St. Mary's Law Journal

Volume 18 | Number 4 Article 7

1-1-1987

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I. Introduction

The exclusionary rule prohibits the use of evidence in a criminal prosecution when the evidence was obtained in violation of the fourth amendment's search and seizure protections.[1] Since its inception, the exclusionary rule

1. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (establishing rule that evidence

has generated considerable debate and has been the focus of substantial criticism.[2] Although the exclusionary rule has thus far escaped judicial or legislative repeal, critics have been partially successful in dissipating the rule's effectiveness.[3] The most recent circumscription of the exclusionary rule has

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unlawfully obtained by federal law enforcement officers inadmissible in criminal prosecutions); *see also* United States v. Calandra, 414 U.S. 338, 346 (1974) (under exclusionary rule, evidence not admissible if obtained in violation of fourth amendment); Wong Sun v. United States, 371 U.S. 471, 484-85 (1963) (suppression extends to fruits of illegally obtained evidence). The exclusionary rule has been referred to as the "suppression doctrine." *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 1 (1964) (suppression doctrine responsible for systematic exclusion of evidence illegally seized); Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 585 (1982) (suppression doctrine source of substantial controversy). The exclusionary rule also affects unlawful governmental conduct unrelated to searches or seizures. *See, e.g.*, United States v. Wade, 388 U.S. 218, 240-41 (1967) (police lineup results subject to exclusion); Miranda v. Arizona, 384 U.S. 436, 479 (1966) (excluding confession); Rochin v. California, 342 U.S. 165, 173-74 (1952) (excluding evidence seized in violation of due process clause).

2. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 424 (1971) (Burger, C.J., dissenting) (exclusionary rule responsible for "thousands of cases in which the criminal was set free because the constable blundered"). Critics of the exclusionary rule maintain that application of the doctrine allows criminals to fortuitously escape punishment as a consequence of mere technical errors. *See* Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 359 (1980). Proponents of the rule assert that the proscription is necessary to sustain the import of the fourth amendment while simultaneously preserving the integrity of the judiciary. *See* United States v. Calandra, 414 U.S. 338, 361 (1974) (Brennan, J., dissenting) (exclusionary rule required to give meaning and substance to fourth amendment); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (illegally obtained evidence should be excluded to prevent judiciary from playing "ignoble part"). The debate regarding the exclusionary rule "has always been a warm one." *See* United States v. Janis, 428 U.S. 433, 446 (1976). For a thorough discussion and analysis of opposing viewpoints regarding the exclusionary rule, see Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 344-65 (1980).

3. *See* United States v. Johnson, 457 U.S. 537, 562 (1982) (exclusionary rule given limited retroactive effect); United States v. Havens, 446 U.S. 620, 627-28 (1980) (illegally obtained evidence admissible to impeach defendant testifying at trial). Application of the exclusionary rule is contingent upon the deterrent effect prospectively realized by suppression of the evidence in question. *See* United States v. Calandra, 414 U.S. 338, 354 (1974) (exclusionary rule inapplicable to grand jury proceedings since harms resulting from use of rule outweigh benefit of possible deterrence). Repeal of the exclusionary rule's applicability to the states has been urged as well. *See* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring) (asserting fourth amendment law "due for an overhauling" which should begin by overruling *Mapp v. Ohio*). Abolition of the exclusionary rule has also been advocated by Chief Justice Rehnquist. *See* Robbins v. California, 453 U.S. 420, 437-38 (1981) (Rehnquist, J., dissenting). Under Chief Justice Burger, the Court significantly narrowed the confines of the fourth amendment and the applicability of the exclusionary rule. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 40 (1979) (evidence seized pursuant to unconstitutional ordinance admissible); United States v. Robinson, 414 U.S. 218, 235 (1973) (authorizing search on basis of arrest alone); Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (suspect's consent validated search regardless of whether individual cognizant of right to deny officer's request).

appeared in the form of the so-called "good faith" exception to the fourth amendment's warrant requirement.[4] This exception renders the exclusionary rule inapplicable when law enforcement officials seize evidence in good faith reliance upon a facially valid search or arrest warrant later shown to have been issued without probable cause or technically deficient in some respect.[5]

State courts are obligated to follow interpretations rendered by the United States Supreme Court relative to provisions of the Federal Constitution.[6] Such interpretations, however, reflect constitutional minimums. State courts are thus free to attribute to their respective constitutions broader interpretation and meaning, provided that the state standards do not fall below federally-prescribed constitutional minima.[7] The United States Supreme Court's

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4. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (benefits realized by excluding evidence seized in good faith reliance on invalid search warrant do not justify social costs of applying exclusionary rule). The good faith exception announced in *Leon* was applied to another case decided on the same day. *See* Massachusetts v. Sheppard, 468 U.S. 981, 991 (1984) (clerical judicial error insufficient to require suppression of evidence).

5. *See* United States v. Leon, 468 U.S. 897, 928-29 (1984) (Brennan, J., dissenting) (gradual "strangulation" of exclusionary rule culminated in *Leon* which represented "Court's victory over the Fourth Amendment"). The good faith exception is viewed by some legal commentators and judges as detrimental to fourth amendment rights. *See* State v. Novembrino, 519 A.2d 820, 845 (N.J. 1987) (*Leon* most significant limitation on exclusionary rule since rule's creation). *Leon* was the first case to actually contradict the principle that evidence obtained illegally is inadmissible. *See id. See generally* Note, *The Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 21 HOUS. L. REV. 1027, 1031-42 (1984) (discussing implications of rule announced in *Leon* and *Sheppard*).

6. *See* U.S. CONST. art. III, § 2, cl. 1 (granting of federal question jurisdiction to United States courts). The United States Supreme Court has ultimate authority to determine the meaning and application of the Federal Constitution. *See* Pennekamp v. Florida, 328 U.S. 331, 335 (1946). Nevertheless, the Court may be precluded from reviewing a state court decision if an adequate state ground was relied upon and applied by the state court in reaching its decision. *See* International Steel & Iron Co. v. National Sur. Co., 297 U.S. 657, 666 (1936). The state ground utilized, however, must be broad enough to support the judgment independent of federal law. *See* Enterprise Irrigation Dist. v. Farmer's Mut. Canal Co., 243 U.S. 157, 163-64 (1917). This concept has been referred to as the adequate and independent state ground doctrine. *See* Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945). The principle relates to a state court ruling based on both federal and state law. The federal court lacks jurisdiction to review a state court decision "resting on an adequate and independent nonfederal ground" despite an erroneous analysis or application of federal law. *See id.* For an excellent discussion of the adequate state ground concept as it is presently being utilized by state courts, see Note, *Rights of Criminal Defendants: The Emerging Independence of State Courts*, 2 HAMLINE L. REV. 83 (1979).

7. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975) (individual states free to interpret state constitutions as affording broader protection than that conferred by United States Constitution); Cooper v. California, 386 U.S. 58, 62 (1967) (holding of United States Supreme Court does not affect power of states to impose higher state constitutional standards than required under federal search and seizure jurisprudence); Brown v. State, 657 S.W.2d 797, 799 (Tex.

narrowing of the scope of fourth amendment protection has focused attention on the position to be adopted by state courts when attempting to fashion remedies for governmental violations of state constitutional law.[8] Many states have rejected the current federal posture and have recognized greater individual protections under their respective state constitutions.[9]

This comment will initially address the historical policy considerations which prompted the enactment of the fourth amendment. An examination of the exclusionary rule at both the federal and state levels and a brief description of the various exceptions to the exclusionary rule, with particular emphasis upon the good faith exception, will then be presented. This comment will also focus upon a current trend among states, loosely referred to as "New Federalism," which has resulted in a rejection of the good faith rule by several state courts on independent state grounds. Finally, a discussion of the Texas exclusionary rule, existing exceptions to the rule, and future projections as to the adoption of a good faith exception in Texas will be submitted. Currently, it remains uncertain whether the Texas Court of Criminal Appeals will choose to follow the United States Supreme Court or whether it will continue to strictly construe Texas' statutory exclusionary rule, thus reaffirming its position as a staunch defender of state constitutional rights.

Crim. App. 1983) (Texas courts have historically recognized greater protection for constitutional rights under state law).

8. *See* State v. Novembrino, 519 A.2d 820, 855-57 (N.J. 1987) (state constitution will not tolerate good-faith modification of exclusionary rule as undertaken by Court in *Leon*); *see also* Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736, 737 (1972) (describing exclusionary rule as "[o]ne of the great questions now confronting the country in reorienting national priorities"); Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 192-93 (1981) (recent United States Supreme Court decisions restricting exclusionary rule have focused attention on state-created rules). The Court's severe limitation of the federal judiciary's protective role should prompt state jurists to "thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms." *See* Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

9. *See, e.g.*, People v. Sundling, 395 N.W.2d 308, 315 (Mich. Ct. App. 1986) (no good faith exception to exclusionary rule under Michigan Constitution); State v. Novembrino, 519 A.2d 820, 856-57 (N.J. 1987) (Supreme Court's good faith exception to exclusionary rule rejected under state constitutional analysis); State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976) (finding inventory search of defendant's automobile, which was upheld as being valid by United States Supreme Court, violative of state constitution, and thus, fruits thereof suppressible). *See generally* Note, *Rights of Criminal Defendants: The Emerging Independence of State Courts*, 2 HAMLINE L. REV. 83, 83 (1979) (discussing South Dakota Supreme Court's treatment of *Opperman* on remand).

II. THE FOURTH AMENDMENT

A. *Historical Perspective*

The fourth amendment was intended to ameliorate the problem of unreasonable and unrestricted issuances of search and arrest warrants.[10] This concern was a response to the evils occasioned by unrestricted searches effected pursuant to "general warrants," lacking in both particularity and probable cause.[11] The general warrant represented the framer's "prime object of concern" insofar as such instruments were perceived as potential authorization for unreasonable searches which were either overbroad or conducted without probable cause.[12] Under the fourth amendment, individuals enjoy the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" conducted by the government.[13] The fourth amendment further dictates that no warrants

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10. *See* Chimel v. California, 395 U.S. 752, 761 (1969) (fourth amendment was reaction to use of general warrants and warrantless searches); Weeks v. United States, 232 U.S. 383, 389-92 (1914) (fourth amendment intended to restrain power and authority of law enforcement officials and to protect citizens from unreasonable searches and seizures). For a thorough discussion of fourth amendment history and development, see Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 586-97 (1982).

11. *See* Boyd v. United States, 116 U.S. 616, 625-27 (1886) (foremost in minds of fourth amendment's framers were abuses permitted by general warrants). In the colonies, there was widespread use of "writs of assistance." *See id.* at 625. These writs, typically issued to revenue officers, empowered the holder to arbitrarily "search suspected places for smuggled goods." The *Boyd* Court noted that writs of assistance had been described as " 'the worst instrument[s] of arbitrary power, the most destructive of English liberty' " and as placing " 'the liberty of every man in the hands of every petty officer.' " *Id.* (quoting COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 368-69 (5th ed. 1883)). Enactment of the fourth amendment was in response to such practices and to the framers' dissatisfaction with the Constitution's failure to address "unreasonable" searches and seizures. *See* Weeks v. United States, 232 U.S. 383, 390 (1914). *See generally* Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 590 (1982) (historical analysis of fourth amendment); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 636 (1978) (discussing Bill of Rights).

12. *See* United States v. Leon, 468 U.S. 897, 971-72 (1984) (Stevens, J., dissenting). The framers did not view the warrant as protection, but "saw it as an authority for unreasonable and oppressive searches." The use of general warrants pursuant to magisterial authority did not render the ensuing searches any more reasonable. *See id.* at 972 (Stevens, J., dissenting). The primary legislative focus of the First Congress and the ratifying states was upon devising a restrictive and specific warrant procedure. *See* Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 587 (1982).

13. *See* U.S. CONST. amend. IV. The fourth amendment prescribes:

> 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.

Id. The fourth amendment prohibits only unreasonable searches and seizures and extends not

shall be issued without a prior determination of probable cause to arrest or search.[14] Although the fourth amendment's protection extends beyond property rights to those areas in which an individual has a legitimate expectation of privacy,[15] the constitutional proscription is limited to "unreasonable" searches or seizures.[16] The United States Supreme Court has concluded on several occasions that warrantless searches and seizures are per se unreasonable.[17] Although courts have engrafted several exceptions onto the warrant requirement,[18] probable cause remains a necessary condition precedent

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only to property rights but also to any interests in which an individual has a legitimate expectation of privacy. *See* Katz v. United States, 389 U.S. 347, 351-53 (1967) (two-part inquiry utilized to determine when fourth amendment applicable to governmental action). An individual claiming a fourth amendment violation must show an intrusion upon his personal privacy expectations. *See* Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) (absent unjustified intrusion upon individual defendant's privacy rights, no standing to assert constitutional challenge to search or seizure under fourth amendment exists). Application of the fourth amendment is further limited to governmental intrusions. *See* Wolf v. Colorado, 338 U.S. 25, 27 (1949) (security of privacy against invasion by police at core of fourth amendment). For an extensive discussion of the scope of fourth amendment protection, see *Eleventh Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1980-81*, 70 GEO. L.J. 465, 469-88 (1981).

14. *See* U.S. CONST. amend. IV. The probable cause determination must be made by a neutral and detached magistrate. *See* Steagald v. United States, 451 U.S. 204, 212 (1981). *See generally* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 636-39 (1978) (historical analysis of probable cause requirement).

15. *See* Katz v. United States, 389 U.S. 347, 351 (1967) (fourth amendment protects people rather than places). In *Katz*, the Court set forth a two-pronged test to determine whether individuals have privacy interests protected by the fourth amendment. *See id.* at 361 (Harlan, J., concurring). The first prong of the inquiry focuses upon whether the individual exhibited a subjective expectation of privacy; the second prong is directed at the question of whether such expectation is one society is prepared to recognize as reasonable. *See id.* at 361 (Harlan, J., concurring); *see also* California v. Ciraolo, __ U.S. __, __, 106 S. Ct. 1809, 1812-13, 90 L. Ed. 2d 210, 216-17 (1986) (application of *Katz* to aerial surveillance of private residence's curtilage).

16. *See* Elkins v. United States, 364 U.S. 206, 222 (1960) (constitution only forbids *unreasonable* searches and seizures). Reasonableness is a function of the intrusiveness of the search or seizure balanced against any benefit to the public. *See* United States v. Cortez, 449 U.S. 411, 421 & n.4 (1981) (brief stop of defendant's vehicle was limited intrusion when weighed against substantial public interest in preventing flow of illegal aliens); Carroll v. United States, 267 U.S. 132, 149 (1925) (fourth amendment designed to proscribe unreasonable searches and seizures and conserve public interests).

17. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (searches executed without warrants are per se unreasonable); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (searches conducted without prior magisterial approval are per se unreasonable); Katz v. United States, 389 U.S. 347, 357 (1967) (searches effected outside judicial process are per se unreasonable under fourth amendment unless exception thereto available).

18. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31, 35 (1979) (valid arrest sufficient to authorize search even absent indication suspect possesses weapon or evidence); United States

to a legitimate or "reasonable" search or seizure.[19]

Probable cause exists when facts and circumstances within a government agent's knowledge are based upon reasonably trustworthy information and are such that a prudent man would have substantial reason to believe that a crime has been, or is being, committed.[20] Mere suspicion that criminal activity is afoot is insufficient to establish probable cause; it must be a belief

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v. Chadwick, 433 U.S. 1, 12 (1977) (vehicle searches not subject to usual warrant requirements); Cady v. Dombrowski, 413 U.S. 433, 447-48 (1973) (warrantless search of automobile trunk justified by concern for public safety). The applicability of the fourth amendment's warrant requirement to automobiles remains somewhat unclear in light of the recognized exceptions to the general rule. *See* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, U. PITT. L. REV. 307, 315 (1982). *See generally Eleventh Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1980-81*, 70 GEO. L.J. 465, 488-505 (1981) (recognized exceptions to warrant requirement include: exigent circumstances, border searches, consent searches, seizure of items in plain view, and inventory searches).

19. *See, e.g.*, United States v. Watson, 423 U.S. 411, 415-16 (1976) (Court's constitutional analysis focused upon existence of probable cause rather than warrantless nature of seizure); Kerr v. California, 374 U.S. 23, 34-35 (1963) (validity of warrantless arrest contingent upon presence of probable cause); Draper v. United States, 358 U.S. 307, 310 (1959) (where probable cause existed warrantless arrest constitutionally legitimate). Probable cause is a prerequisite for a reasonable search or seizure under the fourth amendment. *See* Mertons and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 390 (1981). Some detentions and searches, however, have been found less intrusive than others and thus do not require satisfaction of the probable cause standard. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 705 (1981) (probable cause unnecessary to detain occupants of house while officers conducted search of premises pursuant to valid warrant); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (police may order driver to alight from lawfully stopped vehicle without probable cause); Terry v. Ohio, 392 U.S. 1, 30 (1968) (brief investigative detention permitted on basis of "reasonable suspicion"). Other examples of searches which can be effected without probable cause include administrative or regulatory searches. *See* United States v. Ramsey, 431 U.S. 606, 617-18 (1977) (border search not subject to probable cause requirement).

20. *See* Berger v. New York, 388 U.S. 41, 55 (1967) (probable cause present where affiant has "reasonably trustworthy information" sufficient for prudent man to believe suspect has committed, or was committing, offense). Whether probable cause to arrest or search exists depends upon the facts and circumstances surrounding the case. *Compare* United States v. Allen, 644 F.2d 749, 751-52 (9th Cir. 1980) (insufficient probable cause to conduct search where suspect partially fit drug courier profile and reacted nervously to confrontation by agent) *and* United States v. Chamberlin, 644 F.2d 1262, 1263-66 (9th Cir. 1980) (probable cause not established where suspect observed walking with known felon, looking apprehensive, and attempting to flee from officer) *with* United States v. Caicedo-Asprilla, 632 F.2d 1161, 1167-68 (5th Cir. 1980) (probable cause to search crew's quarters existed when marijuana observed on deck and strong odor of burning cannabis detected) *and* United States v. Huberts, 637 F.2d 630, 637-38 (9th Cir. 1980) (probable cause existed when reliable witness related defendant's counterfeiting activities to officers one month before arrest), *cert. denied*, 451 U.S. 975 (1981). For a detailed discussion of what factors constitute probable cause to arrest or search, see generally Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 636-39 (1978).

well-grounded in fact.[21] To ensure proper protection for this constitutional guarantee, the probable cause determination must be made by a neutral and detached magistrate.[22] This objective assessment of the presence or absence of probable cause has been described as a "necessary checkpoint between the Government and the citizen implicitly acknowledg[ing] that 'an officer engaged in the often competitive enterprise of ferreting out crime' . . . may lack sufficient objectivity to weigh the evidence . . . against the individual's interests in protecting his own liberty."[23]

B. *Restricting the Scope of Fourth Amendment Protection*

A number of exceptions to the fourth amendment's warrant requirement have been judicially created.[24] As a result, certain searches or seizures are now considered "reasonable" despite the absence of a warrant.[25] Concomitantly, the weakening of the warrant requirement obviates the need to suppress evidence obtained in violation thereof. The United States Supreme Court has sustained the constitutional validity of numerous warrantless

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21. *See* Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("mere propinquity" of suspected criminal activity insufficient to establish probable cause); Brinegar v. United States, 338 U.S. 160, 175 (1949) (probable cause exceeds "mere suspicion"). *But see* United States v. Anton, 633 F.2d 1252, 1254 (7th Cir. 1980) (virtual certainty not required to establish probable cause), *cert. denied*, 449 U.S. 1084 (1981). When seeking a warrant, the law enforcement official must present an affidavit which contains sufficient information for a magistrate to weigh the evidence and independently assess the persuasiveness of the facts alleged before drawing a conclusion as to the existence of probable cause. *See* Aguilar v. United States, 378 U.S. 108, 111 (1966) (citing Giordenello v. United States, 357 U.S. 480, 481 (1958)). *See generally Eleventh Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1980-81*, 70 GEO. L.J. 465, 474-80 (1981) (brief discussion of probable cause requirement).

22. *See* Steagald v. United Sates, 451 U.S. 204, 212-16 (1981) (existence of probable cause prior to issuance of warrant must be determined by neutral and detached magistrate).

23. *Id.* at 209-12 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)) (fourth amendment protections include requirement that inferences be drawn by "[n]eutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime").

24. *See, e.g.*, McDonald v. United States, 335 U.S. 451, 456 (1948) (exigencies of situation may justify warrantless search); Carroll v. United States, 267 U.S. 132, 156 (1925) (warrantless search of automobile reasonable where intrusion supported by probable cause); Angello v. United States, 269 U.S. 20, 24 (1920) (search incident to arrest reasonable despite absence of warrant). *See generally* Greenhalgh, *The Warrantless Good Faith Exception—Unprecedented, Indefensible, and Devoid of Necessity*, 26 S. TEX. L.J. 129, 130-38 (1985) (discussing exceptions to fourth amendment's probable cause and warrant prescriptions).

25. *See* Greenhalgh, *The Warrantless Good Faith Exception— Unprecedented, Indefensible, and Devoid of Necessity*, 26 S. TEX. L.J. 129, 131-32 (1985). Professor Greenhalgh posits that the exceptions to the fourth amendment's warrant clause include: moving objects; search incident to arrest; exigent circumstances; plain view; consent; border; inventory; inevitable discovery; and good faith. *See id.*

searches and seizures: stop and frisk;[26] search incident to arrest;[27] consensual searches;[28] seizure of items in plain view;[29] border searches;[30] inventory searches;[31] vehicle searches;[32] felony arrests in public places;[33] searches effected in open fields;[34] and searches necessitated by exigent circumstances.[35] While these exceptions do not directly implicate the exclusionary rule, they do effectively disintegrate the need for a per se exclusion of evidence obtained without a warrant.

III. THE EXCLUSIONARY RULE

A. *Purpose and Development*

The text of the fourth amendment contains no reference to the nature or

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26. *See* Terry v. Ohio, 392 U.S. 1, 16-20 (1968) (reasonable suspicion that suspect engaged in or contemplating criminal act and in possession of deadly weapon sufficient to justify brief investigative detention and pat-down search of suspect's outer garments).

27. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969) (warrantless search of suspect justified if probable cause to arrest present and scope of search limited to suspect's immediate area of control); Agnello v. United States, 269 U.S. 20, 30 (1925) (recognizing validity of warrantless search of suspect lawfully arrested and location in which suspect's arrest consummated).

28. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (warrantless search justified where defendant gave officers voluntary and knowing consent).

29. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plain view alone will justify seizure of evidence where search accompanied by exigent circumstances and discovery of contraband inadvertent).

30. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (warrantless border searches justified by national interest in preventing illegal entry by aliens).

31. *See* South Dakota v. Opperman, 428 U.S. 364, 367-72 (1976) (reasonable to conduct warrantless inventory search of lawfully impounded automobile). Inventory searches of automobiles are justified on the basis of three distinct considerations: (1) protecting the owner's property; (2) protecting the police from claims of mishandling or theft; and (3) protecting the police and society from potential danger. *See* Greenhalgh, *The Warrantless Good Faith Exception—Unprecedented, Indefensible, and Devoid of Necessity*, 26 S. TEX. L.J. 129, 132 (1985).

32. *See* United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (individuals possess "diminished expectation of privacy in vehicles").

33. *See* United States v. Watson, 423 U.S. 411, 423-25 (1976) (upholding warrantless arrest in public place despite absence of exigent circumstances).

34. *See* Hester v. United States, 265 U.S. 57, 59 (1924) (warrantless search of open field reasonable since "fields" do not constitute "persons, houses, papers and effects" to which fourth amendment protection extends). The Court has recognized a distinction between open fields and curtilage, the latter representing "the area immediately surrounding and associated with the home" and entitled to the same degree of fourth amendment protection afforded private residences. *See* Oliver v. United States, 466 U.S. 170, 180 (1984) (citing Hester v. United States, 265 U.S. 57, 59 (1924)).

35. *See* Warden v. Hayden, 387 U.S. 294, 303-06 (1967) (fourth amendment does not require use of search warrant when delay would endanger lives of officers or others).

types of consequences precipitated by an unreasonable search or seizure.[36] In response to this void, the judicially-created exclusionary rule provides that the government may not use evidence obtained in violation of the fourth amendment in a criminal prosecution.[37] The creation of the exclusionary rule spawned extensive litigation concerning fourth amendment issues, thereby ending the quiescence which had shrouded the amendment for nearly a century following its enactment.[38] *Boyd v. United States*,[39] often cited as the progenitor of the exclusionary rule, in actuality concerned the exclusion of evidence based upon alleged fifth amendment violations.[40] It

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36. *See* U.S. CONST. amend. IV (no mention of penalties flowing from unreasonable search or seizure); *see also* Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 597 (1982) (fourth amendment silent as to violations of its contents); Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 373 (1981) (nowhere does fourth amendment address consequences of unreasonable search or seizure). Alternatives to the exclusionary rule have been proposed. *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 15-23 (1964) (suggesting exclusionary rule be replaced by independent review board empowered to conduct hearings on fourth amendment violations and take remedial action against perpetrator of constitutional deprivation); Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 531, 537-40 (1982) (viable alternatives to exclusionary rule include: discipline of law enforcement officials by executive branch, civil tort remedies, and "mini-trial" of offending officer).

37. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence obtained in violation of defendant's fourth amendment rights excluded). The exclusionary rule has also been applied to suppress evidence seized in violation of the fifth or sixth amendments. *See* Miranda v. Arizona, 384 U.S. 346, 444 (1966) (exclusionary rule applicable to statements taken in violation of suspect's right to remain free from compulsory self-incrimination); Massiah v. United States, 377 U.S. 201, 207 (1964) (statements deliberately elicited from defendant without benefit of counsel cannot be used at trial).

38. *See* Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 585-97 (1982) (from date of enactment until 1886 few Supreme Court cases dealt with fourth amendment). During the century subsequent to the enactment of the Bill of Rights, the fourth amendment was rarely the subject of litigation, either criminal or civil. *See* Mertons and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 375 (1982). Lack of fourth amendment litigation was due in part to the less complex era, characterized by fewer laws and limited law enforcement. For example, organized police forces did not exist in the United States prior to the nineteenth century. *See id.*; *see also* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 637 (1978) (majority of federal criminal cases prior to nineteenth century concerned maritime offenses or transgressions directly injurious to government). At the turn of the nineteenth century, prohibition, coupled with the simultaneous granting of criminal appellate review, precipitated substantial litigation on fourth amendment issues. *See id.*; *accord* Mertons and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 376 n.51 (1982) (of 25 search and seizure cases heard by Court, between 1914 and 1933, 24 involved bootlegging, gambling, or narcotics offenses).

39. 116 U.S. 616 (1886).

40. *See id.* at 634 (compulsory production of personally owned books and papers violative

was not until *Weeks v. United States*[41] that the exclusionary rule was applied in the context of the fourth amendment.[42] *Weeks* essentially held that evidence seized in violation of the fourth amendment is inadmissible in criminal prosecutions.[43] The Court in *Weeks* reasoned that, without the exclusionary rule, fourth amendment guarantees lacked substance or value; hence, "the protection of the fourth amendment . . . might as well be stricken from the Constitution."[44]

Following *Weeks*, the Court continued to reason that the newly-created rule rested soundly upon the necessity of giving substantive meaning to the fourth amendment while simultaneously providing a sanction for fourth amendment violations.[45] However, thirty-five years later in *Wolf v. Colorado*,[46] the Court modified its initial position by holding that the rule applied

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of fifth amendment's self-incrimination clause); *see also* Gibbons, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 SETON HALL L. REV. 295, 299 (1972) (discussing *Boyd* in relation to evolutionary development of exclusionary rule); Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 597 (1982) (fourth amendment litigation fueled by *Boyd*). Although *Boyd* dealt primarily with fifth amendment issues, the Court referenced the fourth amendment as an alternative ground for redress. *See* Boyd v. United States, 116 U.S. 616, 621-22 (1886) (all search and seizure cases within fourth amendment's scope).

41. 232 U.S. 383 (1914).

42. *See id.* at 398 (admission of papers seized in violation of fourth amendment held prejudicial error). Although the defendant alleged both fourth and fifth amendment violations, the Court elected to address only the fourth amendment issue. *See id.* at 387.

43. *See id.* at 398 (Court unanimously held evidence seized in violation of fourth amendment subject to suppression). The Court in *Weeks* cautioned that law enforcement officers who attempt to secure convictions through unlawful means would find "no sanctions in the judgments of the courts which are charged . . . with the support of the Constitution." *Id.*

44. *Id.* at 393. Several distinct policy arguments underlying the *Weeks* opinion have been identified: (1) it is inequitable to convict a defendant on the basis of evidence illegally obtained; (2) it is an unjustified intrusion upon personal privacy to admit such tainted evidence at trial; (3) the government should not profit from the unlawful acts of its agents; and (4) the integrity of the courts would be compromised by permitting the introduction of such evidence. *See* Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 378 (1981).

45. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 222-23 (1960) (abolishing so-called "silver platter" doctrine and basing decision on "imperative of judicial integrity"); Nardone v. United States, 302 U.S. 379, 383 (1937) (exclusionary rule extended to suppress evidence obtained by federal officers in violation of statute); Olmstead v. United States, 277 U.S. 438, 463 (1928) (fourth amendment protection impaired unless evidence excluded); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (grand jury subpoenas held invalid because based upon knowledge obtained from illegally seized evidence). *But see* Wolf v. Colorado, 338 U.S. 25, 28 (1949) (reference to *Weeks* as "matter of judicial implication"). Dissenting in *Wolf*, Justice Rutledge urged that "[t]he view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established." *Id.* at 48 (Rutledge, J., dissenting).

46. 338 U.S. 25 (1949).

in *Weeks* was a "matter of judicial implication,"[47] and thus inapplicable to the states through the fourteenth amendment.[48] Three primary, and often competing, theories justifying the exclusionary rule have surfaced since its adoption: (1) the rule is constitutionally mandated as a personal right;[49] (2) judicial integrity requires suppression of unlawfully obtained evidence;[50] and (3) application of the rule is contingent upon its ability to deter police misconduct.[51]

Despite gradual displacement of the original policy reasons underlying the

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47. *Id.* at 28. The Court in *Wolf* further stated that the exclusionary rule was "not derived from the explicit requirements of the Fourth Amendment." *See id.* The Court based its decision, in part, on the determination that "the jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection." *See id.* at 30.

