"This Bitter Pill": The Supreme Court's Distaste for the Exclusionary Rule in *Davis v. United States* Makes Evidence Suppression Impossible to Swallow

*George M. Dery III**

Introduction

In *Davis v. United States*, the Supreme Court held "that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule[1] does not apply."[2] This conclusion was reasonably predictable, given the recent trend in the Court's good faith exception precedent.[3] One could foresee the Court reasoning that police officers, in their daily patrols, are duty bound to lawfully execute the law as the courts interpret it. When in the field,

* Professor, California State University Fullerton, Division of Politics, Administration, & Justice; Former Deputy District Attorney, Los Angeles, California; J.D., 1987, Loyola Law School, Los Angeles, California; B.A., 1983, University of California Los Angeles.

1 The exclusionary rule, as established by the Court in *Weeks v. United States*, prohibited the admission at trial of evidence obtained in violation of the Fourth Amendment. Weeks v. United States, 232 U.S. 383, 398 (1914). The *Weeks* Court found the exclusionary rule necessary because allowing admission of evidence illegally seized by police would render Fourth Amendment protections against unreasonable searches and seizures to be "of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id*. at 393. In *Mapp v. Ohio*, the Court extended the exclusionary rule to apply in state courts when Fourth Amendment violations were committed by local officials. Mapp v. Ohio, 367 U.S. 643, 655 (1961). *Mapp* so held to stop the Fourth Amendment from being "an empty promise." *Id*. at 660. The *Mapp* Court declared that it could no longer permit the Fourth Amendment "to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment." *Id*. Since the exclusionary rule punished police illegality, the Court, in *United States v. Leon,* created an exception for situations where the error was committed by judges, rather than police. United States v. Leon, 468 U.S. 897, 905, 913 (1983). *Leon* noted that the exclusionary rule was "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Id*. at 916. When an officer acted objectively reasonably, excluding evidence did not promote Fourth Amendment protections. *Id*. at 919-20.

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

3 *See generally* Herring v. United States, 555 U.S. 135 (2009) (holding that the exclusionary rule does not apply when a warrant is found invalid due to error in police recordkeeping); Arizona v. Evans, 514 U.S. 1 (1994) (holding that the exclusionary rule does not apply when a warrant is found invalid due to court clerical error); United States v. Leon, 468 U.S. 897 (1983) (holding that the exclusionary rule does not apply when police reasonably rely on a warrant that is found invalid due to court error).

officers are hardly in a position to second-guess the wisdom of appellate opinions. While the Court's ultimate holding might seem unremarkable, its rationale was agitated and alarming. The rationale the Court advanced went well beyond its holding, amounting to an attack on the Fourth Amendment[4] exclusionary rule as nothing less than a "bitter pill" that society, for now, must swallow.[5] Its criticism of the exclusionary rule was gratuitous and curiously laden with emotional language,[6] which directly undermined the force and credibility of evidence suppression as a legitimate legal option.[7] Further, the Court shifted away from the good faith exception's traditional inquiry into identifying the wrongdoer,[8] to instead require a certain threshold level of police culpability.[9] If taken at face value, this interpretation of the good faith exception could swallow the exclusionary rule.[10] Finally, the Court's narrowed focus on police culpability could destroy its long-established compartmentalization of Fourth Amendment analysis[11] and also inject subjectivity into what is supposed to be a purely objective query—the reasonableness of police behavior.[12]

---

[4] The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

[5] *See Davis*, 131 S. Ct. at 2427.

[6] For instance, the Court refers to the exclusionary rule as a "bitter" and "harsh" remedy which provides criminals a "windfall." *Id.* at 2427, 2428, 2433-34.

[7] *See id.* at 2423-24.

[8] In *Leon*, the Court assessed the exclusionary rule's "behavioral effects" on various officials. United States v. Leon, 468 U.S. 897, 916 (1983). The Court determined that the exclusionary rule was "designed to deter police misconduct" rather than judicial mistakes. *Id*. The Court therefore focused on the officer as the potential wrongdoer and analyzed the exclusionary rule by considering whether it would "alter the behavior of the individual law enforcement officer." *Id*. at 918. Moreover, the Court continued to apply the good faith exception to the exclusionary rule with reference to the identity of the wrongdoer in *Arizona v. Evans*. Arizona v. Evans, 514 U.S. 1, 15-16 (1995).

[9] The *Davis* Court based exclusion on police behavior that was "deliberate, reckless, or grossly negligent." *Davis*, 131 S. Ct. at 2427 (quoting Herring v. United States, 555 U.S. 135, 144 (2009)) (internal quotation marks omitted).

[10] *See id.* at 2438-39 (Breyer, J., dissenting).

[11] Such compartmentalization can be seen in *Leon v. United States*, where the Court declared, "Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" Leon v. United States, 468 U.S. 897, 906 (1983) (quoting Illinois v. Gates, 462 U.S. 213, 223 (1983)).

[12] Whren v. United States, 517 U.S. 806, 813-14 (1996).

This Article begins in Part I with a review of the creation and expansion of the good faith exception to the Fourth Amendment's exclusionary rule. Part I then presents *Davis v. United States*: its facts, lower court rulings, and the Court's decision. Part II critically examines the *Davis* Court's reasoning and explores the potential dangers created by its rationales.

I. BACKGROUND

A. *The Creation and Expansion of the Good Faith Exception to the Exclusionary Rule*

The Supreme Court created the good faith exception to the exclusionary rule of the Fourth Amendment[13] in *United States v. Leon*, where police obtained "large quantities of drugs" after a diligent investigation enabled the officers to secure a search warrant from a superior court judge.[14] On appeal, the district court deemed the case "a close one," concluding that the affidavit supporting the warrant "was insufficient to establish probable cause."[15] The Supreme Court was presented with a hard case. Police violated the Fourth Amendment despite having respected the Court's "strong preference for warrants."[16] Usually, once an officer has attempted to get a warrant, "there is literally nothing more the policeman can do in seeking to comply with the law."[17] The Court thus sought to modify "somewhat"

---

[13] In *Weeks v. United States,* the Court established the exclusionary rule, whereby courts suppress from trial evidence obtained in violation of the Fourth Amendment. Weeks v. United States, 232 U.S. 383, 398 (1914). The *Weeks* Court saw the exclusionary rule as necessary to enforce Fourth Amendment rights against unreasonable search and seizure, stating:

> 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 Fourth 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.

Id. at 393. In *Mapp v. Ohio*, the Court applied the exclusionary rule to state courts, declaring, "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[14] *Leon*, 468 U.S. at 901-02. This seminal case quickly prompted discussion regarding its implications. *See, e.g.*, Donald Dripps, *Living with* Leon, 95 YALE L.J. 906 (1986).

[15] *Leon*, 468 U.S. at 903.

[16] *Id.* at 914, 922.

