SUPREME COURT OF THE UNITED STATES

No. 93–1660

ARIZONA, PETITIONER *v.* ISAAC EVANS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

[March 1, 1995]

JUSTICE STEVENS, dissenting.

JUSTICE GINSBURG has written an important opinion explaining why the Court unwisely departed from settled law when it interpreted its own jurisdiction so expansively in *Michigan* v. *Long*, 463 U. S. 1032 (1983). I join her dissent and her conclusion that the writ of certiorari should be dismissed. Because the Court has addressed the merits, however, I add this comment on its holding.

The Court seems to assume that the Fourth Amendment—and particularly the exclusionary rule, which effectuates the Amendment's commands—has the limited purpose of deterring police misconduct. Both the constitutional text and the history of its adoption and interpretation identify a more majestic conception. The Amendment protects the fundamental "right of the people to be secure in their persons, houses, papers, and effects," against *all* official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely on some of its agents. See *Olmstead* v. *United States*, 277 U. S. 438, 472–479 (1928) (Brandeis, J., dissenting). The remedy for its violation imposes costs on that sovereign, motivating it to train all of its personnel to avoid future violations. See Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1400 (1983).

The exclusionary rule is not fairly characterized as an "extreme sanction," *ante*, at 9. As Justice Stewart cogently explained, the implementation of this constitutionally mandated sanction merely places the Government in the same position as if it had not conducted the illegal search and seizure in the first place.[1] Given the undisputed fact in this case that the Constitution prohibited the warrantless arrest of petitioner, there is nothing "extreme" about the Arizona Supreme Court's conclusion that the State should not be permitted to profit from its negligent misconduct.

Even if one accepts deterrence as the sole rationale for the exclusionary rule, the Arizona Supreme Court's decision is correct on the merits. The majority's reliance on *United States* v. *Leon*, 468 U. S.

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[1]See 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, 1392 (1983). I am fully aware of the Court's statements that the question whether the exclusionary rule should be applied is distinct from the question whether the Fourth Amendment has been violated. Indeed, the majority twice quotes the same statement from the Court's opinion in *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983). See *ante*, at 8, 10. I would note that such eminent members of this Court as Justices Holmes, Brandeis, Harlan, and Stewart have expressed the opposite view. See, *e.g.*, *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (Holmes, J., dissenting); *id.*, at 477–479 (Brandeis, J., dissenting); *Whiteley* v. *Warden, Wyoming State Penitentiary*, 401 U. S. 560 (1971) (Harlan, J.); *Elkins* v. *United States*, 364 U. S. 206 (1960) (Stewart, J.); Stewart, *supra*, at 1383–1385. The majority today candidly acknowledges that Justice Harlan's opinion for the Court in *Whiteley* "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Ante*, at 11.

897 (1984), is misplaced. The search in that case had been authorized by a presumptively valid warrant issued by a California Superior Court Judge. In contrast, this case involves a search pursuant to an arrest made when no warrant at all was outstanding against petitioner. The holding in *Leon* rested on the majority's doubt "that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Id.*, at 916. The reasoning in *Leon* assumed the existence of a warrant; it was, and remains, wholly inapplicable to warrantless searches and seizures.[2]

The Fourth Amendment's Warrant Clause provides the fundamental check on official invasions of the individual's right to privacy. *E.g.*, *Harris* v. *United States*, 331 U. S. 145, 195–196 (1947) (Jackson, J., dissenting); see generally Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 571–579 (1983). *Leon* stands for the dubious but limited proposition that courts should not look behind the face of a warrant on which police have relied in good faith. The *Leon* Court's exemption of judges and magistrates from the deterrent ambit of the exclusionary rule rested, consistently with the emphasis on the warrant requirement, on those officials' constitutionally determined role in issuing warrants. See *Leon*, 468

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[2]As JUSTICE O'CONNOR observed in her dissent in *Illinois* v. *Krull*, 480 U. S. 340 (1987), "the *Leon* Court relied explicitly on the tradition of judicial independence in concluding that, until it was presented with evidence to the contrary, there was relatively little cause for concern that judicial officers might take the opportunity presented by the good-faith exception to authorize unconstitutional searches." *Id.*, at 365. I joined that dissent, and I take exception to the majority's pronouncement that today's opinion is "consistent with" it. *Ante*, at 12.

U. S., at 915–917. Taken on its own terms, *Leon*'s logic does not extend to the time after the warrant has issued; nor does it extend to court clerks and functionaries, some of whom work in the same building with police officers and may have more regular and direct contact with police than with judges or magistrates.

