ILLEGAL PREDICATE SEARCHES AND THE GOOD FAITH EXCEPTION

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In United States v. Leon*, the U.S. Supreme Court created the good faith exception, which provides that the exclusionary rule does not bar evidence seized in reasonable reliance on a warrant issued by a detached and neutral magistrate in criminal trials. This note examines whether the good faith exception applies to evidence seized pursuant to a warrant that is itself the fruit of an illegal search. After examining the ambiguities between the narrow holding and broad rationale of* Leon *and tracing the origins of the split of authority regarding illegal predicate searches, the author analyzes three different ways that courts have resolved the issue: extending the good faith exception, refusing to extend the exception, and making application of the exception contingent on the disclosure of facts concerning the predicate search to the magistrate. The author explains why all three of these approaches are unsatisfactory before proposing a novel, three-step analysis. The author's proposed approach attempts to remain consistent with existing doctrine and to restore both the defendant and the government to the status quo ante.*

I. INTRODUCTION

Shortly after September 11, President George W. Bush secretly authorized the National Security Agency (NSA) to intercept the international phone calls and e-mails of American citizens without obtaining a warrant or court order.[1] Lawmakers,[2] scholars,[3] and litigants[4] immedi-

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1. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; *see also* Eric Lichtblau & James Risen, *Eavesdropping Effort Began Soon After Sept. 11 Attacks*, N.Y. TIMES, Dec. 18, 2005, at A44. It is still unclear when exactly the program was authorized. The government has acknowledged that the program was authorized by 2002, *ACLU v. NSA*, 438 F. Supp. 2d 754, 757 (E.D. Mich. 2006), but other sources report that the program was authorized as early as October 2001. *See, e.g.*, RON SUSKIND, THE ONE PERCENT DOCTRINE 37 (2006); *Official: Bush Authorized Spying Multiple Times*, Dec. 16, 2005, http://msnbc.msn.com/id/10488458.

ately challenged the constitutionality of the covert program. Although the Bush administration staunchly defended both the legality and necessity of the program,[5] grave doubts remain regarding the program's constitutionality.[6] In fact, three days after a *New York Times* article first disclosed the existence of the NSA program, U.S. District Judge James Robertson resigned in protest from the Foreign Intelligence Surveillance Act (FISA) court, which grants search warrants for national security threats.[7] Judge Robertson's concern, which was shared by other members of the FISA court,[8] was that "information gained from warrantless NSA surveillance could have . . . been used to obtain FISA warrants."[9] Judge Robertson's suspicion was justified: the *Washington Post* later reported that information obtained through the NSA program had in fact been used to obtain a warrant from the FISA court.[10]

Using Judge Robertson's concern as a point of departure, consider the following scenario. Employing warrantless wiretaps authorized by President Bush's secret order, NSA employees discover an al-Qā'ida cell in America. Through continued warrantless electronic observation, officials develop probable cause to search several operatives' apartments. They present the information obtained from the warrantless surveillance

2. *See, e.g.*, Dan Eggen & Charles Lane, *On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance*, WASH. POST, Dec. 17, 2005, at A1.

3. S*ee, e.g.*, Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS, Feb. 9, 2006, at 42 (expressing the doubts of fourteen prominent constitutional law scholars regarding the program's legality and constitutionality).

4. Complaint at 2, ACLU v. NSA, No. 06-CV-10204, 2006 U.S. Dist. LEXIS 57338 (E.D. Mich. Aug. 17, 2006), *available at* http://news.findlaw.com/hdocs/docs/aclu/aclunsa11706cmp.pdf.

5. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (Jan. 19, 2006), http://permanent.access.gpo.gov/lps66493/White%20Paper%20on%20NSA%20Legal%20Authorities.pdf; *see also* Dan Eggen & Walter Pincus, *Campaign to Justify Spying Intensifies: NSA Effort Called Legal and Necessary*, WASH. POST, Jan. 24, 2006, at A4.

6. A U.S. District Court judge held that the NSA program violates the Fourth Amendment and permanently enjoined the government from using the program to conduct warrantless wiretaps. ACLU v. NSA, 438 F. Supp. 2d 754, 775 (E.D. Mich. 2006) ("The wiretapping program . . . [is] obviously in violation of the Fourth Amendment."). The opinion was immediately attacked. President Bush called it a "terrible opinion" and vowed to appeal. Press Conference by the President (Aug. 21, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/08/print/20060821.html. Several academics blasted the opinion as well. *See, e.g.*, Ann Althouse, *A Law unto Herself*, N.Y. TIMES, Aug. 23, 2006, at A23; Jack Balkin, Federal Court Strikes Down NSA Domestic Surveillance Program, http://balkin.blogspot.com/2006/08/federal-court-strikes-down-nas.html (Aug. 17, 2006, 13:15 EST); Marty Lederman, Ah, Well, That Explains It, http://balkin.blogspot.com/2006/08/ah-well-that-explains-it.html (Aug. 18, 2006, 00:05 EST). On appeal, the Sixth Circuit granted the government's motion to stay the injunction pending appeal, but, as of this writing, the Court of Appeals has not yet heard the case. *See* ACLU v. NSA, Nos. 06-2095/2140, 2006 WL 2827166, at *1 (6th Cir. Oct. 4, 2006).

7. Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits in Protest: Jurist Concerned Bush Order Tainted Work of Secret Panel*, WASH. POST, Dec. 21, 2005, at A1.

8. Carol D. Leonnig, *Secret Court's Judges Were Warned About NSA Spy Data*, WASH. POST, Feb. 9, 2006, at A1 ("U.S. District Judge Colleen Kollar-Kotelly . . . like her predecessor, Royce C. Lamberth, had expressed serious doubts about whether the warrantless monitoring of phone calls and e-mails ordered by Bush was legal.").

9. Leonnig & Linzer, *supra* note 7, at A6.

10. Leonnig, *supra* note 8, at A1.

to a magistrate, and the magistrate issues a search warrant. In the operatives' apartments, federal officials seize a treasure trove of evidence that they intend to use to prosecute the operatives in federal court. Government lawyers rightly believe that without the evidence seized pursuant to the search warrant they will be unable to successfully prosecute the al-Qā'ida cell. However, the trial judge holds that the NSA program is unconstitutional and that the warrant, because it was predicated on tainted information, is invalid. Is the prosecution doomed?

The answer might be yes. A Supreme Court doctrine called the "exclusionary rule" generally requires unconstitutionally seized evidence to be excluded from criminal trials.[11] Further, the "fruit of the poisonous tree"[12] doctrine requires that all evidence obtained but for the unconstitutional search also be excluded.[13] Therefore, because the warrant was the fruit of unconstitutional NSA eavesdropping, one could conclude that the evidence seized pursuant to the warrant should be inadmissible against the al-Qā'ida operatives.

However, that conclusion is not inevitable: there are several exceptions to the exclusionary rule and the fruit of the poisonous tree doctrine. One such exception is the good faith exception, a Supreme Court doctrine providing that evidence seized in reasonable reliance on a warrant issued by a detached and neutral magistrate is admissible in criminal trials.[14] This exception may offer a way to save the prosecution of the al-Qā'ida cell: the government could argue that all the government officials involved—from the NSA employees to the FBI agents who sought and executed the warrant—reasonably believed the NSA program to be constitutional. Because of this reasonable belief, the officials had no reason to doubt the validity of the warrant. Therefore, the government could argue, the good faith exception allows the admission of the evidence against the al-Qā'ida operative.

Clearly, the admissibility of the evidence turns on whether evidence seized pursuant to the warrant should be admissible even though the warrant itself was the fruit of an illegal search. Put more simply, the crucial question is: does an illegal predicate search or seizure preclude using the good faith exception to admit evidence seized pursuant to a "tainted" warrant?

11. The Court has required exclusion in federal criminal trials since 1914. *See* Weeks v. United States, 232 U.S. 383, 398 (1914). Since 1961, the Court has required suppression of illegally seized evidence in state criminal trials. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

12. Justice Frankfurter coined the phrase in *Nardone v. United States*, 308 U.S. 338, 341 (1939), to refer to evidence obtained as a result of a previous illegal search.

13. *See* Wong Sun v. United States, 371 U.S. 471 (1963); *Nardone*, 308 U.S. 338.

14. United States v. Leon, 468 U.S. 897, 922 (1984). As might already be surmised, the "good faith" label is something of a misnomer. It does not mean that the officers executed the warrant with a subjective belief in the validity of the warrant. Rather, it means that an objectively reasonable belief in the validity of the warrant was possible. Because the term good faith is widely used to denote objectively reasonable belief, this note observes that convention.

The NSA eavesdropping program highlights the timeliness and importance of this question: at stake is the validity of potentially hundreds of warrants and the viability of perhaps dozens of future prosecutions. However, the issue has implications far beyond the NSA program. Indeed, the issue arises any time police secure a warrant predicated on unconstitutionally obtained information. Even so, lower courts have no authoritative guidance on this matter because the Supreme Court has not yet squarely addressed the issue. In the absence of Supreme Court guidance, courts and commentators continue to differ as to the issue's proper resolution. This note enters this debate and proposes a novel resolution that reconciles better than any current approach the competing doctrinal and practical considerations involved.

At the outset, it is important to recognize the limited scope of this note: it analyzes only the issue of illegal predicate searches, *not* the NSA eavesdropping program. Thus, although it is certainly a question of great importance, the constitutionality of the NSA eavesdropping program per se is beyond the scope of this note. Rather, this note is concerned only with the question whether the good faith exception applies to evidence seized pursuant to a warrant predicated on an illegal search.