[17] *Id.* at 921 (quoting Stone v. Powell, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring)).

the exclusionary rule "without jeopardizing [the rule's] ability to perform its intended functions."[18]

To support this modification, the Court resorted to a balancing test.[19] It noted that the exclusionary rule's "substantial social costs" of impeding "the truth-finding functions of judge and jury" had long been a cause for concern.[20] Allowing the guilty to be set free was particularly galling "when law enforcement officers have acted in objective good faith or their transgressions have been minor."[21] Overuse of the exclusionary rule could even "generat[e] disrespect for the law and administration of justice."[22]

When assessing the rule's "behavioral effects" on officials,[23] the Court found little deterrence to weigh against exclusion's costs, particularly when police had reasonably relied on a warrant.[24] Judges, the officials who committed error in issuing the defective warrants, were immune to the effects of exclusion, because, "as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions," and therefore the "threat of exclusion . . . cannot be expected significantly to deter them."[25] The sting of deterrence, of course, was directed at, and most acutely felt by, the police. Yet, excluding evidence obtained by a defective warrant "will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances."[26] The only impact exclusion would have here would be to make the officer "less willing to do his duty."[27] The Court thus concluded that evidence obtained by police reasonably relying on a warrant should be admissible.[28]

The Court again employed its judge-officer distinction in *Massachusetts v. Sheppard*, in which police seized evidence "pursuant to a

---

18 *Id.* at 905.

19 *Id.* at 907-09.

20 *Id.* at 907 (quoting United States v. Payner, 447 U.S. 727, 734 (1980)).

21 United States v. Leon, 468 U.S. 897, 908 (1983) (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).

22 *Id.* (alteration in original) (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)).

23 *Id.* at 916-17.

24 *Id.* at 919-21.

25 *Id.* at 917.

26 *Id.* at 920 (quoting Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).

27 United States v. Leon, 468 U.S. 897, 920 (1983) (quoting Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J. dissenting)).

28 *Id.* at 913.

warrant subsequently invalidated because of a technical error on the part of the issuing judge."[29] In *Sheppard*, the officer applying for a warrant used a form specifically printed for controlled substances, because it was the only one available at the time, to seek approval of a search for evidence of a murder.[30] Although the officer had corrected various terms mentioning controlled substances on the form, he missed "the reference to 'controlled substance'" on a "portion of the form that constituted the warrant application and that, when signed, would constitute the warrant itself."[31] The officer alerted the issuing judge that his form was originally designed for controlled substance searches and the magistrate told him he would "make the necessary changes so as to provide a proper search warrant."[32] The judge failed to do so, returning the warrant to the officer and assuring him that "the warrant was sufficient authority in form and content to carry out the search as requested."[33] *Sheppard*'s facts once again presented the Court with a case where "the judge, not the police officers . . . made the critical mistake."[34] While the "judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made,"[35] the "officers in this case took every step that could reasonably be expected of them."[36] The *Sheppard* Court thus found the officer's objectively reasonable reliance on the warrant sufficient to avoid exclusion.[37]

The officer-versus-judge line-drawing, originally so important to the Court in *Leon* and *Sheppard*, began to blur in *Arizona v. Evans*,[38] a case in which police relied upon computer records indicating the

---

[29] Massachusetts v. Sheppard, 468 U.S. 981, 983 (1984).

[30] *Id.* at 985.

[31] *Id.*

[32] *Id.* at 986.

[33] *Id.*

[34] *Id.* at 990.

[35] Massachusetts v. Sheppard, 468 U.S. 981, 991 (1984).

[36] *Id.* at 989.

[37] *Id.* at 988, 991. The Court found the distinction it drew between law enforcement officers and judicial officials so useful that it employed a modified version of the distinction in *Illinois v. Krull*. *See* Illinois v. Krull, 480 U.S. 340, 355-57 (1987). In *Krull*, the Court enabled police to reasonably rely on a statute, likening legislators to judges in their reaction to exclusion of evidence. *Id.* at 350, 355-57.

[38] The blurring of lines became evident in *Evans* when the Court failed to seriously consider the sheriff's office as being the source of the computer error. Arizona v. Evans, 514 U.S. 1, 5-6 (1995).

existence of an arrest warrant.[39] In *Evans*, an officer performing a traffic stop learned from his patrol car computer terminal that an arrest warrant was outstanding for the motorist.[40] The officer therefore arrested Evans, resulting in the discovery of marijuana.[41] The warrant, however, had been quashed seventeen days before Evans's arrest; a clerk, either of the court or the sheriff, had failed to remove the reference to the warrant from the computer records.[42]

The *Evans* Court formulated the issue broadly, considering "whether the exclusionary rule requires suppression of evidence seized incident to an arrest resulting from an inaccurate computer record, regardless of whether police personnel or court personnel were responsible for the record's continued presence in the police computer."[43] The Court's review of the procedure performed by the office of the chief clerk of the justice court and the sheriff's office seemed to locate the error as occurring in the judicial branch.[44] Moreover, the Court based some of its analysis upon the assumption that the court employees were the source of the failure. Chief Justice Rehnquist surmised, "If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction;"[45] and that "[i]f it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer."[46] By the time the Court reached its conclusion, it had dropped all pretense of considering the error as potentially due to the failings of the sheriff's office, declaring, "Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees."[47]

---

[39] *Id.* at 3-4; *see also* Laura A. Giantris, Note, Arizona v. Evans*: Narrowing the Scope of the Exclusionary Rule*, 55 MD. L. REV. 265 (1996) (providing a deeper analysis of *Evans*).

[40] *Evans*, 514 U.S. at 4.

[41] *Id.*

[42] *Id.* at 4-5.

[43] *Id.* at 6.

[44] *See id.* at 5 ("The Chief Clerk testified that there was no indication in respondent's file that a clerk had called and notified the Sheriff's Office that his arrest warrant had been quashed. A records clerk from the Sherriff's Office also testified that the Sheriff's Office had no record of a telephone call informing it that respondent's arrest warrant had been quashed.").

[45] *Id.* at 14.

[46] Arizona v. Evans, 514 U.S. 1, 15 (1995).

[47] *Id.* at 16.

Herring v. United States, unlike *Evans*, presented the Court with a warrant records error that clearly occurred in the sheriff's office.[48] The location of the error, however, was no longer the controlling factor, for Chief Justice Roberts instead reasoned, "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct."[49] Because the exclusionary rule's deterrence value was at its strongest with "flagrantly abusive" violations,[50] the Roberts Court concluded, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[51] The law enforcement error in *Herring* simply did not satisfy this sufficiently deliberate standard.[52]

The good faith exception to the exclusionary rule, which was originally intended to prevent punishing police for dutifully observing the Court's warrant requirement, evolved over time into something else entirely.[53] In *Evans*, still in the hope of sparing police any sanctions when they relied on a warrant, the Court expanded the good faith exception to apply even when no warrant existed in any form whatsoever during the officer's intrusion.[54] Finally, when law enforcement *was* found to be at fault in *Herring*, the Court changed its criteria from the identity of the wrongdoer to the degree of wrongdoing.[55] The good faith exception had thus already gained greatly on the exclusionary rule by the time the Court reconsidered its status in *Davis*.

---

48 *See* Herring v. United States, 555 U.S. 135, 137-38 (2009).

49 *Id.* at 143; *see generally* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011); George M. Dery, III, *Good Enough for Government Work: The Court's Dangerous Decision, in* Herring v. United States*, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 GEO. MASON U. C.R. L.J. 1 (2009).

50 *Herring*, 555 U.S. at 143 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring)).

51 *Id.* at 144.

52 *See id.*

53 *See* United States v. Leon, 468 U.S. 897, 914-16 (1983).

54 *See* Arizona v. Evans, 514 U.S. 1, 15-16 (1995).

