

**DAVIS V. UNITED STATES: EXPANDING
THE GOOD FAITH EXCEPTION TO THE
EXCLUSIONARY RULE TO OBJECTIVE
RELIANCE ON BINDING APPELLATE
PRECEDENT PRESENTS TOO MANY
THREATS TO CONSTITUTIONAL
PROTECTIONS**

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INTRODUCTION

Imagine a person is the victim of an illegal search and seizure. The police searched their home without probable cause or without a search warrant. The police arrested them under a defective search warrant. Or maybe, the police effectuated the arrest under a statute inapplicable to their situation, or the statute was later declared unconstitutional. Under plain Fourth Amendment perception, any incriminating evidence cannot be used against this person because the police officer's conduct was wrong in the first place. And at one time, the Supreme Court provided this illegally obtained evidence would be excluded at trial.¹ But now, the good faith exception allows illegally obtained evidence to be viable at trial when the offending officer believed in good faith his conduct was legal.²

Specifically, consider a person on trial while the evidence, obtained by an act violating their constitutional rights, is being used against them. Not only have they suffered a denial of their rights, but also, the denial proceeds to make them vulnerable to further prosecution—prosecution potentially leading to a further repudiation of those rights with a prison sentence. Now, contemplate the police officer promulgating the search based on the understanding of an invalid law. Or, the police officer relied on jurisdictional law conflicting with your neighboring jurisdiction. Or, the police officer did not comprehend the applicable search and seizure law from the start.

The Supreme Court, in *Davis v. United States*, made the situations described above more likely to occur. The Court in *Davis* ruled the good faith exception to the exclusionary rule extends to situations where law enforcement relies on binding appellate precedent with objective reasonableness.³ A gray area

¹ The Supreme Court established the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914); *see also infra* Part I.A.

² For a detailed explanation of the good faith exception nuances, *see* Part I.B.

³ *Davis v. United States*, 131 S. Ct. 2419, 2434 (2011).

lies in what truly defines binding appellate precedent. A problem arises in determining when police officers honestly relied on binding appellate precedent or when they merely claim they did. A concern appears when the true intentions of the original Fourth Amendment advocates fade away in the implementation of good faith exception progeny.

The *Davis* opinion creates too many problems. First, binding appellate precedent is too ambiguous. Laws should be clear and strictly construed, leaving no doubt or question as to their applicability. What lies in the balance is an individual's constitutional rights. The forthcoming interpretations of *Davis* will be detrimental to Fourth Amendment litigation. If interpreted broadly, police officers are encouraged to push the envelope, and evidence admissions will most likely abound. Second, defendants have no incentive to bring claims. They will lose on the merits, or the evidence will be admitted anyway under *Davis*. Third, defendants' rights are not vindicated. Placing such a broad standard for what constitutes a reasonable search ignores the underlying constitutional right of the Fourth Amendment. Understandably, few scholars have considered the fallout of the *Davis* decision as it was handed down so recently.

To solve the enigma created by *Davis*, state courts interpreting their own constitutions should reach a different result. State judiciaries may provide broader constitutional protections than federal constitutional provisions. State court decisions may deviate from substantially similar federal decisions addressing the same constitutional condition. Not all state courts have accepted other good faith exception nuance cases. Thus, treating *Davis* in a similar fashion provides relevant utility. State courts can handle the *Davis* decision in one of three ways. First, the state court can completely reject the good faith exception altogether. Second, the state court can accept the good faith exception but reject the *Davis* nuance. Third, the state court may accept the *Davis* decision but narrowly apply it. By limiting the repercussions of *Davis*, states can preserve the constitutional rights the *Davis* court diminishes.

This Comment will proceed in three main parts. Part I will describe the Fourth Amendment as interpreted by the Supreme Court and provide necessary understanding of the exclusionary

rule, good faith exception, and the *Davis* holding. Part II will address the constitutional foundations of the exclusionary rule and expose realistic problems with the *Davis* opinion. Part III will suggest state courts construing their own state constitutions should reject the good faith exception, reject *Davis*, or narrowly apply *Davis*.

I. THE FOURTH AMENDMENT EXCLUSIONARY RULE

A. *The Exclusionary Rule*

The Fourth Amendment protects every individual from unreasonable search and seizure.⁴ From the beginning of its jurisprudence, the Amendment carried heavier intrinsic protection than the restrictions spelled out as black-letter law.⁵ The Amendment itself is a constitutional right, but its words alone do not suggest guidance for when the right is violated. The Court established the exclusionary rule in *Weeks v. United States*.⁶ *Weeks* held if evidence flows from a Fourth Amendment violation, the evidence is inadmissible in proceedings against the defendant.⁷ The exclusionary rule was extended to state court proceedings in *Mapp v. Ohio*.⁸ The Court in *Mapp* considered the exclusionary rule to be an integrated part of the Fourth

⁴ U.S. CONST. amend. IV (“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.”).

⁵ See *Boyd v. United States*, for the formative decision framing Fourth Amendment violations as “all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life . . . [T]he essence of the offence . . . is the *invasion of his indefeasible right of personal security, personal liberty, and private property*.” 116 U.S. 616, 630 (1886) (emphasis added).

⁶ 232 U.S. 383 (1914).

⁷ *Id.* at 398. The Court’s decision in *Weeks* was not a written part of the Constitution; the Court was motivated by policy. *Id.* at 393 (“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”).

⁸ 367 U.S. 643, 655-56 (1961) (“[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.”).

Amendment, in contrast to how the Court would later declare the exclusionary rule merely to be a remedy to a Fourth Amendment violation.⁹

B. The Good Faith Exception

United States v. Leon established the good faith exception.¹⁰ The Court held the good faith exception applies and the exclusionary rule does not apply when police officers violate the Fourth Amendment while reasonably relying on a non-police personnel determination that their actions comply with the Fourth Amendment.¹¹

Yet, the *Leon* decision was met with opposition. Justice Brennan voiced concern about this “greater threat to our civil liberties.”¹² Taking a conservative, literal approach to the Amendment’s meaning and interpretation, he stressed the obvious need for an integration of police force and judicial protections.¹³ He stressed the protection could not merely start in the courtroom. Because of the weaknesses in the Court’s argument finding the costs of the exclusionary rule to outweigh the benefits, the judicial reasoning for the good faith exception is unsound.¹⁴

⁹ *Id.* at 650. The Court agreed with the reasoning in *Weeks*, stating the exclusionary rule is “an essential ingredient of the right.” *Id.* (citation omitted).

¹⁰ 468 U.S. 897 (1984).

¹¹ *Id.* at 925-26. The Court assumed the exclusionary rule was not a “personal constitutional right.” *Id.* at 906. Rather, it is a “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.” *Id.* The exclusionary rule’s purpose is to ensure good police conduct, not to make an aggrieved party whole. *Id.* Weighing the benefits and costs of exclusion, the Court found the costs of exclusion when the police rely on a neutral magistrate too much for the justice system to bear. *Id.* at 908-09.

¹² *Id.* at 931 (Brennan, J., dissenting).

¹³ *Id.* at 938 (“[I]f the Amendment is to have any meaning, police and the courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual’s Fourth Amendment rights may be undermined as completely by one as by the other.”).

¹⁴ Justice Brennan described the evidence that inevitably goes unnoticed when the government follows the constitutional constraints as a mere “‘price’ our society pays for enjoying the freedom and privacy safeguarded by the *Fourth Amendment*.” *Id.* at 941 (emphasis added). Regarding the exclusionary rule cost-benefit analysis, Justice Brennan made clear it is “a virtually impossible task for the judiciary to perform honestly and accurately.” *Id.* at 942. The prior opinions “represent inherently unstable

C. Good Faith Exception Expansion

The good faith exception has expanded over the years with nuances provided by new cases. In *Arizona v. Evans*,¹⁵ the Court extended the good faith exception to apply to reasonable police reliance on computer databases and record-keeping systems managed by court clerks.¹⁶ In *Illinois v. Krull*,¹⁷ the Court extended the good faith exception to apply to reasonable police reliance on a state statute later declared unconstitutional.¹⁸ In *Massachusetts v. Sheppard*,¹⁹ the Court extended the good faith exception to reasonable police reliance on a defective search warrant.²⁰

The most recent good faith exception expansion occurred in *Davis v. United States*.²¹ In *Davis*, the Court extended the exception and made the exclusionary rule inapplicable when police objectively and reasonably rely on binding appellate precedent.²² By establishing a new exception, the Court created a new question for Fourth Amendment law development: “[I]f and when defendants can challenge adverse Fourth Amendment precedents in criminal cases.”²³ Now, criminals have no chance of challenging an unreasonable search below the Supreme Court in the federal court system.²⁴

compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data.” *Id.*

¹⁵ 514 U.S. 1 (1995).

¹⁶ *Id.* at 15-16.

¹⁷ 480 U.S. 340 (1987).

¹⁸ *Id.* at 349-50.

¹⁹ 468 U.S. 981 (1984).

²⁰ *Id.* at 988.

²¹ 131 S. Ct. 2419 (2011).

²² *Id.* at 2434 (“[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.”).

