Dismantling The Exclusionary Rule: *United States v. Leon* and the Courts of Washington—Should Good Faith Excuse Bad Acts?

I. INTRODUCTION

Traditionally, when the government has obtained evidence by a method that violates the fourth amendment of the United States Constitution, that illegally obtained evidence has been excluded from use in both state and federal criminal prosecutions.¹ This exclusionary rule has been the sanction employed to enforce the fourth amendment right of citizens to be secure in their homes against unreasonable intrusions by the government;² without enforcement, the fourth amendment right is an empty promise.³ The exclusionary rule, however, has come under increasing scrutiny and criticism in recent years.⁴ The Supreme Court has developed a fourth amendment jurisprudence that greatly limits the application of the rule by narrowly construing its purpose. The rule has come to be regarded solely as a method by which to deter illegal police conduct.⁵ Thus, the Court now excludes illegally obtained evidence only when exclusion will deter police misconduct. Increasingly, the Court discounts or entirely ignores the other policy interests the exclusionary rule

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¹ C. McCORMICK, McCORMICK ON EVIDENCE § 164 at 445 (3rd ed. 1984) [hereinafter cited as McCORMICK].

² See, e.g., Mapp v. Ohio, 367 U.S. 643, 645 (1960) (The state of Ohio asserted that evidence seized in violation of a federal constitutional right could be used in a state prosecution; the Supreme Court ruled that unconstitutionally seized evidence should be excluded from state as well as federal prosecutions).


⁵ See, e.g., Michigan v. DeFillippo, 443 U.S. 31, 40 (1979) (where officer makes arrest pursuant to an ordinance later found to be unconstitutional, officer’s reliance on ordinance is not conduct the rule is designed to deter); United States v. Peltier, 422 U.S. 531, 538-39 (1975) (deterrence function of exclusionary rule does not require retroactive application of a stricter probable cause standard developed by the court after the search and arrest at issue has occurred).
has been thought to protect.\footnote{See Calandra v. United States, 414 U.S. 338, 347-48 (1974); see also Stewart, The Road to Mapp, \textit{supra} note 3, at 1390-92.}

One way in which the Supreme Court has limited application of the exclusionary rule is through its recent adoption, in \textit{United States v. Leon},\footnote{104 S. Ct. 3405 (1983). Justice White wrote for the majority; Justices Brennan, Marshall, and Stevens dissented.} of a good faith exception. Even when viewed in light of the Court’s growing reluctance to apply the exclusionary rule, the good faith exception represents a dramatic retreat from the rule’s historical justifications.\footnote{By the mid-1970s, a majority of the Justices on the Supreme Court were unwilling to support any further expansion of the exclusionary rule. Stone v. Powell, 428 U.S. 465, 494 (1976) (the rule does not extend to certain federal habeas corpus proceedings); United States v. Janis, 428 U.S. 433, 459-60 (1976) (the rule is not applicable in federal civil tax proceedings); Calandra v. United States, 414 U.S. 338, 354 (1974) (the rule is not applied in grand jury proceedings). The Court in these decisions and in others, see \textit{supra} note 5, narrowed its focus to the deterrence rationale and developed a cost/benefit analysis for determining the value of applying the exclusionary rule.}

In \textit{Stone}, \textit{Janis}, and \textit{Calandra}, the Court had effectively halted expansion of the rule’s application to new areas of judicial proceedings. \textit{Leon} represents a retreat from prior case law because the Court creates an exception to the customary and accepted application of the rule. “Today, for the first time, this Court holds that although the Constitution has been violated, no court should do anything about it at any time and in any proceeding.” \textit{Leon}, 104 S. Ct. at 3456 (Stevens, J., dissenting).


\textit{Elkins v. United States}, 364 U.S. 206, 222 (1960); see also \textit{Mapp v. Ohio}, 367 U.S. at 659; \textit{McCormick, supra} note 1, § 168 at 462.

\textit{LaFave and Israel, Criminal Procedure} § 3.1 at 80 (1985). It has also been suggested, as a matter of state law, that the state is morally obligated to prohibit the use of illegally obtained evidence. When exclusion is regarded as a “moral imperative” the rule is applied automatically, without reference to any pragmatic justification. \textit{See State v. White}, 97 Wash. 2d 93, 108-12, 640 P.2d 1061, 1070-71 (1982) (“Without an immediate application of the exclusionary rule whenever an individual’s right to privacy is unreasonably invaded, the protections of the Fourth Amendment and Const. art. 1, § 7 are seriously eroded.”). \textit{See Nock, Seizing Opportunity, Searching for Theory: Article 1,}}
through the use of an illegal search warrant will not be excluded under the fourth amendment if the officers acted in objectively reasonable reliance on a warrant issued by a neutral and detached magistrate.\textsuperscript{12} The fourth amendment requires that search warrants be based on probable cause and that the area to be searched and things to be seized be adequately described. A violation of these requirements no longer suffices to exclude illegally obtained evidence.\textsuperscript{13} This decision is significant because \textit{Leon} and the line of cases on which it rests define a sharp shift in the Court's direction.\textsuperscript{14} The inquiry no longer is whether the fourth amendment was violated,\textsuperscript{15} but whether the deterrent effect of the exclusionary rule outweighs the potential cost of losing valuable evidence.\textsuperscript{16}

State courts that continue to regard the rule's primary purpose as the protection of personal privacy interests need not and should not follow the Supreme Court's policy of restricting application of the exclusionary rule when these state courts interpret state law.\textsuperscript{17} Each state has its own constitutional provision that historically has been understood to protect the same types of interests that the fourth amendment protects.\textsuperscript{18} Ine-

\textit{Section 7, 8 U. Puget Sound L. Rev. 331, 370 (1985) [hereinafter cited as Nock, Seizing Opportunity]; Adams & Nock, Search, Seizure and Washington's Section 7: Standing from Salvucci to Simpson, 6 U. Puget Sound L. Rev. 1, 26-28 (1982) [hereinafter cited as Adams & Nock, Salvucci to Simpson. This moral imperative purpose is distinguished from the rule as a personal remedy by being applied without any pragmatic justification. Finally, Justice Brennan suggests in his dissent in \textit{Leon}, in which he was joined by Justice Marshall, that the admission of illegally obtained evidence constitutes a new violation of the fourth amendment. \textit{Leon}, 104 S. Ct. at 3433. Therefore, application of the exclusionary rule serves the purpose of protecting individuals from new violations as well as from consequences of previous violations. \textit{See supra} Nock, Seizing Opportunity, supra, at 370-371.}


13. \textit{Id.} The \textit{Leon} Court accepted the finding of the district court, which said that "probable cause to issue the warrant was lacking." \textit{Id.} at 3439 (Brennan, J., dissenting).