55 *See Herring*, 555 U.S. at 143.

B. Davis v. United States

1. Facts

On April 27, 2007, in a residential area of Greenville, Alabama, Officer Kenneth Hadley performed a traffic stop on a car in which Willie Gene Davis was a passenger.[56] After the driver, Stella Owens, failed a field sobriety test, Officer Hadley arrested her and placed her in a police cruiser.[57] Corporal Curtis Miller, who arrived at the scene after the stop, approached the passenger side of the vehicle and asked Davis for his name.[58] Initially hesitating, Davis provided police with the false name, "Ernest Harris."[59] Because Davis appeared nervous and ignored police instructions to stop "moving his hands in and out of his pockets," Corporal Miller asked him to exit the vehicle.[60] Davis then removed his jacket, zippering one of the pockets, despite Corporal Miller's instruction to simply leave the coat on.[61] Davis placed the jacket on the car seat and then Corporal Miller patted him down.[62] By this time, a crowd had gathered, and Corporal Miller asked those assembled if anyone recognized the passenger.[63] When a bystander properly identified Davis, Corporal Miller arrested Davis for providing false information to an officer.[64] Police then handcuffed Davis and placed him in a police vehicle separate from Owens.[65] Corporal Miller then searched the passenger compartment of the vehicle, incident to the arrests, and found a revolver inside Davis's jacket pocket.[66]

---

56 Brief for the United States at 1, Davis v. United States, 131 S. Ct. 2419 (2011) (No. 09-11328), 2011 WL 514440 at *1 [hereinafter Brief for the United States]; Brief for the Petitioner at 2, Davis v. United States, 131 S. Ct. 2419 (2011) (No. 09-11328), 2010 WL 5168874 at *2 [hereinafter Brief for the Petitioner].

57 Davis v. United States, 131 S. Ct. 2419, 2425 (2011); Brief for the United States at 1.

58 Brief for the United States at 1-2; Brief for the Petitioner at 2.

59 Brief for the Petitioner at 2.

60 Brief for the United States at 2.

61 *Id.*

62 *Id.*

63 Brief for the Petitioner at 2.

64 *Id.* at 2-3. The officer had also confirmed Davis's identity with a dispatcher before making the arrest. Brief for the United States at 2.

65 Davis v. United States, 131 S. Ct. 2419, 2425 (2011); Brief for the United States at 2.

66 *Davis*, 131 S. Ct. at 2425.

2. Lower Court Proceedings

Davis, indicted in the Middle District of Alabama on possession of a firearm by a convicted felon,[67] moved to suppress evidence of his revolver, acknowledging that he "would not prevail under existing Eleventh Circuit precedent."[68] The Eleventh Circuit Court of Appeals "had long read *Belton* to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrest of recent occupants" even when the arrestee was removed from the vehicle and handcuffed.[69] Davis, however, raised his Fourth Amendment claim "to preserve the issue for review in light of *Arizona v. Gant*, which was then pending before this Court."[70] After an evidentiary hearing, a magistrate judge recommended denial of the motion to suppress because all parties agreed that current law required such a ruling.[71] The District Court, adopting the magistrate's recommendation, denied Davis's motion.[72] A jury convicted Davis of his firearms charge.[73]

While Davis's appeal was pending, the Supreme Court decided *Arizona v. Gant*,[74] which restricted *Belton* by holding that police could "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," or when it is "reasonable to

---

67 *Id.* at 2425-26.

68 Brief for the United States at 2.

69 *Davis*, 131 S. Ct. at 2426 (reviewing United States v. Gonzalez, 71 F.3d 819, 822, 824-27 (11th Cir. 1996)). In its seminal case, *New York v. Belton*, the Court held that "when 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." New York v. Belton, 453 U.S. 454, 460 (1980). *Belton* created this bright-line rule allowing the search of a vehicle's passenger compartment in every case of arrest in the hope that a single familiar standard would both aid police in carrying out their daily activities and preserve Fourth Amendment privacy rights of motorists. *Id.* at 468.

70 Brief for the United States at 2 (citations omitted). In *Gant*, the Court altered *Belton's* bright-line rule by creating a two-part test: (1) Police could "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time," and (2) police could search when it was "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Arizona v. Gant, 556 U.S. 332, 343 (2009) (quoting Thorton v. United States, 541 U.S. 615, 632 (2004)). For further analysis of *Gant*, *see* George M. Dery III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in* Arizona v. Gant, 44 IND. L. REV. 395 (2011).

71 Brief for the Petitioner at 4.

72 *Id.*

73 Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

74 *Id.*

believe evidence relevant to the crime of arrest might be found in the vehicle."[75] Davis therefore argued that the holding in *Gant* required the overturning of his conviction.[76] The Eleventh Circuit agreed, stating, "There can be no serious dispute that the search here violated Davis's Fourth Amendment rights as defined in *Gant*."[77] The Court of Appeals, however, refused to exclude the revolver for fear of penalizing police for following binding precedent and doing nothing to deter Fourth Amendment violations.[78] The Supreme Court granted certiorari to consider this matter in light of the good faith exception.[79]

3. *Davis* in the Supreme Court

The Court, in an opinion written by Justice Alito, considered whether to apply the exclusionary rule "when the police conduct a search in compliance with binding precedent that is later overruled."[80] The *Davis* Court addressed this issue by first examining the constitutional basis of evidence suppression, noting that the exclusionary rule was not itself in the Fourth Amendment text, but was created by the Court to "compel respect for the constitutional guaranty."[81] The exclusionary rule's "sole purpose" was deterrence, which was best served when the benefits of suppression outweighed its heavy costs.[82] Such benefits waxed when police culpability amounted to "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights," and waned when officers acted "with an objectively reasonable good-faith belief that their conduct [was] lawful," or when their

---

75 *Gant*, 556 U.S. at 343 (quoting Thornton v. United States, 541 U.S. 615, 632 (2004)).

76 Brief for the Petitioner at 5. As previously noted, Corporal Miller had handcuffed Davis and secured him in a police cruiser before performing a *Belton* search incident to arrest of the passenger compartment of the stopped vehicle. *Davis*, 131 S. Ct. at 2426. Therefore, Davis was no longer "unsecured and within reaching distance" as required by *Gant*'s newly formulated rule. *See Gant*, 556 U.S. at 343. Because Corporal Miller's vehicle search, which resulted in recovering a gun, allegedly failed to comport with *Gant*, Davis sought to overturn his own firearm possession conviction, which was based on the discovery of the gun in the jacket on the car seat. *See Davis*, 131 S. Ct. at 2426.

77 United States v. Davis, 598 F.3d 1259, 1263, 1268 (11th Cir. 2010), *rev'd*, 131 S. Ct. 2419 (2011) (holding that the officers reasonably relied on well-settled precedent and, thus, admitting the evidence under the good faith exception).

78 *Davis*, 131 S. Ct. at 2426.

79 *Id.*

80 *Id.* at 2423. *Davis*'s other issue, regarding retroactivity of the Court's ruling, *id.* at 2429-34, is beyond the scope of this article.