²³ Orin Kerr, *Supreme Court Expands Good-Faith Exception to Exclusionary Rule to Include Reliance on Overturned Law*, VOLOKH CONSPIRACY (June 16, 2011, 10:41 AM), <http://volokh.com/2011/06/16/court-expands-good-faith-exception-to-reliance-on-overturned-law/>; see *infra* Part C.1. & C.2.

²⁴ The Supreme Court’s stance on how it will decide future issues remains vague as it maintains it would continue to hear cases that could possibly overturn precedent. See Kerr, *supra* note 23. Justice Alito conceded, “The good-faith exception is a judicially created exception to this judicially created rule. Therefore, in a future case, we could, if necessary, recognize a limited exception to the good-faith exception for a defendant who obtains a judgment over-ruling one of our Fourth Amendment precedents.” *Davis*, 131 S. Ct. at 2434.

D. Davis and Objectively Reasonable Good Faith Reliance on Binding Appellate Precedent

Willie Davis gave the police a false name at a routine vehicle stop.²⁵ The police arrested him for being a felon in possession of a firearm.²⁶ The United States District Court for the Middle District of Alabama indicted and convicted Davis on one count of possession of a firearm by a convicted felon.²⁷ At the time of the search, the police officer's conduct complied with Eleventh Circuit precedent pursuant to *New York v. Belton*.²⁸ At trial, Davis raised a Fourth Amendment challenge to preserve it for appeal.²⁹ Davis appealed his case to the Eleventh Circuit.³⁰ While his case was on appeal, the United States Supreme Court decided *Arizona v. Gant*,³¹ overruling the decision in *Belton*. The Eleventh Circuit held the search did violate Davis's rights but did not warrant suppression of the evidence,³² and Davis appealed to the United States Supreme Court.³³

The Court held the evidence against Davis should be admitted and, in deciding so, broadened the good faith exception by adding another exception to the exclusionary rule.³⁴ The Court began its analysis by addressing the original purposes of the

²⁵ *Davis*, 131 S. Ct. at 2425.

²⁶ *Id.*

²⁷ *Id.* at 2425-26.

²⁸ 453 U.S. 454 (1981). *Belton* holds, "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted).

²⁹ *Davis*, 131 S. Ct. at 2426.

³⁰ *Id.*

³¹ 129 S. Ct. 1710 (2009). The Court in *Gant* held:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 1723-24.

³² *Davis*, 131 S. Ct. at 2426.

³³ *Id.*

³⁴ *Id.* at 2434. The Court specifically held, "[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." *Id.*

exclusionary rule, stating it is “a ‘prudential’ doctrine, created by this Court to ‘compel respect for the constitutional guarantee’” that people are secure from unreasonable search and seizure.³⁵ The Court reiterated the exclusionary rule was intended to deter future Fourth Amendment violations “[w]hen the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.”³⁶ It reasoned, “when the police act with an objectively ‘reasonable good-faith belief,’” their conduct is lawful, and the exclusionary rule does not serve its deterrent function.³⁷ The Court followed this analysis with an explanation of its good faith exception progeny of cases.³⁸ By relying on *Herring v. United States*,³⁹ the police officers’ conduct in *Davis* was determined to not be so extreme that exclusion of the evidence would uphold the deterrent purpose of the rule.⁴⁰ The Court further reasoned “[r]esponsible law-enforcement officers will take care to learn ‘what is required of them’ under Fourth Amendment precedent and will conform their conduct to these rules.”⁴¹ In reasoning so, the Court solidified its argument that the exclusionary rule only serves deterrent purposes and is not a right embedded in the Fourth Amendment.

Addressing the dissent’s argument stating the *Gant* law should apply retroactively, the majority countered by arguing retroactivity applies to “rules” and “rights,” not remedies.⁴² *Davis*

³⁵ *Id.* at 2426 (citation omitted) (quoting *Pa. Bd. of Prob. v. Scott*, 524 U.S. 357, 363 (1998)).

³⁶ *Id.* at 2427 (internal quotation marks omitted).

³⁷ *Id.* at 2427 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)).

³⁸ *Id.* at 2428; see *supra* notes 15-22 and accompanying text.

³⁹ 555 U.S. 135 (2009).

⁴⁰ *Davis*, 131 S. Ct. at 2428 (“Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield ‘meaningfu[l]’ deterrence, and culpable enough to be ‘worth the price paid by the justice system.’ The conduct of the officers here was neither of those things.” (citation omitted) (quoting *Herring*, 555 U.S. at 144)).

⁴¹ *Id.* at 2429 (citation omitted) (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)). The majority was purposeful in stating the exclusion of evidence is a severe punishment for reasonable police conduct. *Id.*

⁴² *Id.* at 2430-31. The Court clarified, “retroactivity jurisprudence is concerned with whether . . . a new rule is available on direct review as a *potential* ground for relief.” *Id.* at 2430. *Davis*’s conviction was not final at the time the Court ruled on *Gant*. *Id.* at 2431. Thus, *Davis* can “invoke [the] newly announced rule of *substantive Fourth Amendment* law as a basis for seeking relief.” *Id.* (emphasis added). Now, the question “becomes one of remedy.” *Id.* But, the exclusionary rule does not automatically apply if

contended expanding the good faith exception would “stunt the development of Fourth Amendment law.”⁴³ But, the Court dismissed his argument by saying “applying the good faith exception in this context will not prevent judicial reconsideration of prior Fourth Amendment precedents.”⁴⁴ In closing, the majority reiterated the exclusionary rule is “not a personal constitutional right.” It concluded it is illogical for a criminal to be exonerated when the police have merely done their job.⁴⁵

Justice Sotomayor’s concurrence centered on the question of “whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”⁴⁶ She stressed the importance of police culpability and questioned whether appreciable deterrence may be had when an officer follows incorrect binding precedent versus unsettled precedent.⁴⁷

Justice Breyer’s dissent argued the good faith exception and the Court’s prior decisions on retroactivity were “incompatible.”⁴⁸ He focused on the future problems created by the majority’s

there has been a Fourth Amendment violation. *Id.* “The remedy is subject to exceptions and applies only where its ‘purpose is effectively advanced.’” *Id.* (quoting *Illinois v. Krull*, 480 U.S. 340, 347 (1987)).

⁴³ *Id.* at 2432.

⁴⁴ *Id.* at 2433.

⁴⁵ *Id.* at 2433-34 (“It is one thing for the criminal ‘to go free because the constable has blundered.’ It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.” (citation omitted) (quoting *People v. Defore*, 242 N.Y. 13, 21 (1926)).

⁴⁶ *Id.* at 2435 (Sotomayor, J., concurring).

⁴⁷ *Id.* at 2435-36. Justice Sotomayor explicitly brought attention to the fact the majority did not address the issues of deterrence and when binding appellate precedent is unsettled. *Id.* at 2436.

⁴⁸ *Id.* at 2437 (Breyer, J., dissenting). Justice Breyer noted:

[T]he Court’s distinction between (1) retroactive application of a new rule and (2) availability of a remedy is highly artificial and runs counter to precedent. To determine that a new rule is retroactive *is* to determine that, at least in the normal case, there is a remedy. As we have previously said, the “source of a ‘new rule’ is the Constitution itself, not any judicial power to create new rules of law”; hence, “[w]hat we are actually determining when we assess the ‘retroactivity’ of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.

Id. (quoting *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008)).

expansion of the good faith exception.⁴⁹ Concerned with fairness, he suggested the Court might not have the opportunity to reconsider the precedent created here because, now, a defendant could win on the constitutional question but lose on the relief question.⁵⁰ He disagreed with the Court's emphasis on police culpability⁵¹ and concluded by stating he would apply *Gant* retroactively and suppress the evidence against Davis.⁵²

II. DOUBTING *DAVIS*: FOURTH AMENDMENT FOUNDATIONS

A. *The Exclusionary Rule as a Constitutional Right*

The judicial goals of deterring unreasonable searches and seizures and controlling the evidence obtained are deeply rooted in this nation's history. From the outset, America's Framers were motivated to prevent the new government from "jeopardiz[ing] the liberty of every citizen."⁵³ The singular occurrence inspiring John Adams to declare "[t]hen and there the Child Independence was born" was James Otis's oral argument opposing the issuance of writs.⁵⁴ Adams did not vehemently proclaim his intentions for

⁴⁹ *Id.* at 2437 (Breyer, J., dissenting). Justice Breyer stated:

Suppose an officer's conduct is consistent with the language of a Fourth Amendment rule that a court of appeals announced in a case with clearly distinguishable facts? Suppose the case creating the relevant precedent did not directly announce any general rule but involved highly analogous facts? What about a rule that all other jurisdictions, but not the defendant's jurisdiction, had previously accepted? What rules can be developed for determining when, where, and how these different kinds of precedents do, or do not, count as relevant binding precedent?

Id. (internal quotation marks omitted).

⁵⁰ *Id.* at 2438.

⁵¹ *Id.* at 2439. Justice Breyer brought to light a police officer who conducts a search falling just outside Fourth Amendment allowances is no more culpable than an officer relying on bad appellate precedent. *Id.*

⁵² *Id.* at 2440.

