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NOTES

***Illinois v. Krull*: Extending the Fourth Amendment Exclusionary Rule's Good Faith Exception to Warrantless Searches Authorized By Statute**

Although the fourth amendment's guarantee that citizens shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government is emphatic and clearly worded,¹ the proper disposition of evidence uncovered during unconstitutional searches has been a well-spring of confusion and dispute.² In *Mapp v. Ohio*³ the United States Supreme Court held that evidence obtained by search and seizure violative of the fourth amendment is inadmissible in both federal and state courts.⁴ A string of more recent cases, however, has significantly qualified this principle, pulling many of the teeth from an otherwise draconian exclusionary rule.⁵

*Illinois v. Krull*⁶ marks the latest exception to this controversial doctrine of exclusion. In *Krull* the Supreme Court found that evidence obtained by law enforcement officers during a warrantless search may be admitted in the search victim's criminal trial if the officers acted in good faith reliance on a statute, later found to violate the fourth amendment, that authorized their activity.⁷ Although it sparked a vigorous dissent by four Justices,⁸ the *Krull* holding ap-

1. U.S. CONST. amend. IV. The text of the fourth amendment reads:

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.

2. 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, 1366 (1983).

3. 367 U.S. 643 (1961).

4. *Id.* at 655.

5. *E.g.*, *United States v. Leon*, 468 U.S. 897, 922 (1984). In *Leon* the Court announced a good faith exception to the exclusionary rule for evidence obtained by police officers acting in reliance on a presumptively valid search warrant but lacking probable cause. *Id.* at 920. The Court considered whether suppressing evidence in such a case would deter officers from conducting such searches in the future. It concluded the officers could not be deterred because, in executing the warrant, they were carrying out their duty. *Id.* at 921. This deterrent rationale has been employed to admit evidence in a number of other situations. See *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (evidence admissible when used for impeachment purposes); *Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979) (evidence obtained during arrest for a crime pursuant to a statute later held unconstitutional, is admissible in trial for a different crime based solely on the evidence seized); *Stone v. Powell*, 428 U.S. 465, 494-95 (1976) (evidence may be used to support conviction in habeas corpus proceeding); *United States v. Janis*, 428 U.S. 433, 454 (1976) (evidence admissible in civil trials); *United States v. Calandra*, 414 U.S. 338, 354-55 (1974) (evidence admissible in grand jury investigations); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969) (evidence admissible against defendants whose rights were not violated by the initial search and seizure).

6. 107 S. Ct. 1160 (1987).

7. *Id.* at 1167.

8. *Id.* at 1173 (O'Connor, J., dissenting). Justice O'Connor authored the dissent and was joined by Justices Brennan, Marshall, and Stevens. Justice O'Connor had joined Justice White's majority opinion in *Leon*, which created the good faith exception for warrant searches.

pears consistent with the Court's position, articulated clearly in *United States v. Calandra*,⁹ that the Constitution does not command the exclusion of evidence in all cases in which fourth amendment rights are violated.¹⁰ Instead, the Constitution calls for suppression as a remedy to be applied only when it deters police from conducting future unconstitutional searches.¹¹

This Note analyzes the reasoning of the majority and dissenting opinions in *Krull*, as well as *Krull's* relationship to prior cases and the competing constitutional theories behind the exclusionary rule. The Note concludes that the majority opinion is consistent with the "deterrent-remedy" theory of the exclusionary rule; it faults the dissent, however, for applying that same theory to support suppression without raising the possibility that the Constitution might require the evidence in *Krull* to be excluded regardless of any deterrent effect.

On the morning of July 5, 1981, Detective Leilan K. McNally of the Chicago Police Department visited a local automobile wrecking yard licensed to Albert Krull.¹² McNally's visit was authorized by a section of the Illinois Vehicle Code¹³ permitting police officers wide latitude to inspect, without a warrant, the records and premises of automobile parts dealers.¹⁴ After inquiring about the records, Detective McNally searched the yard. Using his mobile computer

9. 414 U.S. 338 (1974).

10. *Id.* at 348.

11. *Id.* at 347-48.

12. *Krull*, 107 S. Ct. at 1163-64.

13. ILL. REV. STAT. ch. 95 1/2, para. 5-401(e) (1981) (repealed 1983). Paragraph 5-401(e) was eventually repealed and replaced with ILL. REV. STAT. ch. 95 1/2, para. 5-403 (1985).

14. *Krull*, 107 S. Ct. at 1164. The Illinois Vehicle Code required automobile parts dealers to obtain licenses from the State, ILL. REV. STAT. ch. 95 1/2, paras. 5-101, -102, -301 (1985), and to keep records of all vehicles and parts bought and sold, *id.* para. 5-401.2. In 1981 the statute authorized police to inspect these records "at any reasonable time during the night or day" and to examine "the premises of the licensee's established place of business for the purpose of determining the accuracy of the records." *Id.* para. 5-401(e) (1981) (repealed 1983).

Certain types of administrative searches fall within an exception to the general rule that before the state may search the private property of another, it must first have probable cause, based on specific knowledge, to believe evidence of a crime will be found. The Supreme Court acknowledged this distinction in the context of housing code inspections. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967). In *Camara* the Court established that housing inspections based on less than the traditional showing of probable cause were constitutional. For such inspections to be valid, however, the public interest in conducting the search, considered together with the limited nature of the state's invasion, must not offend reasonable expectations of personal privacy and dignity. *Id.* at 534-39. Although the probable cause standard is diluted for such regulatory searches, a warrant must be issued nonetheless. *Id.* at 538-39. Searches of some businesses are exceptions not only to the general rule requiring the State to show strict probable cause, but to the requirement of a warrant as well. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (alcoholic beverage industry as exception). Such industries are pervasively regulated by the government, *id.* at 77, and the statutory programs authorizing the warrantless inspections must establish such a degree of certainty and regularity of application that the statutes provide "a constitutionally adequate substitute for a warrant." *Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (upholding warrantless regulatory search scheme for underground and surface mines). In *Krull* the Court accepted an Illinois Supreme Court determination that para. 5-401(e) of the Illinois Vehicle Code, as it stood in 1981, was unconstitutional. *Krull*, 107 S. Ct. at 1171 n.13. Shortly after its decision, however, the Court affirmed that automobile junkyards could properly be regulated by warrantless administrative searches, so long as the statutes authorizing the searches meet the *Donovan* test. *New York v. Burger*, 107 S. Ct. 2636, 2643-44 (1987).

For an overview of the law governing inspections and regulatory searches of housing and businesses, see 3 W. LAFAVE, SEARCH AND SEIZURE §§ 10.1 to -2 (1987 & Supp. 1988). For a discussion of the concept of probable cause, see 1 W. LAFAVE, SEARCH AND SEIZURE §§ 3.1 to -7.

to trace the serial numbers of several vehicles on the lot, he determined that three cars were stolen. Krull and two others were charged with violating the state vehicular code.¹⁵

At an evidentiary hearing, the Cook County Circuit Court suppressed the evidence seized in the wrecking yard on the ground that the statute authorizing McNally's search was unconstitutional.¹⁶ The Illinois Supreme Court ultimately affirmed the trial court's judgment.¹⁷ It held the statute violated the fourth amendment¹⁸ and asserted that United States Supreme Court precedents mandated suppression of all evidence seized pursuant to any procedural statute purporting to authorize unconstitutional searches.¹⁹

The United States Supreme Court granted certiorari to determine whether a good faith exception to the fourth amendment exclusionary rule applies when an officer's reliance on a presumptively constitutional statute authorizing a warrantless search is objectively reasonable, but the statute is later declared unconstitutional.²⁰ The Court held that evidence such as McNally's, seized in an unconstitutional search authorized by statute, is admissible at trial.²¹ The Court's reasoning followed a predictable path, one well-travelled by the fourth amendment cases handed down in the wake of *Calandra*.

First, the Court in *Krull* acknowledged the basic exclusionary rule: evidence obtained in violation of the fourth amendment generally is inadmissible in the criminal prosecution of the search victim.²² Next, the Court reaffirmed those concepts critical to any limitation of the exclusionary rule: that the rule's

15. *Krull*, 107 S. Ct. at 1164.