81 *Id.* at 2426 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

82 *Id.* at 2426-27.

behavior merely amounted to simple or isolated negligence.[83] Because, in *Davis*, it was uncontested that Corporal Miller's conduct complied with then-binding case law, the lack of police culpability "doom[ed] Davis's claim."[84] In *Davis*, the police conduct was "blameless,"[85] and so exclusion would simply deter conscientious police work.[86] The Court thus held that, "when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply."[87]

II. THE IMPLICATIONS OF DAVIS

A. *The Court's Unrelenting Criticism of the Exclusionary Rule Has So Undermined the Mandate's Constitutional Foundations that, in* Davis*, It Ceases to Be a Credible Limit on Police Behavior*

When the *Davis* Court discussed the exclusionary rule, it was hardly reticent in its criticism.[88] Justice Alito repeatedly made plain that the exclusionary rule lacked a textual basis, noting, "The Amendment says nothing about suppressing evidence,"[89] and further declaring that it is "silent about how [it] is to be enforced."[90] The Court emphasized that evidence suppression was "not a personal constitutional right,"[91] but merely a sanction created by the Court to "supplement the bare text."[92] Lest the reader miss the vulnerability of the exclusionary rule's existence as a "judicially created" rule, the *Davis* Court repeated this reference to the rule's humble origin five times.[93]

---

[83] *Id.* at 2427-28 (quoting Herring v. United States, 555 U.S. 135, 137, 143-44 (2009)); United States v. Leon, 468 U.S. 897, 909 (1984) (internal quotation marks omitted).

[84] Davis v. United States, 131 S. Ct. 2419, 2428 (2011).

[85] *Id.* at 2434.

[86] *Id.* at 2429.

[87] *Id.* at 2434.

[88] *See id.* at 2426 (noting that the exclusionary rule was "created by this Court") (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

[89] *Id.*

[90] Davis v. United States, 131 S. Ct. 2419, 2423 (2011).

[91] *Id.* at 2426 (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)). Further, the Court later repeated that the exclusionary rule was "not a personal right." *Id.* at 2434.

[92] *Id.* at 2423.

[93] The *Davis* Court noted, "this Court created the exclusionary rule," *id.*, declared that the exclusionary rule was "created by this Court," *id.* at 2426, characterized the rule as "'a judicially created remedy' of this Court's own making," *id.* at 2427, and called the rule a "'judicially created' sanction" *id.* at 2333, and "this judicially created rule," *id.* at 2434.

Justice Alito elaborated that the exclusionary rule was neither designed to nor capable of redressing injury or compensating the victim of a Fourth Amendment violation.[94] Exclusion had the narrowest of functions, for its "*sole* purpose" was to deter police misconduct.[95] Suppression of evidence was a harsh sanction[96] that came "at a high cost to both the truth and the public safety,"[97] and "exact[ed] a heavy toll on both the judicial system and society at large."[98] The Court further notes that exclusion "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence."[99] The rule thus "suppress[ed] the truth"[100] and gave the wrongdoer a windfall,[101] which "set the criminal loose in the community without punishment."[102] The exclusionary rule was so toxic that swallowing this "bitter pill" could only be a last resort.[103]

Such an attack on the exclusionary rule had to overcome some inconvenient precedent. Justice Alito acknowledged that the Court had once declared flatly, "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[104] However, Justice Alito wrote off such language as "[e]xpansive dicta" indulged in at a time when the Court was "not nearly so discriminating" in its exclusionary rule analysis.[105] Justice Alito felt the Court had outgrown its youthful impetuosity, stating, "In time . . . we came to acknowledge the exclusionary rule for what it undoubtedly is—a judicially created remedy of this Court's own making."[106] According to Justice Alito's majority opinion, as the Court matured it "abandoned the old, 'reflexive' applica-

---

94 *Id.* at 2426 (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)).

95 *Id.* at 2432 (citing Arizona v. Evans, 514 U.S. 1, 14 (1995); Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984)). The Court felt so strongly about this that it repeated the point by noting that the rule's "sole purpose" was to "deter future Fourth Amendment violations." *Davis*, 131 S. Ct. at 2426.

96 *Davis*, 131 S. Ct. at 2429.

97 *Id.* at 2423.

98 *Id.* at 2427 (citing Stone v. Powell, 428 U.S. 433, 490-91 (1976)).

99 *Id.*

100 *Id.* (citing Herring v. United States, 555 U.S. 135, 141 (2009)).

101 *Id.* at 2433-34.

102 Davis v. United States, 131 S. Ct. 2419, 2427 (2011) (citing Herring v. United States, 555 U.S. 135, 141 (2009)).

103 *Id.* (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

104 *Id.* (alteration in original) (quoting Mapp v. Ohio, 367 U.S. 643, 655 (1961)).

105 *Id.* (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

106 *Id.* (citing United States v. Calandra, 414 U.S. 338, 348 (1974)) (internal quotation marks omitted).

tion of the doctrine, and imposed a more rigorous weighing of [the exclusionary rule's] costs and deterrence benefits."[107]

1. Analog to the Court's Treatment of the *Miranda* Doctrine

The Court's disparaging language about the exclusionary rule is significant, for it portends the undermining of the rule's status as an enforceable sanction. A similar fate befell another controversial doctrine—that established in *Miranda v. Arizona*.[108] *Miranda* held that the prosecution could not admit at trial any statements obtained during custodial interrogation unless "it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[109] Those safeguards were the rendition and honoring of the now famous *Miranda* rights.[110] The *Miranda* Court explicitly stated that it was confronting a constitutional issue,[111] declaring "no doubt" that the Fifth Amendment privilege extended beyond court proceedings to custodial interrogation.[112] The Court traced its subject back to "the roots of our concepts of American criminal jurisprudence,"[113] and even noted that the United States, unlike England, clothed the privilege against self-incrimination "with the impregnability of a constitutional enactment."[114] The Court characterized its ruling as providing "concrete constitutional guidelines for law enforcement agencies and courts to follow."[115]

The *Miranda* rule had its own costs because, like the exclusionary rule, it had the distasteful tendency to exclude from court evidence obtained in violation of its mandates. Less than a decade after handing *Miranda* down, the Court, in *Michigan v. Tucker*, began to back away, noting that the *Miranda* warnings "were not themselves rights

---

107 *Id.* (citing Arizona v. Evans, 514 U.S. 1, 13 (1995)).

108 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

109 *Id.* at 444.

110 *Miranda* requires the following for a suspect in custodial interrogation:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

111 *Id.* at 445.

112 *Id.* at 467.

113 *Id.* at 439.

114 Miranda v. Arizona, 384 U.S. 436, 443 (1966) (quoting Brown v. Walker, 161 U.S. 591, 596-97 (1896)).

115 *Id.* at 442.

protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[116] What were once mandates were now procedural safeguards, protective guidelines, or just "prophylactic standards."[117] A decade later, in *New York v. Quarles,* the Court repeated the characterization that *Miranda* warnings were "not themselves rights protected by the Constitution."[118] Finally, in *Oregon v. Elstad*, the Court ventured still further by explicitly asserting that the *Miranda* decision swept more broadly than the Fifth Amendment itself, and thus could be prompted in the absence of a Fifth Amendment violation.[119] Strangely enough, the *Miranda* Court's preventative medicine might provide "a remedy [by excluding evidence] even to the defendant who has suffered no identifiable constitutional harm."[120]

Such language bore inevitable fruit. The Fourth Circuit Court of Appeals, in *United States v. Dickerson*, boldly declared, "failure to deliver *Miranda* warnings is not itself a constitutional violation,"[121] for the *Miranda* Court merely created a presumption which was "dictated by convenience, not the Constitution."[122] Judge Williams, writing for the Fourth Circuit, relied on a federal statute, 18 U.S.C. § 3501, to admit evidence obtained in violation of *Miranda*'s warning requirements.[123] Congress had enacted the statute "with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions."[124] The court reasoned that Congress could overrule "judicially created rules of evidence and procedure that are not required by the Constitution."[125] It concluded that *Miranda* was clearly not a rule required by the Constitution.[126] Judge Williams easily found support for his reasoning by citing passages

---

116 Michigan v. Tucker, 417 U.S. 433, 444 (1974).

117 *Id.* at 446.