⁵³ 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, 1369 (1983). Commonly agreed to be an important incentive for the Bill of Rights and the amendments therein, the Framers did not want the American government to abuse "the general warrant and the writ of assistance" the British government so willingly used to terrorize citizens. *Id.*

⁵⁴ *Id.* at 1371 (quoting N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-105 (1970)). Political historians

independence when hearing an argument for freedom of religion or freedom of expression. It cannot be coincidence the exuberance of a new nation was materialized with the prospect of all people being free from unwanted personal invasion. It can come as no surprise this zealous debate over the British Crown's control and tyranny through exercise of these writs fueled the fire for the American Revolution.⁵⁵ Because of this spirit, laws constraining citizens' rights and inflating government power must be cautioned against. If the judicial system ignores the intentions of the nation's Founders and the principles bringing the country this far, it is concerning what confidence we can have in the system as citizens. The Fourth Amendment is a promise.⁵⁶ The proper way to counter the balance is to expand Fourth Amendment protections provided by the states.

Personal right protections under state constitutions are no less important than those of the federal Constitution. "Necessary and desirable," state constitutions allow room for expanded protections of rights with federal origins.⁵⁷ Federalism benefits from state autonomy "breath[ing] new life" into Bill of Rights

have long debated whether this issue was the true catalyst in the colonies to spur the American Revolution. *Id.*

⁵⁵ *Id.*

⁵⁶ As noted in *Hudson v. Michigan*:

In *Weeks*, *Silverthorne*, and *Mapp*, the Court based its holdings requiring suppression of unlawfully obtained evidence upon the recognition that admission of that evidence would seriously undermine the Fourth Amendment's promise [F]ailure to apply the exclusionary rule would make that promise a hollow one, reducing it to 'a form of words,' 'of no value' to those whom it seeks to protect.

547 U.S. 586, 608-09 (2006) (Breyer, J., dissenting) (citations omitted); *see, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961) (determining that failure to expand the exclusionary rule to states would violate "human liberties"); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (holding that admitting evidence which was so egregiously attained would compromise the Fourth Amendment to a "form of words"); *United States v. Weeks*, 232 U.S. 383, 393 (1914) (implying that the Fourth Amendment can provide no protection if it is not meaningfully enforced).

⁵⁷ William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). "State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Id.* State laws are an "independent protective force" used to insulate full appreciation of our civil liberties. *Id.* When an individual's federal rights have been exhausted, the expanded personal rights granted by the state should become applicable.

protections.⁵⁸ Independent state supreme courts giving meaning to their own constitutions have the right to interpret provisions based on what they believe is the true implication.⁵⁹ Situations where state courts have evaluated Supreme Court holdings and subsequently rejected them abound.⁶⁰ Simply, “decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”⁶¹ Cases and controversies adjudicated in front of the Supreme Court are not situations leading to cookie-cutter decisions that can be perfectly applied to state court proceedings. Instead, state courts should consider them persuasive and pay

⁵⁸ *Id.* at 503. James Madison, father of the Bill of Rights, advocated at the time of the adoption of the Bill of Rights extra protections were needed against state power because he was scared state courts would encroach on personal rights granted in the amendments. *Id.* Yet, he would be pleased with broader state protections today “as proof of his conviction that independent tribunals of justice ‘will be naturally led to resist every encroachment upon rights expressly stipulated for.’” *Id.* at 504 (quoting 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789)).

⁵⁹ *Id.* at 499 (quoting *State v. Johnson*, 346 A.2d 66, 67-68 (N.J. 1975)). Justice Sullivan of the Supreme Court of New Jersey illustrated the relevant line of reasoning when a state court is presented with a situation where the federal Constitution applies, but the state constitution may afford the defendant expanded protections. *Id.* Initially, Justice Sullivan conceded United States Supreme Court decisions were controlling on state court decisions but then considered whether the New Jersey Constitution counterpart could afford more protection. *Id.* Ultimately, he reasoned while the federal Constitution and the state Constitution were “in haec verba,” the state supreme court has “the right to construe [the] state constitutional provision in accordance with what we conceive to be its plain meaning.” *Id.*

⁶⁰ *Id.* at 500; *see, e.g.*, *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding a search incident to a lawful arrest is automatically considered reasonable under the Fourth Amendment: “[A] search incident to the arrest requires no additional justification [for Fourth Amendment purposes.]”); *State v. Kaluna*, 520 P.2d 51, 58 (Haw. 1974) (holding searches incident to arrest are held to a test of reasonableness: “We have not hesitated . . . to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted.”); *see also State v. Sklar*, 317 A.2d 160, 165 (Me. 1974) (holding the Maine Constitution guarantees the right to trial by jury in all criminal proceedings); *Parham v. Mun. Ct.*, 199 N.W.2d 501, 505 (S.D. 1972) (holding an individual has a right to trial by jury even for petty offenses, such as driving while intoxicated); *cf. Baldwin v. New York*, 399 U.S. 66, 68 (1970) (holding petty offenses may be tried without a jury and do not constitute a violation of the Sixth Amendment); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding the Fourth Amendment guarantees trial by jury for criminal offenses).

⁶¹ Brennan, *supra* note 57, at 502. Cases and controversies adjudicated in front of the Supreme Court do not lead to cookie-cutter decisions that can be applied to state court proceedings perfectly. *Id.*

special attention to the underlying policies when determining if the state would benefit from an identical decision.⁶² Constitutions, including state counterparts, are living documents requiring adaptation to evolving needs of Americans.⁶³ What is determined to be progress for the federal system does not have to overflow to a state system.

At the state level, supreme courts recognize the benefits of the exclusionary rule and the necessity of removing evidence obtained from the denial of a constitutional right. As motivation for adopting a state exclusionary rule, the Vermont Supreme Court recognized, “[i]ntroduction of such evidence at trial eviscerates our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct.”⁶⁴

B. The Skewed Cost-Benefit Analysis

The *Davis* holding explicitly condones objectively reasonable reliance on binding appellate precedent because deciding otherwise would be detrimental to “the truth and the public safety.”⁶⁵ The Court dramatically describes a “heavy toll” on the judicial system from the exclusion of relevant evidence in criminal cases.⁶⁶ Excluding evidence and setting an impliedly guilty criminal free is a “bitter pill” in comparison to the relatively small

⁶² Justice Brennan cautioned:

[S]tate court judges . . . do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

Id. at 502.

⁶³ “[T]he adaptability of [a constitution’s] great principles to cope with the problems of a developing America Constitutions are not ephemeral documents [O]ur contemplation cannot be only of what has been but of what may be.” *Id.* at 495.

⁶⁴ *State v. Badger*, 450 A.2d 336, 349 (Vt. 1982).

⁶⁵ *Davis v. United States*, 131 S. Ct. 2419, 2423 (2011).

⁶⁶ *Id.* at 2427. “The analysis must also account for the ‘substantial social costs’ generated by the [exclusionary] rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence.” *Id.* (citations omitted).

benefits realized from suppression.⁶⁷ Police officer flagrancy is the only factor recognized by the court tipping the scale to where the benefits actually exceed the costs. A police officer's conduct cannot be influenced by the apprehension of exclusion unless there is some cognitive recognition their conduct is wrong and could warrant unwanted suppression of evidence.⁶⁸ Merely negligent law enforcement actions are less than culpable and do not provide the necessary deterrent benefit.⁶⁹ In differentiating police actions from purposeful to carelessness, the cost-benefit analysis employed to expand the good faith exception returns completely different results.

A general theme in the Court's Fourth Amendment adjudication is a cost-benefit analysis comparing the inherent costs of exclusionary rule application and the benefit of Fourth Amendment violation deterrence. Costs outweighing benefits has driven the policy basis for good faith exception application.⁷⁰ In a reasonable reliance context, the Court determined the deterrence benefits are minimal in practice for two reasons. First, it is unreasonable to gain meaningful deterrence from police reliance when they are relying on a non-police officer's Fourth Amendment search justification.⁷¹ Second, the exclusionary rule has little bearing on the conformity of non-police actors' behavior.⁷² Thus,

⁶⁷ *Id.* at 2427. "[The] bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Id.* (citations omitted).

⁶⁸ *Id.* at 2427 (citing *United States v. Herring*, 555 U.S. 135, 144 (2009)) (Justice Alito reiterated, "When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." (internal quotation marks omitted)).

⁶⁹ *Id.* at 2427.

⁷⁰ Specifically, the costs realized by the exclusionary rule are: probative evidence being excluded from trial and a wrongdoer going free. The benefits realized by the exclusionary rule are protection against unreasonable search, seizure and meaningful deterrence against bad police behavior, and law enforcement integrity. *United States v. Leon*, 468 U.S. 897, 906-08 (1984).

⁷¹ When a police officer reasonably relies on the judgment of a neutral magistrate, they are adhering their conduct to the determination of a judge, regardless if the judge is wrong in the ruling. In such case, the police officer has acted reasonably, and no culpable behavior may be deterred.

⁷² *Leon*, 468 U.S. at 917 ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected

the Court has diluted the seemingly beneficial deterrence of poor police conduct to appear to not even be a real benefit at all.

