Privacy vs. Practicality: Should Alaska Adopt the *Leon* Good Faith Exception?

I. INTRODUCTION

In *J.R.N. v. State*,[1] the Alaska Court of Appeals rejected the state's argument that a police officer's good faith violation of a statute does not trigger the exclusionary rule.[2] The Alaska Supreme Court has requested supplemental briefing on the good faith issue,[3] specifically on whether Alaska should adopt the good faith exception as articulated by the United States Supreme Court in *United States v. Leon*.[4] While the facts of *J.R.N.* do not support

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1. 809 P.2d 416 (Alaska Ct. App. 1991).

2. *Id.* at 420-21. In *J.R.N.*, police officers obtained a custodial confession from a minor in violation of Delinquency Rule 7(b). Under Alaska Rule of Evidence 412, such evidence is normally excluded: "Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose . . . ." ALASKA R. EVID. 412. In violating the statute, however, the arresting officer had relied, allegedly in good faith, on erroneous advice from the district attorney's office.

3. Respondent's Supplemental Memorandum Regarding Good Faith Exception to Exclusionary Rule at 1, State v. J.R.N. (No. S-4528). The court posed three questions: (1) "Should a good faith exception to the exclusionary rule be adopted?"; (2)"Should any distinction be drawn between violations of constitutional, as opposed to statutory or rule provisions, in fashioning a good faith exception to the exclusionary rule?"; and (3) "What is the applicable good faith standard, one that is objective, subjective, objectively reasonable — or a combination of objective and subjective standards?" *Id.* at 1-2.

4. 468 U.S. 897 (1984). *Leon* involved the execution of a search warrant that appeared valid on its face, but was actually unsupported by probable cause. In holding the sanction of exclusion too "extreme," the United States Supreme Court determined that the officers' good faith reliance on the judgment of a detached, neutral magistrate to be objectively reasonable. *Id.* at 926.

such a broad query,[5] the *Leon* exception is of pressing concern to state courts throughout the country and must be addressed in Alaska.[6]

Over the past two decades, the United States Supreme Court has limited the rights of victims of illegal searches and seizures. The Fourth Amendment exclusionary rule, once hailed as a personal constitutional right, has been relegated to the status of a "judicially created remedy."[7] Consequently, the triggering of the rule is no longer automatic but is contingent upon the outcome of a cost-benefit analysis.[8] One result of this demotion from right to remedy

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5. In *J.R.N.*, it is undisputed that the police had probable cause to arrest the defendant. The good faith issue in *J.R.N.*, therefore, was not the more difficult *Leon* question of whether the results of an illegal search, conducted in good faith reliance on a warrant unsupported by probable cause, should be excluded, but rather the narrower question of whether a good faith violation of a statute warrants exclusion. In the latter inquiry, no constitutional right is implicated. It would therefore be inappropriate for the Alaska Supreme Court to adopt the *Leon* exception based on the facts of *J.R.N.*

6. State courts are currently split on whether to adopt *Leon*. *See infra* note 19.

7. United States v. Calandra, 414 U.S. 338, 348 (1974). In *Calandra*, the Court said that the purpose of the exclusionary rule is "not to redress the injury to the privacy of the search victim" but "to deter future unlawful police conduct." *Id.* at 347. The Court's conclusion that exclusion was merely "a judicially created remedy," *id.* at 348, resolved the dispute over the rule's constitutional basis and separated the Fourth Amendment exclusionary rule from its Fifth Amendment counterpart, thereby dismantling earlier holdings that had linked the two. *See* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372-77, 1390 (1983) (noting that early cases such as Boyd v. United States, 116 U.S. 616 (1886), and Agnello v. United States, 269 U.S. 20 (1925), had transposed the Fifth Amendment exclusionary rule into the Fourth Amendment, rendering exclusion in search-and-seizure cases a constitutional right).

Calandra is not inconsistent with Mapp v. Ohio, 367 U.S. 643 (1961), which applied the exclusionary rule to the states through the Fourteenth Amendment. The *Mapp* Court had found the exclusionary rule to be constitutionally required, but was unclear about its source. Stewart, *supra*, at 1380. Three interpretations of *Mapp* have been proposed: "[1] exclusion mandated directly by the Constitution, [2] exclusion to preserve the integrity of the government, and [3] exclusion as a constitutionally required remedy." *Id.* *Calandra* adopted the third.

8. *See, e.g.*, United States v. Leon, 468 U.S. 897, 906-07 (1984) (reasoning that because exclusion is distinct from the rights violated by an unlawful search, the propriety of exclusion in a given circumstance "must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of

and its attendant cost-benefit scrutiny is the *Leon* good faith exception.

In *United States v. Leon*,[9] the United States Supreme Court held that a police officer's good faith reliance on a facially valid, albeit constitutionally unsound, search warrant did not trigger the exclusionary rule, despite the Fourth Amendment's requirement that no warrants — and thus no searches — can issue except upon probable cause.[10] The primary purpose of the exclusionary rule, the Court reasoned, was to deter *future* police misconduct.[11] The Court concluded, therefore, that since an officer relying in good faith on a facially valid warrant could not be deterred by exclusion, the "benefits" of exclusion in such a case are "marginal or non-existent" while the costs to society remain unbearably high.[12]

Some state courts have attacked *Leon's* specific cost-benefit analysis without disturbing *Leon's* fundamental assumption that deterrence is the primary justification for exclusion.[13] Other courts, however, have rejected *Leon* on more theoretical grounds. Specifically, some state courts have concluded that because the strong right to privacy implicit in their state constitutions directly

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inherently trustworthy tangible evidence"). Alderman v. United States, 394 U.S. 165 (1969), was the first case to suggest that a cost-benefit analysis was the proper method of gauging the propriety of exclusion in a given circumstance. *See id.* at 174-75. Alaska has also subjected its exclusionary rule to cost-benefit scrutiny, suggesting to some that exclusion in Alaska is not a constitutional right. *See, e.g.*, State v. Sears, 553 P.2d 907 (Alaska 1976).

9. 468 U.S. 897 (1984).

10. *Id.* at 926.

11. *Id.* at 906.

12. *Id.* at 922.

13. *E.g.*, State v. Marsala, 579 A.2d 58 (Conn. 1990). The *Marsala* court made two observations. First, the exclusionary rule does have a deterrent function even when an officer relies in good faith on a facially valid but constitutionally defective warrant. The exclusionary rule is not only directed at police misconduct, but also at the "warrant-issuing process" and may be the only way to induce judges to scrutinize warrant applications. Exclusion will also encourage officers to use more than reasonable care in applying for warrants. *Id.* at 66.