The discussion will proceed as follows. Part II will provide background and context for the issue of illegal predicate searches by locating *Leon* in the Supreme Court's exclusionary rule jurisprudence, briefly discussing *Leon*'s ambiguities, and then tracing the origins of the split of authority regarding illegal predicate searches and seizures. Part III will address some methodological preliminaries, then will critically analyze three different ways courts have resolved the issue: (1) by extending the good faith exception, (2) by refusing to extend the good faith exception, and (3) by making application of the good faith exception contingent on whether officers informed the magistrate how they obtained the facts included in the warrant application. Part IV concludes that all three approaches are inadequate in some vital respect. Therefore, this note proposes a new rule to apply to illegal predicate search cases: a three-step analysis that preserves the integrity of the exclusionary rule while allowing for the possibility of admitting evidence notwithstanding an illegal predicate search.

II. DOCTRINAL BACKGROUND: FROM *MAPP* TO *LEON* AND BEYOND

This Part provides context for the issue of illegal predicate searches. Section A traces the history of the exclusionary rule and examines its evolving policy rationale. Section B introduces the important case of *United States v. Leon*, and Section C describes three ways in which the lower courts have applied *Leon* to the issue of illegal predicate searches. Finally, Section D briefly summarizes the current state of the law.

A. The Exclusionary Rule and the Foundations of the Good Faith Exception

Subject to certain exceptions, the exclusionary rule provides that evidence seized in violation of the Constitution is inadmissible in criminal trials.[15] First articulated by the U.S. Supreme Court in 1886,[16] the exclusionary rule applied only in federal court until 1961,[17] when *Mapp v. Ohio* extended the exclusionary rule to state criminal trials.[18] Thus, the exclusionary rule now binds all federal and state courts.

From its inception, the theoretical underpinnings of the exclusionary rule evolved substantially in ways that paved the way for the creation of the good faith exception. In the beginning, the exclusionary rule was said to be required by the Constitution,[19] particularly the Fourth Amendment.[20] For example, the Court in *Weeks v. United States* reasoned that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution."[21] More forcefully, *Mapp* held that "all evidence obtained by searches and seizures in violation of the Constitution is, *by that same authority*, inadmissible in a state court."[22]

As well as having a solid constitutional basis, the exclusionary rule was originally said to serve incidentally three distinct policy goals: (1) deterring illegal police behavior,[23] (2) maintaining judicial integrity,[24] and (3) assuring the public "that the government would not profit from its lawless behavior."[25] These policy goals were not thought to be the cen-

15. For a useful discussion of the exclusionary rule, see Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

16. Boyd v. United States, 116 U.S. 616, 638 (1886).

17. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949).

18. 367 U.S. 643, 655 (1961) (overruling *Wolf*).

19. *Boyd* was grounded in the Fourth and Fifth Amendments: "We have already noticed the intimate relation between the two amendments. . . . For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which . . . is condemned in the Fifth Amendment." *Boyd*, 116 U.S. at 633. *Leon*, however, expressly repudiated this conjunction. 468 U.S. at 905–06.

20. Weeks v. United States, 232 U.S. 383, 393 (1914).

21. *Id.*

22. 367 U.S. at 655 (emphasis added).

23. *See* Linkletter v. Walker, 381 U.S. 618, 636–37 (1965) ("[A]ll of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."); Elkins v. United States, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter . . . by removing the incentive to disregard it.").

24. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968) ("Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . . A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.").

25. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). This message would minimize "the risk of seriously undermining popular trust in government." *Id.* Although this rationale "may appear to be merely a statement of the deterrent function, this is not the case, for the

tral justification for the exclusionary rule, but rather the incidental goods achieved by a constitutional requirement.

However, in the 1970s and early 1980s, the Burger Court redefined the constitutional basis and policy rationale of the exclusionary rule. The Burger Court completely repudiated the idea that the exclusionary rule was implicit in the Constitution. Instead, *United States v. Calandra* characterized the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights."[26] Thus, the exclusionary rule is no longer seen as a necessary corollary of the Bill of Rights, but as a prophylactic judicial creation.

Relatedly, the primary policy goal of the exclusionary rule is now declared to be deterrence of official misconduct.[27] The other two policy goals previously articulated by the Court—the maintenance of judicial integrity and the preservation of public trust—are no longer articulated as justifications. Deterrence, moreover, is not said to be an incidental good achieved by the exclusionary rule, but the primary mechanism through which the prophylactic function of the exclusionary rule is achieved. In other words, the exclusionary rule safeguards constitutional rights by deterring the government from violating those rights. This reappraisal of the exclusionary rule's constitutional pedigree and policy rationale laid the theoretical foundation for the creation of the good faith exception in *United States v. Leon*.

At the same time, a desire to avoid a dilemma may have laid a practical foundation for *Leon*. Consider that, in the words of Judge Calabresi,

> [b]efore *Leon*, federal courts examining the constitutionality of a search had to choose between: (1) holding the search unconstitutional and excluding the evidence found, thereby significantly increasing the chances that a guilty person would go free, regardless of the heinousness of the crime at issue; or (2) finding the search constitutional, thereby condoning similar searches and injuring potentially innocent objects of future, highly intrusive investigations.[28]

focus is on the effect exclusion has upon the public rather than the police." 1 LAFAVE, SEARCH AND SEIZURE § 1.1(f), at 19 (3d ed. 1996).

26. 414 U.S. at 348.

27. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1044–47 (1984) (concluding that evidence derived from an illegal arrest was admissible in a deportation hearing because suppression would not be a substantial deterrent); United States v. Leon, 468 U.S. 897, 916 (1984); United States v. Janis, 428 U.S. 433, 446–54 (1976) (concluding that evidence seized pursuant to a quashed warrant was admissible in an IRS collection proceeding because suppression would achieve only marginal deterrence); Stone v. Powell, 428 U.S. 465, 486–87 (1976) (concluding that a state prisoner may not be granted federal habeas corpus relief on the ground that evidence was obtained through an unconstitutional search if the State provided a full and fair opportunity to litigate a Fourth Amendment claim).

28. United States v. Reilly, 76 F.3d 1271, 1273 (2d Cir. 1996). Perhaps recognizing this dilemma, the Fifth Circuit—four years before *Leon*—created a blanket good faith exception not limited to with-warrant situations. United States v. Williams, 622 F.2d 830, 842–43 (5th Cir. 1980) (en banc) (holding that the exclusionary rule did not apply where officers act "in good faith and in the reasonable, though mistaken, belief that they are authorized" because "[a]ny slight deterrent effect of excluding fruits of

As Judge Calabresi observed, this dilemma placed "an enormous thumb on the scale" and risked undermining substantive Fourth Amendment rights.[29] A good faith exception, it was thought, would permit a judge to admit evidence even though it was obtained in an unconstitutional search. Therefore, the good faith exception offered a way out of the dilemma described by Judge Calabresi. In any event, *Leon*'s result in 1984, though met with criticism,[30] was hardly a surprise to most observers.[31]

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good-faith arrests . . . does not justify the societal harm incurred by suppressing relevant and incriminating evidence" (quotation omitted)).

29. Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112–13 (2003).

30. *See, e.g.*, Wayne R. LaFave, "*The Seductive Call of Expediency":* United States v. Leon*, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 901–11; Silas J. Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 87–88 (1984); Albert W. Alschuler, "*Close Enough for Government Work": The Exclusionary Rule After* Leon, 1984 SUP. CT. REV. 309, 346–51.

31. By the early 1980s, four justices were on record as supporting some sort of good faith exception. Justice White remarked in dissent that the exclusionary rule should not apply in "circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief." *Stone*, 428 U.S. at 538 (White, J., dissenting).

Justice Rehnquist also clearly stated his view that non-negligent police behavior is undeterrable. United States v. Peltier, 422 U.S. 531, 542 (1975) ("If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."); Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.").

Justice Powell, for his part, expressed approval of Rehnquist's reasoning. *See* Brown v. Illinois, 422 U.S. 590, 612 (1975) (Powell, J., concurring in part) (quoting with approval Justice Rehnquist's *Michigan v. Tucker* opinion).

Similarly, then-Chief Justice Burger was unhappy with the mechanical application of the exclusionary rule because "[i]nadvertent errors of judgment . . . have been treated the same way as deliberate . . . violations of the Fourth Amendment." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting). Burger believed that "graded responses" were more appropriate than the "capital punishment" of the exclusionary rule. *Id.* at 419.

Justice Blackmun might have been included in this group because he had joined Justice Rehnquist's opinion in *Peltier*. *See* Frederick A. Bernardi, *The Exclusionary Rule: Is A Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?*, 30 DEPAUL L. REV. 51, 67 (1980). However, it was unclear before *Leon* whether he supported creating a good faith exception. *See* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 340–41 & n.179 (1982) (noting that *Peltier* dealt with only "the more limited retroactivity issue"). Justice Blackmun concurred in the judgment in *Leon*, but filed a separate opinion observing that the judgment rested on untested empirical assumptions and stating his understanding that the good faith exception may need to be reconsidered if it "results in a material change in police compliance with the Fourth Amendment." United States v. Leon, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

In addition, Justice O'Connor, then the newest member of the Court, said in her Senate confirmation hearings that "[h]er experience as a trial judge . . . had led her to conclude that the exclusionary rule sometimes interfered with the administration of justice." Linda Greenhouse, *Judge O'Connor Wins Praise at Hearing*, N.Y. TIMES, Sept. 11, 1981, at B12 ("Her comments hinted at support for the so-called 'good faith exception' to the exclusionary rule, which the Supreme Court has not yet endorsed, under which evidence is admissible if acquired by the police in a mistaken but 'good faith' belief that their procedures were correct."). Justice O'Connor joined the majority opinion in *Leon*.

