immune from Proposition Eight that is, exclusionary rules based on the State Constitution protecting the privilege against self incrimination. Therefore, even if the Supreme Court of the United States were ready to extend Leon to the fifth amendment context, we would have a very persuasive argument that the evidence should still be suppressed under the California Constitution in spite of Proposition Eight.

JUDGE FIDLER: I would propose playing devil's advocate. I want to pose some problems raised by the discussion tonight as well as by the problem itself and see how the panelists respond.

I would start by perhaps asking Mr. Uelmen a question. If not the good faith exception, then what? In light of the fact, if you accept as a proposition that the general public and also law enforcement despises the exclusionary rule and it has led to a decline in respect for the courts, who would carry it out? What would you put in its place? Or would you leave the rule as it is now?

PROFESSOR UELMEN: I do not think it is anything new that police officers despise the exclusionary rule. They have despised it from the outset, and that is a situation that is nothing new over the course of the years. When I hear that argument, people say, "well, the exclusionary rule is making liars out of the police because to avoid the exclusionary rule, they have to come into court and commit perjury." I do not find that a very persuasive argument, frankly, that somehow we should change the rule because officers do not want to have respect for the fourth amendment. I do not think the situation has changed much since 1961. Remember that the Supreme Court, in imposing the exclusionary rule on the states of Massachusetts and Ohio,²⁸ looked at all of the alternatives and said, "nothing else works, nothing else converts the fourth amendment from more than a wall-hanging to something that actually protects the right of privacy of American citizens."

Has that changed? Do we now have some other remedy that will ensure respect for those rights? I have not seen one of those.

JUDGE FIDLER: Do you think the rule is workable in its present state, given the myriad number of cases that come down on a

daily, if not weekly, basis concerning search and seizure? Do you think it is a workable rule, the exclusionary rule?

PROFESSOR UELMEN: I think the rule has led to substantial improvement. I mean, the cases that are coming down are not the kind of cases that were coming down in the fifties in terms of the kinds of illegality in which police officers were engaged. I frankly do not see this flood of cases in which evidence is being suppressed and criminals are going free.

It is really a rare event when a motion to suppress is granted. We tend to hear about it, but I think we hear about it because it is an unusual event. In most cases, the motions are denied.

JUDGE FIDLER: Mr. Livesay, do you want to respond?

MR. LIVESAY: On that very last point, I think what he has just done is extended a supreme compliment to the public prosecutors of the world. The reason we do not hear about so many search and seizure motions being granted is because the public prosecutor studies the rules along the way and just does not file those cases.

Just after Miranda, we attempted to discover how many cases we had in the system that reflected a Miranda problem as the cause of dismissal and so forth. We just could not isolate any because the public prosecutors, being lawyers, do something with the case—bring on an I.D. witness or try it with another lawyer.

In effect, you plea bargain to the extent it is possible to do so. As we know the rules, we just eliminate the filings and put in the system all the cases that we believe are at least arguable. It has been my experience that, due to the number of criminal cases, public prosecutors are very conservative, especially in this urban environment, in putting cases in the system. They put in only cases in which there is a very good probability that, in the case, the facts will be the basis upon which the judge will decide the case.

I started law school just after Mapp. There were arguments in the law school, concerning Mapp. When I came out and joined the D.A.'s office, they were still talking about California rules and started with Cahan and others, and then Miranda came down in the sixties, and the world thought the sky would fall in—some way we managed.

What I am saying is the times and values have changed, and I think the important rule is to recognize the fact that only Louisiana and California have an exclusionary rule in which standing was not a major facet. In other words, a person could lodge the objection of one who is illegally searched. The Feds did not have that, and only two states did.

From the beginning federal courts recognized that, in order to lodge the objection, one had to be personally subjected to the search. That was a limitation on the exclusionary rule, and as we grew up with the rule, the prosecutors become knowledgeable, as police officers now have become knowledgeable. Instead of making them liars, it has made them lawyers, and I do mean to draw a distinction in that respect. I think it has educated all of us, so to the extent that is true, it is time to make some limitation on the exclusionary rule, and that is a good thing.

Just one other point, what more can we ask of members of the judiciary? The members of the judiciary interpret the fourth amendment, interpret all of our laws. Why is it that suddenly they are to be viewed as incompetent when they review a search warrant? The Court in Leon addressed that issue very persuasively.

JUDGE FIDLER: Ms. Howarth, did you want to respond?

MS. HOWARTH: I will respond to your initial question.