Second, the costs of exclusion, where an officer acts in good faith, are not substantial. In weighing the costs, the *Leon* Court considered the "aggregated costs of exclusion in *all* cases" without distinguishing the percentage of releases that applied to good faith error — figures which are even less substantial. *Id.* at 64-65. Therefore, according to the Court, although the exclusionary rule exacts some cost from society, "this 'cost' is not sufficiently 'substantial' to overcome the benefits" of exclusion. *Id.* at 65.

clashes with a good faith exception, they must afford their citizens greater protection than the United States Supreme Court provides in the federal context.[14] This note will examine the propriety of adopting a good faith exception in Alaska in light of the express right to privacy guaranteed by Article I, Section 22 of the Alaska Constitution: "The right of the people to privacy is recognized and shall not be infringed."[15]

In concluding that deterrence is the sole purpose of the exclusionary rule, the *Leon* Court rejected the possibility that exclusion could redress the privacy violation suffered by the search victim. The Court observed that the suppression of illegally obtained evidence often sets otherwise guilty defendants free, thereby rendering a windfall on some search victims and undermining the foundations of the criminal justice system.[16] The Court will tolerate such a windfall only when exclusion can have a deterrent effect, suggesting that individual privacy rights are subordinate to the demands of judicial expediency. Yet in Alaska, and in other states where a premium is placed on individual privacy rights, vindicating the privacy violation in the form of exclusion does not constitute a windfall — for the costs of suppression are, in the words of the North Carolina Supreme Court, "tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious."[17] This compensatory function is an additional benefit to exclusion that shifts the outcome of a cost-benefit analysis against a good faith exception even where, as in the case of good faith error, the rule's deterrent function is minimal.[18]

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14. *E.g.,* Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991); *see also* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983). In *Leon*, the Court divorced the exclusionary rule from the privacy violation resulting from the unlawful search, observing that "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *Leon*, 468 U.S. at 906 (quoting United States v. Calandra, 414 U.S. 338, 354 (1974)).

15. ALASKA CONST. art. 1, § 22. For a good discussion of the general arguments against *Leon*, see 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE — A TREATISE ON THE FOURTH AMENDMENT §§ 1.2(a)-1.3(g) (2d ed. 1987).

16. *Leon*, 468 U.S. at 907-08.

17. *See* State v. Carter, 370 S.E.2d 553, 560-61 (N.C. 1988) (rejecting *Leon* on the ground that the good faith exception compromises judicial integrity, and noting that "the basis of our exclusionary rule is not suited to such simplistic resolution of the issue," that is, through a straight deterrence-based cost-benefit analysis).

18. This argument does not require the rejection of State v. Sears, 553 P.2d 907 (Alaska 1976), which held that the exclusionary rule is not applicable to parole

In addition to providing a theoretical analysis, this note will show that on a practical level, the adoption of *Leon* could undermine Alaska's privacy right by frustrating the warrant-issuing process. The good faith exception will divert the focus of appellate review from assessing probable cause to finding good faith and consequently will leave questionable probable cause determinations unchecked. The probable cause standard will weaken for want of proper appellate supervision, while deficient warrants will gain legitimacy once executed in good faith. The cumulative effect will likely be an increase in privacy invasions unsupported by probable cause — a result which a judiciary having pledged to uphold Article I, Section 22 of the Alaska Constitution must not sanction. The good faith exception as espoused in *Leon v. United States*, therefore, is irreconcilable with Alaska's privacy provision and must be rejected.[19]

II. *LEON*'S MINIMIZATION OF THE PRIVACY RIGHT

The *Leon* holding contains little more than bare assertions as to the origin and purposes of the exclusionary rule. Justice Brennan, in his dissent, likened the *Leon* majority to a group of magicians, noting how it had made the benefits of the exclusionary

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revocation hearings, or Elson v. State, 659 P.2d 1195 (Alaska 1983), which held that the exclusionary rule does not apply to sentencing hearings. Rather, the premium Alaska places on individual privacy is fully implicated only when evidence is used to prove guilt at a criminal trial; only a judgment of "guilty" can displace the right to life, liberty and property. *See Sears*, 553 P.2d at 915 (noting that Alaska's exclusionary rule "works, at a minimum, to bar the use of illegally obtained evidence for the purpose of directly proving guilt") (Connor, J., dissenting). Post-conviction hearings are merely incidental to a guilty verdict and therefore do not sufficiently implicate privacy rights to offset the costs of exclusion where the deterrent value is minimal.

19. Rejection would be a respectable position as several states have done so. *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991); State v. Oakes, 598 A.2d 119 (Vt. 1991); State v. Marsala, 579 A.2d 58 (Conn. 1990); State v. Carter, 370 S.E.2d 553 (N.C. 1988); State v. Novembrino, 519 A.2d 820 (N.J. 1987); Stringer v. State, 491 So.2d 837 (Miss. 1986); People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985).

Although many state courts have adopted the good faith exception, their constitutions do not contain analogous provisions to Alaska's specific guarantee of the right to privacy. *See* Roger S. Hanson, *The Aftermath of* Illinois v. Gates *and* United States v. Leon*: A Comprehensive Evaluation of Their Impact Upon the Litigation of Search Warrant Validity*, 15 W. ST. U. L. REV. 393, 516-522 (1988).

rule disappear "with a mere wave of the hand."[20] In its strongest argument, the Court reasoned that exclusion could not be used to redress the privacy violation because indiscriminate use of the rule would undermine the criminal justice system by setting guilty defendants free.[21] In the Court's view, this benefit to the search victim far outweighs the harm resulting from the privacy violation, and thus must be limited to situations where exclusion can have a deterrent effect.[22] This reasoning, however, is persuasive only in a society or jurisdiction that places little value on individual privacy rights, for only in such a society can the demands of judicial expediency justify privacy violations. As the Supreme Court itself has stated, "'[t]he efforts of the courts . . . to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice'" of individual rights.[23]

The *Leon* holding turned on the proposition that the exclusionary rule serves solely to deter future police misconduct.[24] In reaching this conclusion, the Court relied primarily on *United States v. Calandra*[25] for the assertion that the "wrong condemned" by the Fourth Amendment is the "unjustified governmental invasion" into the "privacy of one's person, house, papers or effects."[26] In the words of the *Calandra* Court, "[t]hat wrong . . . is fully accomplished by the original search without probable cause."[27] Therefore, the use of such tainted evidence at trial, the *Leon* Court reasoned, does

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20. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

21. *Id.* at 908.

22. *Id.*

23. Weeks v. United States, 232 U.S. 383, 393-94 (1914), *quoted in Leon*, 468 U.S. at 936 (Brennan, J., dissenting).

24. *Id.* at 906.

25. 414 U.S. 338 (1974).

26. *Id.* at 354; *see also Leon*, 468 U.S. at 906. The issue in *Calandra* was whether to apply the exclusionary rule to grand jury hearings, a question that the Court had previously answered in the affirmative in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The *Calandra* Court, however, distinguished *Silverthorne* on the ground that the *Silverthorne* holding was actually directed toward preventing the use of the tainted evidence at trial. The Court observed that "[i]t did not appear [in *Silverthorne*] that the grand jury needed the documents to perform its investigative or accusatorial functions. . . . [T]he primary consequence of the [*Silverthorne*] Court's decision was to exclude the evidence from the subsequent criminal trial." *Calandra*, 414 U.S. at 352 n.8. The Court concluded, therefore, that *Silverthorne* did not control. *Id.* at 353 n.8.

27. *Calandra*, 414 U.S at 354.

not implicate the Fourth Amendment.[28] The *Leon* Court concluded that the exclusionary rule is not a personal constitutional right, but a judicially created remedy designed to deter future police misconduct.[29] This interpretation is supported by the fact that the Fourth Amendment contains no express provision mandating the exclusion of evidence that violates its commands.[30]

While the Court's argument may seem plausible, it is not an "honest assessment of the merits of the exclusionary rule."[31] Because "seizures are executed principally to secure evidence" for criminal trials, "the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence."[32] As Justice Brennan argued in his *Leon* dissent, the "artificial line" drawn by the Court "rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme," for the "right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures."[33]

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28. *Leon*, 468 U.S. at 906.