48. *See id.* at 28. The Court recognized that personal immunity from unreasonable searches and seizures applied to the states but, nevertheless, held that the exclusionary rule should not be required as the method of enforcement. *See id.* at 33.

49. *See* Weeks v. United States, 232 U.S. 383, 392 (1914). The Court in *Weeks* indicated that exclusion itself was constitutionally mandated and thus the use of unlawfully seized evidence at trial represented "a denial of the constitutional rights of the accused." *See id.* at 398. *See generally* Note, *The Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 21 HOUS. L. REV. 1027, 1038 (1984) (although Constitution does not expressly require suppression as remedy for violation of fourth amendment, exclusion is only effective alternative). For further discussion of exclusion as a constitutional mandate, see Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 272-383 (1974) (positing that exclusion is personal constitutional right); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 368-73 (1980).

50. *See* Elkins v. United States, 364 U.S. 206, 223 (1960) (federal courts should not volitionally disobey Constitution they are sworn to enforce); Olmstead v. United States, 277 U.S. 438, 485 (1928) (government's legitimacy and credibility compromised when government itself fails to observe laws). *See generally* Note, *The Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 21 HOUS. L. REV. 1027, 1040-42 (1984) (discussing judicial integrity as justification for exclusion).

51. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 354 (1974) (primary purpose of rule to deter future police misconduct); Linkletter v. Walker, 381 U.S. 618, 629 (1965) (courts must weigh factors including purpose and effect of rule to determine whether retrospective application would further or retard rule's operation); Elkins v. United States, 364 U.S. 206, 217 (1960) (purpose of exclusionary rule is deterrence). *But see* Terry v. Ohio, 392 U.S. 1, 12-13 (1968) (emphasizing vital function served by exclusionary rule in maintaining judicial integrity). The deterrence rationale has been increasingly relied upon by the Court in recent years. As explained in *Elkins*, "the rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *See* Elkins v. United States, 364 U.S. 201, 217 (1960). Many commentators have been dismayed at the Court's reliance upon the deterrence rationale, claiming that " 'the deterrence rationale renders the exclusionary rule vulnerable' because 'the case for the rule as an effective deterrent of police misbehavior has proved, at best, to be an uneasy one.' " *See* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 317 (1982) (quoting Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 537).

Weeks decision in favor of the deterrence theory,[52] the Court ultimately held the exclusionary rule applicable to the states in *Mapp v. Ohio*.[53] Although in *Mapp* the Court predicated its holding upon several theories,[54] later opinions emphasized the deterrence rationale as the primary thrust of the *Mapp* decision.[55] Since *Mapp*, the deterrence objective has risen to a position of predominance in decisions construing the exclusionary rule.[56] With deterrence

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52. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (deterrence of police misconduct is "prime purpose" of rule); Stone v. Powell, 428 U.S. 465, 494 (1976) (habeas corpus relief denied on grounds that deterrent purpose of rule would only be minimally served); Mapp v. Ohio, 367 U.S. 643, 648 (1961) (exclusionary rule viewed as "deterrent safeguard"); Elkins v. United States, 364 U.S. 206, 217 (1960) (exclusionary rule intended to prevent and deter); Wolf v. Colorado, 338 U.S. 25, 31 (1949) (introduced concept of deterrence). The original policies underlying the *Weeks* decision experienced gradual displacement in favor of the deterrence rationale. *Compare* United States v. Calandra, 414 U.S. 338, 354 (1974) (primary purpose of rule to deter future police misconduct) *with id.* at 357 (Brennan, J., dissenting) (judicial integrity rather than deterrent effect was "uppermost" in minds of framers of exclusionary rule) *and* Weeks v. United States, 232 U.S. 383, 392 (1914) (those who execute criminal laws through unlawful means "should find no sanction in . . . the courts"). *See generally* Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 389-417 (1981) (discussing exclusionary rule as deterrent).

53. 367 U.S. 643 (1961). In *Mapp*, three police officers went to Mapp's home with the belief that she was hiding gambling paraphernalia. *See id.* at 644. Mapp refused to open the door without a search warrant. The officers returned later with a piece of paper which they claimed to be a warrant, but which Mapp was not allowed to inspect. Mapp was treated roughly throughout the episode and was handcuffed for her "belligerent" behavior. A thorough search revealed only some obscene books and photos for which Mapp was subsequently convicted for possessing. At trial, the search warrant was not produced by the prosecution. *See id.* at 645. The United States Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." *See id.* at 655.

54. *See id.* at 655-60. The Court in *Mapp* reasoned that without the exclusionary rule, the fourth amendment would be a "form of words, valueless and undeserving of mention" and that to hold otherwise would be to grant a right but withhold its privilege and enjoyment. *See id.* The Court's discussion included concepts of judicial integrity, constitutional mandate, deterrence, and state and federal consistency and cooperation. *See id.* The Court refered to the option of allowing individual states to choose whether to apply the rule as an "ignoble shortcut to conviction" left open to the states. *See id.* at 660.

55. *See* Stone v. Powell, 428 U.S. 465, 484 (1976) (referring to *Mapp* majority as justifying "application of the rule on several grounds, but rel[ying] principally on the belief that exclusion would deter"); Linkletter v. Walker, 381 U.S. 618, 637 (1965) (referring to purpose of *Mapp* as being to deter unlawful police conduct). The holding and rationale of the Court in *Mapp* is somewhat unclear and has generated debate among legal scholars and commentators. *See* Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 599 (1982). A close examination of the majority's discussion in *Mapp*, although referring to the fourth amendment as requiring exclusion, emphasizes that the "purpose of the exclusionary rule is to deter." *See id.*

56. *See, e.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (concluding that deterrence rationale is primary "if not the sole" purpose of exclusionary rule); Stone v. Powell, 428 U.S. 465, 487-94 (1976) (for evidence to be excluded, costs of excluding it must not outweigh bene-

as the primary basis for applying the exclusionary rule, numerous judicial exceptions were recognized in situations where the Court concluded that application of the rule would not serve a deterrent purpose.[57]

B. *Restricting the Applicability of the Exclusionary Rule*

The Court has consistently declined to apply the exclusionary rule when the social costs of its application outweigh any visible deterrent effect.[58] In those situations where deterrence is subordinate to social costs, the Court has sanctioned the admission of evidence seized without a warrant.[59] The application of this balancing of interests approach has resulted in several judicially-created exceptions to the exclusionary rule: attenuation of the taint;[60] the standing requirement;[61] use of illegally obtained evidence for im-

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fits obtained in protecting fourth amendment values); United States v. Calandra, 414 U.S. 338, 347-48 (1974) (noting deterrence as prime purpose of rule; application of exclusionary rule thus limited to situations where rule's purposes best served). The Court in *Calandra* declined to exclude the evidence in a grand jury proceeding, holding that "any incremental deterrent effect which might be achieved by extending the rule . . . is uncertain at best." *See id.* at 351.

57. *See, e.g.*, United States v. Havens, 446 U.S. 620, 627 (1979) (evidence not suppressed for impeachment purposes because deterrence objective not furthered); United States v. Janis, 428 U.S. 433, 453-54 (1976) (declining to extend exclusionary rule where application would accomplish only "marginal deterrence"); United States v. Peltier, 422 U.S. 531, 538 (1975) (refusing to apply exclusionary rule where no deterrent function served).

58. *See* United States v. Peltier, 422 U.S. 531, 538 (1975) (declining to apply court-made exclusionary rule where deterrent purpose not furthered). The balancing approach, accompanied by the deterrence rationale, has become the primary consideration utilized by the Court in determining whether evidence will be excluded. *See* United States v. Payner, 447 U.S. 727, 734 (1980) (balancing required when addressing exclusion; privacy interests must be "weighed against the considerable harm that would flow from indiscriminate application of the exclusionary rule").

59. *See, e.g.*, United States v. Payner, 447 U.S. 727, 734 (1980) (noting that indiscriminate application of exclusionary rule would unduly burden "truth-finding functions of judge and jury"); United States v. Janis, 428 U.S. 433, 453-54 (1976) (marginal deterrence to be accomplished by applying exclusionary rule is outweighed by cost to society); United States v. Calandra, 414 U.S. 338, 349 (1974) (in deciding whether to apply rule, Court weighed potential damage to grand jury's traditional role against potential benefits of applying rule in such context); Alderman v. United States, 394 U.S. 165, 174-75 (1969) (applying social cost-benefit analysis). The Court in *Alderman* balanced the benefits of suppressing incriminating evidence with the costs of weakening the prosecution's case against the party. *See id.* at 176.

60. *See* Wong Sun v. United States, 371 U.S. 471, 486 (1963) (suspect's conduct must be "sufficiently an act of free will to purge the primary taint of the unlawful invasion").

61. *See* United States v. Salvucci, 448 U.S. 83, 89 (1980) (defendants charged with crimes of possession only have standing to claim benefit from exclusionary rule when individual's own fourth amendment rights violated); Alderman v. United States, 394 U.S. 165, 175 (1969) (defendants whose own fourth amendment rights not violated lack standing to object to evidence seized in violation of others' rights). The Court in *Alderman* applied the cost-benefit analysis for the first time. *See id.* at 174-75.

peachment;[62] searches conducted pursuant to a statute subsequently held unconstitutional;[63] grand jury proceedings;[64] independent source;[65] inevitable discovery;[66] civil proceedings;[67] harmless error;[68] denying habeas corpus relief on fourth amendment issues;[69] and refusing to apply the rule retroactively.[70] Fundamental to most of these exceptions was the Court's determination that the deterrent purpose of the exclusionary rule would not be served by suppression of the evidence.[71] On the basis of the deterrence rationale, the Court recently recognized another exception to the exclusionary rule—the "good faith" exception.[72]

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62. *See* United States v. Havens, 446 U.S. 620, 627 (1980) (evidence suppressed as fruit of unlawful search and seizure may nevertheless be admitted for impeachment purposes).

63. *See* Michigan v. DeFillippo, 443 U.S. 31, 39-40 (1979) (presence of probable cause sufficient to justify arrest and search incident to arrest although defendant's seizure effected pursuant to unconstitutional statute).

64. *See* United States v. Calandra, 414 U.S. 338, 351-52 (1974) (grand jury witness precluded from invoking exclusionary rule to refuse to answer questions based on unlawfully obtained evidence).

65. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (evidence obtained from independent source admissible).

66. *See* Nix v. Williams, 467 U.S. 431, 448 (1984) (when unlawfully obtained evidence "would inevitably have been discovered" independent of police misconduct, evidence is admissible).

67. *See* United States v. Janis, 428 U.S. 433, 458 (1976) (unconstitutionally seized evidence admitted in civil proceedings).

68. *See* Fahy v. Connecticut, 375 U.S. 85, 91-92 (1963) (reversal not required for failure to suppress illegally obtained evidence if the court concludes that its admission was harmless).

69. *See* Stone v. Powell, 428 U.S. 465, 493-94 (1976) (habeas corpus relief not granted when prisoner afforded full and fair opportunity to litigate fourth amendment claim in state proceeding).

70. *See* United States v. Johnson, 457 U.S. 537, 562 (1982) (retroactive application of rule not justified).

71. *See* United States v. Havens, 446 U.S. 620, 627 (1979) (furtherance of deterrence objective not accomplished by forbidding impeachment); United States v. Calandra, 414 U.S. 338, 347 (1974) (Court declined to apply exclusionary rule where deterrent effect would be minimal). The Court in *Calandra* further stated that the purpose of the rule is "not to redress the injury to the privacy of the search victim [but rather] to deter future unlawful police conduct." *See id.* at 347.

72. *See* United States v. Leon, 468 U.S. 897, 920-22 (1984) (good faith exception recognized where police relied upon facially-valid warrant); Massachusettes v. Sheppard, 468 U.S. 981, 988 (1984) (case decided on basis of good faith exception announced in *Leon*). Commentators have suggested that the next logical step in the erosion of the exclusionary rule after *Leon* and *Sheppard* is the recognition of a *warrantless* good faith exception. *See* Greenhalgh, *The Warrantless Good Faith Exception— Unprecedented, Indefensible, and Devoid of Necessity*, 26 S. TEX. L.J. 129 (1985). Good faith can be subdivided into two categories: good faith mistake and technical error. *See* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 637 (1978).

IV. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

A. *The Good Faith Exception in Federal Court*

The United States Court of Appeals for the Fifth Circuit was the first federal court to engraft a good faith exception onto the exclusionary rule.[73] In *United States v. Williams*,[74] the Fifth Circuit held that evidence is not subject to suppression under the exclusionary rule when the acting governmental officials conducted themselves in good faith upon a reasonable belief that their actions were constitutionally authorized.[75] Thus, the officials simply needed a good faith belief in the existence of probable cause in order to immunize the search or seizure from later constitutional challenge.[76] The court's holding was based exclusively upon the rationale that the "exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good faith ones."[77] Consistent with its decisions upholding previous excep-

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73. *See* United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980) (en banc) (good faith of officers relying on warrant sufficient to admit evidence despite subsequent determination of warrant's invalidity), *cert. denied*, 449 U.S. 1127 (1981).

74. 622 F.2d 830 (5th Cir. 1980) (en banc),*cert denied*, 449 U.S. 1127 (1981).

75. *See id. Williams* was decided by twenty-four circuit judges in a two-part decision. In *Williams*, the defendant was arrested by a drug enforcement agent for violation of a travel restriction which had been imposed pending an appeal of a prior heroin conviction. *See id.* at 833-34. A search incident to the arrest revealed a packet of heroin in her coat pocket. A subsequent search of her luggage pursuant to a warrant uncovered a substantial quantity of heroin. *See id.* at 834-35. Williams motioned to suppress the evidence on the grounds that she had been illegally arrested and that the search warrant was invalid because it was based on the fruit of the unlawful arrest. The district court granted her motion to suppress; a panel majority of the court of appeals affirmed, but reversed upon rehearing en banc. *See id.* at 833-35. In the first part of the decision, sixteen of the judges concluded that Williams had been lawfully arrested and therefore did not reach the issue of a good faith exception. *See id.* at 833-39. Thirteen judges joined in a second opinion, in agreement that the arrest had been valid but seizing upon the occasion to discuss whether an exception exists which would render the evidence admissible had the arrest been unlawful. *See id.* at 840. This part of the opinion reasoned that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." *Id.*

76. *See id.* at 840 (exclusionary rule unavailable when officer acts in good faith belief that his conduct is constitutional and has reasonable basis for such belief). In a concurring opinion, ten judges objected that the rule created by the majority was inappropriately discussed in light of the instant case, hastily thought out, lacking in substantial justification, and judicially hindering. *See id.* at 848-51 (Rubin, J., Godbold, J., Kravitch, J., Frank M. Johnson, J., Politz, J., Hatchett, J., Anderson, J., Randall, J., Tate, J., Clark, J., concurring).

