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O.T. 1983 AND THE ERA OF AGGRESSIVE MAJORITARIANISM: A COURT IN TRANSITION

*Geoffrey R. Stone**

In his 1984 Sibley Lecture, the Solicitor General of the United States defends the Supreme Court's record in the 1983 Term against three criticisms: (I) the Court too often sided with the government "over the individual" and surrendered its role as "a protector of constitutional rights;" (II) the Court abandoned principled constitutional interpretation in favor of "cost-benefit" analysis; and (III) as a result of the 1983 Term, "Americans are less free."¹ Although these criticisms are no doubt incomplete and overstated, and there is thus some force in the Solicitor General's defense, he ultimately fails to grasp the real significance of the 1983 Term—the Court has entered a new era—the era of aggressive majoritarianism.

On rare occasions, the Supreme Court fundamentally recasts its role in the American constitutional system. This has occurred at least three times this century. In the 1936 Term, the Court abandoned economic substantive due process and ushered in an era of judicial passivism designed to remove the Court from the center of political controversy. In the 1953 Term, the Court abandoned the separate-but-equal doctrine and ushered in an era of judicial activism designed to strengthen the democratic process and protect the unrepresented from majoritarian abuse. In the 1969 Term, the Court experienced a dramatic change in personnel and ushered in an era of moderation in which the Court retained much of its activist style but lacked "the kind of clear-cut agenda" that had pro-

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¹ Lee, *The Supreme Court's 1983 Term: Individual Rights, Freedom, and the Statue of Liberty*, 19 GA. L. REV. 1 (1984).

pelled it in the prior era.² In the 1983 Term, the Court may have signalled a similarly historic shift in its constitutional role.

I

To test this thesis, I examined the Court's decisions in cases posing traditional "civil liberties" issues—freedom of speech and press; freedom of religion; freedom from unreasonable searches and seizures; the privilege against compelled self-incrimination; the rights to due process, assistance of counsel, confrontation, and jury trial; the prohibition on cruel and unusual punishment; the right to equal protection of the laws; and the like. Table I reports the Court's record in such cases in terms selected at five-year intervals over the past fifty years. Table II reports the Court's record in such cases in recent terms.

TABLE I

Decisions of the Supreme Court Interpreting the
First, Fourth, Fifth, Sixth, Seventh, Eighth, and
Fourteenth Amendments at Five-Year Intervals—1933-1983

Term	Decisions Upholding Constitutional Claim		Decisions Rejecting Constitutional Claim	
	Percentage	Number	Percentage	Number
1933	27%	9	73%	24
1938	18%	6	82%	28
1943	29%	7	71%	17
1948	34%	10	66%	19
1953	33%	5	67%	10
1958	35%	8	65%	15
1963	86%	36	14%	6
1968	76%	42	24%	13
1973	45%	29	55%	36
1978	42%	23	58%	32
1983	19%	13	81%	56

² Blasi, *Preface to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* xiii (V. Blasi ed. 1983).

TABLE II

Decisions of the Supreme Court Interpreting the
First, Fourth, Fifth, Sixth, Seventh, Eighth, and
Fourteenth Amendments—1978-1983

Term	Decisions Upholding Constitutional Claim		Decisions Rejecting Constitutional Claim	
	Percentage	Number	Percentage	Number
1978	42%	23	58%	32
1979	46%	25	54%	30
1980	35%	18	65%	33
1981	44%	24	56%	30
1982	30%	16	70%	38
1983	19%	13	81%	56

Table I confirms the era of passivism that followed the abandonment of economic substantive due process, the era of activism that followed the rejection of the separate-but-equal doctrine in *Brown v. Board of Education*,³ and the era of moderation that followed the appointment of Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.

More important, Tables I and II combined reveal some startling conclusions⁴ about the 1983 Term:

(a) The Court in the 1983 Term sided with the government in more first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendment cases than in any term in the Court's history.

(b) Despite a consistently increasing caseload, the Court in the 1983 Term sided with the individual in fewer first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendment cases than in any term in the past quarter-century.

(c) Perhaps most important, the Court in the 1983 Term sided with the government in a higher percentage of first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendment cases than in any term in the past half-century, with the sole exception of the 1938 Term, when the Court was in the throes of dismantling eco-

³ 347 U.S. 483 (1954).