Furthermore, many commentators foresaw the creation of the good faith exception and contemplated its wisdom. *See, e.g.*, Edna F. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 656–57 (1978) (urging caution

B. United States v. Leon

Leon held that the exclusionary rule does not bar the admission of evidence seized in "reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[32] Further narrowing the potential scope of the exception, the Court announced four situations in which the good faith exception could not be invoked:[33]

(1) if the officers recklessly or knowingly included false information in the affidavit,[34]

(2) if the magistrate was not neutral and detached,[35]

(3) if the warrant was severely facially deficient,[36] or

(4) if the warrant was based on an affidavit lacking indicia of probable cause.[37]

If understood solely on these terms, *Leon* appears to be a rather narrow decision. However, its reasoning swept much more broadly.

Justice White, writing for the majority in *Leon*, declared that the exclusionary rule should apply only in cases where, in a balancing test, the benefits of deterrence outweigh the costs of exclusion.[38] Using this balancing test, the Court concluded that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."[39] When an officer's behavior is objectively reasonable, "'it is painfully apparent that . . . the officer is acting as [she] should act . . . .'"[40] This is "*particularly* true . . . when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope."[41] Justice White seemed to reason that it is true, but not *particularly* true, that suppressing evidence cannot

before adopting good faith exception); Bernardi, *supra*, at 108; John R. Hoopes, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915, 950–51 (1978) (arguing that a good faith exception need not be a "dramatic break from fourth amendment law as presently perceived"); D. Lowell Jensen & Rosemary Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916, 930 (1982) (arguing for creation of the exception); LaFave, *supra*, at 340–41 (arguing against creation of the exception); Pierre J. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 895 (1982) (arguing against creation of the exception).

32. 468 U.S. at 900.
33. These are "exceptions to the exception," as it were.
34. *Leon*, 468 U.S. at 923.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 906–07.
39. *Id.* at 919.
40. *Id.* at 919–20 (quoting Stone v. Powell, 428 U.S. 465, 539–40 (1976) (White, J., dissenting)).
41. *Id.* at 920 (emphasis added).

deter an officer who acts objectively reasonably but without a warrant. Because such official acts cannot be deterred, their fruits should be admitted. *A fortiori*, the fruits of a with-warrant search, as in *Leon*, should be admitted because the deterrent value of suppression is even less.

Thus, although Justice White phrased *Leon*'s holding narrowly, he buttressed the holding with reasoning that would apply with equal force to warrantless searches. Given the plain disparity between the breadth of the reasoning and the narrowness of the holding, it was inevitable that questions would arise regarding the extent to which the balancing approach could expand the good faith exception. One question raised by this tension was whether *Leon* should apply when the warrant on which officers rely was predicated on information obtained in a prior unconstitutional search or seizure.

C. The Split of Authority Regarding Illegal Predicate Searches

Lower court decisions regarding *Leon*'s application to illegal predicate searches fall into three categories: (1) courts that apply the good faith exception, (2) courts that refuse to apply the good faith exception, and (3) courts that make application of the good faith exception contingent on whether officers informed the magistrate how they obtained the facts contained in the warrant application. The first group of courts extends the good faith exception, holding that it is possible for officers to rely in good faith on a warrant predicated on illegally obtained information. The District of Columbia Circuit was the first to take this position when it confronted the issue of illegal predicate searches almost immediately after *Leon*.[42] More recently, the First Circuit has held that evidence obtained in a prewarrant search that is in a constitutional "penumbral zone" can be used to establish probable cause in a warrant application.[43] However, the Eighth Circuit, having confronted four cases on the subject, has provided the most extensive treatment of this issue.[44]

The second group of courts, conversely, holds that there can be no good faith reliance on a warrant if the warrant itself is the fruit of a prior illegal search. Courts adopting this approach generally conclude that the *Leon* analysis is inapplicable to illegal predicate searches because such searches are, by definition and in contrast to a *Leon*-type search, conducted without a warrant.[45] Their claim, in short, is that *Leon* dealt with magistrate mistakes and is inapplicable where the mistake is solely the officer's.[46] The Ninth[47] and Tenth Circuits,[48] joined by a federal district court[49] and four state supreme courts,[50] have adopted this approach.

42. United States v. Thornton, 746 F.2d 39, 48–49 (D.C. Cir. 1984).
43. *See, e.g.*, United States v. Diehl, 276 F.3d 32, 43 (1st Cir. 2002).
44. *See infra* Part III.C.1 and cases cited therein.
45. United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987).
46. *Id.*
47. *Id.* at 789–90.

The third approach has less support, having been advocated by only one commentator[51] and adopted only implicitly by the Second Circuit.[52] This approach holds that *Leon* applies if the officers who engaged in the antecedent illegal search or seizure informed the issuing magistrate how the information in the warrant application was obtained.[53] If, however, the officers misled or failed to inform the magistrate about their prewarrant activities, *Leon* will not apply.[54]

D. The Current State of the Law

The Supreme Court denied certiorari in most of the cases in which review was sought on the issue of illegal predicate searches.[55] In *Arizona v. Hicks*, it explicitly declined to resolve the issue of illegal predicate searches because it had not been briefed.[56] Thus, the Court has not given lower courts clear guidance on the issue. However, the Court recently hinted that the good faith exception might allow admission of evidence seized pursuant to a warrant tainted by illegally obtained information. In *Kyllo v. United States*, police officers conducted an illegal search by using a thermal imaging machine to detect heat inside a house and then presented the scan's results to a magistrate in a warrant application.[57] The Court held that the use of the thermal scan was unconstitutional and remanded to the District Court "to determine whether, without the evidence [the thermal scan] provided, the search warrant issued in this case was supported by probable cause—*and if not, whether there is any other basis for supporting admission of the evidence* that the search pursuant to the warrant produced."[58] Obviously, the good faith exception is one possible basis for admission of the evidence seized pursuant to the warrant, but it would be dangerous to infer from this sentence that the Court in-

48. United States v. Scales, 903 F.2d 765, 768 (10th Cir. 1990).

49. United States v. Villard, 678 F. Supp. 483, 490–93 (D.N.J. 1988).

50. *See* State v. DeWitt, 910 P.2d 9, 15 (Ariz. 1996) (en banc); State v. Reno, 918 P.2d 1235, 1243 (Kan. 1996); People v. Machupa, 872 P.2d 114, 124 (Cal. 1994) (en banc); State v. Carter, 630 N.E.2d 355, 364 (Ohio 1994) (per curiam); *see also* State v. Hicks, 707 P.2d 331, 333 (Ariz. Ct. App. 1985), *aff'd on other grounds sub nom.* Arizona v. Hicks, 480 U.S. 321 (1987).

51. Thomas K. Clancy, *Extending the Good Faith Exception to the Fourth Amendment's Exclusionary Rule to Warrantless Seizures that Serve as a Basis for the Search Warrant*, 32 HOUS. L. REV. 697, 711 (1995).

52. *See* United States v. Reilly, 76 F.3d 1271 (2d Cir. 1996). Two other courts rejected the argument that informing the magistrate of prewarrant activities could save evidence from exclusion. *Vasey*, 834 F.2d at 789; *Hicks*, 707 P.2d at 333. The California Supreme Court left open the possibility that disclosure to the magistrate could make a difference. *Machupa*, 872 P.2d at 124.

53. *Reilly*, 76 F.3d at 1280–82.

54. *Id.*

55. United States v. Diehl, 276 F.3d 32 (1st Cir. 2002), *cert. denied*, 537 U.S. 834 (2002); United States v. Fletcher, 91 F.3d 48 (8th Cir. 1996), *cert. denied*, 520 U.S. 1121 (1997); United States v. Kiser, 948 F.2d 418 (8th Cir. 1991), *cert. denied*, 503 U.S. 983 (1992); United States v. White, 890 F.2d 1413 (8th Cir. 1989), *cert. denied*, 498 U.S. 825 (1990).

56. 480 U.S. 321, 329 (1987).

57. 533 U.S. 27, 40 (2001).

58. *Id.* (emphasis added).

tended to express a firm view on the subject. Therefore, the question whether *Leon* applies when the warrant upon which the officers relied was itself the fruit of an illegal search remains open. This note proposes an answer that, although not yet adopted by any court, fits best with the doctrinal and practical considerations at stake.

III. ANALYSIS

A. Two Brief Preliminaries

1. A Methodological Preliminary

This note is aimed at judges and practitioners and suggests a practical way to resolve existing doctrinal tensions and uncertainty. Accordingly, this note's analysis adopts what H.L.A. Hart called the "internal view."[59] That is, its analysis will proceed as if bound by current doctrine and its stated rationales in the same way that participants in the American legal system believe themselves to be bound. The exclusionary rule, the warrant requirement, and the good faith exception are regarded, for purposes of this note, as fixed points with which any resolution of the issue of illegal predicate searches must fit. Therefore, any new proposed doctrine should be consistent with Supreme Court doctrine and make good normative sense of such doctrines.[60]

2. The Factual Scope of the Analysis

Illegally seized information can be either necessary or unnecessary to a magistrate's determination of probable cause. This note's analysis is relevant only to cases in which an illegal predicate search provides information that is necessary to the magistrate's determination of probable cause. After all, if illegally seized information is unnecessary to the magistrate's determination of probable cause, the warrant would still be supported by probable cause even if the illegally seized information is disregarded. In such a case, a court should use either the independent source doctrine[61] or the harmless error doctrine to admit evidence seized pursuant to the warrant.[62] Indeed, some reviewing courts have done precisely that: they have excised illegally obtained information from the warrant

59. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).

60. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

61. *Cf.* Murray v. United States, 487 U.S. 533 (1988); Segura v. United States, 468 U.S. 796, 805 (1984). The Second Circuit in *United States v. Reilly*, 76 F.3d 1271, 1282 n.2 (2d Cir. 1995), and the Ninth Circuit in *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987), and in *United States v. Reed*, 15 F.3d 928, 933 (9th Cir. 1994), noted that a reviewing court should excise the illegally obtained information and determine whether probable cause existed without that information.

62. Some courts skip the probable cause inquiry entirely to consider good faith. *See, e.g.*, United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984); United States v. Mettetal, No. 3:96CR50034, 2000 U.S. Dist. LEXIS 21604, at *20 (W.D. Va. 2000), *rev'd on other grounds*, 48 Fed. Appx. 895, 896–97 (4th Cir. 2002) (per curiam).

application and then determined *de novo* whether the remaining information in the warrant application established probable cause.[63] This approach seems to be correct.[64] In any event, this note focuses on the problems raised by cases in which the warrant would lack probable cause without the information generated by the illegal predicate search.[65]

B. A Tale of Two Leon*s*

There is a gap between *Leon*'s holding, which is quite narrow, and its rationale, which sweeps quite broadly. The problem of illegal predicate searches floats in this doctrinal lacuna.[66] Therefore, the journey to a useful and satisfying solution to the problem of illegal predicate searches must begin with a close reading of *Leon*. This Section describes two possible readings of *Leon*—the broad reading and the narrow reading.

1. The Narrow Reading of Leon

> The issue presented in *Leon*, as articulated by Justice White, was: [W]hether the Fourth Amendment 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.[67]

Justice White repeatedly framed the issue in *Leon* this narrowly,[68] suggesting that the good faith exception was limited to the facts in *Leon*.

Moreover, Justice White focused repeatedly on the particular facts presented in *Leon*, writing a great deal about magistrates. Indeed, magistrates figure prominently in the five premises on which *Leon*'s holding ostensibly rests:

63. *See* United States v. Herrold, 962 F.2d 1131, 1144 (3d Cir. 1992); *Vasey*, 834 F.2d at 788; *see also Reilly*, 76 F.3d at 1282 n.2; *cf.* Franks v. Delaware, 438 U.S. 154, 171–72 (1978) ("[I]f, when [improper material] is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause," defendant is not entitled to a factual hearing.).

64. The Court in *Kyllo v. United States*, 533 U.S. 27, 40 (2001), hinted that this was proper. *See id.* (remanding to the "District Court to determine whether, without the evidence [the thermal scan] provided, the search warrant issued in this case was supported by probable cause").

65. For examples of cases where the illegally obtained information was necessary to the warrant, see United States v. Diehl, 276 F.3d 32, 41–42 (1st Cir. 2002); State v. DeWitt, 910 P.2d 9, 14 n.3 (Ariz. 1996) (en banc); State v. Carter, 630 N.E.2d 355, 364 (Ohio 1994) (per curiam) (Brogan, J., by appendix).

66. This gap has created disagreements beyond illegal predicate searches. *Compare, e.g.*, United States v. Martin, 297 F.3d 1308, 1309 (11th Cir. 2002) (holding that information outside the four corners of the warrant application can be used to determine officer's good faith), *with* United States v. Hove, 848 F.2d 137, 140 (9th Cir. 1988) ("*Leon* does not extend . . . to allow the consideration of facts known only to an officer and not presented to a magistrate.").

67. United States v. Leon, 468 U.S. 897, 900 (1984).

68. Unsurprisingly, the issue as framed by Justice White has since been accepted by other members of the Court. *See* Arizona v. Evans, 514 U.S. 1, 11 (1995) (Justice Rehnquist writing for the Court); Illinois v. Krull, 480 U.S. 340, 348 (1987) (Justice Blackmun writing for the Court).

(1) the exclusionary rule is meant to deter police, not magistrates,[69]

(2) there was "no evidence" magistrates ignored or subverted the Fourth Amendment,[70]

(3) there was no reason to believe exclusion would deter magistrates,[71]

(4) excluding evidence cannot deter reasonable police conduct,[72] and

(5) officers are entitled (i.e., reasonable) to rely on the magistrate's determination of probable cause.[73]

The narrow reading of *Leon* regards these five premises as individually necessary and only jointly sufficient to *Leon*'s result.

The Court's subsequent good faith exception cases fit neatly into the narrow reading's logical framework. *Illinois v. Krull* in effect substitutes state legislature for magistrates in all five premises, and constitutionality for probable cause in the fifth premise.[74] Similarly, *Arizona v. Evans* essentially replaces magistrates with clerical workers in all five premises, and accuracy in reporting for determination of probable cause in the fifth premise.[75]

On the narrow reading, the good faith exception applies only when police reasonably rely on a person or institution on which they are entitled—i.e., reasonable—to rely. Although there may be many other entities on which police are entitled to rely, to date the Supreme Court has named only three entities on which police may rely: magistrates for probable cause,[76] legislatures for permission to search,[77] and clerical workers for information on outstanding warrants.[78] Implicit in this narrow reading of *Leon* is the necessity of an entity other than the officers themselves. Therefore, by negative implication, police officers would *not* act reasonably if they rely on their own judgment of constitutionality,

69. *Leon*, 468 U.S. at 916.
70. *Id.*
71. *Id.*
72. *Id.* at 919–20.
73. *Id*. at 921.
74. 480 U.S. 340, 349–55 (1987). The five premises, phrased to lead to *Krull*'s holding, are (1) the exclusionary rule is meant to deter police, not state legislatures, (2) there was "no evidence" state legislatures ignored or subverted the Fourth Amendment, (3) there was no reason to believe exclusion would deter state legislatures, (4) excluding evidence cannot deter reasonable police conduct, and (5) officers are entitled (i.e., reasonable) to rely on the constitutionality of state legislative enactments.
75. 514 U.S. 1, 14–16 (1995). The five premises, phrased to lead to *Evans*'s holding, are (1) the exclusionary rule is meant to deter police, not clerical workers, (2) there was "no evidence" clerical workers ignored or subverted the Fourth Amendment, (3) there was no reason to believe exclusion would deter clerical workers, (4) excluding evidence cannot deter reasonable police conduct, and (5) officers are entitled (i.e., reasonable) to rely on the clerical worker's report of outstanding warrants.
76. *Leon*, 468 U.S. at 926.
77. *Krull*, 480 U.S. at 349–50.
78. *Evans*, 514 U.S. at 15–16.

even if that same judgment would be reasonable if made by a magistrate or state legislature.

2. *The Broad Reading of* Leon

The broad reading of *Leon* recognizes that not all five of *Leon*'s premises are necessary to the result. On the contrary, the first premise (i.e., the exclusionary rule is meant to deter police) and the fourth premise (i.e., excluding evidence cannot deter reasonable police conduct) can constitute the major and minor premise, respectively, of a syllogism with a new conclusion: (1) the purpose of the exclusionary rule is to deter police illegality; (2) it is not possible to deter reasonable police behavior; *therefore*, (3) any evidence seized by an officer who reasonably believes that her behavior comports with the Fourth Amendment should not be suppressed.

Although this syllogism is consistent with the results in *Leon*, *Krull*, and *Evans*, this reading of *Leon* has far-reaching implications: this interpretation entails extending the good faith exception to without-warrant cases.[79] Thus, on the broad reading, it is not necessary to the result in the *Leon* line of cases that the officers relied on the judgments of others. Rather, the only touchstone is the officers' reasonableness.

C. *The Split of Authority: Three Approaches to Illegal Predicate Searches*

1. *The First Approach: Applying the Good Faith Exception to Illegal Predicate Searches*

Although some courts, including the District of Columbia[80] and Second Circuits,[81] have held that evidence may be admitted notwithstanding an illegal predicate search, the Eighth Circuit's treatment of the issue is significantly more extensive than any other court. In *United States v. White*, the Eighth Circuit's first case addressing illegal predicate searches, two DEA agents observed White looking around nervously in the St. Louis airport as he deplaned a flight from Los Angeles.[82] The two officers approached White after he retrieved his luggage.[83] White agreed to speak with the officers and, with a trembling hand, produced his iden-

79. Justice Brennan saw this reasoning immanent in Justice White's *Leon* opinion; he was "not at all confident" that the good faith exception would remain confined to with-warrant cases. *Leon*, 468 U.S. at 959 (Brennan, J., dissenting). Professor LaFave also remarked that "much of the reasoning in *Leon* will offer support for [extending the good faith exception] beyond the with-warrant situation." LAFAVE, *supra* note 25, § 1.3(g), at 93.

80. United States v. Thornton, 746 F.2d 39, 49 (D.C. Cir. 1984).

81. United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985).

82. 890 F.2d 1413, 1414 (8th Cir. 1989).