The cost-benefit analysis provides a “narcotic effect” and neglects actual factors in the cost-benefit action.⁷³ The singular benefit recognized as only police deterrence is skewed because a benefit is not factored in the form of the upholding of a constitutional right. The benefit side of the scale wrongfully focuses on police deterrence, implying deterrence is only useful at the crime scene. In his *Leon* dissent, Justice Brennan scolded the Court for their nonchalant dismissal of the benefits of the exclusionary rule.⁷⁴ He stressed the “fundamental constitutional importance” served by excluding wrongfully obtained evidence.⁷⁵ By referring back to the original intentions of the Framers, Justice Brennan illustrated the Amendment’s “commitment to protecting individual liberty and privacy.”⁷⁶ To him, deterring police conduct

significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors”). The *Leon* majority advocated the exclusionary rule has little deterrent value on non-police actors such as court clerks, magistrates, and legislatures for three reasons. First, the exclusionary rule primarily deters police misconduct. *Id.* at 916 (“[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.”). Second, non-police actors have little incentive to violate the Fourth Amendment because their primary function is not to collect condemning evidence. *Id.* at 913-914 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (“[A] search warrant ‘provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’” (citation omitted)). Third, exclusion does not prevent neutral actors from making erroneous decisions because they have no stake in the outcome of criminal prosecutions. *Id.* at 917 (“Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors”).

⁷³ *Id.* at 929 (Brennan, J., dissenting). Justice Brennan illustrated the costs of the exclusionary rule “loom to exaggerated heights” and the benefits “are made to disappear with a mere wave of the hand.” *Id.* at 929. He made it clear the Court had obviously inflated the benefits realized and downplayed the costs suffered.

⁷⁴ *Id.* at 929 (“[I]t is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the ‘costs’ of excluding illegally obtained evidence loom to exaggerated heights and where the ‘benefits’ of such exclusion are made to disappear with a mere wave of the hand.”).

⁷⁵ *Id.* at 930.

⁷⁶ *Id.* Justice Brennan explained, “[W]hat the Framers understood then remains true today—that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of

is an important goal we want to achieve, but the weight of our constitutional rights should be the motivation of the exclusionary rule.⁷⁷ He believed our constitutional rights have been forfeited for a “seductive call of expediency” and found the threat to our civil liberties troubling.⁷⁸ Parallel to how preceding justices have reacted before him, Justice Brennan upheld the theme that admitting wrongfully obtained evidence rescinds the true meaning of the Fourth Amendment.⁷⁹

A line has been wrongfully drawn between constitutional rights, police actions, and court decisions.⁸⁰ Looking at Court precedent in another way, an individual’s Fourth Amendment rights are retired at the time of the illegal search.⁸¹ When, in actuality, Fourth Amendment rights include both the right to be free from an unreasonable search but also the right to be free from adjudication involving illegally obtained evidence.⁸² The wrongfully discovered evidence and personal constitutional right violation should not be used against a suspect. Implying the right should not stop at the crime scene invokes the need for deterrence

expediency into forsaking our commitment to protecting individual liberty and privacy.” *Id.* at 929-30.

⁷⁷ *Id.* The Framers’ aim was to “permanently and unambiguously [restrict unreasonable searches and seizures] in order to preserve personal freedoms.” *Id.* at 930.

⁷⁸ *Id.*

⁷⁹ A recurring theme in Fourth Amendment case opinions is a concern of reducing the Amendment to its mere words. The court in *Weeks* explained:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and . . . might as well be stricken from the Constitution.

Weeks v. United States, 232 U.S. 383, 393 (1914). It is a part of the Constitution requiring more than its words to ensure its protections are fully realized by the American people. For this reason, the exclusionary rule was judicially-created and, as a result, so much controversy has stemmed from its implementation.

⁸⁰ *Leon*, 468 U.S. at 935.

⁸¹ *Id.* (“[T]he substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual’s privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.”).

⁸² The Fourth Amendment includes, “a personal right to exclude all evidence secured by means of unreasonable searches and seizures. 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.” *Id.*

of the judiciary. Contrary to the philosophy of the *Leon* majority, the judiciary's admittance of illegally seized evidence connects a "single governmental action" to the illegal search.⁸³ The "evidence-gathering role of the police" and the "evidence-admitting function of the courts" function together to put criminals behind bars.⁸⁴ If the Amendment is to have any functional meaning, the police and the courts cannot be "[c]onstitutional strangers."⁸⁵ So, imposing limitations on one function does little to affect the process as a whole. "The Amendment . . . must be read to condemn not only the initial unconstitutional invasion of privacy—which is done . . . for the purpose of securing evidence—but also the subsequent use of any evidence so obtained."⁸⁶

Because the Court is so hesitant to apply the exclusionary rule and keeps recognizing nuance exceptions to the rule, constitutional protections end at the crime scene.⁸⁷ At trial, defendants are further denied the rights the Framers were cognizant to include in the Bill of Rights. Whether the denial of rights occurs at the crime scene or at trial, each represents a violation of a person to be "free from unreasonable searches and seizures."⁸⁸ Thus, the costs of the good faith exception weigh heavily against the benefits so greatly valued at our nations inception.

Justice Stevens reiterated this protection of fundamental rights in his dissent in *Arizona v. Evans*.⁸⁹ Instead of focusing the sole purpose of the exclusionary rule on police deterrence, he noted the rule also serves to "merely [place] the Government in

⁸³ *Id.* at 933.

⁸⁴ *Id.*

⁸⁵ *Id.* at 938.

⁸⁶ *Id.* at 934. "[A]dmission of improperly seized evidence denigrates the integrity of the judiciary—judges become accomplices to unconstitutional executive conduct." *State v. Gutierrez*, 863 P.2d 1052, 1068 (N.M. 1993).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1067. "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." U.S. CONST. amend. IV.

⁸⁹ 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) ("The Court seems to assume that the Fourth Amendment—and particularly the exclusionary rule, which effectuates the Amendment's commands—has the limited purpose of deterring police misconduct. Both the constitutional text and the history of its adoption and interpretation identify a more majestic conception. . . . The Amendment is a constraint on the power of the sovereign, not merely on some of its agents.").

the same position as if it had not conducted the illegal search and seizure in the first place.”⁹⁰ His argument almost goes to say the weighing of poor police behavior deterrence versus suppressing truthful evidence should not be the focus of exclusionary rule debate. Because the police are no better off than if they had respected the individual’s constitutional rights in the first place, the exclusionary rule should be more freely exercised.

C. Fourth Amendment Litigation as an Exclusionary Rule Benefit

1. Motivating Defendants to Raise Claims

The Fourth Amendment is only vibrant if defendants bring claims to afford courts the opportunity to expand and enforce the right. Fourth Amendment litigation battles a recurring tension between the government’s interest in public safety and the public’s interest in controlling excessive government power.⁹¹ Sometimes, the pendulum swings too far, and the balance shifts dramatically in one of the interests’ directions.⁹² After the *Davis* opinion, the balance has shifted too far in the government’s favor. By allowing searches based on objectively reasonable reliance on binding appellate precedent by law enforcement, the government has opened an exception too far to preserve citizens’ rights. Prior Supreme Court decisions permitted the possibility of relief if the Court could be persuaded the law enforcement officer was relying on unconstitutional law.⁹³ Now, too many avenues exist for courts to find the search valid and the exclusionary rule inapplicable.

⁹⁰ *Id.* at 19 (citation omitted).

⁹¹ Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1089 (2011).

⁹² The Court has recognized this need for an evaluation of the balance of interests. “[T]he question in every case must be whether the balance of legitimate expectations of privacy, on the one hand, and the State’s interests in conducting the relevant search, on the other, justifies dispensing with the warrant and probable-cause requirements that are otherwise dictated by the *Fourth Amendment*.” *Samson v. California*, 547 U.S. 843, 864 (2006) (Stevens, J., dissenting) (emphasis added).

⁹³ See *Illinois v. Krull*, 480 U.S. 340, 355 (1987), for the discernment that “a law enforcement officer [cannot] be said to have acted in good-faith reliance . . . if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.”

Opponents of the exclusionary rule fail to realize if the police had followed accepted Fourth Amendment precedent from the start, the condemning evidence would not have been gathered and the defendant would still be free.⁹⁴ They contend the high costs of exclusion are not countered by some significant benefits. The Court clings to this cost-benefit analysis as a proponent of the good faith exception.⁹⁵ Yet, it is naïve to argue evidence should be admitted anyway when it is obtained from a constitutional violation. The exercise of a constitutional right should weigh significantly against any reciprocal cost.

Instead, an emphasis should be placed on law enforcement education. Studies have shown the exclusionary rule to be of weak specific deterrent value to police officers.⁹⁶ Arguments have been made that police are more preoccupied with seizing prosecutable evidence than successful prosecution.⁹⁷ A problem arises for law enforcement departments, not just the court system. As a result, constitutional violations occur. Rather than expanding good faith exceptions to remedy this psychological occurrence, police departments need to invest more in better investigation education and continuing education as laws change.⁹⁸ Thus, police officers

⁹⁴ See Stewart, *supra* note 53, at 1392.

⁹⁵ See *supra* Part II.B.