In a companion case to \textit{Leon}, the Supreme Court ruled that failure of a warrant to accurately particularize the things to be seized should not trigger the exclusionary rule where officers acted in objectively reasonable reliance on that warrant. Massachusetts v. Sheppard, 104 S. Ct. 3424, 3428 (1984).


15. \textit{Leon}, 104 S. Ct. at 3412. \textit{See also id.} at 3430-31 (Brennan, J., dissenting) ("The majority ignores the fundamental constitutional importance of what is at stake here.").

16. \textit{Id.} at 3412.


18. The Alaska constitution, for example, uses language nearly identical to that of
dependent interpretation of these state constitutional provisions can provide citizens with greater protections than are available to them under the federal constitution. Specifically, state courts are free to promote the several purposes served by application of the exclusionary rule in light of their own constitutional guarantees.

In Washington State, the trend toward providing individuals with greater protection under state law is well established. Thus, the Washington Constitution's privacy provision, article I, section 7, will not support a "good faith" exception such as the one created by the Supreme Court in United States v. Leon. Although the issue has not been expressly decided by the state supreme court, the court's general commitment to the protection of privacy rights and its specific rejection of the deterrence rationale as the sole justification for application of the exclusionary rule compel this conclusion.

the fourth amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ALASKA CONST. art. I, § 14. The Virginia Constitution uses similar language:

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.


19. MCCORMICK, supra note 1, § 166 at 452-55.
20. Id. at 453.
21. See also infra notes 23 & 24.
22. Article I, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

23. State v. Jackson, 102 Wash. 2d 432, 435-37, 688 P.2d 136, 138-39 (1984) (Aguilar-Spinelli test for probable cause required in Washington even though test rejected by Supreme Court); State v. Chrisman, 100 Wash. 2d 814, 817-19, 676 P.2d 419, 422 (1984) (article I, section 7 prohibits police from entering dormitory room to inspect possible contraband observed from outside room); State v. Ringer, 100 Wash. 2d 686, 690-99, 674 P.2d 1240, 1242-47 (1983) (court limited scope of motor vehicle search incident to arrest to the person arrested and the area within his immediate control); State v. Simpson, 95 Wash. 2d 170, 177, 622 P.2d 1199, 1204-05 (1980) (police violated driver's reasonable expectation of privacy by opening door to read vehicle identification number); State v. Hehman, 90 Wash. 2d 45, 47, 578 P.2d 527, 528 (1978) (full custody arrest for minor traffic offense was improper where defendant was willing to sign the promise to appear).

24. State v. White, 97 Wash. 2d at 109-12, 640 P.2d at 1070 (stop-and-identify stat-
This Note will review briefly the history of the exclusionary rule under fourth amendment jurisprudence, with special emphasis given to the purposes the rule has traditionally been thought to serve. The significance of the Leon decision then will be examined in light of the emergence in Washington of an interpretation of article I, section 7 that diverges from the Supreme Court’s interpretations of the fourth amendment. This Note will conclude by discussing how article I, section 7 continues to embody the several purposes traditionally served by the exclusionary rule.25

II. HISTORY OF THE EXCLUSIONARY RULE

The fourth amendment does not explicitly require exclusion of illegally obtained evidence.26 At common law, the legality of the method of obtaining evidence was unrelated to the admissibility of that evidence.27 In 1886, the Supreme Court laid the foundation for the exclusionary rule in Boyd v. United States.28

25. This analysis is limited to a consideration of the constitutional provision. Statutes and administrative laws, which are also important sources of a citizen’s protection against unreasonable governmental intrusions, are not examined. See, e.g., WASH. REV. CODE § 10.79 (1983) (specific procedures and standards police and magistrates must follow in obtaining the issuing warrant, and the conduct required by officers acting without authority of warrant); WASH. REV. CODE § 66.32 (1983) (search and seizure of alcoholic beverages); WASH. CRR. 2.3; WASH. JCRR. 2.10 (guidelines for issuance, contents, and execution of search warrants).

26. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV. The fourth amendment does not explicitly demand that evidence be excluded. The framers’ intent in creating and passing the fourth amendment was principally to prevent the government’s use of either general warrants or of writs of assistance. Kamisar, Does (did)(should) the Exclusionary Rule Rest on a “Principled Basis” rather than an “Empirical Proposition”? 16 CREIGHTON L. REV. 565, 577 (1982-83) [hereinafter cited as Kamisar, Principled Basis].

27. [T]hough papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.

S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 254(a), at 325 (14th ed. 1883).

In *Boyd*, the Court struck down a section of a Customs and Revenue law that compelled the production of a businessman's private papers. The Court held that the seizure of the papers was unconstitutional because their use in evidence violated the merchant's fifth amendment right against self-incrimination.

Although *Boyd* was a civil case with no clear fourth amendment violation, the Court articulated a principle of construction that set the stage for the exclusionary rule and the rule's application to federal criminal prosecutions. The *Boyd* Court observed that unconstitutional practices often begin as only slight deviations from accepted procedures. To guard against these infractions, the constitutional provisions for the security of person and property must be construed liberally. This principle of liberal construction formed the foundation for creation of the exclusionary rule twenty-eight years later in the landmark case of *Weeks v. United States*.

In *Weeks*, a United States Marshall who had no warrant either for the arrest of Mr. Weeks or for the search of his home seized evidence from the home in Weeks' absence and without his consent. The Court reasoned that if evidence seized in this manner could be held and used against a defendant, "the protection of the Fourth Amendment . . . is of no value . . . ." The *Weeks* Court insisted that the fourth amendment puts "the courts of the United States and Federal officials . . . under limitations and restraints as to the exercise of . . . [their] power and authority . . . ." Therefore, the unanimous Court established that evidence obtained by federal agents in violation of a defendant's fourth amendment rights should be excluded in a.