It seems to me that we are in trouble as soon as we start analyzing the fourth amendment or any other of the amendments in the Bill of Rights in terms of a popularity contest. I think most of us have seen the astounding studies showing that a majority of Americans, if confronted with the words of the Bill of Rights, are not really sure that they are in favor of it.

What we had with Proposition Eight was a referendum creating widespread wholesale changes in the criminal law in California. Most of the people who voted had absolutely no idea of the specific changes that they were making. For instance, we have already said Proposition Eight contains an exclusion or exception for privileges, although the exclusionary rule itself is based on privileges.

Therefore, we know that in enacting the “Truth-in-Evidence”

section of Proposition Eight, the people of California did not get rid of the exclusionary rule as it would apply to this hypothetical. The people of California do not know that—I am sure they do not. But with Proposition Eight, I believe that we reduced the level of debate on this whole issue to a level of sloganism, sloganeering, and simplicity. I guess the only response is that people like the A.C.L.U. and those believing, as I do, have to do a better job of educating themselves about the fourth amendment and its application.

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JUDGE FIDLER: Thank you. Mr. Wolff, any response?

MR. WOLFF: I think a related concept that must be borne in mind is the reality of the officer in the field. After graduating from law school and starting with the City Attorney’s office, I went through training. Part of that training was to go on ride-alongs with officers in the field.

Standing on the sidewalk while an officer was conducting an arrest or a search, I was going through my law school classes in criminal law and criminal procedure, fervently trying to figure out what he could do and what the next step should be. I was about twenty minutes behind the action. I mean, the officer was acting and reacting to the situation as it unfolded. There is no way that an officer can be aware of every rule. I must spend three mornings a week reading search and seizure cases, and I am not sure that I am completely aware of all the rules that are currently in effect.

The officer is going to react to the situation. Hopefully, if the officer is well trained, he will have a basic understanding of the fourth amendment, a basic understanding of current law; but he is basically going to react for his own safety, to enforce the law, to uncover criminal conduct and to act as appears reasonable at the time.

What then happens when he goes into court—and we are assuming a good officer—is not that he lies, but that he sits down and tries to figure out what he did and place it in the pigeonholes that the search and seizure cases talk about. The version that comes across in court, in most cases, is not a lie, but it also does not have a strong correlation with what happened in the field. You lose the flavor. There is no other way around it. That, I think, is one of the purposes for considering good faith in these motions.

It should not be a blanket rule, but on a case-by-case basis. What the principle helps you to do is to bridge that gap between the reality of police conduct and the principles of the fourth amendment, which are only determined months later after panels of from three to nine judges, with all of their law clerks, have thought about this situation for months and determined what should be done. It allows you some bridge between the two in close cases, and I think that is all they are talking about.

JUDGE FIDLER: Did you want to respond to that, Mr. Uelmen?

PROFESSOR UELMEN: I wanted to respond to Mr. Livesay’s point that the exclusionary rule has now professionalized police and prosecutors. I think that argument really just closes our eyes to the history and to the tendency of history to repeat itself.

If you go back and look at some of the landmarks right here in Los Angeles before we had the exclusionary rule, cases like Rochin,34 where the cops drag the suspect into a hospital and pump his stomach without a warrant, or Lisenba,35 where they sneak into the defendant’s bedroom and install a dictaphone and listen to everything in his bedroom for two weeks. I mean, I am not confident that that kind of stuff is not going to happen. The reason it is not happening now is because we have the motivator—the exclusionary rule.

We have seen that the motivator does work. Now, removing that motivator, removing the incentive and saying, “police and prosecutors, we trust you,” is not a step I am prepared to take. I hope you are not prepared to take it, because those who do not know history, as someone said, are condemned to repeat it.

MR. LIVESAY: I agree with what Mr. Uelmen said. My point was we are not trusting just the police and public prosecutors of the world with the Leon good faith exception, but a member of the judiciary who has reviewed it. That is not too much to ask. Trust the judges in our society to interpret and apply our laws.

JUDGE FIDLER: Let me offer—and we will see if anyone has any response—just a personal comment. Mr. Uelmen, you indicated from the study that you read that in seven metropolitan cities the

average length of time to review a search warrant affidavit was two to three minutes. I think I am the only person here who signs warrants, as far as I know, unless people here are doing it free-lance. Often it may sound shocking on its face that a judge may average only two or three minutes in reviewing an affidavit, but some warrants are very simple. There is often a whole line of cases where the police simply want a judge to sign a warrant, and the affidavit is all of two pages long and clearly establishes probable cause. It does not take the world’s greatest legal scholar to analyze what is in an affidavit and decide whether there is probable cause.

