
THE EXPRESSIVE FOURTH AMENDMENT: RETHINKING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

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I. INTRODUCTION

The United States Supreme Court has repeatedly and forthrightly declared that “subjective purpose”—what was in the hearts and minds of individual police officers—can have no relevance to determining the reasonableness of a search or seizure under the Fourth Amendment.¹ That an officer stops one motorist but not another because of racial animus is of no moment.² That an officer stops and frisks a young man primarily to assert “the power image of the beat officer,” rather than because of actual subjective suspicion of that young man's ongoing criminality, is likewise outside the ambit of the Fourth Amendment's concerns.³ In both instances, so long as there was

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¹ See ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 374-79, 441-45 (2d ed. 2003) (summarizing cases).

² See *id.* at 441-45; *Whren v. United States*, 517 U.S. 806 (1996) (holding that alleged police racial animus is irrelevant, as is any other sort of subjective pretext, under the Fourth Amendment).

³ See *Terry v. Ohio*, 392 U.S. 1, 15 n.11 (1968). *Terry* was decided before the Court

objectively reasonable suspicion of criminality that *could have* justified these searches and seizures, what really motivated the officers conducting them does not matter.⁴

Yet the Court has equally made it clear that varying notions of “*objective purpose*” are at the heart of several central Fourth Amendment doctrines.⁵ Here I focus on one of those

had flatly declared a Fourth Amendment inquiry into subjective pretext irrelevant in its 1996 *Whren* decision. Nevertheless, the *Terry* Court spoke of, and rejected, an inquiry into the hearts and minds of police officers. Said the Court,

While the frequency with which “frisking” forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the “stop and frisk” of youths or minority group members is “*motivated by the officers’ perceived need to maintain the power image of the beat officer*, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”

Terry, 392 U.S. at 15 n.11 (citations omitted) (emphasis added). However, continued the Court, this “wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.” *Id.* at 14-15. Application of the exclusionary rule to stamp out ill police motives, concluded the Court, would be a “futile protest against practices which it can never be used effectively to control.” *Id.* at 15. Still, the Court seemed to recognize an obligation not to stamp out unacceptable police *motives* but to respond to the objectively-imposed humiliating *messages* that excessive stop-and-frisk activity might impose. As the Court explained, “courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.” *Id.* Using moralistic-sounding language recognizing the expressive power of the police and of the courts, the Court concluded: “When such conduct is identified, *it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.*” *Id.* (emphasis added).

⁴ See TASLITZ & PARIS, *supra* note 1, at 441-45.

⁵ For example, “administrative” or “special needs” searches and seizures can often be warrantless and suspicionless and are defined as those having a “programmatic purpose” other than criminal law enforcement. See, e.g., Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL’Y 1, 26-40, 62-77 (2002). This special needs category embraces a wide range of search and seizure activity: from roadblocks and drug-test-

doctrines: the good faith exception to the exclusionary rule. That exception declares that even unreasonable searches and seizures violative of the Fourth Amendment will not result in suppression of evidence *if* it was discovered in “objectively reasonable” good faith reliance on a search warrant.⁶ A phrase like “good faith” implies in common and much legal usage, however, an entirely subjective, interior state of mind.⁷ What can it mean, therefore, to say that “good faith” must be determined “objectively,” and why still use a phrase like “good faith” that ordinarily connotes greater moral culpability than simply unreasonable, that is, negligent, conduct? The Court's answers to these questions are vague and incomplete. Nevertheless, a close reading of the leading case law suggests that the Court's doctrine can best be understood as an effort to regulate the “expressive function” of policing; that is, the ways in which police exercise of the power to search and seize sends powerful messages about human worth, fundamental political values, and the nature of American peoplehood.⁸ It is the actions of and messages sent by the police as an entity, rather than of any individual officer, with which the Court is most concerned. My central thesis is that the Court sees the exclusionary rule, at

ing, to probationer home visits, records examination of pervasively regulated industries, border searches, inventory searches, administrative fire marshal warrants, and health and safety inspections. See TAsLITZ & PARIS, *supra* note 1, at 361-402.

⁶ See TAsLITZ & PARIS, *supra* note 1, at 547-48 (reviewing good faith exception's contours); *infra* text accompanying notes 20-130 (elaborating on the exception in greater detail).

⁷ See *infra* text accompanying notes 42-44.

⁸ For more on this expressive function and its role in Fourth Amendment analysis, see generally Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002) [hereinafter Taslitz, *Fourth Amendment Disrespect*] (concerning racial profiling, immigration searches, flight-based reasonable suspicion, and immigration seizures); ANDREW E. TAsLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006) [hereinafter TAsLITZ, RECONSTRUCTING THE FOURTH AMENDMENT] (arguing history supports seeing the Fourth Amendment as primarily regulating expressive political violence by the state).

least as it is understood in *United States v. Leon*,⁹ as partly serving the function of condemning the institutional *moral* culpability of the police.¹⁰ Where the police as an entity lack such moral culpability—a culpability gauged by the nature and intensity of the degrading messages that their conduct sends—they act in “good faith” and do not, therefore, merit the “punishment” of exclusion. All the Court’s language of “deterrence” as the primary purpose of the exclusionary rule seems incomplete when judged in light of this aspect of the *Leon*

⁹ 468 U.S. 897 (1984).

¹⁰I am not using the term “moral” in some broad sense of whether a police department can be labeled “good” or “bad” much like we might make a character assessment of a natural person. Rather, I am referring to *political morality*, those moral principles that our society expects to govern state actors’ public behavior in our constitutional scheme of government. See, e.g., Taslitz, *Fourth Amendment Disrespect*, *supra* note 8, at 2282-84 (reciting principles of political morality under the Fourth Amendment). The sort of moral principles enforced by the criminal law are not identical to principles of political morality because the criminal law reaches purely private actors’ conduct in addition to that of the state. Yet both sorts of moral principles aim at regulating expressive conduct injurious to the public good rather than merely to private interests. See Andrew E. Taslitz, *The Inadequacies of Civil Society: Law’s Complementary Role in Regulating Harmful Speech*, 1 MD. L. J. OF RACE, RELIGION, GENDER & CLASS 305, 320-24, 330-35, 342-55 (2001) [hereinafter Taslitz, *Civil Society*] (comparing public versus private retributive principles of political morality). Furthermore, as will be explained shortly, the moral principles at work in corporate criminal liability and police suppression liability in the context of the good faith exception to the exclusionary rule are sufficiently similar that each might shed light on the other. Cf. STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME (2006) (arguing that white collar and corporate criminal liability can only be sensibly explained by the confluence of three factors in each case: a wrongful act, a harm, and breach of a moral principle specific to that area of criminality, such as the prohibitions on deception, cheating, coercion, exploitation, disloyalty, and promise-breaking). Sharon Davies has made an analogous argument to mine, though without specifying the precise factors that should help in proving good faith, nor analyzing the importance of entity over individual liability, nor making the corporate criminal liability analogy. See Sharon L. Davies, *The Penalty of Exclusion: A Price or Sanction?*, 73 S. CAL. L. REV. 1275 (2000) (arguing that the exclusionary rule is best understood as a “sanction” designed to communicate messages of “wrongful” police behavior rather than a “price” imposed for engaging in inefficient conduct).

rationale. Furthermore, deterrence is best understood in this context as deterring morally condemnable police conduct.¹¹ Similar moral condemnation of an entity arises in a sister area of law—corporate criminal liability—and I will further argue here that an analogy to such liability sheds light on the Court's approach to good faith and suggests refinements to the latter doctrine.

Under one version of the justification for corporate criminal punishment, each corporation is unique, a distinct entity with its own personality. That personality and the accompanying existence of a corporate mens rea inhere in the corporation's policies, structure, and actions. Corporate character and mens rea are not fictions but social realities and are understood as such by the American people. When corporations act with indifference to human worth, they send a message inconsistent with equal human dignity—a message that can be nullified only by the special power of condemnation inherent in criminal punishment.¹² My argument here is that the Court's concept of “good faith” articulated in *Leon* embraces a similar notion of the moral culpability of an entity—in this case, the police—whose actions can send degrading messages about human worth. Imposing criminal entity liability on society's primary enforcers of the criminal law (police departments) is, however, neither practical nor necessary. Instead, the Court sees the exclusionary rule as nearly as effective a way as criminal punishment for rejecting state messages of human degradation.¹³

Furthermore, for the Court, the necessary moral culpability must be assumed whenever the police engage in an unconstitutional *warrantless* search and seizure. But when the police have gone to the trouble of seeking advance judicial review by obtaining a warrant, the Court reverses this presumption, assuming that an unconstitutionally-issued warrant reflects at most mere tort negligence by the police, thus not requiring the

¹¹See *infra* text accompanying notes 36-71.

¹²See *infra* text accompanying notes 144-202.

¹³See *infra* text accompanying notes 19-143.

criminal-law-like condemnatory punishment of the exclusionary rule. Such punishment, as with criminal punishment of corporations under a character-based theory of corporate liability, should, in this reading of the Court's view, be reserved *only* for instances of gross, that is, criminal, negligence, or for still more culpable mental states, such as recklessness, knowledge, and purpose.

The Court's re-conceiving of the exclusionary rule as a form of condemnatory punishment of unconstitutional police action is incomplete. The Court still pays lip service to deterrence as a goal of exclusion and certainly gives some version of deterrence weight. But the primary concern with the moral culpability of the police and the expressive function of their conduct, I will argue, is implicit in the *Leon* opinion and is not identical with traditional understanding of the deterrence goals. I will also argue that the Court's seeming attachment to multiple goals (despite its protestations of overriding commitment to the one of deterrence) and its confusing and half-hearted commitment to any single, clear rationale for the exclusionary rule lead to inconsistent doctrinal outcomes and vague opinions. I do not maintain, therefore, that the analogy between corporate criminal liability and the good faith exception is a perfect fit or that the concepts are identical. But I do suggest that the analogy is an enlightening one.¹⁴

In particular, courts, legislatures, and theorists wrestling with how to identify and rank degrees of corporate mens rea have come up with a list of very specific indicators of the culpability of entities and very specific actions that these entities can take to protect themselves from liability. These indicators, it turns out, with slight modifications, are also good measures of the moral culpability of police departments for unconstitutional searches and seizures by individual officers.¹⁵ Happily, the corresponding suggestions for how police departments can avoid being found culpable in such circumstances show how a stricter adherence to the moral culpability model posited here will do a

¹⁴See *infra* text accompanying notes 228-365.

¹⁵See *infra* text accompanying notes 228-365.

better job at deterring police wrongdoing than does the current weaker, muddled version of the good faith exception. I am no fan of the good faith exception for a variety of reasons, including my belief that suppressing unconstitutionally seized evidence serves important expressive and other functions beyond simply punishing the police.¹⁶ Nevertheless, if the exception is to continue its life, as it undoubtedly will, an energetic commitment to an expressive, condemnatory model of police punishment via the exclusionary rule will do far more good than the feint-hearted version of the rule now embraced by the Court.

After this Part I introduction, this article will proceed in three primary parts: in Part II, first, an examination of aspects of *Leon's* rationale that highlight implicit emphases on moral culpability; second, in Part III, an overview of the law and theory of corporate—as opposed to individual—criminal liability; and third, in Part IV, an explanation of how corporate liability sheds better light on the soundest meaning of the good faith exception to the exclusionary rule. Along the way, I will explore the significance of post-*Leon* decisions for my thesis. My analysis, if accepted by the Court, would lead to greater judicial intrusiveness into policing by creating stronger incentives for police departments to discourage Fourth Amendment violations by individual officers. On the other hand, the courts would leave police wide discretion in going about this task, and police compliance would give them a safe harbor for avoiding the shoals of the exclusionary rule. The greater intrusiveness aspect of these recommendations would likely lead this Court, I suspect, to shy away from fully embracing the implications of *Leon's* logic. Nevertheless, some state courts acting under their state constitutions might be more receptive to incentives-based institutional reform of police search and seizure practices, as

¹⁶*Cf.* Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 685-91 (explaining how a properly-applied exclusionary rule can prompt police in the area of eyewitness identification to make use of the latest scientific research in ways least prejudicial to criminal suspects); *see infra* text accompanying notes 356-61.

these courts have recently been concerned with other sorts of police practices.¹⁷ Furthermore, the safe harbor aspect of these proposals might garner enough political support for legislative action in some states and might even prove attractive enough to certain police departments to encourage self-reform and, where that has happened, advocacy on behalf of this modified good faith exception by local prosecutors might occur.¹⁸ At a minimum, the analysis here will, I hope, at least foster debates over the current good faith exception's wisdom in ways that will shed new light on that doctrine. That new light must, however, first be shone on *Leon*.

II. *UNITED STATES V. LEON*

A. *The Majority Opinion*

For my purposes, the precise facts of *Leon* do not matter. All parties there had effectively agreed for purposes of the appeal to the United States Supreme Court that that case involved a search of homes and cars, and a resulting seizure of drugs, pursuant to a warrant that was *not* based on probable cause. The Government's petition for certiorari presented this question: "[W]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good faith reliance on a search warrant that is subsequently held to be defective."¹⁹ The Court answered this question in the affirmative, concluding that, "in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions."²⁰

¹⁷See Kruse, *supra* note 16, at 685-91 (explaining analogous point); *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005) (using state constitution's due process clause to promote police institutional change concerning the risk of convicting the innocent).

¹⁸*Cf.* Kruse, *supra* note 16, at 690-91, 696-718 (recounting factors that encourage law enforcement and other stakeholders to buy into institutional reform).

¹⁹*United States v. Leon*, 468 U.S. 897, 905 (1984).

²⁰*Id.*

The intended function that the Court claimed to be the primary one was that of deterring police violations of Fourth Amendment rights. This purpose was not to be pursued single-mindedly, however, for the degree to which exclusion of relevant evidence fosters the benefit of reduced police misconduct must, said the Court, be weighed against the “substantial social costs exacted” by an “unbending application of the exclusionary sanction to enforce ideals of governmental rectitude” that “impede unacceptably the truth-finding functions of judge and jury.”²¹ To let the guilty go free or to plea bargain for reduced sentences because of the defense's using the hammer of the suppression motion to enhance its defense bargaining power would, the Court concluded, generate “disrespect for the law and administration of justice,” at least where police transgressions were minor or were done in objectively reasonable good faith.²²

“Substantial and deliberate” violations, the Court agreed, require a stiff sanction to deter police wrongdoing.²³ But such deterrence is unlikely significantly to be advanced where the police have acted in objectively reasonable good faith pursuant to a warrant. A good faith exception to the exclusionary rule would, said the Court, also encourage police resort to warrants, while magistrates can be trusted to issue such warrants only when proper. Indeed, for this reason, the Court explained, it has

²¹*Id.* at 907 (quoting *United States v. Payner*, 447 U.S. 727, 734 (1980)).

²²*Id.* at 907-08 (quoting in part *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

²³*Id.* at 908-09. In retrospect, *Leon's* insistence on punishing “deliberate” violations seems odd given the Court's later unequivocal rejection of the relevance of inquiries into individual officers' subjective mental states for any Fourth Amendment purposes. *See supra* text accompanying notes 1-4. Moreover, the Court's initial justification for its good faith approach in *Leon* is that good faith searches are not deliberate, therefore in no need of deterrence. But today, whether a violation is deliberate would not matter, so “deliberate” violations are not necessarily subject to the exclusionary sanction. That then begs the question, “What violations are still subject to the exclusionary sanction?” While providing no overarching answer to this question, the Court's actions suggest the following response: “very few.” *See, e.g.*, Margaret L. Paris & Andrew E. Taslitz, *Catering to the Constable: The Court's Latest Fourth Amendment Cases Give the Nod to Police*, 19 A.B.A. SEC. CRIM. JUST., Fall 2004, at 5.

always declared that the magistrate's judgment to issue a warrant is entitled to great deference.²⁴ Magistrates can be administratively sanctioned adequately by intra-judicial branch methods in the rare cases where they go too far. Penalizing the police for the magistrates' improper performance of their duties makes no sense because "Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions."²⁵

Similarly, police who act in good faith could not have, and therefore will not in the future have, their behavior altered by suppression, unless exclusion makes them less willing to do their duty, an undesirable outcome. Quoting *Michigan v. Tucker*, the Court explained:

"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. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."²⁶

²⁴*See Leon*, 468 U.S. at 914; *see also Illinois v. Gates*, 462 U.S. 213, 236 (1983) ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts" (internal quotations omitted)).

²⁵*Leon*, 468 U.S. at 917. Of course magistrates can be lay people, who are neither judges nor lawyers. *See Shadwick v. City of Tampa*, 407 U.S. 345, 347 (1972). They also face powerful political pressures to approve warrant applications, even in the face of questionable showings of probable cause. *See, e.g., Taslitz, Fourth Amendment Disrespect*, *supra* note 8, at 2293-98 (discussing the powerful political pressures that successfully prodded district court Judge Baer to reconsider his granting of a suppression motion).

²⁶*Leon*, 468 U.S. at 919 (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)). *Tucker* was a *Miranda*-rule case rather than a Fourth Amendment one. *Tucker* held that, where the police acquire the name of a potential witness from a defendant in the course of obtaining a *Miranda*-violative statement, the testimony of that witness will not necessarily be excluded pursuant to the exclusionary rule, even though the defendant's

The Court concluded that this weakening of the deterrence rationale was particularly true where officers acted in objectively reasonable good faith reliance on a warrant. In such circumstances, “Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”²⁷ Suppression of evidence obtained pursuant to a warrant should be ordered, therefore, “only in those *unusual* cases in which exclusion will further the purposes of the exclusionary rule.”²⁸

The Court cataloged four examples of such “unusual” cases. Repeatedly, the Court declared that it “eschew[ed] inquiries into the subjective beliefs of law enforcement officers,”²⁹ warning that “sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”³⁰ Its four major purportedly “objective” examples of unreasonable police reliance included these: (1) where the magistrate has “wholly abandoned his judicial role,” acting more like a police officer than a neutral member of the judiciary; (2) where the affiant’s statements in obtaining the warrant were knowingly false or made in reckless disregard of the truth; (3) where the warrant was “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; and (4) where the warrant is so “facially deficient” in failing to particularize the places to be searched or the things to be seized that “the executing officers

statements themselves will be excluded. *Tucker* proved to be a harbinger of things to come, with more recent case law further dramatically narrowing the scope of the exclusionary rule in the *Miranda* context. See TASLITZ & PARIS, *supra* note 1, at 671-72 (summarizing case law); ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE SECOND EDITION 2005 SUPPLEMENT 99-103 (2005) [hereinafter 2005 SUPPLEMENT] (further summarizing still more recent precedent).

²⁷ *Leon*, 468 U.S. at 921.

²⁸ *Id.* at 918 (emphasis added).

²⁹ *Id.* at 922-23 n.23.

³⁰ *Id.* at 923 n.23 (quoting *Massachusetts v. Painten*, 398 U.S. 560, 565 (1968)).

cannot reasonably presume it to be valid."³¹

Leon thus purported to embrace a concept of *objectively reasonable* good faith, and, at one point, in quoting the *Tucker* case, the Court momentarily sounded like ordinary tort negligence by the police was sufficient to show unreasonable conduct.³² A careful reading of the portions of the majority opinion just summarized, viewed in light of additional language in that opinion, and seen in the context of the dissenting Justice's critiques and several of the Court's later holdings on the subject, demonstrate, however, that the Court in fact made far more culpable conduct—at least at the level of gross or criminal negligence—a pre-requisite to suppression pursuant to a warrant.³³

Moreover, although the Court's rejection of subjective mental state inquires was incomplete, as I will explain shortly, yet it also emphasized a concept of moral culpability judged primarily at the level of the police department as an entity rather than at the level of the individual officer.³⁴ I will address three major arguments here that the Court adopted a standard of culpability akin to at least criminal negligence while still being under the influence of some subjective culpability residue: first, its choice of the "good faith" moniker rather than simply one of negligence; second, its frequent use nevertheless of other, subjective terminology; and third, its articulation of a standard of reasonableness that sets a bar too high to constitute ordinary

³¹See *id.* at 923-24, 926. In crafting these exceptions, the Court respectively cited *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (magistrate accompanying police to search site to determine what material could be seized as obscene rendered the magistrate an "adjunct law enforcement officer"); *Franks v. Delaware*, 438 U.S. 154 (1978) (placing the burden on the defendant to show that an otherwise apparently proper warrant should be invalidated because the statements in the supporting affidavit were knowingly false or made in reckless disregard of the truth); *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part) (noting importance of indicia of probable cause); *Massachusetts v. Sheppard*, 468 U.S. 981, 988-91 (discussing facial deficiencies).

³²See *supra* text accompanying notes 26-27 (noting *Tucker* reference to exclusion's deterring "at the very least negligent . . . conduct").

³³See *infra* text accompanying notes 36-131 (supporting this proposition).

³⁴See *infra* text accompanying notes 62-71.

negligence—indeed that is thoroughly inconsistent with mere ordinary tort negligence, which is, after all, likely what is required to find any substantive Fourth Amendment violation in the first place.³⁵

B. Why Leon's "Good Faith" Test Requires More Than Ordinary Tort Negligence

1. The Common Everyday and Legal Meanings of "Good Faith"

If the standard the *Leon* Court adopted is one of ordinary tort negligence, then why does the Court label the test one of "good faith?" In ordinary usage, according to the *Microsoft Encarta College Dictionary*, "good faith" means "honesty of intention" or an effort to fulfill an obligation, such as an "effort to fulfill . . . [a] contract."³⁶ These two related meanings imply both goodness of heart³⁷ and faith or fidelity to an obligation.³⁸ Obligations are, of course, owed to others, presupposing actions taken in relationships.³⁹ Those others can, however, be individuals, organizations, or even nations, for we each, for example, owe fidelity to our spouses, our churches, and our government.⁴⁰ To act in bad faith is a grievous moral wrong, involving either a desire to breach important duties or a thoroughgoing indifference to them, revealing a hardness of heart.⁴¹

³⁵See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 32-40 (1997) [hereinafter AMAR, *CRIMINAL PROCEDURE*].

³⁶MICROSOFT ENCARTA DICTIONARY 618 (2001) [hereinafter MICROSOFT].

³⁷See, e.g., *Wikipedia, the Free Encyclopedia*, <http://en.wikipedia.org/wiki/Good-faith> (last visited June 28, 2006) ("Good faith . . . is the mental and moral state of honesty, conviction as to the truth or falsehood of a proposition or body of opinion, or as to the rectitude or depravity of a line of conduct, even if the conviction is objectively unfounded.").

³⁸See *id.* (noting that, in natural law, as in positive law, "good faith" helps to determine the "degree of *right or obligation* prevailing in the various forms of human engagements," being prescriptively "an indispensable requirement . . . of acquiring

In law, “good faith” can also connote subjective wrongdoing,⁴² yet

dominion or freeing oneself from a burden”).