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29. Id. at 631-32. The amended Act authorized production of business papers in order to prevent importers from avoiding import taxes.
30. Id. at 632-33.
32. Boyd, 116 U.S. at 635.
33. Id.
34. 232 U.S. 383 (1914). Between *Boyd* and *Weeks*, the Supreme Court decided Adams v. New York, 192 U.S. 585 (1904). The *Adams* majority, on facts similar to those in *Boyd*, found no constitutional violation and seemed to resurrect the common law notion that courts will not scrutinize the source of competent evidence. Id. at 594. This case, however, has been characterized as "just a wild turn in the exclusionary rule roller coaster track." Stewart, *The Road to Mapp*, supra note 3, at 1374.
36. Id. at 393. The Court went on to declare that so far as Mr. Weeks was concerned, the fourth amendment "might as well be stricken from the Constitution." Id.
37. Id. at 391-92.
federal criminal prosecution. 38

The Weeks decision often is cited as the authority for the proposition that the exclusionary rule is an essential part of the fourth amendment. 39 But regardless of whether the rule is acknowledged as constitutionally mandated or judicially created—by no means a settled question in 1914 or now—the Weeks decision left some doubt in the minds of federal prosecutors as to the reach of the judicial remedy of exclusion.

Assuming that the Weeks Court was concerned only with the government’s possession of illegally obtained evidence, prosecutors in New York examined some illegally seized papers and then returned the papers to their owner. 40 The owner subsequently was subpoenaed and ordered to produce the papers. This case was brought before the Supreme Court in Silverthorne Lumber Co. v. United States. 41 Justice Holmes, writing for the Court, rejected the government’s distinction between introducing the evidence that actually was seized unlawfully and other evidence derived from the unlawful seizure. The fourth amendment forbids the use in federal criminal prosecutions of any evidence obtained illegally by federal officials. 42

The Court in these decisions implicitly rejected any distinction, for fourth amendment and exclusionary rule purposes, between prosecutors and police. Neither group is permitted any advantage from illegally obtained evidence. It was on the basis

38. Id. The Weeks decision did not apply to criminal proceedings in state courts. The decision also did not apply to evidence used in federal courts if it was seized by state officers. This latter exception, characterized as the “silver platter” exception was later eliminated by the Court. Elkins v. United States 364 U.S. 206, 223 (1960) (The Court held that “evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant’s immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant’s timely objection in a federal criminal trial.”) The “silver platter” exception was revived to a degree in United States v. Janis, 428 U.S. 433, 459-60 (1976) (evidence illegally seized by state officials held admissible in a federal civil tax proceeding).


40. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

41. Id.

42. Mr. Justice Holmes left no doubt as to the consequences of accepting the government’s proposition: it would reduce the fourth amendment “to a form of words.” Id. at 392. He concluded that the essence of the Weeks decision was that evidence illegally obtained could not be put to any use. This holding in Silverthorne was later identified as the “fruits of the poisonous tree” doctrine in Nardone v. United States, 308 U.S. 338, 341 (1939). This doctrine acknowledged the broad scope of the exclusionary rule as applied in federal criminal prosecutions.
of this principle that Justice Holmes, dissenting in *Olmstead v. United States*,43 argued that a distinction should not be made between prosecutors and judges. The *Weeks* Court overthrew the common law mandate that courts will take no notice of the method by which evidence is acquired.44 The holding in *Weeks* thus supports Justice Holmes’ conclusion: “If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.”45

The common law rule and the *Weeks* doctrine, as embellished by *Silverthorne*, suggest two different models of criminal prosecution. The common law model envisions a fragmented process in which courts are merely neutral conduits of evidence.46 The most important function of a court under this model is to ensure a fair trial by bringing before the trier of fact all the available, reliable evidence.47 The court is separate from the rest of government. The court’s presumed neutrality enables the judge to admit evidence obtained in violation of the fourth amendment without condoning the unlawful action of the police.48

An alternative model of prosecution is to envision a single governmental process beginning with arrest or the seizure of evidence and ending with punishment or acquittal. Under such a unitary model, a court that admits evidence obtained in violation of the fourth amendment is tainted by that violation and becomes, in effect, the accomplice of the police.49 Admission of illegally obtained evidence is, in itself, an independent, separate

43. 277 U.S. 438 (1928).
47. *Id.* See also Kamisar, *Principled Basis*, supra note 26, at 639.
49. *Id.* at 257. The Court from time to time has commented on its understanding of the integral role courts play in legitimizing the conduct of law enforcement officials: “A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.” *Terry v. Ohio*, 392 U.S. 1, 13 (1968). See also, LaFave, “The Seductive Call of Expediency”: United States v. Leon, *Its Rationale and Ramifications*, U. ILL. L.F. 895, 909-10 (1984) (repeating the above quotation in context of magistrates issuing warrants and whether the legality-admissibility dichotomy has an effect on the education of law enforcement officials as to the mandates of the fourth amendment) [hereinafter cited as LaFave, *Rationale and Ramifications*].
violation of an individual's fourth amendment right to be secure against the unreasonable intrusions of government. The Weeks and Silverthorne Courts and the dissents in Olmstead, whether self-consciously or not, created and envisioned the exclusionary rule in the context of a unitary model of a prosecution. In both Weeks and Silverthorne the Court applied the exclusionary rule broadly wherever the federal government, courts, or officials violated the fourth amendment.

The unitary approach to exclusion protects the rights of all citizens and not merely those who stand accused of crimes. A tension unquestionably exists between a policy of excluding evidence that government officials have obtained unlawfully and one of bringing every criminal to justice. In imposing limits on the government's use of tainted evidence, the exclusionary rule may frustrate prosecution: “The criminal is to go free because the constable has blundered.” But the tension is unavoidable and the choices are clear:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . . [I]f the government becomes a law-breaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

The language in these early cases illustrates that the exclusionary rule has traditionally been thought to serve more than one purpose. First, the rule is intended to discourage misconduct on a system-wide basis. The Silverthorne majority emphasized that the rule was designed to prevent any use of illegally obtained evidence, not merely its direct introduction at trial. The Weeks Court spoke explicitly in terms of all federal officials

51. Schrock & Welsh, Up From Calandra, supra note 46, at 298-302 (supports this assertion as to Weeks only).
52. See supra note 42 and accompanying text.
55. Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting).
56. Silverthorne, 251 U.S. at 392.
and all federal courts.\textsuperscript{57} Under this broad prohibition on the use of the fruits of present or past misconduct, the rule deters misconduct by removing any governmental benefit and by educating officials as to the fundamental privacy interests protected by the fourth amendment.\textsuperscript{58}

Deterring government misconduct, however, even on a system-wide basis, is not the only purpose served by the rule. The \textit{Olmstead} dissenters suggested a second purpose: preserving judicial integrity.\textsuperscript{59} Justice Holmes understood the holding in \textit{Weeks} to be a complete rejection of the common law notion that courts should take no notice of the source of evidence.\textsuperscript{60} Justice Brandeis, borrowing a maxim from the courts of equity, declared that, "a court will not redress a wrong when he who invokes its aid has unclean hands."\textsuperscript{61} By applying the exclusionary rule, the judiciary protects itself from becoming or seeming to become a lawbreaker or an ally of lawbreakers.\textsuperscript{62} This notion that judicial integrity is preserved by application of the rule frequently is cited by courts and commentators as a significant justification for the rule.\textsuperscript{63}