29. *Id.*

30. *Leon*, 468 U.S. at 932 (Justice Brennan beginning his dissenting opinion by acknowledging the strengths of the majority's position) (Brennan, J., dissenting). *But see* Kamisar, *supra* note 14, at 581 (noting that although there is no express provision in the Fourth Amendment mandating the exclusion of improperly seized evidence, much of our constitutional doctrine has been the product of judicial implication).

31. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

32. *Id.* at 933 (Brennan, J., dissenting).

33. *Id.* at 935 (Brennan, J., dissenting). The *Calandra* Court cited Elkins v. United States, 364 U.S. 206, 217 (1960), as authority for its conclusion that the exclusionary rule's sole function is deterrence. *Calandra*, 414 U.S. at 347-48. On the contrary, dissenting in *Leon*, Justice Brennan argued that in Mapp v. Ohio, 367 U.S. 643 (1961), decided one year after *Elkins*, "such a narrow conception of the rule" had "forever [been] put to rest." *Leon*, 468 U.S. at 931 (Brennan, J., dissenting). *Mapp*, in fact, was unclear as to the purpose of the exclusionary rule. Writing for the *Mapp* plurality, Justice Clark at one point stated that the rule is "a clear, specific, and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a form of words." *Mapp*, 367 U.S. at 648.

Despite this language, many commentators suggest that deterrence was not the driving force behind Justice Clark's opinion. Professor Kamisar suggests that Justice Clark, in seeking to overrule Wolf v. Colorado, 338 U.S. 25 (1949) (which refused to impose the exclusionary rule on the states), felt compelled to advance

The *Leon* Court's reliance on *Calandra* is also questionable, for the *Calandra* Court's analysis that deterrence is the sole function of the exclusionary rule was incomplete. The *Calandra* Court began its discussion with the premise that the "purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim."[34] As authority for this proposition, the Court cited the following observation made, in passing, by the Court in *Linkletter v. Walker*:[35] "'[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.'"[36]

The *Calandra* Court, however, misconstrued *Linkletter*; the words "redress" and "restore" are not synonymous. "Restore" refers to making something whole again, while "redress" is defined as making amends or giving "satisfaction for an injury."[37] Thus, while *Linkletter* properly recognized that the exclusionary rule cannot cure the privacy violation,[38] the *Calandra* Court improperly held that the exclusionary rule could not *redress* the wrong suffered by the search victim.[39] *Calandra's* conclusion that the rule plays

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"as many reasons for the exclusionary rule as he could find, whether constitutional or pragmatic." Kamisar, *supra* note 14, at 622-23. See also Stephen K. Schlesinger & Bradford Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225, 235-36 (1980), for the following explanation of *Wolf*:

> The only reason Justice Clark engaged in that factual discussion was that he read *Wolf* to be "bottomed on factual considerations," as opposed to constitutional analysis . . . and out of respect for the precedent he was overturning, he felt obliged to meet and defeat it on its own grounds first, before moving to the basis of his own position.

Indeed, the fact that the *Mapp* Court imposed the exclusionary rule on the states via the Fourteenth Amendment suggests that the rule has some constitutional lineage. One thing, however, is certain: the deterrence rationale has arrived only of late. It appeared for the first time in *Wolf* — 35 years after the United States Supreme Court had declared the exclusionary rule to be mandated by the Fourteenth Amendment in Weeks v. United States, 232 U.S. 383 (1914). Kamisar, *supra* note 14, at 598.

34. *Calandra*, 414 U.S. at 347.

35. 381 U.S. 618 (1965).

36. *Calandra*, 414 U.S. at 347 (quoting *Linkletter*, 381 U.S. at 637).

37. BLACK'S LAW DICTIONARY 1279 (6th ed. 1990).

38. *See* Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting). The *Leon* Court cited *Stone* for the proposition that the rule was "neither intended nor able to 'cure'" the privacy violation. *Leon*, 468 U.S. at 906.

39. Some courts and commentators have suggested that the exclusionary rule is not well suited to compensate the search victim, recognizing that many privacy violations go unanswered where prosecution is not pursued. Terry v. Ohio, 392

only a deterrent function, therefore, is inaccurate, for the possibility that the rule could compensate the search victim was never properly addressed.

In *Commonwealth v. Edmunds*,[40] the Pennsylvania Supreme Court noted the *Calandra* holding with disapproval.[41] While tracing the evolution of the exclusionary rule, the *Edmunds* court observed that during the early 1970's, the United States Supreme Court "began moving towards a metamorphosed view, suggesting that the purpose of the exclusionary rule 'is not to redress the injury to the *privacy* of the search victim (but, rather) to deter future *unlawful police conduct.*'"[42] The Pennsylvania Supreme Court refused to follow the path of the United States Supreme Court on the ground that *Calandra* was inconsistent with the strong right to privacy inherent in the Pennsylvania Constitution.[43]

Indeed, only by minimizing the value of the individual privacy right does the *Leon* cost-benefit analysis weigh in favor of a good faith exception. For it is only in this "curious world" where the liberty and privacy "benefits" of the exclusionary rule "are made to disappear with a mere wave of the hand" that exclusion, in the absence of any deterrent function, brings a windfall to a search victim.[44] The *Leon* Court rejected the possibility that the rule could play a compensatory role when it observed that "the magnitude of the benefit conferred on such guilty defendants [by the suppression of illegally obtained evidence] offends basic concepts of the criminal justice system."[45] The majority agreed to tolerate such

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U.S. 1, 14 (1968) (stating that the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal"); *see also* LAFAVE, *supra* note 15, § 1.2(a). But this criticism "does not suggest that the rule is not a necessary remedy, only that it is not a sufficient one." Stewart, *supra* note 7, at 1396. Non-actionable invasions of privacy by the state occur continuously in a modern society; it is only when the state seeks to strip an individual of her personal liberty by way of such an invasion that a constitutional remedy is necessary.

40. 586 A.2d 887 (Pa. 1991).

41. *Id.* at 897-98. *See infra* notes 87-95 and accompanying text.

42. *Id.* at 898 (alteration and emphasis added by the *Edmunds* court) (quoting *Calandra*, 414 U.S. at 347).

43. *Id.* at 899, 905-06.

44. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

45. *Id.* at 908 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)). The *Leon* Court was referencing the following quote by Justice Powell in the *Stone* decision: "The disparity in particular cases between the error committed by the police officer

a windfall only when exclusion, as determined on a case-by-case basis, could also deter future police misconduct. Under *Leon,* therefore, no personal constitutional remedy exists for the victim of an illegal search.[46]

The Alaska Constitution must not sanction such a result, particularly since no workable alternative to the exclusionary rule exists.[47] The express right to privacy guaranteed by the Alaska Constitution[48] has been recognized as fundamental to Alaskan life, affording Alaskans "a measure of control over their own [lives] which is . . . virtually unattainable" in other states.[49] In a jurisdiction that places a premium on individual privacy, such as Alaska, exclusion can serve a compensatory function without rendering a windfall on the search victim. Therefore, even where the deterrent value of exclusion is minimal, as in the case of good faith reliance on a facially valid but defective warrant, the importance of vindicating the aggrieved party's privacy rights can justify the costs of exclusion.

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and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." *Stone,* 428 U.S. at 490. *But cf.* Baker v. City of Fairbanks, 471 P.2d 386, 394 (Alaska 1970) ("The American constitutional theory is that constitutions are a restraining force against the abuse of governmental power, not that individual rights are a matter of governmental sufferance.").

46. *Leon,* 468 U.S. at 906. The *Leon* Court opined that the exclusionary rule "thus operates as a 'judicially created remedy' designed to safeguard Fourth Amendment rights *generally* through its deterrent effect, *rather than a personal constitutional right of the party aggrieved.*" *Id.* (emphasis added) (quoting *Calandra,* 414 U.S. at 348).