³⁹See *id.* (listing as examples of good faith only instances of relationships, generally ones of mutual obligation, with others).

⁴⁰*Cf.* GREEN, *supra* note 10, at 98-104 (defining “loyalty” as “being true or faithful to someone or something—having a `persevering commitment to some associational object,” which may be an “individual, or group, or institution,” or even “causes or ideals”). Acting loyally and acting in good faith are not necessarily the same thing, for, at least in the view of some thinkers, loyal action assumes that the actor has a prima facie obligation to act in another’s or a cause’s best interests, “even when doing so would be against . . . [the actor’s] own self-interest,” *id.* at 99, arguably requiring a degree of self-sacrifice well beyond what good faith might require. *Compare id.* at 100-01 (articulating the idea of perseverance or self-sacrifice in the face of obstacles as central to loyalty) with MICROSOFT, *supra* note 36, at 618 (never mentioning “self-sacrifice” or “perseverance” in connection with “good faith”). No extended examination of the conceptual differences between loyalty and good faith is, however, necessary. One who is disloyal cannot be said to be acting with “honest intention” or with fidelity of obligation and thus cannot be acting in “good faith.” There is sufficient overlap between the concepts to make reference to one instructive in understanding the other. See Andrew E. Taslitz, *Foreword: Loyalty and Criminal Justice*, 49 HOWARD L. J. 405, 407-10 (2006) (offering more extended definition of “loyalty”); *cf.* MICROSOFT, *supra* note 36, at 513 (including among its five alternative definitions of “faith,” “Loyalty, allegiance or loyalty to somebody or something”).

⁴¹See MICROSOFT, *supra* note 36, at 102 (defining “bad faith” as “insincerity, especially as evidenced by actions that do not accord with somebody’s stated intentions.”); *cf.* OXFORD AMERICAN WRITER’S THESAURUS 324 (2004) (defining the opposite of faith as “mistrust; Disloyal to, be unfaithful to, be untrue to, betray, play someone false, break one’s promise to, fail, let down; double-cross, deceive, cheat, stab in the back”).

⁴²See, e.g., *Smith v. State*, 13 N.E.2d 562 (Ind. 1938) (“good faith,” as used in statute under which a physician was prosecuted for unlawful sale of morphine, was properly defined in a jury instruction as the honest intention that the person to whom narcotics were sold or administered was actually suffering from a physical condition suggesting that use of the narcotics might be in accord with good medical practice); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 485-88 (1960) (defining “good faith bargaining” for purposes of the National Labor Relations Act as being “bound to deal with each other in a serious attempt to resolve differences and reach a common ground,” thus requiring “a *desire* to reach agreement” to “encourage an attitude of settlement through give and take” (emphasis added)); *United States v. Manchester Farming P’ship*, 315 F.3d 1176, 1180 (9th Cir. 2003) (for purposes of awarding attorney’s fees pursuant to the “Hyde Amendment,” the required showing of “bad faith” meant “not simply bad judgment or negligence, but rather

the phrase can be given a relatively more objective meaning as well, as where the U.C.C. speaks of a duty of “good faith and fair dealing in the enforcement of a contract” or the judiciary speaks of “judging in good faith.”⁴³ In each instance, however, the notion of fidelity to an important obligation to some other person, entity,

it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; . . . it contemplates a state of mind affirmatively operating with furtive design or ill will.”); J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 228 (2002) (noting that a good faith, mistaken understanding of what the law requires, even if unreasonable, is generally a defense to tax fraud).

⁴³See U.C.C. § 1-201 (“‘Good Faith,’ except as otherwise provided in Article 5, means honesty in fact *and* the observance of reasonable commercial standards of fair dealing”), § 5-102 (“In this article, ‘Good faith’ means honesty in fact in the conduct or transaction concerned.”); see generally STEVEN J. BURTON, JUDGING IN GOOD FAITH (1994) (analyzing what it means for a judge to act in good faith and why he or she is obligated to do so). I say a “more” objective meaning because the law often arguably creates both objective and subjective components to the concept of good faith. See, e.g., STRADER, *supra* note 42, at 65 (noting mail fraud cannot be proven if the defendant acted in good faith, that is, “with good will and without intent to harm,” a seemingly entirely subjective test, yet further noting that in the context of claimed good faith reliance on the advice of counsel, such reliance must, in addition to being honest, include the client’s full disclosure of material facts to the attorney, a debatably somewhat objective question), 91 (similar analysis of the meaning of good faith in the context of securities fraud); 26 C.F.R. § 1.6664-4(b)(c) (2006) (An honest misunderstanding of the law is relevant to a good faith exception to § 662 tax penalties, but if the taxpayer claims that he relied on professional advice, such reliance “may not be reasonable or in good faith if the taxpayer knew, or *reasonably should have known*, that the advisor lacked knowledge in the relevant aspects of Federal tax law.” (emphasis added)). But see *Automobile Suits Against Manufacturers Act*, 15 U.S.C. § 1221 (defining “good faith” in a seemingly purely objective fashion as “the duty of each party to any franchise . . . to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party.”); BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “good faith” as a “state of mind” consisting of such subjective states as “honesty in belief or purpose” or “absence of intent to defraud or to seek unconscionable advantages” *and* objective states, specifically “observance of reasonable commercial standards of fair dealing in a given trade or business” or both); *United States v. Brown*, 978 F.2d 585 (10th Cir. 1992) (a good faith showing to be released from a desegregation order requires showing a consistent pattern of lawful conduct).

or even to an idea is involved.⁴⁴ Furthermore, if we do not always look to examine the relevant actor's heart, we do insist that he articulate good and sufficient reasons for his actions, reasons that only someone with good intentions and an abiding sense of concern about the duties he owes would have.⁴⁵ Breaching a duty

⁴⁴The Restatement of Contracts puts the point this way:

The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good Faith performance or enforcement of a contract emphasizes *faithfulness to an agreed common purpose* and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.

RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. A (1979); *see also* Robert H. Jerry II, *The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History*, 72 TEX. L. REV. 1317, 1336 (1994) (similar); BLACK'S LAW DICTIONARY, *supra* note 43 (including in one major definition of "good faith" as "faithfulness to one's duty or obligation"). Similarly, in the insurance context, "bad faith" on the part of an insurer often means "any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent." *Wikipedia*, *supra* note 37 (good faith is frequently applied to determine the "degree of . . . obligation"); Dayton Heidelberg Distrib. Co. v. Vineyard Brands, Inc. 74 F. App'x 509 (2003) (describing franchisee's statutory duty of dealing with each other in good faith under Ohio law as acting "in a fair and equitable manner toward each other *so as to guarantee each party* freedom from coercion or intimidation"); *cf.* AHARON BARAK, THE JUDGE IN A DEMOCRACY 65-66 (2006) (describing the mandate to act in objective good faith as a core "principle of substantive democracy," reflecting "society's fundamental conceptions about proper behavior between people," even when acting in their own self-interest (quoting in part *Roker v. Salomon*, 55 (1) P.D. 199, 279)). Barak believes, however, that the principle of good faith is too low a baseline for public law because "the public authority has a heavier duty than the one derived from the principle of good faith." *Id.* at 66. Nevertheless, his description of this baseline seems an apt guide for minimally acceptable police standards of behavior in the area of search and seizure, if not necessarily in other areas: "Person-to-person, one cannot behave like a wolf, but one is not required to be an angel. Person-to-person, one must act like a person." *Roker*, 55 (1) P.D. at 279. Barak concedes that the duty of good faith is not as widely recognized as a general minimal standard of behavior in the United States as in many other countries but that it is nevertheless recognized in specific areas of American law. *See* BARAK, *supra*, at 65-66.

⁴⁵*See, e.g.*, BURTON, *supra* note 43, (judging in good faith requires giving good reasons for actions). *See generally* STEVEN J. BURTON & ERIC G. ANDERSON, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT (1995);

of objectively reasonable good faith thus implies far more than ordinary negligence, smacking of more moral culpability than merely accidental or mistaken conduct.⁴⁶

GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson and Daniel Friedman eds., 1995); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 829-30 (1982).

⁴⁶See, e.g., *Manchester Farming*, 315 F.3d at 1181 (“bad faith’ is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it contemplates a state of mind affirmatively operating with furtive design or ill will.”); *The Nw. Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 137 n.6 (3d Cir. 2005) (To recover from an insurer for failure to pay a claim, a showing of “bad faith” “imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; *mere negligence or bad judgment is not bad faith*”). I recognize that the terms “good faith” and “bad faith” are sufficiently protean that they cannot be assigned a single clear meaning in all contexts, and their meaning might indeed be ambiguous even in a single context. See, e.g., Black’s Law Dictionary, *supra* note 43 (noting the elusive nature of the term “good faith”); GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT 1, 3 (Reger Brownsword ed., 1999) (“Good faith is an elusive idea, taking on different meanings as we move from one context to another. . . .”). Nor do I claim here to have offered anything approaching a comprehensive listing and analysis of the terms’ meanings in every area of the law in which it arises. Nevertheless, the various examples used here should be sufficient to support the idea that in law and in everyday usage bad faith connotes more than simple tort negligence, requiring either some significantly more culpable failure of obligation to another, some consciousness of wrongdoing or both.

2. The Court's Inability to Let Go of Language Smacking of the Moral Culpability Associated with Subjective Mental States

The *Leon* Court's commitment to a purely objective notion of good faith was, however, also a weak one, for the opinion is replete with references to subjective mental states.⁴⁷ Thus, the Court praised the deterrent purpose of the exclusionary rule as one that "necessarily assumes that the police have engaged in *willful*," or at least negligent, misconduct.⁴⁸ Likewise, the Court noted that it has never questioned the need for the exclusionary rule where "a Fourth Amendment violation has been substantial and deliberate."⁴⁹ Furthermore, the Court gave as one of its four primary examples of conduct that would *not* constitute good faith an affiant's *knowingly* making false statements to obtain a search warrant or doing so in reckless disregard of the truth, situations unquestionably requiring inquiry into the affiant's state of mind.⁵⁰ The Court also considered it relevant to consider "whether the warrant application had previously been rejected by another magistrate," an inquiry that arguably explores an individual officer's ill intentions in judge-shopping.⁵¹ Similarly, in a footnote, the Court cautioned that its approach was not meant to, and should not, "encourage officers to pay less attention to what they are taught [about Fourth Amendment doctrine], as the requirement that the officer act in 'good faith' is inconsistent with *closing one's mind* to the possibility of illegality."⁵² Language of "mind" rather than "reason-giving" smacks of inquiry into an officer's actual processes of thought. At a minimum, language sounding in subjective mental states suggests a concern with a level of moral culpability akin to, if not necessarily identical to, those states.

⁴⁷See *United States v. Leon*, 468 U.S. 897, 919, 907-08, 923-24 (1984).

⁴⁸*Id.* at 919.

⁴⁹*Id.* at 907-08.

⁵⁰*Id.* at 923-24.

⁵¹*Id.* at 922 n.23.

⁵²*Id.* at 919 n.20.

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3. The Illogic of “Unreasonable Unreasonableness”

Even if we accept at face value the Court's assertion that its test is a purely objective one, however, its notion of unreasonable behavior still goes well beyond ordinary tort negligence. Justice Stevens recognized this in his dissent.⁵³ Stevens noted that, under *Illinois v. Gates*,⁵⁴ probable cause is itself a practical, common-sense decision whether there is but a fair probability of uncovering contraband or evidence of crime in a particular place. Additionally, a magistrate's determination of probable cause is entitled to "substantial deference."⁵⁵ Yet, in *Leon* itself, the Court conceded that there was no probable cause for the search. The magistrate had, therefore, by definition already acted so unreasonably that his probable cause determination was no longer entitled to substantial deference, Stevens maintained. But, explained Stevens, under the *Leon* majority's good faith rule such gross magistrate negligence, unquestionably violative of the Fourth Amendment's command that all searches be "reasonable," would still be insufficient to justify suppression. Suppression would follow only if this already extreme failure of the magistrate was so beyond the pale that no officer could miss it. Explained Stevens, "when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know they are violating the Constitution."⁵⁶ The Court's approach—which, in effect, encourages the police to seek a warrant even if they know the existence of probable cause is doubtful—can only lead to an increased number of constitutional violations. To require more, as does the majority, Stevens seems to be saying, is to require a sort of super-negligence by the police. But this sort of gross negligence—above and beyond simple tort negligence—is precisely what the vast majority of jurisdictions require as the minimum for imposing criminal, rather than civil, liability.⁵⁷ It is

⁵³468 U.S. at 960 (Stevens, J., dissenting).

⁵⁴*Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁵⁵*Id.* at 236.

⁵⁶*Leon*, 468 U.S. at 975.

⁵⁷*See, e.g.*, MODEL PENAL CODE § 2.02(2)(d) (defining criminal negligence as

a form of negligence revealing a character indifferent to the harm one's conduct imposes on others.⁵⁸ For Stevens, this requirement of super-negligence was also inconsistent with the Framers' intentions. Thus, Stevens continued,

In short, the Framers of the Fourth Amendment were deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a warrant not based on probable cause. The fact that colonial officers had magisterial authorization for their conduct when they engaged in general searches surely did not make their conduct "reasonable." The Court's view that it is consistent with our Constitution to adopt a rule that it is presumptively reasonable to rely on a defective warrant is the product of constitutional amnesia.⁵⁹

The issuance of unparticularized warrants unsupported by adequate individualized suspicion was thus, for Stevens, the very core of the Framers' definition of an "unreasonable" search or seizure. To require more than this base level of unreasonableness is to render reliance on flawed warrants nearly "automatically appropriate," a position that the Framers, in Stevens' view, "would have vehemently rejected."⁶⁰

Justice Brennan, joined by Justice Marshall, dissented separately,⁶¹ but relying largely on the very different grounds to which I now turn, namely, whether the exclusionary rule aims at affecting the individual officer, the police as an entity, the judiciary, some combination of these possibilities, or society as a

involving a "gross deviation from the standard of care that a reasonable person would observe in the actor's situation") (emphasis added).

⁵⁸See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J. LAW & GENDER 381 (2005) [hereinafter Taslitz, *Willfully Blinded*] (analyzing criminal negligence in date rape).

⁵⁹*Leon*, 468 U.S. at 972 (Stevens, J., dissenting).

⁶⁰*Id.* at 970-71. For a summary of the relevant history of the Fourth Amendment supportive of Stevens' vision that guaranteeing government action only upon individualized suspicion was a core purpose of the Amendment, see TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8.

⁶¹See *Leon*, 468 U.S. at 928 (Brennan, J., dissenting).

whole.

C. Institutional Obligations

1. Suppression Aims at the Police as an Entity

The Court majority saw the exclusionary rule and the good faith exception as operating at the level of the police as an institution rather than at the level of the individual officer. On the other hand, insisted the Court, it is only the police as an institution and not other, sometimes broader, institutions or entities, such as the judiciary or society as a whole, with which good faith is concerned.⁶² Moral culpability thus generally, though not exclusively, means the moral culpability of the police *department* rather than of the beat officer, his commander, or a supervising judge.

Thus the Court declared that it rejected “the subjective good faith of individual officers” in place of objective reasonableness because only the latter “retains the value of the exclusionary rule as an incentive for the *law enforcement profession as a whole*” to act in accord with the Fourth Amendment.⁶³ The objective standard, the Court continued, “requires officers to have reasonable knowledge of what the law prohibits.”⁶⁴ The Court therefore praised Professor Jerold Israel’s observation that the major value of the exclusionary rule as a deterrent is “the impetus it has provided to police training programs that make officers aware of the limits imposed by the Fourth Amendment and emphasize the need to operate within these limits.”⁶⁵ An objective good faith exception preventing exclusion of evidence in

⁶²See *infra* text accompanying notes 63-80.

⁶³*Leon*, 468 U.S. at 915 n.13, 918-19 (majority opinion) (emphasis added).

⁶⁴*Id.* at 919 n.20.

⁶⁵*Id.* at 919 n.20 (quoting Jerold Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412-13 (1977)). The empirical data shows that, since *Leon*, Professor Israel’s observation has continued to be borne out. See, e.g., SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990* (1993).

“borderline cases,” concluded the Court, will not undermine such Fourth Amendment educational programs, “which are now viewed as an important aspect of police professionalism,” nor will it alter their tenor or encourage instructors to pay less attention to Fourth Amendment dictates.⁶⁶ To the contrary, suggested the Court, encouraging high quality, effective educational programs designed by police departments to reach each and every officer may be a *sine qua non* of objectively reasonable behavior. Indeed, noted the Court, only the “reasonably well-trained officer”—presumably as defined by the high quality of these paradigm educational programs—can be the standard for whether action is done in good faith.⁶⁷

Elsewhere in its opinion the Court analogously emphasized the *collective knowledge* of the police rather than of individual officers. Explained the Court:

References to “officer” throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a “bare bones” affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.⁶⁸

⁶⁶*Leon*, 468 U.S. at 919 n.20.

⁶⁷*See id.* at 919 n.20.

⁶⁸*Id.* at 923 n.24. A number of well-known scholars have similarly emphasized the idea of entity liability for the police as central to giving the Fourth Amendment meaning. Professor Amar thus declares:

Strict entity liability in the twentieth century makes perfect sense as the substitute for—indeed, the exact equivalent of—strict officer liability in the eighteenth century. The intervening years have brought us vastly increased bureaucratic density. The Framers' constables have become our police *departments*; their watchmen, our environmental protection *agencies*; and so on. The true locus of decisionmaking authority has shifted from the individual to the organization. The deterrence concept implicit in both the text and history of the

Importantly, however, the Court went to great pains to emphasize that it views the police as the *only* relevant institution, and the one whose ill conduct the exclusionary rule is designed to deter. Getting a warrant is presumptively the most that can be expected of a law-abiding officer, that act itself demonstrating compliance with the law. "Penalizing the officer," explained the Court, for the magistrate's error rather than his own "cannot logically contribute to the deterrence of Fourth Amendment violations."⁶⁹ Magistrates can be trusted to do their job and, where they breach that trust, there are administrative remedies internal to the operation of the judiciary and professional incentives to improve future magisterial conduct.⁷⁰ Recourse for his misdeed lies elsewhere than the exclusionary rule.⁷¹

amendment calls for placing (initial) liability at the level best suited to restricting government conduct to avoid future violations. For the Framers, that level was the constable; for us, the police department.

AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 41.

⁶⁹*Leon*, 468 U.S. at 921.

⁷⁰*See id.* at 917 n.18.

⁷¹*Id.*

2. The Dissenters

a. Brennan: The Exclusionary Rule Aims Jointly at the Institutions of the Police and the Judiciary

The dissenting Justices agreed that the constitutional rules governing suppression of evidence must ultimately aim at institutional more than individual behavior. However, the dissenters disagreed among themselves and with the majority over what institutions were of concern. Justice Brennan, joined by Justice Marshall, saw the very purpose of searches and seizures as being to obtain evidence admissible against a defendant at a criminal trial.⁷² Officers obtaining and judges admitting evidence thus work in tandem. Beyond this, the Fourth Amendment by its very terms, like all provisions of the Bill of Rights, “restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.”⁷³ Justice Brennan therefore rejected the majority’s distinction of the evidence-gathering function of the police from the evidence-admitting function of the judiciary. No such separation, argued Brennan, is justified by either the language or history of the Amendment. “It is difficult,” Brennan argued, “to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements.”⁷⁴ Accordingly, “by admitting unlawfully seized evidence, the judiciary becomes part of what is in fact a single governmental action.”⁷⁵

⁷²*Leon*, 468 U.S. at 932-34 (Brennan, J., dissenting).

⁷³*Id.* at 932.

⁷⁴*Id.* at 933-34

⁷⁵*Id.* at 933. Yet, Brennan also stressed, even within the police department, the question of incentives must be judged at the entity, not the individual, level:

b. Stevens: The Exclusionary Rule Aims at All of Society

Justice Stevens' dissent went still further, seeing the exclusionary rule as even more broadly impacting all of political society. Stevens thought the exclusionary rule preferable to civil liability against an individual officer, both because the latter would create excessive deterrence and because "it avoids the obvious unfairness of subjecting the dedicated officer to the risk of monetary liability for a misstep while endeavoring to enforce the law."⁷⁶ To avoid such unfairness, maintained Stevens, it is "[s]ociety, rather than the individual officer," who "should accept the responsibility for inadequate training or supervision of officers engaged in hazardous police work."⁷⁷ But, Stevens further argued, there are more important reasons for society's paying the price for police errors than simply avoiding unfairness to the individual officer. Democratic theory and the political-moral principles defining America as a single nation required society-wide acceptance of blame for an officer's unconstitutional misbehavior.⁷⁸ Quoting Justice Burger's statement of two decades earlier at length, as I think is merited here as well, Justice Stevens elaborated on the relevance of democratic theory. Said Stevens, through embrace of the words of Chief Justice Burger:

If the overall educational effect of the exclusionary rule is considered, application of the rule to even those situations in which individual officers have acted on the basis of a reasonable but mistaken belief that their conduct was authorized can still be expected to have a considerable long-term deterrent effect. If evidence is consistently excluded in these circumstances, *police departments* will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements.

Id. at 955 (emphasis added).

⁷⁶*Leon*, 468 U.S. at 974 n.28 (Stevens, J., dissenting). Akhil Amar, no fan of the exclusionary rule, would add, however, that the current civil liability regime falls woefully short of the mark:

In our century, however, judges for the first time have created wide zones of individual officer immunity for constitutional torts. Within these zones, the innocent citizen victim is in effect held liable and left to pay for the government's constitutional wrong. The Framers would have found the current remedial regime, in which a victim of constitutional tort can in many cases recover from neither the officer nor the government, a shocking violation of first principles, trumpeted in *Marbury v. Madison*, that for every right there must be a remedy.

AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 40-41.

⁷⁷*Leon*, 468 U.S. at 974 n.28. Again, in Amar's reading of history, this was also indeed analogous to the understanding of the Framers, who, he notes, additionally would have rejected at least any sort of subjective good faith defense to a damages award:

Eighteenth-century common law allowed suit against the officers personally, but everyone understood that the real party in interest was the government itself, which would typically be forced to indemnify officials who were merely carrying out government policy. (Without indemnification, who would agree to work for the government?) Thus, we have already seen the Maryland Farmer speaking of damage awards deriving from "the public purse"—no doubt a reference to the notorious fact that the English government had indemnified all the officials in the Wilkes affair, to the tune, it appears, of £100,000. . . . Precisely because officials would be indemnified, it was not unfair to hold them strictly liable for constitutional torts, even if they acted in the good faith (but incorrect) belief that their behavior was fully constitutional. Recall, for example, the Maryland Farmer's insistence on "ruinous damages whenever an officer had deviated from the rigid letter of the law"—and recall further that heavy damages were assessed in the Wilkes affair, even though the officials there had followed an executive practice stretching back seventy years.

AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 40. Amar's contentions that liability was strict and that there were few serious obstacles to damage awards for valid claims have been vigorously contested. See Tracy Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. REV. 925 (1997); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993). Neither challenge takes away from his point that it was ultimately the government, rather than the individual officer, who was understood to be responsible for damages for constitutional violations. Governmental *liability* is not necessarily the same as *societal responsibility* — the latter being Stevens' emphasis — except to the extent that the government is viewed as one important practical representative of society, which it would be in a damages action (there is no other practical way to make "society" pay a damages award). Outside the context of monetary damages or equitable relief, and in the context of the theory underlying the

"It is the proud claim of a democratic society that the people are masters and all officials of the state are servants of the people. That being so, the ancient rule of respondeat superior furnishes us with a simple, direct and reasonable basis for refusing to admit evidence secured in violation of constitutional or statutory provisions. Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer. Society as a whole is thus responsible and society is 'penalized' by refusing it the benefit of evidence secured by the illegal action. This satisfies me more than the other explanations because it seems to me that society—in a country like ours—is involved in and is responsible for what is done in its name and by its agents. Unlike the Germans of the 1930's and early '40's, we cannot say 'it is all The Leader's doing. I am not responsible.' In a representative democracy we are responsible whether we like it or not. And so each of us is involved and each is in this sense responsible when a police officer breaks rules of law established for our common protection."⁷⁹

Although Stevens lost his argument against the good faith exception to the exclusionary rule, his calls for democratic vicarious responsibility for others' wrongful acts has much in

Fourth Amendment, however, Stevens' broader emphasis on "society" over the "government" may make sense if "society" and "the People" are equated. See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8, at 55-61 (arguing that both the beneficiaries of, and the ultimate responsible enforcers of, the Fourth Amendment, as well as those fundamentally bearing its burdens and enjoying its benefits, are "the People"). As for Amar, he either sees the government as a whole or the People as the responsible parties—which is a bit unclear—but seems to side against the *Leon* majority's view that it is only *police liability* that matters (as distinct from other governmental entities), at least in the exclusionary rule context. Compare AMAR, CRIMINAL PROCEDURE, *supra* note 35, at 40-41 (primarily emphasizing *governmental* responsibility—though seemingly willing to make the offending sub-entity, whether the police or the EPA, pay damage awards) with AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 64-77 (1998) (primarily emphasizing the central role of "the People" under much of the Bill of Rights generally and the Fourth Amendment specifically).

⁷⁸See *Leon*, 468 U.S. at 974 n.28.

⁷⁹*Id.*

common with the majority's reasoning. The differences among Stevens, his fellow dissenter Justice Brennan, and the majority are over what social institutions are to fall within the exclusionary rule's embrace. But all three approaches emphasize concepts of primarily *institutional* fidelity, moral responsibility, and vicarious liability. The commitment to an institutional level of thinking is not monolithic, as exemplified by the majority's definition of *intentionally* false affiant statements made to obtain a warrant as necessarily done in bad faith.⁸⁰ Nevertheless, the primary focus is an institutional one.

D. Simultaneous and Post-Leon Developments

My major concern here is with the conceptual model implicit in *Leon* itself. Nevertheless, most of the few simultaneous and post-*Leon* cases decided by the Court lend further preential support for this model, with one cryptic potential exception unlikely to have much countervailing impact on future cases.

⁸⁰See *supra* text accompanying notes 30-31. Justice Blackmun, it is worth briefly mentioning, joined the majority but also wrote a separate concurrence to issue this caution:

What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.

Leon, 468 U.S. at 928 (Blackmun, J., concurring). Blackmun is obviously not accepting Stevens' notion of society-wide responsibility for Fourth Amendment violations. But, though admittedly somewhat ambiguous, Blackmun's repeated emphasis seems to be on the future impact of the good faith exception on law enforcement *as a whole*, that is, as a distinct entity separate from the individual officers comprising it and from other parts of the government.

1. *Massachusetts v. Sheppard*

*Massachusetts v. Sheppard*⁸¹ was decided the same day as *Leon*. There, a police detective drafted an affidavit in support of an application for an arrest warrant and a warrant to search Osborne Sheppard's home for specifically-described items, including a homicide victim's clothing and a blunt instrument that might have been used in the killing. Because it was a Sunday (the courts were closed), police were only able to find a warrant form for controlled substances. The affiant explained to the judge at his home that the warrant might need changes. The judge found probable cause and told the detective that the necessary changes in the warrant form would be made. But the judge never altered the form to authorize seizure of anything other than controlled substances nor to incorporate the affidavit. The judge returned the warrant and affidavit to the detective, informing him that the warrant was sufficient in form and content to authorize the search requested. The ensuing search was limited to the items listed in the affidavit, and the resulting discovery of incriminating evidence led to Sheppard's conviction of first-degree murder.

After a circuitous history leading to denial of Sheppard's suppression motion at the trial level but reversal of that ruling at the state appellate level, the case reached the United States Supreme Court limited to the question whether the officer's undisputed but mistaken belief that the warrant contained a valid, particular description, of the items to be seized was reasonable. The Court held that it was.

"The officers in this case took every step that could reasonably be expected of them,"⁸² the Court concluded. Although the warrant itself was ultimately facially defective, said the Court, that was because the detective had relied upon the judge's assurance that "everything is all right."⁸³ "[W]e refuse," the Court

⁸¹468 U.S. 981 (1984).

⁸²*Id.* at 989.

⁸³*Id.* at 990.

explained, “to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.”⁸⁴ Although a warrant-executing officer who was not involved in the application process might have to read the warrant, an issue the Court did not then need to decide, the detective in *Leon* was involved in that process in a way that gave him good reason to believe that the warrant he had obtained granted the authority he had sought.

The warrant-issuing judge may, of course, have acted unreasonably, but the Court sharply compartmentalized the judiciary and the police, refusing to hold the latter liable for the former's wrongs. Explained the Court:

In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. “[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges.” Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve.⁸⁵

⁸⁴*Id.* at 989-90.

⁸⁵*Id.* at 990-91 (alteration in original) (quoting in part *Illinois v. Gates*, 462 U.S. 213, 263 (1983) (White, J., concurring)).

2. *Arizona v. Evans*

a. *The Majority Opinion*

The Court similarly stressed the compartmentalization of the police from the judiciary in *Arizona v. Evans*.⁸⁶ When an officer stopping Isaac Evans for driving the wrong way on a one-way street checked Evans' computer records, they mistakenly indicated that he was wanted on an arrest warrant. Unbeknownst to the officer, that warrant had previously been quashed. The procedure usually followed in Phoenix, Arizona, where these events took place, was that a justice court clerk would inform the warrant section of the Sheriff's Office when a judge had ordered a warrant quashed. The clerk would note in a file that the phone call to the Sheriff's office had been made, and the Office would then remove the warrant from its computer records. In Evan's case, however, no court clerk had apparently ever made that call. The officer stopping Evans thus believed that the arrest warrant was still valid, accordingly arresting Evans. While being handcuffed, Evans dropped a marijuana cigarette, prompting a search of his car and the discovery of a bag of marijuana under the passenger's seat. The trial judge's grant of Evan's motion to suppress, after his arrest for possession of marijuana, eventually brought the case before the United States Supreme Court, which found suppression to be in error under the Fourth Amendment. Once again, as in *Sheppard*, the Court saw the error as the judiciary's, not the police department's, and the latter could not be charged with the former's errors, nor could the judiciary's errors be the basis for an exclusionary remedy:

⁸⁶514 U.S. 1 (1995). Eight years before deciding *Evans*, the Court had also decided *Illinois v. Krull*, 480 U.S. 340 (1987). I do not address *Krull* in detail here, for it does less than the other cases that I discuss to illuminate the two issues of concern to me here: moral culpability and entity liability. Nevertheless, a brief summary of *Krull* may be worthwhile.

In *Krull*, the Court extended the good faith exception from reasonable reliance on an unconstitutional warrant to reasonable reliance on an unconstitutional statute. In doing

If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon*, *the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees*. Secondly, respondent [Evans] offers no evidence that court employees are inclined to ignore or subvert the Fourth amendment or that lawlessness among

so, the Court tracked *Leon's* reasoning closely. Explained the Court, "legislators, like judicial officers, are not the focus of the [exclusionary] rule." *Id.* at 350 (alteration in original). Accordingly, paraphrasing *Leon*, the Court declared: "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 350 (alteration in original) (quoting *Leon*, 468 U.S. at 921). The Court saw no reason to deter legislators, who would not be inclined to subvert their oaths to uphold the Constitution, are not part of the law enforcement team, deliberate in a less-harried fashion than the police, and are already adequately deterred by the fear of judicial review. However, explained the Court, an officer cannot reasonably rely on a statute passed under circumstances demonstrating that the "legislature wholly abandoned its responsibility to enact constitutional laws," *id.* at 355, nor on statutory provisions "that a reasonable officer should have known . . . [were] unconstitutional." *Id.* at 355 (alteration in original). Once again, the Court emphasized, "the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers." *Id.* at 355.

Justice O'Connor, joined by Justices Brennan, Marshall, and Stevens, dissented, primarily on historical grounds:

Unlike the Court, I see a powerful historical basis for the exclusion of evidence gathered pursuant to a search authorized by an unconstitutional statute. Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment. This Court has repeatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance was the moving force behind the Fourth Amendment.

Id. at 362 (O'Connor, J., dissenting) (citations omitted). O'Connor also argued that experience and precedent showed that the legislature could not always be trusted, lacked a tradition like that of judicial independence, and lacked the particularized, fact-specific, non-political decisionmaking structure of the judiciary, there thus being still more reason to trust judges rather than legislators. At least concerning the historical analysis, Justice O'Connor likely had the better of the argument. See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8.

these actors requires application of the extreme sanction of exclusion.

Finally, and most important, there is no basis for believing the application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.⁸⁷

b. Justice O'Connor's Concurrence

Justice O'Connor wrote a concurring opinion, joined by Justices Souter and Breyer.⁸⁸ O'Connor emphasized that she saw the Court's opinion as limited to the narrow question whether the sort of error by a court employee now before the Court was one to which the exclusionary rule should apply. But O'Connor wondered whether there may have been another error, not considered by the Court, an error still focusing on unreasonable action by the police as an entity but concerning the relationship of the police to the judicial branch:

[T]he Court does not hold that the court employee's mistake in this case was necessarily the *only* error that may have occurred and to which the exclusionary rule might apply. While the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance *on the recordkeeping system itself*. Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has

⁸⁷*Evans*, 514 U.S. at 14 (citations omitted).

⁸⁸*Id.* at 17 (O'Connor, J., concurring).

ceased to exist (if it ever existed).

This is saying nothing new. We have said the same with respect to other information sources police use, informants being an obvious example. . . . Certainly the reliability of recordkeeping systems deserves no *less* scrutiny than that of informants.⁸⁹

c. Justice Souter's Concurrence

In a separate brief concurring opinion, Justice Souter, joined by Justice Breyer, while not generally questioning the wisdom of separating the police from other governmental entities for exclusionary rule purposes, did raise doubts about continued application of that separation in the context of computer error:

To [Justice O'Connor's] concurrence, which I join as well, I add only that we do not answer another question that may reach us in due course, that is, how far, in dealing with fruits of computerized error, our very concept of deterrence by exclusion of evidence should extend to the government as a whole, not merely the police, on the ground that there would otherwise be no reasonable expectation of keeping the number of resulting false arrests within an acceptable minimum limit.⁹⁰

That question has not, however, yet reached the Court in “due course,” and Souter has not since *Evans* given any indication of pushing for a breach in the liability wall between the police and other governmental actors.

⁸⁹ *Id.*

⁹⁰ *Id.* at 18 (Souter, J., concurring) (alteration in original).

d. Justice Stevens' Dissent

Justice Stevens, in dissent, rejected the wall notion entirely.⁹¹ For Stevens, the Fourth Amendment protects the right of the police to be secure “against *all* official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely some of its agents.”⁹² Accordingly, “[t]he remedy for its violation imposes costs on that sovereign motivating it to train all of its personnel to avoid future violations.”⁹³ Even accepting the inadvisable wall, however, concluded Stevens, the police needed deterring, for they do not and cannot operate in splendid isolation from other governmental actors. Police cannot simply trust the rest of government to act rightly. The police are obligated to investigate the competence of their sister state entities. In this case, said Stevens,

The Phoenix Police Department was part of the chain of information that resulted in respondent'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*. The deterrent purpose extends to law enforcement as a whole, not merely to “the arresting officer.”⁹⁴

Stevens further complained that the innocent citizen would suffer the indignity of arrest, handcuffing, and public search “simply because some bureaucrat has failed to maintain an accurate computer data base.”⁹⁵ Stevens further agreed that *Leon*

⁹¹*Id.* (Stevens, J., dissenting).

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.* at 19-20 (emphasis added) (citation omitted).

⁹⁵*Id.* at 21.

did not even apply, for the officer believed he acted pursuant to what was in reality *a non-existent warrant*. Leon's logic does not apply to such warrantless arrests.

e. Justice Ginsburg's Dissent

Justice Ginsburg also authored a dissenting opinion, joined by Justice Stevens. Ginsburg would have dismissed the writ of certiorari on the grounds that the Court had incorrectly presumed that Arizona had rested its decision on federal grounds. Without greater clarity, concluded Ginsburg, the obligation affirmatively to demonstrate the Court's jurisdiction had not been satisfied. Ginsburg was particularly concerned about the Court's too easily finding jurisdiction because, she believed, computerization raised complex questions better initially reserved to the states, acting as "laboratories for testing solutions to novel legal problems."⁹⁶

Although the main thrust of Ginsburg's opinion was that the writ should have been dismissed and that computers pose unique dangers to constitutional rights, along the way she too challenged the wisdom of the wall between the police and the rest of the government, at least where computers are involved:

In this electronic age, particularly with respect to recordkeeping, court personnel and police officers are not neatly compartmentalized actors. Instead, they serve together to carry out the State's information-gathering objectives. Whether particular records are maintained by the police or the courts should not be dispositive where a single computer data base can answer all calls. Not only is it artificial to distinguish between court clerk and police clerk slips; in practice, it may be difficult to pinpoint whether one official, *e.g.*, a court employer, or another, *e.g.*, a police officer, caused the error to exist or to persist. Applying an exclusionary rule as the Arizona court did may well supply a powerful incentive to the State to promote the prompt updating of computer records. . . .The incentive to

⁹⁶*Id.* at 23 (Ginsburg, J., dissenting).

update promptly would be diminished if court-initiated records were exempt from the rule's sway.⁹⁷

Ginsburg also cited with approval one party's argument that exclusion would encourage "policymakers and systems managers" to monitor their systems and personnel, and further approved the trial court's statement that "the mistake in Evans case was perhaps the negligence of the Justice Court, or the negligence of the Sherriff's office. But it is still the *negligence of the State*."⁹⁸ This last point, though ambiguous, might extend beyond the computer-reliance situation, suggesting the complete collapse of the police wall in all exclusionary rule analysis. In sum, *none* of the various opinions challenged the moral culpability precepts of *Leon* or its emphasis on entity liability. Indeed, the opinions generally supported these precepts. The only major dispute (except for Stevens' hint that the entire good faith exception should fall because it is based on flawed premises) was whether to treat the relevant entity as the police or the government as a whole (or at least some parts of the government other than the police). Stevens would have collapsed the wall entirely, while Ginsburg and Souter seemed willing to do so at least in the instance of computer-informed searches and seizures, and perhaps less clearly, in all cases whatsoever. Yet these three Justices have not thus far either had the opportunity, or been able, to build a majority for smashing the wall or even punching little holes in it. The *Leon* rule—subject to reservations arising from a recent case that I will next address—remains supported by the tripod of: (1) distinct (2) police entity liability (3) turning on breach of fundamental principles of political morality.

⁹⁷*Id.* at 29.

⁹⁸*Id.* at 29 n.5 (quoting App. 51).

3. *Groh v. Ramirez*

a. *Groh's Holding*

*Groh v. Ramirez*⁹⁹ is the potential outlier. I address all the major issues in *Groh* here for several reasons. First, the initial impression left by *Groh* is that it is inconsistent with *Leon's* model of good faith. I want to counter that impression while also considering the implications of its nevertheless turning out to be correct. Second, the various opinions in *Groh* do not clearly parse out the remedial question from the substantive one. The two questions are indeed intertwined. In some sense this must always be so, for the more egregious the substantive violation, the less likely that it was made in good faith. Indeed, for violations of the particularity requirement—the substantive question involved in *Groh*—the *Leon* court had expressly declared the availability of the good faith exception to be contingent on the severity of the substantive mistake.¹⁰⁰ Relatedly, if there is reason to believe that the substantive violation found in *Groh* would not today be recognized by the new Roberts' Court, then the remedial portion of the opinion might also carry less current precedential weight. Finally, the interchanges among the majority and dissenting Justices in *Groh* concerning both the substantive and remedial issues clarify in particular the meaning of the “mental state” requirement inherent in the good faith test.

Groh involved a magistrate who signed a warrant form based upon an application particularly describing the items to be seized: “any automatic firearms or parts of automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.”¹⁰¹ The application was sup-

⁹⁹540 U.S. 551 (2004).

¹⁰⁰ See *supra* text accompanying notes 30-31.

¹⁰¹ *Groh*, 540 U.S. at 554.

ported by a detailed affidavit establishing probable cause, cause based upon the personal observations made by a concerned citizen. The unregistered possession of these items constituted a crime.

Unfortunately, the warrant itself contained no description whatsoever of the items to be seized, which had been so carefully catalogued in the application. Nor did the warrant incorporate the application by reference. Instead, it merely described the property to be searched—the ranch residence of Joseph Ramirez—repetitively and mistakenly listing that same location as the *items* to be seized.

Jeff Groh, a Special Agent for the Bureau of Alcohol, Tobacco, and Firearms, led a team of officers in conducting the search the next day. Groh maintained that he orally described the objects of the search to Mrs. Ramirez in person and later to Mr. Ramirez by telephone. Mrs. Ramirez insisted, however, that she was told only that Groh was searching for “an explosive device in a box.”¹⁰² But the officers did not find any illegal weapons or explosives. When they left, they for the first time gave Mrs. Ramirez a copy of the warrant but not of the sealed application. The next day, upon the request of the Ramirez's counsel, Groh faxed that attorney a copy of the page of the application listing the items to be seized.

The Ramirezes' subsequent civil suit against the agents included a Fourth Amendment claim, but the district court granted summary judgment in favor of all the defendants on all claims. The Court of Appeals, by contrast, found a Fourth Amendment violation because of the absence of a particular description in the warrant but also found that all the executing officers other than Groh were protected by qualified immunity. Under *Leon*,¹⁰³ according to the appellate court, Groh, as the search team leader, lost immunity for failing to read the warrant and satisfy himself that it was not defective. The court added that a search team leader is obligated to ensure that an accurate and complete copy of the warrant is available to be given to the person whose

¹⁰² *Id.* at 555 (citation omitted).

¹⁰³ United States v. Leon, 468 U.S. 897 (1984).

property is being searched *at the search's commencement*.

(i) The Substantive Fourth Amendment
Unreasonableness Claim

The United States Supreme Court affirmed the judgment of the Court of Appeals. The Court concluded that the warrant was “plainly invalid”¹⁰⁴ because of its violation of the Fourth Amendment's particularity requirement as to the things to be seized. The accurate description in the application did not cure the defect because the application was not incorporated into the warrant by reference. There was indeed no description at all in the warrant of what was to be seized, rendering the search effectively warrantless, thus presumptively unreasonable.

The Court was thus unpersuaded that Groh's oral description, combined with the magistrate's finding of probable cause and the actual limitation of the search to the items listed in the application, “was functionally equivalent to a search authorized by a valid warrant.”¹⁰⁵ The Court also rejected the argument that the presumption of unreasonableness should not apply where, as here, the goals of the particularity requirement, such as preventing general searches, the seizure of items not authorized, or the issuance of warrants based on dubious information, have been served by other means: “[U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit.”¹⁰⁶

The Court distinguished this case from that of the magistrate in *Sheppard*,¹⁰⁷ who had specifically advised the officers that he would and had corrected any constitutional defects in the

¹⁰⁴ *Groh*, 540 U.S. at 557.

¹⁰⁵ *Id.* at 558.

¹⁰⁶ *Id.* at 560.

¹⁰⁷ *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

warrant. Because no such magistrate assurances were present in *Groh*, concluded the Court, the error was fairly described as chargeable to the police rather than only to the magistrate. Yet, the *Groh* Court added: "Nor would it have been reasonable for petitioner [Groh] to rely on a warrant that was so patently defective, *even if the Magistrate was aware of the deficiency.*"¹⁰⁸

Furthermore, the Court maintained, the particularly requirement does more than prevent general searches. It also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search,"¹⁰⁹ thus "greatly reduc[ing] the perception of unlawful or intrusive police conduct."¹¹⁰

Cryptically, however, after making these unequivocal declarations, the Court stated in a footnote that whether it would be reasonable to refuse a request to furnish a warrant at the outset of a search when, as here, the occupant of the premises was present and posed no threat to the officers "is a question that this case does not present."¹¹¹ This statement was itself preceded in that same footnote by the assertion that "neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing office to serve the warrant on the owner before commencing the search."¹¹² Yet, in a later footnote, the Court once again asserted that the "Fourth Amendment's particularity requirement assures the subject of the search that a magistrate has duly authorized the officer to conduct a search of limited scope[.]"¹¹³ a substantive right breached when the officer fails even to glance at the warrant to detect a glaring defect.

As for Groh's assertion that his oral description gave sufficient notice to all relevant persons adequate to serve the goal of

¹⁰⁸ *Groh*, 540 U.S. at 561 n.4.

¹⁰⁹ *Id.* at 561 (quoting *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated on other grounds*, *California v. Acevedo*, 500 U.S. 565 (1991)).

¹¹⁰ *Id.* at 561-62 (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

¹¹¹ *Id.* at 562 n.5.

¹¹² *Id.*

¹¹³ *Id.* at 565 n.9.

enhancing the perceived legitimacy of the search, the Court simply noted that Mrs. Ramirez disagreed, asserting that she was told only that Groh sought “an explosive device in a box,” a description, the Court concluded, that was “little better than no guidance at all.”¹¹⁴ Because the matter came before the Court in the context of a motion for summary judgment, Mrs. Groh's version of the facts, as that of the nonmovant, must, said the Court, be accepted as true and all inferences from it drawn in her favor.