16. *People v. Krull*, 107 Ill. 2d 107, 111, 481 N.E.2d 703, 705 (1985), *rev'd sub nom.* *Illinois v. Krull*, 107 S. Ct. 1160 (1987). The trial court found that McNally's search had been conducted without warrant, probable cause, or consent. *Id.* It further held that para. 5-401(e), on which McNally had relied for authority to conduct the administrative search, was unconstitutional. *Id.* In so doing, the court accepted a federal district court decision handed down the day after Detective McNally conducted his search. *Bionic Auto Parts & Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981), *vacated as moot*, 721 F.2d 1072 (7th Cir. 1983) (by time of appeal, para. 5-401(e) had been repealed and redrafted in constitutional form). In *Bionic* a federal judge declared the same statutory provision to be an unconstitutional substitute for a search warrant because it permitted officers in the field "unbridled discretion . . . as to when to search and whom to search." *Id.* at 585 (quoting *Marshall v. Barlow's, Inc.*, 431 U.S. 307, 323 (1978)). The flaw lay in statutory language giving officers the permission to search at "any reasonable time during the night or day." ILL. REV. STAT. ch. 95 1/2, para. 5-401(e) (1981) (repealed 1983). The district court found such wording overly broad and similar to an OSHA regulation struck down by the United States Supreme Court in *Marshall v. Barlow's, Inc.*, 431 U.S. 307 (1978). *Bionic*, 518 F. Supp. at 585.

17. *Krull*, 107 Ill. 2d at 120, 481 N.E.2d at 709. The case followed a rather convoluted path through the lower courts. The trial court initially held para. 5-401(e) unconstitutional and ordered the evidence suppressed. *Id.* at 111, 481 N.E.2d at 705. The Illinois Appellate Court vacated the decision by unpublished order and remanded it for further consideration. *People v. Krull*, 119 Ill. App. 3d 1163, 471 N.E.2d 250 (1983). The trial court again held the statute unconstitutional, thus permitting the State direct appeal to the Illinois Supreme Court. *Krull*, 107 Ill. 2d at 110-11, 481 N.E.2d at 705.

18. *Krull*, 107 Ill. 2d at 116, 481 N.E.2d at 707. The Illinois Supreme Court agreed with the federal district judge's conclusion that the statute, as it existed in 1981, "vested State officials with too much discretion to decide who, when, and how long to search." *Id.*

19. *Id.* at 118-19, 481 N.E.2d at 708. For a discussion of this argument, see *infra* text accompanying notes 93-103.

20. *Krull*, 107 S. Ct. at 1165.

21. *Id.* at 1167.

22. *Id.* at 1165.

prime purpose is to deter future violations of the fourth amendment by police officers; that violation of a defendant's fourth amendment rights is complete at the time of search; and that the rule is a judicially created remedy designed to deter future violations.²³ The *Krull* Court emphasized that a search victim has no personal constitutional right to exclusion.²⁴

After discussing these fundamental concepts, the Court held that its recent decision in *United States v. Leon*²⁵ controlled the *Krull* facts.²⁶ In *Leon* the Court declared the exclusionary rule does not apply to evidence obtained by a police officer who acts in objectively reasonable reliance on a search warrant, issued by a neutral magistrate, that later is found to be defective and in violation of a defendant's constitutional rights.²⁷ The *Leon* Court reasoned that excluding evidence could have no significant deterrent effect on a magistrate's behavior because the magistrate's interests lie in impartial adjudication, not catching criminals.²⁸ The exclusionary rule was developed to curb only police misconduct. Because the officer who reasonably relies on the probable cause determination of a neutral magistrate is doing his duty, not engaging in misconduct, the Court in *Leon* ruled that exclusion of evidence for the purpose of deterrence in such situations would make little, if any, sense.²⁹

The *Krull* Court found no difficulty analogizing from an officer who acts in reasonable reliance on an unconstitutional warrant to one who acts pursuant to an unconstitutional statute; deterrence in both cases seems pointless. When the error is the legislature's, the Court reasoned, punishing the officer for enforcing the law serves no rational purpose.³⁰

Because the officer's conduct in *Krull*, like that in *Leon*, did not merit the exclusion of evidence, the Supreme Court sought to find some significant difference between legislators and judges that might justify employing the rule in *Krull*. The Court admitted that the two groups play different roles in the criminal justice system but found the differences irrelevant.³¹ Legislators are like judges, the Court reasoned; neither is "inclined to ignore or subvert the Fourth Amendment."³² Although legislators are not "neutral judicial officers," neither are they "adjuncts to the law enforcement team."³³ In their effort to enact laws that establish and perpetuate the criminal justice system, legislators are sworn to support the Constitution and are presumed to act in accordance

23. *Id.* at 1165-66.

24. *Id.* The conclusion that the exclusionary rule is *not* a victim's personal constitutional right has been established only recently. It was first definitely stated by the Court in *Calandra*, 414 U.S. at 348. It has remained a favorite topic for debate. See *infra* notes 63-89 and accompanying text.

25. 468 U.S. 897 (1984).

26. *Krull*, 107 S. Ct. at 1166-67. Some commentators have severely criticized the reasoning underlying *Leon*. See *infra* note 92. Given the similarities between *Leon* and *Krull*, much of that criticism applies with equal force to *Krull*.

27. *Leon*, 468 U.S. at 922.

28. *Id.* at 916-17.

29. *Id.* at 920-21.

30. *Krull*, 107 S. Ct. at 1167.

31. *Id.*

32. *Id.* (quoting *Leon*, 468 U.S. at 916).

33. *Id.* (quoting *Leon*, 468 U.S. at 917).

with it. As evidence, the Court pointed out that most statutes allowing warrantless searches as part of a regulatory scheme are constitutional.³⁴ Furthermore, even if the role of legislators could be considered significantly different from that of magistrates, the Court maintained that the power of courts to review statutes and declare them unconstitutional already provides the most effective means of deterring improper legislative action.³⁵ In the Court's view, any additional disincentive that might be created by excluding evidence would be greatly outweighed by the substantial social costs—namely, the prospect that some clearly guilty defendants could go free or receive reduced sentences.³⁶

The *Krull* Court rejected the idea that because a statute, unlike a warrant, affects an entire industry and not just a single individual, it merits a different application of the exclusionary rule.³⁷ Instead, the Court reasoned, the relevant issue in considering the need for exclusion is the likely deterrence of police officers, not the number of people exposed to the searches.³⁸ The Court also concluded that making an officer's good faith the determinative factor in suppressing evidence would not result in defendants asserting fewer fourth amendment claims. Rather, the benefits of a successful motion on those grounds would always remain quite attractive to criminal defendants.³⁹ Having determined that Detective McNally acted in objectively reasonable reliance on the Illinois statute, the Court reversed and remanded the case for a proceeding at which the evidence would be admitted.⁴⁰

34. *Id.* at 1168. The Court listed several examples of constitutional statutes authorizing administrative searches that have been upheld in recent decisions. *Donovan v. Dewey*, 452 U.S. 594 (1981) (Federal Mine Safety & Health Act of 1977 as applied to stone quarries); *United States v. Biswell*, 406 U.S. 311 (1972) (Gun Control Act of 1968 as applied to firearms dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (26 U.S.C. §§ 5146(b), 7606 (1964) as applied to alcoholic beverage industry); *United States v. Jamieson-McKames Pharmaceuticals, Inc.*, 651 F.2d 532 (8th Cir. 1981) (Federal Food, Drug, & Cosmetic Act as applied to drug manufacturers), *cert. denied*, 455 U.S. 1016 (1982). For a post-*Krull* United States Supreme Court opinion holding automobile wrecking yards to be proper targets for warrantless administrative searches, see *New York v. Burger*, 107 S. Ct. 2636 (1987).

35. *Krull*, 107 S. Ct. at 1168.

36. *Id.* at 1168-69 & n.9.

37. *Id.* at 1169.

38. *Id.*

39. *Id.* The Court added that subjects of warrantless searches authorized by statute were free to challenge the officer's "reasonable reliance" at trial, and potential subjects of searches would always have standing to challenge the constitutionality of such statutes through injunctive suits. *Id.* at 1169-70.

40. *Id.* at 1171-73. The Supreme Court held that Detective McNally's reliance on the statute was justified because the Court had upheld warrantless administrative searches for other heavily regulated industries and Illinois properly regarded the inspection of junkyards as within the public interest. *Id.* at 1171; see generally *New York v. Burger*, 107 S. Ct. 2636 (1987) (wrecking yards proper subjects for regulation and warrantless administrative searches). The defect in para. 5-401(e) was "not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable." *Krull*, 107 S. Ct. at 1172.