47. Stewart, *supra* note 7, at 1398-1400 (discussing the inadequacies of various proposals to modify the exclusionary rule, including a good faith exception); *see also* Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 935-36 (1986) (observing that *Leon* creates the oddity of an admitted constitutional violation that has no remedy at law); David Clark Esseks, *Errors in Good Faith: The* Leon *Exception Six Years Later,* 89 MICH. L. REV. 625, 631 n.46 (1990).

48. *See* ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed.").

49. Ravin v. State, 537 P.2d 494, 503-04 (Alaska 1975); *see also* State v. Glass, 583 P.2d 872, 878-79 (Alaska 1978), *modified on other grounds by* City & Borough of Juneau v. Quinto, 684 P.2d 127, 129 n.8 (Alaska 1984) (holding that Alaska's privacy amendment affords broader protection than the penumbra of privacy rights granted under the United States Constitution).

III. A THEORETICAL BASIS FOR THE COMPENSATORY FUNCTION OF EXCLUSION

A. Privacy Protection in Alaska

The *Leon* Court's conclusion that exclusion is a constitutionally required *remedy* does not necessarily mean that the search victim has no related rights; a remedy "is a right . . . in the sense that every remedy vests a right in those who may claim it."[50] The question therefore becomes: "Who may claim the remedy?" Under *Leon*, the victim of an illegal search may claim the remedy for the sake of society, that is, to serve the general purpose of deterrence, but not for the victim's own sake. In Alaska, however, where the state constitution expressly recognizes individual privacy rights, exclusion should be treated as a constitutionally required remedy claimable by all victims of searches at the moment the fruits of an unlawful privacy invasion are sought to be used at trial. Such a conclusion is implicit in the Alaska Constitution and Alaska common law — both of which would be frustrated by the adoption of a good faith exception.

The Alaska Supreme Court has recognized that it is "not bound by the United States Supreme Court's interpretations of the Fourth Amendment in expounding the corresponding section of the Alaska Constitution's Declaration of Rights, [A]rticle I, [S]ection 14."[51] Indeed, the Alaska Supreme Court is "under a duty . . . to develop additional constitutional rights and privileges under [the] Alaska Constitution if [it] find[s] such fundamental rights and privileges to be within the intention and spirit of [the] local constitutional language."[52]

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50. Stewart, *supra* note 7, at 1384.

51. McCoy v. State, 491 P.2d 127, 139 (Alaska 1971); *see also* Roberts v. State, 458 P.2d 340, 342 (Alaska 1969) ("To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities."). Article I, Section 14 of Alaska's Declaration of Rights reads: "The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause . . . ." ALASKA CONST. art I, § 14. But for the phrase "and other property," Article I, Section 14 is identical to the Fourth Amendment to the United States Constitution. *See* U.S. CONST. amend. IV.

52. Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970); *see also Roberts*, 458 P.2d at 342.

Article I, Section 22 of the Alaska Constitution, which expressly guarantees the right to privacy, has been interpreted as providing a greater right to privacy than that afforded by the penumbra of privacy rights under the federal constitution.[53] The fundamental importance of the right to privacy to the Alaska citizenry must not be underestimated. In *Ravin v. State*,[54] the Alaska Supreme Court explained:

> The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.[55]

As a result of this "more extensive right of privacy," Alaska's guarantee against unreasonable searches and seizures "is broader in scope than Fourth Amendment guarantees under the United States Constitution."[56]

B. Alaska's Departures from Federal Law

The privacy amendment has provided the basis for Alaska's rejection of many of the United States Supreme Court's search-and-seizure decisions. For example, in *State v. Jones*,[57] the Alaska Supreme Court rejected the *Illinois v. Gates*[58] "totality of the circumstances" test for determining the existence of probable cause.[59] In *Gates*, the United States Supreme Court replaced the *Aguilar-Spinelli* two-pronged test for probable cause[60] with the

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53. *Glass*, 583 P.2d at 878-79. *See supra* note 49 and accompanying text.

54. 537 P.2d 494 (Alaska 1975).

55. *Id.* at 503-04. *See supra* note 49 and accompanying text.

56. State v. Jones, 706 P.2d 317, 324 (Alaska 1985). *But see* Weltin v. State, 574 P.2d 816, 821 n.15 (Alaska 1978) (holding that under the particular circumstances of that case, where officers conducted a warrantless search for weapons incident to a lawful arrest, the protections of Alaska's privacy amendment "do not add to the privacy protections provided by Article I, Section 14" of the Alaska Constitution).

57. 706 P.2d 317 (Alaska 1985).

58. 462 U.S. 213 (1983).

59. *Jones*, 706 P.2d at 322-24.

60. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). The *Aguilar-Spinelli* test required that an affidavit establish both the informant's basis of knowledge and his veracity. *See Gates*, 462 U.S. at 228-30.

more flexible "totality of the circumstances" standard.[61] The *Gates* Court noted that probable cause determinations are "'factual and practical considerations of everyday life'"[62] that are not suited to the "rigid compartmentalization" of the two-pronged *Aguilar-Spinelli* test.[63] Under the "totality of the circumstances" test, therefore, the "task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances," probable cause exists.[64] Clearly, *Gates* made it easier for police to secure search warrants in close cases. The Alaska Supreme Court, however, refused to follow *Gates*, concluding that "the *Gates* totality of the circumstances approach does not provide the constitutional protection against unreasonable searches and seizures required by Article I, Section 14 and Article I, Section 22 of the Alaska Constitution."[65]

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61. *Gates*, 462 U.S. at 238.

62. *Id.* at 231 (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

63. *Id.* at 231 n.6.

64. *Id.* at 238.

65. State v. Jones, 706 P.2d 317, 324 (Alaska 1985). In reaching this conclusion, the court was persuaded, in part, by Justice Brennan's dissent in *Gates* defending *Aguilar-Spinelli*. *Id.* at 322; *see Gates*, 462 U.S. at 284-85 (Brennan, J., dissenting).

The Alaska Supreme Court refused to follow two other significant search-and-seizure decisions handed down by the United States Supreme Court. In an earlier case, Harrelson v. State, 516 P.2d 390 (Alaska 1973), the Alaska Supreme Court rejected the United States Supreme Court's decision in United States v. Harris, 403 U.S. 573, 579-80 (1971), which had held that a warrant application need not state with specificity the basis of the informant's credibility. In *Harrelson*, the Alaska Supreme Court wrote: "In order to prevent groundless searches based on wholly unreliable information from being inflicted on the citizens of this State, we shall continue to insist that the circumstances that would justify a magistrate in crediting an informant's statements shall be set out with specificity in the affidavit." *Harrelson*, 516 P.2d at 394-95.

In another departure from federal law, in Coleman v. State, 553 P.2d 40 (Alaska 1976), the Alaska Supreme Court limited the rule adopted by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968). *Terry* held that "where a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot," the officer may briefly stop the suspect and, if there is reason to believe the suspect may be armed, "conduct a carefully limited search" to discover such weapons. *Id.* at 30. The Alaska court confined *Terry* to situations where "the police officer has a reasonable suspicion that *imminent public danger* exists or serious harm to persons or property has recently occurred." *Coleman*, 553 P.2d at 46 (emphasis added); *see also* Ozenna v. State, 619 P.2d 477, 479 (Alaska 1980) (recognizing the "imminent public danger" requirement to be a limit on *Terry*). The court reasoned that only in situations of

Alaska's refusal to follow *Gates* signifies a rejection of the "practical" and "common sense" approach to Fourth Amendment jurisprudence utilized by the Supreme Court.[66] In *Leon*, the majority based its decision primarily on an expediency rationale made possible by its characterization of the exclusionary rule as a deterrent safeguard, rather than a constitutional right. Alaska has yet to be "lured by the temptations of expediency"[67] in its analysis of constitutional rights.[68] Thus, Alaska courts must not blindly follow, and indeed must take a critical look at, *Leon*.