(ii) Qualified Immunity

On the question whether, despite the constitutional violation of the particularity requirement, Groh was entitled to qualified immunity, the Court purported to apply the same test as in criminal cases: *Leon's* good faith exception to the exclusionary rule.¹¹⁵ According to the Court, the particularity requirement is set forth in express, clearly established constitutional language that any reasonably competent public official can understand. Furthermore, said the Court, because Groh himself prepared the flawed warrant, he could not claim that he reasonably relied on the magistrate's assurances, contrary to the situation in *Sheppard*.¹¹⁶ Even more importantly, the Court explained:

In fact, the guidelines of petitioner's own department placed him on notice that he might be liable for executing a manifestly invalid warrant. An ATF directive in force at the time of this search warned: “Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate.” *See also* . . . [§] 3220.1(23)(b) (“If any error or deficiency is discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be

¹¹⁴ *Id.* at 562-63.

¹¹⁵ Compare *United States v. Leon*, 468 U.S. 897 (1984) (articulating good faith exception) with *Malley v. Briggs*, 475 U.S. 335 (1986) (reciting the qualified immunity standard).

¹¹⁶ *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

executed. The search shall be postponed until a satisfactory warrant has been obtained.”¹¹⁷

Although the Court recognized that not every violation of an internal guideline vitiated qualified immunity, the Court “refer[red] to the ATF Order only to underscore that petitioner should have known that he should not execute a patently defective warrant.”¹¹⁸

Finally, and once again cryptically, the Court addressed the “mens rea” requirement for qualified immunity, and thus for the good faith exception:

Petitioner contends that the search in this case was the product, at worst, of a lack of due care, and that our case law requires more than negligent behavior before depriving an official of qualified immunity. See *Malley v. Briggs*, 475 U.S. 335, 341 . . . (1986). But as we observed in the companion case to *Sheppard*, “a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” *Leon*, 468 U.S. at 923 This is such a case.¹¹⁹

¹¹⁷ *Groh*, 540 U.S. at 564.

¹¹⁸ *Id.* at 564 n.7.

¹¹⁹ *Id.* at 565.

b. Simple or Super-Negligence?

This last passage is one reason that I have described *Groh* as an outlier. The Court never expressly explained *why* “[t]his is such a case,” that is, a case failing *Leon*'s good faith test. One way to read the quoted language is that the Court was agreeing that more than simple negligence is required; the Court's citation of *Malley v. Briggs*,¹²⁰ which expressly took this position, supports this reading. If that is so, the Court necessarily concluded that Groh engaged in grossly negligent conduct. Yet Groh's efforts included solid investigation and careful drafting of the warrant application and supporting affidavit, with the error involved being one of mere “proofreading,” however much the Court might have preferred alternative terminology.¹²¹ This hardly seems like extreme negligence.

An alternative way to read the Court's language is that the Court in fact rejected Groh's position that loss of good faith or of qualified immunity required more than simple negligence. Under this view, ordinary tort negligence, or perhaps even less, would suffice to overcome a claim of good faith. That would surely be a departure from the *Leon* test as the Court originally articulated it. Justice Kennedy, with whom then-Chief Justice Rehnquist joined, in fact feared that that was precisely what the Court had done:

Our Court has stressed that “the purpose of encouraging recourse to the warrant procedure” can be served best by rejecting overly technical standards when courts review warrants We have also stressed that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley*, 475 U.S. at 341 The Court's opinion is inconsistent with these principles.

¹²⁰ 475 U.S. 335 (1986).

¹²¹ See *Groh v. Ramirez*, 540 U.S. at 563 n.6 (insisting that the Court had not created a mere duty to “proofread” but rather “a duty to ensure that the warrant conforms to constitutional requirements”).

Its analysis requires our Nation's police officers to concentrate more on the correctness of paper forms than substantive rights. The Court's new "duty to ensure that the warrant conforms to constitutional requirements" sounds laudable, . . . but would be more at home in a regime of strict liability than within the "ample room for mistaken judgments" that our qualified immunity jurisprudence traditionally provides.¹²²

Justice Thomas, in his own dissent (joined in full by Justice Scalia and in part by Chief Justice Rehnquist), seemed to agree with Justice Kennedy that *Leon* required more than simple negligence but that the facts of *Groh* did not meet this threshold.¹²³ Yet, if it is correct that the majority opinion adopted a mere negligence or an even lower "strict liability" standard, then the good faith exception to the exclusionary rule (in the criminal context) and qualified immunity (in the civil context) de facto cease to exist. Remember that state conduct violates the Fourth Amendment only if that conduct is "unreasonable," a form of simple tort negligence.¹²⁴ If good faith evaporates whenever ordinary negligence is shown, then good faith evaporates entirely and forever in all cases because every Fourth Amendment violation involves such negligence, in effect occurring in "bad faith." That cannot be what the majority intended, for it never suggested that it was overruling *Leon*. Moreover, the new Roberts Court seems unlikely to accept such an interpretation of *Groh*, for that Court (or at least four of its members, with a fifth, Justice Kennedy, somewhat ambivalent on the point) is at least intent on narrowing, rather than expanding, the scope of the exclusionary rule.¹²⁵ Yet overturning *Leon* would have precisely

¹²² *Id.* at 566, 571 (Kennedy, J., dissenting).

¹²³ *Id.* at 571, 579 (Thomas, J., dissenting) ("Given the sheer number of warrants prepared and executed by officers each year, combined with the fact that these same officers also prepare detailed and sometimes somewhat comprehensive documents supporting the warrant applications, it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors.").

¹²⁴ *See supra* text accompanying notes 34-35.

¹²⁵ *See Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (majority opinion rejecting application of the exclusionary rule to knock-and-announce violations and con-

the opposite effect.

c. The Recent Weakening of Groh's Underpinnings

(i) The Significance of Notice

Moreover, whatever proposition *Groh* originally stood for, and though it is a precedent only a few years old, the conceptual underpinnings of the most anti-*Leon* or *Leon*-narrowing interpretation of *Groh* have recently been undermined. Despite the *Groh* Court's purported ambivalence on the point, its decision seemed to rest heavily on the presumption that the Ramirez's were entitled to prior notice of the limits on the officers' discretion by being presented with a copy of a particularized warrant.¹²⁶ Yet, just this past term, the Court in *United States v. Grubbs*¹²⁷ cited *Groh* unequivocally for the precisely opposite proposition:

This argument [by the Ninth Circuit below] assumes that the executing officer must present the property owner with a copy of the warrant before conducting the search In fact, however, neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposes such a requirement. See *Groh v. Ramirez*, 540 U.S. 551, 562, n.5 (2004). "The absence of a constitutional requirement that the warrant be exhibited at the outset of the search, or indeed until the search has ended, is . . . evidence that the requirement of particular description does not protect an interest in monitoring searches." *United States v. Stefonek*, 179 F.3d 1030, 1034 (CA 7 1999) (citations omitted). The Constitution protects property owners not by giving them

taining a blistering attack on any further expansion of the exclusionary rule); ANDREW E. TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE SECOND EDITION 2006 SUPPLEMENT 116-24 (2006) (summarizing and analyzing the *Hudson* decision and the differences among the various Justices' positions).

¹²⁶ See *supra* text accompanying notes 109-13.

¹²⁷ *United States v. Grubbs*, 126 S. Ct. 1494 (2006). In *Grubbs*, the Court approved use of "anticipatory warrants." See *id.*

license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the “deliberate, impartial judgment of a judicial officer . . . between the citizen and the police,” . . . and by providing, *ex post*, a right to suppress evidence improperly obtained and a cause of action for damages.¹²⁸

(ii) Rejecting "Hyper-technicalism"

That leaves as the primary remaining basis for *Groh* the Court's conclusion that the warrant itself, not merely the affidavit and application, must be particularized to ensure that the magistrate in fact approved seizing all the items listed in these other documents. Yet, as Justice Thomas pointed out in his dissent in *Groh*, the "more reasonable inference is that the Magistrate intended to authorize everything in the warrant application, as he signed the application and did not make any written adjustments to the application or the warrant itself."¹²⁹ *Groh* was a 5-4 decision, with the majority consisting of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. Justice O'Connor has since been replaced by Justice Alito, whose track record and jurisprudential philosophy make it far more likely that, facing similar issues in the future, he will reject the *Groh* majority's "hyper-technicalism" in favor of the four dissenting Justices' more flexible approaches.¹³⁰ One of the dissenters, then-Chief Justice Rehnquist, has been replaced by Chief Justice John Roberts, who purportedly has a judicial philosophy quite similar to Rehnquist's.¹³¹ Two of the remaining dissenters, Justices Thomas and Scalia, have tended thus far to vote with Justice Alito and Chief Justice Roberts on criminal justice issues, particularly those involving the Fourth Amendment.¹³² The remaining *Groh* dissenter, Justice Kennedy, seemed firm in his opposition to any dilution in *Leon*'s super-negligence standard.¹³³

¹²⁹ *Groh v. Ramirez*, 540 U.S. 551, 577 (2004) (Thomas, J., dissenting).

¹³⁰ See, e.g., David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb 1, 2006, at A21.

¹³¹ See, e.g., Sheryl Gay Stolberg & Elizabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 30, 2005, at A1; Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L. J. 1589, 1620-21 nn.194-95 (2006).

¹³² The state prevailed in four out of the five Fourth Amendment cases decided just this last term, the first in which both Justice Alito and Chief Justice Roberts

(iii) Treating Good Faith and Qualified Immunity Differently

sat on the Court for at least part of the term. One opinion was unanimous. *See* *Brigham City v. Stuart*, 126 S. Ct. 1493 (2006). Of the remaining three pro-state opinions, Chief Justice Roberts was consistently in the majority, as was Justice Alito in two of these cases, having taken no part in the decision of one of the cases. *See* *Hudson v. Michigan*, 126 S. Ct. 2159 (2006); *Samson v. California*, 126 S. Ct. 2193 (2006); *United States v. Grubbs*, 126 S. Ct. 1494 (2006) (in which Alito did not participate). In the one pro-defendant decision, *Georgia v. Randolph*, 126 S. Ct. 1515 (2006), Roberts authored a stinging dissenting opinion, while Alito again took no part in the decision. Roberts and Alito were also in the majority in a relevant First Amendment case, in which the Court held that that Amendment was not violated by the alleged demotion of a senior prosecutor for seeking a case's dismissal because a search was based on a warrant affidavit filled with lies, who also testified for the defense at the suppression motion. *See* *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006); *see also* Alan Raphael, *Bolstering the Confrontation Clause and Threatening the Exclusionary Rule*, 8 SUP. CT. PREV. 454 (2006) (analyzing the Justices' votes and ideologies on criminal justice issues during the past term).

Furthermore, although all the Justices in *Groh* said that the *Leon* good faith exception to the exclusionary rule in criminal cases and the qualified immunity doctrine in civil cases involved identical standards,¹³⁴ there is reason to believe that the Court, if directly confronted with that question, may be willing to re-think that position, at least in deed if not in word. In the recent *Michigan v. Hudson*¹³⁵ case, the Court rejected suppression as a remedy in criminal cases for knock-and-announce violations. In doing so, the Court emphasized what it saw as the enormously expanded availability since the “hey days” of its exclusionary rule jurisprudence of civil suit remedies for Fourth Amendment violations.¹³⁶ This expansion, concluded the Court, made the suppression remedy far less necessary than it had been decades ago, reasoning that could extend well beyond the knock-and-announce situation. If civil remedies are now to be viewed as preferable to the exclusionary rule, that might at least logically support a greater willingness to find police actions outside the protective cloak of qualified civil immunity relative to finding them beyond the good faith exception's shield against criminal case suppression. Under this view, *Groh*, if seen as adopting a mere negligence test, could be understood as doing so only concerning qualified immunity questions, not *Leon* good faith exception questions.

¹³⁴ *Groh*, 540 U.S. at 565 n.8.

¹³⁵ 126 S. Ct. 2159 (2006).

¹³⁶ *Id.* at 2167.

(iv) Limited to Its Facts

Groh also might easily be limited to its facts. Though not alone determinative, the *Groh* Court thought it an important factor that *Groh's* governmental employer, the ATF, had written policies mandating careful review by search team leaders of warrants to ensure their validity.¹³⁷ This *Groh* had failed to do. In effect, he was doubly negligent, first in not reviewing and correcting the warrant, second in ignoring the notice given by his employer of this task's importance and the violation of its mandatory rules, rules that may reflect its institutional judgment that the scope of its mission required particularly scrupulous care in obtaining and executing valid warrants.

d. Groh's Current Significance

The bottom line concerning *Groh's* significance is a double-edged sword. On one side of the blade, it seems unlikely that the Court will view *Groh* as reducing the *Leon* super-negligence requirement. Nor is there likely anything about *Groh* that undercuts *Leon's* application to the police as an institution rather than simply applying to individual officers—an institution sharply separate from other governmental entities, such as the judiciary.¹³⁸

On the other side of the blade, however, is the current Court's seeming growing hostility to the exclusionary rule.¹³⁹ Although the standard proposed here and implicit in *Leon's* logic requires proof of super-negligence by the police if they are to lose the good faith exception's protection, I argue that such super-negligence can be proven fairly readily absent affirmative steps taken by the police to discourage future constitutional violations.¹⁴⁰ Initially,

¹³⁷ See *Groh*, 540 U.S. at 564 & n.7; *supra* text accompanying notes 117-18.

¹³⁸ See *supra* text accompanying notes 36-137.

¹³⁹ See *supra* text accompanying notes 130-35; TASLITZ ET AL., *supra* note 125, at 116-24.

¹⁴⁰ See *infra* Parts III-IV. More precisely, the state likely has the burden of

this approach might expand availability of the exclusionary remedy, an outcome counter to the tenor of the current Court's most recent opinions. However, over time, if police do take the affirmative steps that I suggest, they will have a "safe harbor" ensuring good faith protection.¹⁴¹ Furthermore, because these steps are flexible ones empowering the police to control avoidance of suppression by numerous means, my proposal may be less invasive of law enforcement choice of means for doing their job than might more precise rules of behavior governing conduct governed by the Fourth Amendment, a sort of incentives-based approach that, I have argued elsewhere in other contexts, the Court may find appealing.¹⁴²

In any event, whether the Court ultimately accepts my proposal here or not, the proposal is nevertheless, I maintain, implicit in *Leon's* logic (if not necessarily its result) and, apart from *Leon*, is simply a good idea—at least if the good faith exception is to be retained at all. If, as I think unlikely, *Groh* instead portends the good faith exception's death, then I will be happier still, though I hope this article might then still prove to be of some value in better understanding the exclusionary rule.¹⁴³

proving the *absence* of super-negligence once a violation of the Fourth Amendment has been shown. See 2005 SUPPLEMENT, *supra* note 26, at 569 ("*Leon* suggests that the burden of showing good faith is on the prosecutor.") My position is that the state's burden should be hard to meet absent adequate evidence of police departmental efforts to prevent Fourth Amendment violations.

¹⁴¹ Cf. Robert M. Mark, *Structuring, Negotiating, & Implementing Strategic Alliances*, 1151 PLI 1 Corp 111, 121 (July/August 2006) (illustrating the "safe harbor" concept).

¹⁴² See Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: the Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006).

¹⁴³ See *infra* Part III (summarizing my reasons for opposition to the good faith exception but recognizing that some version of it is likely here to stay so long as the exclusionary rule itself survives). I want to emphasize that I see the approach that I suggest here as consistent with *Leon's* express rationale and implicit logic—a logic of super-negligence entity liability analogous to corporate criminal liability doctrine and theory—not with *Leon's* outcome or that of its progeny. In my view, the Court has been far too liberal in its application of *Leon's* logic, a point that I hope my corporate liability

E. Taking Stock

This picture of *Leon* is of a Court purportedly committed to an objective standard yet seemingly inconsistently embracing subjective tests of good faith as well. It is likewise a picture in which the objective aspects of the standard require a sort of super-negligence, evincing a grave indifference to the value of constitutional rights to others' lives and to the polity as a whole.

Moreover, the *Leon* Court focused its sight more on the institutional aspects of police wrongdoing than the individual ones while ignoring neither. Furthermore, it saw the institution of the police as akin to a separate legal person, with a distinctive personality or character apart from that of the judiciary, from the rest of the Executive branch, and from more amorphous entities like the government, or even society, as a whole.

But the idea of distinctive institutional personalities responsible for individual wrongful acts of those in their employ where those acts are reflective of a broader organizational moral culpability involving reprehensible indifference to others' fate, ranging from gross negligence to the knowing or purposeful infliction of harm, is familiar to another area of the law: corporate criminal liability. It is, therefore, to a comparison to that sister area of jurisprudence—and to the lessons it offers for the jurisprudence of search and seizure—to which I now turn.

III. CORPORATE CRIMINAL LIABILITY

A. Corporate Personality

1. Character Morality

The most helpful justification for corporate criminal liability for my purposes here lay in a group of theories of criminal liability more generally that operate under the rubric of “character morality.” All variations of character morality hold that we should be punished for causing certain harms that stem from who we are rather than merely for what we do.¹⁴⁴ Specifically, character moralities seek to condemn and deter evil character.¹⁴⁵ “Character” is an enduring disposition to behave in particular ways in particular situations. A disposition consists of both thoughts and acts, so neither thoughts nor acts alone show an evil character. Both are required.¹⁴⁶ Furthermore, most character moralities contain a strong expressive component—a primary evil being actions expressing an indifference to the fundamental worth of each unique human being.¹⁴⁷ As applied to criminal law, character moralities recognize that criminal law can deter evil acts, but deterrence alone cannot justify criminal punishment.¹⁴⁸ Civil liability, including civil administrative regulation, can often deter just as well.¹⁴⁹ Criminal liability thus holds the particular power of societal condemnation of morally culpable acts reflective of evil character.¹⁵⁰

¹⁴⁴ See LAWRIE REZNEK, *EVIL OR ILL: JUSTIFYING THE INSANITY DEFENSE* 12-13, 41-60 (1997).

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 12-13, 42; Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 6-14 (1993).

¹⁴⁷ See, e.g., Taslitz, *Civil Society*, *supra* note 10, at 313-42 (defending “communicative retributivism” while responding to public harms as the defining justification separating criminal from civil liability); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN’S L.J. 3 (2000) [hereinafter Taslitz, *Date*

2. Unique Corporate Personality

Rape] (applying this theory to date rape); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C.L. REV. 739 (1999) (applying this theory to hate crimes legislation).

¹⁴⁸ Taslitz, *Civil Society*, *supra* note 10, at 342-73 (recognizing a role for private, *not* public, retribution, along with deterrence, in tort law); Pamela Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1115-19 (1991) (tort remedies can compensate corporate victims and administrative agency regulation can deter much corporate wrongdoing, but only corporate criminal liability imposes moral stigma while filling gaps in deterrence).

¹⁴⁹ See *id.* at 313-42; Taslitz, *Two Concepts*, *infra* note 211, at 45-64.

¹⁵⁰ See, e.g., See WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY x-xi (2006) (arguing for punishing corporate entities on a sliding scale based on reasonable attribution of blame); Taslitz, *Civil Society*, *supra* note 10 (articulating a theory of the condemnatory function of criminal law). *But see* V.S. Khanna, *Should the Behavior of Top Management Matter?*, 92 GEO. L. J. 1215, 1223-24 (2003) (arguing deterrence is the primary justification, if any, for corporate criminal liability) [hereinafter Khanna, *Top Management*]; Daniel R. Fischel & Alan O. Sykes, *Corporate Crimes*, 25 J. LEGAL STUD. 319, 323 (1996) (describing corporations as mere "webs of contractual relationships consisting of individuals who band together for their mutual economic benefit").

Many commentators on, and much of the law of, corporate criminal liability justifies its imposition instead on grounds of deterrence alone and views the corporation as little more than an aggregation of its individual members.¹⁵¹ The corporate “person” is thus a fiction without an empirical reality. Notions of corporate moral culpability are therefore meaningless.¹⁵²

But, as a newer generation of scholars and policymakers have increasingly come to recognize, this vision of the corporation is seriously flawed. There are “social facts” with as real consequences for political culture as any physical, material facts.¹⁵³ In the social world, corporate persons are real. They have an identity and a unique character separate and apart from that of their individual shareholders, directors, officers, and employees.¹⁵⁴

Anecdotal evidence supports the public's vision of corporate character.¹⁵⁵ For example, bids to purchase the ice cream manu-

¹⁵¹ Professor John Hasnas made both points thus:

Corporations, like all businesses, are abstract entities. They have no mind in which to form intentions, no hearts in which to conceive a guilty will, and no bodies that can be imprisoned or corporeally punished in response to bad behavior. They have no actual existence apart from the human beings from which they are comprised. How then can corporations be subject to criminal punishment in contradistinction to (and often in addition) their individual members? How can there be corporate as opposed to individual criminal responsibility?

JOHN HASNAS, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW 23 (2006).

¹⁵² See *id.*

¹⁵³ See JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1997) (defining “social facts”).

¹⁵⁴ See, e.g., PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 32 (1984) (“[C]orporations are not just organized crowds of people. . . . [T]hey have a metaphysical-logical identity that does not reduce to a mere sum of human members.”); CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 62 (2d ed. 2001) (“Any consideration of corporate liability which ignores the complex process of social construction will be arid and unproductive.”); *id.* at 63-83 (summarizing arguments that corporations have a metaphysical, moral, and legal existence separate from the individuals comprising them).

¹⁵⁵ See Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23

facturer Ben and Jerry's sparked protests in 1999. The protesters complained that the takeover would "destroy the company's unique personality,"¹⁵⁶ one protestor describing the politically progressive company as "a living, breathing organism that is continually benefiting our planet and communities."¹⁵⁷ Job-seekers likewise know that each corporation is unique some being seen as more "flexible" and "welcoming" to the personal needs of family, others more "staid" or even "cold."¹⁵⁸ Employees also often come to identify with a particular corporation's values and attitudes.¹⁵⁹ Thus one commentator has described the distinct personalities of major oil companies: Texaco, "with its selfishness and greed cultivat[ing] a reputation for meanness and

HARV. J. L. & PUB. POL'Y 833, 847 (2000) ("Anecdotal evidence confirms that, unlike the inanimate matter of steel and glass office buildings, corporations have . . . a presence in the community . . . quite apart from that of its owners, managers, and employees.").

¹⁵⁶ William Lowther, *US in a Stir Over Ice Cream Hippies*, MAIL ON SUNDAY, Dec 19, 1999, available at 1999 WL 21947574.

¹⁵⁷ *Id.*; see also Friedman, *supra* note 155, at 847 (discussing the Ben and Jerry's protests).