Krull has already been followed in several jurisdictions. *E.g.*, *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (en banc) (plenary searches by guards at checkpoint 14 miles from Mexican border held unconstitutional, but evidence not suppressed because guards relied in good faith on judicial and statutory authority), *cert. denied, sub nom. Ryan v. United States*, 108 S. Ct. 711 (1988); *United States v. One Parcel of Land*, 671 F. Supp. 544 (N.D. Ill. 1987) (good faith exception to exclusionary rule permits admission of goods purchased with drug money in civil forfeiture proceeding when goods seized pursuant to judicially issued warrant lacking probable cause but authorized by statute); *Commonwealth, Dep't of Envtl. Resources v. Blosenski Disposal Serv.*, 532 A.2d 497

A four-member dissent, led by Justice O'Connor, strongly disputed the majority's decision. Although agreeing that the *Leon* decision had been supported by the "historic purpose of the exclusionary rule," the neutral role of the judiciary, and the finding that magistrates could not be significantly deterred from violating the fourth amendment, the dissent nevertheless concluded that application of *Leon's* deterrent-remedy reasoning to the *Krull* facts demanded suppression of the evidence seized by Detective McNally.⁴¹

Justice O'Connor claimed that the history and deterrent purpose of the fourth amendment supported the exclusion of evidence obtained under authority of an unconstitutional statute.⁴² She argued, first, that statutes allowing unreasonable searches had inspired the drafting of the amendment.⁴³ She then pointed out that the Supreme Court had taken pains in prior cases to establish clearly that evidence seized unconstitutionally pursuant to similar statutes enacted in modern times should be barred from the courtroom.⁴⁴ This historical background, she argued, strongly supports the conclusion that legislators, unlike magistrates, can constitute a significant threat to fourth amendment rights.⁴⁵ To allow evidence seized pursuant to statutes authorizing unconstitutional searches to be admitted at trial, the dissent reasoned, would provide legislators with a positive incentive to enact unconstitutional search statutes. That incentive would take the form of the "grace period" created between a statute's enactment and a court's ruling as to its unconstitutionality, during which the state could freely conduct searches that violate the fourth amendment rights of the public.⁴⁶ Exclusion of evidence obtained during this period would be merited, therefore, because it would effectively deter legislators from passing unconstitutional search laws.⁴⁷ After concluding this elaborate argument, Justice O'Connor added that even if the deterrence analysis she had proposed did not control, she still would be "unwilling to abandon both history and precedent weighing in

(Pa. Commw. Ct. 1987) (search of defendant's transfer station by employee of regulatory agency acting in reliance on statute upheld without clear determination of statute's constitutionality).

Krull has drawn some judicial criticism, however, for depriving defendants of a remedy when their fourth amendment rights have been unquestionably violated by a search. *Jackson*, 825 F.2d at 872 (Rubin, J., concurring); *id.* at 878 (Hill, J., concurring).

41. *Krull*, 107 S. Ct. at 1173 (O'Connor, J., dissenting).

42. *Id.* at 1174-75 (O'Connor, J., dissenting).

43. *Id.* at 1174 (O'Connor, J., dissenting). Justice O'Connor pointed out that the Court in prior cases had noted that "reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance . . . was the moving force behind the Fourth Amendment." *Id.* (citing 7 & 8 Will. 3, ch. 22, § 6 (1696)). The dissent also relied on James Otis' argument in opposition to the writs, advanced in Massachusetts in 1761, which mentioned that "'[n]o Acts of Parliament can establish such a writ; . . . it would be void [as against Magna Carta].'" *Id.* (quoting 2 WORKS OF JOHN ADAMS 523-25 (C. Adams ed. 1850)). For criticism of the dissent's claim that statutes allowing unreasonable search and seizure inspired the fourth amendment, see *infra* note 106. For background on British search and seizure prior to the American Revolution, see *infra* note 49.

44. *Krull*, 107 S. Ct. at 1174-75 (O'Connor, J., dissenting).

45. *Krull*, 107 S. Ct. at 1175 (O'Connor, J., dissenting). Justice O'Connor found this threat inherent in the political nature of legislators, their explicit goal of facilitating law enforcement when passing laws, and the widespread, sweeping effect their acts have on the public. *Id.*

46. *Id.* at 1173, 1175-76 (O'Connor, J., dissenting).

47. *Id.* at 1175-76 (O'Connor, J., dissenting).

favor of suppression."⁴⁸

As the dissent in *Krull* suggests, the exclusionary rule has not been uniformly applied since its inception, and its origin and purpose have proved unusually difficult to pin down.⁴⁹ The roots of the doctrine may be traced to several cases interpreting the fourth amendment that were decided around the turn of the century.⁵⁰ In *Weeks v. United States*⁵¹ the Supreme Court established the fundamental notion that evidence unconstitutionally seized by federal officers could not be admitted in the federal courts.⁵² The exact scope and significance

48. *Id.* at 1176 (O'Connor, J., dissenting). The dissent further pointed out that there was no clear answer to the question of how much constitutional law the reasonable officer is expected to know in an area as open to litigation as administrative searches. The scope of the good faith exception was therefore uncertain and the rule of the case "both difficult to administer and anomalous." *Id.* Justice O'Connor concluded with the observation that by recognizing a violation of a search victim's rights but failing to offer him a remedy because an officer had acted in good faith, the majority had eliminated any incentive for criminal defendants to pursue fourth amendment claims. The result, she predicted, would be that "a chill will fall upon enforcement and development of Fourth Amendment principles governing legislatively authorized searches." *Id.* at 1176-77 (O'Connor, J., dissenting).

49. See Stewart, *supra* note 2, at 1372. There is little question as to the origin of the fourth amendment itself, however. Scholars attribute its inclusion in the Bill of Rights to the colonists' desire to eliminate from their government the considerable disregard for privacy rights that had characterized the British government from the fourteenth century to the time of the American Revolution. The two chief instruments of unreasonable search during this period were writs of assistance and general warrants. N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 23-27, 31-50, 51-78 (1937). Writs of assistance were granted routinely and gave general search powers to organized trades to enforce regulations and protect their monopolies. General warrants were issued by the government typically to control the printing industry and censor "seditious" publications. *Id.*

These warrants and writs granted tremendous discretion to the individuals bearing them. Often they would fail to specify the persons and places to be searched, and their issuance was based on neither probable cause nor oath. See, e.g., *id.* at 26-27. Authority to issue them was derived from a variety of sources. General warrants were authorized, at one time or another, by the Court of Star Chamber, the Parliament, or the Crown itself. *Id.* at 24, 33, 38. The writs of assistance originally were granted by the Crown and later were authorized by Parliament. *Id.* at 23-24, 28-30, 37.

Although the framers of the Constitution were quite familiar with the history of the general warrant in England, the writs of assistance had the most direct impact on the interests of the American colonies, whose economy depended so heavily on trade. *Id.* at 51; see also J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 19-42 (1966) (additional history of the fourth amendment and commentary on Lasson's conclusions).

50. See *Weeks v. United States*, 232 U.S. 383 (1914); *Adams v. New York*, 192 U.S. 585 (1903); *Boyd v. United States*, 116 U.S. 616 (1886).

In *Boyd* the Supreme Court established the concept of suppression of evidence in the context of a civil trial. The Government, as plaintiff, sought to subpoena incriminating evidence from defendants. The Court found a subpoena under such conditions tantamount to an unconstitutional search and seizure, and it found the use of evidence obtained through a subpoena the equivalent of compelling defendants to incriminate themselves. Thus, it held the fourth and fifth amendments commanded that the evidence be excluded. *Boyd*, 116 U.S. at 633-35.

Adams, which has been described as "a wild turn in the exclusionary rule roller coaster track," Stewart, *supra* note 2, at 1374, addressed the admissibility of evidence seized by officers in a search and objected to by a defendant at trial. The Court found such an issue a question of evidence, not constitutional law. *Adams*, 192 U.S. at 594. Thus, *Adams* appeared to erase the emerging concept of an exclusionary rule. Stewart, *supra* note 2, at 1374.

51. 232 U.S. 383 (1914).