In 1960 the Supreme Court held in \textit{Mapp v. Ohio}\textsuperscript{64} that the exclusionary rule, as an essential part of the fourth amendment, is binding on the states through the due process clause of the fourteenth amendment.\textsuperscript{65} In so holding, the Court announced

\begin{itemize}
\item \textsuperscript{57} \textit{Weeks}, 232 U.S. at 391-92.
\item \textsuperscript{58} \textit{Stewart, The Road to Mapp, supra} note 3, at 1400; see also \textit{Elkins v. United States}, 364 U.S. 206, 209 (1960).
\item \textsuperscript{59} \textit{Olmstead}, 277 U.S. at 470 (Holmes, J., dissenting); \textit{id.} at 483 (Brandeis, J., dissenting).
\item \textsuperscript{60} \textit{id.} at 470-71 (Holmes, J., dissenting).
\item \textsuperscript{61} \textit{id.} at 483 (Brandeis, J., dissenting).
\item \textsuperscript{62} \textit{id.} at 485.
\item \textsuperscript{63} See, e.g., \textit{Elkins v. United States}, 364 U.S. 206, 222 (1960); \textit{Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?}, 62 JUDICATURE 66, 67 (1978). The Supreme Court never rested application of the rule entirely on the purpose of promoting judicial integrity and implicitly rejected that purpose in \textit{Calandra v. United States}, 414 U.S. 338, 354 (1974); see also \textit{Stewart, The Road to Mapp, supra} note 3, at 1391.
\item \textsuperscript{64} \textit{Stewart, The Road to Mapp, supra} note 3, at 1391.
\item \textsuperscript{65} \textit{Id.} The Supreme Court first applied the fourth amendment to state criminal prosecutions in \textit{Wolf v. Colorado}, 338 U.S. 25 (1949). In \textit{Wolf}, the Supreme Court held that the fourth amendment applied to the states through the due process clause of the fourteenth amendment. \textit{Id.} at 33. The Court, however, specifically refused to apply the sanction of the exclusionary rule to state criminal prosecutions. \textit{Id.} The \textit{Wolf} Court speculated that the remedy of exclusion was not necessarily the only effective remedy available and, therefore, the Court declined to regard the rule as constitutionally mandated. \textit{Id.} at 31. The \textit{Wolf} Court was also reluctant to impose its will on the many states that
\end{itemize}
that application of the rule carries out the mandate of the Constitution: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."\textsuperscript{66}

The application of the exclusionary rule is required in order to ensure the protection of privacy guaranteed by the fourth amendment.\textsuperscript{67} In declaring that the exclusionary rule is constitutionally mandated, the \textit{Mapp} Court acknowledged the rule's other purposes:

Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice.\textsuperscript{68}

Justice Stewart suggested that following the history of the exclusionary rule is like following a roller coaster track.\textsuperscript{69} The purposes served by application of the rule have followed a similarly fluctuating history.\textsuperscript{70} The roller coaster track now may be said to have flattened out. Since 1974, the Supreme Court has found but one purpose for the exclusionary rule, a narrowly defined purpose of deterrence.\textsuperscript{71} The consequence is that the exclusionary rule under federal law is slowly rolling to a stop.

III. \textit{United States v. Leon}

Justice Brennan, among others, has asserted that the door to the "good faith" exception to the exclusionary rule announced in \textit{United States v. Leon}\textsuperscript{72} was first opened by the Supreme

\textsuperscript{66} Mapp, 367 U.S. at 655.

\textsuperscript{67} Id. at 656. There is language in \textit{Mapp} to support what has recently been identified as the "moral imperative" purpose of the exclusionary rule. \textit{See} Nock, \textit{Seizing Opportunity}, supra note 11, at 370. The \textit{Mapp} Court never explicitly required application of the exclusionary rule as a moral principle, but the Court did describe the rule as an essential part of the fourth and fourteenth amendments, \textit{Mapp}, 367 U.S. at 657, which arguably is all the justification a moral principle requires.

\textsuperscript{68} Id. at 660.

\textsuperscript{69} Stewart, \textit{The Road to Mapp}, supra note 3, at 1374.

\textsuperscript{70} For decisions supporting a system-wide deterrence rationale, see \textit{Weeks}, 252 U.S. 383, and \textit{Silverthorne}, 251 U.S. 385. For decisions emphasizing judicial integrity, see \textit{Elkins v. United States}, 364 U.S. 206 (1960), and \textit{Terry v. Ohio}, 392 U.S. 1 (1968). For a decision asserting that the rule is mandated by the Constitution, see \textit{Mapp}, 367 U.S. 643 (1960).

\textsuperscript{71} \textit{See}, e.g., cases cited supra note 8.

\textsuperscript{72} 104 S. Ct. 3405 (1984).
Court more than a decade ago in *Calandra v. United States.* The *Calandra* Court held that the exclusionary rule could not be invoked by a witness before a grand jury in order to bar questions based on evidence obtained through an unlawful search and seizure. Although the *Calandra* Court arguably only declined to extend the rule and did not retract it, the majority articulated two important assumptions that radically altered the analysis of application of the rule.

The first assumption reflects the fragmentary model of prosecution. The *Calandra* Court stated that the fourth amendment violation, claimed to have been committed by the grand jury, had already been committed by the police when they unlawfully searched Mr. Calandra’s offices. The use of the evidence as the basis for questions put to Mr. Calandra by the grand jury was therefore derivative and was not in itself a “new” violation of Mr. Calandra’s constitutional rights. The Court acknowledged that even such derivative use would be enough to bar such evidence in a criminal trial but not in a grand jury setting. The Court’s distinction between the police and the grand jury thus insulated the grand jury from any fourth amendment violation. Once the distinction was made, the *Calandra* Court was free to consider whether illegally obtained evidence could be used by a grand jury as an issue unrelated to the issue of whether the fourth amendment had been violated. The Court used a cost/benefit analysis to determine whether the cost to society of excluding the illegally obtained evidence outweighed the benefit of admitting it.