¹⁵⁸ See Friedman, *supra* note 155, at 847. Friedman elaborates, noting these statements about Ben and Jerry's

betray[] the public's perception that corporations are "alive," and can act, through their agents, in specific ways. It reflects a truism that employment-seekers in the corporate world know only too well: All corporations are not alike. Each corporation has its own culture, its own way of training employees, its own preferred practices. These aspects of corporate life have a cumulative weight, and the institutionalized relationships and practices of each corporation collectively denote a unique character. And so we tend to speak of corporations "as `real' entities in ordinary language and in moral discourse . . ."

Id. at 847 (quoting in part Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 24 (1995)). Social science research supports the impressions created by anecdote. See WELLS, *supra* note 154, at 40-62 (explaining how social psychological work on the attribution of moral responsibility demonstrates that individuals attribute such responsibility to corporations and not only individuals).

¹⁵⁹ See, e.g., A. LARRY ELLIOTT & RICHARD J. SCHROTH, HOW COMPANIES LIE: WHY ENRON IS JUST THE TIP OF THE ICEBERG 111 (2002) ("Inside the organizations, team leaders and loyal workers are inundated with motivational messages about the work they do and the progress of the corporation. They come to accept and believe what they hear and do what they are asked to do.").

secrecy”;¹⁶⁰ Mobil as “the most sophisticated of American [oil companies] . . . much concerned with communications and image”;¹⁶¹ Exxon as “tranquil,” operating in a “rarefied” atmosphere “full of rhetorics of global responsibilities”; and Shell as “lordly and sedate,” with an “obsessive introversion.”¹⁶² Social scientists have likewise traced the variety of corporate personalities, and middle managers have themselves in interviews overwhelmingly opined that unethical corporate behavior stems from unique corporate cultures.¹⁶³

¹⁶⁰ ANTHONY SAMPSON, *THE SEVEN SISTERS* 196-97 (1975).

¹⁶¹ *Id.* at 193.

¹⁶² *Id.* at 8, 191; see Bucy, *supra* note 148, at 1124-27 (summarizing these studies and interviews).

¹⁶³ SAMPSON, *supra* note 160, at 11.

3. Corporate Personality as Distinct from that of Its Individual Members

Individuals may have a say in corporate decisionmaking, but many contribute to but a small part of the decisionmaking process, unaware of its totality or its implications.¹⁶⁴ Each individual contributor may have very different reasons for supporting a particular action, while many may disagree with it entirely.¹⁶⁵ Furthermore, corporate culture, once established, itself tends to shape the social norms of the individual participants, shaping their behavior as much as being shaped by it.¹⁶⁶ In these ways, among others, the corporation has an existence and behavioral propensities distinct from any individuals or their aggregation.¹⁶⁷ The law recognizes distinct corporate identity as well. Individuals come and go, yet the corporate person continues as a distinct and legally stable entity.¹⁶⁸ Corporations have rights, most of which are not different in character from those granted individuals.¹⁶⁹ Corporations can be defamed, their property stolen, their contracts wrongly broken.¹⁷⁰ The law sees them as subject to injury and worthy of redress as well as capable of harm and subject to punishment.¹⁷¹ The overall popular and legal picture of the corporation is as a person capable of acting with intentions and of modifying its actions once learning of the harmful consequences they may cause¹⁷²—the two key pre-requisites, in the view of several commentators, for moral and criminal culpability.¹⁷³

¹⁶⁴ As Professor Susanne M. Kim put it:

[I]n most instances, individual participants may contribute a small part to a collective decisionmaking process without necessarily being aware of the totality of that process. Certain individuals may be asked for their input on discrete, isolated issues without being informed of how the input will be incorporated into the bigger picture. As a result, none of them fully understand the larger implications of their singular contributions. It is not appropriate in such cases to pinpoint the final intent of the corporation on specific individuals who each played only a small role in forming the intentionality of the corporation

Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 790.

¹⁶⁵ Virginia Held, *Corporations Persons, and Responsibility*, in SHAME, RESPONSIBILITY AND THE CORPORATION 159, 171-72 (Hugh Curtler ed., 1986) (“[I]t is much more believable to think that as a multitude of persons with varying amounts of power and influence contribute to a corporate decision, the outcome is plainly shaped in ways that produce corporate ‘intentions’ quite different from those that entered into the process.”). Held offers as an example a situation in which the decision to move a corporate plant comes about, though not reflecting the true and varying intentions of any of the individual executives involved in the decision-making process. *See id.* at 171.

¹⁶⁶ *See* Kim, *supra* note 164, at 791 (“To the extent that human beings are involved in corporate actions, they act on behalf of the corporation, and within the parameters of the corporation’s goals, policies, and preferences.”); Bucy, *supra* note 148, at 1127 (“[T]he formal and informal structure of a corporation can promote, or discourage, violations of the law . . .”).

¹⁶⁷ *See* WELLS, *supra* note 154, at 1-2, 63-83 (defending this independent entity liability theory of corporate personhood against more individualistic theories of corporate responsibility); Kim, *supra* note 152, at 806 (“[C]orporations can be held responsible, both legally and morally, for their intentions, actions, and character.”).

¹⁶⁸ *See* Kim, *supra* note 164, at 786.

¹⁶⁹ *See* William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1293 (2000); BYRON L. SHERWIN, GOLEMS AMONG US: HOW A JEWISH LEGEND CAN HELP US NAVIGATE THE BIOTECH CENTURY 164-65 (2004) (arguing that corporations in practice have greater legal rights than natural persons). An important exception to the rule of corporate/natural person equality of rights is that corporations lack the protection of the Fifth Amendment privilege against self-incrimination. *See* TASLITZ & PARIS, *supra* note 1, at 719-21. Some commentators bemoan this near-equality of corporate and natural persons’ rights. *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT 43-48 (2001) (maintaining America has created corporate persons with the rights of individuals but not their moral conscience, a development so dangerous that it “threaten[s] not just American society but world society”); SHERWIN, *supra*, at 185 (“Relieving corporations of the rights and privileges of natural persons, and limiting their influence over the government, would be important steps in placing corporations under effective oversight,” though the author would nevertheless subject them to the same civil and criminal liabilities facing natural persons).

¹⁷⁰ *See* Laufer & Strudler, *supra* note 169, at 1293.

¹⁷¹ *See id.* at 1293 (noting corporate vulnerability to injury and entitlement to redress); HASNAS, *supra* note 151, at 23-29 (noting corporate exposure to criminal lia-

Perhaps the most relevant aspect of the law governing corporations from the perspective of expressive character morality is the judicial willingness to accord free speech rights to the corporate form.¹⁷⁴ The judiciary recognizes that speech is "indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."¹⁷⁵ Corporate citizens, like individual ones, are seen as having the capacity to express independent moral judgments in public discourse.¹⁷⁶ Even opponents of the granting

bility, though regretting it given the corporation's lack of a privilege against self-incrimination).

¹⁷² Says Professor Kim:

As a practical matter it is cognitively incongruous to maintain that the corporation is a fiction in light of everyday experience. We regularly observe and interact with corporations as entities. We read newspaper accounts of corporate mergers and acquisitions, follow lawsuits alleging corporate manufacturing of defective products, acknowledge corporate gifts to charities and good causes, and remit our monthly payments to utility companies. Our own experience tells us that corporations are not merely fictional creatures. To insist that they are denies the empirical reality of their existence. The more sound approach is to view the corporation as a real person with separate and independent rights and obligations rather than as an imaginary, artificial person.

Kim, *supra* note 164, at 786-87 (explaining why corporations should be held morally and criminally responsible for their wrongdoing).

¹⁷³ *Id.* at 794 ("Because a corporation has the capacity to be an intentional actor and to modify its actions after learning of unintended harmful consequences, it may be regarded as a morally responsible being."). Professor Kim elaborates:

Corporations satisfy both the input and output conditions for moral responsibility. They make decisions, have rights and duties in law, carry on nonlegal relationships with other corporations and with human persons; in short, they participate in the whole spectrum of activities and relationships we associate with persons. Not only are corporations persons in a full-fledged moral sense, but [they] are essential elements of the moral world.

Kim, *supra* note 164, at 794.

¹⁷⁴ Friedman, *supra* note 155, at 848-52.

¹⁷⁵ First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (internal citation omitted).

¹⁷⁶ Friedman, *supra* note 155, at 849-51.

of free speech rights to corporations ground their opposition partly in a fear of the power of corporations to influence public discourse and to therefore shape public norms, including those norms embodied in the law.¹⁷⁷ Corporate voices affect attitudes toward, and the content of, environmental regulation, campaign finance, religious freedoms, workplace safety, willingness to wage war, and a host of other political and legal concerns.¹⁷⁸ Corporate expression affects “discussion and debate about a community's problems, fears, and hopes, including determinations about the conduct which should be deemed laudable, and that conduct which should be condemned.”¹⁷⁹

A corporation is therefore recognized as having an identifiable persona separate from that of any individuals and capable of expressing independent judgments and attitudes “entirely unrelated to the personal views of their owners, managers, and employees.”¹⁸⁰ Consequently, corporations can express through autonomous actions their indifference to, or even intentional degradation of, human worth.¹⁸¹ This independent expressive ca-

¹⁷⁷ See, e.g., MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 179-84 (1986) (protecting corporate speech alters the balance of expressive power in society, threatening to drown out alternative points of views); OWEN FISS, LIBERALISM DIVIDED 15-16 (1996) (similar).

¹⁷⁸ See generally ROBERT W. MCCHESENEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE 21ST CENTURY (2004) (extended argument that corporate domination of the media distorts democratic policymaking in a wide range of areas); R. GEORGE WRIGHT, SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE (1997) (drawing on tobacco, internet, and other advertising examples to illustrate the corporate promotion of a hyper-commercial culture).

¹⁷⁹ Friedman, *supra* note 155, at 851-52. Friedman also notes: “Corporations, like individual members of a community, participate in the process of creating and defining social norms, and in so doing distinguish themselves from those individuals.” *Id.* at 852.

¹⁸⁰ *Id.* at 852.

¹⁸¹ See *supra* text accompanying notes 144-50 (on expressive evils of criminal conduct); SHERWIN, *supra* note 169, at 164-83 (illustrating some ways in which corporate choices have sent degrading messages about human worth); see generally ELLIOT & SCHROTH, *supra* note 159 (explaining how current corporate governance and

capacity, reflective of corporate choice and evil character, is what warrants corporate criminal liability.¹⁸² Such liability is designed to condemn the demeaning messages sent by morally inappropriate corporate action while working to achieve a form of corporate penance, redemption of evil character through contrition combined with strenuous efforts at positive personality change.¹⁸³ As one law reformer has put it, corporate "criminal liability 'sends the message' that people matter more than profits and reaffirms the value of those who were sacrificed to 'corporate greed.'"¹⁸⁴

other structures foster lies, inflicting widespread social harm to which corporations often seem indifferent); MITCHELL, *supra* note 169, at 43-48 (arguing maximization of stock price is pursued as the sole corporate goal, regardless of the impact on the worth of individual and collective lives).

¹⁸² Compare Bucy, *supra* note 148, at 1121-27 (maintaining that a corporation's "ethos"—its "characteristic spirit or prevalent tone of sentiment" is what justifies corporate criminal liability), with Kim, *supra* note 164, at 779-808 (arguing that corporations have unique characters and that evidence of such character should sometimes be admissible at criminal trials as relevant to moral and legal culpability).

¹⁸³ See Friedman, *supra* note 155, at 855; see KIM SCHLEGEL, JUST DESERTS FOR CORPORATE CRIMINALS (1990) (arguing that the condemnatory, retributive purposes of the criminal law primarily justify corporate criminal liability while also promoting deterrence and reform).

¹⁸⁴ Friedman, *supra* note 155, at 855 (quoting in part Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618-19 (1998) (footnotes omitted)).

B. Proof Problems

1. Corporate Ethos

Even if this sounds nice in theory, how can it be put into practice? After all, if a corporation has an existence independent of the individuals that compose it, how can we show that an individual action was done as the agent of a morally culpable corporation rather than as a rogue action of the individual himself, not attributable to the organization at all? Peter French began developing an answer to this question in his idea of a “corporate internal decision structure” or “CID.”¹⁸⁵ The CID consists of a flowchart defining the levels and positions within the corporation representing its decisionmaking processes, the “internal recognition” rules identifying the collective nature of those processes, and the “policy recognitors” representing the “basic beliefs of the corporation.”¹⁸⁶ These things in combination constitute corporate intention.¹⁸⁷ French explains:

[W]hen the corporate act is consistent with an instantiation or implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intention¹⁸⁸

Law professor Pamela Bucy has built on French's concept of corporate mens rea to link it more closely to corporate personality while adding a specificity improving the concept's practicability. Bucy rests criminal liability on “corporate ethos,” defined as the “abstract, and intangible character of a corporation separate from

¹⁸⁵ FRENCH, *supra* note 154, at 41.

¹⁸⁶ *Id.*; see also SCHLEGEL, *supra* note 183, at 81 (explaining these aspects of French's theory).

¹⁸⁷ See SCHLEGEL, *supra* note 183, at 81-84.

¹⁸⁸ FRENCH, *supra* note 154, at 44.

the substance of what it actually does, whether manufacturing, retailing, financing, or other activity.”¹⁸⁹ Ethos can include such “[s]uperficial things as the manner of dress and the camaraderie of the employees” and such formal things as “written goals and policies.”¹⁹⁰ The corporate ethos test does not require the state to determine what individual, if any, within a corporation committed or encouraged the criminal act. It is sufficient to show that some corporate agent did the act and was encouraged to do so by the corporate ethos.¹⁹¹ To show that reprehensible conduct occurred in the accounting department while the corporate ethos in fact encouraged criminality in the research and development division is insufficient.¹⁹² Liability must follow only when an identifiable corporate ethos has encouraged criminal behavior.¹⁹³ Bucy identifies numerous concrete ways to identify such encouragement. Here is a whirlwind summary of seven indicators of particular relevance:

1. *Hierarchy*: Are the Board of Directors so organized, or the corporate structure so complex, as to encourage either criminality or top-level ignorance of it?¹⁹⁴
2. *Corporate Goals*: For example, if the corporation values profits over all else, that might encourage criminality. The recent Enron example comes to mind.¹⁹⁵
3. *Educating Employees*: Has the corporation made adequate efforts to educate its employees about their moral and legal responsibilities?¹⁹⁶

¹⁸⁹ Bucy, *supra* note 148, at 1123.

¹⁹⁰ *Id.* at 1123.

¹⁹¹ *See id.* at 1128.

¹⁹² *See id.*

¹⁹³ *See id.* at 1127-28.

¹⁹⁴ *See id.* at 1129.

¹⁹⁵ *See id.* at 1133 (making this point); ELLIOT & SCHROTH, *supra* note 159, at 26-27, 66-69, 87-88, 117, 119 (summarizing the central aspects of the Enron fiasco).

¹⁹⁶ *See Bucy, supra* note 148, at 1134.

4. *Punishing the Current Offense*: This factor asks whether the corporation made prompt, serious efforts to investigate and punish the current offense while deterring future similar offenses.¹⁹⁷

5. *Monitoring Compliance with Legal Requirements*: This factor examines such things as sound internal audits and open door policies to create an atmosphere in which errors are actively uncovered and sought to be corrected as a matter of corporate routine.¹⁹⁸

6. *Reaction to Past Violations*: Has the corporation made redress for past wrongs and made efforts to prevent their repetition?¹⁹⁹

7. *Reward Structure and Indemnification Policies*: This last factor asks whether the compensation structure creates incentives for lawfulness or criminality. Too easy willingness of the corporation to indemnify individual malfeasants can create incentives for wrongdoing, this factor also recognizes.²⁰⁰

Most of these factors embrace a commitment to keeping corporate management and directors fully aware of criminality committed within subdivisions and units or by individuals.²⁰¹ Willful, or even negligent, blindness is not an option for a corporation wishing to avoid an attribution of ethos-induced criminality.²⁰²

¹⁹⁷ See *id.* at 1138.

¹⁹⁸ See *id.* at 1136-37.

¹⁹⁹ See *id.* at 1138-39.

²⁰⁰ See *id.* at 1139-41.

²⁰¹ See *id.* at 1105 (criticizing the Model Penal Code approach to corporate criminality as allowing the avoidance of corporate criminality where higher echelon officials “maintain unawareness” of criminality).

²⁰² See *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990) (explaining the willful blindness or “ostrich” doctrine as treating an accused as acting knowingly when he strongly suspects that he is involved in shady dealings but “takes steps to make sure that he does not acquire full or exact knowledge”); Ira Robbins, *The Ostrich In-*

These very practical factors will, it should be noted, shortly be shown to have particular salience in crafting rules for police entity liability for constitutional violations as well.

a. Collective Knowledge

Another helpful concept of corporate criminal liability is that of collective knowledge, a concept embraced by numerous courts.²⁰³ The collective knowledge concept, when applied, prevents a corporation from pleading that ignorance by a higher echelon (a relevant or important) agent of matters purportedly known only to an isolated or lower-level agent shields the corporation itself from a finding of the necessary corporate mens rea.²⁰⁴ One court elaborated thus:

[K]nowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who should then have comprehended its full import. Rather, the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.²⁰⁵

An ethos-informed version of corporate criminal liability rules might reject “collective knowledge” as a fiction that purports to

struction: Deliberate Ignorance as Criminal Mens Rea, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990). Note that under an ethos-liability model for corporate criminality, *inaction* by the corporation, that is, the absence of affirmative corporate steps to keep management and directors fully informed about criminality within the corporate ranks, is sufficient mens rea to impose corporate liability; some commentators criticize any application of the willful blindness doctrine to pure inaction, seeing that as more akin to negligence than to knowledge. See *Giovannetti*, 919 F.2d at 1230. But the corporate ethos-liability approach views gross (i.e., criminal) negligence as adequate to justify corporate punishment.

²⁰³ See *Bucy*, *supra* note 148, at 1156-57.

²⁰⁴ See *WELLS*, *supra* note 154, at 134-35 (explaining the collective knowledge doctrine).

²⁰⁵ *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738-39 (1962); see also *WELLS*, *supra* note 154, at 134 (analyzing the *T.I.M.E.-D.C., Inc.* case).

aggregate individuals' knowledge.²⁰⁶ Nevertheless, a concern with corporate character does require an inquiry into what all individuals knew and a determination whether the corporate ethos encouraged, tolerated, or permitted the ignorance of other units and of managerial agents capable of correcting errors concerning criminal conduct.²⁰⁷ In effect, the corporation is often charged

²⁰⁶ See Bucy, *supra* note 148, at 1156-57. Bucy argues that traditional tests for corporate criminal liability, specifically the respondeat superior and Model Penal Code tests, which are discussed *infra* text accompanying notes 216-32, relieve corporations from liability whenever it is not possible to identify the precise corporate agents responsible for a crime, even though it is clear that corporate conduct of some kind caused the harm. *See id.* at 1156. This failure of liability occurs because these tests require proving criminal intent by at least one corporate agent, imputing that intent to the corporation. Courts thus often turn to the collective knowledge fiction to find the necessary intent where justice seems to require it. *See id.* at 1156-57. In this way, corporations are not rewarded for a culture of ignorance or indifference. Bucy prefers the ethos standard because it avoids this fiction (adding up individual mental states to form a "corporate one") by focusing more directly and candidly on corporate actions creating an ethos that encourages criminality, actions including those permitting or enforcing widespread or upper level blindness to criminal wrongs. *See id.* at 1156-57.

²⁰⁷ For example, if a corporate agent had relevant information about criminality or engaged in it and management had implemented inadequate monitoring devices, thus not discovering the wrongdoing, or failed to investigate and correct wrongdoing that was brought to their attention, that would be evidentiary of a corporate ethos promoting criminal conduct. *See id.* at 1136-40.

Interestingly, some courts have taken the collective knowledge fiction so far as to approach an ethos-liability standard. Thus in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987), a bank's conviction for failing to report numerous customer currency transactions over \$10,000 each was affirmed, though only a single bank teller knew of the amount involved in each transaction. The relevant statute required "willful" violation, meaning knowing of the law's reporting mandate, and the trial judge had instructed the jury that aggregating individual employees' intent could establish willfulness, doing so even though there was, argued the bank, no evidence of an intent to commit the crime. Professor Wells summarized the appellate court's logic in a way that smacks of the logic of ethos-liability:

The court said that collective knowledge is appropriate in this context since "corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components." Rejecting the corporation's

with the collective knowledge of its agents if it has not implemented sound internal procedures for the discovery and dissemination of knowledge, including to the most relevant decisionmaking personnel for each particular issue.²⁰⁸

argument that it was effectively being punished for having a poor communications network, the court said that the aggregate of those components constitutes the corporation's knowledge of a particular operation, and it is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another.

WELLS, *supra* note 154, at 135.

²⁰⁸ *Cf.* Bucy, *supra* note 148, at 1155-56 (arguing correspondingly that corporations do not have a lawless ethos when even high level employees have an evil mental state but the corporation had made serious efforts to educate its employees about the specific illegality involved and made solid efforts to discourage it).

b. A Corporate Mens Rea Spectrum

Different criminal statutes provide, of course, for different degrees of mens rea, ranging from negligence, to recklessness, to knowledge, to purpose.²⁰⁹ Ordinary tort negligence is insufficient in most jurisdictions to impose criminal responsibility.²¹⁰ Only gross or criminal negligence demonstrates the extreme indifference to human worth that justifies criminal liability.²¹¹ Negligence—as a purely objective concept—is the easiest one to prove in the corporate context.²¹² But, since a corporation, while a social and legal person, is still not a human being, how can we hold it criminally responsible for such subjective state-of-mind requirements as recklessness, knowledge, and purpose? The answer: we can't. But we can do the next best thing, argue Professors William S. Laufer and Alan Strudler: we can recognize a form of “objective mens rea,” or “constructive corporate fault.”²¹³ Thus, argue Laufer and Strudler, we must ask “whether the average corporation of like size, complexity, functionality, and structure, given the circumstances presented, would have the required state of mind.”²¹⁴ The inquiry would turn on reasonable inferences rather than any subjective exploration of the subjective state of mind of a particular significant individual in the corporation and would require courts to wrestle with the same kinds of evidence and inferences involved in gauging the mental states of biological persons.²¹⁵ Thus, Laufer and Strudler state in summary:

²⁰⁹ See, e.g., MODEL PENAL CODE § 2.02 (defining these four types of mental state).

²¹⁰ See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 129-30 (3d ed. 2003).

²¹¹ See *id.* at 130; Taslitz, *Date Rape*, *supra* note 147.