52. *Id.* at 398. *Weeks* presented facts very similar to those in *Adams*. Defendant, convicted of illegal gambling through the prosecution's use of evidence seized during a search, maintained that the search violated his fourth and fifth amendment rights. The Court distinguished *Adams* by pointing out that the defendant in that case had moved for return of the illegally seized evidence at trial, whereas defendant in *Weeks* objected before trial. *Id.* at 396. The Court found that the search

of *Weeks* have been subjects of much discussion,⁵³ but the decision clearly marked the start of a suppression doctrine that had not previously existed at common law.⁵⁴

In three cases handed down within twenty years of *Weeks*,⁵⁵ the Supreme Court widened the scope of the rule to create "a full-blown rule of exclusion at federal trials."⁵⁶ In *Wolf v. Colorado*,⁵⁷ decided in 1949, the Court faced the inevitable question whether the fourth amendment and the exclusionary rule should apply to the states through the fourteenth amendment. The Court held that the fourth amendment applied, but the states were not bound to employ the sanction of excluding evidence.⁵⁸ Thus, states were left to experiment with "other methods" of "detering unreasonable searches."⁵⁹ Faced with mounting evidence that alternative sanctions were failing miserably in the states, the Court in *Mapp v. Ohio*⁶⁰ declared the exclusionary rule to be part of the fourth amendment, constitutionally recognized and applicable to the states through the fourteenth amendment.⁶¹ In the years following *Mapp*, however, the Supreme Court waged a campaign to limit the rule's application in numerous situations.⁶²

Almost from the inception of the exclusionary rule, its constitutional basis inspired heated debate. Because the fourth amendment makes no mention of such a sanction, the justification for mandating one deserves special attention. The Supreme Court Justices and commentators divide into two schools of thought. One school maintains that the exclusionary rule is mandated by the Constitution to preserve the court's integrity and prevent it from becoming party to the violation of a search victim's fourth amendment rights.⁶³ The other school views the rule as a judicially fashioned remedy necessitated by the Consti-

violated the fourth amendment and held that the evidence should be suppressed on the strength of that amendment alone, without consideration of the fifth amendment. *Id.* at 389.

53. See, e.g., Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition?"*, 16 CREIGHTON L. REV. 565, 591-606 (1983); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 285-308 (1974); Stewart, *supra* note 2, at 1374-75.

54. *Olmstead v. United States*, 277 U.S. 438, 462-63 (1928), *overruled on other grounds by Katz v. United States*, 389 U.S. 347 (1967); Stewart, *supra* note 2, at 1372.

55. *Agnello v. United States*, 269 U.S. 20 (1925); *Gouled v. United States*, 255 U.S. 298 (1921); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

56. Stewart, *supra* note 2, at 1374. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920), established the "fruit of the poisonous tree" doctrine, holding that the Government may not take advantage of information obtained in violation of fourth amendment rights. The "poison tree" metaphor was first used to describe the doctrine in *Nardone v. United States*, 308 U.S. 338, 341 (1939). *Gouled v. United States*, 255 U.S. 298, 305 (1921), eliminated the vestigial requirement that objection to the introduction of illegally seized evidence must be made before trial. Finally, in *Agnello v. United States*, 269 U.S. 20, 34 (1925), the Court held that a defendant need not move for the return of contraband seized during an unconstitutional search to avail himself of the benefits of exclusion.

57. 338 U.S. 25 (1949).

58. *Id.* at 27-28.

59. *Id.* at 31.

60. 367 U.S. 643 (1960).

61. *Id.* at 651-55.

62. See cases cited *supra* note 5.

63. This theory arguably contains two elements. The first is that a court is commanded by the imperative of judicial integrity to review the actions of the executive branch and keep out unconstitutionally seized evidence that would taint its proceedings. See *United States v. Calandra*, 414 U.S.

tution but applicable only in situations in which it deters police officers from future violations of the fourth amendment.⁶⁴

The theory that the Constitution commands the exclusion of illegally seized evidence to protect the integrity of the courts finds support in earlier fourth amendment decisions.⁶⁵ Several Justices on the present Court, most notably Justice Brennan, also have advocated this idea.⁶⁶ Such a view has been said to reflect a unitary model of government,⁶⁷ in which an unconstitutional search is only the beginning of an "evidentiary transaction" that becomes complete when a court, as part of this unitary government, permits the evidence to be used to convict the search victim.⁶⁸ Under such reasoning, courts have a responsibility to ensure not just a fair trial, but a fair prosecution.⁶⁹ Commentators have argued persuasively that the *Weeks* case was decided under such a view.⁷⁰ Indeed,

338, 355 (1974) (Brennan, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); *Kamisar*, *supra* note 53, at 590-97.

The second element is that victims of unconstitutional searches and seizures have a personal right to exclusion of evidence. This right can be found when one views a court's admission of evidence at trial as consummating the violation of the defendant's fourth amendment rights begun by police in conducting the search. *See Schrock & Welsh*, *supra* note 53, at 289-307.

Justice Brennan seemed to acknowledge the synthesis of these elements in his dissent in *Leon*, when he stated:

I submit that [the majority's] crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, [the amendment's language] comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures.

Leon, 468 U.S. at 935 (Brennan, J., dissenting).

A distinct variation of the personal rights justification for excluding evidence finds its origin in the fifth amendment's privilege against self-incrimination and may be seen in several early fourth amendment cases. *E.g.*, *Agnello v. United States*, 269 U.S. 20, 33-35 (1925); *Boyd v. United States*, 116 U.S. 616, 638-39 (1886). For a brief description of *Boyd* and *Agnello*, see *supra* notes 50 & 56. No Justice on the Court has seriously argued this concept since *Mapp*, 367 U.S. at 662 (Black, J., concurring).

64. *See United States v. Calandra*, 414 U.S. 338, 347-48 (1974); *Stewart*, *supra* note 2, at 1383-89.

65. *E.g.*, *Olmstead v. United States*, 277 U.S. 438, 462 (1928), *overruled on other grounds* by *Katz v. United States*, 389 U.S. 347 (1967); *Dodge v. United States*, 272 U.S. 530, 532 (1926); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Weeks*, 232 U.S. at 392-93.

Early decisions also reveal several collateral "integrity" issues offered in support of exclusion. *See Mertens & Wasserstrom*, *Foreword—The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 *GEO. L.J.* 365, 377-78 (1981). The dissents in *Olmstead* suggest that a moral concern about the unfairness of convicting a defendant with unlawfully seized evidence may have played a role in the *Weeks* decision. *Olmstead*, 277 U.S. at 469-71 (Holmes, J., dissenting); *id.* at 483 (Brandeis, J., dissenting). The majority opinion in *Silverthorne*, by establishing the "fruit of the poisonous tree" doctrine, reflected a view that the exclusionary rule should be employed to stop the United States Government from profiting by the wrongful acts of its officers. *See Silverthorne*, 251 U.S. at 392.

66. *E.g.*, *Leon*, 468 U.S. at 928 (Brennan, J., dissenting); *Calandra*, 414 U.S. at 355 (Brennan, J., dissenting).

67. *Schrock & Welsh*, *supra* note 53, at 257-60.

68. *Schrock & Welsh*, *supra* note 53, at 295-302; *see also United States v. Leon*, 468 U.S. 897, 933 (1984) (Brennan, J., dissenting) ("[By] admitting unlawfully seized evidence, the judiciary becomes a part of what is in fact a single governmental action prohibited by the terms of the Amendment.").

69. *Schrock & Welsh*, *supra* note 53, at 259.

70. *See Kamisar*, *supra* note 53, at 591-606; *Schrock & Welsh*, *supra* note 53, at 285-308. For a brief description of the Court's holding in *Weeks*, see *supra* notes 51-52 and accompanying text.

the language of the opinion is studded with references to the responsibility of the trial court and its governmental role in the prosecution of a defendant.⁷¹ *Silverthorne Lumber Co. v. United States*,⁷² decided shortly after *Weeks*, reveals the force of this broad view in Justice Holmes' ringing pronouncement: "The essence of a provision forbidding acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."⁷³

Nearly thirty years after *Silverthorne*, the Supreme Court in *Wolf* introduced the other possible rationale behind the rule, casting what would become considerable doubt on the constitutional basis for suppression. In holding that states were not constitutionally required to apply the exclusionary sanction, the Court characterized suppression not as a constitutional command, but as a remedy designed to deter the government from conducting unconstitutional searches.⁷⁴ In divorcing the exclusionary rule from the fourth amendment, the

71. Particularly illustrative of this point are the following passages:

The effect of the Fourth Amendment is to put the Courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. . . .

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

. . . .

. . . The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles [such as freedom from unreasonable search and seizure] established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Weeks, 232 U.S. at 391-93.

72. 251 U.S. 385 (1920); see *supra* note 56.