83. *Id.* at 1415.

tification and a one-way ticket paid for in cash.[84] After White refused to give permission to search his luggage, the officers told White he was free to go but that his luggage would be detained in order to allow a narcotics detection dog to sniff the bags.[85] White requested "six or seven times" to be allowed to take his luggage with him, and each time the officers refused.[86] Not long after, while White was still present, the dog arrived and "alerted" to one of White's bags.[87] The officers then sought and obtained a warrant,[88] searched the bag, and found cocaine.[89]

On appeal, the Eighth Circuit concluded that the officers violated White's Fourth Amendment rights because they lacked reasonable suspicion to detain his bags.[90] However, because the officers waited to search the luggage until after they had obtained a warrant, the court believed that *Leon* was relevant.[91] The court concluded that the officers violated the Fourth Amendment, but that they were "close enough to the line of validity" that their belief in the warrant's validity was objectively reasonable.[92] It is curious that the Court offered no further explanation: did it view its decision as an extension, or merely a straightforward application, of *Leon*?[93]

Two years later, a different panel[94] on the Eighth Circuit confronted facts strikingly similar to those in *White*. In *United States v. Kiser*,[95] officers observed Kiser at Chicago's O'Hare airport after arriving on a flight from Miami.[96] Kiser looked over his shoulder as he walked through the airport and stopped at a drinking fountain twice but never took a drink.[97] The officers approached Kiser, who was "evasive" when questioned and lied about having used his cousin's credit card to rent a car.[98] After Kiser refused to consent to a search of his bag, the officers, as in *White*, told

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. The opinion contains no description of what facts the officers presented to the magistrate via the warrant affidavit.
89. *White*, 890 F.2d at 1415.
90. *Id.* at 1417.
91. *Id.* at 1419.
92. *Id.*
93. *But see id.* at 1420 n.1 (Magill, J., concurring) ("I do find the majority's *extension* of the *Leon* doctrine to be persuasive." (emphasis added)).
94. Only Judge Arnold served on both the *White* panel and the *Kiser* panel.
95. 948 F.2d 418 (8th Cir. 1991).
96. *Id.* at 422. How this case came before the Eighth Circuit is a story of some intricacy. Kiser was convicted on drug charges in Illinois state court, but the Illinois appellate court reversed on the ground that the airport search was unconstitutional. *See* People v. Kiser, 447 N.E.2d 858, 861 (Ill. App. Ct. 1983). Importantly, this decision was rendered before the Supreme Court handed down *Leon*. Kiser was then indicted on federal drug charges and stood trial in the Southern District of Iowa. *Kiser*, 948 F.2d at 420. Venue was proper in Iowa under 18 U.S.C. § 3237 because Kiser's continuing criminal enterprise targeted the Quad Cities for drug distribution. *Id.* at 425–26.
97. *Kiser*, 948 F.2d at 422.
98. *Id.*

him that they were going to detain his bags for a dog sniff.[99] The dog alerted and the officers obtained a warrant,[100] searched the bag, and found cocaine.[101]

In *Kiser*, however, the Eighth Circuit declined to address the issue of whether the detention of the bags was lawful.[102] Rather, the court reasoned that the only issue was whether the officers' actions were objectively reasonable, which the court believed they were.[103] Indeed, the court had "no hesitation in concluding that . . . the circumstances gave the officers an objectively reasonable belief that they possessed a reasonable articulable suspicion that would make the search warrant valid."[104]

In *United States v. Fletcher*, the Eighth Circuit once again confronted facts similar to those in *White* and *Kiser*.[105] And, once again, the panel concluded that although the *Terry* stop in the airport was unlawful,[106] "the officers had an objectively reasonable belief that they possessed a reasonable suspicion such as would support the valid detention of Fletcher's bag as well as an objectively reasonable belief that the warrant issued was valid."[107] Simply put, the prewarrant activities were "close enough to the line of validity"[108] that the police could reasonably believe them to be legal.

99. *Id.*

100. Again, the Court did not describe what information was presented to the magistrate.

101. *Kiser*, 948 F.2d at 421–22.

102. *Id.* at 421.

103. *Id.* at 421–22. The panel was invited to overrule *White*, but declined because it lacked the power and because it found *White*'s reasoning persuasive. *Id.* at 422.

104. *Id.* at 422. The court's articulation of its conclusion is difficult to understand. The court seems to mean that if the police reasonably believed that they had the reasonable suspicion necessary to make the antecedent *Terry* stop constitutional, then they could have reasonably believed the warrant was valid; thus, evidence seized pursuant to the warrant is admissible under the good faith exception. This bifurcated test for reasonableness has two fatal inadequacies. First, it is vulnerable to an infinite regress problem. The Fourth Amendment requires that police have reasonable suspicion to make a *Terry* stop. Terry v. Ohio, 392 U.S. 1, 20–21 (1968). Therefore, to reasonably believe in the constitutionality of a *Terry* stop is to reasonably believe one has reasonable suspicion. If it is possible to reasonably believe one has reasonable suspicion, it should also be possible to *reasonably* believe that there could have been a *reasonable* belief that one has *reasonable* suspicion. Courts could end up asking the reasonableness question *ad infinitum*.

Second, this approach eschews any effective definition of Fourth Amendment rights and simply asks the question: "Is it close enough for government work?" But in order to answer that question the Eighth Circuit must also ask: "Close enough to what?" Without addressing the antecedent question of the search's legality, there is no way to know what exactly the conduct at issue is "close enough" to. The courts must first determine what a constitutionally valid search or seizure would have been under the circumstances before they can judge whether the officer's conduct in a particular case is "close enough" to it. Under the Eighth Circuit's approach, therefore, there is a danger that Fourth Amendment law could remain frozen in place. Some commentators foresaw that the good faith exception might produce this outcome, but the *Leon* court brushed their concerns aside. *See* United States v. Leon, 468 U.S. 897, 924–25 (1984). These Eighth Circuit cases may give one reason to believe that the commentators' fears were justified.

105. 91 F.3d 48 (8th Cir. 1996).

106. *Id.* at 51.

107. *Id.* at 52.

108. *Id*. at 51 (quoting United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989)).

This time, however, the defendant had a new argument: Fletcher quite intelligently urged the court to suppress the evidence on the ground that doing so would serve the deterrent purpose of the exclusionary rule.[109] After all, police had been using the same (illegal) interdiction tactic in airports for the past six years and sought refuge behind the good faith exception each time. Police departments, six years after *White*, should have been on notice that this method had been declared unconstitutional—or so Fletcher argued. The Eighth Circuit rejected the intuitive appeal of Fletcher's argument: "The district court held that the officers' belief in the validity of the detention and warrant was not only objectively reasonable, but also in good faith. . . . The purpose of the exclusionary rule, deterrence of police misconduct, will not be served by its application to this case."[110]

It is scarcely possible that the Eighth Circuit has adopted the narrow reading of *Leon*. If the Eighth Circuit retained all five premises of the narrow reading of *Leon*, it would be committed to the following course of reasoning:

(1) The exclusionary rule is meant to deter police.

(2) There is no evidence that police ignore or subvert the Fourth Amendment.

(3) There is no reason to believe that exclusion would deter police.

(4) Excluding evidence cannot deter reasonable police conduct.

(5) Officers are entitled (i.e., reasonable) to rely on their own judgments regarding the constitutionality of their conduct.

This reasoning is absurd. Premises one and three, though not formally contradictory, are inconsistent and practically cancel each other out. Thus, the Eighth Circuit cases cannot be consistent with a narrow reading of *Leon*.

A more plausible reading of the Eighth Circuit cases understands them to reflect the broad reading of *Leon*. In other words, the Eighth Circuit jettisoned all but two of *Leon*'s premises—(1) the purpose of the exclusionary rule is to deter police illegality, and (2) it is not possible to deter reasonable police behavior—and concluded that any facts developed by an officer who wrongly but reasonably believed that her behavior comported with the Fourth Amendment should not be excluded from a warrant application. This entails that if the officer reasonably believed in the constitutionality of the predicate search, then her belief in the warrant's validity was similarly reasonable. Because the belief in the predi-

109. *Id.* at 52.

110. *Id.* On the basis of this reply, it might be wondered whether the Eight Circuit missed the thrust of Fletcher's argument.

cate search and the warrant's validity were both reasonable, neither can be deterred—and when there is no deterrent value, the evidence should not be suppressed. Therefore, it can be concluded that the Eighth Circuit has adopted the broad reading of *Leon* and ought, as a logical matter, to extend the good faith exception to all searches, warrantless or otherwise.[111]

This course of reasoning endangers the warrant requirement. Under current law, police have an incentive to seek warrants because warrants provide the good faith safe harbor. However, if courts extend good faith treatment to predicate searches, the same reasoning compels them to extend good faith treatment to all warrantless searches. If warrantless searches come within the good faith safe harbor, police would have no remaining incentive to seek a warrant. Under these circumstances, the warrant requirement would become a meaningless form of words. Therefore, the Eighth Circuit approach—and the broad reading of *Leon*—should be rejected as inconsistent with current doctrine.

However, even if the Eighth Circuit were correct to apply the good faith exception to illegal predicate searches, its approach would have practical complications if widely adopted. For example, the Eighth Circuit's relaxed view of deterrence is untenable. The deterrence rationale of the exclusionary rule presupposes that police are, in some manner, made aware of court decisions that exclude illegally obtained evidence; it assumes that reasonably administered police departments take note of Fourth Amendment decisions by their circuit court and adjust their tactics accordingly. The Eighth Circuit seems to disregard that assumption, for it allowed the admission of illegally seized evidence in three virtually identical cases over the course of six years. Continuing to allow the admission of evidence seized in the same unconstitutional manner under the good faith exception provides no deterrent at all. Quite the opposite, these decisions (1) provide an *incentive* for the police to encourage certain "approved" types of illegal behavior that are "close enough to the line" to fall within the good faith exception; and (2) reward police officers' ignorance of the Fourth Amendment's requirements.