Like the United States Supreme Court in *Leon*, Alaska has framed its discussion of the exclusionary rule in cost-benefit terms, suggesting that it too perceives exclusion to be a remedy, not a personal constitutional right.[69] Yet, it is also evident that the privacy amendment has influenced the Alaska Supreme Court's analysis of the exclusionary rule. In its discussions of the rule, the Alaska Supreme Court has intimated that exclusion is *directly* connected to the personal constitutional rights of the search victim — a connection that was expressly rejected by the United States Supreme Court in *Leon*.[70]

"imminent public danger" was a balance struck between a person's privacy interest and society's need for effective law enforcement. *See Coleman*, 553 P.2d at 46-47 (quoting People v. Mickelson, 380 P.2d 658, 660 (Cal. 1963)).

66. *See Harris*, 403 U.S. at 577 (citation omitted).

67. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting).

68. In Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), the Alaska Supreme Court rejected the expediency arguments utilized by the United States Supreme Court to limit the right to a jury trial. *See, e.g.*, District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) (noting that Congress had determined that a sentence of 90 days in jail "is not too great to be summarily administered"). The *Baker* court concluded that, under the Alaska Constitution, the right to a jury applies to *all* criminal proceedings. *Baker*, 471 P.2d at 394-95, 401. As noted by the Alaska Supreme Court in *Baker*: "The argument from expediency contains inherent defects .... To allow expediency to be the basic principle would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency." *Id.* at 394.

69. *See, e.g.*, J.R.N. v. State, 809 P.2d 416, 420-21 (Alaska Ct. App. 1991) (excluding juvenile's confession based on police failure to notify parents of arrest pursuant to Delinquency Rule 7(b)); State v. Sears, 553 P.2d 907 (Alaska 1976) (holding exclusionary rule not applicable to parole revocation hearings).

70. "The [exclusionary] rule ... operates as 'a judicially created remedy' designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Leon*, 468

Due to the ambiguity of the Alaska Supreme Court's language in discussing exclusion, the extent to which the privacy amendment has directed the exclusionary rule analysis remains uncertain. However, it is clear that the Alaska Supreme Court has been hesitant to adopt a straight, deterrence-based cost-benefit rationale to gauge the propriety of exclusion in circumstances involving *constitutional* rights.[71]

Alaska courts have identified at least three justifications for the exclusionary rule: (1) deterrence, (2) judicial integrity and (3) the protection of individual constitutional rights.[72] In *Leon*, the United States Supreme Court suggested that the deterrence and individual

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U.S. at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). Therefore, the *Leon* court sought to protect the constitutional rights of the search victim only *indirectly*, that is, on a societal level through the deterrence of future police misconduct.

71. Violations of *statutes* do not trigger any constitutionally protected privacy interests. Harker v. State, 663 P.2d 932, 934 (Alaska 1983). Accordingly, Alaska has adopted a deterrence-based cost-benefit analysis to determine the propriety of exclusion for violations of statutes. *See J.R.N.*, 809 P.2d at 420-21; *Harker*, 663 P.2d at 935 ("[T]he deterrent effect of excluding evidence [may be] outweighed by the interest in admitting such evidence obtained as a result of a violation of the Posse Comitatus Act at trial . . . ."); State v. Sundberg, 611 P.2d 44, 51-52 (Alaska 1980) (declining to apply the exclusionary rule to the violation of a forcible arrest statute).

72. *See, e.g.*, State v. Malkin, 722 P.2d 943, 947 (Alaska 1986) ("[T]he exclusionary rule reflects a balance between the interests of society in being able to use reliable evidence . . . and . . . in not having its citizens' privacy unreasonably invaded."); Stephan v. State, 711 P.2d 1156, 1163-64 (Alaska 1985) (identifying the "more important objective of the rule . . . [to] protect an individual's personal constitutional rights"). In *Stephan*, the court determined that an unexcused failure to record electronically a custodial interrogation violated due process and mandated exclusion of the suspect's statements. *Stephan*, 711 P.2d at 1159. Nevertheless, the conclusion reached in *Stephan* may fall outside the search-and-seizure realm. Because *Stephan* involved a custodial interrogation and a resulting due process violation, its discussion may be relevant only to the Fifth Amendment exclusionary rule which, unlike its Fourth Amendment counterpart, has clearly been interpreted as a personal right: "The Fifth Amendment prohibition against compelled self-incrimination extends only to unlawfully induced testimony, not to the admission of evidence . . . unlawfully obtained through an unconstitutional search." Stewart, *supra* note 7, at 1381; *see* Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (Black, J., concurring) (noting that the Fourth Amendment differs from the Fifth Amendment in that "the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence").

rights rationales, the two rationales relevant to this note,[73] are complementary. As the *Leon* Court explained: "The exclusionary rule . . . operates as a 'judicially created remedy' designed to safeguard Fourth Amendment rights generally through its deterrent effect."[74] Under this framework, the fact that the Alaska Constitution offers a more extensive right to privacy may have no impact on the exclusionary rule; for if exclusion is, as *Leon* suggests, not directly connected to the privacy right of the search victim, the magnitude of that right is irrelevant.[75]

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73. Only the deterrence and protection of individual constitutional rights rationales are relevant to this discussion. The judicial integrity rationale, which was dismissed by the majority in *Leon,* 468 U.S. at 921 n.22, has, in Alaska, been limited to situations of gross police misconduct. *Harker,* 663 P.2d at 934 n.2 (citations omitted). In Alaska, therefore, the integrity of the judiciary is implicated only when the prosecution seeks to introduce evidence obtained by blatant police misconduct. This is not the situation contemplated by the *Leon* good-faith exception and hence is not relevant here.

74. *Leon,* 468 U.S. at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). *See supra* note 70 and accompanying text.

The Alaska Supreme Court's discussion in Elson v. State, 659 P.2d 1195 (Alaska 1983), can be read to support the *Leon* approach. In *Elson,* the court held that the exclusionary rule does not apply to sentencing hearings. The court found deterrence to be the sole rationale for exclusion but noted that "illegal evidence is suppressed not because it is untrustworthy . . . but rather because it was obtained through an unconstitutional invasion of the defendant's rights." *Id.* at 1203 n.5. However, this ambiguous statement, by itself, is not dispositive of the Alaska Supreme Court's position on this issue. *Cf. Harker,* 663 P.2d at 934 (noting that exclusion under Alaska Rule of Evidence 412 operates to deter future police misconduct and "to breathe life into constitutional guarantees"). *See infra* note 82.