A second assumption was critical to the Court’s cost/benefit

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73. *Id.* at 3430 (Brennan, J., dissenting).
74. During a grand jury investigation, Mr. Calandra claimed the fifth amendment privilege against self-incrimination and made a motion to suppress evidence obtained with a search warrant that lacked probable cause during a search that went beyond the scope of the warrant. The Court of Appeals held that the exclusionary rule could be invoked by a witness before a grand jury to bar questions based on evidence obtained in an unlawful search and seizure. The Supreme Court, however, reversed. *Calandra v. United States*, 414 U.S. 338, 340-42 (1974).
75. *Id.* at 354.
76. *Id.*
77. *Id.* at 347, 351.
78. *Id.* at 354.
analysis: that the exclusionary rule functions primarily to deter future police misconduct. Police deterrence becomes the measure of benefit. Costs will, of course, vary from case to case. In Calandra, the cost of the rule was identified as impairment of the historical function and role of the grand jury. The Court said that allowing witnesses to invoke the exclusionary rule would impede the pace of trials and interfere with swift justice. The benefit was defined as the impact of the rule on future police misconduct, an impact the Court characterized as incremental and uncertain. The Court concluded that the costs were great, and the benefit slight, and therefore the exclusionary rule should not be extended to the grand jury proceeding.

The reasoning in Calandra reappeared in several cases in which a majority of Justices declined to extend application of the exclusionary rule. In United States v. Leon, the reasoning was used to justify an important exception in the well-established application of the rule to criminal trials. The Court held that when officers act in reasonable reliance on a search warrant issued by a detached and neutral magistrate, evidence obtained pursuant to the warrant may be used in the prosecution’s case-in-chief, even if the warrant is subsequently found to lack probable cause.

80. Calandra, 414 U.S. at 348.
81. Id. at 349.
82. Id. at 350.
83. Id. at 351.
84. Id. at 349-52.
86. Leon, 104 S. Ct. at 3412. The district court held that the search warrant lacked probable cause because the information on which it was based was stale, and everything the police had observed was as consistent with innocence as with guilt. Id. at 3411 n.12.

The facts in Leon are summarized as follows: Mr. Leon employed a man named Del Castillo. Mr. Castillo’s car, with an unidentified driver, was seen arriving and departing from a house the police had under surveillance. The surveillance was begun on an informant’s tip that drug dealers lived in the house. The police discovered that Del Castillo was on probation and that his probation records listed Mr. Leon as his employer. When police checked their records on Mr. Leon, they discovered that he was the subject of a 1980 arrest in Glendale, California on drug charges. The record included a statement made by Mr. Leon’s companion at the time of his arrest who told Glendale police officers that Mr. Leon brought large quantities of drugs into the country. Based on this information, the Burbank police obtained a search warrant for Mr. Leon’s home. Id. at 3409-10. The district court suppressed the drugs taken from Mr. Leon’s residence. Id. at 3411. A divided panel for the Ninth Circuit Court of Appeals upheld the district court’s finding, and the case was appealed to the Supreme Court. Id.
The Leon Court's analysis, while borrowing heavily from Calandra, broke new ground. First, the Court dismissed any notion that the exclusionary rule is constitutionally mandated by noting that the fourth amendment has "no provision expressly precluding the use of evidence obtained in violation of its commands . . . ."87 Second, the Court cited Calandra for the proposition that use of illegally obtained evidence "work[s] no new fourth amendment wrong."88

In the process of discarding two traditional purposes associated with the rule—fulfillment of a constitutional mandate and preservation of judicial integrity—the Leon Court set up a powerful dichotomy between the evidence-gathering function of the police and the evidence-admitting function of the courts.89 This continued acceptance of a fragmentary model of prosecution derives no support from the Constitution. Courts are government institutions and are presumably restrained by the Bill of Rights, particularly by those restraints associated with the fourth amendment applied to the states through the fourteenth amendment.

Third, the Leon Court rejected any notion of a system-wide deterrence function for the exclusionary rule. For example, until Leon, higher courts could apply the exclusionary rule in order to communicate to magistrates the importance of proper probable cause determinations. Those magistrates who issued warrants on less than probable cause saw the fruits of their orders suppressed. That communication is now silenced.90 According to Leon, "the exclusionary rule is designed to deter police miscon-

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87. Leon, 104 S. Ct. at 3412.
88. Id.
89. Id. at 3432. (Brennan, J., dissenting).
duct rather than punish errors of judges and magistrates."

The Leon Court's demotion of the exclusionary rule to a tool used only to deter police misconduct cleared the way for the central argument in the Leon decision: that the costs of exclusion in this case far outweighed the benefit of deterrence. The cost/benefit analysis central to the decision has two problems. First, the analysis rests on speculative and questionable measurements.\(^9^2\) Second, the Court misapplied its own test.\(^9^3\)

The cost, in the Court's analysis, rested on the broadly stated contention that application of the exclusionary rule to vindicate fourth amendment rights exacts substantial social costs.\(^9^4\) These costs were nowhere measured by the Court, but included the possibility that, because crucial evidence is suppressed, "some guilty defendants may go free or receive reduced sentences."\(^9^5\) The Court's own footnote, however, indicated that there is little or no empirical data to support this broad conclusion.\(^9^6\)

The benefits of the rule also are not susceptible to precise measurement. It is difficult to obtain empirical data showing that the exclusionary rule actually deters illegal police behavior\(^9^7\) because it is difficult to quantify an omission. Deterrence cannot be easily observed but is rather inferred from other trends such as changes in police practices.\(^9^8\) The problems with the use of empirical data cut both ways, and opponents of the rule are in no better position than proponents if the argument turns to statistics: "Those who want rigorous proof must be disappointed, unless, of course, they have assigned the burden of proof to their opponents. Then they will be delighted."\(^9^9\) This is exactly what the Court did in Leon—assigned the burden of proof to proponents of the rule.\(^1^0^0\)

Some evidence exists that contradicts the conclusions drawn

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91. Leon, 104 S. Ct. at 3418.
92. See infra notes 94-104 and accompanying text.
93. Id. at 3442 (Brennan, J., dissenting).
94. Id. at 3414.
95. Id. at 3413.
96. Id. at 3413 n.6.
98. Id.
100. Leon, 104 S. Ct. at 3419.
by the Court. For example, Justice Brennan in dissent refers to a 1979 General Accounting Office study that indicated that only 0.2 percent of all federal felony arrests are declined for prosecution because of potential exclusionary rule problems. One commentator asserts that in spite of the exclusionary rule, suppression motions are seldom granted.

The *Leon* Court turned from its empirically unproven "substantial social costs" to an analysis of the potential benefits of the exclusionary rule. Because the Court recognized deterrence of police misconduct as the only possible benefit, it concluded that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." In other words, when the police do nothing unreasonable, there is nothing to deter.