²¹² Indeed, negligence, because it does not require an inquiry into a subjective state of mind or its analogues but rather involves a deviation from a desired standard of conduct, is the easiest to prove of all the “standard” mental states recited in the Model Penal Code. See Taslitz, *Willfully Blinded*, *supra* note 58, at 438-46 (analyzing

Evidence of purposeful action is reflected in a desire to engage in certain illegal behavior. Policies and practices that explicitly or implicitly promote and encourage illegality, efforts to ratify or endorse the violation of law, and express or tacit authorization, approval, consent, or support of the illegality reveal purposeful corporate action. For knowledge, courts inquire: Did the organization permit or tolerate the illegality? Was there evidence that the corporation was willing to allow the illegality? Given any evidence of actual awareness, permission, toleration, or willingness, would an average corporation of like size and structure have been aware of the nature of its conduct? A reckless entity disregards a substantial and unjustifiable risk of harm.²¹⁶

Corporate action can, therefore, be consistent with more subjective concepts of intentional, knowing, or reckless wrongdoing. But, at a minimum, corporations will face criminal negligence liability under this model for dereliction of both the duties to be informed and to create internal structures that discourage and correct socially harmful, criminally culpable behavior.

the proof advantages of criminal negligence liability over more subjective mental states); MODEL PENAL CODE § 2.02(2)(d) (defining criminal negligence).

²¹³ See Laufer & Strudler, *supra* note 169, at 1308-12.

²¹⁴ *Id.* at 1310.

²¹⁵ *Id.*

²¹⁶ *Id.*

C. *The Current State of the Law*

1. Strict Vicarious Liability Regimes

Corporate case law and legislation often purport to embody principles of strict vicarious liability through the doctrine of respondeat superior.²¹⁷ A strict liability regime is, however, inconsistent with a character morality because it can result in liability for the acts of individual agents that in no sense stem from the corporation's ethos.²¹⁸ Moreover, although strict liability regimes are intended to make corporate prosecutions easy and to prod corporate internal control mechanisms, in practice such regimes often foster corporate ignorance, internal denial, and an evasion of corrective mechanisms.²¹⁹ This is so because any evidence of wrongdoing by an agent intending to benefit the corporation can expose it to liability. It is better for the corporation, therefore, not to generate such evidence in the first place, so that the cause of a harm cannot be provably linked to a specific *corporate* actor.²²⁰ As I will discuss shortly, in practice the law is moving away from this purported embrace of a strict liability regime.

²¹⁷ See Bucy, *supra* note 148, at 1102-03. Bucy summarizes this doctrine:

Derived from agency principles in tort law, it provides that a corporation "may be held criminally liable for the acts of any of its agents [who] (1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation." As construed by most courts, the latter two requirements are almost meaningless.

Id. at 1102. *Vis-à-vis* the corporation, this doctrine exposes the entity to strict liability, liability applying in the absence of corporate wrongdoing:

Courts deem criminal conduct to be "within the scope of employment" even if the conduct was specifically forbidden by a corporate policy and the corporation made good faith efforts to prevent the crime. Similarly, courts deem criminal conduct by an agent to be "with the intent to benefit the corporation" even when the corporation received no actual benefit from the offense and no one within the corporation knew of the criminal conduct at the time it occurred. With these latter two requirements thus weakened, a corporation may be criminally liable

2. The MPC Due Diligence Regime

whenever one of its agents (even an independent contractor in some circumstances) commits a crime related in almost any way to the agent's employment.

Id. at 1102-03. *See also* V.S. Khanna, *Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?*, 37 AM. CRIM. L. REV. 1239, 1246 (2000) (equating respondeat superior with strict liability as applied in the corporate criminal context).

²¹⁸ *See* Bucy, *supra* note 148, at 1104 (noting that the respondent superior approach means that "all corporations, honest or dishonest, good or bad, are convicted if the government can prove that even one maverick employee committed criminal conduct").

²¹⁹ *See* Khanna, *Top Management*, *supra* note 150, at 1228-29.

²²⁰ *See id.* It should be noted, however, that Khanna considers strict liability and negligence standards each to have their respective benefits in certain situations but not others. *See id.* at 1231. I need not explore these subtleties here because any strict liability standard is inconsistent with a character-based morality like that embraced by ethos-liability. *See generally* Bucy, *supra* note 148. Moreover, remember that I am reviewing the law and scholarship on corporate criminal liability as an analogy to guide police liability under the good faith exception to the exclusionary rule, an exception that unquestionably is *not* based on strict liability and could not be under the Fourth Amendment's "reasonableness" test. *See supra* Part III.

Another influential model of corporate criminal liability is that of the Model Penal Code ("MPC").²²¹ Under the most commonly used of the three MPC corporate liability standards, a corporation is criminally liable if its conduct was "authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment."²²² This standard limits the respondeat superior doctrine to actions by some high-level agents.²²³

Yet, from the perspective of character morality, this is an overly-broad standard. Absent corporate mens rea revealing acts encouraged by the corporate ethos, the corporation should not be responsible even for the behavior of its high managerial agents.²²⁴ Nor, because the corporation is an entity distinct from the individuals that comprise it, should any individual's intent automatically be imputed to the corporation.²²⁵

At the same time, the MPC standard can unduly narrow criminal liability by denying it when a lower-level agent's actions were indeed the result of the corporation's ethos.²²⁶ Moreover, the MPC test creates an incentive for higher echelon officials to insulate themselves from knowledge of lower-level agents' malfeasance, an ignorance of which these employees will be

²²¹ See Bucy, *supra* note 148, at 1103.

²²² MODEL PENAL CODE § 2.07(i)(c) (Proposed Official Draft 1962). The other two situations in which the Code imposes corporate liability are for mere violations or similar offenses showing a plain legislative purpose to impose corporate liability and the conduct was of a corporate agent acting on its behalf within the scope of his employment, and an offense consisting of "an omission to discharge a specific duty of affirmative performance imposed on corporations by law." *Id.* § 2.07(i)(a), (b).

²²³ See Bucy, *supra* note 148, at 1103.

²²⁴ See *id.* at 1104-05 (noting that MPC permits imposing liability on blameless corporations even where a maverick employee acts contrary to corporate rules and practices but happens to qualify as a high managerial agent).

²²⁵ See *id.* at 1105 ("By automatically imputing the intent of an individual within the corporation to the corporation, the MPC standard, like the traditional respondeat superior standard, provides for inappropriately broad liability.").

²²⁶ See *id.* at 1105.

aware and which may, therefore, encourage their continued criminality.²²⁷

Yet the MPC makes an important nod toward a character morality by providing for a due diligence defense.²²⁸ Under this defense, a corporation can evade liability by demonstrating by a preponderance of the evidence that it exercised due diligence to prevent the crime.²²⁹ The due diligence defense squarely shifts the focus from an individual agent's knowledge and behavior to that embraced in the corporation's structure, practices, and policies—in short, in its ethos.²³⁰

A character-morality approach would also inquire into due diligence, but the burden would be on the prosecution to show *its absence* rather than on the defense to show its presence.²³¹ A sound approach to due diligence would also reject reactive fault—requiring a corporate effort to correct wrongdoing only after it is discovered—because it leaves culpable corporate indifference unpunished until the uncertain and perhaps long-coming point when the state uncovers it and, even then, insulates the corporation from liability if it thereafter falls into line.²³² Proactive fault—requiring corporate efforts to prevent wrongdoing in the first place and holding it fully responsible for

²²⁷ See *id.* at 1105; Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 670-72 (2000) (analyzing willful blindness doctrine in the corporate context and defending a variant of it).

²²⁸ See MODEL PENAL CODE § 2.07(5) (Proposed Official Draft 1962); Laufer & Strudler, *supra* note 169, at 1299-1301 (explaining the MPC due diligence defense and its state analogues), 1307-08 (defending a “proactive fault” regime attributing liability to a corporation when its “practices and procedures are inadequate to prevent the commission of a crime,” an approach that, while not identical to ethos liability, seems to have much in common with it).

²²⁹ See Bucy, *supra* note 148, at 1162-63.

²³⁰ See *id.* Under an ethos-liability standard, however, due diligence is a factor, not alone necessarily determinative, in judging the presence of a culpable ethos. See *id.*

²³¹ See *id.*

²³² See Laufer & Strudler, *supra* note 169, at 1308 (discussing reactive fault and its weaknesses).

their absence—is both fairer and a better deterrent.²³³

3. Compliance and Related Programs and Corporate Fault

Prosecutors have moved away from strict liability regimes as well by using compliance programs as evidence of due diligence, justifying diversion programs.²³⁴ *Federal Prosecutorial Guidelines for Diversion*, for example, consider such things as whether the corporation has made full disclosure of wrongdoing, implemented a well-designed and effective compliance program, failed to learn from prior mistakes, identified the culprits within the organization, disciplined them, and paid restitution.²³⁵ The United States Sentencing Commission has also stepped into the fray, adopting *Guidelines for Organizational Defendants* that

²³³ See *id.* (defining proactive fault but criticizing it and even ethos liability as creating only a form of negligence liability when, in the authors' view, corporate liability must be graded based upon corporate mens rea akin to the MPC negligence, recklessness, knowledge, purpose spectrum, an approach they label "constructive corporate fault"). I see no inconsistency between the ethos and constructive corporate fault approaches, for ethos-liability is a good guide to corporate negligence, while constructive fault recognizes that even greater degrees of evil corporate conduct can be shown. But a mens rea spectrum to impose respectively higher penalties is in one sense unimportant for my purposes, for the exclusionary rule permits only one sanction: suppression. In any event, super-negligent mental states inherently prove grossly unreasonable behavior, and the repeated references to reasonableness in *Leon* and its progeny suggest that criminal negligence, though not ordinary tort negligence, is sufficient to overcome any claim of good faith.

²³⁴ See Laufer & Strudler, *supra* note 169, at 1299. Professor Laufer has more recently cautioned that corporations sometimes structure compliance programs to enhance their reputations as good citizens and give the appearance of deterring wrongdoing rather than the reality, suggesting ways that the law can prevent corporations from snookering prosecutors. See LAUFER, *supra* note 150. Similar dangers may lurk in police departmental reform efforts, requiring vigilant defense counsel and the availability of adequate defense discovery options to prevent good faith efforts from degenerating into an elaborate police public relations campaign. See *infra* Part IV.

²³⁵ See Laufer & Strudler, *supra* note 169 at 1303; U.S. Department of Justice, *Guidance on Prosecutions of Corporations*, June 16, 1999, reprinted in BNA Compliance Manual, 41 *Prevention of Corporate Liability* 1200 (1999).

fine-tune the severity or leniency of corporate criminal sentences based upon such factors as the establishment of compliance procedures that are actually implemented and reasonably capable of reducing the prospect of criminal conduct, the implementation of special policies to address the particularly high risk of deviance in particular business sectors, the efforts made to communicate legal and ethical standards effectively to employees, the consistent discipline of both wrongdoers and those responsible for failing to detect their behavior, the taking of reasonable steps at compliance with the law via monitoring and auditing systems, and the willingness to admit guilt and cooperate with the prosecution.²³⁶

Again, these are standards seeking to identify actions stemming from flawed corporate character, guiding sentencing authorities in choosing among such penalties as community service, fines of varying sizes, structural interventions into corporate operations and management, day fines, and the suspension of business activities.²³⁷ The flaw in the *Guidelines* is only that they kick in too late—after the condemnation accompanying a verdict of guilt of a crime has been announced, based largely or entirely on inappropriate principles of strict liability.²³⁸

²³⁶ See Laufer & Strudler, *supra* note 169, at 1305-07; U.S. SENTENCING GUIDELINES MANUAL, ch. 8, *Sentencing of Organizations* (2004); Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002); Association of Corporate Counsel, *The New Federal Sentencing Guidelines for Organizations: Great for Prosecutors, Deadly For the Privilege*, www.acca.com/protected/article/attyclient/sentencing.pdf (March 2005); LAUFER, *supra* note 150, at xiii, 42-43, 63-65, 71, 103, 112, 115, 118-19, 134, 139, 184, 191-92, 195 (summarizing and analyzing the most recent versions of the federal organizational sentencing guidelines and related policies).

²³⁷ See GUIDELINES MANUAL, *supra* note 236, §§ 8A1-8D, at 468-512; STRADER, *supra* note 42, at 323-24 (summarizing some of these penalties); HASNAS, *supra* note 151, at 45-55 (summarizing many aspects of the organizational guidelines and the incentives they create in detail).

²³⁸ See Bucy, *supra* note 148, at 1160. See generally Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 OHIO ST. J. CRIM. L. 487 (2004) (summarizing strengths and weaknesses of the federal organizational guidelines and proposing remedies).

In sum, both the law of, and commentary on, corporate criminal liability are moving toward—without having yet reached—a character-based model condemning serious culpable indifference stemming from a unique and independent corporate personality. This model of corporate liability is designed to encourage internal corporate systems for the generation and dissemination of information about wrongdoing, the creation of proactive compliance systems and auditing procedures, the deterrence of future crimes, the education of employees in proper moral and legal standards, and the swift punishment of wayward individuals.

Corporations implementing the proper systems, however, have not engaged in *corporate* wrongdoing and should not be punished for resulting harm. Some commentators have gone even further, seeing the level of ambiguity of criminal statutory prohibitions as so extraordinarily high as also to justify a true “mistake of law” defense where a corporation could not reasonably have been on notice that the conduct it was encouraging or tolerating was *criminal*.²³⁹

This fault-based model of organizational moral culpability, with some fine-tuning, turns out to be a helpful model for understanding *Leon's* concept of the organizational culpability of the police for bad faith conduct in performing searches and seizures. I now turn to exploring the degree to which the character-based model of corporate criminal liability can be transferred to the police context.

²³⁹See Bucy, *supra* note 148, at 1147-48.

IV. THE POLICE AND MORAL CULPABILITY

A. *Similarities Between Corporate and Police Department Moral Culpability*

What similarities do police departments and units bear to culpable corporate criminals? Arguably many, including these: (1) a distinct departmental character (2) capable of sending powerful messages about human worth (3) that stem from an internal structure making these messages reflective of a corporate, departmental mental state.

1. Distinct Police Character

a. *Law and Popular Culture Paint a Picture of a Police Character*

In the public mind and in practice, the police as a whole have an identity distinct from that of other governmental entities or from the “government” seen as an amorphous whole.²⁴⁰ No one confuses police officers with postal workers, sanitation workers, firemen, or school teachers.²⁴¹ Police shows like *NYPD Blue* and the various *Law and Order* incarnations have appeal to their audiences because of public perceptions of the police as a unique

²⁴⁰ See generally CHRISTOPHER P. WILSON, COP KNOWLEDGE: POLICE POWER AND CULTURAL NARRATIVE IN TWENTIETH-CENTURY AMERICA (2000) (analyzing public images of policing in America over time); *infra* text accompanying notes 254-67 (discussing police self-image).

²⁴¹ See KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 31 (2004) (noting that the characteristics of modern policing include its being done by a single, distinct organization, with city-wide jurisdiction and centralized control, serving a specialized function (policing) done by salaried personnel retaining continuity via the continued existence of the office and its characteristic procedures and embracing a preventive orientation providing round-the-clock service).

arm of the government.²⁴² It is the police whom most Americans trust to get the bad guys.²⁴³ Judging from TV shows, however, it is also the police whom the public expect to cross the lines drawn by the law where needed to win the fight against evil—a crossing often winked at by the ordinary citizen.²⁴⁴ The police, though perhaps inevitably corrupted by their contact with evil, are the “thin blue line” that stands between us and chaos.²⁴⁵

Not everyone embraces this tainted but still positive vision of the police. Members of racial minority groups may in particular worry that they will be victimized, rather than protected, by the police.²⁴⁶ Yet minorities' anger at the police also often stems from the sense that the police are not protecting minority communities as effectively as white ones. They *want* the officers to be knights in blue, though they more frequently expect muddied, fallen knights than those on steeds.²⁴⁷ Moreover, their wariness is of the

²⁴² See WILSON, *supra* note 240, at 3, 212-17 (discussing *NYPD Blue* and similar shows).

²⁴³ See RAY SURETTE, *MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES* 42 (2d ed. 1998) (“Crime fighters are portrayed as being very effective in solving crimes and apprehending criminals, but not at all effective in preventing crime.”). The picture is, however, a complex one, entertainment media often focusing on police ineffectiveness *when police obey the law* and effectiveness when they violate it. See *id.* at 42. Private investigators, also not so clearly bound by the constraints of law, are depicted as remarkably successful crime-solvers, and maverick but interested private citizens do at least as well. See *id.* at 42-43. Nevertheless, it is the police more than any other social institution that we expect to enforce the criminal law, and we therefore hold them accountable when lawlessness gets out of hand or goes unpunished. See SANJA KUTNJAK IVKOVIC, *FALLEN BLUE KNIGHTS CONTROLLING POLICE CORRUPTION* 3 (2005) (“We entrust police officers with the right to use coercive force when needed, and we expect them to enforce the law.”).

²⁴⁴ See SURETTE, *supra* note 243, at 42-43 (noting that the media portrays successful cops as “rebellious law enforcement insider[s] . . . willing to bend the law,” violating civil liberties and ignoring due process).

²⁴⁵ See WILSON, *supra* note 240, at 1 (using term, the “thin blue line”).

²⁴⁶ See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 22, 24-26 & n.62 (2003) [hereinafter Taslitz, *Respect*].

²⁴⁷ See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29-75 (1997); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to*

police as a distinct and special arm of the state. A query from a postman about how to find a particular address or person simply does not excite the same level of anxiety as does the same query from a police officer.

The mass media, of course, tell recurring tales of *individual* officers' lives.²⁴⁸ Yet TV shows always portray the individual cop as constrained or enabled by the organization within which he works.²⁴⁹ Officers must contend with departmental policies, a chain of command, and the pressures of their peers.²⁵⁰ News coverage likewise emphasizes departmental responses to individual officers' alleged wrongdoing.²⁵¹ When racial minorities express fear of law enforcement, that fear is of "the police" as a whole as much as it is of beat officer Joe or Detective Kelly.²⁵² The mere sight of a blue uniform²⁵³—without any knowledge about the particular person inhabiting it—is enough to induce flight by some neighborhood residents or anxiety by a driver stopped for a traffic violation.²⁵⁴ Individual police are therefore

Inspire Political Action, 66 LAW & CONTEMP. PROBS. 221, 239-48 (2003) [hereinafter Taslitz, *Racial Auditors*].

²⁴⁸ See Taslitz, *Respect*, *supra* note 246, at 22, 24-26 & n.62.

²⁴⁹ See generally ELAYNE RAPPING, LAW AND JUSTICE AS SEEN ON TV 21-70 (2003) (analyzing major TV shows in which the police play an important role).

²⁵⁰ See D. KEETLEY, LAW AND ORDER, IN PRIME-TIME LAW 33 (Robert Jarvis & Paul Joseph eds., 1998) ("Roles are dictated by process rather than personality," for "the real star of *Law and Order* is the criminal justice system itself . . . Here process is king and woe to those naïve enough to think they have some control over its mysterious ways.").

²⁵¹ See WILSON, *supra* note 240, at 46-68 (collecting examples).

²⁵² See, e.g., Taslitz, *Racial Auditors*, *supra* note 247, at 283; Taslitz, *Respect*, *supra* note 246, at 24-26 & n.62.

²⁵³ See Taslitz, *Respect*, *supra* note 246, at 22, 24-26 & n.62.

²⁵⁴ See Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2293-302 (2002) [hereinafter Taslitz, *Stories of Disrespect*] (summarizing law and social science); Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135 (2002) (arguing that racial minority flight from the police in so-called "high-crime areas" is often a form of protest against the tactics and attitudes of the police as an institution in these neighborhoods).

understood in significant part as mere agents of the organization for which they work. The “police” as an entity thus reflect a distinct culture—the culture of the *Men in Blue*.

b. The Nature of the Police Personality

Academics and police leadership themselves recognize the existence of a police culture. Anthony Bouza, former Chief of Police in Minneapolis, Minnesota, and a former commander of the Bronx, New York, police force explains: “Such a thing as the ‘police character’ exists because of the power of the institution to shape and condition its members.”²⁵⁵ The culture is one with its own set of rules and expectations distinct from those of the broader society. It is the culture of “us”—the brave warriors—against “them”—the rabble of the street.²⁵⁶ Police, therefore, come to see themselves as “under siege” by the very neighborhood communities whom they are sworn to protect, as well as by the political establishment, their own internal affairs unit, and anyone else seen as the voice of the outsiders.²⁵⁷ These outsiders are the enemies who are assaulting the insiders, the “brothers on the force.”²⁵⁸ Brothers band together, protecting their own and what the group as a whole stands for. Consequently, explains Bouza, in police culture,

The moral courage to stand up and disagree or to point out wrongdoing or to remonstrate when someone is committing a brutal or corrupt act has been systematically exorcised from the body. Nothing is rarer than dissidents publicly disagreeing with their colleagues about the codes of conduct, as is clearly evident from the cover-ups and studied silences accompanying serious

²⁵⁵ ANTHONY V. BOUZA, POLICE UNBOUND: CORRUPTION, ABUSE AND HEROISM BY THE BOYS IN BLUE 21 (2001).

²⁵⁶ See MICHAEL L. MIDDLETON, COP: A TRUE STORY 85 (rev. ed. 2000) (“It was ‘us against them’ . . . *Them* not only encompassed the criminal element, but also included law-abiding citizens who wanted equality and justice.”).

²⁵⁷ See *id.* at 67-105 (exploring officers’ “siege mentality”).

²⁵⁸ See *id.* at 85.

acts of wrongdoing. Whistleblowers, reformers, and other troublemakers are “snitches and rat finks” and all ranks are to close against these menaces.²⁵⁹

This blue wall of silence serves to shield officers from outside influences and is firmly rooted in a commitment to group loyalty.²⁶⁰ Loyalty is both horizontal—to one's peer officers²⁶¹—and vertical—to superiors and to the department as a whole.²⁶² Group loyalty is necessary to effective police work, promoting, at its best, “acts of heroic daring and self-sacrifice,” a sense of group cohesion, mission, and responsibility.²⁶³ Loyalty enables officers to endure difficult times, adding meaning to their daily tasks by linking their fate to that of a greater whole and, at its best, also

²⁵⁹ BOUZA, *supra* note 255, at 22.

²⁶⁰ See WILLIAMS, *supra* note 241, at 23-24 (discussing police insularity); STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 99 (2006) (recounting generally the nature of group loyalty).

²⁶¹ Professor Ivkovic explains:

Police officers' sense of isolation, enhanced by their embrace of the “us versus them” mentality, generates perceptions that nobody understands them, that very few people can relate to their experience, that they cannot trust other community members, and that the only people they feel comfortable around are other police officers. As a consequence, an intense sense of solidarity, loyalty, and mutual trust develops among police officers. Indeed, at least 70% of the surveyed NYPD officers in the 1960s agreed: “The police department is really a large brotherhood in which each patrolman does his best to help all other patrolmen.”

IVKOVIC, *supra* note 243, at 79.