77. *Id.* at 841-42 (exclusionary rule justified only by its ability to deter future police misconduct). The court further stated that it is illogical to attempt to achieve a deterrent objective where police officers had acted in a good-faith belief that their conduct was legal unless, "by suppressing evidence derived from such actions . . . we somehow wish to deter them from acting at all." *See id.* at 842. *But see* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 340 (1982) (likening

tions to the exclusionary rule, the court in *Williams* supported its position by applying the societal costs balancing test.[78] The court further buttressed its reasoning by analogizing the *Williams* case to several United States Supreme Court opinions. The court in *Williams* concluded that "the deterrent effect of exclusion . . . does not justify the societal harm incurred by suppressing relevant and incriminating evidence."[79]

The cases relied upon by the Fifth Circuit in *Williams*, as support for the good faith exception it fashioned, proved to be a precursor of the United States Supreme Court's later recognition of the good faith exception in *United States v. Leon*.[80] In *Peltier v. United States*,[81] a case cited by the court in *Williams*, the United States Supreme Court applied the good faith exception to a situation in which law enforcement officials conducted a warrantless border search with a good faith belief that the search was constitutionally legitimate, although such searches were subsequently held consti-

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Williams rationale to adage, "close only counts in horseshoes and grenades . . . and also in searches and seizures").

78. *See* United States v. Williams, 622 F.2d 830, 840-42 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). The court declared that the costs to society in applying the exclusionary rule to situations which do not further its deterrent purpose are too great to be justifiable. *See id.* at 840.

79. *Id.* at 842 (good faith exception considered by Supreme Court as situation which fails to serve deterrent purpose of exclusionary rule). The court stated that several Supreme Court justices had urged adoption of a good faith exception. *See id.* at 841. The court in *Williams* undertook a careful analysis of the following United States Supreme Court cases in justification for its new exception: Michigan v. DeFillippo, 443 U.S. 31 (1979) (good faith reliance upon statute subsequently declared unconstitutional); United States v. Janis, 428 U.S. 433 (1976) (good faith reliance on search warrant later found invalid); United States v. Peltier, 442 U.S. 531 (1975) (warrantless good faith border search); Michigan v. Tucker, 417 U.S. 433 (1974) (declining to exclude testimony obtained during interrogation where officer, in good faith, failed to give suspect *Miranda* warnings). *See* United States v. Williams, 622 F.2d 830, 841-45 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). For further authority to support its holding, the court in *Williams* also cited *Ybarra* as a Supreme Court case which did not "mitigate against the good faith exception." *See id.* at 846. United States Supreme Court decisions, resting upon the deterrence rationale as the exclusive justification for the exclusionary rule, leave courts "ample room" for arriving at decisions such as those reached in the cases relied upon by the court in *Williams*. *See* Rader, *Legislating a Remedy for the Fourth Amendment*, 23 S. TEX. L.J. 585, 606 (1982).

80. 468 U.S. 897, 918-19 (1984). The court in *Williams* cited *Janis*, *Tucker*, and *DeFillippo*, drawing analogies with previous decisions of its own. *See* United States v. Williams, 622 F.2d 830, 840-46 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). The line of Supreme Court decisions prior to *Leon*, holding exclusion inappropriate when there is no future misconduct to deter, culminated logically in the good faith exception. *See* Note, *The Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 21 HOUS. L. REV. 1027, 1031-36 (1984); *see also* United States v. Leon, 468 U.S. 897, 928-29 (1984) (Brennan, J., dissenting) (since *Calandra* exclusionary rule has undergone "gradual but determined strangulation").

81. 422 U.S. 531 (1975).

tutionally infirm.[82] The Court did not require suppression of the fruits of the search, reasoning that "if the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge . . . that the search was unconstitutional under the fourth amendment."[83] *Peltier*, in conjunction with the line of cases gradually eliminating all justification for the exclusionary rule save the deterrence rationale, ultimately resulted in the Court's decision to recognize the good faith exception

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82. *See id.* at 541-42 (upholding admission of evidence seized in good faith reliance on court precedent subsequently overruled). In *Peltier*, border patrol agents conducted a warrantless automobile search under authority of a federal statute which provided that such searches be made "within a reasonable distance from any external boundary of the United States." *See id.* at 539-40 n.6. Federal courts had construed "reasonable distance" to encompass 100 air miles from the border. *See id.* at 539-40 & n.8. However, in 1973, the United States Supreme Court held that such a broad construction of the act was unconstitutional and violative of the fourth amendment. The search in question, conducted pursuant to the statute, occurred four months prior to the Supreme Court's decision rendering the statute unconstitutional. *See id.* at 532; *see also* Michigan v. DeFillippo, 443 U.S. 31, 40 (1979) (Court held that evidence was admissible when obtained pursuant to good faith arrest with sufficient probable cause to believe that violation of an ordinance, later declared unconstitutional, had occurred). In *DeFillippo*, police officers approached a couple in an alley just as the woman was about to lower her slacks. *See id.* at 33. They arrested the man who, when asked to identify himself, responded with obviously false and contradictory answers. The arrest was made pursuant to a city ordinance providing that failure to properly identify oneself when stopped was a misdemeanor. A search incident to arrest uncovered drugs. The Supreme Court addressed the issue of whether the officers lacked "probable cause" within the scope of the fourth amendment because the ordinance was subsequently held unconstitutional. Although heavily relied upon in support of its position in *Williams*, the Court in *DeFillippo* only briefly dealt with the exclusionary rule; the primary thrust of the opinion dealt with the concept of probable cause. *See id.* at 37-38. The Court distinguished *DeFillippo* from previous cases requiring suppression of evidence on the grounds that the officers in *DeFillippo* had probable cause where it had been lacking in the cited cases. *See id.* at 39.

83. United States v. Peltier, 422 U.S. 531, 542 (1975). The Court concluded that admitting the evidence would be neither offensive to judicial integrity nor detrimental to the deterrence objective. *See id.* The Court in *Peltier* was the last Supreme Court majority to thoroughly take issue with the imperative of the judicial integrity rationale. *See* Note, *The Good Faith Exception to the Exclusionary Rule*, 21 HOUS. L. REV. 1027, 1041 (1984). The Court stated that admitting evidence seized in a good faith belief that such seizure was in accordance with existing law would not offend judicial integrity. *See* United States v. Peltier, 422 U.S. 531, 537 (1975). Addressing the issue of deterrence, the Court determined that suppression of evidence obtained pursuant to a good faith belief would serve no deterrent function. *See id.* at 556-57 (Brennan, J., dissenting). In Justice Brennan's view, the deterrent function of the rule is served when directed at a much broader audience in more general terms of society at large rather than individual officers. *See id.* (Brennan, J., dissenting). One commentator has suggested that Justice Rehnquist, in *Peltier*, laid to rest the concept of judicial integrity, thereby removing any existing barriers to the good faith exception. *See* Note, *The Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 21 HOUS. L. REV. 1027, 1041 (1984).

to the exclusionary rule.[84]

The good faith exception, as articulated by the Court in *Leon*,[85] allows the prosecution to introduce evidence at trial obtained by law enforcement officials who mistakenly, but in good faith, believed they were conducting a valid search or seizure pursuant to a warrant wherein the existence of probable cause had been determined by a neutral and detached magistrate.[86] The Court in *Leon* surmised that the good faith exception should be adopted for various reasons: (1) the exclusionary rule was designed to deter police misbehavior rather than punish society for the errors of judges or magistrates; (2) there is no evidence that judges or magistrates ignore or pervert the confines of the fourth amendment or that such behavior by these officials would require application of the exclusionary rule; and (3) most importantly, there was no basis for concluding that "exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate."[87] The Court further indulged in a lengthy discussion of the deterrent

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84. *See* United States v. Leon, 468 U.S. 897, 913 (1984). Addressing the issue of whether or not to adopt a good faith exception, the Court stated that "the balancing approach that has evolved during the years of experience with the [exclusionary] rule provides strong support for the modification currently urged upon us." *See id.*

85. *See* United States v. Leon, 468 U.S. 897, 920 (1984). In *Leon*, pursuant to information obtained from an informant, surveillance was initiated of respondent's activities. A facially valid search warrant was issued on the basis of observations made by the informant. A search uncovered large quantities of drugs. The district court granted part of respondent's motion to suppress the evidence upon a finding that the affidavit prepared in application of the search warrant failed to establish the necessary probable cause. *See id.* at 901-03. Although *Massachusettes v. Sheppard* was decided on the same day, the Court articulated its formal adoption of the rule in *Leon*. *See* Massachusettes v. Sheppard, 468 U.S. 981 (1984). In *Sheppard*, the badly burned and beaten body of a woman was found in a vacant lot. *See id.* at 984. In the ensuing investigation, Sheppard, the victim's boyfriend, made some contradictory remarks and physical evidence was uncovered which tended to incriminate him. On the basis of this evidence, an affidavit was prepared for a warrant authorizing the search of Sheppard's house. The officers could not find a proper warrant form and made some modifications on a warrant designed for a drug search. The magistrate, aware of the problem, made additional changes and assured the police that the warrant was valid. *See id.* at 985-86. The search revealed several items of blood stained clothing. The Massachusettes Supreme Court, affirming the trial court, held that the evidence should have been excluded since the warrant failed to conform to fourth amendment standards by not particularly describing the items to be seized. *See id.* at 987.

86. *See* United States v. Leon, 468 U.S. 897, 920 (1984).

87. *See id.* at 916 (noting that reliance upon behavioral effects on judges and magistrates by exclusion is misplaced since such individuals have no stake in outcome). *But see id.* at 947 (Brennan, J., dissenting) (Court overlooked fact that requirement of particularity is express constitutional command, not minor technicality). Furthermore, the good faith exception will implicitly convey the message to magistrates that they need not take as much care in reviewing warrants since a mistake, even in the probable cause determination, "will from now on have virtually no consequence," if the police rely in good faith. *See id.* at 956 (Brennan, J., dissenting).

purpose ostensibly served by the rule, concluding that the "marginal or non-existent benefits" of suppressing evidence obtained in reasonable reliance upon an invalid warrant could not justify the "substantial costs of exclusion."[88]

The broad implications of the *Leon* decision are illustrated by Justice White's statement concerning future fourth amendment violations: "We . . . conclude that suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule . . . ."[89] Justice White further elaborated that the rule's purposes would rarely be served by applying it to situations where officers have relied, in good faith, upon a warrant issued by a neutral and detached magistrate which is subsequently held invalid for want of probable cause.[90] Dissenting, Justice Brennan, joined by Justice Marshall, observed that the *Leon* majority's "victory over the Fourth Amendment [was] complete."[91] Rejecting the deterrence rationale entirely, the dissent reasoned that judicial integrity and personal privacy rights necessitate preservation of the rule as it was originally articulated in *Weeks*.[92] The dissent urged that "by admitting unlawfully seized

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88. *See id.* at 918-26. The Court asserted that by its holding it was leaving untouched the probable cause standard. *See id.* at 923. The Court suggested that whenever officers act pursuant to an invalid warrant, inquiry should be made as to whether they were acting in good faith. Such determination should be implemented with very little inconvenience and "the prosecution should . . . be able to establish objective good faith without a substantial expenditure of judicial time." *See id.* at 924. However, as Justice Brennan pointed out, the majority has vitiated the past incentive to establish probable cause by replacing it with a "not entirely unreasonable" standard. *See id.* at 957 (Brennan, J., dissenting).

89. *Id.* at 918. The primary thrust of the Court's decision is that the exclusionary rule is not constitutionally mandated but instead, is 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." *Id.* at 906.

90. *See id.* at 926. Justice White, writing for the majority, indicated that the good faith exception would be the new standard and application of the exclusionary rule would be the exception. Justice Blackmun, while concurring, cautioned that experience with the good faith exception might result in a reconsideration of the Court's holding. *See id.* at 928 (Blackmun, J., concurring).

91. *See id.* at 929 (Brennan, J., dissenting). Justice Brennan opined that, with this decision, the Court had "positioned themselves to reopen the door [to evidence secured by official unlawfulness] still further and abandon[ed] altogether the exclusionary rule in search and seizure cases." *Id.* at 928 (Brennan, J., dissenting). In a separate dissent, Justice Stevens argued that the good faith exception, now available when evidence is seized in reliance on an invalid warrant, is directly contrary to the intentions of the amendment's framers, and referred to such a holding as the product of "constitutional amnesia." *See id.* at 972 (Stevens, J., dissenting).

92. *See id.* at 943 (Brennan, J., dissenting). Whether or not the rule actually deters is not the issue. Because there is inconclusive evidence that the rule actually deters, reliance upon this rationale renders the rule easy prey for abuse, making it especially vulnerable to criticism.

evidence, the judiciary becomes a part of what is in fact a single government action prohibited by the terms of the [Fourth] Amendment."[93] Additionally, Justice Brennan noted that *Leon* further vitiated the probable cause standard and called for a restoration of lost freedoms "to their rightful place as a primary protection . . . against overreaching officialdom."[94]

B. *The Good Faith Exception in State Court*

It would appear that state courts have been mindful of Justice Brennan's plea for a reconsideration of the principles upon which the exclusionary rule is predicated.[95] Although the good faith exception existed through legislative enactment in three states prior to the rendition of *Leon*,[96] states have been reluctant to adopt the exception and several state supreme courts have

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Regardless, "personal liberties are not rooted in the law of averages." Justice Brennan proposes that "proper understanding of the purposes sought to be served by the Fourth Amendment demonstrates that the principles embodied in the exclusionary rule rest upon a far firmer foundation than the shifting sands of the Court's deterrence rationale." *Id.* at 930 (Brennan, J., dissenting).

93. *Id.* at 933 (Brennan, J., dissenting). Justice Brennan characterized the majority's view that the exclusionary rule should be further limited to warrantless searches as an "impoverished understanding of judicial responsibility." *See id.* at 933 (Brennan, J., dissenting).

94. *Id.* at 957-60 (Brennan, J., dissenting) (noting that rights, once lost, are difficult to recover).

95. *See, e.g.*, People v. Brisendine, 531 P.2d 1099, 1111-12 (Cal. 1975) (rejecting, on basis of California Constitution, Supreme Court's holding that full search of driver made incident to arrest for minor traffic violation is "reasonable"); State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975) (consent search upheld by Supreme Court, reversed by New Jersey Supreme Court under state constitution although state and federal provisions nearly identical); State v. Opperman, 247 N.W.2d 673, 677-78 (S.D. 1976) (Supreme Court's decision dispositive as to federal constitutional law but not as to state constitutional law); *see also* State v. Kaluna, 520 P.2d 51, 62 (Haw. 1974) (rejecting scope of search, which was upheld by Supreme Court, as "unreasonable" under state constitution). State court decisions reversing United States Supreme Court holdings on the basis of state grounds are becoming increasingly common on many issues confronting the criminal justice system and are not limited to the fourth amendment. *See* State v. Santiago, 492 P.2d 657, 664 (Haw. 1971) (predicating rejection of Supreme Court decision regarding fifth amendment as matter of state constitutional law); People v. Jackson, 217 N.W.2d 22, 27-28 (Mich. 1974) (declining to follow Supreme Court's holding that right to counsel does not attach until initiation of formal judicial criminal proceedings). For a thorough discussion of state courts exercising their federalist rights, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

96. *See* ARIZ. REV. STAT. ANN. 13-3925 (A) & (B) (Supp. 1982) (providing that evidence will not be excluded if court determines that evidence was seized as result of "good faith mistake or technical violation"); COLO. REV. STAT. ANN. 16-3-308 (1) (1982) (providing that evidence seized pursuant to "good faith mistake" or "technical violation" need not be suppressed); FLA. CONST. art. I, § 12 (Supp. 1982) (constitution amended to read that Florida Constitution be construed in conformity with United States Constitution as interpreted by United States Supreme Court). Under this constitutional amendment, Florida does not recognize a warrantless good faith exception, although a good faith exception pursuant to a defec-

explicitly rejected the Court's reasoning in *Leon*; these states have chosen instead to embrace a traditional application of the exclusionary rule supported by their state constitutions.[97] Illustrative of this view is *State v. Novembrino*,[98] where evidence, which would have been admissible under the terms of the good faith exception as recognized by the Court in *Leon*, was

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tive warrant is recognized. *See* State v. Carney, 423 So. 2d 511, 512 (Fla. Dist. Ct. App. 1982); Pesci v. State, 420 So. 2d 380, 382 (Fla. Dist. Ct. App. 1982).