The *Leon* Court compounded the problems inherent in any cost/benefit analysis by misapplying its own test. What the court actually weighed is the total cost of the exclusionary rule as applied in all cases against the benefits of deterrence only in those cases where the police act in reasonable but mistaken reliance on the validity of a warrant. At least one commentator has suggested that this error is significant because "[h]ad the Court's cost inquiry been properly focused, it would have been apparent that the relevant costs are insubstantial."

A more fundamental problem with the Court's cost/benefit analysis is that costs associated in *Leon* with application of the exclusionary rule are actually costs properly associated with the fourth amendment itself:

It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place.

The *Leon* Court has placed limits on how this new good

101. *Id.* at 3441 (Brennan, J., dissenting).
103. *Leon*, 104 S. Ct. at 3419.
104. *Id.* at 3420.
105. *Id.* at 3442 (Brennan, J., dissenting).
faith exception will be applied. In spite of these limitations, however, the Leon decision creates an exception to the exclusionary rule that may also be understood as an exception to the application of the fourth amendment. The privacy interests once protected by the fourth amendment are now guarded, if at all, by state constitutional provisions construed to provide greater protection for privacy rights than are now afforded by the federal constitution.

IV. Washington's Interpretation of Article I, Section 7

Most states have constitutional provisions that protect privacy rights; many of these provisions use language similar or identical to the language of the fourth amendment. Under the Washington Constitution, privacy rights are protected by an unusually phrased provision: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." In spite of the obvious difference in language, article I, section 7 was, for the better part of this century, interpreted as guaranteeing the same rights as the fourth amendment. After only a slight delay, Washington courts adopted the United States Supreme Court's holding in Weeks, and, until the mid-

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108. An officer's reliance on a warrant is not objectively reasonable when he knows his affidavit contains falsehoods, when he knows the magistrate is merely acting as a rubber stamp, when he knows the affidavit lacks probable cause, or when the warrant is facially deficient. Leon, 104 S. Ct. at 3421-23.

109. See supra note 18.


111. See, e.g., Seattle v. See, 62 Wash. 2d 475, 478-79, 408 P.2d 262, 264 (1965) (the court acknowledged the difference in language between the provisions but regarded the provisions as serving the same purpose); State v. Miles, 29 Wash. 2d 921, 926, 190 P.2d 740, 743 (1948) ("It will be observed that the fourth amendment to the Constitution of the United States, and Art. I, § 7, of our state constitution, although they vary slightly in language, are identical in purpose and substance."); State v. Sanders, 8 Wash. App. 306, 309, 506 P.2d 892, 895 (1973) ("and because the constitutional right secured by article 1, section 7 is the same constitutional right secured by the Fourth Amendment, we will discuss the validity of the search in terms of the Fourth Amendment.").

112. The Weeks decision was made in 1914, and Washington state courts accepted it in 1922. See infra note 113.

113. State v. Gibbons, 118 Wash. 171, 184, 203 P. 390, 395 (1922). This case was decided just eight years after the Weeks decision had created the exclusionary rule and applied it to all criminal trials in federal courts. In a scenario worthy of the wild west, Mr. Gibbons drove peaceably into Ritzville one day and was observed by the local sheriff, who thought Gibbons might be selling illegal whiskey. The sheriff told his deputy to get a warrant, but apparently the sheriff was too impatient to wait. He pulled out his gun, jumped onto the running board of Gibbons' car, and ordered Gibbons to drive to the sheriff's office. Not surprisingly, Gibbons complied. Whiskey was later discovered
1970s, the courts of this state continued to assert that the state and federal provisions marked the same boundaries and defined the same right.\footnote{114}

The current shift in Washington is toward a careful consideration of state constitutional provisions in general and in article I, section 7 in particular.\footnote{115} The state supreme court has recognized that in the past, blind adherence to federal law has been to the neglect of state law.\footnote{116} Further, federal constitutional rights, as interpreted by federal courts, are now understood to define the minimum protections available to all citizens.\footnote{117} The proposition that "state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution" is well established.\footnote{118} Finally, there are sound jurisprudential reasons for turning to a state constitutional provision first when both a state and a federal provision may be applicable.\footnote{119}

\footnote{114} See, e.g., State v. Fields, 85 Wash. 2d 126, 130, 530 P.2d 284, 286 (1975); ("What is that right? It is that of protection against unreasonable search and seizure, made without probable cause. . . . The boundaries of the right are the same under the Fourth Amendment as under Const. art. 1, § 7."); see also infra note 111.

\footnote{115} See, e.g., State v. White, 97 Wash. 2d 92, 108-112, 640 P.2d 1061, 1070-72 (1982) (court devoted an entire section of its opinion to the proposition that Art. I, section 7 offers broader protections than does the fourth amendment); State v. Simpson, 95 Wash. 2d 170, 177-81, 622 P.2d 1199, 1204-06 (1980) (court analyzed at some length the "ample basis for interpreting Const. art. 1, § 7 as more protective than the federal constitution.").


\footnote{118} Simpson, 95 Wash. 2d at 177, 622 P.2d at 1204; see also Utter, The Right to Speak, Write and Publish Freely: State Constitutional Protection Against Private Abridgment, 8 U. Puget Sound L. Rev. 157 (1985); Linde, First Things First, supra note 17, at 395.

\footnote{119} Interpretations of state constitutional provisions independent of interpretations of similar provisions in the federal constitution should not be seen as merely a way to get around current Supreme Court decisions. There are sound reasons why a state constitutional provision should be considered before the comparable provision in the federal constitution.

First, as a basic rule of self-respect, a state court should consider its own applicable law first. Linde, First Things First, supra note 17, at 383. Second, consideration of state law first promotes judicial economy by bringing cases to faster resolution: "If the state in fact has a law protecting some claimed right, the law should be followed, and if it applies to the case, there is no federal question." Id. at 392. In Washington, state court consideration of an independent interpretation is a duty. Alderwood Ass'n v. Washington Envtl. Council, 96 Wash. 2d 230, 238-39, 638 P.2d 108, 113 (1981).

Third, some states' bills of rights predate the federal Bill of Rights and, until the federal Bill of Rights was applied to the states through the fourteenth amendment,
The exclusionary rule, under article I, section 7 of the Washington Constitution, can be interpreted as serving several distinct purposes. The authority for this proposition is precedent, the plain language of the text, and the intent of the framers. Of these three authorities, recent case law provides the clearest and strongest support.