²⁶² See *id.* at 85 (“Until yesterday, newly promoted sergeants were peers of the police officers they are now assigned to supervise; they have spent long hours on patrol with them, shared the same police subculture, and probably engaged in some form of rule-violating behavior.”), 68-69 (explaining that, despite the rise of community policing, the paramilitary-style hierarchical bureaucracy predominates, one that assumes that “personnel have to be under strict command, obedient to supervisors, and in compliance with a voluminous sense of rules,” an approach that may foster “a combat mentality and soldierlike perceptions . . . of duties”); STEPHEN M. PASSAMANECK, POLICE ETHICS AND THE JEWISH TRADITION 33-34 (2003) (“[P]olice can and do maintain a blue wall of silence to protect peers, or perhaps the department itself.”).

²⁶³ See PASSAMANECK, *supra* note 262, at 33.

linking them to higher values, the sense of loyalty to the noblest of ideals.²⁶⁴ Loyalty provides a sense of safety in the face of danger, a sense of belonging in a world of isolation, a sense of virtue in a daily stew of suspicion and corruption.²⁶⁵

What it means to be loyal to the group, however, turns on the group's own code of conduct. If that code is too detached from broader social codes of conduct, then group loyalty can degenerate into a commitment to behavior of a sort condemned by the broader society.²⁶⁶ For the police, this too often means a culture in which “honorable” actions include those done to evade constitutional strictures.²⁶⁷ In the Fourth Amendment area in particular, such evasion has been well-documented in the phenomenon of police “testilying”—a police willingness to perjure themselves at suppression hearings, creating a false impression of complying with constitutional rules.²⁶⁸ For example, in so-called “dropsy” cases, virtually every police officer in a department might testify that a fleeing suspect conveniently “dropped” or abandoned drugs while in flight, thus losing any privacy protection under the Fourth Amendment.²⁶⁹ The form but not the substance of the law is protected.

c. The Forces Shaping Police Personality

(i) Command Structure

²⁶⁴ See *id.* at 34-35, 67-75.

²⁶⁵ See *id.* at 40-41.

²⁶⁶ See Taslitz, *Racial Auditors*, *supra* note 247, at 291-92.

²⁶⁷ See, e.g., SAMUEL WALKER, *THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA* 138-45 (1998) (arguing that only public protest, community struggle, practical experimentation, and community condemnation can help police adequately to internalize and obey broader community norms, including constitutional mandates).

²⁶⁸ See Taslitz, *Stories of Disrespect*, *supra* note 254, at 2297.

²⁶⁹ See Andrew E. Taslitz, *Slaves No More?: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U.L. REV. 709, 762 (1999) [hereinafter Taslitz, *Slaves No More*].

Yet it would be a mistake to view these aspects of police culture as either monolithic or inevitable.²⁷⁰ To the contrary, much of police life operates on a top-bottom model of command, one often increasingly similar in spirit to that of the military.²⁷¹ Superiors can act as role-models, enforcers of, and educators about, the group's rules and aspirations.²⁷² The words and actions of superiors help set the organization's tone, and both words and deeds must match.²⁷³ Superiors who talk the language of constitutional ideals but look the other way when violations occur send the wrong message. Egregious violations that are inadequately punished breed a wink-and-a-nod tolerance of legally out-of-bounds behavior.²⁷⁴ Rewards also help to set the tone. Are whistleblowers and dissenters praised for upright behavior or despised? Are those who isolate, insult, and threaten such dissenters severely and publicly sanctioned? Are bonuses awarded to the energetic but by-the-book cop or to the no-questions-asked swashbuckler? Are educational seminars, counselors, and legal advisors made available to help guide the cop who wants to do right, and are sanctions limited so that police are not over-deterred from doing their job properly by a fear of punishment for honest mistakes?²⁷⁵

²⁷⁰ See IVKOVIC, *supra* note 243, at 81 (“[T]here is no single, uniform police culture.”).

²⁷¹ See *id.* at 68-69. See generally MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE (Peter B. Kraska ed., 2001) (collecting essays examining the increasing militarization of police departments).

²⁷² See IVKOVIC, *supra* note 243, at 70-73.

²⁷³ *Id.* at 72 (“[P]olice chiefs who talk the talk but don’t walk the walk, in addition to decreasing their own credibility, send the message that they are not sincere and that the efforts put into corruption control are hypocritical.”).

²⁷⁴ See BOUZA, *supra* note 255, at 22.

²⁷⁵ See, e.g., IVKOVIC, *supra* note 243, at 73-79, 83-87 (surveying internal police department rewards, punishments, and training). See generally C. FRED ALFORD, WHISTLEBLOWER: BROKEN LIVES AND ORGANIZATIONAL POWER (2001) (exploring the importance and difficulty of being an organizational whistleblower); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363,

(ii) Socialization

Socialization begins in the police academy itself, both in what is said in class and in private conversations.²⁷⁶ When the rookie arrives on the job, his education continues in the precinct and on the street.²⁷⁷ If he is paired with a right-thinking partner, finds an open management door to advice or for expressing concerns, and knows that his other fellow officers will “have his back,” the rookie will himself become right-thinking. Loyalty to truly higher ideals will become integral to his personality and world view.²⁷⁸

(iii) Transparency

To avoid the challenge of conflicting loyalties, however, the group's code of honor must be congruent with that of the broader society.²⁷⁹ That in turns requires systems for community involvement in, and oversight of, police policymaking and operations; community policing styles in which police closely interact with, rather than stand apart from, the neighborhoods they police; and systems for police accountability to the broader public but in a shared mission of public service.²⁸⁰

405-12 (1999) (analyzing the dangers of over-deterrence in some proposed civil liability systems for police violations of constitutional rights).

²⁷⁶ See PASSAMANECK, *supra* note 262, at 157-58.

²⁷⁷ See *id.* at 158-59.

²⁷⁸ See *id.* at 35, 70-73.

²⁷⁹ See Taslitz, *Racial Auditors*, *supra* note 247, at 293.

²⁸⁰ See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1163-78 (2000) (surveying techniques for improving police transparency and accountability to the community); Taslitz, *Slaves No More*, *supra* note 269, at 262-71 (describing the historical basis for transparency as a strategy for police regulation).

(iv) The Unique Character of Each Distinct Police Department,
Not Merely of the Police as a Whole

Because the institutional structure and management practices of police departments, precincts, and units can so affect police culture, each police department, large or small, develops its own corporate personality, its own unique ethos.²⁸¹ One example of a particularly undesirable police ethos involved the New York Police Department's ("NYPD") Street Crimes Unit ("SCU").²⁸² Sergeant Noel Leader, in his testimony before the United States Commission on Civil Rights, explained that "Street Crime rides around the city. And they stop individuals with no complainant, no victim. They arbitrarily of their own initiation stop individuals . . . Street Crime . . . stops male blacks and Latinos randomly in the street without any victims."²⁸³ New York Attorney General Elliot Spitzer likewise noted that "it is the officer's own observation that initiates the stop and frisk."²⁸⁴ Members of the SCU itself admitted, according to the Commission, to calling in phony complaints matching a suspect's description if the suspect indicated a willingness to complain about the stop's legality.²⁸⁵

Yet, if the SCU was the worst example of a police culture disdainful of constitutional rights, that culture flourished in, and was encouraged or tolerated by, the NYPD more generally, which, the United States Civil Rights Commission concluded, disproportionately targeted Hispanics and African-Americans for stop-and-frisk investigation—a conclusion based partly on the NYPD's data summaries, which the Commission believed to be incomplete and to vastly understate the problem, and upon

²⁸¹ See *supra* text accompanying notes 184-201.

²⁸² See UNITED STATES COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, *Report* (2000) [hereinafter COMM'N, POLICE IN NYC].

²⁸³ *Id.* at 105 (quoting testimony of Sergeant Noel Leader).

²⁸⁴ *Id.* (quoting New York State Attorney General Elliot Spitzer).

²⁸⁵ *Id.* at 107.

citizen complaints.²⁸⁶ Law professor and criminologist Bernard Harcourt, in a careful analysis of the data, found this disparate stop-and-frisk racial impact to be a direct result of the NYPD's commitment to "quality-of-life" policing targeting even the most minor of crimes for aggressive prosecution combined with sub-conscious stereotypes of black criminality and an internal management culture of denial of wrongdoing and obfuscation of community monitoring.²⁸⁷

The NYPD serves as one salient example, but many others could be named. The Los Angeles Police Department Ramparts scandal, the torture squads of Chicago's Area Two, racial profiling by the New Jersey State Police, and race-linked use of excessive force by the Cincinnati police are just a few of the most recent and infamous examples.²⁸⁸ What does not make the papers as often, of course, are the many police departments with an ever-increasing commitment to the rule of law, a commitment sparked by enlightened leadership, scandal-revelation, public pressure, or some combination of these and other factors.²⁸⁹ The bottom line is that each police department, like each corporation, has a unique ethos that inheres in its decisionmaking structure and socialization and management practices. In this sense, as with corporations, individual police departments can be said to have a mens rea accompanying actions reflecting a unique departmental character worthy of censure for wrongdoing.

²⁸⁶ *Id.* at 95-96.

²⁸⁷ See BERNARD HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 713-75 (2001).

²⁸⁸ See Taslitz, *Racial Auditors*, *supra* note 247, at 239-48 (concerning racial profiling by the Maryland and Pennsylvania police and in Cincinnati); Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999) (analyzing police brutality in Chicago's Area Two); IVKOVIC, *supra* note 243, at 69, 76-77, 85, 94, 137-38, 142 (analyzing Ramparts area scandal).

²⁸⁹ See generally DAVID A. HARRIS, GOOD COPS (2005) [hereinafter HARRIS, GOOD COPS] (summarizing and analyzing these developments in certain police departments); SAMUEL WALKER, THE NEW WORLD OF POLICE ACCOUNTABILITY (2005) (similar) [hereinafter WALKER, NEW WORLD].

B. The Expressive Function of the Police

Another prerequisite to the moral culpability of an organization is not only that it have a distinctive character but also that it be capable of, and be seen as capable of, sending messages about human worth.²⁹⁰ On this score too, however, the police fit the bill.

Of course, the state's monopoly on the legitimate use of force is what enables the state to promote the social stability and cohesion necessary for the existence of civil society.²⁹¹ When the state uses force against any individual, therefore, its actions necessarily mark that individual as a threat to society.²⁹² If there is insufficient justification for targeting that person as a prior or current social threat—for example, if a police officer arrests someone without probable cause—that targeting in turn identifies that person as undeserving of the safeguards provided by requiring adequate reasons for invasive state action.²⁹³ The individual becomes marked as outside the circle of equal citizens. If that individual's identity is linked to a broader social group, and if his arbitrary treatment is in turn seen as the result of his group membership, as happens with racial profiling, then harm to him is seen as harm to the group.²⁹⁴

The police are the primary institution accorded the responsibility to use force in everyday life on behalf of the state.²⁹⁵ Police actions are, therefore, necessarily unsettling to those subjected to them and are frequently demeaning.²⁹⁶ When those actions are perceived as racially biased, even if subconsciously so or

²⁹⁰ See *supra* text accompanying notes 144-83.

²⁹¹ See ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 1-6 (forthcoming NYU Press Oct. 1, 2006).

²⁹² *Id.* at 1-11.

²⁹³ See Sherry Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1486-1500 (1996).

²⁹⁴ See Taslitz, *Respect*, *supra* note 246, at 45-51 (defining "respect" and explaining how unjustified searches and seizures can violate it).

²⁹⁵ See IVKOVIC, *supra* note 243, at 3.

²⁹⁶ See Taslitz, *Respect*, *supra* note 246, at 15-41 (making and illustrating this point).

even if resulting from mere institutional indifference rather than intentional malfeasance, entire racial groups feel the sting of insult.²⁹⁷ The results can be explosive. Amnesty International's Executive Director, William F. Schulz, in the wake of a series of police scandals, issued this caution:

Nothing threatens to rip this society apart racially any faster than disparity in treatment at the hands of the police. It has happened over and over before. Have we forgotten that nearly every one of the incidents of urban unrest in 1968 was touched off by arrests of blacks by white officers for minor offenses? Have we forgotten the experience of Los Angeles in 1992 following the acquittal of police in the Rodney King case, a conflagration that did more than \$700 million worth of damage in the country? Are we unaware that St. Petersburg, Florida was the scene of a similar, if less costly, riot as recently as 1996 following the killing of a black motorist by a white officer? Do we really want to gamble that the United States has "put all this behind us?"²⁹⁸

Schulz, I am sure, did not mean to suggest that police misbehavior alone causes riots. But the message of racial insult sent by police abuses can be the spark that lights the fires of violent protest. The examples of this point are legion, recurring periodically in American history like clockwork. The most recent race riot happened in Cincinnati after a white officer shot and killed a young black male.²⁹⁹

More subtle communicative effects are evident daily, rather than the eye-catching ones of occasional riotous conflagration. Notably, Professors Yuen J. Huo and Tom R. Tyler, in an empirical study of minority attitudes toward the police in California,

²⁹⁷ See *id.* at 27-28.

²⁹⁸ WILLIAM F. SCHULZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL 158 (2002).

²⁹⁹ See Taslitz, *Racial Auditors*, *supra* note 247, at 244-48 (discussing the Cincinnati riots); WILLIAMS, *supra* note 241, at 4-9 (engaging in a whirlwind tour of race "riots" (some call them "protests") sparked at least in part by perceptions of police injustices).

concluded that, compared to whites, African-Americans and Latinos reported lower levels of satisfaction in their interactions with legal authorities—especially the police—and consequently less willingness to comply with the directives of legal authorities.³⁰⁰ These same minority groups also experienced less procedural fairness in dealing with authorities than did whites, and these perceptions of unfair treatment were more important than case outcomes in influencing the level of satisfaction with the police.³⁰¹ Furthermore, different minority groups and whites shared relatively similar conceptions of what constitutes procedural fairness: unbiased, respectful, individualized assessments of each person by the authorities.³⁰² Procedural fairness mattered most to those minorities most strongly identifying with American society, even where those same minorities shared a strong sense of ethnic identity.³⁰³

The result of such minority group distrust of the police is a reduced willingness to aid the police in combating crime.³⁰⁴ That lessened police-community cooperation means that more criminals escape justice, and, with a reduced prospect of punishment, crime rises. But higher crime rates in minority communities breed the sense in those communities that police simply do not care.³⁰⁵ Thus, police come to be seen as either callous toward racial minorities or an active source of harassment of honest citizens, escalating the mutual sense of distrust and the cycle of

³⁰⁰ YUEN J. HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY viii (Public Policy Institute of California ed., 2000).

³⁰¹ *Id.* at viii-ix.

³⁰² *Id.* at ix-x.

³⁰³ *Id.*

³⁰⁴ *See, e.g.*, TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING COOPERATION WITH THE POLICE AND THE COURTS 146-47 (2002) (explaining why African-Americans, especially if young, are more unwilling to accept police officer decisions than are whites). *See generally* DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002) [hereinafter HARRIS, RACIAL PROFILING] (providing an extended defense of the proposition that minority group distrust of the police reduces minority cooperation with law enforcement, severely hampering its effectiveness).

³⁰⁵ *See* Taslitz, *Respect*, *supra* note 246, at 22, 26.

crime and recrimination.³⁰⁶ Once again, Amnesty International's George Schulz put the point well:

A good percentage of successful police work depends on cooperation from the law-abiding elements in any community. If huge segments of the community are alienated from law enforcement authorities, mistrustful of them or frightened, that bodes ill for the willingness of those community members to extend a helping hand. Social commentator Dinesh D'Souza could never be accused of being a "bleeding heart liberal." His reason for opposing racial profiling is quite pragmatic: "Government-sponsored . . . discrimination has the cataclysmic social effect of polarizing African-Americans who play by the rules and still cannot avoid being discriminated against. Even law-abiding blacks become enemies of the system because they find themselves treated that way."³⁰⁷

Police departments, like corporations, are therefore entities, each having a distinct ethos, that are capable of sending demeaning messages about human worth via morally inappropriate action. The public, or at least important segments of it, perceive such action as deeply degrading, demanding a firm retributive response—a response that reaffirms the worth and dignity of individuals and of salient social groups.³⁰⁸ These seem good reasons to condemn serious police misconduct in a way akin to that accomplished by the criminal law.³⁰⁹

³⁰⁶ *Id.* at 21-28; HARRIS, GOOD COPS, *supra* note 289.

³⁰⁷ SCHULZ, *supra* note 298, at 159.

³⁰⁸ On the need for those degraded and of society to wreak retribution on tormenters who cause public harms, *see generally* Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 U. MD. L. J. OF RACE, RELIGION, GENDER & CLASS 306 (2001).

³⁰⁹ *See* Taslitz, *Stories of Disrespect*, *supra* note 254, at 2325.

C. Police Department Mens Rea

As with corporations, this analysis raises questions of proof: How can we prove what is a particular department's ethos and whether it has acted with the sort of institutional mens rea worthy of criminal responsibility and punishment? My answer is the same as that given in the corporate context: by looking to the department's internal decisionmaking processes—its policies, decisionmaking structure, flow chart and practices—to determine whether an individual officer's action reflects the “basic beliefs of the [department].”³¹⁰ Departmental responsibility does not, therefore, even require identifying any individual officer's wrongdoing but merely showing that some officer's reprehensible conduct was in fact encouraged by the corporate departmental ethos. The same concrete ways that Pam Bucy identified for establishing such encouragement in the corporate context can effectively be extended to the police context as well.

1. Hierarchy

Policing is necessarily hierarchical.³¹¹ However, hierarchy can be structured to encourage or discourage the flow of information from the bottom up.³¹² Moreover, an organizational hierarchy that allows the leadership to be too distant from the beat officers will mean a leadership unaware of—perhaps willfully blind to—the details of everyday policing.³¹³

³¹⁰ FRENCH, *supra* note 154, at 41; *see supra* text accompanying notes 184-201.

³¹¹ *See* HARRIS, GOOD COPS, *supra* note 289, at 131 (noting police departments adhere to a strict chain of command).

³¹² *Id.* at 131-32 (explaining that, despite policing's hierarchical nature, most offices in practice do nearly all their work unsupervised and with only sporadic reporting to superiors).

³¹³ *Id.* at 127-30 (examining case study of a police manager improving performance by getting closer to his line officers and enhancing bottom-up communications), 134 (attacking departments that too readily pit command staff against rank-and-

The isolation and ignorance of management will further be fostered if it is insulated from feedback from those most affected by police management decisions or inaction—the local community.³¹⁴ Broader political pressures will always be brought to bear on the police from powerful interest groups or where some scandal or explosive event erupts.³¹⁵ The best sorts of community policing reach out to the neighborhoods being policed, not only to build trust or open the flow of information about crime, but also to glean data about how the police themselves are performing.³¹⁶ Furthermore, community outreach is not limited to a public relations officer or a few beat officers; outreach includes police captains and even builds in regular opportunities for citywide police leadership to meet with various local communities.³¹⁷ Therefore, information must move locally from the bottom-up and then continue up the chain from the precincts to the Chief and his immediate aides.

2. Departmental Goals

If departmental goals are too narrow and include only what is rigidly measurable, the incentives throughout the chain of command will simply be to push up the numbers. For example, a focus on numbers of arrests will mean more arrests but not necessarily more *valid* arrests.³¹⁸ A focus solely on the numbers

file officers).

³¹⁴ *Id.* at 116-18 (explaining community feedback loops); WALKER, NEW WORLD, *supra* note 289 (“It is a basic principle of a democratic society that police should be answerable to the public.”).

³¹⁵ See HARRIS, GOOD COPS, *supra* note 289, at 134-35 (illustrating political pressures).

³¹⁶ *Id.* at 116-18.

³¹⁷ *Id.* at 132-34; Taslitz, *Racial Auditors*, *supra* note 247, at 244-48 (illustrating a high-community-involvement experiment in Cincinnati).

³¹⁸ See, e.g., Jennifer R. Wynn, *Can Zero Tolerance Last?*, in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 107, 118-19 (Andrea McArdle & Tanya Erzen eds., 2003) (illustrating this point via an interview with an officer who admits making phony arrests of suspected drug dealers for minor offenses

of guns kept off the streets will lead to widespread random, suspicionless searches like those undertaken by the New York City Street Crimes Unit, which did indeed collect many weapons.³¹⁹ In modern data-driven policing, enhancing the numbers of personnel assigned to a “hot-spot” neighborhood with the expressed goal of dramatically reducing crime at that location creates incentives to achieve that goal by any means necessary.³²⁰ Police should, of course, be accountable for their numbers, but they must also be accountable for their methods. Respecting constitutional limitations on how police go about their job must be embraced explicitly as as important a goal as up-ing the numbers of bad guys captured.³²¹ That may mean more emphasis on collecting qualitative as well as quantitative data—on how the police do their job, not merely on what job they do.³²² Expanding

without probable cause, then refusing to show up in court to avoid perjuring himself, all done to raise his arrest statistics and make it harder for the suspected dealers to make as many sales).

³¹⁹ *Id.* at 113-14 (noting New York City’s Street Crimes Unit made 45,000 stops in 1997 and 1998 but only 9500 resulted in arrests); Taslitz, *Racial Auditors*, *supra* note 247, at 256-57 (recounting evidence that SCU made many of these stops with no complainant or evidence of any crime in the first place, then calling in phony complaints when it seemed likely that a stoppee would report the illegality).

³²⁰ *See* Wynn, *supra* note 318, at 119-20 (discussing “Compstat,” the data-driven policing system in New York City), 108-112 (recounting financial and other incentives to maximize arrests regardless of their validity or wisdom), 117-18 (noting rise in civilian complaints against New York City police in the era of “zero tolerance” policing but the relative rarity of resulting police discipline).

³²¹ *See, e.g.*, IVKOVIC, *supra* note 243, at 140-41 (emphasizing importance of fostering a culture in which police are encouraged to report internal corruption); HARRIS, GOOD COPS, *supra* note 289, at 156-58 (noting importance of the police defining their mission as service to the public—not as “catch[ing] bad guys”—a mission that includes upholding the law *and* the Constitution).

³²² *See* HARRIS, GOOD COPS, *supra* note 289, at 116-18 (stressing collecting community data on how its members perceive being treated by the police); WALKER, NEW WORLD, *supra* note 289, at 100-34 (summarizing “early intervention systems” prompting investigation of how particular officers do their job and seeking, where appropriate, to correct it); Taslitz, *Racial Auditors*, *supra* note 247, at 230-38 (explaining what sorts of data, including qualitative data, independent racial auditors of the police collect, how, and why).

quantitative information can help in this goal as well. For example, efforts to increase data-collection on the race of those stopped and the reasons for the stop has both highlighted in several jurisdictions the existence of racial profiling and helped to discourage it.³²³

3. Educating Officers

Police officers need a thorough grounding not only in Fourth Amendment and related constitutional mandates, but also in their importance and their consistency with effective law enforcement.³²⁴ Police training at the academy and beyond must emphasize how compliance with reasonable suspicion, probable cause, and warrant requirements can build community trust, thus enhancing community candor and assistance.³²⁵ Such a partnership makes it easier to fight crime *and* to avoid error—to reduce the risk of convicting the innocent from getting only one side of a story.³²⁶

³²³ See HARRIS, RACIAL PROFILING, *supra* note 304.