However, if the *Fletcher* court had avoided these problems and accepted the defendant's argument that suppression would serve a deterrent purpose, a thornier question would then confront the court: how long does it take a reasonable police department to integrate controlling case law into its training and education programs? Certainly there are resources constraints and administrative barriers to consider, but it

111. It must be observed that the Eighth Circuit has not explicitly adopted the broad reading of *Leon* presented in this article. However, *United States v. Teitloff*, 55 F.3d 391 (8th Cir. 1995), lends support to the view that the Eighth Circuit uses the broad reading. In *Teitloff*, *Leon* was applied to a warrant based on illegally seized evidence when officers without knowledge of the prior illegal searches executed the warrant. *Id.* at 393. *But see* United States v. O'Neal, 17 F.3d 239, 243 n.6 (8th Cir. 1994) (casting doubt on the wisdom of *White*). Concurring, Chief Judge Bowman took exception to footnote six and wrote separately to voice his disagreement with it. *Id*. at 244.

would be difficult for judges to determine the proper amount of time to give police departments to adapt. Even if a bright-line rule could be fashioned, there is a danger of anomalous results. For example, suppose the courts give police departments a six-month grace period to educate their force about a decision. The grace period could, in theory, give police a six-month license to engage in "objectively reasonable" behavior that they nevertheless know is illegal. A court would not be able to handle the problem of subjective bad faith without saddling judges with the "intolerable" burden of getting into the minds of officers,[112] a burden the *Leon* Court sought to avoid placing on judges.[113] In addition, because Fourth Amendment jurisprudence is rather complicated,[114] the court would also have to answer the question of how well reasonable police officers should understand recent federal case law. Without the brute teacher of exclusion, the learning curve might be much flatter. Therefore, apart from the doctrinal difficulties involved with the Eighth Circuit cases, this approach should be rejected on practical grounds alone.

2. The Second Approach: Holding the Good Faith Exception Inapplicable to Illegal Predicate Searches

Upon close analysis, one finds that courts declining to apply the good faith exception to illegal predicate search cases have adopted the narrow reading of *Leon*. First, these courts find *Leon*'s first premise—that the exclusionary rule exists to deter police, not magistrates—to be particularly important.[115] Emphasizing this premise, these courts highlight the distinction between the facts presented in *Leon* and those presented in illegal predicate search cases. That is, they focus on the contrast between cases of illegal predicate searches and the facts of *Leon*. In the former, an officer—not a magistrate—has made the constitutional error.[116] In the latter, "[t]he only error in the entire process was the magistrate's erroneous finding that the evidence established probable cause."[117] Distinguishing *Leon* on this ground enables these courts to hold that the good faith exception does not extend to illegal predicate search cases.

112. LAFAVE, *supra* note 25, § 1.3(g), at 95.

113. United States v. Leon, 468 U.S. 897, 919 n.20 (1984) ("We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers."). Nowhere in *Leon* is there a subjective "bad faith" exception to the good faith exception.

114. Professor Amar has gone so far as to call contemporary Fourth Amendment jurisprudence "an embarrassment." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

115. *See* United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987); People v. Machupa, 872 P.2d 114, 121–22 (Cal. 1994).

116. *Vasey*, 834 F.2d at 789; *Machupa*, 872 P.2d at 122.

117. *Vasey*, 834 F.2d at 789 (Prewarrant illegal searches are "an activity that the exclusionary rule was meant to deter.").

These courts also consider *Leon*'s fifth premise—that police are reasonable to rely on the validity of a warrant issued by a detached and neutral magistrate—to be important. The California Supreme Court's reasoning in *People v. Machupa* is representative:

> Because the exclusionary rule will not deter the "objectively reasonable" conduct of a police search *made in reliance on a warrant previously issued* by a neutral and detached magistrate, it should not be applied in such cases. That rationale is absent, however, where the initial Fourth Amendment violation is the product of police rather than magisterial conduct.[118]

Machupa suggests that Fourth Amendment mistakes by the police can only be absolved by the good faith exception if committed in reliance on other persons or institutions. This conclusion can be reached only by accepting the narrow view of *Leon* and regarding all five premises as individually necessary and only jointly sufficient to *Leon*'s holding.

However, there is one ambiguity. It is possible that the courts refusing to extend the good faith exception all confronted predicate searches that were clearly unconstitutional. The Ninth Circuit concluded that the officer in *Vasey* had intentionally included misrepresentations in his warrant application.[119] The predicate search in *United States v. Wanless* was not conducted in conformance with statutory procedures for inventory searches.[120] In *United States v. Scales*, the agents held the defendant's luggage for more than twenty-four hours and misled the defendant regarding where they were taking his luggage, how long they would hold it, and how he could reclaim his bags.[121] Similarly, the Arizona Supreme Court believed the predicate search in *State v. Hicks* was "plainly unlawful."[122] So, if those courts did not view the officers' prewarrant mistakes as objectively reasonable, then these cases (*Vasey, Wanless, Scales*, and *Hicks*) can be distinguished from the cases discussed in Part III.C.1, in which the courts invariably found the illegal predicate search to be an objectively reasonable mistake. Therefore, the government may argue that cases like *Vasey, Wanless, Scales*, and *Hicks* are distinguishable from cases where the police were objectively, reasonably mistaken regarding the legality of their prewarrant activity.[123]

118. 872 P.2d at 122 (emphasis added).

119. 834 F.2d at 790 n.4. However, a different panel later explained that even when police are entirely truthful in the warrant application, the evidence would still be suppressed if the predicate search was illegal. United States v. Wanless, 882 F.2d 1459, 1466 (9th Cir. 1989).

120. 882 F.2d at 1463–64.

121. 903 F.2d 765, 768–69 (10th Cir. 1990).

122. 707 P.2d 331, 332 (Ariz. 1985), *aff'd on other grounds sub nom.* Arizona v. Hicks, 480 U.S. 321 (1987). One may doubt just how plain the violation was; the officer in *Hicks* merely nudged a piece of stereo equipment in order to read its serial number.

123. It is unlikely that this argument is still open in California. People v. Machupa, 872 P.2d 114, 124 (Cal. 1994) (en banc) (the magistrate apparently believed that the police behaved objectively reasonably, although erroneously, in entering the defendant's house).

Assuming the cases can be distinguished, it is not completely clear how courts, such as the Ninth Circuit and Arizona Supreme Court, would rule if they believed the prewarrant error was objectively reasonable. If any of the courts ruled on such an argument, it would certainly clarify the theoretical grounds on which cases like *Vasey* and *Hicks* rest. After all, the split of authority on illegal predicate searches may be a chimera—a simple function of differing fact patterns. However, it seems likely that, given the tone and reasoning of the opinions, the split of authority arises out of a fundamental disagreement regarding the scope of *Leon*. It is doubtful that the Ninth and Tenth Circuits, or the Arizona Supreme Court, would extend the good faith exception to warrants based on illegal searches, even if the predicate search was an objectively reasonable mistake. Indeed, these courts appear emphatic that "[w]hen the magistrate issued the warrant, he did not endorse past activity; he only authorized future activity."[124] In other words, these courts would likely hold that the fruit of the poisonous tree doctrine governs the case, the warrant is tainted, and the good faith analysis is inapposite. As the Arizona Court of Appeals put it, "[p]olice officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate."[125]

If this prediction is correct, this approach may be in tension with the good faith exception as articulated by *Leon*. *Leon* says that excluding evidence cannot deter reasonable police conduct.[126] An officer negligently violating the Fourth Amendment, by definition, would not have—but should have—perceived a risk that her conduct violated the Fourth Amendment. In such circumstances, the evidence should be excluded.[127] By contrast, an officer behaving reasonably, by definition, has no reason to perceive a risk that her conduct is illegal. If it never should cross a police officer's mind that her conduct is illegal, how could the threat of exclusion possibly deter her action? Thus, the second approach may not properly respect the deterrent rationale of the good faith exception.

One obvious counterargument is that, although it may not be possible to deter an objectively reasonable constitutional violation the first time, it is possible to deter similar actions in the future. One study reported that having evidence excluded had a great impact on officers' knowledge of the law.[128] Excluding illegally seized evidence, even if the

124. Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 302 (1985), *quoted in* State v. DeWitt, 910 P.2d 9, 15 (Ariz. 1996); *see also* United States v. Scales, 903 F.2d 765, 768 (10th Cir. 1990); *Wanless*, 882 F.2d at 1466.

125. *Hicks*, 707 P.2d at 333.

126. United States v. Leon, 468 U.S. 897, 919–20 (1984).

127. *See supra* note 30.

128. Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1036 (1987). The officers were asked how they learned about search and seizure law. Their answer options were: "[1] written rules given to the police; [2] through lectures or presentations . . . ; [3] through the officer's experience having evidence suppressed; [4] through an officer's experience seeing another officer's evidence suppressed; [5] other." Answers three and four were most common.

officers had no reason to believe they were violating the Fourth Amendment, could have a deterrent effect on officers' subsequent behavior. Conversely, admission may not teach the officers that their conduct was unconstitutional; admitting the evidence implicitly sanctions the officers' prior conduct and gives them reason to repeat it.[129] Therefore, even though "the wrong condemned by the Fourth Amendment is 'fully accomplished' by the unlawful search or seizure itself,"[130] excluding the fruit of warrantless unconstitutional searches, even where the officers could have reasonably believed in the validity of their conduct, will deter officers in future cases. On the other hand, the Supreme Court may already be committed to the view that excluding the fruits of reasonable police conduct entails unacceptable overdeterrence.[131]

It stands to reason that constitutional tort suits might also edify police. However, a combination of qualified immunity and indemnification arrangements might serve to blunt the deterrent impact of these lessons. *See generally* PETER SCHUCK, SUING GOVERNMENT 85–89 (1983); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 29–31 (2000) ("The reality is that individual officers are not often forced to pay damage awards from their own pockets" because of indemnification.); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 92–93 (1999); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 965 n.211 (2005); Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1211 (2001); Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1795–96 (1997); Matthew J. Silveira, Comment, *An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation*, 52 UCLA L. REV. 601, 623–24 (2004).