97. *See, e.g.*, Commonwealth v. Upton, 476 N.E.2d 548, 553-54 & n.5 (Mass. 1985) (discussing *Leon* but holding that state statute prohibits admission of evidence seized pursuant to warrant issued without probable cause); State v. Novembrino, 519 A.2d 820, 856-57 (N.J. 1987) (expressly rejecting good faith exception on state constitutional grounds); People v. Bigelow, 488 N.E.2d 451, 458 (N.Y. 1985) (good faith exception not recognized under New York Constitution). In some states, lower courts have rejected the good faith exception although the highest state court has not yet addressed the issue. *See* People v. Sundling, 395 N.W.2d 308, 315 (Mich. Ct. App. 1986) (Michigan courts hold good faith exception to exclusionary rule not recognized under Michigan Constitution); *see also* Mers v. State, 482 N.E.2d 778, 783-84 (Ind. Ct. App. 1985). Several state supreme courts have chosen to embrace *Leon* under their state constitutions. *See, e.g.*, McFarland v. State, 684 S.W.2d 233, 243 (Ark. 1985) (adopting good faith exception as articulated in *Leon* to state exclusionary rule); State v. Brown, 708 S.W.2d 140, 145 (Mo. 1986) (good faith exception recognized under state law); State v. Welch, 342 S.E.2d 789, 795 (N.C. 1986) (state exclusionary rule to be interpreted no more liberally than federal rule); State v. Willmoth, 490 N.E.2d 1236, 1247-48 (Ohio 1986) (expressly adopting *Leon* under state constitution). Numerous state supreme courts, faced with the issue of adopting or rejecting a good faith exception, have declined to address the issue and, instead, have decided the cases on other grounds. *See, e.g.*, State v. Whiting, 497 A.2d 1217, 1217-18 (N.H. 1985) (declining to decide issue of good faith under state law); State v. Ronnegren, 361 N.W.2d 224, 230 n.1 (N.D. 1985) (where probable cause present issue of good faith did not require resolution); State v. Adkins, 346 S.E.2d 762, 775 (W. Va. 1986) (evidence excluded regardless of whether *Leon* applicable); State v. Brady, 388 N.W.2d 151, 156 (Wis. 1986) (concluding case not "proper vehicle" for deciding good faith issue).

98. 519 A.2d 820 (N.J. 1987). Other states have rejected Supreme Court holdings on the basis of their state constitutions. *See, e.g.*, People v. P.J. Video, Inc., 501 N.E.2d 556, 562 (N.Y. 1986) (rejecting reasoning of Supreme Court in *Leon* and refusing to allow good faith exception on state constitutional grounds); People v. Bigelow, 488 N.E.2d 451, 455 (N.Y. 1985) (declining to follow *Leon* on state constitutional grounds). State courts are manifesting a desire to preserve fourth amendment rights through strict interpretations of analogous state constitutional provisions. *See, e.g.*, State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976). Although in *Opperman* the Court held that an inventory search of a closed console in a car towed for a parking violation was not unreasonable under the fourth amendment, the South Dakota Supreme Court, reversed holding that such a search was offensive to its state constitution. The South Dakota Supreme Court premised its decision on state grounds even though the petitioner failed to raise the applicability of the state constitution on first appeal. The court maintained that its consideration of this issue was allowed by its inherent power to hear issues of significant importance to state citizens. *See id.* at 675 n.6. *Opperman* was the first case where a state court, on remand, rejected a United States Supreme Court decision on the basis of its state constitution. *See* Note, *Rights of Criminal Defendants: The Emerging Independence of State Courts*, 2 HAMLINE L. REV. 83, 84 (1979); *see also* State v. Johnson, 346 A.2d 66, 67-68 (N.J. 1975) (rejecting Court's "totality of the circumstances" test when determining voluntariness of consensual search).

excluded by the New Jersey Supreme Court on state constitutional grounds.[99] After noting that the state constitutional provision was virtually identical to its federal counterpart, the court in *Novembrino* was nevertheless unwilling to allow a good faith usurpation of the exclusionary rule.[100] The New Jersey court, relying upon well-established principles of federalism and matters of " 'particular state interest' " giving rise to an independent state ground, concluded that the good faith exception as adopted in *Leon* would "undermine the constitutionally-guaranteed standard of probable cause."[101] New Jersey and other state courts are participating in a widespread revitalization of the Federalist system, a process which affords state constitutions the opportunity to function as a source of "individual liberties more expansive than those conferred by the Federal Constitution."[102]

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99. *See* State v. Novembrino, 519 A.2d 820, 857 (N.J. 1987) (expressly rejecting *Leon* holding and its reasoning on grounds that such exception will "undermine constitutionally-guaranteed standard of probable cause").

100. *See id.* at 849-50 (New Jersey Constitution, art. 1 paragraph 7, "virtually identical" to fourth amendment). Despite the identical language of the two provisions, the New Jersey Supreme Court determined that its decision was compelled by an overwhelming state interest. *See id.* at 857; *see also* People v. P.J. Video, Inc., 501 N.E.2d 556, 558 n.1 (N.Y. 1986) (state constitution reads nearly identical to fourth amendment). Because of the similarity between the two provisions, the New York Constitution had previously been interpreted in conformity with federal interpretations of the parallel provision. *See id.* at 561. However, the court determined that federal-state uniformity was of minor consequence in comparison to "the ability to protect fundamental constitutional rights." The court discussed the ground upon which a state constitution may be interpretively distinguished from the federal constitution. There are two bases for relying on the state constitution. One arises when the language of the state constitution differs substantially enough from the United States Constitution to support a broader interpretation. Conversely, "noninterpretive review proceeds from a judicial perception of sound public policy, justice, and fundamental fairness." *See id.* at 560. The court in *P.J. Video* chose to distinguish the New York Constitution on noninterpretive grounds, consisting of policy considerations based upon federalism and the historically broader protection of individual rights given by the state. *See id.* The South Dakota Supreme Court, in *Opperman*, stated that even though the two provisions were alike, they found that "logic and a sound regard for the purposes of the protections afforded" by the state constitution warranted greater protection than found by the United States Supreme Court. *See* State v. Opperman, 247 N.W.2d 673, 674-75 (S.D. 1976) (language of state constitution and fourth amendment virtually identical but state court may interpret state independently from federal).

101. *See* State v. Novembrino, 519 A.2d 820 (N.J. 1987). The court noted that its decision was made in the context of a federalist system which allows a state court to give enhanced protection for individual liberties. However, the court also stated that its holding would actually entitle individuals to no more protection than the federal constitution already grants them. *See id.*

102. *See* PruneYard Shopping Center v. Robbins, 447 U.S. 74, 81 (1980). The movement toward federalism in criminal law and procedure is a reaction to the extreme conservatism of the Burger Court. *See* Note, *Rights of Criminal Defendants: The Emerging Independence of State Courts*, 2 HAMLINE L. REV. 83, 86 (1979) (rejection of Supreme Court holdings by state courts on state grounds is reaction against extreme conservatism of Burger Court). The trend of rejecting Supreme Court holdings on state grounds represents a valid expression of the role

C. *Adequate and Independent State Grounds*

State courts are obligated to follow United States Supreme Court precedent when interpreting or applying federal statutes or the United States Constitution.[103] State courts may, however, interpret their own law in such a way as to expand upon rights conferred by the Federal Constitution.[104] At the core of the federalist theory is the separate and independent state ground principle.[105] This theory precludes review by a federal court when the state tribunal's decision was based upon an adequate state ground independent of federal law.[106] Federal review in this context is limited to correcting errors

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to be played by state courts in the federalist system. *See id.*; *see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) ("every believer in our concept of federalism . . . must salute this new development in our state courts"). *But see* Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 755-65 (1976) (problems arise when state courts reject Supreme Court decisions on state grounds).

103. *See* Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (Supreme Court has ultimate authority to determine meaning and application of United States Constitution). Courts have construed their state constitutions as providing greater protection than the federal constitution in many instances under a variety of rationales. *See* Note, *Stepping into the Breach: Basing Defendants' Rights on State Rather Than Federal Law*, 15 AM. CRIM. L. REV. 339, 340 (1978). Three commonly asserted rationales include the following: (1) if the state constitutional provision is similar to the federal provision, the state court may construe its meaning in light of state legislative history and prominent state policies; (2) if the language of the state provision differs from that of the federal provision, state courts may hold that the state statute warrants a different interpretation; and (3) state courts may base their decision on an adequate state ground. *See id.* at 340-41.

104. *See, e.g.*, PruneYard Shopping Center v. Robbins, 447 U.S. 74, 81 (1980) (well-established that state courts may provide more expansive freedoms under own state constitutions than that which is conferred by the federal constitution); Burgett v. Texas, 389 U.S. 109, 113-14 (1967) (states may set individual standards if standard selected does not infringe on guarantees of federal constitution); Cooper v. California, 386 U.S. 58, 62 (1967) (holding would not impair "state's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so"); People v. P.J. Video, Inc., 501 N.E.2d 556, 559-60 (N.Y. 1986) (by established principles of federalism, states may construe own laws to expand on those rights guaranteed by federal constitution). *But see* Comment, *Expanding Criminal Procedural Rights Under State Constitutions*, 33 WASH. & LEE L. REV. 909, 932 (1976) (discussing three primary objections to federalist trend).

105. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 630 (1975) (Supreme Court review limited to federal questions). The Court in *Murdock*, discussing the federal question jurisdiction statute, stated that such a "system ha[d] been based upon the fundamental principle that this jurisdiction was limited to the correction of errors relating solely to Federal law." The Court further surmised that such policy was "vital in its essential nature to the independence of State courts." *Id.*

106. *See* Commonwealth v. Platou, 417 U.S. 976, 976 (1974), (denying certiorari where state court decision appeared to rest upon adequate state grounds); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (jurisdiction of Supreme Court limited to state decisions which "incorrectly adjudge federal rights"). Furthermore, if the judgment of the state court would not be affected by the correction of the federal issue, the Court cannot review the decision. *See id. See gener-*

in the state opinion which relate solely to federal law.[107] The rule encourages states to resolve fundamental issues on the basis of their respective state constitutions, placing reliance exclusively upon state constitutional jurisprudence.[108]

V. THE TEXAS EXCLUSIONARY RULE

A. *Historical Perspective*

Article I, section 9, of the Texas Constitution and the fourth amendment to the United States Constitution are essentially identical.[109] In response to the Texas Court of Criminal Appeals' refusal to recognize an exclusionary

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ally Wilkes, *The New Federalism in Criminal Procedure: Evasion of the Burger Court*, 62 KY. L.J. 420, 426-31 (1974) (discussing adequate and independent state ground principles).

107. *See* 28 U.S.C. § 1257 (1970) (present codification of federal question jurisdiction); *see also* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (power of United States Supreme Court over state judgments is limited to addressing incorrect adjudication of federal rights). The Court, in *Pitcairn*, stressed the constitutional basis for the rule in stating that the Supreme Court may not "revise" opinions but may only "correct" them. The Court noted that it was without power to correct a federal issue in a case where the same judgment would be rendered by the state court regardless of the federal issue, reasoning that to do so would be rendering an advisory opinion which it is not permitted to do. *See id. But see* Michigan v. Payne, 412 U.S. 47, 56-57 (1973) (Supreme Court reversed state court decision construing state statute for re-evaluation in light of federal standards); California v. Byers, 402 U.S. 424, 432-34 (1971) (Court held California Supreme Court has adjudged defendant's rights too liberally under interpretation of state statute). It appears that the United States Supreme Court, under Chief Justice Burger, disregarded principles of federalism and set aside state judgments which were not approved of by the Burger Court. *See* Wilkes, *The New Federalism in Criminal Procedure: Evasion of the Burger Court*, 62 KY. L.J. 421, 433-34 (1974).

108. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1978) (Supreme Court has limited its role in protecting individual liberties by relying upon state courts to exercise federalist powers); Wilkes, *The New Federalism: Evasion of the Burger Court*, 62 KY. L.J. 421, 450 (1974) (Burger Court invited states to adopt higher state standards than federal by circumscribing federal constitutional protections). *But see* Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 193 (1981) (although some state court opinions disagree with Supreme Court interpretations and employ state constitutions to extend rights, most state courts still follow Supreme Court holdings).

109. *See* TEX. CONST. art. I, § 9. The Texas Constitution mandates:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable searches and seizures, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Id. The fourth amendment of the United States Constitution 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.

rule in connection with article I, section 9, of the state constitution, the Texas Legislature enacted a statutory version of the rule providing that no evidence obtained in violation of the laws or Constitution of the state of Texas, or of the Constitution or laws of the United States, shall be admitted into evidence against the accused in a criminal case.[110] Immediately following its enactment, the provision was given its intended effect by the Texas Court of Criminal Appeals when the court reversed at least thirty-four cases between 1926 and 1928 on the basis of the rule, holding that the arrest or search involved violated the Texas Constitution, and thus, evidence obtained pursuant thereto was suppressible.[111] The present rule, codified in article 38.23 of the Texas Code of Criminal Procedure, substantively retains its original form as enacted in 1925.[112]

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110. *See* Welchek v. State, 93 Tex. Crim. 271, 280-81, 247 S.W. 524, 529 (1922) (court denied exclusion of evidence obtained in violation of state constitution). The court based its decision in part on its finding that the Texas Constitution did not provide for the exclusionary remedy. *See id.* The rule has substantially retained its present form since enactment in 1925. *See* Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1981). The statute today recites:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence.

TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1979). Under this provision, all defendants in a criminal case are protected against the introduction of evidence seized in violation of their constitutional rights. *Compare* Garza v. State, 678 S.W.2d 183, 190 (Tex. App.— San Antonio 1984, pet. granted) (Texas exclusionary statute protects defendants in all criminal cases against admission of any evidence obtained in violation of constitutional rights) *with* United States v. Ceccolini, 435 U.S. 268, 275 (1978) (federal rule does not "proscribe the introduction of all illegally seized evidence in all proceedings or against all persons").

111. *See, e.g.*, Lewis v. State, 103 Tex. Crim. 528, 528, 1 S.W.2d 638, 638 (1928) (search invalid without warrant); Chapin v. State, 107 Tex. Crim. 477, 483, 296 S.W. 1095, 1100 (1927) (warrant invalid for failure to allege facts establishing probable cause); Foster v. State, 104 Tex. Crim. 121, 122, 282 S.W. 600, 600 (1926) (search held invalid because search warrant not based on two affidavits as statutorily required). Thirty-two of the thirty-four reversals were prohibition cases. *See* Dawson, *State-Created Exclusionary Rules In Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 199 (1981).

112. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon 1979) (present exclusionary rule); *see also* Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1981). The 1929 Texas Legislature narrowed the scope of the rule slightly, but the original version was reinstated in 1953. *See* S.J. OF TEX., 41st Leg., 2d Called Sess. 143-44 (1929) (removing reference to the "laws of the United States"); *see also* Dawson, *State-Created Exclusionary Rules In Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 196-204 (1981) (detailed discussion of historical development of Texas statutory exclusionary rule). A minor change in the form of the rule occurred in 1965 when the provision was recodified in the present Code of Criminal Procedure. *See id.* at 204. A second paragraph was added which provided for submission of controverted fact issues for jury determination. *See id.*

B. *The Scope of Article 38.23*

The language of the Texas statute is unambiguous and Texas courts have generally applied the rule as such, holding that absolutely no evidence seized unlawfully may be admitted against the accused in a criminal prosecution.[113] The Texas exclusionary rule "goes beyond the requirements of the Federal Constitution,"[114] and the Texas Court of Criminal Appeals has referred to the rule as "mandatory."[115] Moreover, the Texas rule requires the suppression of evidence seized in violation of state law regardless of the potential admissibility of the evidence under a federal constitutional analysis.[116] Despite its absolute language, application of the Texas rule by the Texas Court of Criminal Appeals has been characterized by treatment lacking in meaningful discussion of both the policy issues implicated by the rule and the

113. *See, e.g.*, Hernandez v. State, 600 S.W.2d 793, 799 (Tex. Crim. App. 1980) (terms of article 38.23 mandatory; evidence obtained in violation of state law must be suppressed); Cruz v. State, 586 S.W.2d 861, 865 (Tex. Crim. App. 1979) (pursuant to article 38.23, Texas Court of Criminal Appeals held evidence seized in violation of article 38.10 inadmissible); Irvin v. State, 563 S.W.2d 920, 924 (Tex. Crim. App. 1978) (evidence seized during course of unlawful arrest excluded under article 38.23). The rule requires suppression upon a governmental violation of either state or federal law. *See* Dees v. State, 722 S.W.2d 209, 213 (Tex. App.—Corpus Christi 1986, no pet.). Texas courts emphasize the absolute language of the Texas exclusionary rule, holding that the rule admits of no exceptions. *See id.* at 214. Texas courts have stated that any exception to rule should be by legislative action, not by judicial decision. *See* Oliver v. State, 711 S.W.2d 442, 445 (Tex. App.—Fort Worth 1986, no pet.) (inevitable discovery and independent source exceptions unavailable in Texas).

114. *See* Hill v. State, 643 S.W.2d 417, 419 (Tex. App.— Houston [14th District]), *aff'd*, 641 S.W.2d 543 (Tex. Crim. App. 1982); *see also* Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983) (noting that Texas has historically established more protective provisions than federal constitution); Simpson v. State, 709 S.W.2d 797, 803 (Tex. App.—Ft. Worth 1986, no pet.) (noting article 38.23 extends beyond requirements of federal constitution).

115. *See* Hernandez v. State, 600 S.W.2d 793, 799 (Tex. Crim. App. 1980) (flatly stating "terms of article 38.23 are mandatory", citing Jordan v. State, 562 S.W.2d 472 (Tex. Crim. App. 1978)). The court in *Hernandez* further reasoned that because the arrest in question was a clear violation of Texas law, the "clear mandate of Article 38.23 requires suppressing evidence seized" as a result of the unlawful acts. *See* Hernandez v. State, 600 S.W.2d 793, 799 (Tex. Crim. App. 1980).

116. *See, e.g.*, Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1979) (en banc) (noting autonomy of Texas exclusionary rule as functioning independently of federal rule); Lowery v. State, 499 S.W.2d 160, 164 (Tex. Crim. App. 1973) (although arrest valid under fourth amendment, court invalidated seizure under Texas law); Garza v. State, 678 S.W.2d 183, 190-91 (Tex. App.—San Antonio 1984, pet. granted) (although federal exclusionary rule does not exclude illegally obtained evidence in all proceedings, Texas courts must statutorily exclude all illegally obtained evidence). The court in *Garza* described the federal exclusionary rule as a " 'medicament' which is 'grudgingly taken' so that 'no more should be swallowed than is necessary to combat the disease' " and the Texas exclusionary rule as a legislatively prescribed "full dosage," of which "Texas courts are not free to decide whether, or how much, of the medication shall be taken." *Id.*

rationale underlying the court's decisions.[117] The Texas Court of Criminal Appeals has recognized several exceptions to the rule which presumably circumvent its inflexible language.[118] Soon after its enactment, the court judicially engrafted a standing requirement onto the Texas exclusionary rule.[119] Texas eventually adopted the federal standing prescription and applied it indiscriminately to both article 38.23 and fourth amendment claims.[120] Although article 38.23 applies to statutory violations,[121] the Texas Court of

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117. *See* Bell v. State, 707 S.W.2d 52, *opinion withdrawn*, No. 68,989 (Tex. Crim. App.—March 19, 1986) (available on WESTLAW, Texas Cases library) (adopted attenuation of taint as recognized under federal exclusionary rule but court failed to discuss how decision reached); Jones v. State, 568 S.W.2d 847, 858 (Tex. Crim. App. 1978) (well- settled that failure to comply with article 18.06 does not render search invalid). *But see* Hernandez v. State, 600 S.W.2d 793, 799 (Tex. Crim. App. 1980) (emphasizing mandatory nature of Texas statutory exclusionary rule and noting court must defer to legislature for any modification of rule); Escamilla v. State, 556 S.W.2d 796, 798 (Tex. Crim. App. 1977) (rejecting Supreme Court decision by holding blood samples searches and seizures under Texas Constitution, although court did not discuss divergence from federal rule). *See generally* Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 237 (1981) (Texas Court of Criminal Appeals has approached article 38.23 with "curious ambivalence"). The court's decisions have alternated between construing the statute in strict accordance with its express language, thus refusing to allow exceptions; while in other cases the court has allowed exceptions without any indication as to the basis of its decision and a noticeable absence of any meaningful discussion as to the intended purpose of the rule. *See id.*

118. *See, e.g.*, Bell v. State, 707 S.W.2d 52, *opinion withdrawn*, No. 68,989 (Tex. Crim. App.—March 19, 1986) (available on WESTLAW, Texas Cases library) (evidence admissible when sufficient attenuation of taint exists); Jones v. State, 568 S.W.2d 847, 858 (Tex. Crim. App. 1978) (en banc) (failure to comply with article 18.06 does not render evidence obtained excludable); Holcomb v. State, 484 S.W.2d 929, 933 (Tex. Crim. App. 1972) (standing to challenge search or seizure required before Texas exclusionary rule invoked).

119. *See* Jenkins v. State, 108 Tex. Crim. 184, 186, 299 S.W. 642, 643 (1927). The Texas standing rule prevents suppression of the evidence when the party seeking to invoke the rule lacked ownership and possession of the place or item searched. *See* Craft v. State, 107 Tex. Crim. 130, 132-33 (1927) (no right to remedy for violation of another's rights). *See generally* Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 237 (1981) (discussing standing requirement).

120. *See, e.g.*, Holcomb v. State, 484 S.W.2d 929, 933 (Tex. Crim. App. 1972) (no standing absent showing that defendant owned or had right to use property or was legitimately on premises); Vines v. State, 397 S.W.2d 868, 869 (1966) (defendant legitimately on premises had standing to challenge search); Hensley v. State, 387 S.W.2d 877, 880 (1964) (defendant not on premises at time of search lacked standing). Since the adoption of the federal standard, no independent interpretation of the standing requirement under article 38.23 is possible. *See* Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 238 (1981).

121. *See, e.g.*, Lowery v. State, 499 S.W.2d 160, 165 (Tex. Crim. App. 1973) (warrant invalid under article 14.14 of Texas Code of Criminal Procedure); McLennan v. State, 109 Tex. Crim. 83, 84, 3 S.W.2d 447, 447 (1928) (invalidated warrant based upon oral affidavit because procedure statutorily proscribed); Foster v. State, 104 Tex. Crim. 121, 122, 282 S.W. 600, 600 (1926) (search warrant invalid for failure to comply with statutory specifications).

Criminal Appeals has additionally failed to strictly construe the rule where certain statutory violations occurred during the execution of a warrant. These excepted violations include the failure of an officer to either announce his purpose upon execution of the warrant[122] or announce his authority upon execution.[123] Recently, in *Bell v. State*,[124] the Texas Court of Criminal Appeals, sitting en banc, permitted the admission of evidence under an "attenuation of the taint" theory despite asserted grounds for suppression under article 38.23.[125] In *Bell*, the court entertained virtually no discussion as to the applicability of the federal exclusionary standard to article 38.23, glossing over the parameters of the Texas rule by concluding that when determining "whether a confession has been tainted by a prior warrantless arrest that is illegal as a matter of state statutory law," the federal standard would be applied.[126]

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122. *See* Jones v. State, 568 S.W.2d 847, 858 (Tex. Crim. App. 1978) (failure to comply with article 18.06 does not render search invalid); Barnes v. State, 504 S.W.2d 450, 454 (Tex. Crim. App. 1974) (failure of officers to give notice upon entering as required under article 18.06 does not render search illegal).

123. *See* Jones v. State, 568 S.W.2d 847, 858 (Tex. Crim. App. 1978) (no conceivable reason why failure to comply with article 15.25 should render arrest illegal when noncompliance with article 18.06 does not invalidate search).

124. *See* Bell v. State, 707 S.W.2d 52, *opinion withdrawn*, No. 68,989 (Tex. Crim. App.—March 19, 1986) (available on WESTLAW, Texas Cases library).

125. *See id.* (attenuation of taint exception to Texas exclusionary rule recognized). Bell was a suspect in a dual murder. Officers, believing they had probable cause to arrest Bell, did not obtain a warrant because they "knew that the bars closed at 1:00 a.m., when appellant's whereabouts would again be unknown." When apprehended, Bell gave written consent for a search of his residence, where the officers later discovered incriminating evidence linking Bell to the murders. Confronted with the evidence Bell confessed. Bell later admitted to further foul play involving the murders and implicated an accomplice. Additional searches were made of Bell's residence with his consent, uncovering further incriminating evidence. The court held that although there had been sufficient probable cause to arrest Bell, the arrest was nevertheless invalid because there were no exigent circumstances excusing the failure to obtain a warrant. However, the court went on to say that not all evidence obtained "at a point in time after an illegal detention" must be excluded. Recognizing that it was not bound to follow the United States Supreme Court when a violation of Texas law was at issue, the court nevertheless applied the test established in *Brown v. Illinois* to determine whether Bell's confession had been tainted by his prior warrantless arrest. The Texas Court of Criminal Appeals did not discuss why such an exception was now, though never before, tolerated under the Texas rule. The court concluded that since there was probable cause to arrest Bell, "it [was] immaterial that some of the evidence . . . presented to the magistrate to justify the warrant might have been fruits of the illegal arrest." The court, failing to clearly delineate between article 38.23 and the federal exclusionary rule, held that, for fourth amendment purposes under the *Brown* analysis, there was sufficient attenuation of the taint to render all evidence seized after the warrant was issued admissible. *See id.*

126. *See id.* In support for applying the federal standard instead of an independent state ground, the court stated that the federal test ensures that states do not "cure Fourth Amendment violations simply by administering the Fifth Amendment warnings required by *Mi-*

In contrast, the Texas Court of Criminal Appeals has, at times, applied the Texas exclusionary rule to situations in which the evidence would have been admissible under an exception to the federal rule, thus giving the Texas rule much broader application. The Texas Court of Criminal Appeals has suppressed evidence seized unlawfully in post-trial proceedings.[127] Likewise, the court has refused to admit evidence seized pursuant to an ordinance subsequently found unconstitutional.[128] Despite the unexplained exceptions recognized by the Texas Court of Criminal Appeals and its apparent inconsistent application of the rule, the court has nevertheless indicated on more than one occasion that the Texas rule is mandatory and any modification of its plain meaning must be effectuated legislatively.[129] This

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randa." The court cited twelve previous cases in which they had utilized the federal standard in determining attenuation of the taint. However, contrary to *Bell*, in the cited decisions, the court based its holding solely upon the fourth amendment; never was a challenge made to the admissibility of the evidence under article 38.23, nor was the Texas exclusionary rule an issue addressed by the court in these cases. *See id.*

127. *See* Jackson v. State, 508 S.W.2d 89, 90 (Tex. Crim. App. 1973) (expanding statutory language "on the trial," to include probation revocation proceedings). It appears that the Texas exclusionary rule would also bar evidence for impeachment purposes despite the admissibility of such evidence under the federal rule. *Compare* Butler v. State, 493 S.W.2d 190, 198 (Tex. Crim. App. 1973) (expressly refusing to follow United States Supreme Court case allowing admission of tainted testimony for impeachment purposes) *with* Harris v. New York, 401 U.S. 222, 226 (1971) (statement obtained in violation of fifth amendment admissible for impeachment). Although there are no Texas cases on point, the *Butler* case, addressing the fifth amendment, would seem to apply to search and seizure cases. *See* Dawson, *State-Created Exclusionary Rules in Search and Seizure: The Texas Experience*, 59 TEXAS L. REV. 191, 240 (1981).

128. *See* Howard v. State, 617 S.W.2d 191, 193-94 (Tex. Crim. App. 1981) (under Texas law evidence seized incident to arrest conducted pursuant to unconstitutional ordinance inadmissible). The facts in *Howard* are substantially similar to *DeFillippo* where the United States Supreme Court recognized that evidence seized on the basis of a law which was subsequently held unconstitutional may be admitted unless the law is "grossly and flagrantly unconstitutional so that any person of reasonable prudence would be bound to see its flaws." *See* Michigan v. DeFillippo, 443 U.S. 31, 38 (1979). The Texas Court of Criminal Appeals noted that such an exception was rejected in *Baker v. State*, 478 S.W.2d 445, 449 (Tex. Crim. App. 1972), and expressly declined to apply the rule announced in *DeFillippo*. *See* Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1981). The court in *Howard* distinguished the Texas exclusionary rule from the federal rule, reaffirming the "soundness of the [Texas] rule as a matter of state law," and confirming "the continued vitality of the Texas exclusionary rule." *See id.* at 193-94.

129. *See* Hernandez v. State, 600 S.W.2d 793, 799 (Tex. Crim. App. 1980) (evidence suppressed under Texas law even though suppression not required under federal law). The court stated that the terms of article 38.23 are "mandatory" and it was therefore without power to deviate from "the plain mandate of the statute." *See id. But see* Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983) (applying federal standard without discussion of state considerations). In a case on remand from the United States Supreme Court, the Texas Court of Criminal Appeals stated that it would construe the state constitution "in harmony with the Supreme Court's opinions interpreting the Fourth Amendment." The court acknowledged

incongruous position adopted by the highest criminal court in Texas has left lower courts without clear guidance on these crucial issues in a time when state courts are responding independent of the United States Supreme Court to ensure adequate preservation of important constitutional rights.