³²⁴ Professor Harris notes that almost all new law enforcement officers in the United States receive many weeks of formal training, followed by field training, that includes recitation of constitutional limits on police power. See HARRIS, GOOD COPS, *supra* note 289, at 169. But, he notes, the completeness and quality of the legal training is woefully inadequate:

But it is unlikely that most police officer trainees will receive any training in civil or human rights, the flashpoint for so many of the struggles in our society between police officers and the public, particularly minority groups. Those departments that do cover these topics in their training typically spend little time on them. Moreover, whatever training recruits get in civil rights or constitutional law is usually taught not to help officers understand how to protect these important American values, but as part of “avoiding liability”—how to steer clear of lawsuits for violating the rights of the public. Little effort is made in such classes to show how a genuine regard for human and civil rights properly sets the standards for law enforcement and police conduct.

Id. at 169.

³²⁵ See HARRIS, RACIAL PROFILING, *supra* note 304.

³²⁶ See Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and*

But much police unconstitutional behavior, such as racial profiling, is caused by unconscious and institutional forces rather than police ill will.³²⁷ Much social science research demonstrates that alerting persons to unconscious processes alone does not generally change behavior.³²⁸ But explaining to someone how and why these processes work and the reasons why we resist acknowledging their influence and avoid changing our actions does succeed nicely in improving poor behavior.³²⁹ Role-plays and active learning experiences, and guest lectures by those hurt by police misconduct, are also likely to be more effective than sole reliance on recitations of the law or other passive learning techniques.³³⁰

Education must, however, not be limited to the classroom. The learning process must be constant. Policy bulletins, the modeling of behavior by superiors, and clear rules to guide rookies are among the many ways to build a culture of compliance.³³¹ It is the constant *effort* to do better that matters, as one expert on police ethics, T.E. Wren, has said:

What is needed, then, is an approach to police formation that instills a passionate commitment to the law into the most

Tunnel Vision, 49 HOWARD L. J. 475, 481-82 (2006) (explaining the cognitive processes that often lead police and prosecutors to focus too early on one subject, a "tunnel vision" that may distract them from the real wrongdoer).

³²⁷ See generally, Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006) (exploring some of these unconscious processes).

³²⁸ See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 133 (1999).

³²⁹ *Id.* at 133.

³³⁰ Similar active-learning approaches seem to be having some success in changing attitudes and behavior in other areas governed by the law, for example, in reducing sexual harassment. See Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 834-35 (1996).

³³¹ See HARRIS, GOOD COPS, *supra* note 289, at 84-85 (emphasizing importance of a pervasive police culture of accountability) 90-103, 116-22 (surveying accountability techniques), 135-53 (illustrating enlightened leaders using these techniques), 154-71 (articulating and illustrating the elements of a healthy police culture).

intimate parts of a policeman's personality structure and self interpretation and simultaneously incorporates this attitude with the tacit norms and expectations that bind the police fraternity together. If this could somehow be done, then a policeman who himself [is] confronted by misconduct and corruption by his comrades would be perceived as having been betrayed by them and not, as it usually seems, the other way around. In this best of all police sub-worlds, the revised idea of a fellow officer being "all right" would include his having qualities like the strength to resist corruption . . . and above all the confidence to chide another for tarnishing his badge.³³²

4. Punishing the Current Offense

No system designed to show an entity's due diligence in preventing harm should meet that burden without an effective internal means for sanctioning wrongdoers. Current internal sanctioning mechanisms for individual officers' Fourth Amendment violations have been shown to be inadequate.³³³ They usually do not include economic sanctions on the wayward officer; few are reprimanded anyway, especially given minimal, if any, efforts to ferret out the misbehavior,³³⁴ and, as law professor Christopher Slobogin has put it, "police superiors have a hard time punishing hard-working cops for mistakes made at the margin, at least where there is no external pressure to do so."³³⁵

A wide variety of better internal reprimand procedures can easily be envisioned. Independence of the investigators and decisionmakers would be important. A department might, for example, create an administrative mechanism in which departmental outsiders—perhaps rotating three-person tribunals of volunteer lawyers—consider complaints.³³⁶ A schedule of liqui-

³³² T.E. Wren, *Whistleblowing and Fidelity to Friends*, in *THE ETHICS OF POLICING* 37 (J. Kleinig ed., 1996).

³³³ See Slobogin, *supra* note 275.

³³⁴ See *id.* at 374-79.

³³⁵ *Id.* at 384.

³³⁶ See *id.* at 386-87 (suggesting analogous proposals); Robert P. Davidow,

dated penalties might be applied, based both upon officer salary and the egregiousness of the violation.³³⁷ To avoid over-deterrence,³³⁸ initially only officers recklessly, knowingly, or purposely violating the Constitution should pay a financial penalty.³³⁹ Negligent officers facing a first offense might be required

Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal, 4 TEX. TECH. L. REV. 317 (1973) (proposing a "fourth branch" ombudsman to enforce constitutional restrictions on law enforcement).

³³⁷ See Slobogin, *supra* note 275, at 386-90 (recommending a similar form of liquidated damages).

³³⁸ See Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640-42 (1982) (arguing that police salaries will always necessarily fail to compensate adequately, so imposing the full social costs on an officer of his mistakes will severely over-deter; Posner thus favors only monetary entity liability for the police department); PETER SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 98 (1983) (arguing damages remedy will "chill . . . vigorous decisionmaking").

³³⁹ See Slobogin, *supra* note 275, at 410-11. Slobogin argues that officers who inadvertently violate the Constitution might resent a financial penalty as unfair, though he seems to suggest both that the result may be under-deterrence or over-deterrence. See *id.* at 373-80, 405-12, 416-18. The police department, as an organizational entity, is both unlikely to suffer resentment effects for negligent conduct and is particularly well-suited to achieve organization-wide change and improved training, especially for problem officers. See *id.* at 399-400. Therefore, Slobogin would not punish individual officers acting in good faith but would instead allow civil penalties on the department as a whole for individual officers' well-meaning but negligent conduct, or even permit strict liability as to the department, though a "strict liability" with a "good faith" out that sounds to me more like negligence liability. See *id.* at 399-400, 417. I do not address civil case police entity liability here for the simple reason that I think that expanding such liability is a political non-starter. For similar political reasons, I doubt that permitting injured citizens to pursue ordinary tort damages against individual officers is a viable option either. Of course, I recognize that there are considerable political obstacles to my own proposals. But I think it more likely that state or local legislatures might permit a system of liquidated damages paid by officers to the state—in effect, docking offending officers' pay without hurting the state's overall budgetary health—than the sort of regime Slobogin proposes. (An alternative approach—paying part or all liquidated damages to citizens who never faced prosecution, thus never having the benefit of the exclusionary rule—might also be politically marketable as providing a relatively easy administrative way of compensating "innocent" victims of improper searches and seizures. See *infra* text accompanying notes 342-45 (proposing such an alternative). Perhaps police chiefs could

to participate in remedial training programs and receive a warning. But repeated violations—even if each were merely negligent—should thereafter result in a rising penalty scale, creating an incentive to learn and obey the law.³⁴⁰ There is strong reason to believe, contrary to claims made elsewhere, that such a regime would not over-deter.³⁴¹ Instead, both individual officers and the department as a whole would have an incentive to search for more proactive methods of preventing crime so that fewer searches are needed³⁴² and to turn to judges for warrants more often, the warrant serving as a sort of “advisory opinion” giving officers some comfort that their actions are legal.³⁴³ Professional pride,

impose analogous pay-docking procedures without legislation if the chiefs are able to stand up to powerful police unions. My proposal as to punishing an officer's current offense is thus inspired by, and closely tracks aspects of, Slobogin's suggestion while also substantially differing from it, especially because Slobogin sees his regime as entirely replacing the exclusionary rule. To avoid an individual officer's perception of unfairness, however, I agree that his negligence should not result in immediate financial penalties. But he would face re-training and a warning, thus both discouraging re-offending and reducing perceived unfairness if he does re-offend. Because financial penalties are only one non-determinative factor in my proposed good-faith analysis, departments, not just individual officers, still have an incentive to seek organizational reform to avoid the sting of the exclusionary remedy. They cannot simply pay a fine as the “price” for admitting evidence. *See Davies, supra* note 10 (explaining the difference between a “price” and a “sanction” and the distinction's significance under the exclusionary rule).

³⁴⁰ *Cf. Slobogin, supra* note 275, at 416-17 (discussing punitive and other damages options in certain cases, an idea analogous to that of a rising individual officer penalty scale).

³⁴¹ *See id.* at 394-417 (defending an analogous regime against claims of over-deterrence and under-deterrence based on the teachings of cognitive psychology).

³⁴² *See id.* at 413-16 (summarizing data suggesting that “problem-oriented policing” is as effective as aggressive search and seizure practices in combating crime in “hot spot” neighborhoods); Mark Moore, *Problem-Solving and Community Policing*, in MODERN POLICING 130 (Michael Tonry & Norval Morris eds., 1992) (collecting data on problem-solving impacts); LAWRENCE SHERMAN ET AL., THE KANSAS CITY GUN EXPERIMENT 1-3 (1995) (reporting results of aggressive patrol and seizure tactics); Lawrence W. Sherman, *Police and Crime Control*, in MODERN POLICING, *supra*, at 157, 213 (similar).

³⁴³ *See Slobogin, supra* note 275, at 409-10.

other reward structures encouraging aggressive crime-control efforts, and political pressures would also likely prod, there is good reason to believe, officers into doing their jobs via constitutional means rather than abandoning doing them at all.³⁴⁴

To ensure that cases are brought before these tribunals in the first place, a mandatory referral should be made whenever either: (a) a suppression motion is granted or (b) a constitutional violation is found but suppression denied pursuant to the exclusionary rule's good faith exception. Moreover, liquidated penalties could be turned over as damages paid to any citizen filing a complaint of ill-treatment, later found by the tribunal to be valid, but where no prosecution resulted or where one was readily nolle-prossed by the prosecutor's office.³⁴⁵ This would create incentives for citizens ultimately not facing prosecution to have their complaints heard. Such a regime—though only one possible way to do things—would raise the likelihood that the good faith exception will not undermine the exclusionary rule's deterrent value. It would, on the other hand, in a real sense demonstrate the department's good faith commitment to the rule of law.³⁴⁶

³⁴⁴ See *id.* at 407-10. Yet, without some financial penalty on individual officers, under-deterrence is likely. See *id.* at 373-80 (using cognitive theory to explain why the exclusionary rule devoid of serious individual officer financial penalties will under-deter). My task here is to gauge the scope of the good faith exception to the exclusionary rule, not to defend the rule itself, so I do not here respond to Slobogin's broader goal—that the exclusionary rule be eliminated. See *id.* at 364-68.

³⁴⁵ Citizen payments smack, however, of tort damages remedies, raising potential constitutional objections, including violation of the Seventh Amendment right to jury trial in civil cases, a problem likely avoided by adhering to a more administrative-style model conceiving of the payments as pure penalties turned over to the state. See *id.* at 421-23; see also *supra* note 315 (also noting an administrative scheme might be more politically marketable). The choice between making payments to the citizen (creating incentives for them to report claims) versus to the broader state treasury (thus raising no state-wide budgetary issues) is thus a close one. What matters for the purposes of establishing good faith, however, is that the existence of *some* system of financial penalties is an important indicator of that faith.

³⁴⁶ Cf. Slobogin, *supra* note 275, at 418 (arguing, interestingly, and though

5. Monitoring Compliance with Legal Requirements

I, Erik Luna, and others have written about this point extensively elsewhere.³⁴⁷ The central theme of a sound monitoring system is that it must be aggressive in uncovering violations rather than simply reacting to them, and it must “fetishize” transparency.³⁴⁸ Active systems require both internal and external audits specifically aimed at identifying constitutional violations—audits distinct from those done for other purposes.³⁴⁹ Transparency requires involving outsiders—especially lay representatives of the neighborhood—to have an effective voice in police policymaking and in review of individual cases.³⁵⁰ One fascinating experiment in this area, albeit one begun under judicial auspices, is under way in Cincinnati, where joint groups of various strata of the local citizenry worked together with street officers and police managers to craft a mutually agreeable system for preventing police abuses and for continuing to be actively involved in monitoring.³⁵¹ The resulting publicity accompanying such efforts further promotes transparency.³⁵²

only in a paragraph, that a department, under the entity liability the author proposes, might reduce or eliminate its financial liability in some cases if, “[a]nalogous to the framework for fining corporations under the federal sentencing guidelines, . . . it could show that it cooperated with the investigation into the police action and that it made a meaningful post-offense response to the culprit”).

³⁴⁷ See generally Luna, *supra* note 280; Taslitz, *Racial Auditors*, *supra* note 247.

³⁴⁸ See *supra* note 347.

³⁴⁹ See generally Taslitz, *Racial Auditors*, *supra* note 247; WALKER, NEW WORLD, *supra* note 289, at 135-70.

³⁵⁰ See Taslitz, *Racial Auditors*, *supra* note 247, at 221-64; see generally Luna, *supra* note 280.

³⁵¹ See Taslitz, *Racial Auditors*, *supra* note 247, at 244-48.

³⁵² See *id.* at 258-64 (noting auditors' symbiotic relationship with the media).

6. Reacting to Past Violations

The point here is that it is necessary but not sufficient to make a good faith claim that the violator in the case now before the court has been or shortly will be punished. The department must also show that it has consistently sanctioned past violators and, much like the National Transportation Safety Board would do in airplane crash cases, has thoroughly investigated the causes of any mistakes made and attempted to correct them.³⁵³

7. Reward Structure

This last consideration would focus on whether bonuses, raises, commendations, and awards are given to effective officers who comply with constitutional mandates and denied to those who do not.³⁵⁴ Similarly, the department must provide the counseling and training opportunities to enable all officers to compete for these benefits and to allow even wayward officers to aspire to the carrot and not merely fear the stick.³⁵⁵

³⁵³ Cf. Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 102-03 (Sept.-Oct. 2002) (analogizing to National Transportation Safety Board procedures to create a new board to investigate innocence claims and associated systemic failures).

³⁵⁴ See HARRIS, GOOD COPS, *supra* note 289 at 155 (concerning incentive and reward structures).

³⁵⁵ See *id.* at 155, 169-71 (reforming officer training).

D. Tentative Conclusions

1. The Good Faith Exception Was Not A Good Idea

I should not be understood by my remarks as endorsing any version of the good faith exception to the exclusionary rule. Although my goal here is not to develop any full-blown challenge to the exception but rather to improve its operation, there are good reasons to doubt its wisdom that are worth mentioning as a cautious note. Notably, it never truly makes the victims—the individual searched and society—entirely whole because it does not nullify the search, rendering it as if it had never been.³⁵⁶ To the contrary, it places the judicial imprimatur on a violation of constitutional rights.³⁵⁷ What courts or anyone *does* speaks more loudly than what they *say*.³⁵⁸ Although a court may bemoan a breach of Fourth Amendment rules, failing to provide any effective remedy for such a breach demonstrates disrespect for the law.

Furthermore, I tend to agree with Justices Stevens and Burger that the police as an entity are not the only culpable parties when the constitutional law of search and seizure is violated.³⁵⁹ Such a breach reflects a failure to foster a constitutional culture in which rights are fully respected, and the denial of a remedy for breach by society's representatives is a *de facto* endorsement of the wrong.³⁶⁰ Constitutional principles serve as a way of bonding

³⁵⁶ See *supra* text accompanying notes 72-73. I admit, however, to some ambivalence here, given Professor Davies thought-provoking argument that the good faith exception is necessary to the exclusionary rule's being viewed as a moral "sanction" rather than the mere "price" of doing business. See Davies, *supra* note 10.

³⁵⁷ See *supra* text accompanying notes 73-75.

³⁵⁸ Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 220-21 (2005) (concerning ways in which changes in law change public attitudes).

³⁵⁹ See *supra* text accompanying notes 78-79.

³⁶⁰ See *supra* text accompanying notes 78-79.

a diverse nation into the *American* people.³⁶¹ The nullification of the wrong represented by application of the exclusionary rule is a re-affirmation of American bonding and unity behind our highest moral principles.

³⁶¹
at 55-61.

See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8,

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2. The Exception as Practiced Is Vacuous

But, if there is to be a good faith exception, the Court has created a ramshackle doctrinal structure. Simple tort negligence is definitionally present whenever the police have violated the Fourth Amendment by engaging in an “unreasonable” search and seizure.³⁶² Yet, in *Leon*, the Court made clear that, when police are relying on a warrant, such negligence is insufficient to show bad faith.³⁶³ Instead, something more is required, something demonstrating greater culpability by the police as an institution—something akin to at least the gross negligence involved in imposing entity liability in criminal cases.³⁶⁴ But the Court does not require any serious inquiry into whether such gross negligence *by the entity* has occurred. It does not explore internal police departmental policies, structure, and practices to assess departmental culpability.³⁶⁵ Such an inquiry would have its costs, but they are not insuperable ones, as the experience in Florida of requiring depositions in felony cases—originally challenged as likely to promote explosive costs but instead decreasing long-term costs—has revealed.³⁶⁶ More importantly, however, such inquiries, even if costly, are mandated if entity culpability is truly in question. Instead, however, the Court relies on a subjective and rough instinctive judicial reaction to whether the police have gone too far. The Court overtly justifies its approach by an empirically unproven cost-benefit analysis that assumes no reduction in deterrence by recognizing a good faith exception.³⁶⁷ But its implicit moral analysis suggests that it would not change direction were empirical evidence to point the other way because it sees application of the exclusionary rule as a public sanction condemning extreme negligence or recklessness showing an indifference to human worth and constitutional values akin to

³⁶² See *supra* text accompanying notes 35-39.

³⁶³ See *supra* note 9.

³⁶⁴ See *supra* text accompanying notes 36-80.

³⁶⁵ See *supra* text accompanying notes 19-143 (analyzing the Court's good faith exception cases).

³⁶⁶ See Taslitz, *Slaves No More*, *supra* note 269, at 768-69 n.378, 776-79 (discussing the Florida experience).

³⁶⁷ See *supra* text accompanying notes 19-35.

that in criminal cases.³⁶⁸ But such a vision is morally vacuous absent adequate investigation into, and proof of, such culpability, as this article recommends.

3. Criminal Sanctions Are Not a Feasible Alternative

Criminal sanctions for police departments are not a practical substitute for such investigation. Such sanctions could truly bleed treasuries dry and severely over-deter. They would divert enormous psychological and material resources from crime control.³⁶⁹ If successful, such prosecutions would mark entire police departments as criminals, either breeding disrespect for the law or blurring the line between law enforcement and criminality.³⁷⁰ Proof would also be very time-consuming and difficult given the beyond a reasonable doubt standard and the other procedural protections for defendants at criminal trials.³⁷¹ Yet, in the Court's vision of the exclusionary rule's function, some sort of serious condemnation of entity culpability is nevertheless required.³⁷² A properly-constructed good faith exception to the exclusionary rule can do just that.

³⁶⁸ See *supra* text accompanying notes 36-71. Perhaps more accurately, the Court may be conflicted about whether it sees the good faith exception as involving release from an economic "price" or a "moral sanction." Cf. Davies, *supra* note 10.

³⁶⁹ Critics who worry that civil damages remedies imposed on individual officers would over-deter would surely be aghast at the idea of individual officer criminal liability. See, e.g., William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POLY 443, 446 (1997).

³⁷⁰ See Taslitz, *Civil Society*, *supra* note 10 (discussing communicative political impact of criminal sanctions).

³⁷¹ See ELLEN S. PODGOR, ET. AL., CRIMINAL LAW: CONCEPTS AND PRACTICE 199-219, 240-53 (2005) (discussing beyond a reasonable doubt and other procedural protections for defendants in criminal trials).

³⁷² See *supra* text accompanying notes 36-71.

4. The Court's Rationale for Not Extending the Exception to Warrantless Searches is Fuzzy

The Court's current version of the good faith exception also raises another puzzle. If the absence of departmental culpability is the primary justification for the exception, then why not apply it to warrantless searches?³⁷³ One response is that the Court may take the view that, though warrantless searches and seizures are frequently necessary, they can never be set up as the politically moral ideal.³⁷⁴ There is always some taint of culpability without prior judicial sanction when a constitutional violation occurs, even if it involved but ordinary negligence on the officer's or the entity's part.³⁷⁵ In any event, extending the good faith exception to warrantless searches and seizures would make suppression the exception rather than the rule when a constitutional violation is found, a step the Court has apparently thus far been unwilling to take. Furthermore, taking such a step makes sense only if you believe that deterrence is the sole purpose of the exclusionary rule and will not be undermined by the good faith exception's expansion to warrantless searches—two beliefs I do not share.³⁷⁶

³⁷³ See TASLITZ & PARIS, *supra* note 1, at 547 (noting good faith exception applies only to searches based upon a warrant).

³⁷⁴ See TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 8, at 17-44 (reviewing historical grounds for distrusting both warrantless searches and those based on insufficiently particularized warrants).

³⁷⁵ See Taslitz, *Civil Society*, *supra* note 10, at 329-30 (on a character of indifference toward harm being what justifies criminal liability for gross negligence); *supra* text accompanying notes 144-50 (similar).

³⁷⁶ See *supra* text accompanying notes 355-58 (summarizing briefly the reasons for my opposition to narrowing of the exclusionary remedy).

5. The Court Should Have the Courage of Its Convictions

The current doctrine is a confused and half-hearted effort. If the Court is truly to have the courage of its convictions, it should grant the good faith shield only when the prosecutor has proven the absence of any departmental-level culpability via the factors addressing such culpability that I have outlined here. Otherwise, the Court should recognize the inadequacy of its current approach to good faith by chucking the doctrine entirely. One way to come close to doing this *sub judice* without openly jettisoning a long-standing doctrine is to find “bad faith” where there is simple tort negligence. Arguably, looked at in isolation, the recent *Groh* case did this, denying the good faith shield where the police had made a truly technical error.³⁷⁷ I doubt, however, that this case marks a radical retrenchment of the good faith exception, though it may reveal a sense that the Court is at least troubled by its earlier precedent's implications.³⁷⁸ If the good faith exception is to exist, the entity-liability model posited here and nascent in *Leon* would do more to deter constitutional violations and promote respect for the police and the law than does the current state of confusion.

³⁷⁷ See *supra* text accompanying notes 100-12.

³⁷⁸ See *supra* text accompanying notes 100-12 (discussing my reasons for this conclusion).