118 New York v. Quarles, 467 U.S. 649, 654 (1984) (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

119 Oregon v. Elstad, 470 U.S. 298, 306 (1985).

120 *Id.* at 307.

121 United States v. Dickerson, 166 F.3d 667, 690 (4th Cir. 1999) (quoting United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997)), *rev'd*, 530 U.S. 428 (2000).

122 *Id.* at 690 n.20.

123 *Id.* at 691.

124 *Id.* at 671. Section 3501 provides in part: "In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C. § 3501 (1994).

125 *Dickerson*, 166 F.3d at 672, *rev'd*, 530 U.S. 428 (2000).

126 *Id.*

from *Tucker*, *Quarles*, and *Elstad*.[127] The court concluded that "The admissibility of confessions in federal court is governed by 18 U.S.C.A. § 3501, rather than *Miranda*."[128]

In *Dickerson v. United States*, therefore, the Supreme Court found itself pinned between a lower federal court, which took the Court's own language at face value, and a challenge from Congress—a coequal branch of government.[129] Finding the challenge from Congress to be a threat to its power, the Court circled the wagons, holding *Miranda* to be a constitutional rule[130] and further ruling, "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."[131] The survival of the *Miranda* decision, therefore, might have been due more to the form in which it was attacked, rather than the Court's actual assessment of the rule.[132]

The Fourth Amendment exclusionary rule is following a trajectory remarkably similar to that of the *Miranda* rule. In 1961, in *Mapp v. Ohio*, the Court announced the exclusionary rule's application to the states in terms at least as glowing as those used by the *Miranda* Court in presenting its warnings mandate.[133] Writing for the majority, Justice Clark declared that the Fourth Amendment must be enforceable against the states by the "sanction of exclusion," because "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[134] The Court asserted that it could "no longer permit [the right to privacy embodied in the Fourth Amendment] to remain an empty promise."[135] Justice Clark saw the Court's holding as giving "to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."[136] He therefore

---

127 *See id.* at 689-91.

128 *Id.* at 695.

129 *See* Dickerson v. United States, 530 U.S. 428 (2000). For a provocative discussion of *Dickerson*, *see* Kevin McNamee, Comment, *Do As I Say, Not As I Do:* Dickerson*, Constitutional Common Law and the Imperial Supreme Court*, 28 FORDHAM URB. L.J. 1239 (2001).

130 *See Dickerson*, 530 U.S. at 437, 439-40 (2000).

131 *Id.* at 437.

132 For a complete discussion of this possibility, *see* George M. Dery III, *The "Illegitimate Exercise of Raw Judicial Power:" The Supreme Court's Turf Battle in* Dickerson v. United States, 40 BRANDEIS L.J. 47 (2001).

133 *See* Mapp v. Ohio, 367 U.S. 643 (1961).

134 *Id.* at 655, 656.

135 *Id.* at 660.

136 *Id.*

explicitly held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . ."[137] Thus, both the Fourth Amendment exclusionary rule and the *Miranda* warnings were intended at their creation to be constitutional mandates.

The decisions in both *Mapp* and *Miranda* have been subject to corrosive characterizations that undermine their foundations. While the *Miranda* requirements have been marginalized as a prophylactic procedure rather than a right, *Mapp's* formulation of the exclusionary rule, as repeatedly noted in *Davis*, has suffered a similar demotion from constitutional right to judicially-created remedy.[138] Moreover, the *Davis* Court has eliminated one of the major rationales that the *Mapp* Court articulated when applying the exclusionary rule to the states—judicial integrity.[139] The Court, in *Terry v. Ohio,* found that the exclusionary rule served "another vital function—the imperative of judicial integrity," because courts "cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[140] The *Terry* Court refused to grant "the constitutional imprimatur" to evidence obtained by Fourth Amendment violation.[141] In *Lee v. Florida*, the Court went even further, refusing to be sullied as "an accomplice in the willful transgression of the Laws of the United States."[142]

2. The Court's Reduction of the Exclusionary Rule from a Constitutional Principle to a Source of Deterrence

Less than a decade later, however, in *United States v. Janis*, the Court deemed its integrity not nearly so delicate, noting, "Judicial integrity clearly does not mean that the courts must never admit evidence obtained in violation of the Fourth Amendment."[143] The *Janis* Court declared judicial integrity's primary meaning to be that "courts

---

137 *Id.* at 657.

138 *See* Davis v. United States, 131 S. Ct. 2419, 2423, 2426, 2427, 2433, 2434 (2011).

139 Mapp v. Ohio, 367 U.S. 643, 660 (1961).

140 Terry v. Ohio, 392 U.S. 1, 12-13 (1968) (citing Elkins v. United States, 364 U.S. 206, 222 (1960)) (internal quotation marks omitted).

141 *Id.* at 13.

142 Lee v. Florida, 392 U.S. 378, 385-86 (1968) (internal quotation marks omitted). In *Stone v. Powell*, the Court explained that "exclusion of illegally seized evidence prevents contamination of the judicial process." Stone v. Powell, 428 U.S. 465, 484 (1975).

143 United States v. Janis, 428 U.S. 433, 458 n.35 (1976).

must not commit or encourage violations of the Constitution."[144] The Court's focus "must be on the question [of] whether the admission of the evidence encourages violations of Fourth Amendment rights. . . . [T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."[145] Essentially, judicial integrity was just another way to consider deterrence; it therefore was redundant. Such redefinition initially enabled the Court to assert that the exclusionary rule's prime purpose was deterrence.[146] Later, the Court spoke in even starker terms, finding deterrence to be the rule's sole purpose.[147]

The elimination of judicial integrity as a separate basis for exclusion reduced the rule to the single dimension of deterrence. The existence of a deterrent effect alone was not enough to exclude evidence. A mere incremental, "uncertain,"[148] or "marginal"[149] deterrent effect would not suffice. Instead, the Court employed a balancing process[150] where the benefits of deterrence would be weighed against its costs.[151] This balancing ensured that the exclusionary rule, "[a]s in the case of any remedial device," was constrained to those areas where its remedial goals were thought most effectively served.[152] Those areas were being trimmed as well. Exclusion of evidence could not fix the "ruptured privacy of the victims' homes and effects" because "reparation [came] too late."[153] Quite simply, "the exclusion of evidence at trial [could] do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation."[154] Further, the Court has recently moved the bar still higher for evidence suppression, applying the rule

---

144 *Id.*

145 *Id.*

146 *See* United States v. Calandra, 414 U.S. 338, 347 (1973).

147 Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

148 *Calandra*, 414 U.S. at 351.