73. *Id.* at 392; see also *Zap v. United States*, 328 U.S. 629, 630 (1946) ("As explained in [*Silverthorne*], the evidence is suppressed on the theory that the government may not profit from its own wrongdoing.").

That the Court during this period viewed the rule as commanded by the Constitution to preserve the integrity of the judiciary is suggested also by *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled on other grounds by*, *Kate v. United States*, 389 U.S. 347 (1967). Although the Court in *Olmstead* held the exclusionary rule did not apply when officers violated a state wiretapping statute but not the Constitution, it nevertheless recognized that *Weeks* and its progeny "[declared] that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really [forbids] its introduction if obtained by government officers through a violation of the Amendment." *Id.* at 462. The dissents of Holmes and Brandeis, who felt that exclusion should be the rule even when evidence has been seized unlawfully but not unconstitutionally, advocated a particularly broad vision of the judicial integrity rationale. See *id.* at 469 (Holmes, J., dissenting); *id.* at 471 (Brandeis, J., dissenting).

74. *Wolf*, 338 U.S. at 30-32; see *supra* text accompanying notes 57-59. "[I]n practice the exclusion of evidence may be an effective way of deterring unreasonable searches. . . ." *Wolf*, 338 U.S. at 31. "[T]he exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found." *Id.* at 30-31.

That the exclusionary rule benefits only the guilty is not an inevitable conclusion. For example, in *United States v. Calandra*, 414 U.S. 338 (1974), the Court described the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect," rather than a remedy created to protect the rights of the guilty alone. *Id.* at 348; see also Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1230 (1983) ("Under this theory of the fourth amendment, a guilty person, lacking the right to

Wolf Court cited no precedent for its novel interpretation. Nowhere in *Weeks* or the cases preceding *Wolf* had such a deterrence rationale been expressed.⁷⁵

If observers of the Supreme Court had hoped that *Mapp v. Ohio*⁷⁶ would establish a firm constitutional basis for the rule, they were to be disappointed. Although *Mapp* clearly established that the Constitution requires the exclusionary rule,⁷⁷ it failed to specify the reason.⁷⁸ One can argue, as at least one commentator has, that the *Mapp* Court squelched the *Wolf* deterrence rationale and characterized suppression as a constitutional command,⁷⁹ but by describing the exclusionary rule as "that command which this Court has held to be 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,'"⁸⁰ the majority managed to touch all the theoretical bases without scoring a run.⁸¹ The constitutional underpinnings of the rule were no clearer after *Mapp* than they had been before it.

Not until 1974 did the Court definitively pronounce the rationale behind the exclusionary rule. In so doing, it began to trim back the expansive doctrine suggested by early cases such as *Silverthorne*. In *Calandra*⁸² the Court stated unequivocally that "the [exclusionary] rule is 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."⁸³ Its

secrete evidence, is essentially an incidental beneficiary of a rule designed to benefit somebody else—an innocent person who is not before the court.").

75. According to one commentator,

Nowhere in *Weeks* is the exclusionary rule called a "remedy" [T]he *Weeks* opinion "contains no language that expressly justifies the rule by reference to a supposed deterrent effect on police officials."

. . . .

Nor, as far as I have been able to tell, is the idea of deterrence expressed for the next thirty-five years—in the interim between *Weeks* and the year of the *Wolf* case.

Kamisar, *supra* note 53, at 598 (quoting Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 536 n.90.).

Wolf's impact on the Supreme Court's view of the exclusionary rule was devastating. Commentators argue that prior to *Wolf* there had been little disagreement among the Justices as to the significance of *Weeks*; the idea that the Constitution commanded suppression whenever the fourth amendment was violated had been accepted almost tacitly. Mertens & Wasserstrom, *supra* note 65, at 375-78. With the attempt in *Wolf* to apply the exclusionary rule to the states, however, the "harmony was shattered." *Id.* at 378. *Wolf* inspired five separate opinions, and "by driving a wedge between the fourth amendment and the exclusionary rule, [the majority opinion] dealt the rule a blow from which it has never recovered." *Id.* at 380.

76. 367 U.S. 643 (1960); see *supra* notes 60-61 and accompanying text.

77. *Mapp*, 367 U.S. at 655.

78. Stewart, *supra* note 2, at 1380.

79. Kamisar, *supra* note 53, at 621-27.

80. *Mapp*, 367 U.S. at 648 (quoting *Silverthorne*, 251 U.S. at 392).

81. "This passage is incorrigibly ambiguous, mixing in about equal portions of vague constitutional references, deterrence rationale, and empirical generalization." Schrock & Welsh, *supra* note 53, at 319. Kamisar regards *Mapp* somewhat more charitably, explaining Justice Clark's vague language as designed "to secure maximum approval [among the Justices] for the decision overruling *Wolf*." Kamisar, *supra* note 53, at 622.

82. United States v. Calandra, 414 U.S. 338 (1974); see *supra* notes 9-11 and accompanying text.

83. *Calandra*, 414 U.S. at 348. In 1979 the Court did make a passing reference to "the two policies behind the use of the exclusionary rule," listing them as deterrence of improper searches and

application, therefore, "has been restricted to those areas where its remedial objectives are thought most efficaciously served."⁸⁴ This interpretation naturally called for a test balancing costs and benefits to determine if the rule applied to a particular case.⁸⁵ Employing this test, the *Calandra* Court found that extending the rule to exclude grand jury questions based on illegally obtained evidence, which would later be inadmissible at trial, would hinder the grand jury's investigative purpose and have no additional deterrent effect on police officers. Questions based on such evidence, therefore, could rightfully be asked in grand jury proceedings.⁸⁶

The conclusion reached by the *Calandra* Court has been said to envision a "fragmentary model" of government—the polar opposite of the unitary model suggested by earlier cases.⁸⁷ In a fragmented governmental system, the court serves as a neutral conduit for evidence. A judge must shut her eyes to fourth amendment wrongs wrought by other government officers and offer a fair trial based on all available evidence.⁸⁸ This distinction was not lost upon Justice Brennan, who maintained in his dissent in *Calandra* that the historic purpose of the exclusionary rule "accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior."⁸⁹

Despite the protests of the minority, however, the Court employed similar cost-benefit analyses in subsequent cases to admit unconstitutionally seized evidence in a variety of procedural settings.⁹⁰ In *Leon* the Court took the deterrent remedy rationale a giant step forward by allowing wrongfully seized evidence to be admitted in the prosecution's case-in-chief against the search victim.⁹¹ The "good faith exception" for evidence seized in reasonable reliance on presump-

seizures by police and preservation of judicial integrity. *Dunaway v. New York*, 442 U.S. 200, 217-18 (1979). Justice Brennan, writing for the majority, made this comment while addressing a fourth amendment personal seizure violation that led a defendant to incriminate himself. *Id.* This appears to be the only reference in a post-*Calandra* majority opinion that might lend support to a theory other than the deterrence rationale. Justice Rehnquist, in dissent, did not directly challenge Justice Brennan's characterization of the rule, but argued that "[g]iven the deterrent purposes of the exclusionary rule" the evidence should be admitted. *Id.* at 226 (Rehnquist, J., dissenting). Because these references to the constitutional rationale for the rule are rather oblique and tread close to a fifth amendment issue, *Dunaway* should not be regarded as persuasive authority for the rationale behind the exclusionary rule.

84. *Calandra*, 414 U.S. at 348.

85. A balancing test was first suggested in a prior Supreme Court decision:

[W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants [whose constitutional rights are not violated by the search and seizure] would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Alderman v. United States, 394 U.S. 165, 174-75 (1969); see Stewart, *supra* note 2, at 1390.

86. *Calandra*, 414 U.S. at 349-52.

87. Schrock & Welsh, *supra* note 53, at 255.

88. Schrock & Welsh, *supra* note 53, at 255-57.

89. *Calandra*, 414 U.S. at 357 (Brennan, J., dissenting).

90. *E.g.*, *United States v. Havens*, 446 U.S. 620, 627-28 (1979) (permitting admission of illegally obtained evidence for impeachment purposes).