⁹⁶ L. Timothy Perrin et al., *If it's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 737 (1998). Specific deterrence in an exclusionary rule situation would mean directly reprimanding the offending officer for his conduct. *Id.* at 722. "If the exclusionary rule is to have any specific deterrent effect, the offending officers must be apprised of the ruling and the reasons for it." *Id.* The exclusionary rule alone seeks to promote general deterrence, but it is not completely effective as Fourth Amendment violations still occur and the good faith exception is still needed. But, specific deterrence, and by example, general deterrence, can be promoted if defendants raise claims.

⁹⁷ Stewart, *supra* note 53, at 1395.

⁹⁸ Perhaps, police officers need a little "skin" in the game. A suggested remedy for knock and announce violations has been to have police officers contribute to a "liquidated damages [fund to be paid to defendants] for violations of the knock and announce rule." K. Robert Schalburg, Comment, *Taking Advice from the Doctors in the Wake of Hudson v. Michigan: Modeling a Remedy for Knock and Announce Violations After the Indiana Medical Malpractice Act*, 34 OHIO N.U. L. REV. 267, 284 (2008). Just as Schalburg suggested for this fund to cover the paying of damages for knock and announce violations, similar state funds could be created to cover general Fourth Amendment violations—or specifically, for failed claims of violations related to reasonable reliance on binding appellate precedent. *Id.* at 285. More importantly, this reservoir of funds should be used to support police education. *Id.* The benefits will be

will be better prepared for investigations and avoid Fourth Amendment violations. Skeptics of this solution may argue completely doing away with the exclusionary rule would better resolve this substantial problem. Yet, our society cannot simply do away with the Fourth Amendment. While imperfect, the exclusionary rule serves a noble goal, appreciated by a nation grounded in principles of personal freedom.⁹⁹

2. Avoiding Asymmetrical Claims between States and Defendants

The incentives for Fourth Amendment litigation are constrained by the result in *Davis*. Defendants face two losing fates. First, they lose on the merits of their Fourth Amendment claim. Second, they lose under this expansion of the good faith exception—the evidence is still admitted.¹⁰⁰ Defendants have little incentive to challenge Fourth Amendment precedent because in either case, they are going to jail. On the other end of the spectrum, prosecutors, or the government, will still have an incentive to challenge broad Fourth Amendment protections. If the prosecution wins in the first place, the evidence is admitted. If they lose, the case may still be appealed to a higher court, and the evidence may still be admitted with the higher court restricting the individuals' Fourth Amendment rights. In either situation, the government faces no discouragement of claims. Justice is not fairly encouraged to both defendants and prosecutions.

This is troubling in a state setting. States should offer more constitutional protections for their citizens than the federal government provides. When the incentives to litigate are so asymmetrical, the evolution of the law seems heavily weighted in

two-fold. First, law enforcement will be more cognizant of their actions as they are financially providing a cushion for their mistakes. *Id.* Secondly, the unused damages fund will be re-invested in their own education to provide double reinforcement of proper police conduct within the Fourth Amendment. *Id.*

⁹⁹ Many arguments can be made against the exclusionary rule and opposition to the judicially-created remedy is not new. “[C]ontinued vigilance by the courts is necessary to ensure that the rule, as well as other currently available remedies for unlawful searches and seizures, are faithfully applied.” Stewart, *supra* note 53, at 1395-96 (confronting arguments that the exclusionary rule is ineffective).

¹⁰⁰ Transcript of Oral Argument at *10, *Davis v. United States*, 131 S. Ct. 2419 (2011), 2011 U.S. Trans. LEXIS 22.

the government's favor. Meaning, state court opinions could veer to a point where constitutional rights are constrained and ignored.¹⁰¹ An outcome of this proportion is unconscionable. For that reason, state courts must guide Fourth Amendment litigation in a direction to preserve the exclusionary rule and limit the effect of *Davis*.

From a practical standpoint, citizens should enjoy the right to bring suit.¹⁰² Courts should be able to have the opportunity to review their own precedents. Without these polar forces, legal protections could become one-sided.¹⁰³ The perceived benefit of admitting almost all evidence under any circumstance as purported by the ruling in *Davis* comes with social costs.¹⁰⁴ State court systems would be wise to consider who will be bearing these costs and to strive to alleviate the burden as much as possible.¹⁰⁵

¹⁰¹ “[L]aw-developing litigation concerns where the law should go, not where it has been.” Orin Kerr, Fourth Amendment Remedies and Development of the Law: A Comment on *Camreta v. Greene* and *Davis v. United States* (Aug. 29, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1918991>. Our country needs litigation if we are to have material advancement of the law. By creating exceptions where the winner is always obvious, the judicial system is undercut.

¹⁰² Kerr, *supra* note 91, at 1089. Kerr asserts, “In an adversarial system premised on litigants making arguments and courts evaluating them, courts can arrive at optimal Fourth Amendment rules only if both sides of the balance make the best arguments on their respective sides.” *Id.*

¹⁰³ *Id.* (“The government is best suited to articulate the public’s interest in security from crime, and the defense is best suited to articulate the public’s interest in security from excessive government power. If one side lacks an incentive to point out how existing precedents weigh those interests, the law will, over time, become unbalanced. Being unbalanced, the law will be inaccurate . . .”).

¹⁰⁴ “The potential losses of law-developing litigation involve genuine social costs because law developing litigation typically involves facts in which the police are not acting culpably. Remedies against the police are easy to justify when officers act in flagrant violation of the law.” See Kerr, *supra* note 101.

¹⁰⁵ Kerr explained:

The point of the litigation is the direction of appellate case law, not the culpability of individual officers. As a result, the costs of remedies when the police lose law-developing litigation are at best a necessary evil. Those costs will be imposed either on society as a whole or else on individual officers who did not act culpably.

Id.

D. The Davis Exception Has No Obvious Stopping Point

1. What Counts as Reasonable Reliance on Binding Appellate Precedent?

In her concurrence, Justice Sotomayor agreed with the Court's disposition but questioned if Fourth Amendment violations can be deterred by exclusion when the underlying law is unsettled.¹⁰⁶ Her question asks if reasonable deterrence can be had when a police officer wrongfully obtains evidence in a way not specifically condoned by precedent (i.e., by *Krull*, *Evans*, or *Massachusetts v. Sheppard*), and a court includes the evidence anyway.¹⁰⁷ How do courts define binding appellate precedent?

Judges have begun applying *Davis*, and the initial aftermath is a “mess.”¹⁰⁸ In *United States v. Jones*, the Court held GPS device attachment to an automobile constitutes a search under Fourth Amendment interpretation.¹⁰⁹ Federal district courts applying *Jones* have already encountered complications from the *Davis* ruling.¹¹⁰ Binding appellate precedent disparity abounds.

¹⁰⁶ *United States v. Davis*, 131 S. Ct. 2419, 2435 (Sotomayor, J., concurring). Justice Sotomayor explained:

This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled Whether exclusion would deter Fourth Amendment violations where appellate precedent does not specifically authorize a certain practice and, if so, whether the benefits of exclusion would outweigh its costs are questions unanswered by our previous decisions.

Id. Justice Sotomayor makes it clear that “whether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled.” *Id.* at 2436. The latter question is left unresolved. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Kim Zetter, *Judges Drive Truck Through Loophole in Supreme Court GPS Ruling*, WIRED (Apr. 20, 2012, 6:30 AM), <http://www.wired.com/threatlevel/2012/04/dea-use-of-gps-tracker/>.

¹⁰⁹ 132 S. Ct. 945, 946 (2012). After *Jones*, police must obtain a search warrant before installing a GPS tracking device on a suspect's automobile.

¹¹⁰ See Memorandum Opinion and Order Regarding Defendant's Motion to Suppress GPS Systems, *United States v. Amaya*, No. CR 11-4065-MWB (N.D. Iowa filed Apr. 10, 2012). Amaya sought to suppress the incriminating GPS device evidence, which linked him to various drug distribution and money laundering charges. *Id.* The United States District Court for the Northern District of Iowa defined its binding appellate precedent within the Eighth Circuit to be “agents, who have reasonable suspicion that a suspect is using a vehicle for drug trafficking, do not need a warrant to use GPS monitoring . . .

The difference between suppressed or admitted GPS tracking evidence hinges on the circuit's stance on GPS usage pre-*Jones*¹¹¹—or even if no specific pre-*Jones* precedent exists.¹¹² Three circuits—the Seventh, Eighth, and Ninth—expressly ruled warrantless GPS tracking to be legal prior to the Supreme Court's ruling in *Jones*.¹¹³ Now, nineteen states, almost half the country, can use *Davis* to negate the exclusionary rule in cases founded on GPS tracking evidence. Persons located in the other thirty-one states enjoy full Fourth Amendment protections while everyone else is simply out of luck. The problem in defining binding appellate precedent is neither inherent in *Jones* nor the circuit's

when they attach the GPS device while the vehicle is in a public place.” *Id.* at 17 (citing *United States v. Marquez*, 605 F.3d 604, 610 (8th Cir. 2010)). The police did not have a warrant when using the GPS devices but were acting in compliance with *Marquez*. *Id.* at 18, 21. The judge found although the warrantless GPS usage violated *Jones* and the Fourth Amendment, the exclusionary rule did not apply pursuant to *Davis*. *Id.* at 22.

¹¹¹ Zetter, *supra* note 108.