149 United States v. Janis, 428 U.S. 433, 453-54 (1976).

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

151 *Janis*, 428 U.S. at 453-54; *Calandra*, 414 U.S. at 350.

152 Stone v. Powell, 428 U.S. 465, 486-87 (1976) (quoting United States v. Calandra, 414 U.S. 338, 348 (1973)).

153 Linkletter v. Walker, 381 U.S. 618, 637 (1965). In *Leon*, the Court asserted, "The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" United States v. Leon, 468 U.S. 897, 906 (1983) (citations omitted).

154 Withrow v. Williams, 507 U.S. 680, 691 (1993) (citing Stone v. Powell, 428 U.S. 465, 486 (1976)).

"only where it 'result[s] in appreciable deterrence'"[155] and where it is the last resort.[156] Now that the *Davis* Court has deemed the exclusionary rule a "bitter pill,"[157] this pill could now be circling the drain as the *Miranda* decision was before its resurrection in *Dickerson*.

The exclusionary rule may be even more vulnerable to challenge than the *Miranda* warnings were in *Dickerson*. The *Miranda* rule not only had the good fortune of being challenged in a case where eliminating the warning requirement would reduce the Court's power in relation to Congress, but also its impact on the courts' truth-finding function differed markedly from *Mapp*'s exclusionary rule. The Court in *Withrow v. Williams* noted that "the evidence excluded under *Mapp* 'is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.'"[158] Suppressing this evidence thus potentially adversely affects the fact-finder's ability to accurately determine what happened in the case. In contrast, *Miranda* is not similarly "divorced from the correct ascertainment of guilt"[159] because a "system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation."[160] The *Miranda* Court, in "bracing against 'the possibility of unreliable statements in every instance of in-custody interrogation'" guards against the use of unreliable statements at trial.[161] *Mapp*'s exclusionary rule, having an impact opposite to that of *Miranda*'s on the guilt-determination process, provides the Court with yet another reason to avoid its distasteful medicine.

Miranda's near-death experience should signal the Court to be more cautious in its disparagement of the Fourth Amendment exclusionary rule. Instead, the *Davis* Court has chosen to recklessly pummel its own rule, casting doubt on its current effectiveness.

---

155 Herring v. United States, 555 U.S. 135, 141 (2009) (quoting United States v. Leon, 468 U.S. 897, 909 (1983)).

156 Hudson v. Michigan, 547 U.S. 586, 591 (2006).

157 Davis v. United States, 131 S. Ct. 2419, 2427 (2011).

158 *Withrow*, 507 U.S. at 691 (quoting Stone v. Powell, 428 U.S. 465, 490 (1976)).

159 *Id.* at 692.

160 *Id.* (quoting Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974)) (internal quotation marks omitted).

161 *Id.* (citing Johnson v. New Jersey, 384 U.S. 719, 730 (1966)).

B. Davis*'s Narrow Focus on Police Culpability Could Cause the Good Faith Exception to Swallow the Exclusionary Rule*

The *Davis* Court offered two different criteria for analyzing the deterrence benefits of the exclusionary rule: (1) "the culpability of the law enforcement conduct at issue" and (2) the frequency of police misconduct.[162] For culpability, the Court deemed the deterrent effect of exclusion strong enough to outweigh its costs only when "police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights."[163] If instead police act "with an objectively 'reasonable good-faith belief' that their conduct is lawful," or merely negligently, then deterrence cannot "pay its way."[164] For the frequency factor, the Court focused on how often the police committed violations; an isolated act of negligence was not amenable to deterrence by exclusion in contrast to "recurring or systemic negligence."[165]

When the Court considered the culpability of the police, it determined that the officers' "objectively reasonable reliance on binding judicial precedent"[166] was simply not wrongful at all.[167] The Court stressed that it was dealing with "nonculpable, innocent police conduct" which all agreed was in "strict compliance with then-binding Circuit law."[168] Because the police had "scrupulously adhered to governing law," the Court could not justify setting the criminal free.[169] Indeed, it warned that exclusion of the evidence here would only deter "conscientious police work," operating as a strict-liability rule.[170]

If the conduct of police in *Davis* was not culpable in any way,[171] and if police were merely responsible law-enforcement officers doing what was required of them,[172] then the Court's application of the good

---

162 Davis v. United States, 131 S. Ct. 2419, 2427-28 (2011) (internal quotation marks omitted). The Court referred, in the second prong of the test, to whether the improper behavior "involves only simple, isolated negligence." *Id.* at 2428 (citing Herring v. United States, 555 U.S. 135, 137 (2009)).

163 *Id.* at 2427 (citing Herring v. United States, 555 U.S. 135, 144 (2009)).

164 *Id.* at 2427-28 (quoting United States v. Leon, 468 U.S. 897, 908, 919 (1983)).

165 *Id.* at 2428 (quoting Herring v. United States, 555 U.S. 135, 144 (2009)).

166 *Id.*

167 *Id.* at 2429.

168 Davis v. United States, 131 S. Ct. 2419, 2428-29 (2011).

169 *Id.* at 2434.

170 *Id.* at 2429.

171 *See id.* at 2428.

172 *See id.* at 2429 (citing Hudson v. Michigan, 547 U.S. 586, 599 (2006)).

faith exception—a doctrine that is only triggered in the face of a Fourth Amendment violation—should be unnecessary. Curiously, the Court made a point of repeating, and thus entrenching, *Herring*'s distinctions between negligence and deliberate wrongdoing,[173] where it found that neither kind of behavior even occurred.[174]

Perhaps the incongruity of the *Davis* opinion—lauding police for their conscientious and blameless behavior while simultaneously accepting the Eleventh Circuit's conclusion that the officers violated the Fourth Amendment—is a function of the Court's blinkered focus on the level of police culpability.[175] The Court's derailment in *Davis* is best demonstrated by Justice Sotomayor's attempt to get the Court back on track in her concurring opinion, where she noted:

> In my view, whether an officer's conduct can be characterized as "culpable" is not itself dispositive. We have never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer's conduct could be characterized as nonculpable. Rather, an officer's culpability is relevant because it may inform the overarching inquiry whether exclusion would result in appreciable deterrence.[176]

In her final declaration on this point, Sotomayor stated, "Whatever we have said about culpability, the ultimate questions have always been, one, whether exclusion would result in appreciable deterrence and, two, whether the benefits of exclusion outweigh its costs."[177] Her statement was appropriately phrased in the past tense because the Court's opinion in *Davis* appears to mark a shift away from this analysis toward a narrower focus on police culpability.

Davis's departure from a broad deterrence analysis to the single question of whether police exhibited "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights"[178] was so dramatic

---

173 *See id.* at 2427-28.

174 *See* Davis v. United States, 131 S. Ct. 2419, 2428 (2011) ("The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent.").

175 *See id.* at 2436 (Breyer, J., dissenting) (criticizing the majority for "conceding that, like the search in *Gant*, this search violated the Fourth Amendment," but still holding that "unlike *Gant*, this defendant is not entitled to a remedy").

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

177 *Id.* at 2436.