I would say—and obviously, this is not a scientific sampling—that no judge likes to be reversed, so the argument that you sign a warrant, without care to what happens to it under pre-Leon cases—is not true. I do not think anyone wants to look bad in the eyes of his or her colleagues, having somebody review a warrant that you sign and another judge says, “there was clearly no probable cause” and kicks that warrant out.

At the same time, it is a protection. We all realize that if you make a mistake, there is a certain amount of protection because another judge will review it at a later time. In effect, if you carry Leon to its logical end, this protection no longer exists, because in almost all cases the signature on that warrant validates the search; however, in talking to my colleagues, and I agree, we are looking at warrants even more carefully than in the past. We realize that by placing the signature on the warrant, we have even more responsibility now in the warrant process than we had before.

How do you feel about that, Mr. Uelmen?

PROFESSOR UELMEN: Well, you know, Mr. Livesay says there is the intervention of the judicial officer. Remember, though, the judicial officer who is intervening is being selected by the prosecutor, and I think that raises a question of why do prosecutors select certain judges to issue their warrants. Why are half of the warrants in Los Angeles issued by two judges, Mr. Livesay?

MR. LIVESAY: Without perhaps explaining the record of a particular judge, I am not aware of Mr. Uelmen’s statistics, but it seems to me what we are using and, as described by the majority, is a situation where a judge is performing a completely detached function, not merely as a rubber-stamp. They are looking for enough in an affidavit to provide the magistrate with a substantial basis for de-
determining the existence of probable cause with a great deal of de
terence to the magistrate, a presumption, that the magistrate is correct. Therefore, there is a review of the judge's conduct, and a great deal of deference is offered.

Prosecutors take affidavits to a particular judge for a warrant for a number of reasons. One is that the judge is on duty and has volunteered to do it. There are several judges which we are aware of who have volunteered to do warrant duty, and we allow them to do most of the warrants. I am not aware of any court rule that says, "you shall ride circuit or rotate through the warrant duty."

Another reason is just a matter of personality. I would much rather deal with a judge with whom I have had contact, than to deal with a judge who otherwise is a stranger. By "contact," I mean having been in his or her court on a previous occasion, so that when I call in the middle of the night I am assured that the person at the other end recognizes me, my accent, and believes I am who I say I am. I am more comfortable dealing with them.

If the judge meets the standards that even the majority rule sets out about substantial basis for determining the existence of probable cause, what is the problem if there is a friendship? What is the difference if it is a judge or magistrate in preliminary hearings who deals with police a great deal and signs half of the warrants for Los Angeles County?

JUDGE FIDLER: Let me just indicate, before I ask for a response, how warrants are signed in Los Angeles County.

During the day, if a warrant is sought during the court hours, most police officers will go to a judge. Normally it will be a municipal court judge, one that handles preliminary hearings.

If it is a courthouse where there is only one court assigned, they will normally go to that judge—especially with felony warrants. If, instead, it is downtown, where there are several judges doing preliminary hearings during court hours, the majority will go into the master calendar preliminary hearing courtroom, and use whatever judge is sitting there. If the court is tied up, they will go to the various judges that sit in preliminary hearing courts throughout the criminal courts building.

The judges do volunteer for warrant service. The way it works is, in the municipal court, a list goes around to every single judge who sits on the court, asking them to please provide their address and their personal home phone number. This is then given to the
District Attorney's Command Post so that when officers come to the District Attorney late at night—and, believe me, we are talking about any hour—the Command Post will then simply call the judge. They will say: "Are you willing to have the officers come out to present a warrant to you, not to sign it, but present it for your review?" That is the way it works, and sometime later in the evening, the officers appear knocking at the door, and the judge reviews the warrant at home.

Mr. Uelmen, did you want to respond to that?

PROFESSOR UELMEN: I have got a couple students on a research project this semester going through all the warrants issued downtown in Los Angeles, to see which judges signed them and to what extent they are randomly distributed among those judges. I think the results will be very interesting.

The results of the seven cities study that I cited earlier, let me quote: "It is a sizable overstatement to say that the warrant review process routinely operates as it was intended. It was clear in many cases that the review process was largely perfunctory and apparent that some judges regarded themselves more as allies of law enforcement than as independent reviewers of evidence."

I think just as some judges regard themselves as deputy public defenders, some judges regard themselves as deputy prosecutors. I do not have any quarrel with the presumption that judges follow the law, but what troubles me is when we make that presumption conclusive and irrebuttable, and that is precisely what Leon does.