91. *United States v. Leon*, 468 U.S. 897, 922 (1984).

tively valid search warrants served as the vehicle for this significant change.⁹²

Seven years before *Calandra* began the steady erosion of the exclusionary rule, the Supreme Court decided the first in a series of cases particularly relevant to the *Krull* decision.⁹³ *Berger v. New York*⁹⁴ was decided before the constitutional basis for exclusion was clarified. This line of authority addressed the specific problem of evidence seized unconstitutionally pursuant to statutory authority. In each case the Court ordered the evidence suppressed, without mentioning a constitutional basis for exclusion or couching its holding in terms of deterrent effect. The reason for suppression was best expressed in *Sibron v. New York*,⁹⁵ in which Chief Justice Warren declared simply that the government, in creating laws, "may not . . . authorize police conduct which trenches upon Fourth Amendment rights."⁹⁶

These decisions are unusual, not so much for their uniform result, but for the dual standard the Court applied when considering evidence seized under unconstitutional statutes. This standard, referred to as the "substantive-procedural dichotomy,"⁹⁷ first appeared in *Michigan v. DeFillippo*.⁹⁸ Defendant in *DeFillippo* had been arrested for violating a statute later found unconstitutional on vagueness grounds. A body search upon arrest had yielded controlled sub-

92. *Id.*; see *supra* text accompanying notes 25-29. *Leon* was opposed by three Justices in two dissenting opinions. See *Leon*, 468 U.S. at 928 (Brennan, J., joined by Marshall, J., dissenting); *id.* at 960 (Stevens, J., dissenting). The good faith exception also has drawn harsh criticism from commentators. See Dripps, *Living with Leon*, 95 YALE L. J. 906 (1986); LaFave, "The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications, 1984 U. ILL. L. REV. 895; Mertens & Wasserstrom, *supra* note 65, at 410-62; Stewart, *supra* note 2, at 1399-1403.

For example, *Leon* has been criticized for the following: advancing a mistaken view of the constitutional rationale behind the exclusionary rule, *Leon*, 468 U.S. at 931-38 (Brennan, J., dissenting); LaFave, *supra*, at 901-02; failing to treat the Constitution as law because the good faith exception acknowledges a violation of a defendant's constitutional rights yet wholly denies him a remedy, *Leon*, 468 U.S. at 977-80 (Stevens, J., dissenting); Dripps, *supra*, at 934-39; failing to supply empirical evidence supporting the cost of the rule to the criminal justice system or its beneficial effect on it, *Leon*, 468 U.S. at 949-54 (Brennan, J., dissenting); LaFave, *supra*, at 902-09; chilling the development of fourth amendment jurisprudence, see Mertens & Wasserstrom, *supra* note 65, at 451-53; encouraging the breakdown of law enforcement's internal warrant screening procedures and putting "a premium on police ignorance of the law," *Leon*, 468 U.S. at 955 (Brennan, J., dissenting); Dripps, *supra*, at 930-31; and envisioning the paradoxical situation in which an officer can reasonably rely on a warrant authorizing an unreasonable search, *Leon*, 468 U.S. at 960-80 (Stevens, J., dissenting).

93. See *Ybarra v. Illinois*, 444 U.S. 85 (1979) (statute allowed officers to body search all persons found on premises being searched pursuant to warrant, without a reasonable belief that they were armed and presently dangerous); *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (statute permitted luggage searches of all persons entering Puerto Rico); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (statute allowed vehicle searches within 100 miles of Mexican border); *Sibron v. New York*, 392 U.S. 40 (1968) (statute authorized stop-and-frisk searches without suspicion that search victim was a present danger to officer); *Berger v. New York*, 388 U.S. 41 (1967) (statute permitted police to obtain eavesdropping warrants with insufficient showing of probable cause).

94. 388 U.S. 41 (1967).

95. 392 U.S. 40 (1968).

96. *Id.* at 61. In *Sibron* the Court did not declare the stop-and-frisk statute in question unconstitutional, because it could be carried out in a constitutional manner. The Court adamantly insisted, however, that legislative authority could never serve as a justification for an unconstitutional search and seizure. *Id.* at 59-62; see *infra* note 109.

97. *People v. Krull*, 107 Ill. 2d 107, 118, 481 N.E.2d 703, 708 (1985), *rev'd sub nom.* *Illinois v. Krull*, 107 S. Ct. 1160 (1987).

98. 443 U.S. 31 (1979).

stances that subsequently led to a possession charge.⁹⁹ The Court declared the contraband admissible as evidence and confronted the apparent inconsistency with the *Berger* line of authority. Evidence seized pursuant to *procedural* statutes authorizing unconstitutional searches is inadmissible, the Court explained, but evidence from arrest searches conducted pursuant to unconstitutional statutes that create *substantive* crimes is not.¹⁰⁰ The *Leon* decision reinforced this new substantive-procedural dichotomy.¹⁰¹ The *Leon* Court, in creating the good faith exception for officers relying on presumptively valid search warrants, acknowledged the importance of the *DeFillippo* distinction by stating:

We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. . . . The substantive Fourth Amendment principles announced in those cases are fully consistent with our holding here.¹⁰²

To reach the conclusion in *Krull*—that evidence should be admitted when unconstitutionally seized by an officer acting in good faith reliance on a statute—the majority had to address the line of search statute cases distinguished in *DeFillippo* and *Leon*. The *Krull* Court confronted this seemingly conflicting precedent in a footnote, dismissing it with the following explanation:

None of the cases cited in *DeFillippo* in support of the [substantive-procedural] distinction, however, addressed the question of whether a good-faith exception to the exclusionary rule should be recognized when an officer's reliance on a statute was objectively reasonable. Rather, those cases simply evaluated the constitutionality of particular statutes, or their application, that authorized searches without a warrant or probable cause.¹⁰³

If one accepts the deterrent-remedy view of the rule announced in *Leon*, this explanation, cavalier as it may be, seems reasonable enough. The *Berger* line of cases simply assessed whether probable cause to search existed under various statutes. The rationale behind the exclusionary rule had never been at issue in those cases. The *Krull* Court's acknowledgement of the good faith exception, however, necessarily modifies the analysis that had been applied to *Berger* and the other search statute cases. If these cases were to come before the

99. *Id.* at 39-40. DeFillippo was arrested for refusing to identify himself when stopped by an officer for engaging in behavior warranting further investigation, a crime held to be unconstitutionally vague. A body frisk upon his arrest yielded unlawful drugs in a tin foil packet, which provided the basis for a second, and constitutional, charge of possession of controlled substances. *Id.* at 33-34.

100. *Id.* at 39. The Court characterized *Torres v. Puerto Rico*, 442 U.S. 465 (1979), *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), *Sibron*, and *Berger* as involving "statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment," and stated "Our holding today is not inconsistent with these decisions." *Id.*

101. *United States v. Leon*, 468 U.S. 897, 912 n.8; see *supra* notes 25-29, 91-92 and accompanying text.

102. *Leon*, 468 U.S. at 912 n.8.

103. *Krull*, 107 S. Ct. at 1170 n.12.

Court again, their outcome, at least with regard to the suppression of evidence, would very likely be different.

The dissent in *Krull* found the substantive-procedural dichotomy established in prior cases commanded more respect.¹⁰⁴ Although claiming that she accepted the *Leon* result and the deterrent-remedy rationale, Justice O'Connor argued that suppression of evidence in cases involving procedural search statutes is proper; suppression would deter legislators from enacting laws that threaten fourth amendment values.¹⁰⁵ The *Berger* line of cases and the history of the fourth amendment, the dissent maintained, reveal that legislators are inclined at times to subvert the amendment.¹⁰⁶ Therefore, a legislature could be expected to respond appropriately to the sanction of excluding evidence.¹⁰⁷

104. The evidence seized in the previous search statute cases cited *supra* note 93 could, however, be suppressed if the defendants could establish that in drafting the statutes at issue, "the legislature wholly abandoned its responsibility to enact constitutional laws" or that the provisions of the statutes "are such that a reasonable officer should have known that the statute was unconstitutional." *Krull*, 107 S. Ct. at 1170. The dissent criticized this "bad faith" exception, claiming that the Court failed to explain how or when a legislature can be said to have "wholly abandoned" its responsibility, *id.* at 1177 (O'Connor, J., dissenting), and that "it is not apparent how much constitutional law [pertaining to administrative searches] the reasonable officer is expected to know," *id.* at 1176 (O'Connor, J., dissenting).

105. *Id.* at 1173-76 (O'Connor, J., dissenting).

106. *Id.* at 1174 (O'Connor, J., dissenting). On the subject of pre-Revolutionary history, Justice O'Connor claimed that "[s]tatutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment." *Id.* The Court, she claimed, had recognized that fact on several occasions. *Id.* (citing *Payton v. New York*, 445 U.S. 573, 583-84 & n.21 (1980); *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965); *Boyd v. United States*, 116 U.S. 616, 624-30 (1886)). The decisions cited by the dissent certainly discussed the history of the fourth amendment and the British abuses under the writs of assistance, but nowhere did they even mention the statute authorizing the writs. Further, nowhere do these opinions characterize that statute as a "core concern" of the framers or maintain that reaction against it was "the moving force behind the Fourth Amendment." *Krull*, 107 S. Ct. at 1174 (O'Connor, J., dissenting).