¹¹² Orin Kerr, *District Court Rules That Mosaic Search Triggers Good Faith Exception Even Absent Binding Precedent*, VOLOKH CONSPIRACY (Apr. 9, 2012, 2:24 PM), <http://volokh.com/2012/04/09/district-court-rules-that-mosaic-search-triggers-good-faith-exception-even-absent-binding-precedent/>. In *United States v. Leon*, a GPS device monitored Leon's car for more than three months. No. CR 09-00452 JMS, 2012 WL 1081962 (D. Haw. Mar. 28, 2012). Leon moved to suppress the evidence under *Jones*. *Id.* The judge ruled *Davis* applied and the evidence could come in under Ninth Circuit precedent. *Id.* At this point, the judge's rationale was completely valid. *Id.* But, the judge went on to dismiss Leon's claim that the three-month, long term GPS tracking usage also fell under Ninth Circuit precedent. *Id.* But, no express prior precedent approves long-term usage in the Ninth Circuit. *Id.* The district court judge extended *Davis* so far as to encompass an area of law not strictly construed as binding appellate precedent. *Id.* This is the type of situation Justice Sotomayor warned would be “lurking in the background” of Fourth Amendment litigation to come. *Id.*

¹¹³ Zetter, *supra* at note 108. The Seventh Circuit includes Illinois, Indiana, and Wisconsin. *Id.*; see *United States v. Cuevas-Perez*, 640 F.3d 272 (7th Cir. 2011) (holding warrantless use of GPS tracking devices did not violate an offender's Fourth Amendment rights). This case was later vacated and remanded by the Supreme Court after the decision in *Jones*. See *Cuevas-Perez v. United States*, 132 S. Ct. 1534 (2012). The Eighth Circuit covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. Zetter, *supra* note 108; see *Marquez*, 605 F.3d at 610 (holding police do not need a warrant to use GPS monitoring for drug trafficking suspects). The Ninth Circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, the Mariana Islands, Montana, Nevada, Oregon, and Washington. Zetter, *supra* note 108; see *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010) (holding GPS tracking devices to be constitutional).

rulings prior to *Jones*.¹¹⁴ The problem in ambiguity arises from *Davis*.¹¹⁵

An obvious way to tighten this ambiguity is to define binding appellate precedent by changing the language used in case law. For example, in qualified immunity defenses, government officials avoid civil damages so long as their conduct does not offend “clearly established” rights.¹¹⁶ Courts could require binding appellate precedent be “clearly established” in order for law enforcement to reasonably rely on it for good faith exception purposes. From a uniformity of law standpoint, all the circuit courts need an agreement as to the applicable law. The United States has differentiated itself from the world by its societal value of individual, fundamental rights. Poor adherence to those rights would form an obstruction of justice. Prior Supreme Court cases have nodded to this “clearly established” or “well-established” standard,¹¹⁷ but the majority in *Davis* ignores it. The majority’s ignorance adds to the uncertainty of how the holding’s application will play out in practice. In the end, the application needs to be as narrow and defined as possible.

¹¹⁴ Zetter, *supra* note 108. Hanni Fakhoury, staff attorney for the Electronic Frontier Foundation, called *Davis*, “a really poorly-reasoned, not well-thought-out opinion . . .” and commented, “[T]he whole point of a Supreme Court ruling is to clarify the law and make it uniform across the country.” *Id.* He expected the problems from *Davis* to reoccur, especially as technology advances and new search methods are recognized. *Id.*

¹¹⁵ Kerr, *supra* note 112. “The *Davis* court offered a broad rationale to support a narrow holding, and then justified its holding against critiques by emphasizing its narrowness: It was inevitable that at least some courts would follow the broad rationale of *Davis* rather than stick to the limits of its narrow holding.” *Id.* This narrow holding has opened a broad spectrum of Fourth Amendment problems.

¹¹⁶ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), for the Supreme Court holding, “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”

¹¹⁷ See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (“Although both *Sheppard* and *Leon* involved the application of the ‘good faith’ exception to the Fourth Amendment’s general exclusionary rule, we have explained that ‘the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.” (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986))).

2. Why Would *Davis* Not Extend to any Reasonable Belief About the Law?

To control rogue law enforcement behavior, no gray area need exist for any questionable application of law. Binding appellate precedent is anything but black and white. If *Davis* is interpreted broadly, police have the incentive to “push the envelope,” resulting in constitutionally questionable searches and seizures. If the police are granted a safe haven for potentially illegal or merely questionable searches, an incentive exists for them to continually flirt with the line of what is allowed and disallowed under the Fourth Amendment. Police officers must follow the Fourth Amendment to the maximum. Reasonable belief about the applicable law implies individual discretion of decision makers. Unfortunately, individual discretion is met with disparity in application of the law. If the law is vague from the beginning, disparity is inevitable. “Consistency in the treatment of similar cases is possible only with a sufficiently clear and precise definition of an offense”¹¹⁸

Future litigation could experience police officers asserting they followed binding appellate precedent in situations with glaringly distinguishable facts.¹¹⁹ Law enforcement could also claim they followed the binding appellate precedent of a jurisdiction not their own.¹²⁰ Others could assert following binding appellate precedent is actually only dicta in another major holding of a comparable Fourth Amendment case.¹²¹ In all of these situations, the problem encompasses a dilemma in determining when, where, and how these different kinds of precedents do or do not count as relevant binding precedent. Pursuant to the *Davis* majority, any defendant in the preceding situations would not be able to invoke the exclusionary rule, and the ruling would utilize the vague binding appellate precedent exception.

¹¹⁸ PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 61 (2d ed. 2008).

¹¹⁹ *Davis v. United States*, 131 S. Ct. 2419, 2437 (2011) (Breyer, J., dissenting).

¹²⁰ *Id.*

¹²¹ *Id.*

III. WHAT STATES SHOULD DO IN THE WAKE OF *DAVIS*: THREE OPTIONS

To preserve a balance of power for further litigation, state courts interpreting their own state constitutional protections should reach a different result. State courts have a variety of options, but this Comment entertains three. First, states could choose to reject the good faith exception to the exclusionary rule completely. Second, states could recognize a good faith exception to the exclusionary rule but reject the holding in *Davis*. Third, states could recognize a good faith exception to the exclusionary rule but narrowly construe the holding in *Davis*.

A. *Reject the Good Faith Exception*

One solution to the problem created by *Davis* is for states to ignore the good faith exception. Completely rejecting the good faith exception for exclusionary rule application would preclude any binding appellate precedent debate. If the state has no good faith exception, then no situation would present itself to apply objectively reasonable reliance on binding appellate precedent.

The Pennsylvania Superior Court does not recognize the good faith exception.¹²² In *Commonwealth v. Arnold*,¹²³ the Pennsylvania Superior Court refused to apply the good faith exception when police officers obtained evidence from what they reasonably believed in good faith to be a common area of an apartment building.¹²⁴ In *Arnold*, Arnold was searched after police officers entered an unlocked door of an apartment building and observed him pass a marijuana pipe to another person.¹²⁵ Law enforcement did not have a warrant, failed to prove the exigency of the circumstances, and did not exhibit probable cause

¹²² *Commonwealth v. Edmunds*, 586 A.2d 887, 899 (Pa. 1991) (“[O]ur Constitution has historically been interpreted to incorporate a strong right of privacy . . . even where a police officer in ‘good faith’ carrying out his or her duties inadvertently invades the privacy or circumvents the strictures of probable cause. To adopt a ‘good faith’ exception to the exclusionary rule . . . would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years.”).

¹²³ 932 A.2d 143 (Pa. Super. Ct. 2007).

¹²⁴ *Id.* at 144.

¹²⁵ *Id.*

necessary for arrest.¹²⁶ Arnold was charged with marijuana and drug paraphernalia possession.¹²⁷ He moved to suppress the evidence, and the trial court denied the motion.¹²⁸ On appeal, the Pennsylvania Superior Court found the police officers were not legally entitled to be inside the apartment.¹²⁹ The court ruled, “[T]o the extent the trial court found that the intrusion was justified based upon the officers’ good faith belief that they were entering a common area of the apartment building, [they were] . . . in error.”¹³⁰ Because Pennsylvania state courts have yet to apply a good faith exception to the exclusionary rule, *Davis* application is not entertained. If a law enforcement officer in Pennsylvania performs an illegal search then asserts he was objectively relying on binding appellate precedent, the evidence will be quashed. No good faith exception is ever applied, thus only legally obtained evidence is used.¹³¹ Rights are preserved in the most direct way possible, ensuring unadulterated exercise of the Fourth Amendment.

Vermont also does not recognize the good faith exception.¹³² In contrast to Pennsylvania who denies the exception for privacy reasons, the state made clear in *State v. Oakes* it was not persuaded by the United States Supreme Court’s cost-benefit analysis in *Leon*. The Vermont Supreme Court scolded the United States Supreme Court’s “inconsistency” in *Leon* of weighing exclusionary rule costs as “substantial,” but then conceding the

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 148.

¹³⁰ *Id.* “Our Supreme Court has specifically ruled that there is no good faith exception to the exclusionary rule.” *Id.* (citation omitted).