JUDGE FIDLER: Well, you say it makes it irrebuttable, but since they keep talking about the neutral magistrate, once you have a Leon hearing the defense can present evidence to show that a magistrate is not acting in a neutral and detached manner. They may bring statistics like you have indicated you are compiling.

PROFESSOR UELMEN: That is why we are compiling them.

JUDGE FIDLER: Right, and is there something wrong with that process?

PROFESSOR UELMEN: Well, I think we will have to see how the courts treat that kind of challenge. I am frankly not optimistic, reading Leon, that we are going to have a lot of leeway to raise that kind of issue.
MR. LIVESAY: Just one quick comment?

JUDGE FIDLER: Sure.

MR. LIVESAY: Mr. Ulemen, I would respectfully request that when you do that, if possible, to track some of the cases of judges who sign most of the warrants, and see how many of those warrants resulted in a suppression. If they are all valid warrants, so what?

JUDGE FIDLER: Ms. Howarth, did you wish to add anything?

MS. HOWARTH: No, except that the political climate of the day induces candidates for judgeships to be selling themselves as crime stoppers, and that is just a fact of life that is evident to me. It is something that is in glaring contrast to the language of Leon about the objective and neutral magistrate when, in fact, I think that many of our judges see themselves very much as private law enforcement individuals.

JUDGE FIDLER: Of course, you have to separate when you make the judge a politician, which in this state we do every six years or at other various times, depending upon the time of appointment. Given the political climate, you have to separate political rhetoric from the way a judge acts on the bench. Because I know that judges that I would consider very liberal, based on their rulings, when you read their campaign statements, you would think that they are personal friends of Attila the Hun and subscribe to all of his policies and beliefs. Can you not take that with perhaps a grain of salt?

MS. HOWARTH: Sure, you can, but on the other hand, one of the issues that we are talking about is the public perception of what is going on with the courts. The campaign literature is directed at prospective judges' understanding of what the public wants their judges to be.

JUDGE FIDLER: We have to take into account, what the public expects from the bench? Is that not a valid factor? I mean, obviously, judges should not make rulings based on the change in public mood. But, when the electorate has clearly stated at both the local and national levels what they expect from the bench in a general way, they deserve a certain amount of confidence.
Is it wrong for judges to keep an ear to the ground and pay attention to what the public wants? Should we simply sit in ivory towers and ignore the public? Do you think that is right?

MS. HOWARTH: Well, of course, as judges, you cannot sit in an ivory tower and ignore the public. On the other hand, you cannot ignore the fourth amendment and the other currently unpopular principles that as lawyers and as judges, we are all bound to obey.

JUDGE FIDLER: We have had a very patient audience. You have all been very attentive. Are there any questions from the audience at this time?

MEMBER OF THE AUDIENCE: Looking at the historic perspective of the exclusionary rule, is it not something which involves hitting a peak and, like any basic objective rule, it hits a peak? It must have some elasticity, some bend, some give, and is not this good faith exception that elasticity which is needed to make the rule work?

Also, I found your comment on trust a little distressing. Trust is the glue of society, without it there is only chaos. Something that bothers me, is that I would rather trust the policeman to come to my door with a warrant. I would be less afraid of that, than I would be of the guy who is not going to use my front door, but the window to get into my house.

He needs that strength to go into somebody’s home and make sure that he is not kept out of it or that that person’s home becomes a hideout. There has to be some give and take there.

PROFESSOR UELMEN: First of all, in terms of the give and take, I think we can see about fifteen years of take under the Burger court. It is clear that they have limited the exclusionary rule in every opportunity that they have had by putting up all sorts of procedural obstacles to its invocation; for example, the rules of standing and the collateral use of evidence.

I do not think this is a question of give and take. They are making an assumption about the rule that really kind of pulls the rug out

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from under the rule itself. It is only a matter of time before this exception will gobble up the rule.

In terms of trust, all I can say is that the basic underlying assumption of the Bill of Rights is that we, as citizens, do not trust our government. We did not trust the King, and we do not trust our present government. As soon as we relax and say, “well we can trust the King,” watch out, because I think you are going to have a different system.

JUDGE FIDLER: Mr. Livesay, can you just respond?

MR. LIVESAY: My answer to all of his questions is “yes.”

JUDGE FIDLER: Does anybody else want to respond either to his remarks?