75. It has been suggested that the privacy clause in the Alaska Constitution establishes an independent exclusionary rule. John F. Grossbauer, Note, *Alaska's Right to Privacy Ten Years After* Ravin v. State*: Developing a Jurisprudence of Privacy,* 2 ALASKA L. REV. 159, 179 n.128 (1985). According to this theory, under an exclusionary rule based on Article I, Section 22 of the Alaska Constitution, the dissemination of illegally seized information in court could result in a constitutional violation distinct from the search-and-seizure violation that produced such information. Nonetheless, such a broad reading of Article I, Section 22 was expressly rejected in Wortham v. State, 641 P.2d 223 (Alaska Ct. App. 1982), *aff'd after remand,* 657 P.2d 856 (Alaska Ct. App.), *aff'd,* 666 P.2d 1042 (Alaska 1983). Defendant Wortham contended that the privacy amendment provided "an independent ground for suppression . . . taking the case out from under [Alaska Rule of Evidence] 412." The court rejected this argument, noting:

> [A] review of Alaska Supreme Court decisions reflects no intent to create an independent ground of exclusion. A close reading of the cases

However, the Alaska Supreme Court's analysis in *Harker v. State*[76] suggests that in Alaska, deterrence and the privacy interests of the search victim are distinct, and not merely complementary, rationales. In *Harker*, the court was asked to interpret the scope of Alaska Rule of Evidence 412, which provides for the exclusion of illegally obtained evidence.[77] While the court recognized that the "primary rationale behind the federal exclusionary rule is to deter police from using unconstitutional methods of law enforcement,"[78] it noted that exclusion under Rule 412 is supported by an additional rationale: "'to breathe life into constitutional guarantees.'"[79] This language echoes Justice Brennan's observation in his dissent in *Leon* that exclusion "is a doctrine that gives life to the 'very heart of the Fourth Amendment directive: that . . . a governmental search and seizure should represent both the efforts of the officers to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence *is sufficient to justify invasion of a citizen's private premises*.'"[80]

Writing for the court in *Harker*, Justice Compton briefly examined the rationales underlying Alaska Rule of Evidence 412. He referred to an earlier case, *State v. Sears*,[81] in which Justice Connor had characterized the predecessor to Rule 412[82] as "the

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establishes that suppression is always predicated on [A]rt. I, [S]ection 14, and that [A]rt. I, [S]ection 22 is merely used as a justification for giving [S]ection 14 a liberal interpretation.

Wortham, 641 P.2d at 224 n.2 (citations omitted).

76. 663 P.2d 932 (Alaska 1983).

77. *See supra* note 2. The court observed that Rule 412, as a state rule of evidence, could offer more protection than the exclusionary rule under the federal constitution. *Harker*, 663 P.2d at 934.

78. *Harker*, 663 P.2d at 934.

79. *Id.* (quoting ALASKA R. EVID. 412 cmt.). The commentary to Rule 412 specifically provides that "such evidence must generally be excluded in order to breathe life into constitutional guarantees and to remove incentives for governmental intrusion into protected areas."

80. *Leon*, 468 U.S. at 946 (omission in original) (emphasis added) (quoting United States v. United States District Court, 407 U.S. 297, 316 (1972)) (Brennan, J., dissenting).

81. 553 P.2d 907, 915 (Alaska 1976).

82. The predecessor, Alaska Rule of Criminal Procedure 26(g), stated: "Evidence illegally obtained shall not be used for any purpose including the impeachment of any witness." *Harker*, 663 P.2d 934 n.3.

Alaskan expression of the constitutionally mandated exclusionary rule."[83] In *Sears*, Justice Connor indicated his belief that the earlier version "necessarily operate[d] to remedy a violation of federal Fourth Amendment rights as well as . . . Fifth and Sixth Amendment rights."[84] Given this history, as well as the fact that the rule serves in part to "'breathe life into constitutional guarantees,'"[85] there is reason to conclude that Alaska Rule of Evidence 412 is intimately connected to the privacy interests of the aggrieved party. Although there is little evidence that this broad interpretation of Rule 412 is constitutionally mandated, it is certainly consistent with the expansive privacy rights guaranteed by the Alaska Constitution.

The Alaska Supreme Court has been reluctant, it seems, to follow the course of *Leon* and announce a straight deterrence rationale for the exclusionary rule. The court's language, seasoned with invocations of privacy interests, suggests that the explicit terms of Article I, Section 22 of the Alaska Constitution have had some impact on the court's conception of exclusion. That this conception remains an "unarticulated intuition"[86] is merely endemic to the nature and history of the exclusionary rule.

Other jurisdictions, however, have soundly rejected *Leon* on the basis of individual privacy rights which were merely *implicit* in their state constitutions. In *Commonwealth v. Edmunds*,[87] for example, the Pennsylvania Supreme Court found the "strong right of privacy which inheres in Article I, Section 8" of the Pennsylvania Constitution to be irreconcilable with a good faith exception.[88] The court "flatly reject[ed]" the notion that the exclusionary rule's sole purpose is deterrence.[89] In tracing the evolution of the exclusionary rule, the court recognized that Pennsylvania had departed from the path taken by the United States Supreme Court. The court noted that approximately two decades ago, the United States Supreme Court "began moving to a metamorphosed view" in

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83. *Sears*, 553 P.2d at 915 (footnote omitted) (Connor, J., dissenting).
84. *Id.* (Connor, J., dissenting).
85. *See supra* note 79.
86. *Leon*, 468 U.S. at 943 n.10 (citation omitted) (Brennan, J., dissenting).
87. 586 A.2d 887 (Pa. 1991). *See supra* notes 40-43 and accompanying text.
88. *Id.* at 901.
89. *Id.* at 899.

asserting that the purpose of the exclusionary rule is to "'deter future *unlawful police conduct*,'" rather than to "'redress the injury to the *privacy* of the search victim.'"[90] Meanwhile, Pennsylvania "began to forge its own path . . . declaring with increasing frequency that Article I, Section 8 of the Pennsylvania Constitution embodied a strong notion of privacy, notwithstanding federal cases to the contrary."[91]

In a strong assertion of federalism, the *Edmunds* court proclaimed: "Whether the United States Supreme Court has determined that the exclusionary rule does not advance the [Fourth] Amendment purpose of deterring police conduct is *irrelevant*."[92] All that is significant, the court continued, "is that our [Pennsylvania] Constitution has historically been interpreted to incorporate a strong right of privacy, and an equally strong adherence to the requirements of probable cause under Article I, Section 8."[93] The court concluded that the adoption of a good faith exception "would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years."[94] In Pennsylvania, therefore, the exclusionary rule

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90. *Id.* at 898 (emphasis in original) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)).

91. *Id.*

92. *Id.* at 899 (emphasis added).

93. *Id.*

94. *Id.; see also* State v. Carter, 370 S.E.2d 553 (N.C. 1988); People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985). The *Edmunds* court also found that its adoption of *Gates* created "far less [of a] reason" to follow the strictures of *Leon*, for "the flexible *Gates* standard now eliminates much of the prior concern which existed with respect to an overly rigid application of the exclusionary rule." *Edmunds*, 586 A.2d at 904 (footnote omitted). Rejecting *Gates*, however, does not of itself warrant the adoption of *Leon*. The maintenance of the distinct *Aguilar-Spinelli* prongs requires continual appellate supervision. A good faith exception will inhibit effective appellate review, thereby allowing the two prongs to degenerate into the "totality of the circumstances" test — which the Alaska Supreme Court has already deemed insufficient to protect the privacy rights of Alaskans. State v. Jones, 706 P.2d 317, 324 (Alaska 1985). Therefore, because the Alaska Supreme Court has rejected *Gates*, it must also reject *Leon*. For a discussion of the effects of adopting both *Gates* and *Leon*, see Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 589 (1984) ("To impose a 'reasonable belief' exception on top of this already diluted [*Gates*] standard merely would amount to a double dilution.").

remains a remedy geared to redressing the privacy invasion of the search victim.[95]

Given the court's duty to "develop additional constitutional rights . . . [when it] find[s] such . . . rights . . . to be within the intention and spirit" of the Alaska Constitution,[96] the Alaska Supreme Court must reject *Leon* or re-evaluate the purpose behind the privacy amendment. It would be counterintuitive for a state that expressly guarantees privacy rights to offer less protection to its citizens than a state whose privacy rights are merely implicit in its constitutional tradition.