⁴ These conclusions are premised, not on an examination of the Court's record in every term, but on assumptions about the unexamined terms based on trends that were evident in the examined terms.

conomic substantive due process.

Moreover, if we factor out the "easy" cases in the 1983 Term—that is, those cases that were decided unanimously or with only one dissent—the results are even more dramatic. Of the forty-six "non-easy" first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendment cases decided during the 1983 Term, the Court decided thirty-nine, or 85%, in favor of the government.⁵

I should note two caveats about these statistics. First, as Solicitor General Lee suggests, decisions involving the first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendments are not necessarily a *perfect* measure of "activism," "liberalism," "strict constructionism," or the like. In some instances, for example, decisions in favor of the individual, as under the eminent domain clause, may not fit within the conventional "liberal" agenda. In other instances, decisions in favor of the state, as in the affirmative action area, may not fit within the conventional "conservative" agenda. Such anomalies are relatively infrequent, however. Therefore, they do not appreciably affect the statistics. Second, it is at least possible that some part of the trend reflected in the 1983 Term is due to the Court's effort merely to hold the line against increasingly activist lower court judges. In fact, however, as this paper suggests, many of the Court's decisions in the 1983 Term break sharply with the Court's own precedents or with a substantial consensus of opinion in the lower courts. Thus, although a possible increase in the activism of lower court judges might have some impact on the statistics, I do not consider it a substantial factor.⁶

What these statistics suggest is a Court in transition. Indeed, the transition, foreshadowed in the 1982 Term, is well under way. From 1969 to 1983, the Burger Court had no "clear-cut agenda." That is no longer the case. Just as the high percentage of civil liberties cases decided in favor of the individual by the Warren Court tells us a good deal about that Court's agenda, the similarly strik-

⁵ If one considers only the decisions that generated three or more dissents, the results are unchanged. In the 1983 Term, the Court decided 34 cases involving the first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendments with three or more dissents. The Court sided with the government in 29, or 85%, of these cases.

⁶ I should also note that when a single decision involved both an acceptance and rejection of constitutional claims, I classified it according to the more important aspect of the decision. If the two aspects of the decision were of equal importance, I simply disregarded the decision. The number of decisions falling into this category is statistically insignificant.

ing record in the 1983 Term tells us a good deal about the Court's agenda today. A Court that decides 85% of its "non-easy" civil liberties cases in favor of the government knows where it is headed. The era of moderation is over.

The nature and tone of the Court's new agenda is evident in its decisions. This is a "majoritarian" Court. Or, perhaps more precisely, it is a "nonminoritarian" Court. It is a Court that sees the Constitution through the eyes of mainline America. It seeks to restore to the "majority" its right to assert its will, even in those areas in which minority interests are most seriously threatened. It is insensitive, or at least unempathetic, to those most in need of its protection.

Several decisions best capture the tone of the 1983 Term. In *Lynch v. Donnelly*,⁷ the Court held that a city's official sponsorship and display of a creche did not violate the establishment clause of the first amendment. In reaching this result, the Court, continuing a recent trend,⁸ expressly abandoned the principle that the first amendment erects a "wall" of separation between church and state.⁹ It announced instead that the Constitution "affirmatively mandates accommodation" of religion.¹⁰ In defining the appropriate "accommodation" in *Lynch*, the Court offered the rather extraordinary assertion that the city's sponsorship of the creche was designed, not "to express . . . a particular religious message," but to further the legitimate "secular purpose" of celebrating the Christmas holiday.¹¹ The Court dismissed out-of-hand the claim that the "effect on minority religious groups . . . is to convey the message that their views are not similarly worthy of public recognition."¹² As Professor Laurence Tribe has observed, "[o]ne cannot avoid hearing in *Lynch* a faint echo of the Court which found nothing invidious in the Jim Crow policy of 'separate but equal.'"¹³

⁷ 104 S. Ct. 1355 (1984).

⁸ See Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770.

⁹ See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

¹⁰ *Lynch*, 104 S. Ct. at 1359.

¹¹ *Id.* at 1363.

¹² *Id.* at 1373 (Brennan, J., dissenting).

¹³ Tribe, *Constitutional Calculus: Efficient Justice Under Economics?* (forthcoming in *Harvard Law Review*, volume 98).