MS. HOWARTH: It is not a question—the exclusionary rule is not keeping us from having effective law enforcement. I think there is a public perception that you can either have effective police work or you can have the exclusionary rule—that is just not true.

The exclusionary rule comes into play in only a tiny minority of cases, and the fourth amendment, which is what the exclusionary rule is protecting, is something that is valuable to all of us.

JUDGE FIDLER: Mr. Wolff, do you wish to respond to that?

MR. WOLFF: I think your comment about the pendulum effect of the rule swinging back and forth is certainly correct, and I do agree with Professor Uelmen that a pendulum swings pretty well in one direction. Also, I think we will be continuing in that direction for a while; but, I think it is important to keep that in mind and not to give too much of a doomsday prediction.

The good faith exception is not going to swallow up the exclusionary rule, in my opinion. The exclusionary rule is here, and I think it is here to stay. The fourth amendment has been severely restricted by the Burger Court, but as practical matter, at least from my perspective as a prosecutor, I do not see a great difference in the way that motions are being handled.

I learned a big lesson when Proposition Eight was passed, the Victims’ Bill of Rights. I sat in my office on June ninth, waiting for the roof to cave in because absolutely everything had changed. I waited for the phone to ring; I waited on June tenth; I waited on
June eleventh, and I am still waiting. What amazed me about that is how little everything has changed. Proposition Eight has had almost no effect on the day-to-day work of the courts so far.

What the Burger Court has done is of very great theoretical interest, and it is of very great interest in certain selective cases, but I think it is wrong to think that it will have a huge practical effect or that this rule is the death knell for it.

JUDGE FIDLER: There was a question?

MEMBER OF THE AUDIENCE: I would like to address the concept that the exclusionary rule is keeping out the policeman at your door and aiding the burglar at your window.

The exclusionary rule is not the target of that objection but, rather, the fourth amendment. Your objection appears to be to the fourth amendment. Your assumption is that if the rule changes the policeman can stop the burglar. You are not talking about the use of evidence in the courts; you answer the question, it would appear to me, that the policeman could stop that burglar better without the exclusionary rule than he could with it. The premise, therefore, of your question appears to be, without the good faith exception, that the policeman will violate the fourth amendment.

Before I came to teach at this law school, I was in a state which perhaps was a bit different from California, where we had people who issued warrants that were called justices of the peace—they were not called judges. They were elected, and were not lawyers. In the case of Shadwick,38 the United States Supreme Court approved—the Burger court approved twelve years ago, the use of court clerks to issue warrants.

We are not talking about judges like here in Los Angeles most of the time. You are talking functionaries, who work hand-in-glove with the police. Sometimes that is good; however, sometimes they do not know what they are doing. Therefore, judicial review of those warrants is the only time that a judge is going to look at those decisions. I do not know if the good faith exception applies to those warrants. If it does not, then, this decision is a sham, because it does not apply in much of the country.

A quick comment on the fifth amendment application of the exception, is needed in order to note a major difference in the word-

ing of the fourth and fifth amendments. Opponents of the fourth amendment exclusionary rule for years used the argument that the fourth amendment, unlike the fifth, did not contain explicit exclusionary language. You have to remember that this is a major hurdle to extending any exception because the fifth amendment talks expressly about the use of evidence in court being prohibited: “No person shall be compelled to be a witness against himself.” The extension of the fifth amendment to the police station was controversial in Miranda, partly because, like the fourth amendment, it does not talk about use of that evidence. There is an enormous textual problem in limiting or eliminating the exclusion of evidence under the fifth amendment. It does not exist in the fourth or, unfortunately, in the sixth amendment.

One last thought on the subject of text. The fourth amendment talks about the right of the people to be secure in their persons, houses, papers and effects. Therefore, while the Burger Court laid part of the groundwork for this Leon decision—stating that the fourth amendment is a personal right, there is no textual basis for that claim.

The language of the fourth amendment is collective language, not personal language. Therefore the question is, do you feel less secure in your house and papers if you know that the police have gotten authority from the government to enter your house; to take your papers in a manner which is unreasonable or invalid under a warrant. I feel insecure when I read that lawyers' offices are searched and all the files read by police, who do not particularly believe that those lawyers may be criminals, but that they have criminals as clients with whom they are closely associated. Therefore, it is the security of the people that is involved. We have to ask not just are we protecting the guilty, but what are the guilty doing for us by becoming the guinea pigs or the subjects of these opinions?