C. *The Good Faith Exception in Texas*

Two Texas appellate courts recently declined an opportunity to engraft a good faith exception onto the state exclusionary rule.[130] In *Dees v. State*,[131] the defendant was found guilty of possessing a controlled substance.[132] A search, conducted pursuant to a warrant, uncovered the controlled substance which led to the defendant's conviction.[133] The warrant was held invalid since the affidavit supporting its issuance lacked a sufficient factual basis upon which a neutral and detached magistrate could have concluded that probable cause existed.[134] The court in *Dees* held that the evidence, although admissible under the federal good faith exception, must be suppressed under the Texas statutory exclusionary rule.[135] The court carefully delineated state and federal issues, noting that the "Texas statutory rule ha[d] not been altered by recent federal constitutional reinterpretation."[136] The court took the position that the power to rule, in contravention with the absolute language of the statute, was not constitutionally reposed in the judi-

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that although Texas had opted for a stricter exclusionary rule than the federal prescription, it had in the past and would continue to interpret the Texas Constitution in conformity with the decisions of the United States Supreme Court on the fourth amendment. *See id.*

130. *See* Dees v. State, 722 S.W.2d 209, 214 (Tex. App.— Corpus Christi 1986, no pet.) (Texas statutory exclusionary rule contains no exceptions to provision's plain wording); Polk v. State, 704 S.W.2d 929, 934 (Tex. App.—Dallas 1986, no pet.) (expressly rejecting prosecution's invitation to adopt good faith exception). Both courts characterized the power to adopt a good faith exception as legislative in nature. *See* Dees v. State, 722 S.W.2d 209, 214 (Tex. App.--Corpus Christi 1986, no pet.); Polk v. State, 704 S.W.2d 929, 934 (Tex. App.—Dallas 1986, no pet.).

131. 722 S.W.2d 209 (Tex. App.—Corpus Christi 1986, no pet.).

132. *See id.* at 211-12.

133. *See id.*

134. *See id.* Two affidavits had been submitted in application for the warrant. The magistrate testified that his probable cause determination was based upon the facts as set forth in the first affidavit. *See id.* The court held that the first affidavit was "ambiguous" and consisted primarily of conclusory statements. *See id.* at 214-15. The court also examined the second affidavit, concluding that it contained even fewer facts. The court held that under either affidavit, the magistrate lacked a sufficient basis for concluding that probable cause existed and, additionally, the combined information of the two affidavits even fell short of what was needed to establish probable cause. *See id.*

135. *See id.* at 214.

136. *See id.* at 213.

ciary.[137] Similarly, in *Polk v. State*,[138] another court of appeals refused to recognize and apply the federal good faith exception despite the prosecution's protestations to the contrary.[139] The court in *Polk*, echoing federalist sentiments, noted that "when a court determines that the admission of certain evidence is not prohibited by the Constitution of the United States, a state court is free to make its independent determination of whether such evidence is admissible under state exclusionary rules."[140]

VI. EXAMINING THE GOOD FAITH EXCEPTION: A PROPOSAL FOR TEXAS

A. *Legislative Deference*

The time is ripe for the Texas Court of Criminal Appeals to evaluate the good faith exception in relation to the Texas exclusionary rule. Numerous considerations will confront the court. Unlike the judicially-created federal exclusionary rule, the Texas rule was implemented legislatively, predating *Mapp* by more than thirty-five years.[141] The impact of *Mapp*, therefore, was irrelevant in Texas where the exclusionary rule was already a well-established statutory component of Texas criminal procedure.[142] Judicial amendment to article 38.23 would be an affront to the Texas Legislature, which only recently rejected a proposed good faith exception to the statute.[143] Given this legislative refusal to statutorily impose a good faith exception onto article 38.23, recognition of such an exception by the Texas Court of Criminal Appeals would constitute an act of judicial legislation. It is axiomatic that the role of the judiciary in the legislative process is limited to

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137. *See id.* (quoting Oliver v. State, 711 S.W.2d 442, 445 (Tex. App.—Fort Worth 1986, no pet.).

138. 704 S.W.2d 929, 934 (Tex. App.—Dallas 1986, no pet.).

139. *See id.* at 934.

140. *See id.* (citing Garza v. State, 678 S.W.2d 183, 190-91 (Tex. App.—San Antonio 1984, pet. granted)). The court additionally expressed the opinion that to allow a good faith exception would be "usurping the power of the Legislature." *See id.* at 934.

141. *Compare* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (exclusionary rule held applicable to states through fourteenth amendment) *with* Act of March 9, 1925, ch. 149, 1925 Texas Gen. Laws, Local and Spec. 186 (legislative enactment of Texas exclusionary rule).

142. *See* Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1981) (pre-*Mapp* enactment of Texas exclusionary rule and Texas Bill of Rights illustrates independent nature and "early viability" of Texas rule). *See generally* Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEXAS L. REV. 191, 215 (1981) (Texas courts "reluctant participant[s]" in proliferation of criminal procedure litigation precipitated by *Mapp*).

143. *See* H.B. 632, 69th Leg. (1985) (providing that evidence would be inadmissible under Texas law if inadmissible under federal constitution as construed by United States Supreme Court); S.B. 357, 69th Leg. (1985) (admissibility of evidence determined in accordance with United States Supreme Court rulings).

enforcement of the law whereas the power to *enact* legislation is constitutionally reposed in the legislative branch of government.[144] Any modification of the rule, therefore, is best left to the state legislature since "[c]ourt[s] [are] without right or power to do otherwise than follow the plain mandate of the statute."[145] In addition to legislative deference, Texas courts should remain mindful of the independent and autonomous nature of the Texas exclusionary rule.[146] Despite the continual erosion of the federal exclusionary rule and diminution in fourth amendment protection, Texas courts should remain undissuaded in their efforts to enforce the plain language of article 38.23.

B. *An Analytical Framework for Evaluating the Good Faith Exception*

Elements of federalism and concern for maintaining constitutional guarantees have increasingly become subject to judicial review. The New Jersey Supreme Court's recent rejection of the good faith exception in *Novembrino* provides an excellent model for examining these constitutional considerations. The *Novembrino* court reasoned that rejection of *Leon* "gives no more to the individual than that which the Constitution guarantees him, to the police officer no more than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice."[147] Implicit within this statement is the assertion that the reasoning of the Court in *Leon* is flawed.[148] In arriving at its decision, the court in *Novembrino* examined the probable cause standard,[149] analyzed the

144. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (Court emphasized "original constitutional proposition that courts do not substitute their economic and social beliefs for the judgment of legislative bodies, who are elected to pass laws"); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (Court constitutionally devoid of power to sit as "superlegislature to weigh the wisdom of legislation"); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) ("It is our duty to expound and execute the law as we find it"). Indeed, the Texas Court of Criminal Appeals cogently summarized the axiom in a related context. *See* Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983). In *Brown*, the court concluded that "it is not the function of the judiciary to engraft . . . changes upon our Constitution. That function lies with the people of the State of Texas through the constitutional amendment process, and through the Legislature which has the duty and ability to make statutory change in our procedure." *Id.*

145. *See* Hernandez v. State, 600 S.W.2d 793, 799 (Tex. Crim. App. 1980).

146. *See id.* at 798 (court emphasized independent nature of Texas exclusionary rule); *see also* Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1981) (rejecting prosecution's assertion that Texas exclusionary rule was "bottomed on the federally forged 'Exclusionary Rule' ").

147. *See* State v. Novembrino, 519 A.2d 820, 823 (N.J. 1987).

148. *See id.* (questioning wisdom of good faith exception in *Leon*).

149. *See id.* at 827-40.

United States Supreme Court's deterrence rationale,[150] undertook a discussion of judicial integrity,[151] and focused upon the role of states in preserving constitutional guarantees.[152] The concerns espoused by the court in *Novembrino* provide a legally-sound analytical framework for a discussion of whether Texas should diverge from the minimum federal standards established by the Court in *Leon*.

1. Probable Cause

When addressing fourth amendment rights, of primary concern is the preservation of the probable cause standard.[153] The probable cause determination is constitutionally mandated by both the fourth amendment to the United States Constitution and article I, section 9, of the Texas Constitution. The deference given to this standard cannot be undermined, as it serves as a necessary check against unreasonable searches and seizures conducted by the government.[154] Texas courts have consistently protected the probable cause requirement,[155] and it remains well-established under both Texas and

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150. *See id.* at 842-49.

151. *See id.* at 848-49.

152. *See id.* at 854-57.

153. *See id.* at 826. The probable cause requirement "occupies a position of indisputable significance in search and seizure law." *Id.* Probable cause is the constitutionally imposed standard used to determine whether a search or seizure was reasonable. *See id.* The probable cause standard was established to protect citizens against "rash and unreasonable interferences with privacy." *See* Brinegar v. United States, 338 U.S. 160, 176 (1949). The rule of probable cause is the best workable safeguard against such intrusions and "to allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *See id.* The probable cause requirement is a crucial component of search and seizure law inasmuch as the purpose of the requirement is to prevent the very kind of behavior which prompted the enactment of the fourth amendment. *See* United States v. Leon, 468 U.S. 897, 947-48 (1984) (Brennan, J., dissenting). The language and history of the fourth amendment require that such minimum precautions be taken so as to render the intrusion reasonable. *See id.* (Brennan, J., dissenting).

154. *See* Brinegar v. United States, 338 U.S. 160, 176 (1948) (constitutional standards protect individuals from unreasonable invasions of privacy). The particularity requirement contained in the fourth amendment was intended to prevent unreasonable searches. *See* United States v. Leon, 468 U.S. 897, 963 (1984) (Stevens, J., dissenting). Such constitutional standards ensure that "each search is carefully tailored to its justification, and does not resemble the wide-ranging general searches that the Framers intended to prohibit." *See id.* (Stevens, J., dissenting). The Framers were "deeply suspicious of warrants; in their minds the paradigm of an abusive search was the execution of a search not based on probable cause." *Id.* at 972 (Stevens, J., dissenting).

155. *See* Lippert v. State, 664 S.W.2d 712, 721-22 (Tex. Crim. App. 1984) (where search invalid under Texas constitution due to absence of probable cause evidence obtained thereby suppressible). Presence on the premises during the execution of a search warrant does not authorize a detention or frisk without probable cause. *See id.* Texas courts have demonstrated little reluctance to exclude evidence seized in violation of the probable cause standard. *See, e.g.*, Green v. State, 615 S.W.2d 700, 706 (Tex. Crim. App. 1980) (affidavit stating sheriff had "good reason to believe and does believe" that defendant was guilty insufficient basis for prob-

Federal law that good faith is an insufficient substitute for probable cause.[156] Under the good faith exception, where law enforcement officials have acted in good faith reliance upon a facially valid search or arrest warrant, the issue of whether probable cause was present upon issuance of the warrant becomes irrelevant unless: (1) the magistrate's actions clearly exceeded the scope of his neutral and detached status; or (2) exclusion of the evidence would serve a deterrent purpose.[157] As Justice White stated in *Leon*, however, when an officer is acting in good faith, suppression will rarely serve a deterrent purpose.[158] Under *Leon*, therefore, the critical factor in the sup-

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able cause); Gutierrez v. State, 423 S.W.2d 593, 595 (Tex. Crim. App. 1968) (test of validity of search is probable cause); Dees v. State, 722 S.W.2d 209, 214-15 (Tex. App.—Corpus Christi 1986, no pet.) (affidavits containing conclusory statements fall short of satisfying probable cause standard under Texas Constitution); Cerna v. State, 693 S.W.2d 570, 572 (Tex. App.—San Antonio 1985, no pet.) (evidence suppressed for failure to satisfy requirements of probable cause under Texas constitution).

156. *See* Beck v. Ohio, 379 U.S. 89, 97 (1965) (good faith of arresting officers insufficient to validate unlawful governmental intrusion). "If good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Id.* (quoting U.S. CONST. amend. IV); *see also* Carroll v. United States, 267 U.S. 132, 161 (1925) ("good faith is not enough to constitute probable cause"); Henry v. United States, 361 U.S. 98, 102 (1959) (good faith insufficient to satisfy probable cause standard). A good faith belief on the part of the arresting officer that he has probable cause is insufficient when contrasted with the absolute language of the warrant requirement. *See* Green v. State, 615 S.W.2d 700, 706 (Tex. Crim. App. 1981) (sheriff's subjective belief in defendant's guilt falls short of probable cause); Leighton v. State, 544 S.W.2d 394, 397 (Tex. Crim. App. 1976) (suspicion or good faith of arresting officer insufficient to constitute probable cause for arrest). *See generally* Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 649 (1978) (discussing probable cause standard and good faith exception).

157. *See* United States v. Leon, 648 U.S. 897, 922-23 (1984) (good faith exception inapplicable where magistrate "wholly abandoned his judicial role"). The Court in *Leon* explained that when this occurs, no reasonable officer should rely on such warrant, nor should a reasonable officer rely on a warrant which is facially deficient or so obviously lacking in probable cause that no reasonable person would believe it to be sufficient. *See id.* After *Leon*, suppression in cases involving warrants will be determined on a case-by-case basis and only allowed where exclusion will further the deterrent purpose of the exclusionary rule. *See id.* at 918 & n. 19. The Court further reasoned that by so limiting the good faith exception, the fourth amendment's probable cause standard was left "untouched." The Court opined that courts would not necessarily address the good faith issue before determining whether the fourth amendment had been violated. *See id. But see* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 354 (1982) (implementing good faith exception would "stop dead in its tracks judicial development of Fourth Amendment rights").

158. *See* United States v. Leon, 468 U.S. 897, 918 (1984) (suppression only justified in "unusual cases" where deterrent purpose served). The Court concluded that since the purpose of the rule is to deter police misconduct, there is little deterrence to be had where evidence is excluded on the basis of a search warrant subsequently invalidated. *See id.*

pression calculus is the presence or absence of good faith rather than the level of suspicion possessed by the officer when the intrusion initially occurred. To the extent that the probable cause standard is a vital component of fourth amendment protection, the good faith exception to the exclusionary rule perverts the substance of the fourth amendment since it replaces the probable cause standard with a good faith test.[159]

2. Deterrence

Using the deterrence rationale as a justification for the exclusionary rule provides tenuous support for its existence since little concrete evidence demonstrating the actual deterrent effect of the rule is available.[160] Regardless of the lack of evidentiary support for the deterrence rationale, "[p]ersonal liberties are not based on the law of averages" and constitutional guarantees should not be subject to statistical conjectures.[161] Although proponents claim that the good faith exception is logically sound inasmuch as there has been no police misconduct and thus nothing to *deter* in the future, it is ironic to note that the good faith exception will ultimately *foster* law enforcement disregard and disrespect for warrant procedures and the probable cause requirement.[162] Illustrating this deleterious effect on warrant procedures, one

159. *See id.* at 958-59 (Brennan, J., dissenting) (referring to majority's new standard as "objectively reasonable reliance upon an objectively unreasonable warrant"). The majority's conclusion that searches pursuant to good faith are reasonable is directly contrary to constitutional requirement of probable cause. *See id.* at 966-67 (Stevens, J., dissenting) (referring to good faith standard as substituting for probable cause "newfangled nonconstitutional standard of reasonableness").