In *Members of the City Council v. Taxpayers for Vincent*,¹⁴ the Court upheld a municipal ordinance prohibiting the posting of signs on public property, as applied to individuals who had attached political campaign posters to public utility poles. In reaching this result, the Court overstated the government's interest in prohibiting the expression and understated the individuals' interest in using the prohibited means of communication. In assessing the government's interest, the Court maintained that the city could not effectively prevent "visual clutter"¹⁵ by any less extreme measure than absolute prohibition. A more modest form of regulation, designed to accommodate free speech, was simply out of the question. In assessing the individuals' interest, however, the Court maintained that the challenged restriction did not appreciably limit the right of free expression, for the speakers could always resort to alternative means of communication. The Court ignored the fact that posting signs on public utility poles is a less expensive, more convenient, and more effective means of reaching a large audience than any of the alternatives suggested by the Court.

It is illuminating to compare *Vincent* with the Court's analysis of a related issue some forty-five years earlier in *Schneider v. State*.¹⁶ In *Schneider*, the Court invalidated a municipal ordinance prohibiting leafletting on the public streets. Although the city quite sensibly pointed out that leafletting causes litter, the Court held that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance"¹⁷ that "diminishes the exercise of rights so vital to the maintenance of democratic institutions."¹⁸ The Court explained that, in such circumstances, the city must deal with the "indirect consequences" of free "speech and press"¹⁹ by regulation, rather than prohibition. In *Vincent*, the city could have minimized "visual clutter," while accommodating free expression, by regulating the size, appearance, and location of campaign signs. But the Court in *Vincent*, unlike the Court in *Schneider*, was unwilling to impose such a "burden" on government.

¹⁴ 104 S. Ct. 2118 (1984).

¹⁵ *Id.* at 2135.

¹⁶ 308 U.S. 147 (1939).

¹⁷ *Id.* at 162.

¹⁸ *Id.* at 161.

¹⁹ *Id.* at 162.

Perhaps even more troublesome was the Court's indifference in *Vincent* to the long-standing principle that, in construing the first amendment, the Court must take special care to preserve the availability of unconventional means of communication, for such means of expression are "essential to the poorly financed causes of little people."²⁰ The Court understood in *Schneider* that not everyone can afford a newspaper or television campaign. In *Vincent*, the Court gave short shrift to this central first amendment insight.²¹

The Court was equally unreceptive to fourth amendment claims in the 1983 Term. The Court sided with the government in fourteen of sixteen, or 88%, of its "search and seizure" decisions. Moreover, these decisions were of no small import. In *United States v. Leon*,²² for example, the Court for the first time engrafted a "good faith" exception onto the exclusionary rule. Even more revealing than *Leon*, however, was the Court's decision in *Hudson v. Palmer*,²³ in which the Court, rejecting the view of every court of appeals that had addressed the question in the past decade,²⁴ held that "prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells."²⁵ The Court defended this result on the ground "that society would insist that the prisoner's expectation of privacy always yield to . . . the paramount interest in institutional security."²⁶ As Justice Stevens noted in dissent, the Court in *Hudson* betrayed its "special obligation to protect the rights of

²⁰ *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943). See generally Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

²¹ See also *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984). In *Clark*, the Court upheld, against a first amendment challenge, a National Park Service regulation prohibiting sleeping in a public park, as applied to individuals engaged in a round-the-clock demonstration designed to call attention to the plight of the homeless.

²² 104 S. Ct. 3405 (1984).

²³ 104 S. Ct. 3194 (1984).

²⁴ See, e.g., *Lyon v. Farrier*, 727 F.2d 766 (8th Cir. 1984); *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983); *Palmer v. Hudson*, 697 F.2d 1220 (4th Cir. 1983); *United States v. Chamorro*, 687 F.2d 1 (1st Cir. 1982); *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982); *United States v. Lilly*, 576 F.2d 1240 (5th Cir. 1978); *United States v. Ready*, 574 F.2d 1009 (10th Cir. 1978); *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975); *Daughtery v. Harris*, 476 F.2d 292 (10th Cir. 1973); see also *Hudson*, 104 S. Ct. at 3212-13 n.19 (Stevens, J., dissenting).

²⁵ *Hudson*, 104 S. Ct. at 3202.

²⁶ *Id.* at 3201.

prisoners.”²⁷ Prisoners are, after all, disenfranchised, scorned, and shut off from public view. They are true “outcasts of society.”²⁸ By denying prisoners even a minimal right of privacy, the Court sacrificed a fundamental constitutional principle to its own—highly speculative—assessment of what “society” might “insist” on.