The Washington Supreme Court in *State v. White*\(^\text{120}\) considered a case exactly on point with *Michigan v. DeFillippo*,\(^\text{121}\) a case in which the United States Supreme Court created an early, limited "good faith" exception to the exclusionary rule. The Supreme Court held in *DeFillippo* that evidence obtained by a police officer pursuant to an arrest under an ordinance later found to be unconstitutional is not subject to the exclusionary rule.\(^\text{122}\) The Detroit ordinance under consideration in *DeFillippo* was a "stop and identify" statute subsequently found to be unconstitutionally vague and, therefore, a violation of the fourteenth amendment’s guarantee of due process. An arrest under the ordinance was unconstitutional, and arguably a search and seizure incident to that illegal arrest was unreasonable and a violation of the fourth amendment. The *DeFillippo* Court said that the ordinance did not authorize an unlawful arrest or search, but instead gave the officer the presumption of probable cause to

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The responsibility for articulating an independent interpretation is a heavy one. Washington judges and state lawyers alike are in uncharted waters when they embark on an independent interpretation. Utter, *Freedom and Diversity*, at 504-05. For example, they confront problems of construction such as framers' intent, which they may never have had to consider before. *Id.* at 511-21. It has been suggested that "the intent to be determined is that of the people who ratified the document [i.e., the electorate] rather than the intent of the handful of men who wrote it." *Id.* at 511. This suggestion indicates that traditional methodologies for interpreting the federal constitution may have little application in the area of state constitutional interpretation.

State court activism in this area requires of judges more attention to detail than time may permit. The relative responsiveness of an elected judiciary to the political process makes judges who pursue independent interpretations vulnerable to political opinion. *Id.* at 495-96; see infra note 144.

120. 97 Wash. 2d 92, 640 P.2d 1061 (1982).
121. 443 U.S. 31 (1979).
122. *Id.* at 39.
arrest or search or both.

In *White*, the evidence in question was taken from the defendant during an arrest made pursuant to a "stop and identify" statute which, like the ordinance in *DeFillippo*, was pronounced unconstitutional. Allen White was arrested under a local law that made it a misdemeanor to obstruct a public servant by failing to provide true information lawfully requested by that public servant. The trial court found the relevant sections of the ordinance unconstitutionally vague, invalidated White's arrest, and granted White's motion to suppress both the goods seized from him pursuant to his arrest and the confession he made after his arrest.123 The fact patterns in *White* and *DeFillippo* are strikingly similar. The *White* court, however, refused to accept *DeFillippo* as the controlling law of the case.124 The *White* court found three justifications for rejecting *DeFillippo*. First, the court found that the Washington ordinance under review was flagrantly unconstitutional.125 Second, the conduct of the officer was, in this instance, unreasonable.126 Third, article I, section 7 of the state constitution offers greater protections to the defendant than does the fourth amendment, as the amendment was interpreted at that time by the United States Supreme Court.127

The *White* court specifically accepted the proposition that the exclusionary rule is an essential part of the article I, section 7 privacy right it enforces.128 The *White* court refused to permit the protection of individual privacy conferred by the state constitutional provision to be selectively abridged wherever the exclusion of evidence obtained in violation thereof would serve no deterrent function.129 According to the court, article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations."130 The court concluded: "The important place of the right to privacy in Const. art. 1, § 7 seems to us to require that whenever the right is unreasonably violated, the

123. *White*, 97 Wash. 2d at 95, 640 P.2d at 1063.
124. *Id.* at 102, 640 P.2d at 1067.
125. *Id.* at 103, 640 P.2d at 1067.
126. *Id.* at 105-06, 640 P.2d at 1068-69. By contrast, the *DeFillippo* Court found that the arresting officer had acted as a reasonable, prudent person under the circumstances. *DeFillippo*, 443 U.S. at 37.
128. *Id.* at 111-12, 640 P.2d at 1071-72.
129. *Id.* at 109-10, 640 P.2d at 1070-71.
130. *Id.* at 110, 640 P.2d at 1071.
remedy must follow." Where the exclusionary rule is deemed an essential part of article I, section 7 rights, its application can be regarded as a "moral imperative." The exclusionary rule serves a moral purpose and is "legally necessary to uphold and vindicate the underlying privacy guarantee" of article I, section 7. The White court emphasized that the function of the exclusionary rule is to protect personal rights rather than . . . [to curb] government action," thus illustrating both the court's commitment to application of the rule as a moral principle and the court's rejection of the narrow deterrence rationale repeatedly articulated by the Supreme Court.

The White court recognized as legitimate the deterrent function of the exclusionary rule, but the court viewed deterrence in a broad, systemic sense. The court suggested that application of the exclusionary rule in the instant case would deter the legislature from passing unconstitutional "stop and identify" statutes in the future and that deterring legislative conduct through application of the exclusionary rule "is as essential as deterring police action." The White court also acknowledged the preservation of judicial integrity as a purpose served by application of the rule and specifically noted the absence of this purpose from the Supreme Court's analysis in DeFillippo. The court's rejection of a narrow deterrence rationale and acceptance of the idea that judicial integrity should be promoted through application of the rule support the inference that the White court considered a prosecution according to a unitary model.

Whatever the philosophical underpinnings of the White court's analysis, the interpretation of the exclusionary rule under article I, section 7 has not resulted in an uncritical application of the rule. Shortly after the White decision, the Washington State Supreme Court held, in State v. Bonds, that a

131. Id.
133. Id. at 28.
134. White, 97 Wash. 2d at 110, 640 P.2d at 1071.
135. Id. at 111-12, 640 P.2d at 1072.
136. Id. at 108, 640 P.2d at 1070.
137. Id. at 109 n.8, 640 P.2d at 1070 n.8.
138. See supra notes 49-63 and accompanying text.
139. 98 Wash. 2d 1, 653 P.2d 1024 (1982) (Washington state police arrested a juvenile suspect in Oregon and returned him to the state of Washington where he was charged with first degree murder, rape, and burglary.).
violation of Oregon law by Washington police officers, though obviously illegal, did not rise to the level of a violation of the defendant’s constitutional rights under either federal or state constitutions and, therefore, the exclusionary rule did not apply.\textsuperscript{140} The \textit{Bonds} court observed, “When evidence is obtained in violation of the defendant’s constitutional immunity from unreasonable searches and seizures, there is no need to balance the particular circumstances and interests involved.”\textsuperscript{141} This language emphasizes the idea that the exclusionary rule may operate as a moral imperative inseparable from the fundamental guarantee it promotes. Conversely, when a right is not of constitutional magnitude, the exclusionary rule may not protect it.\textsuperscript{142}