¹³¹ See generally *State v. Marsala*, 579 A.2d 58 (Conn. 1990); *State v. Guzman*, 842 P.2d 660 (Idaho 1992); *State v. Novembrino*, 519 A.2d 820 (N.J. 1987); *State v. Carter*, 370 S.E.2d 553 (N.C. 1988); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); *State v. Oakes*, 598 A.2d 119 (Vt. 1991).

¹³² Vermont’s initial case questioning state court recognition of the federal rule was *State v. Oakes*, 598 A.2d 119 (Vt. 1991). In *Oakes*, marijuana was seized from a residence pursuant to a search warrant. *Id.* at 120. At trial, the defendant moved to suppress the evidence as the warrant was accompanied by an affidavit lacking probable cause. *Id.* The trial court denied the motion to suppress, declaring the detective acted in good faith and endorsing the *Leon* exclusionary rule. *Id.* The Vermont Supreme Court validated its adoption of the exclusionary rule under the state’s constitution but declined to introduce the good faith exception. *Id.* at 121.

research upon which the opinion relied concluded the costs were “insubstantial.”¹³³ Vermont’s highest court appreciated its reasoning in *Oakes* so much it continued to apply the logic in other constitutional proceedings.¹³⁴

The New Mexico Supreme Court rejected the good faith exception as contrary to the New Mexico Constitution’s protections.¹³⁵ The court affirmed the court of appeals’ decision

¹³³ *Id.* at 123 (citing *United States v. Leon*, 468 U.S. 897, 908 n.6 (1984)). The court specifically explained it would not adopt the good faith exception because there was simply not enough convincing evidence the costs of exclusion truly outweighed the benefits. *Id.* The court was logical in explaining, “[p]olice compliance with the exclusionary rule produces a non-event which is not directly observable—it consists of *not* conducting an illegal search.” *Id.* at 126 (quoting Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner’s Economic Analysis of Law*, 57 WASH. L. REV. 647, 653 (1982)). Meaning, it is difficult to collect applicable data when the circumstances leading to exclusionary rule relevancy are rarely culpable. If the police were aware they were conducting an illegal search, they probably would not do it in the first place. The Vermont Supreme Court concluded by refusing to “impose such a significant limitation upon our state exclusionary rule on the basis of the Court’s cost-benefit analysis in *Leon*.” *Id.* at 126-27.

¹³⁴ *See also* *State v. Peterson*, 923 A.2d 585 (Vt. 2007). The issue in *Peterson* was “whether physical evidence obtained as a result of a violation of defendant’s *Miranda* rights must be excluded at trial.” *Id.* at 586. *Peterson* had consented to a police search but then at trial moved to suppress the evidence, asserting the officers violated his rights by not administering the required *Miranda* warnings. *Id.* at 586-87. The substantive debate in *Peterson* concerned the Fifth Amendment of the United States Constitution and Article 10 of the Vermont Constitution, providing protections against self-incrimination. *Id.* at 590. Yet, the Vermont Supreme Court decided the rationale of the *Oakes* decision applied equally to the self-incrimination issue and reiterated its “independence from the federal doctrine dealing with the exclusionary rule.” *Id.* at 591. The court ultimately suppressed the evidence gained from the *Miranda* violation. *Id.* at 593. The interrelational logic of the Fourth and Fifth Amendments is not uncommon. The Supreme Court has previously considered a genuine relation between the amendments, and they “run almost into each other.” *See Boyd v. United States*, 116 U.S. 616, 630 (1886). It is important to note *Boyd* was a civil, rather than a criminal, case, and a search and seizure did not occur. *Id.* at 617-18. Rather, the defendant was forced to forfeit incriminating evidence against himself to law enforcement officials. *Id.* *See generally* Stewart, *supra* note 53, at 1372-74.

¹³⁵ *State v. Gutierrez*, 863 P.2d 1052, 1053 (N.M. 1993) (holding “the good-faith exception is incompatible with the guarantees of the New Mexico Constitution that prohibit unreasonable searches and seizures and that mandate the issuance of search warrants only upon probable cause”). In *Gutierrez*, the defendant sought to suppress evidence from an unannounced entry of his residence authorized by a search warrant, later held invalid. *Id.* at 1054. The issue was “whether evidence obtained by virtue of an invalid search warrant nevertheless may be admitted under the exclusionary rule’s ‘good-faith’ exception as articulated by the United States Supreme Court in *United States v. Leon*.” *Id.* at 1053.

which called the *Leon* cost-benefit analysis “exaggerated.”¹³⁶ The court of appeals explicitly cited and supported Justice Brennan’s assertion stating little evidence exists to truly prove a substantial number of guilty defendants go free as a result of the exclusionary rule.¹³⁷ Rebuking the understatement of exclusionary rule benefits, the New Mexico Court of Appeals believed the good faith exception would destroy the probable cause requirement as police could always allege they acted in reasonable reliance on a warrant.¹³⁸ The New Mexico Supreme Court accused the good faith exception for “swallow[ing] the constitutional requirement of probable cause.”¹³⁹ Focusing on the underlying constitutional right, the court refused to simply “turn the other cheek” and ignore police error.¹⁴⁰

Justice Breyer highlighted this main concern in his *Davis* dissent.¹⁴¹ The good faith exceptions encompassing reliance on binding appellate precedent is uncontrollable. Police officers can still contend they were relying on some verifiable law even if they cognitively were not. Justice cannot be based on lies. Justice cannot even be based on a mere glimpse of the truth. The gray area subsumed by *Davis* unleashes the possibility for inaccuracy and inconsistency in police enforcement. It creates an easy default excuse for police officers in the event of an illegal search. It ignores the necessary honesty the good faith exception implies.

¹³⁶ *Id.* at 1054.

¹³⁷ *State v. Gutierrez*, 819 P.2d 1332, 1336 (N.M. Ct. App. 1991); *see also supra* Part II.B.

¹³⁸ *Id.* at 1336-37. The court reasoned application of the good faith exception would remove any incentive for police officers to not commit invasions of privacy. *Id.* at 1337. Police officers are remunerated for obtaining convictions. *Id.* Good faith exception application would only foster police officer ignorance of the law in order to procure more evidence and convict more criminals. *Id.* at 1337. The unavoidable result is rampant illegal police activity—the quandary the exclusionary rule and the Fourth Amendment condemn in the first place. *Id.*

¹³⁹ *Gutierrez*, 863 P.2d at 1054.

¹⁴⁰ The court did not emphasize *Leon*’s value on the deterrent function of the exclusionary rule. *Id.* at 1067. To preserve the constitutional rights of New Mexico citizens, the court focused on the need for citizens to be free of unreasonable searches and seizures. *Id.* (“The approach we adopt today focuses not on deterrence or judicial integrity, nor do we propose a judicial remedy; instead, our focus is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure.”). The court ultimately took a strict constitutional approach.

¹⁴¹ See *supra* notes 48-52 and accompanying text for a full discussion of Justice Breyer’s dissent.

Good faith behavior entails a truthful declaration the action was not purposefully taken for malice or other reasons. Thus, a bright-line denial of the good faith exception removes the uncertainty when mental status cannot be completely determined—or just the mere possibility—the police officer was honestly acting in good faith.

While this seems like the simplest solution to control the problems created by *Davis*, it opens up even more policy issues. First, law enforcement may experience over-deterrence. If police officers know wrongfully obtained evidence will be thrown out, they may become too cautious in investigations, leaving valuable evidence unfound. As a result, a criminal may go free. When the good faith exception is not even considered, a bright-line exclusionary rule separates evidence correctly obtained which can convict a defendant and evidence incorrectly obtained which can convict a defendant but is suppressed because of a Fourth Amendment violation. When the exclusionary rule is applied to valid evidence, criminals remain unapprehended. While this solution is the simplest, complications arise, and courts must be informed of such.

B. Recognize the Good Faith Exception But Reject Davis

Another solution to the issue left unresolved by *Davis* would be for states recognizing the good faith exception to the exclusionary rule to ignore the majority opinion in *Davis*. Meaning, the state could still interpret their constitutions as accepting a good faith exception but would not extend it so far as to include reliance on binding appellate precedent as found in *Davis*. State courts have applied this selective reasoning to prior Supreme Court decisions expanding the scope of the good faith exception. For example, Illinois recognizes the good faith exception established by *Leon*.¹⁴² But, the state has abstained from applying the *Krull* extension when police officers rely on a state statute

¹⁴² The good-faith exception was first recognized in Illinois in *People v. Stewart*. 473 N.E.2d 1227, 1233 (Ill. 1984) (“Even if one assumes a want of particularity in the affidavits, the agents’ reasonable and good-faith belief, although a possibly mistaken one, that the searches were authorized under the warrants, insulated the searches from a motion to suppress.” (citation omitted)).

later determined to be unconstitutional.¹⁴³ In *State v. Krueger*, law enforcement searched Krueger's home unannounced.¹⁴⁴ He was convicted of possession of a controlled substance, possession of a controlled substance with intent to deliver, and armed violence.¹⁴⁵ The no-knock statute under which the search was conducted was later held unconstitutional.¹⁴⁶ Krueger moved to quash the evidence, and the state urged the Court to recognize the good faith exception from *Krull*.¹⁴⁷ The Court refused to do so and suppressed the evidence.¹⁴⁸