However, the underdeterrence problem may be offset by: (1) the stigmatic deterrent of being a named defendant in a lawsuit, (2) the undefined scope of indemnification programs, and (3) a statutory cap on the state's indemnification obligation. Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 880–86 (2000); *see also* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854 (2001) (arguing that constitutional tort remedies deter officers because "[n]o officer wants to be sued, particularly when there is no absolute guarantee that his municipal employer will pay for his defense and indemnify him for damages." (footnotes omitted)).

Professor Meltzer has questioned whether indemnification arrangements are efficacious for several reasons: (1) some employees or agencies may be excluded; (2) indemnification may be permissive, not mandatory (although routine practice of permissive indemnification may blur the distinction); (3) some states may have caps on indemnification liability; (4) there may be provisions that preclude indemnification for criminal, egregious, or willful and wanton actions; and (5) the vagaries of attempting to recover large damages against an employee of modest means. *See* Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1359–61 (2001); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors In Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1019–20 (2000).

However, a (somewhat dated) study of constitutional tort cases in the Central District of California indicated no case in which an individual defendant/official had borne the cost of an adverse judgment. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 685–86 (1987). A second, even more dated, study of § 1983 suits in Connecticut disclosed results similar to those found by Eisenberg and Schwab. *See* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 809–14 (1979).

129. The Eighth Circuit cases seem to exemplify this danger. *See supra* Part III.C.1.

130. *Leon*, 468 U.S. at 906.

131. *Id*. at 920 ("Excluding the evidence [seized by objectively reasonable mistake] can in no way affect [an officer's] *future conduct* unless it is to make him less willing to do his duty." (emphasis added) (quoting Stone v. Powell, 428 U.S. 465, 540 (1975) (White, J., dissenting)). Of course, this rea-

In any event, it seems that this second approach entails less doctrinal tension and fewer practical difficulties than the first approach. The first approach seems quite inconsistent with the warrant requirement, but the second approach is at most mildly in tension with the deterrent purpose of the exclusionary rule. Therefore, although neither is perfect, the second approach seems clearly preferable to the first. Still, there is a third approach to consider.

3. The Third Approach: Disclosure to the Magistrate Triggers the Good Faith Exception

The best exposition of the third approach appears in Judge Calabresi's eminently quotable opinion in *United States v. Reilly*.[132] In *Reilly*, two officers approached a small uninhabited cottage on Reilly's land and observed marijuana growing near the cottage.[133] The officers filed an affidavit for a search warrant indicating that the officers saw marijuana growing on Reilly's land.[134] Unfortunately, the affidavit did not particularly describe either the area where the marijuana was growing or the point from which the officers observed the marijuana growing.[135] The magistrate issued a search warrant, pursuant to which the officers seized fifteen marijuana plants.[136] The Second Circuit ruled that the predicate search—in which the officers observed the plants growing—was illegal because it took place within the curtilage.[137] The court further held that the good faith exception was inapplicable for two reasons.

First, the court invoked the "knowing or reckless falsity" exception to *Leon*[138] and noted that, under the Second Circuit's precedent, recklessness was inferred when the warrant application omitted information that was "'clearly critical' to assessing the legality of a search."[139] Because the application lacked the "crucial" particulars of the area,

soning neglects the possibility that exclusion would deter similar violations in the future without paralyzing the officer in different situations in the future.

132. 76 F.3d 1271 (2d Cir. 1995).

133. *Id.* at 1274. Judge Calabresi observed that "Kevin Reilly's green thumb was allegedly both legendary and shady." *Id.* at 1273.

134. *Id.* at 1274. The opinion discusses only the sufficiency of the officers' description of the land. It contains no description of what other information was, or was not, contained in the affidavit. Thus, it is unclear whether a harmless error or independent source could have saved the warrant because the affidavit established probable cause even in the absence of the facts obtained by the observation within the curtilage. In any event, the government did not raise that issue on appeal.

135. *Id.* at 1280. However, the officers did present the magistrate with a very poor quality photograph of the cottage—a photograph that, Judge Calabresi quipped, "would do Rorschach proud." *Id.*

136. *Id.* at 1274.

137. *Id.* at 1279.

138. *Id.* at 1280 (quoting United States v. Leon, 468 U.S. 897, 914 (1984)); *see also supra* text accompanying notes 26–30.

139. *Reilly*, 76 F.3d at 1280. The earlier decision Judge Calabresi cited, *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991), concerned information that was "clearly critical" to the *determination*

> the issuing judge could not possibly make a valid assessment of the legality of the warrant that he was asked to issue. The good faith exception to the exclusionary rule does not protect searches by officers who fail to provide all potentially adverse information to the issuing judge, and for that reason, it does not apply here.[140]

The second justification for refusing to apply the good faith exception in *Reilly* was that the officers did not do everything they could to ensure their conduct was legal.[141] In contrast to an earlier Second Circuit case where it was reasonable for the officers to believe that their prewarrant behavior was legal, the officers in *Reilly* had reason to believe their prewarrant observation was within the curtilage: "they knew very well that large parts of their search were potentially illegal—and yet they never told the issuing judge about it."[142] The court held that good faith was precluded by the officers' failure to inform the magistrate of their investigatory methods.[143]

These two justifications are related in that they both pertain to disclosure of methods of investigation. *Reilly* implies that if the officers *had* disclosed their investigative work in detail and the magistrate issued the warrant anyway, the officers could not be charged with recklessly omitting "clearly critical" information or with failing to provide the issuing judge with an account of what they did. In that case, it would follow that the good faith exception would apply. The upshot of *Reilly* may be that officers may sanitize any Fourth Amendment violation, regardless of the level of fault, by describing to a magistrate the manner in which the officers developed the facts purported to establish probable cause.

This approach seems both initially plausible and acceptable, and the Second Circuit would not be alone in thinking this a workable or desirable rule.[144] Moreover, any system on which Judge Calabresi even implicitly places his imprimatur deserves serious consideration. Nevertheless, there is reason to believe that accepting the *Reilly* approach would undercut the magistrate's traditional role and could lead to undesirable consequences.

The first and most obvious problem with any "Disclosure System," regardless of its precise contours, is that it would require a daunting redefinition of the magistrate's role. A magistrate's ordinary function is to determine whether the affidavit is supported by oath and whether the

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of probable cause, not the legality of investigatory methods that disclosed such information. *Reilly*'s use of this language expanded the meaning of the phrase.

140. *Reilly*, 76 F.3d at 1280.

141. *Id.* at 1281–82.

142. *Id.* at 1281–83 (distinguishing United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985)).

143. *Id.* at 1282.

144. *See* United States v. Solomon, 728 F. Supp. 1544, 1549–50 (S.D. Fla. 1990) ("The probable cause affidavit . . . omitted the material details of how the evidence was obtained. . . . [T]o excuse the officer's material omissions here would encourage the police to be less than candid in applying for warrants."); Clancy, *supra* note 51, at 711.

facts alleged in the affidavit establish probable cause.[145] Thus, "[b]y negative implication, it is *not* the magistrate's function also to determine whether the facts alleged in the affidavit were lawfully obtained."[146]

Second, the question of whether Fourth Amendment rights were violated is a fact-intensive inquiry.[147] It may be seriously doubted whether an ex parte, nonadversarial hearing is an appropriate forum for the kind of fact development necessary for accurate and reliable protection of the Fourth Amendment's guarantees.[148]

Third, magistrates are under pressure to expedite their dockets.[149] Their review "seems quite hurried in practice, especially as compared with the process of review which occurs after a suppression motion has been filed."[150] In large cities, thousands of warrant applications receive review every year.[151] In fact, according to one study, 65% of review proceedings lasted 150 seconds or less, and 89% lasted less than five minutes.[152] One might worry whether Fourth Amendment rights were taken seriously if violations could be sanitized in such a hurried manner.

A fourth criticism is that an officer engaging in illegal behavior that she reasonably believes to be legal would have no reason to report that activity to a magistrate in a warrant application. Why, when no reasonable officer should doubt the legality of her conduct, would it occur to that officer that the magistrate should know of her prewarrant investigatory methods? There is no plausible answer to this question, but it would give police an incentive to include extensive details of their investigation in a warrant application. Any significant number of officers acting on this incentive would result in a dramatic increase in the magistrate's workload and would shift the locus of Fourth Amendment decision making and case law to magistrates. The only question left for a trial judge would be whether the information disclosed by the officers was sufficient.

Moreover, a Disclosure System might also lead to officers manipulating the system—becoming savvy on how much or what kind of disclosure can satisfy good faith. Therefore, despite its superficial consistency with current law and Judge Calabresi's implicit endorsement, courts should avoid implementing a Disclosure System because of its undesirable practical ramifications.

145. People v. Cook, 583 P.2d 130, 145 (Cal. 1978) (citations omitted).

146. *Id.* (emphasis added).

147. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE §§ 8.1–8.2, at 146–235 (2d ed. 1987).

148. *See generally* Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1187–95 (1987).

149. *See* People v. Machupa, 872 P.2d 114, 123 (Cal. 1994).

150. 2 LAFAVE, *supra* note 25, § 4.1(a), at 398.

151. *See* RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 18 (1985).

152. *Id.* at 26.