178 *Id.* at 2438 (Breyer, J., dissenting).

that Justice Breyer was uncertain that the Court understood the magnitude of its leap.[179] He qualified his analysis by asking, "If the Court means what it says, what will happen to the exclusionary rule . . . ?"[180] Breyer's answer to his own question—once again premised by the incredulous assumption, "if the Court means what it now says,"[181]—predicted a dramatic shift in Fourth Amendment law. Because the Court "would place determinative weight upon the culpability of an individual officer's conduct," and would apply the exclusionary rule only where it could find a deliberate, reckless, or grossly negligent violation of the Fourth Amendment, the "'good-faith' exception [would] swallow the exclusionary rule."[182] In other words, the Court would rarely apply the exclusionary rule because the "vast majority of [F]ourth [A]mendment violations . . . [are] motivated by commendable zeal, not condemnable malice,"[183] and without reaching a higher standard, those violations would be immune from the exclusionary rule's sanction.

The Court's opinion might actually contain a glimpse of the moment when the exception began to swallow the rule. Justice Alito, in responding to the dissent's retroactivity argument, first noted that the exclusionary rule was a "judicially created sanction,"[184] and then offered:

> 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 defen-

---

179 *See id.*

180 Davis v. United States, 131 S. Ct. 2419, 2438 (2011) (Breyer, J., dissenting).

181 *Id.* at 2439.

182 *Id.*

183 *Id.* (Breyer, J., dissenting) (quoting 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, 1389 (1983)) (third and fourth alterations in original). Justice Breyer further noted, "In many, perhaps most, of these instances the police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective good faith." *Id.* He continued, "Surely many more Fourth Amendment violations result from carelessness than from intentional constitutional violations." *Id.* (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3, at 64 (4th ed. 2004)).

184 *Davis*, 131 S. Ct. at 2433-34 (quoting United States v. Calandra, 414 U.S. 338, 348 (1973)) (internal quotation marks omitted).

> dant who obtains a judgment over-ruling one of our Fourth Amendment precedents.[185]

It would be a small step from the barbershop mirror effect of the Court's analysis in *Davis* to transforming the exclusionary rule into an exclusionary exception to the good faith exception's "good-faith rule."[186]

The *Davis* decision has signaled to police that their carelessness will not suffer the consequences of exclusion, and informed the individual that he or she must suffer repeated harm because an isolated incident might not reach the threshold for suppression. The decision has disparaged the exclusionary rule to courts as a "bitter pill" in a case where it failed to find the impropriety needed to present the issue in the first place. This deviation from "the 'suppression' norm"[187] will eliminate the exclusionary rule in a very large number of cases, leaving ordinary Americans without protection from unreasonable searches and seizures.[188] Effectively, the Fourth Amendment now protects citizens only from the most egregious wrongdoing.[189]

C. Davis*'s Culpability Discussion Impermissibly Blended the Court's Violation and Remedy Analyses and Risked Injecting Subjectivity into Fourth Amendment Reasoning*

The *Davis* Court warned that "exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred."[190] This assessment was part of a larger effort by the Court

---

185 *Id.* at 2434.

186 The Court, in proposing to construct a judicially created exception to a judicially created exception to a judicially created rule, seemed to be in danger of setting in motion an infinite regression such as that seen in old-fashioned barbershop mirrors. Verlyn Klinkenborg described the effect of barbershop mirrors in "The City Life" column, "Barbershop," in the *New York Times*. Verlyn Klinkenborg, *The City Life—Barbershop*, N.Y. TIMES, Apr. 24, 2009, at A26, *available at* www.nytimes.com/2009/04/24/opinion/24fri4.html. While getting a haircut at a barbershop on 43rd Street, Klinkenborg noted, "The facing mirrors gather the scene up and cast it back and forth, lessening it in scale with each reflection all the way out to infinity, which is somehow still in the same shop on 43rd Street." *Id.*

187 *Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting) (citing United States v. Leon, 468 U.S. 897 (1984)).

188 *See id.* at 2439-40 (citing Wolf v. Colorado, 338 U.S. 25, 41 (1949)).

189 *See id.*

190 *Id.* at 2431 (majority opinion) (citing Arizona v. Evans, 514 U.S. 1, 13-14 (1995).

to break its Fourth Amendment analysis down into three separate stages or inquires: (1) application;[191] (2) violation;[192] and (3) remedy.[193] As for the application inquiry, the Court has decided a series of cases in which it disposed of the matter simply by finding that the Fourth Amendment, which applies only to "searches and seizures,"[194] did not apply because the government activity in the matter did not constitute a search or a seizure.

The case of *California v. Ciraolo*, where police flew over the backyard of Ciraolo's home to observe his marijuana from navigable airspace, provides an instance where the Court found no Fourth Amendment application.[195] The *Ciraolo* Court did not believe the over-flight to be a search because, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[196] The Court has also found Fourth Amendment application lacking when the conduct at issue is purported to be a seizure.

In *California v. Hodari D.*, where police recovered evidence thrown by a fleeing suspect, the Court decided the case on the sole issue of whether "Hodari had been 'seized' within the meaning of the Fourth Amendment" at the time he tossed his drugs.[197] The *Hodari D.* Court concluded that because Hodari D. did not comply with the order to halt, "he was not seized until he was tackled," and therefore the Fourth Amendment simply did not apply to his discarding of the contraband.[198] Because the threshold issue of application was not sat-

---

191 As far back as 1928, the Court, in *Olmstead v. United States*, had disposed of Fourth Amendment cases by determining that the Fourth Amendment simply did not apply. *See* Olmstead v. United States, 277 U.S. 438, 464 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967). In *Olmstead*, the relevant intrusion was a phone wiretap. *Id. Olmstead* ruled, focusing on the application category of the Fourth Amendment, "The Amendment does not forbid what was done here. There was no searching. There was no seizure." *Id.* at 464. *Katz v. United States* rejected *Olmstead*, due to the Court's alteration of the definition of a Fourth Amendment search. *Katz*, 389 U.S. at 353.

192 *See* New Jersey v. T.L.O., 469 U.S. 325, 337 (1894).

193 *See* Leon v. United States, 468 U.S. 897, 906 (1983) (citing United States v. Calandra, 414 U.S. 338, 348 (1974)).

194 U.S. CONST. amend. IV.

195 California v. Ciraolo, 476 U.S. 207, 209, 214-15 (1986).

196 *Id.* at 213 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

197 California v. Hodari D., 499 U.S. 621, 623 (1991).

198 *Id.* at 629.

isfied, the Court could decide the matter without bothering to address violation or remedy.[199]

The next inquiry formed by the Court involves what constitutes a violation, for "[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[200] The Court has taken care to point out that Fourth Amendment application does not necessarily amount to a violation.[201] As the Court noted in *New Jersey v. T.L.O.*, "To hold that the Fourth Amendment applies to searches . . . is only to begin the inquiry into the standards governing such searches" because reasonableness is a separate issue from application.[202]

The last inquiry of Fourth Amendment analysis is remedy, because, "the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation."[203] The Court has emphasized, "The fact that a Fourth Amendment violation [has] occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies."[204]

The *Davis* Court, in defending police conduct that constituted a Fourth Amendment violation as blameless and innocent, confused the Court's carefully established categories by blurring the lines between violation and remedy.[205] When protesting that officers acted conscientiously in *Davis*, the Court re-litigated the violation issue by essentially stating that there are violations and then there are *violations*.[206] By contrasting the officers' actions with police who deliberately, recklessly, or continually violate the Fourth Amendment, the *Davis* Court approved the officers' behavior, thus injecting into the good faith discussion—the remedy portion of Fourth Amendment analysis—a reassessment of officer conduct.[207] Such reasoning would have

---

199 The Court, in *Florida v. Royer*, demonstrated such compartmentalization, noting, "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." Florida v. Royer, 460 U.S. 491, 498 (1983).