A fair appraisal of the history of the writs and the infamous general warrants reveals that the actual source of authority for the issuance of the writs was probably not a "core concern" of anyone. As discussed *supra* note 49, the searches were carried out by the executive branch of the government, and authority for issuing the warrants came from whatever source the executive could find available. These sources included at various times the Parliament, the Crown, the Court of High Commission, and the Court of Star Chamber. N. LASSON, *supra* note 49, at 23-24, 28-29, 33, 37-38.

The "ancient Act of Parliament" to which Justice O'Connor referred happened to be the instrument from which authority for the writs was derived at the time of the Revolution. *Krull*, 107 S. Ct. at 1174 (O'Connor, J., dissenting). The act was drafted in the 1600s and debate concerning it focused more on its interpretation and the question whether it could be applied to the American colonies (as opposed to the British mainland) than on a sense of outrage at a perceived legislative abuse. N. LASSON, *supra* note 49, at 58-63.

The framers were much more concerned about the abuse of power by officers of the executive branch. Through the passage of the fourth amendment they hoped to find a means to prevent officers from barging into their businesses and homes without reasonable grounds to search. Kamisar, *supra* note 53, at 574. The particular mechanism for checking this threat of unwarranted police action was the judiciary, which the framers felt confident could serve as an impartial source of authority for issuing warrants. *Id.* at 574-76. The mechanism for resolving abuses of the legislative branch was soon to become, of course, judicial review. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In light of the realities of pre-Revolutionary history, Justice O'Connor's interpretation of the significance of statutory authority for writs of assistance seems rather exaggerated. It should also be noted that the "ancient Act," 7 & 8 Will. 3, ch. 22, § 6 (1696), cited by Justice O'Connor did not originally create the writs but merely conveyed the powers of English customs agents to their American counterparts. An earlier act of Charles II actually authorized the writs. 13 & 14 Car. 2, ch. 11, § 5 (1662); see N. LASSON, *supra* note 49, at 53.

107. *Krull*, 107 S. Ct. at 1174.

The argument that legislators, because of their political nature, pose a significant threat to the fourth amendment rights of citizens may well be correct; the language of *Sibron*¹⁰⁸ certainly suggests this conclusion.¹⁰⁹ However, *Sibron* and the other search statute cases never explored the constitutional rationale for excluding evidence and never mentioned the deterrent effect of suppression. The suggestion that they might stand as precedent for the proposition that suppression effectively deters unconstitutional legislative action, therefore, seems far-fetched. If such a thesis has any force at all, it dissipates in the face of the *Krull* majority's argument that a declaration of unconstitutionality, likely to be obtained through an injunctive suit, would serve the same deterrent purpose.¹¹⁰

Justice O'Connor recognized the weaknesses inherent in using the deterrence rationale to justify suppression when she concluded her main argument with the declaration: "Even conceding that the deterrent value of the exclusionary rule in this context is arguable, I am unwilling to abandon both history and precedent weighing in favor of suppression."¹¹¹ The meaning of this cryptic remark does not appear on the face of the opinion. Although she declined to discuss the implications of her comment, it certainly suggests that Justice O'Connor is not wholly convinced that the remedial force of the rule can provide the sole justification for the exclusion of evidence.

Justice O'Connor chose to argue for suppression of Detective McNally's evidence under the theory that the exclusionary rule's deterrent value provides the sole constitutional rationale for its use. In doing so, she employed a strained analysis of prior case law and fourth amendment history. She might have chosen an alternative theoretical approach, however, that would have provided an argument for suppression supported by prior cases and by the peculiar facts of *Krull*.

The judicial integrity theory, which maintains that the Constitution commands the exclusion of illegally seized evidence, seems particularly well suited for application to the *Krull* facts. This theory envisions a unitary system of government in which the judiciary has an obligation to halt the violation of an individual's fourth amendment rights.¹¹² Typically a court fulfills this responsibility by nullifying the actions of the executive branch.¹¹³ On facts such as *Krull*, however, a court must confront an even greater threat to fourth amendment rights: two branches of government—the legislative and the executive—

108. See *supra* notes 95-96 and accompanying text.

109. In Chief Justice Warren's words:

New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, and in the process it may call the standards it employs by any names it may choose. *It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct.*

Sibron, 392 U.S. at 60-61 (emphasis added) (citation omitted).

110. *Krull*, 107 S. Ct. at 1169. Illinois automobile parts dealers had brought precisely such an action in response to the statutory provision at issue in *Krull*. See *Bionic Auto Parts & Sales, Inc. v. Fahner*, 518 F. Supp. 582 (N.D. Ill. 1981); see *supra* note 16.

111. *Krull*, 107 S. Ct. at 1176 (O'Connor, J., dissenting).

112. Schrock & Welsh, *supra* note 53, at 295-302; see *supra* notes 63, 65-69 and accompanying text.

113. Schrock & Welsh, *supra* note 53, at 325.

have acted in tandem to bring about the unreasonable search and seizure. If a court were to disregard that this evidence had been procured by the police under legislative authority in violation of the fourth amendment, and to permit its introduction at trial, nothing less than a tripartite violation of a search victim's rights would result—a scenario completely at odds with the language of *Weeks*.¹¹⁴

Employing the judicial integrity theory to justify suppression could also explain the *Berger* line of search statute cases without resort to the weak “legislative deterrence” logic proposed by the *Krull* dissent. *Berger* was decided in 1967—seven years before *Calandra* purported to declare the supremacy of the deterrence rationale. Therefore, an argument could be made that this line of cases grew out of the original judicial integrity view of the exclusionary rule. The Court's later efforts to distinguish the search statute decisions from decisions such as *DeFillippo* and *Leon*, which admitted illegally seized evidence based on a deterrent remedy rationale, could be explained as an appropriate recognition of the peculiar combination of legislative and executive authority behind the fourth amendment violations in cases like *Berger*. Because such a combination involves a legislature specifically authorizing “police conduct which trenches on fourth amendment rights,”¹¹⁵ it can be characterized as particularly egregious. Therefore, it merits the special judicial treatment of exclusion.

In a portion of their brief to the United States Supreme Court, defendants argued a similar point.¹¹⁶ The search statute cases, they maintained, were decided under the judicial integrity basis for the exclusionary rule and, therefore, the good faith exception should not apply.¹¹⁷ Obviously, Justice O'Connor chose not to adopt this concept in the dissenting opinion, but because she admitted that her “[unwillingness] to abandon both history and precedent weighing in favor of suppression”¹¹⁸ was not grounded in the deterrence rationale she had advanced earlier, she seemed to suggest, in a roundabout way, that the judicial integrity rationale guided her hand. She elected not to develop this possibility, however, and as a result the dissenting opinion lost much of its force. The majority opinion in *Krull* appears completely consistent with the free-wheeling deterrence concept developed from *Calandra* through *Leon*, and the dissent's

114. See *supra* note 71.

115. *Sibron*, 392 U.S. at 61.

116. The petitioner . . . simply [ignores] one of the policies underlying the exclusionary rule. In *Dunaway v. New York* . . . this Court recognized that the use of evidence obtained in violation of constitutional rights is excluded not only as a deterrent to police conduct but also because the use of such tainted evidence “is more likely to compromise the integrity of the courts.” Thus when the Supreme Court concluded in *DePhillippo* and *Leon* (which cites the *Dunaway* opinion . . .) that the exclusionary rule applied to suppress evidence obtained pursuant to procedural statutes that authorized searches under circumstances which did not satisfy traditional warrant and probable cause requirements of the Fourth Amendment, the focus was not at all upon the deterrence policy of the rule. The focus implicitly rested upon the integrity of the courts and the sanctity of the Constitution.

Brief for Respondent at 23-24, *Krull* (No. 85-608) (quoting *Dunaway v. New York*, 442 U.S. 200, 218 (1979)). The significance of *Dunaway* is discussed *supra* note 83.

117. Brief for Respondent at 24-25, *Krull*.

118. *Krull*, 107 S. Ct. at 1176 (O'Connor, J., dissenting).

contrived use of precedent and history cannot create a credible argument for suppression using the same deterrent-remedy analysis.