IV. RESOLUTION

From the discussion in Part III, it is apparent that all three current approaches to the problem of illegal predicate searches are unsatisfactory. The first is inconsistent with Supreme Court doctrine, and the third entails unacceptable practical difficulties. Therefore, neither should be adopted. The second approach, although preferable to the first and third doctrinally and practically, is not perfectly consistent with current doctrine.[153] Moreover, some would resist the second approach for fear that it would invalidate a warrant supported by adequate, legally obtained evidence simply because one bit of information in the affidavit was illegally obtained. This result seems wrong because it would place the government in a worse position than if the officers acted reasonably. Fortunately, there is an approach that, although not yet adopted by any court, offers a way to reconcile doctrinal tensions without creating daunting practical challenges.

A. A Novel Proposal

When a defendant moves to suppress evidence on the ground that the warrant was supported by evidence seized in an illegal predicate search, a court should engage in the following three-step analysis.

1. Step One: Was There an Illegal Predicate Search?

The threshold question is whether a predicate search was illegal. If it was not, the analysis is concluded and the normal good faith principles apply. If there was an illegal predicate search, however, the trial court should excise any information generated by the illegal predicate search from the warrant application. Thus, the government will not be able to avail itself of the fruits of any illegal predicate search.

2. Step Two: Would the Warrant Be Supported by Probable Cause Apart from the Fruits of the Illegal Predicate Search?

After the court excises any tainted information from the warrant application, it should review the magistrate's finding of probable cause. Normally, substantial deference is given to the magistrate's determination of probable cause.[154] However, because the question of whether probable cause existed absent tainted information is counterfactual, deference to the magistrate's determination of probable cause is inappropriate in these cases. Thus, the court should review the magistrate's finding de novo.

153. *See supra* text accompanying notes 130–31.
154. *See* Illinois v. Gates, 462 U.S. 213, 236 (1983).

If the court, reviewing de novo, finds that the warrant would have established probable cause without the illegally obtained information, it should admit any evidence seized pursuant to the warrant. Because the government would have procured the warrant even if it had not violated the defendant's rights, to invalidate the warrant would place the government in a worse position than if it had behaved impeccably. This result would be inconsistent with the values behind the independent source doctrine and harmless error doctrine, and it might overdeter police. Therefore, the warrant should be upheld if it would be supported by probable cause without the fruits of the poisonous tree.

On the other hand, if the warrant application would have lacked probable cause without the illegally obtained information, evidence seized pursuant to the warrant should not necessarily be excluded. Rather, a third step is necessary to ensure that both the government and the defendant are returned to the status quo ante.

3. Step Three: Could the Diminished Warrant Application Have Supported Good Faith Reliance?

If a warrant application would have lacked probable cause absent information uncovered by an illegal predicate search, the court should ask whether an officer could have had an objectively reasonable belief in the validity of the warrant if, contrary to fact, the fruits of the illegal predicate search were never put before the magistrate.

That is, the court must imagine that the illegal predicate search had never taken place. Then, the court must look at whatever facts would remain in the warrant application apart from the fruits of the illegal predicate search. The court should then decide whether, if a warrant had been issued on those facts, the evidence would have been sufficient to support an officer's reasonable good faith reliance. In short, a court should ask: "Had the illegally obtained evidence never been presented to the magistrate, would an officer have been reasonable to accept the magistrate's judgment that the application established probable cause?" If the answer to that question is yes, the evidence seized pursuant to the warrant should be admitted. If, on the other hand, the warrant application would be rendered "so lacking in indicia of probable cause" so as to render any belief in its validity objectively unreasonable, the evidence seized pursuant to the warrant should be suppressed.[155]

B. Illustrating the Proposal

Let us return to the initial al-Qā'ida cell hypothetical.[156] Recall that a search warrant was issued based solely on information obtained from

155. United States v. Leon, 468 U.S. 897, 923 (1984) (citations omitted).
156. *See supra* Part I.

NSA spying, and that the evidence seized pursuant to the warrant was necessary to the prosecution. The threshold question is whether the NSA program is unconstitutional. In this hypothetical, the trial judge concluded (correctly, let's assume) that the NSA program was unconstitutional.[157] Thus, there was an illegal predicate search that was used to support the warrant application.

Next, the court should look at what other information the government presented to the magistrate. In this hypothetical, the only information given to the magistrate was tainted by the NSA program. Thus, all facts presented to the magistrate must be disregarded by the reviewing court. Clearly, then, a court would conclude that the warrant application was "so lacking in indicia of probable cause" so as to render any belief in its validity objectively unreasonable.[158] Therefore, a court would exclude the evidence seized pursuant to the warrant, and the prosecution of the entire al-Qā'ida cell would fail.

The result would be different if more evidence had been presented to the magistrate. Suppose that (1) the magistrate issued the warrant based on one legally obtained piece of evidence and one illegally obtained piece; and (2) had the illegal piece of evidence never been presented to the magistrate, the warrant would have been unsupported by probable cause but would have fallen within the good faith safe harbor. On these facts, a court would admit the evidence seized pursuant to the warrant. Therefore, under this note's proposal, the only situation in which evidence would be excluded would be where the officers present the magistrate with very little, or very weak, evidence apart from that uncovered by the illegal predicate search.

C. Defending the Proposal

There are four advantages of this proposal. First, it is more consistent with existing doctrine than any alternative. This proposal respects the warrant requirement because, unlike the first approach, the proposal neither extends the good faith exception to warrantless searches nor continues laying the logical foundation for such an extension. This proposal respects the exclusionary rule because it prevents the good faith exception from swallowing the exclusionary rule in the way the first approach threatens to do. Finally, the good faith exception plays a vital role in step three of the proposal. Therefore, this note's proposal fits with Supreme Court doctrine better than any other approach.

Second, this proposal entails no revolutionary redefinition of the magistrate's role. The third approach risked overwhelming magistrates and shifting responsibility for defining constitutional rights away from

157. This note takes no position on the NSA program's legality. For the purposes of illustration, this example simply assumes the program to be unconstitutional.

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

Article III judges. This proposal is well-suited to be applied by trial court judges and appellate courts. Thus, it is much more feasible and prudent than the third approach.

Third, as a policy matter, this proposal recognizes that a single item of evidence should not irreparably taint a warrant if there are other untainted pieces of evidence supporting the warrant. Excluding evidence seized pursuant to a warrant on which an officer could have reasonably relied simply because some other evidence in the application was illegally seized risks overdeterring police. Conversely, admitting evidence notwithstanding a deliberate illegal predicate search as long as the officer informs the magistrate of her investigative methods risks underdeterring police. This proposal strikes a more desirable balance between the need for evidence and police deterrence. In this respect, it reconciles the deterrent purpose of the exclusionary rule with the virtues of the good faith exception better than the second or third approach.

Perhaps the best feature of this proposal is the way that it restores both the defendant and the government to the position they would have been in had the illegal predicate search not taken place. The first approach would give the government an illegitimate advantage by allowing it to profit from its misconduct. Likewise, the second approach places the defendant in a better position and the government in a worse position by automatically excluding the fruits of an illegal predicate search. This note's proposal, in contrast, restores the defendant to the position she would have occupied had her rights not been violated, and it forces the government to disgorge the benefit of its wrongful search. Both parties are placed in the status quo ante.

In the final analysis, this proposal accounts for the relevant doctrinal, practical, and normative considerations and reaches a reasonable compromise between them better than any current competing approach.

D. An Objection

One possible objection to this proposal is its complexity. The Fourth Amendment is directed at the police, so it is desirable that ordinary police officers be able both to understand what the Fourth Amendment requires and make quick practical decisions.[159] This note's proposal requires a moderate amount of reflection and consideration. One might think it asks too much of police to engage in this three-step analysis every time they need to act. This objection, however, misses the force of this note's proposal for two reasons.

First, this proposal would not change substantive Fourth Amendment jurisprudence. That is, what is and is not an illegal search or seizure remains unchanged. This proposal is a device for guiding the ex

159. *See* LaFave, *supra* note 31, at 320–21.

post facto analysis of trial judges; it is not a conduct-regulating doctrine of the Fourth Amendment. Therefore, the amount and type of knowledge required of the ordinary police officer does not change one whit under this proposal.

Second, to the extent that this proposal may affect police conduct, it gives police two incentives. First, police would have the incentive to conduct prewarrant activities legally. Because only legally obtained information can be considered by a reviewing court, police must still respect Fourth Amendment rights. Second, police would have an incentive under this proposal to gather as much evidence as possible before seeking a warrant because they can avail themselves of the good faith exception only if there is sufficient legally obtained information in the warrant application. These incentives are not difficult to understand. Thus, the complexity of this proposal is not a serious objection.

V. CONCLUSION

This note, prompted by concerns regarding the recently disclosed NSA eavesdropping program, examined the important question of whether the good faith exception applies to a warrant based on an illegal predicate search. The analysis described a critical ambiguity in *Leon*—the disparity between the narrowness of its holding and the breadth of its reasoning. This note identified and evaluated three different ways that lower courts have approached illegal predicate search cases. It found all three existing approaches at least partially unsatisfactory. Accordingly, it proposed a new three-step inquiry: (1) Was the predicate search illegal? (2) Would the warrant have been supported by probable cause even if the illegally obtained information had not been included in the warrant application? (3) Could a reasonably well-trained officer have believed that a warrant, based solely on the remaining untainted information, was valid? This reasonable, pragmatic solution accounts for the doctrinal, practical, and normative considerations at stake better than any available alternative. This proposal, if accepted by courts, would help secure Americans' right to privacy consistent with reasonable law enforcement imperatives.