These decisions are merely illustrative, not exhaustive.²⁹ I must emphasize, however, that the thrust of my point—that the Court is in an era of transition—is seen most clearly in the overall pattern of its decisions. One might identify decisions analogous to those described above from almost any of the past fifteen terms. What makes the 1983 Term different is that *Lynch*, *Vincent*, *Leon*, and *Hudson* are not out of the ordinary.

The Court has entered an era of aggressive majoritarianism. The aggressiveness is evident in the pattern of its decisions. Just as the Court in the Warren era aggressively exercised its jurisdiction to select a docket that would enable it actively to pursue its “agenda,” the Court in the 1983 Term followed a similar course. It is no “accident” that the Court sided with the government in more than 85% of its “non-easy” civil liberties decisions. The majoritarianism is evident in the nature of its decisions. This is not a “passivist” Court. It does not speak the language of “deference” or extol the “passive virtues.” Rather, its constitutional judgments are premised on its own—often strikingly majoritarian—conceptions about society and how it should be structured.

It is possible, of course, that the 1983 Term is a statistical anomaly. Perhaps the 1984 Term will see a return to moderation. I think not. The shift is due, in part, to a more general shift in our na-

²⁷ *Id.* at 3216 (Stevens, J., dissenting).

²⁸ *Id.*

²⁹ The majoritarian tone of the 1983 Term is reflected, not only in the Court's decisions concerning the first, fourth, fifth, sixth, seventh, eighth, and fourteenth amendments, but across its entire docket. In *Pennhurst State School & Hosp. v. Halderman*, 104 S. Ct. 900 (1984), for example, the Court embraced an unprecedented construction of the eleventh amendment to prohibit a federal district court from ordering state officials to comply with the minimum requirements established by state law for the operation of state institutions for the mentally retarded. In *Allen v. Wright*, 104 S. Ct. 3315 (1984), the Court embraced a stringent construction of the “standing” doctrine to block a suit by parents of black children challenging the constitutionality of Internal Revenue Service regulations that allegedly granted tax-exempt status to racially discriminatory private schools. And in *Firefighters Local Union v. Stotts*, 104 S. Ct. 2576 (1984), the Court narrowly construed a consent decree to elevate the “seniority” rights of white employees over the rights of black employees who had been hired in order to remedy prior unconstitutional discrimination.

tional politics and attitudes. It is increasingly common these days for national leaders to describe minorities, once thought to need special protection, as mere "interest groups" grasping for political power. The prevalence of this view appears to legitimate the Court's aggressive majoritarianism. Moreover, the shift in the Court is due, not only to a change in public attitudes, but also to a change in the Court itself. The substitution of Justice O'Connor for Justice Stewart has had a dramatic effect. Justice Stewart was a calming voice in the era of moderation. Justice O'Connor is a strident advocate of the Court's new direction. Justice Stewart's departure triggered a fragmentation of the center and a critical realignment in the Court. The 1983 Term is no anomaly. The new era is real. It is here to stay.

II

If the 1983 Term is any indication, "cost-benefit" analysis may well become the dominant jurisprudential tool of the new era.³⁰ Solicitor General Lee defends the Court's use of cost-benefit analysis. He asserts that cost-benefit analysis is merely another name for "balancing," and that it "carries no real threat to individual rights."³¹ I agree that cost-benefit analysis, understood as a rigorous and objective evaluation of the costs and benefits of particular rules, can play a useful role in constitutional analysis. I do not agree, however, that cost-benefit analysis, as employed by the Court in the 1983 Term, is mere "balancing" or that it "carries no real threat to individual rights."

Cost-benefit analysis focuses on "marginal effects."³² Although this focus may at times enlighten, it is often incompatible with the central task of constitutional interpretation. As Professor Frank Easterbrook has observed, "the Constitution often instructs judges to disregard utilitarian calculations in favor of recognizing personal rights and reshaping preferences."³³ In the free speech context, for example, the Court has long recognized the need to avoid ad hoc assessments of the dangerousness of particular messages, for as

³⁰ See Tribe, *supra* note 13.

³¹ Lee, *supra* note 1, at 9, 12.