IV. *STATE V. JONES* OVERRULED — THE PRACTICAL EFFECTS OF ADOPTING *UNITED STATES V. LEON*

Practical considerations also demand that Alaska not follow *Leon.* A society that places such a high premium on individual privacy cannot allow privacy invasions to go unanswered. Yet, if Alaska adopts *Leon*, the foundation supporting Alaska's strict standard for probable cause will deteriorate, resulting in the effective overruling of *State v. Jones*[97] and, consequently, more frequent privacy invasions.

In order to protect privacy interests, the Alaska Supreme Court has sought to limit magistrates' discretionary powers in the warrant process. In *Jones*, the Alaska Supreme Court refused to adopt the *Gates* "totality of the circumstances" test for probable cause on the ground that such a diluted standard was inconsistent with Article I, Section 22 of the Alaska Constitution.[98] Alaska instead retained the more structured *Aguilar-Spinelli* standard, with its distinct two-prong analysis. The court indicated that only a highly structured test like *Aguilar-Spinelli* could provide adequate guidance to magistrates and assure the fewest possible privacy violations.[99] In an earlier case, *Harrelson v. State*,[100] Alaska rejected *United States*

95. *See Edmunds*, 586 A.2d at 898. The court's conclusion also appears to be based on a fear that *Leon* would undermine the probable cause standard. *See id.* at 899.

96. Baker v. City of Fairbanks, 471 P.2d 386, 402 (Alaska 1970).

97. 706 P.2d 317 (Alaska 1985). *See supra* notes 57-65 and accompanying text.

98. *Jones*, 706 P.2d at 324.

99. *See id.* at 322-24.

100. 516 P.2d 390 (Alaska 1973). *See supra* note 65.

v. Harris,[101] a United States Supreme Court case holding that a warrant application need not state with specificity the basis of an informant's credibility. In order to "prevent groundless searches based on wholly unreliable information being inflicted on the citizens of [Alaska]," the Alaska Supreme Court insisted that magistrates continue to "set out with specificity" their reasons for "crediting an informant's statements."[102] By requiring magistrates to justify their decisions, the *Harrelson* court minimized the subjectivity of the warrant-issuing process and ensured that a clear record would exist to allow effective appellate review. Together, *Harrelson* and *Jones* safeguard privacy rights; both would be undermined by an adoption of *Leon*.

The *Leon* holding will frustrate appellate supervision of the warrant process, leaving magistrates' probable cause determinations virtually unchecked. While *Leon* encourages appellate review of search warrants, it focuses reviewing courts on the question of *good faith*, rather than on *probable cause* as required by the Fourth Amendment.[103] The *Leon* holding itself is an example of such misdirection. The contested search in *Leon* was authorized by a warrant that the Ninth Circuit Court of Appeals deemed insufficient under both prongs of the *Aguilar-Spinelli* test.[104] When the case came before the United States Supreme Court, the *Leon* majority recognized that it was "within [its] power to consider the question [of] whether probable cause existed under the 'totality of circumstances' test announced [the previous] Term in *Illinois v. Gates*."[105] The Court chose instead to accept the Ninth Circuit's conclusion as to the absence of probable cause, but reversed the court's holding on the ground that the officers acted in good faith.[106]

Following *Leon*'s lead, appellate courts have begun to uphold "questionably descriptive warrant[s] by immediately invoking the 'good faith' rule of *Leon*," rather than initially deciding on the

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101. 403 U.S. 573 (1971).

102. *Harrelson*, 516 P.2d at 394-95.

103. The Fourth Amendment of the United States Constitution provides: "no warrants shall issue but upon probable cause . . . ." U.S. CONST. amend. IV.

104. *Leon*, 468 U.S. 897, 904 (1984). *See supra* note 60.

105. *Id.* at 905.

106. *Id.* at 926.

probable cause issue.[107] In the interest of judicial efficiency, it is likely that more courts will begin to bypass the probable cause inquiry for the more simplistic good faith analysis.[108] Unchecked, the probable cause standard will ultimately be weakened, for, thereunder, magistrates "need not take much care in reviewing warrant applications . . . [when] their mistakes will . . . have virtually no consequence."[109]

The *Leon* exception has been praised because it encourages the police to seek warrants prior to executing a search.[110] While this assessment may be accurate in an ideal world, in practical terms, the already defective warrant-issuing process may further deteriorate under the strain of an increase in warrant applications. Magistrates usually spend between three to ten minutes assessing probable cause.[111] However, a "'finding of probable cause by an experienced magistrate . . . within two minutes after receiving the affidavit would be neither unreasonable nor unusual.'"[112] Studies have

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107. Hanson, *supra* note 19, at 534 n.578 (citing State v. Watson, 715 S.W.2d 277 (Mo. Ct. App. 1986)); *see id.* at 533-37 (citing more examples of situations where courts bypassed a probable cause determination via *Leon*).

108. The *Leon* majority laid out four scenarios where an officer's reliance on the magistrate's probable cause determination would not be considered objectively reasonable: (1) where the magistrate is "misled by information in the affidavit that the affiant knew . . . or should have known [to be] false;" (2) where the magistrate abandons his neutral role; (3) where the affidavit is completely lacking in "indicia of probable cause;" and (4) where the warrant is so facially deficient that an executing officer could not reasonably believe it was valid. *Leon*, 468 U.S. at 923.

109. Hanson, *supra* note 19, at 956. Also, with the possibility of exclusion all but gone, defendants will have little incentive to make motions to suppress illegally obtained evidence. Magistrates, therefore, will ultimately be shielded from the watchful eyes of appellate courts and aggressive defendants.

110. The empirical verdict on *Leon* has yet to come in. Although the immediate effects of *Leon* have been minimal, "no determination [has been] made of the lasting effects of the ruling." Timothy S. Bynum et al., *Acting in Good Faith: The Effects of* United States v. Leon *on the Police and Courts*, 30 ARIZ. L. REV. 467, 494 (1988).

111. R. Van Duizend et al., *A Review of the Search Warrant Process*, STATE CT. J., Spring 1984, at 4, 23. The level of scrutiny that is given a warrant application is often a function of the time of day the magistrate is approached, with late night applications receiving the least attention. *Id.*

112. Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1182 n.31 (1987) (quoting Clodfelter v. Commonwealth, 235 S.E.2d 340, 341 (Va.), *rev'd on reh'g on other grounds*, 238

indicated that magistrates "tend to ask no questions and to issue warrants in a routine fashion."[113] A summary of a recent study reports:

> Too many warrant applications were filled with "boilerplate" language and were not fitted in detail to the situation at hand. The "oath or affirmation" requirement rarely played a significant role because of the large amount of hearsay or double hearsay on the affidavits. Proceedings before the magistrate generally lasted only two to three minutes and the magistrate rarely asked any questions to penetrate the boilerplate language or the hearsay in the warrant . . . . [T]he police often engaged in "magistrate shopping" for judges who would give only minimal scrutiny to the application.[114]

An increase in warrant applications, therefore, will exacerbate the shortcomings of the warrant-issuing process. While the quantity of warrant applications may rise, the quality of the probable cause determinations underlying those warrants is bound to suffer. Misdirected appellate review, meanwhile, will continue to legitimize searches based on such warrants. The result will be more unanswered privacy violations and a further dilution of the probable cause standard.