The Phoenix Police Department was part of the chain of information that resulted in petitioner's unlawful, warrantless arrest. We should reasonably presume that law enforcement officials, who stand in the best position to monitor such errors as occurred here, can influence mundane communication procedures in order to prevent those errors. That presumption comports with the notion that the exclusionary rule exists to deter future police misconduct systemically. See, *e.g.*, *Stone* v. *Powell*, 428 U. S. 465, 492 (1976); *Dunaway* v. *New York*, 442 U. S. 200, 221 (1979) (STEVENS, J., concurring); see generally Kamisar, *supra*, at 659–662; Stewart, *supra*, at 1400. The deterrent purpose extends to law enforcement as a whole, not merely to "the arresting officer." Compare *ante*, at 13, with *Whiteley* v. *Warden, Wyoming State Penitentiary*, 401 U. S. 560, 568 (1971). Consequently, the Phoenix officers' good faith does not diminish the deterrent value of invalidating their arrest of petitioner.

The Court seeks to minimize the impact of its holding on the security of the citizen by referring to the testimony of the chief clerk of the East Phoenix Number One Justice Court that in her "particular court" this type of error occurred "`maybe [once] every three or four years.'" See *ante*, at 13. Apart from the fact that the clerk promptly contradicted herself,[3] see *post*, at 6, this is slim evidence on which

[3]"Q. In your eight years as a chief clerk with the Justice of the Peace, have there been other occasions where a warrant was quashed but the police were not notified?

to base a conclusion that computer error poses no appreciable threat to Fourth Amendment interests. For support, the Court cites a case from 1948. See *ante*, at 13, citing *Johnson* v. *United States*, 333 U. S. 10 (1948). The Court overlooks the reality that computer technology has changed the nature of threats to citizens' privacy over the past half century. See *post*, at 4–6. What has not changed is the reality that only that fraction of Fourth Amendment violations held to have resulted in unlawful arrests is ever noted and redressed. As Justice Jackson observed: "There may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Brinegar* v. *United States*, 338 U. S. 160, 181 (1949) (dissenting opinion). Moreover, even if errors in computer records of warrants were rare, that would merely minimize the cost of enforcing the exclusionary rule in cases like this.

While I agree with JUSTICE GINSBURG that premature adjudication of this issue is particularly unwise because we have much to learn about the consequences of computer error as well as the efficacy of other preventive measures, see *post*, at 7–

"A. That does happen on rare occasions.

"Q. And when you say rare occasions, about how many times in your eight years as chief clerk?

"A. In my particular court, they would be like maybe one every three or four years.

"Q. When something like this happens, is anything done by your office to correct that problem?

"A. Well, when this one happened, we searched all the files to make sure that there were no other ones in there, which there were three other ones on that same day that it happened. Fortunately, they weren't all arrested." App. 37.

8, one consequence of the Court's holding seems immediately obvious. Its most serious impact will be on the otherwise innocent citizen who is stopped for a minor traffic infraction and is wrongfully arrested based on erroneous information in a computer data base. I assume the police officer who reasonably relies on the computer information would be immune from liability in a §1983 action. Of course, the Court has held that *respondeat superior* is unavailable as a basis for imposing liability on her municipality. See *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 663–664, n. 7 (1978). Thus, if courts are to have any power to discourage official error of this kind, it must be through application of the exclusionary rule.

The use of general warrants to search for evidence of violations of the Crown's revenue laws understandably outraged the authors of the Bill of Rights. See, *e.g.*, *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 325 (1979); *Weeks* v. *United States*, 232 U. S. 383, 389–391 (1914). "`It is a power, that places the liberty of every man in the hands of every petty officer.'" James Otis, quoted in 2 Works of John Adams 524 (C. Adams, ed. 1850), in turn *Illinois* v. *Krull*, 480 U. S. 340, 363 (1987) (O'CONNOR, J., dissenting). The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base strikes me as equally outrageous. In this case, of course, such an error led to the fortuitous detection of respondent's unlawful possession of marijuana, and the suppression of the fruit of the error would prevent the prosecution of his crime. That cost, however, must be weighed against the interest in protecting other, wholly innocent citizens from unwarranted indignity. In my judgment, the cost is amply offset by an appropriately "jealous regard for maintaining the integrity of individual rights." *Mapp* v. *Ohio*, 367 U. S.

643, 647 (1961). For this reason, as well as those set forth by JUSTICE GINSBURG, I respectfully dissent.