³² Easterbrook, *Method, Result, and Authority: A Reply* (forthcoming in *Harvard Law Review*, volume 98).

³³ *Id.*

history teaches, judicial attempts to evaluate the threat posed by unpopular opinions "inevitably became involved with the ideological predispositions of those doing the evaluating."³⁴ Thus, in this context, the Court must establish clear, precise, and predictable rules rather than rely on ad hoc evaluations of marginal effects.

A Court that is enamoured by cost-benefit analysis, however, may resort to that analysis even when it is inappropriate. *Lynch v. Donnelly* illustrates the danger. Although the protection of freedom of religion, like the protection of freedom of speech, poses a serious risk of ideological bias in the judicial process, the Court in *Lynch* did not attempt to articulate a clear, precise, or predictable rule to reconcile the city's sponsorship and display of a creche with the underlying principles of the establishment clause, nor did it apply the established "*Lemon* test."³⁵ Rather, the Court argued that to forbid the city's sponsorship and display of "the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction."³⁶ Rather than enunciate a principled definition of religious neutrality, the Court slid down the slope of marginal effects.

Moreover, even in those circumstances in which a consideration of costs and benefits may be appropriate, cost-benefit analysis as employed by the Court may pose a serious "threat to individual rights." Unlike traditional balancing, which focuses explicitly on a weighing of competing values, cost-benefit analysis tends to disguise and distort this "value-weighing" process. Sound cost-benefit analysis turns on the capacity to monetize costs and benefits. Many of the values at stake in constitutional interpretation, however, such as privacy, equality, and dignity, cannot and ought not be monetized. A Court determined to employ cost-benefit analysis in constitutional interpretation may undervalue or even ignore those values that it cannot readily monetize;³⁷ it may overvalue

³⁴ J. ELY, *DEMOCRACY AND DISTRUST* 112 (1980); see Stone, *Content, Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

³⁵ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

³⁶ *Lynch v. Donnelly*, 104 S. Ct. 1355, 1365 (1984).

³⁷ See generally Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1318-19 (1974) (cost-benefit analysis tends to "dwarf soft variables").

those concerns, such as administrative efficiency, that fit neatly within its cost-benefit calculus; and it may exaggerate the certainty of its evaluations in order to create the aura of rigor and objectivity that cost-benefit analysis purports to achieve.³⁸

These dangers were evident throughout the 1983 Term. In *Hudson v. Palmer*, for example, the Court held that whether a prisoner has any reasonable expectation of privacy in his cell turns on "a balancing of interests."³⁹ In assessing the government's interest, the Court declared that any protection of prisoner privacy "would seriously undermine" the "paramount interest in institutional security."⁴⁰ In assessing the individual's interest, however, the Court focused solely on marginal effects, and emphasized that the "interest of the prisoner in privacy . . . is already limited by the exigencies of the circumstances."⁴¹ Accordingly, there was not all that much privacy left to protect. But the Court in *Hudson* could just as easily have run its analysis in reverse. That is, it could have emphasized marginal effects in assessing the government's interest and the importance of privacy in assessing the individual's interest. As Justice Stevens noted in dissent, "the slight residuum of privacy that a prison inmate can retain" may not mean much to the Court, but from the perspective of the prisoner, it "may mark" the last vestige of his "humanity."⁴² The invocation of cost-benefit analysis in *Hudson* was a mere cover for the Court's own—hidden—agenda.

In *New York v. Quarles*,⁴³ the Court, "departing from prior precedent,"⁴⁴ used cost-benefit analysis to create a "public safety" exception to *Miranda v. Arizona*.⁴⁵ The Court held in *Quarles* that the government could introduce into evidence a defendant's state-

³⁸ Cost-benefit analysis in the economic sense counts goods as costs or benefits "only when and to the extent that private persons are willing to pay for those goods." Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1275 (1981). The Court's version of cost-benefit analysis, however, is more accurately understood as a form of utilitarianism that involves the Court in wholly "subjective judgments of value." *Id.* at 1276. See generally Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

³⁹ 104 S. Ct. 3194, 3200 (1984).

⁴⁰ *Id.* at 3201.

⁴¹ *Id.* at 3200-01.

⁴² *Id.* at 3208 (Stevens, J., dissenting).

⁴³ 104 S. Ct. 2626 (1984).

⁴⁴ *Id.* at 2634 (O'Connor, J., dissenting in part and concurring in part).