The application of the exclusionary rule in \textit{White} was grounded explicitly on the court’s interpretation of article I, section 7.\textsuperscript{143} The court’s reliance on the state constitution establishes the adequate and independent state grounds necessary to insulate the decision from federal review.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 14, 653 P.2d at 1032.
\item \textsuperscript{141} \textit{Id.} at 11, 653 P.2d at 1030.
\item \textsuperscript{142} The \textit{Bonds} court used a balancing test to determine if the exclusionary rule applied and found that no constitutional right had been violated. \textit{Id.} at 10-14, 653 P.2d at 1030. Although the court did not apply the exclusionary rule, it reserved the right to do so in the future if police officers did not accept the court’s command that they comply with the laws of neighboring states. \textit{Id.} at 15, 653 P.2d at 1032.
\item \textsuperscript{143} \textit{White}, 97 Wash. 2d at 11-12, 640 P.2d at 1031.
\item \textsuperscript{144} In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court attempted to clarify the doctrine of independent and adequate state grounds. The Court found that the “ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved.” \textit{Id.} at 1039. Accordingly, the Court required that a state court make “a plain statement that a decision rests upon adequate and independent state grounds . . . .” \textit{Id.} at 1042. The “plain statement” rule specifically requires that state courts make clear that the use of federal precedents in an opinion decided on the basis of state law is for guidance only and does not compel the result. \textit{Id.} at 1041.
\end{itemize}

The state court’s interpretation of article I, section 7 may be protected from federal review, but the interpretation is not protected from legislative or electoral review. House Joint Resolution No. 11 was first placed before the regular session of the 49th Legislature of the State of Washington in February 1985. This resolution, nicknamed the “Ringer Amendment,” called for a constitutional amendment to article I, section 7 that would make the language of article I, section 7 identical with the language of the fourth amendment. The proposal would also limit the role of state courts in interpreting article I, section 7. The “Ringer Amendment” provided as follows:

This right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. No court shall have the authority to order suppression of evidence on grounds that such evidence was obtained in violation of this section if such evidence would not be suppressed under the Fourth Amendment to the
Subsequent cases have found White to be authority for the proposition that the application of the exclusionary rule under article I, section 7 serves at least three purposes: "[F]irst, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means."  

White and the cases that have relied on it are not the only authority that supports a broadly applied exclusionary rule. There is some textual authority for asserting that article I, section 7 supports a more broadly applied exclusionary rule. The language of article I, section 7 protects the individual’s "private affairs," a phrase that arguably covers a wider spectrum of privacy interests than does the language of the fourth amendment.  

What the delegates at the Washington State Constitutional Convention intended when they adopted article I, section 7 is unclear. No minutes of the proceedings exist. It is known, however, that those delegates had an opportunity to adopt the exact language of the fourth amendment. The proposal was rejected. The specific rejection of the federal provision indicates that the delegates sought to have the privacy interests protected by article I, section 7 unrestricted by the language of the fourth amendment.  

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United States Constitution as interpreted by the United States Supreme Court.

House Joint Resolution 11. Although this resolution died in committee, the power of such an amendment, once adopted, has already been demonstrated in other states. In California, a similar amendment was passed by the voters in 1982. The amendment was called Proposition 8. In February 1985, the California Supreme Court held that Proposition 8 had abrogated "a defendant's right to object to and suppress evidence seized in violation of the California, but not the Federal, Constitution." In re: Lance W., The L.A. Daily Journal, Daily Appellate Report, 425, Feb. 11, 1985.

145. Bonds, 98 Wash. 2d at 12, 653 P.2d at 1024, 1031.
146. State v. Myrick, 102 Wash. 2d 506, 510-11, 688 P.2d 151, 153-54; see also Utter, Freedom and Diversity, supra note 119, at 495.
148. Id. at 497.
149. Id.
150. Utter, Freedom and Diversity, supra note 119, at 515.
CONCLUSION

The exclusionary rule has been interpreted under the Washington State Constitution as serving at least three purposes. 151 Both the text of the provision and the intent of the framers of the provision support broad application of the rule. 152 When the Washington Supreme Court confronts a case in which officers act in reasonable reliance on a warrant lacking probable cause, the court will have an opportunity to define further the scope of the exclusionary rule under article I, section 7. 153

The United States Supreme Court in Leon did not address the question of whether the defendant’s fourth amendment rights had been violated. 154 The court focused on whether the exclusionary rule should be imposed on the particular facts of the case. 155 This is exactly the sort of separation of the exclusionary remedy from an individual’s privacy rights that the Washington Supreme Court rejected in White. 156

The exclusionary rule under article I, section 7 should be applied to facts such as those in Leon first as a “moral imperative.” The court’s analysis should focus on whether use of a warrant that was not based on probable cause violated the individual privacy rights guaranteed by article I, section 7. The Leon Court’s distinction between the evidence-gathering function of the police and the evidence-admitting function of the courts 157 collapses under either a broadly applied deterrence rationale or under any concept of judicial integrity.

There is no danger that the analysis in Leon or the “good

151. See supra note 145 and accompanying text.
152. See supra notes 120-51 and accompanying text.
153. It has been argued that had Leon been reconsidered in light of Illinois v. Gates, 462 U.S. 213 (1983), no fourth amendment violation would have been found. See supra note 86. The Washington Supreme Court has emphatically declared its rejection of Gates and its continued reliance on the more stringent two-prong Aguilar-Spinelli test of whether an informant’s tip may provide probable cause for a warrant. State v. Jackson, 102 Wash. 2d 432, 443, 698 P.2d 136, 143 (1984). The Ninth Circuit Court of Appeals had found in Leon that the affidavit used to obtain the warrant included stale information and failed to establish the credibility of the informant. Leon, 104 S. Ct. at 3411. The Court of Appeals concluded that the information given by the informant failed both prongs of the Aguilar-Spinelli test. Id. The independent investigation by police failed to cure the problems with the informant’s information. Id. In a case factually similar to Leon, the Washington Supreme Court is likely, on the basis of Jackson, to arrive at a finding similar to the Ninth Circuit’s finding in Leon.
154. Leon, 104 S. Ct. at 3412.
155. Id.
157. Leon, 104 S. Ct. at 3432 (Brennan, J., dissenting).
faith” exception it created could be accepted under current article I, section 7 jurisprudence. When a case like Leon does come before this state’s supreme court, the court should use the opportunity to further elaborate and refine the several purposes served by the exclusionary rule under article I, section 7 of the Washington State constitution.

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