C. Recognize Davis But Strictly Define Binding Appellate Precedent

Further, states could recognize the good faith exception to the exclusionary rule but extend the *Davis* opinion very narrowly. States who ultimately chose to accept and apply the *Davis* nuance face an even bigger challenge in consistently applying the rule to various circumstances. Each opportunity for binding appellate precedent exception application will hinge on the police officer's perception of the evidence-gathering situation. Every arresting setting is different. Thus, applying a uniform rule based on such

¹⁴³ Initially, the Illinois Supreme Court declined to recognize *Krull* in *People v. Bessler*. 548 N.E.2d 52 (Ill. App. Ct. 1989). The Illinois Supreme Court also refused to adopt the extended good-faith rule recognized by *Krull* in *People v. Krueger*. 675 N.E.2d 604 (Ill. 1996). In that case, the court considered the interests specified by the Illinois Constitution to "balance the legitimate aims of law enforcement against the right of our citizens to be free from unreasonable governmental intrusion." *Id.* at 612. It found citizens' rights weigh more heavily by reasoning:

We are not willing to recognize an exception to our state exclusionary rule that will provide a grace period for unconstitutional search and seizure legislation, during which time our citizens' prized constitutional rights can be violated with impunity. We are particularly disturbed by the fact that such a grace period could last for several years and affect large numbers of people. This is simply too high a price for our citizens to pay. We therefore conclude that article I, section 6, of the Illinois Constitution of 1970 prohibits the application of *Krull*'s extended good-faith exception to our state exclusionary rule.

Id.

¹⁴⁴ *Id.* at 606.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See *supra* note 17-18 and accompanying text.

ambiguity, as the binding appellate precedent rule, will require state courts to be as rigid and conservative with the application as possible. A state's acceptance of a good-faith exception nuance does not mean it is automatically applicable in a seemingly relevant case. Thus, states should recognize *Davis* but strictly define binding appellate precedent.

States should look to the plain language of a rule when strictly defining binding appellate precedent. Following binding appellate precedent should not apply when the police rely on a completely irrelevant law—sufficiently incorrect or mistakenly applied. For example, Massachusetts recognizes the good faith exception and specifically ratified the nuance established by *Arizona v. Evans*.¹⁴⁹ Yet, in *Commonwealth v. Miller*, the Appeals Court of Massachusetts suppressed evidence from an illegal traffic stop based on a mistake of law.¹⁵⁰ The police officer arrested Miller under a statute he believed applied to the situation, but in reality, Miller had broken no law.¹⁵¹ The officer's mistake of law was the catalyst causing the officer to stop Miller in the first place.¹⁵² Without the illegal stop, the officer would never have known Miller was driving under the influence.¹⁵³ The Appeals Court of Massachusetts recognized evidence may still be admitted

¹⁴⁹ See, e.g., *Commonwealth v. Wilkerson*, 763 N.E.2d 508, 511 (Mass. 2002) (holding when an officer arrests a defendant based on information and records provided by an independent agency and those records turn out to be erroneous, the arrest may be upheld because the officer had not erred and thus, there was no "unlawful conduct for exclusion of the evidence to deter").

¹⁵⁰ In *Commonwealth v. Miller*, Miller was charged with driving under the influence after he was stopped because a stripe covered part of his Massachusetts license plate. 944 N.E.2d 179, 180 (Mass. App. Ct. 2011). The stripe did not cover the license plate number, month of registration, or the word "Massachusetts." *Id.* The police officer pulled Miller over only because the phrase "Spirit of America" was obscured, not for any other reason meriting a stop. *Id.* The Massachusetts statute governing the officer's motivation for the stop does not concern the obstruction of sayings on a license plate, only the license plate numbers. The issue was "whether evidence of operating a motor vehicle under the influence of alcohol was obtained in violation of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights and . . . whether it is admissible at trial . . ." *Id.* at 181 n.2.

¹⁵¹ *Id.* at 181.

¹⁵² *Id.* at 183 ("The trooper did not have any basis to stop the defendant; therefore the stop was improper and the evidence obtained as a result of that stop must be suppressed.").

¹⁵³ *Id.*

when an officer relies on a law later deemed unconstitutional.¹⁵⁴ It distinguished this situation as an officer relying on a law the defendant had not violated in first place. The court declined to address the validity of the statute and granted the motion to suppress.¹⁵⁵

States interpreting good faith reliance on binding appellate precedent should strictly be limited to their own judicial decisions. The judiciary interprets the law. It is not the police officer acting as he has interpreted the law, and then, the judiciary accepting the police officer's interpretation as valid that is the law maker.¹⁵⁶ If we allow police officers to act and then the judiciary condones their vague interpretation of precedent as good faith reliance, the system has "create[d] a legal chaos based on individual selectivity."¹⁵⁷ It is concerning to imagine the law evolving in the direction led by police officers rather than judges, who are legal scholars in their own right and know the true meaning of the Fourth Amendment. This principle is best illustrated through the holding in *New York v. Marrero*. In *Marrero*, the court held a defendant's mere misinterpretation of a statute did not absolve him of liability.¹⁵⁸ The same can be related to police officer

¹⁵⁴ *Id.* at 182 ("Federal and State decisional law has held that when a police officer objectively and reasonably relies on an act of another government body (such as a legislative enactment or agency records) and the actions of that government body are later determined to be incorrect or invalid, evidence obtained by the otherwise proper actions of the police need not be suppressed.").

¹⁵⁵ *Id.* at 183 ("As a matter of prudence, we should not address the validity of a regulation unless it is necessary to do so.").

¹⁵⁶ From a policy standpoint, people should be encouraged "to read and rely on official statements of the law, not to have individuals conveniently and personally question the validity and interpretation of the law and act on that basis." *New York v. Marrero*, 507 N.E.2d 1068, 1071 (N.Y. 1987).

¹⁵⁷ *Id.*

¹⁵⁸ Julio Marrero was convicted of third-degree criminal possession of a weapon. *Id.* at 1068. Marrero was a federal corrections officer while the New York Penal Law allows only peace officers to "carry a weapon with legal impunity." *Id.* at 1069. Marrero claimed, "[T]here were various interpretations of fellow officers and teachers, as well as the peace officer statute itself, upon which he relied for his mistaken belief." *Id.* Specifically, he claimed he reasonably relied on his interpretation of the statute, and this should excuse him from liability. *Id.* The issue in this case was "whether [Marrero's] personal misreading or misunderstanding of a statute may excuse criminal conduct in the circumstances of [his] case." *Id.* Marrero further argued the statute was ambiguously worded and he followed his "reasonable" interpretation of an "official statement." *Id.* at 1070. Essentially, he was arguing a mistake of law defense, much like a good-faith defense a police officer would argue for a Fourth Amendment search

interpretation of binding appellate precedent. The court should decide the relevant appellate precedent, apply the precedent to the instant case, and narrowly determine whether the police officer was truly acting on good faith reliance or on a separate personal interpretation. Further, *Marrero* stresses a broadly applied good faith standard for reliance on binding appellate precedent would only encourage questionable police behavior.¹⁵⁹ If state courts narrowly interpret *Davis*, the Fourth Amendment right is protected and any possibility of “the exception swallow[ing] the rule” is mitigated.¹⁶⁰

CONCLUSION

The good faith exception expansion by *Davis* creates an uncontrollable precedent for future Fourth Amendment litigation. The underlying right of an individual to be free from unreasonable search and seizure is ignored. It exploits a cost-benefit analysis based on empirical evidence and does little to truly support its conclusion. The opinion in *Davis* fails to address what constitutes binding appellate precedent when the underlying law is unsettled. Nor does it consider the unequal incentives for prosecutors and defendants to bring suit. Too much gray area for interpretation is created, and a situation arises for police officers to abuse discretion.

The most reasonable way to control the problem created by *Davis* is for state courts to expand unreasonable search and seizure protections under respective state constitutions. The original Fourth Amendment intentions must be preserved by the states regardless of the path of the federal courts. While our

and seizure violation. The New York State Court of Appeals ultimately held the defense of mistake was not applicable to *Marrero*'s situation because he was only mistaken of understanding the law. *Id.* at 1072.

¹⁵⁹ If we allow a broad interpretation of *Davis*, flagrant police behavior is encouraged, rather than promoting appropriate following of the law. *Id.* at 1073 (“Mistakes about the law would be encouraged, rather than respect for and adherence to law.”). The concern still remains that bad faith violations will still occur, so strict interpretation of *Davis* in state courts protects against such malicious and unspeakable violations from occurring. *Id.* (“Even more troublesome are the opportunities for wrong minded individuals to contrive in bad faith solely to get an exculpatory notion before the jury.”).

¹⁶⁰ *Id.* at 1073.

individual constitutional rights hang in the balance, state courts must limit the effects of *Davis*. States not recognizing the good faith exception can continue to reject it. States accepting the good faith exception may reject the decision in *Davis* while continuing to apply the good faith exception in other ways. States applying the reasoning in *Davis* may finely tailor the rule to control abounding application. The *Davis* holding represents a swaying of dominance from citizens' rights to government power. To preserve Fourth Amendment liberties, states must take the proper steps to preserve citizens' rights and defend the privilege to be free of unreasonable searches and seizures.

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