⁴⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

ment disclosing the location of a gun, even though the statement was elicited in a custodial interrogation without *Miranda* warnings, where there was an immediate need to find the gun to protect the "public safety." The Court explained that although the benefits to be derived from *Miranda* may outweigh the "cost . . . of fewer convictions," those benefits do not outweigh the costs when one adds to the government's side of the equation the additional cost of "a threat to the public safety."⁴⁶

The Court in *Quarles* posed a false conflict in order to inflate the costs to the government. Consider, for example, the following situation. Defendant is arrested for planning to blow up a public building. The police have reliable information that the bomb is set to explode in fifteen minutes. The police beat the defendant until he discloses the location of the bomb. The police then find and defuse the bomb. In such circumstances, the defendant's statement disclosing the location of the bomb may not be used against him at trial even if the beating was a "reasonable" means to protect the "public safety." There is, in other words, a simple way to accommodate both the interest in "public safety" and the privilege against compelled self-incrimination—permit the government to compel the disclosure, but exclude its use at trial. This solution was equally available in *Quarles*. Rather than adopt this solution, the Court manipulated its assessment of costs in order to reach its "desired" result.⁴⁷

Ironically, perhaps the best example of the Court's misuse of cost-benefit analysis in the 1983 Term is the decision cited by Solicitor General Lee as the model—*United States v. Leon*. In *Leon*, the Court, overturning seventy years of precedent, held that the fourth amendment exclusionary rule will no longer bar the use of evidence obtained in an unconstitutional search if the officers conducting the search acted in "good faith" reliance on a warrant. The Court explained that the appropriateness of exclusion must be resolved in each case "by weighing the costs and benefits."⁴⁸ On the cost side in *Leon*, the Court noted the "substantial social costs ex-

⁴⁶ *Quarles*, 104 S. Ct. at 2632, 2633.

⁴⁷ The Court attempted to deal with this problem with the rather circular assertion that "there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry of this kind." *Id.* at 2633 n.7.

⁴⁸ 104 S. Ct. 3405, 3412 (1984).

acted by the exclusionary rule”—that is, “some guilty defendants may go free.”⁴⁹ On the benefit side, the Court maintained that where the searching officers act in “good faith” reliance on a warrant, the rule “can have no substantial deterrent effect.”⁵⁰ The Court thus concluded that, at least, “in the sorts of situations under consideration” in *Leon*, the exclusionary rule “cannot pay its way.”⁵¹

I have three objections to the Court’s cost-benefit analysis in *Leon*. First, the essential predicate of the Court’s analysis is its assertion that the exclusionary rule is merely “‘a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.’”⁵² This view, which has gained support only in the last decade,⁵³ directly contradicts the traditional conception of the rule as “an essential part” of the fourth amendment.⁵⁴ Although the Court’s recharacterization of the rule is justified neither by logic nor history,⁵⁵ it has enabled the Court to convert a central constitutional principle into a mere technicality the utility of which turns entirely on its capacity to “deter.” In effect, the inability of the Court to fit the essentially unquantifiable “judicial integrity” and “personal right” rationales of the rule within its cost-benefit calculus has led the Court to ignore these alternative, equally forceful justifications.

Second, the Court in *Leon* misstated and inflated the costs of the exclusionary rule. The Court maintained that, as a result of the rule, “guilty defendants may go free.” But the actual cost of the rule—in terms of “lost” convictions—is in fact minimal. According to statistics cited by the Court, the exclusionary rule results in the nonprosecution or nonconviction of only “between 0.6% and

⁴⁹ *Id.* at 3413.

⁵⁰ *Id.* at 3413 n.6.

⁵¹ *Id.*

⁵² *Id.* at 3412 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

⁵³ See *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Peltier*, 422 U.S. 531 (1975).

⁵⁴ *Mapp v. Ohio*, 367 U.S. 643, 657 (1961); see also *Olmstead v. United States*, 277 U.S. 438, 462-63 (1928); *Weeks v. United States*, 232 U.S. 383, 391-94 (1914).

⁵⁵ See *Leon*, 104 S. Ct. at 3430-38 (Brennan, J., dissenting); see also Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565 (1983); White, *Forgotten Points in the “Exclusionary Rule” Debate*, 81 MICH. L. REV. 1273 (1983).