Justice Day's historic opinion in *Weeks*, which gave rise to the fourth amendment exclusionary rule, appears to have sprung not from a flexible deterrence rationale, but from the normative principle that the judiciary bears a special responsibility to protect an individual's fourth amendment rights.¹¹⁹ *Weeks* and the early decisions that followed it suggest that the Constitution commands the courts to exclude improperly seized evidence to protect judicial integrity and a search victim's fourth amendment rights. Historical appearances aside, however, that view no longer holds the support of a majority on the Supreme Court. The deterrent-remedy rationale, conceived in *Wolf* and taken to its height in *Leon*, has emerged as the dominant theory behind the exclusionary rule.¹²⁰ Given the evolution of the deterrence rationale and the good faith exception, the *Krull* Court's conclusion—that evidence seized by officers reasonably relying on search statutes violating the fourth amendment is admissible—seems inescapable. The *Krull* dissent, unable to accept the admissibility of evidence thus seized, advanced the case for suppression only in terms of deterrence. In so doing, the dissent passed up an opportunity to reaffirm what appears to have been the original judicial integrity theory behind the exclusionary rule and produced instead a poorly constructed argument that misrepresented fourth amendment history.

To characterize Justice O'Connor's dissent as the minority's endorsement of the deterrent-remedy basis for the exclusionary rule and the last gasp of the judicial integrity rationale would be an overstatement.¹²¹ *Krull*'s significance, however, does seem to lie not in the majority's holding but in the dissent's approach to refuting it.¹²² When given an unusually strong factual basis from

119. See *supra* notes 65-73 and accompanying text.

120. See *supra* notes 82-92 and accompanying text.

121. It should be noted that Justice Marshall joined Justice O'Connor's dissent with a brief qualification: "I do not find it necessary to discuss the Court's holdings in . . . [*Calandra*, *Stone v. Powell*, and *United States v. Janis*]. Accordingly, I do not subscribe to that portion of the opinion." *Krull*, 107 S. Ct. at 1173 (Marshall, J., dissenting). His remark presumably refers to the establishment of the deterrent-remedy rationale, although he did not offer further explanation.

122. Justice Brennan, in his dissent to *Leon*, expressed a fear that the good faith exception to warrant searches would lead to a similar exception for searches without warrants:

[T]he full impact of the Court's regrettable decisions will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances.

United States v. Leon, 468 U.S. 897, 959 (1984) (Brennan, J., dissenting). This concern has been echoed by commentators as well. *E.g.*, Dripps, *supra* note 92, at 944-47; LaFave, *supra* note 92, at 926-29; Mertens & Wasserstrom, *supra* note 65, at 454-55.

The temptation will also be great to extend *Leon* to without-warrant cases, for surely there is even more reason to accept the officer's good-faith mistaken judgment as to what the law allows when he was not even in a position to check with a judge first! Then the Court's abjuration of the exclusionary rule will be virtually complete.

LaFave, *supra* note 92, at 930.

Although *Krull* does address a warrantless search situation, it does not constitute a bold step in the direction that LaFave, Justice Brennan, and others feared the Court might take. Warrantless searches authorized by statute are unlike the typical situations in which a warrant is not required. These situations include, for example, probable cause in exigent circumstances, consent, search inci-

which to advocate what appears to have been the original intent behind the rule, the dissent declined the opportunity. By choosing to meet the majority on the slippery playing field of deterrence, the dissent failed to question the validity of that particular rationale. That choice, although serving the purpose of advocating suppression in this particular case, had the added effect of moving the Court

dent to arrest, and weapons frisks. An officer conducting a search under a procedural search statute is not called on to exercise his own judgment as to what the law allows. Instead, like the officers in *Leon*, he relies on a superior source of authority—in this case a legislative statute or regulation. So long as that statute is not blatantly unconstitutional, his personal judgment should not come into play. See *Krull*, 107 S. Ct. at 1170, 1172. Insofar as *Krull* does not apply the good faith exception to an officer's personal judgment, the holding does not break new ground.

The limits of *Krull* become apparent when one considers the Court's decision in *Arizona v. Hicks*, 107 S. Ct. 1149 (1987), in which the Court passed up an opportunity to expand the good faith exception to a typical without-warrant search. In *Hicks* an officer executing a valid warrantless search for weapons and shooting suspect noticed an expensive stereo in the suspect's "squalid and otherwise ill-appointed four-room apartment." *Id.* at 1152. Suspecting that the stereo might be stolen property, the officer moved the turntable to see and copy its serial number. The stereo was later determined to be stolen. *Id.* Considering the defendant's motion to suppress, the Supreme Court, in a six-to-three opinion, ruled that moving the turntable amounted to an unconstitutional search without probable cause which was beyond the scope of the officer's initial search and not justified by the "plain view" doctrine. *Id.* at 1153-54.

As part of its argument, the State urged that, if the stereo were unconstitutional, the evidence uncovered should be admitted under *Leon* because the officer had acted in the good faith belief that this "plain view" warrantless search was constitutional. *Id.* at 1155; see Brief of Petitioner at 29-31, *Hicks* (No. 85-1027). Because the constitutionality of his actions was debated all the way to the United States Supreme Court, it would follow that the officer acted in an objectively reasonable good faith belief that his search was permissible. *Hicks*, then, presented an appropriate opportunity to extend the good faith exception to those warrantless searches that require an officer's on-the-scene determination of constitutionality. The Court, however, refused to consider the good faith exception issue. "That was not the question on which certiorari was granted," Justice Scalia explained, "and we decline to consider it." *Hicks*, 107 S. Ct. at 1155.

Although the decision not to pursue the good faith issue in *Hicks* went unexplained and therefore remains ambiguous, it serves to place *Krull* in perspective as a logical extension of *Leon*. See *supra* text accompanying notes 103-04. To characterize *Krull* as the *coup de grace* to the fourth amendment exclusionary rule would certainly seem to overstate its significance. The narrow five-to-four margin by which it was decided, combined with the Court's refusal to consider the good faith issue in *Hicks*, may signal that the good faith exception is not likely to swallow the entire exclusionary rule in the foreseeable future.

It should be noted that lower courts in general have taken a rather dim view of expanding the good faith exception to typical warrantless searches. See *United States v. Whiting*, 781 F.2d 692, 698-99 (9th Cir. 1986) ("The *Leon* exception, however, . . . does not create the broad 'good faith' exception [for warrantless searches] the government suggests."); *United States v. Whaley* 781 F.2d 417, 421 (5th Cir. 1986) ("To extend the exception so far as to allow evidence of a clearly unlawful warrantless search of residential property would put too great a premium on ignorance of the law and would virtually terminate the exclusionary rule."); *United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985); *United States v. McBean*, No. CR487-97, slip op. at 26-28 & n.6. (S.D. Ga. Nov. 18, 1987) (LEXIS, Genfed library, Dist file) (refusing to extend good faith exception to search unconstitutional due to insufficient consent; court noted officer's good faith subjectively, but not objectively, reasonable); *State v. Prestwich*, 112 Idaho 590, 593, 733 P.2d 811, 814 (Idaho Ct. App. 1987) (refusing to apply good faith exception to warrantless search of defendant's property conducted by probation officer lacking "reasonable grounds" for search); see also *United States v. Vasey*, 834 F.2d 782, 789 (9th Cir. 1987) ("The fact that Officer Jensen conducted a warrantless search of the vehicle which violated Vasey's Fourth Amendment rights precludes any reliance on the good faith exception."); *State v. Williams*, 409 N.W.2d 553, 556 (Minn. Ct. App. 1987) (court rejected argument that officer's good faith could prevent suppression of evidence seized during unconstitutional search incident to arrest). *But see United States v. Williams*, 622 F.2d 830, 840-47 (5th Cir. 1980) (splintered en banc), (potentially far-reaching pre-*Leon* endorsement of good faith exception); *cert. denied*, 449 U.S. 1127 (1981); *People v. Mashaney*, 160 Ill. App. 3d 390, 513 N.E.2d 615, 618 (1987) (good faith exception applied to officer trespassing unknowingly on defendant's land when seeking vantage point from which to spy defendant's marijuana crop).

further away from what may well have been the original basis for the exclusionary rule. In this manner, the dissenting Justices in *Krull* managed to enhance the credibility of a deterrence theory that has served as the majority's useful tool for paring down the fourth amendment's troublesome exclusionary doctrine.

J. DONALD HOBART, JR.