It is not, just the guilty, it is anyone from whom evidence is found. By choosing the drug cases, the Court distorts the picture, because those are cases in which evidence is guilt of crime—possession. Most crimes are not crimes of possession, and the evidence that is taken is merely evidence; the person from whom some admissible evidence is seized and that person may or may not be guilty. Many of us have in our homes material which, in the context of other circumstances, would be admissible in court as evidence against us,

39. Rakas, 439 U.S. at 133.
whether we were guilty or not—the exclusionary rule and its effective application is essential to us in this regard as well.

JUDGE FIDLER: Does anybody on the panel wish to add anything on his point?

MR. WOLFF: The only neutral response I have is: How does the exclusionary rule protect that third person who has had his home invaded when he is not defending the case? He cannot bring a motion to suppress that evidence, he can only bring a statutory motion in California under section 1538.5 of the Penal Code or have an attorney do so, but that is not the exclusionary rule.

MEMBER OF THE AUDIENCE: Two reasons: First of all, this person may become a witness in the case, the defendant in the case from whom evidence is seized but who is not guilty. That is the first thing.

MR. WOLFF: Well, but that changes your hypothetical of the defendant.

MEMBER OF THE AUDIENCE: I was talking about the person from whom incriminating evidence is seized but who is not guilty. You understand?

MR. WOLFF: Well, certainly not all defendants are guilty, but I thought that is not the point you were making.

MEMBER OF THE AUDIENCE: Okay, but even the person from whom incriminating evidence is seized or whose house is searched and who does not become the defendant, the fourth amendment is important to that person. The enforcement of other people's cases is important because the exclusionary rule has been the only vehicle for the development of case law under the fourth amendment.

If you look at the case law, you will find that before 1914, when *Weeks*\(^{40}\) was decided, there were only two United States Supreme Court decisions in those first 120 years of our 200-year history that talk about the fourth amendment. One, in the context of a forfeiture proceeding,\(^{41}\) and the other is dictum in a criminal case in which the

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argument was that the criminal law on its face violated the fourth amendment.\(^{42}\)

Since *Weeks*, you have federal case law. Most of it developed in the context of trial cases. In 1949, the United States Supreme Court said the fourth amendment applies to the states. Justice Frankfurter said in the *Wolf* case,\(^{43}\) "We are not going to apply the exclusionary rule yet, we are going to apply the fourth amendment to you in the states, and you pick your remedy—you enforce it. If you enforce it successfully, we will not impose the exclusionary rule on you because the fourth amendment requires a remedy but not any particular remedy."

The states were given a twelve-year experimental period, in effect. What happened form 1949 to 1961? We have already had our experimental period after the exclusionary rule. We had it from 1949 to 1961. What does history teach us? The states did not enforce the fourth amendment, during that period. It was only after 1961, when *Mapp* came down, that you see the development of case law—that the states were forced to comply. In what kinds of cases? In those criminal defendants' cases, cases which thus protect the innocent party.

**JUDGE FIDLER:** Mr. Livesay, do you want to respond to that?

**MR. LIVESAY:** California did. The jurisdiction which was this case, the *Leon* case, did it through *Cahan*\(^ {44}\) in the 1950's.

**PROFESSOR UELMEN:** Justice White, in the *Leon* case, says, "this ruling will not stop the development of case law because the court can still decide on the validity of the warrant even though that invalidity has no consequence in terms of the suppression of the evidence."

I think that is a pipe dream. I do not think he seriously believes the courts are actually going to do that.

**MEMBER OF THE AUDIENCE:** They said the opposite in other cases. In several cases their ruling says the judge should first rule on good faith defense before getting to the merits.\(^ {45}\)

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\(^{42}\) *Ex parte Jackson*, 96 U.S. 727 (1878).

\(^{43}\) *Wolf*, 338 U.S. 25.

\(^{44}\) *Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

JUDGE FIDLER: Let me say one thing about the speakers. As I indicated before, I do not know Ms. Howarth personally. This is the first chance I have had to meet her. I think it is clear from her remarks and her comments, you can tell how deeply she feels about her subject and how strongly she is involved in her work.

In Mr. Wolff, you have a true class act, and I say that because I have known Greg a number of years. I have worked with him and opposed him in court. He is a terrific attorney.

Mr. Curt Livesay is sort of a legend in his own time among District Attorneys. He is a terrific and a superb prosecutor who is just as good as they get.

Every so often you start to think you are smart, but then you hear Mr. Uelmen talk, and I go back to the comic books after that, it depresses me so much.

So you have had an opportunity to participate tonight with some speakers who really know what they are talking about, and I would appreciate it if you would give them a hand for their appearance.