2.35% of individuals arrested for felonies.”⁵⁶ Moreover, and perhaps more important, the fourth amendment “directly contemplates that some reliable and incriminating evidence will be lost to the government.”⁵⁷ Thus, for the most part, “it is not the exclusionary rule,” but the fourth amendment “that has imposed the cost.”⁵⁸

Third, the Court misstated and trivialized the benefits of exclusion. Although the Court may be correct in its assumption that officers acting in “good faith” reliance on a warrant are unlikely to be deterred, deterrence of the searching officers does not exhaust the possible benefits of the rule, even accepting a deterrence rationale. To the contrary, “the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment.”⁵⁹ The exclusion of unconstitutionally obtained evidence may reinforce this educational purpose whether or not the officers involved in any particular search acted in “good faith.” Indeed, in the long run this educational purpose may be more important than the deterrence of specific unlawful searches. Moreover, magistrates, as well as police officers, may be influenced by the threat of exclusion. If the exclusionary rule governed even “good faith” searches conducted pursuant to a warrant, as it did prior to *Leon*, a magistrate’s erroneous decision to issue a warrant would frustrate society’s interest in effective law enforcement. Magistrates would thus have an incentive to be careful in issuing warrants. *Leon* removes that incentive. The Court in *Leon* too eagerly discounted these benefits of exclusion.

A rigorous, objective consideration of costs and benefits might serve a useful function in some areas of constitutional interpretation. But cost-benefit analysis, as employed by the Court in the 1983 Term, and as endorsed by Solicitor General Lee, is neither

⁵⁶ 104 S. Ct. at 3413 n.6; see Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RESEARCH J. 611; Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RESEARCH J. 585.

⁵⁷ 104 S. Ct. at 3437 (Brennan, J., dissenting).

⁵⁸ *Id.*; see Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392-93 (1983).

⁵⁹ Stewart, *supra* note 58, at 1400.

rigorous nor objective. It is, rather, an "inherently unstable" compound of "intuitions, hunches, and occasional pieces of partial and often inconclusive data."⁶⁰ It is a masquerade by which the Court insinuates its undisclosed and unexamined value judgments into the Constitution.

III

Solicitor General Lee also defends the Court against the claim that, as a result of its record in the 1983 Term, "Americans are less free." He argues that "freedom means more than the absence of governmental abuse. It must also include some element of protection from other individuals."⁶¹ Indeed, for "the overwhelming majority of people in America, the thief, the rapist, and the kidnapper pose a significantly greater threat" than "the policeman and the jailor."⁶² Thus, "one of government's jobs is to keep its citizens as free as it can from the depredations of [crime]."⁶³

Of course freedom from "the thief, the rapist, and the kidnapper" is important. That is what society is about. The issue is not *whether* such freedom must be preserved, but *how*. There are many ways to preserve this freedom. We may attempt to alleviate the causes of poverty, misery, and crime. We may improve law enforcement. We may employ police-state tactics. We may inflict barbaric punishments. The easy way is to yield to the temptation of expediency and self-interest. It is to disadvantage the poor, the weak, the suspicious, and the disenfranchised. It is to avoid inconvenience for those who are not threatened by "the policeman and the jailor."

But we have a Constitution to obstruct the easy way. We have a Constitution to channel our efforts towards more civilized ways that respect individual privacy and dignity. The issue is not freedom from rapists versus freedom of rapists. It is how best to achieve freedom for us all. This does not, in itself, decide cases. But it does tell us something about how we ought to weigh the costs and benefits of our decisions. As Solicitor General Lee suggests, "one of the government's jobs is to keep its citizens as free as

⁶⁰ *Leon*, 104 S. Ct. at 3437 (Brennan, J., dissenting).

⁶¹ Lee, *supra* note 1, at 6.

⁶² *Id.*

⁶³ *Id.* at 2.

it can from the depredations of [crime]." But one of its other jobs is to preserve and protect the rights of those who, like Leon, Quarles, and Palmer, *are* threatened by "the policeman and the jailor." When government fails in that job, it is for the Court—the essential "guardian of those rights"—to serve as the "impenetrable bulwark" of our Constitution.⁶⁴ In the 1983 Term, the Court betrayed that responsibility. And if the past is any guide, we can expect more of the same.

⁶⁴ Madison, *Address to the First Congress*, 1 ANNALS OF CONGRESS 439 (1789).