In Alaska, specifically, the probable cause standard will be jeopardized more quickly. The maintenance of the distinct *Aguilar-Spinelli* two prong test[115] requires continual appellate supervision. Without sufficient judicial review, the two prongs will ultimately degenerate into the "totality of the circumstances" test — which the Alaska Supreme Court has already deemed inadequate to protect the privacy rights of Alaskans.[116]

Many courts have acknowledged the debilitating effect *Leon* could have on the probable cause standard. In *State v. Novembrino*,[117] for example, the New Jersey Supreme Court refused to follow *Leon* for fear that the good faith exception "would tend to undermine the constitutionally guaranteed standard of probable

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S.E.2d 820 (Va. 1977)).

113. *Id.* at 1182.

114. *Id.* at 1182-83.

115. *See supra* note 60.

116. State v. Jones, 706 P.2d 317, 324 (Alaska 1985). *See supra* notes 57-65 and accompanying text.

117. 519 A.2d 820 (N.J. 1987).

cause."[118] The New York Court of Appeals, meanwhile, has noted that "[t]he Fourth Amendment rules governing police conduct have been muddied, and judicial supervision of the warrant process diluted" by *Gates* and *Leon*, "thus heightening the danger that our citizens' rights against unreasonable police intrusions might be violated."[119]

In addition to inhibiting initial probable cause determinations and future appellate review, the adoption of a good faith exception will dilute the probable cause standard by altering police behavior. Such a rule will encourage police officers to spend less time establishing the necessary probable cause and more time shopping for police-friendly magistrates.[120] The good faith exception also places "a premium on police ignorance of the law."[121] Police would need concern themselves only with obtaining a warrant, not with procuring one that will stand up to appellate review.[122]

If Alaska is to remain true to Article I, Section 22 of the state constitution as well as its holdings in *State v. Jones* and *Harrelson v. State*, it must reject *Leon*.[123] This can be accomplished even without determining that the exclusionary rule redresses the privacy

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118. *Id.* at 857.

119. People v. P.J. Video, Inc., 501 N.E.2d 556, 562 (N.Y. 1986) (commenting on past decisions rejecting *Gates* and *Leon*).

120. State v. Marsala, 579 A.2d 58, 67 (Conn. 1990). The *Leon* majority discounted this argument as "speculative." *Leon*, 468 U.S. at 918.

121. *Leon*, 468 U.S. at 955 (Brennan, J., dissenting).

122. State v. Oakes, 598 A.2d 119, 125 (Vt. 1991) (citation omitted).

123. Should the Alaska Supreme Court seek to adopt *Leon*, it will be hard-pressed to find cases in Alaska supporting a good faith exception. As a generic phrase with many meanings, the language of good faith has appeared in several appellate decisions, particularly situations involving the retroactivity of a new ruling. In Judd v. State, 482 P.2d 273 (Alaska 1971), the court wrote, "[w]e will not be placed in the position of now declaring invalid searches which were performed in good faith reliance upon prior decisions of the United States Supreme Court." *Id.* at 279; *see also* Unger v. State, 640 P.2d 151, 156 n.2 (Alaska Ct. App. 1982) (applying Payton v. New York, 445 U.S. 573 (1980) retroactively only to the defendants in the case, thus the court did not have to reach the good faith issue). But as Kamisar warns, "[a] proponent of the 'good faith' or 'reasonable belief' test" should not use "some of the very difficult but relatively rare situations that arise in the retroactivity/prospectivity cases as 'loss leaders' to attract support for a softening of the exclusionary rule across the board." Kamisar, *supra* note 94, at 607.

violation.[124] In *State v. Marsala*,[125] the Connecticut Supreme Court rejected *Leon* by attacking the *Leon* Court's reasoning, but not its basic premise that deterrence is the sole benefit of exclusion. The court argued that the exclusionary rule does have a deterrent effect even when an officer relies in good faith because the exclusionary rule is not just directed at police misconduct, but also at the "warrant-issuing process."[126] The court also found the costs of exclusion resulting from good faith error to be minimal.[127] If Alaska rejects *Leon* based on these arguments, the practical result will be the same as if it were to adopt the compensatory rationale for exclusion: deficiencies in probable cause would not be shielded by an officer's good faith.

However, unless Alaska attacks the basic premise of *Leon*, the court will be conceding precious constitutional ground. Alaska will be sanctioning a constitutional theory which divorces exclusion from the privacy right — a concept that is inimical to Article I, Section 22 of the Alaska Constitution. Under a deterrence-based exclusionary rule, privacy invasions are not remedied for the sake of the individual, but for the sake of society, leaving the search victim without a personal remedy for the violation of his privacy rights. The suppression of incriminating evidence is confined to the status of a windfall, given as a matter of governmental sufferance. Such treatment minimizes the value of individual privacy rights and contradicts the language of the Alaska Constitution: "The right of the people to privacy is recognized and shall not be infringed."[128]

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124. Several state courts have done so. *E.g.*, State v. Marsala, 579 A.2d 58 (Conn. 1990). A portion of Justice Brennan's dissent in *Leon*, moreover, persuasively challenges the Court's analysis without straying from the Court's "general approach." *Leon*, 468 U.S. at 948 (Brennan, J., dissenting).

125. 579 A.2d 58 (Conn. 1990).

126. *Id.* at 66. *See supra* note 13 and accompanying text.

127. *Id.*

128. ALASKA CONST. art I, § 22; *see also* Baker v. City of Fairbanks, 471 P.2d 386, 394 (Alaska 1970) ("The American constitutional theory is that constitutions are a restraining force against the abuse of governmental power, not that individual rights are a matter of governmental sufferance.").

V. CONCLUSION

In *United States v. Calandra*,[129] the United States Supreme Court resolved the debate over the constitutional basis and function of the federal exclusionary rule. As a "judicially created remedy" designed "to deter future unlawful police conduct" and not "to redress the injury to the privacy of the search victim," the triggering of the federal exclusionary rule became contingent on the outcome of a cost-benefit analysis.[130] That individual privacy rights vanished from the equation did not seem to trouble the United States Supreme Court, but proved unsettling to many of the states. At least one state court has noted that its exclusionary rule is "not suited to such a simplistic resolution of the issue."[131] As Justice Brennan explained in his dissent in *United States v. Leon*, "[the] balancing of deterrent benefits and costs is an 'inquiry [that] can never be performed in an adequate way and the reality is thus that the decision must rest not upon these grounds, but upon prior dispositions or unarticulated intuitions that are never justified.'"[132] Nevertheless, the cost-benefit paradigm has become the accepted means, even in Alaska, for gauging the propriety of exclusion. The Rule and the Right can still be re-united, however, if state courts recognize that exclusion can redress the privacy violation. To some, such as the Pennsylvania Supreme Court,[133] this realization is a matter of intuition; but to Alaska, in light of Article I, Section 22, it is a matter of *Constitution*.

Jeremy S. Simon

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129. 414 U.S. 338 (1973).

130. *Id.* at 347-48.

131. State v. Carter, 370 S.E.2d 553, 561 (N.C. 1988).

132. *Leon*, 468 U.S. at 943 n.10 (quoting James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1281-82 (1983)) (Brennan, J., dissenting).

133. *See supra* notes 87-95 and accompanying text.