160. *See* Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 565 (1982) (discussing research and difficulties involved in obtaining accurate results as to whether exclusionary rule deters). After conducting extensive research and studying the results of others' research, Canon concludes that "anything more than limited and probably inconclusive feedback on the rule's deterrent impact is impossible of achievement." *See id.* The statistics are clear, however, that the majority of convictions which are not obtained by reason of the exclusionary rule involve crimes which are nonviolent, such as crimes involving drugs, gambling, illegal possession of weapons, and illegal immigration. *See id.* at 576-77; *see also* Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than an Empty Blessing*, 62 JUDICATURE 337, 340-44 (1978-79) (studies show exclusionary rule has little or no impact on conviction rate). Those who subscribe to the rationale that the exclusionary rule is founded upon its ability to deter appear to have little or no data indicating that the rule actually serves as a deterrent. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 674-78 (1970). It is difficult to arrive at an accurate, quantitative measure of the rule's deterrent effect. *See id.* at 709.

161. *See* Faretta v. California, 422 U.S. 806, 834 (1975) (noting personal nature of constitutional guarantees); *see also* United States v. Leon, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting) (quoting Justice Stewart from *Faretta* and adding that the Court's protection of constitutional rights should not depend upon "statistical uncertainties").

162. *See* United States v. Leon, 468 U.S. 897, 955-59 (Brennan, J., dissenting) (*Leon* viti-

commentator has observed that under *Leon* a police officer has no reason to engage in "such cautious procedures and every reason not to. Why take the risk that some conscientious prosecutor or police supervisor will say the application is insufficient when, if some magistrate can be induced to issue a warrant on the basis of it, the affiant is thereafter virtually immune from challenge?"[163] Texas courts have not relied upon the deterrence rationale as support for the Texas exclusionary rule; rather, they have been satisfied to apply the rule on the basis of its mandatory nature.[164] Similarly, the Texas Court of Criminal Appeals should not insist upon interpreting the Texas Constitution in harmony with the "constrictions placed on the fourth amendment by the Supreme Court of the United States,"[165] but should in-

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ates incentive to comply with fourth amendment requirements). The standard announced in *Leon* encourages disregard of constitutional requirements by both police officers and magistrates, resulting in an "undermin[ing] [of] the integrity of the warrant process." *See id.*; *see also* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 358 (1982) (such an exception would be viewed by police as a "license to engage in the same conduct in the future"). Law enforcement officials will feel freed from constitutional requirements of probable cause, and their conduct will instead be governed by those exceptions they determine to be appropriate. *See id.*

163. *See* LAFAVE, SEARCH AND SEIZURE ON THE FOURTH AMENDMENT § 1.2, at 20 (Supp. 1986). Professor LaFave points out that before *Leon*, police were aware that simply obtaining a warrant was not enough since the warrant could later be subjected to scrutiny during a motion to suppress. Consequently, special procedures developed to ensure that the warrant process was correctly and carefully complied with; often including review of the affidavit by several individuals other than the magistrate. *See id.*

164. *See* Hernandez v. State, 600 S.W.2d 793, 799 (Tex. Crim. App. 1980) (terms of Texas exclusionary rule are "mandatory" and court without power to do other "than follow the plain mandate of the statute"). The court in *Hernandez* cited cases in which evidence had been excluded under the mandatory language of article 38.23, but would not have been excluded under the federal exclusionary rule. *See id.*; *see also* Howard v. State, 617 S.W.2d 191, 193 (Tex. Crim. App. 1979) (rejecting prosecution's proposal to adopt federal standard in which evidence seized incident to arrest under unconstitutional statute inadmissible). The Texas Court of Criminal Appeals in *Howard* entertained no discussion regarding the purposes to be served by the Texas statute, implying that its holding was predicated upon the plain language of the statute. *See id.* Similarly, the holdings of lower Texas courts entertain virtually no discussion as to the purposes or justification for the rule; rather, they simply apply it where it is appropriate under the terms of the statute. *See* Kann v. State, 694 S.W.2d 156, 159-60 (Tex. App.—Dallas 1985, no pet.) (discussing suppression of evidence in terms of independent and mandatory nature of Texas exclusionary rule; deterrence not factor in decision). Texas courts do not consider deterrence when ruling on suppression issues under the Texas exclusionary rule, but point instead to the plain language of the statute. *See, e.g.*, Polk v. State, 704 S.W.2d 929, 934 (Tex. App.—Dallas 1986, no pet.) (rejecting good faith exception on basis of "unambiguous language" of Texas statutory exclusionary rule); Garza v. State, 678 S.W.2d 183, 191 (Tex. App.—San Antonio 1984, pet. granted) (Texas exclusionary rule mandates suppression of all evidence seized in violation of accused's constitutional rights); Tumlinson v. State, 663 S.W.2d 539, 544 (Tex. App.—Dallas 1983, pet. ref'd) (all evidence obtained unlawfully excluded in criminal case under article 38.23).

165. *See* Brown v. State, 657 S.W.2d 797, 799-800 (Tex. Crim. App. 1983) (declining on

stead recall its own observation in a similar context that "the federal exclusionary rule is not involved, and the federal decisions dealing with it are of no moment."[166]

3. Judicial Integrity

The judiciary, at both the state and federal levels, is ultimately responsible for the preservation of a citizen's right to remain free from unreasonable searches and seizures.[167] A frequent criticism levelled against the exclusionary rule is that application of the proscription permits "[t]he criminal . . . to go free because the constable has blundered."[168] A greater consideration is implicated, however, when the judiciary condones the unlawful violation of individual freedoms by governmental officials.[169] Such judicial behavior is likely to breed contempt and disrespect for the laws; laws which the courts are bound to uphold and law enforcement officials to follow. As well-stated in *Novembrino*, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[170]

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remand from United States Supreme Court to hold that Texas constitution provided more liberal standard of protection than federal constitution). *But see id.* at 808-10 (Teague, J., dissenting) (majority's holding destroys concept of independent state appellate judiciary which may grant greater freedoms to state citizens than those recognized through United States Supreme Court's interpretation of federal constitution). Justice Teague further asserted that Texas courts do not exist simply "to mimic decisions of the Supreme Court of the United States" when interpreting the Texas constitution. *See id.* (Teague, J., dissenting). "[D]ecisions of the [Supreme] Court . . . should not be dispositive of questions regarding rights guaranteed by counterpart provisions of state law;" rather, state courts should consider decisions made by the Court and apply its reasoning only when the state court finds it logically sound and consistent with the state's precedent and policies in light of the state constitution. *See Brennan, State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

166. *See* Hernandez v. State, 600 S.W.2d 793, 798 (Tex. Crim. App. 1980) (citing cases illustrating mandatory suppression of evidence obtained in violation of article 38.23 which would have been admissible under federal exclusionary rule).

167. *See, e.g.*, United States v. Leon, 468 U.S. 897, 938 (1984) (Brennan, J., dissenting) (judiciary has responsibility for ensuring protection of constitutional rights); Weeks v. United States, 232 U.S. 383, 391-92 (1914) (fourth amendment places courts and federal officials in position of effectuating constitutional mandates); Novembrino v. State, 519 A.2d 820, 856 (N.J. 1987) (judiciary has "primary responsibility" for preservation of fourth amendment liberties); *see also* Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (state and federal courts are both "guardians" of personal liberties).

168. *See* People v. Delfore, 150 N.E. 585, 587 (N.Y. 1926) (Justice Cardozo discussed federal exclusionary rule and expressed concerns about consequences of rule in application).

169. *See* Elkins v. United States, 364 U.S. 206, 222-23 (1960) (courts should not sanction unconstitutional behavior).

170. *See* State v. Novembrino, 519 A.2d 820, 848 (N.J. 1987) (discussing imperative of judicial integrity); *see also* Elkins v. United States, 364 U.S. 206, 222-23 (1960) (federal courts should not be "accomplices" in unlawful action by disregarding constitution). Refusal by a

If a magistrate issues a warrant without probable cause, any search or seizure effectuated pursuant to that instrument represents the illicit use of governmental authority and a police officer's good faith cannot cure this constitutional infirmity.[171] When a court allows the prosecution to introduce into evidence material seized in violation of the fourth amendment's probable cause prerequisite, the judiciary is tacitly condoning the unconstitutional act which produced the evidence in question. By sanctioning the illegitimate use of official power, the integrity of the judiciary is placed into disrepute.[172] The Texas Court of Criminal Appeals should thus reject the Court's reasoning in *Leon* and thereby arrest the denigrating effect the good faith exception has upon the integrity of the judiciary.

4. New Federalism

The federalist system places state courts in a position of independent responsibility for the preservation of their citizens' rights, typically through effectuation of state constitutions.[173] Erosion of fourth amendment protection by the Burger Court furnished the impetus behind a trend on the part of state courts in which greater protection for individual liberties is extended as a matter of state constitutional jurisprudence.[174] Commenting on these

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court to take action in the face of a constitutional violation is an indication that the court is imposing its own judicial values in place of constitutional values. *See* Dripps, *Living With Leon*, 95 YALE L. J. 906, 948 (1986) (expressing doubts that *Leon* majority would have included fourth amendment in Constitution).

171. *See* U.S. CONST. amend. IV. (no warrants shall issue without probable cause); *see also* United States v. Leon, 468 U.S. 897, 966-67 (1984) (Stevens, J., dissenting) (search without probable cause is unreasonable under terms of fourth amendment). To hold that it is reasonable to rely upon a constitutionally defective warrant "is the product of constitutional amnesia." *See id.* at 792 (Stevens, J., dissenting).

172. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968) (judiciary should not be party to unlawful governmental conduct by admitting fruits of unconstitutional invasions); United States v. Leon, 468 U.S. 897, 976-78 (Stevens, J., dissenting) (courts have responsibility to address constitutional violations and should not take part in furthering such conduct).

173. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (discussing role of states in protecting individual freedoms). Stressing this point, Justice Brennan asserted that "state courts cannot rest when they have afforded their citizens the full protections of the Federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Id.*; *see also* Brown v. State, 657 S.W.2d 797, 808 (Tex. Crim. App. 1983) (Teague, J., dissenting) (responding to recent constrictions of individual liberties by United States Supreme Court; resort must be had to state legislatures and judiciaries to retain desired protection).

174. *See* Note, *Rights of Criminal Defendant's: The Emerging Independence of State Courts*, 2 HAMLINE L. REV. 83, 84-89 (1979) (Burger Court decisions represent significant departure from decisions rendered under Chief Justice Warren). Substantial expansions of the rights of the accused were recognized during the Warren Court era; marked set-backs of these advancements are evident in decisions rendered by the Court under Chief Justice Burger. The

events, Justice Brennan noted that, forasmuch as the United States Supreme Court is severely limiting its role in the bifurcated federalist system, state courts must "step into the breach" if individual liberties are to survive.[175]

The uncompromising terms of article 38.23 of the Texas Code of Criminal Procedure prescribe:

> No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of a criminal case.[176]

The prohibition against unreasonable searches and seizures contained in article I, section 9, of the Texas Constitution is, by definition, included within the scope of article 38.23. Thus, any search or seizure which runs afoul of the Texas Constitution presumably renders the statutory proscription applicable.

When evidence is admitted under a good faith analysis, the constitutional requirement of probable cause is supplanted by a judicially-created standard of good faith. This practice is patently offensive to the Texas Constitution, which mandates that "no warrant to search any place, or to seize any person or thing, shall issue . . . without probable cause."[177] The seizure of evidence pursuant to a search or arrest warrant issued without probable cause is thus expressly condemned by the Texas Constitution. Consequently, any item of evidence obtained through the use of such a warrant is statutorily inadmissible under article 38.23, which unequivocally prohibits the introduction of evidence seized in violation of the state constitution. The Texas Court of Criminal Appeals is accordingly constrained, both constitutionally and statutorily, to reject the "ignoble shortcut to conviction left open to the State[s]"[178] and thereby confirm the independent and "continued vitality of

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trend established by the Burger Court indicated that both the Bill of Rights and the decisions rendered by the Warren Court "will be narrowly interpreted." Some of the decisions of the Burger Court seemed predeterminative of a future "abandonment of all but the most basic rights of the accused." *See id.* at 82; *see also* Dawson, *State-Created Exclusionary Rules in Search and Seizure*, 59 TEXAS L. REV. 191, 193 (1981) (noting new focus of Court in criminal procedure). *But see* Note, *Stepping Into the Breach: Basing Defendant's Rights on State Rather Than Federal Law*, 15 AM. CRIM. L. REV. 339, 340 (1978) (pointing out that Burger Court gave states opportunity to determine extent of protection to be given individuals while Court under Justice Warren "generally ignored" deference to the states).

175. *See* Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

176. TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1984).

177. *See* TEX. CONST art. I, § 9.

178. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1960); *see also* State v. Novembrino, 519 A.2d 820, 823 (N.J. 1987) (referring to good faith exception).

the Texas exclusionary rule."[179]

VII. CONCLUSION

The exclusionary rule, as initially articulated by the United States Supreme Court in *Weeks*, rested firmly upon the necessity of effectuating the specific guarantees of the fourth amendment. Over the years, however, the rationale underlying the *Weeks* decision was gradually displaced by the theory that the exclusionary rule existed solely to deter future police misconduct. The Court was thus able to create numerous exceptions to the exclusionary rule when it was determined that no significant deterrent objective would be realized by application of the rule. The most recent of these, the good faith exception, permits the admission of evidence obtained by law enforcement officials who mistakenly, but in good faith, believed they were acting pursuant to a valid warrant later shown to have been issued without probable cause. Recognition of the good faith exception in *United States v. Leon* is indicative of a trend in which the Court appears to be abdicating its position as the primary guardian and defender of individual liberties.

In response to this erosion of constitutional protections, state courts, relying upon adequate and independent state grounds, have afforded greater protections to citizens under their respective state constitutions than those currently recognized by the United States Supreme Court under the Federal Constitution. Loosely referred to as "New Federalism," several state courts have applied the principle in the context of the good faith exception, wholly rejecting the reasoning of the *Leon* Court on state constitutional grounds. Consistent with such federalist sentiments, two Texas appellate courts, asserting their right to construe the Texas Constitution independently of the United States Constitution, refused as a matter of state law to engraft a good faith exception onto the statutory version of Texas' exclusionary rule. These courts emphasized the mandatory nature of the Texas rule, clearly delineated the independence of the state statute from the judicially-created federal exclusionary rule, and concluded that the good faith exception was inconsistent with the state constitution and therefore would not be tolerated under Texas law.

It remains for the Texas Court of Criminal Appeals to evaluate the good faith exception in relation to the Texas exclusionary rule. The court will be confronted with a number of considerations which militate against recognition of a good faith exception to article 38.23. These considerations include: the compromising position in which the probable cause requirement is placed by application of the good faith standard; the ancillary nature of the

179. *See* Howard v. State, 617 S.W.2d 191, 194 (Tex. Crim. App. 1981) (rejecting urged adoption of federal standard and affirming "soundness" of state law).

deterrence rationale in the determination of whether to apply the Texas exclusionary rule; the constitutional obligation imposed upon the Texas judiciary to enforce and apply the law pursuant to the expressed intent of the state legislature; and the dynamic and protective role the Texas judiciary must assume in securing individual freedoms. When these factors are considered in their entirety, the balance in favor of rejecting the United States Supreme Court's reasoning in *Leon* appears to be struck. It is, therefore, incumbent upon the Texas Court of Criminal Appeals to "step into the breach" and reject the good faith exception on the basis of the Texas Constitution and the legislatively-created exclusionary rule.