200 Elkins v. United States, 364 U.S. 206, 222 (1960).

201 City of Ontario v. Quon, 130 S. Ct. 2619, 2630 (2010).

202 New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

203 United States v. Janis, 428 U.S. 433, 443 (1976).

204 Herring v. United States, 555 U.S. 135, 140 (2009) (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)).

205 *See* Davis v. United States, 131 S. Ct. 2419, 2429, 2434 (2011).

206 *See id.* at 2429.

207 *Id.*

confounded Justice Stevens, who criticized *Leon* in his dissent by noting:

> The Court assumes that the searches in these cases violated the Fourth Amendment, yet refuses to apply the exclusionary rule because the Court concludes that it was "reasonable" for the police to conduct them. In my opinion an official search and seizure cannot be both "unreasonable" and "reasonable" at the same time. . . .
>
> . . . We cannot intelligibly assume, arguendo, that a search was constitutionally unreasonable but that the seized evidence is admissible because the same search was reasonable.[208]

Davis therefore called into question the very structure of the Court's Fourth Amendment analysis, followed in *Leon*—the original good faith exception case. The Court, in its rush to defend the officers, forgot the admonition in *Leon* that "[w]hether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'"[209]

The *Davis* Court's focus on officer culpability during the remedy stage of Fourth Amendment analysis also confused the standard the Court has employed to assess official behavior. In determining the reasonableness of police behavior, the Court has refused to consider "the actual [subjective] motivations of individual officers involved."[210] Instead, the Court has found that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."[211] Thus, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[212] The Court's consideration of whether a particular violation was done "deliberately, recklessly, or with gross negligence" complicated this otherwise simple approach.[213]

---

208 United States v. Leon, 468 U.S. 897, 960-61 (1983) (Stevens, J., dissenting).

209 *Id.* at 906 (majority opinion) (quoting Illinois v. Gates, 462 U.S. 213, 223 (1983)).

210 Whren v. United States, 517 U.S. 806, 813 (1996).

211 Horton v. California, 496 U.S. 128, 138 (1990).

212 *Whren*, 517 U.S. at 814.

213 *See* Davis v. United States, 131 S. Ct. 2419, 2428 (2011) (citing Herring v. United States, 555 U.S. 135, 144 (2009)).

In a previous attempt to confront this concern in *Herring*, the Court made the unsupported assertion that the "pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers."[214] The *Herring* Court aimed to rebut the charge of subjectivity by recasting it as criticism about its focus on "a particular officer's knowledge and experience."[215] The Court reasoned that an officer's subjective awareness of a situation's facts is a normal part of such objective inquiries as determining probable cause.[216]

The problem with the Court's discussion in *Herring* is that deliberate behavior goes well beyond an officer's awareness of particular facts. This difficulty is best illustrated by the case that the *Herring* Court considered to be an apt analogy—*Franks v. Delaware*.[217] In *Franks*, which considered a motion to traverse a warrant, the Court found "negligence or innocent mistake" to be insufficient to support an attack on a warrant affidavit, instead requiring that the misconduct rise to "allegations of deliberate falsehood or of reckless disregard for the truth."[218] A deliberate falsehood is knowingly telling a falsehood[219] having the intent to mislead.[220] The entire point of assessing a deliberate falsehood is to look inside an individual's mind to see not only what he or she knew but also what he or she meant to make others believe. Such an inquiry outstrips the straightforward assessment of what a reasonable person would do in a particular situation. It leads to questions of intent and motivation of a particular person—an inquiry explicitly rejected by the Court in *Whren*.[221]

The *Davis* Court's drift into police culpability is problematic on several levels. It undermined the carefully built categories of analysis—application, violation, and remedy—that the Court had previously crafted. The focus on culpability also potentially injects a subjective component into Fourth Amendment analysis. Finally, these two concerns could interact, resulting in subjectivity tarnishing not only the Court's remedy reasoning but also its violation analysis.

---

214 Herring v. United States, 555 U.S. 135, 145 (2009) (internal quotation marks omitted).

215 *See id.*

216 *See id.* at 145-46.

217 *Id.* at 145.

218 Franks v. Delaware, 438 U.S. 154, 171 (1978).

219 United States v. Leon, 468 U.S. 897, 914 (1984).

220 *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2090 (2011) (Sotomayor, J., concurring).

221 *See* Whren v. United States, 517 U.S. 806, 814 (1996).

CONCLUSION

When it originally created its good faith exception in *Leon*, the Court professed a quite modest aim, concluding that "in the Fourth Amendment context, the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended functions."[222] The good faith exception, of course, hardly turned out to be a mere modification. The *Leon* decision instead was the beginning of a slowly evolving "grave mistake,"[223] which allowed the Court, while bemoaning the exclusionary rule's high cost,[224] to give way to expediency.[225] The Court first expanded its good faith exception in *Evans*,[226] only to dramatically transform its deterrence rationale in *Herring*.[227]

Finally, in *Davis*, any mask of respect for the exclusionary rule simply slipped. The *Davis* Court potentially stripped the exclusionary rule of its constitutional foundation by declaring, "The Amendment says nothing about suppressing evidence,"[228] and dismissing the Court's earlier recognition of the exclusionary rule's constitutional authority as "[e]xpansive dicta."[229] The *Davis* Court then, ironically, repeated and expanded on the "broad dicta" in *Herring* to further marginalize the exclusionary rule.[230] In its aim to avoid what it deemed exclusion's "high cost to truth and public safety,"[231] the *Davis* Court argued rationales that themselves could pose a threat to our civil liberties.[232] The *Davis* decision, by its unsparing attack on the exclusionary rule, has cast doubt on the viability of a doctrine once considered part of the Fourth Amendment.[233] In its shift away from

---

222 *Leon*, 468 U.S. at 905.

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

224 *Id.* at 907 (majority opinion).

225 *Id.* at 929-30 (Brennan, J., dissenting).

226 *See* Arizona v. Evans, 514 U.S. 1, 16 (1995).

227 *See* Herring v. United States, 555 U.S. 135, 143 (2009).

228 *See* Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

229 *Id.* at 2427 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

230 *See id.* at 2439 (Breyer, J., dissenting).

231 *Id.* at 2423 (majority opinion).

232 *See* United States v. Leon, 468 U.S. 897, 931 (1984) (Brennan, J., dissenting). Justice Brennan warned, "But, as troubling and important as today's new doctrine may be for the administration of criminal justice in this country, the mode of analysis used to generate that doctrine also requires critical examination, for it may prove in the long run to pose the greater threat to our civil liberties." *Id.* Much the same could be said about the reasoning offered by the *Davis* Court.

233 *See* Mapp v. Ohio, 367 U.S. 643, 657 (1961).

considering deterrence generally to its singular requirement that exclusion should occur only when police commit the most culpable behavior, the Court has made suppression a special case rather than a procedural norm.[234] Finally, by vehemently defending the propriety of police conduct which legally constituted a Fourth Amendment violation,[235] the Court confused the "violation" and "remedy" categories so painstakingly built up by the Court's own precedent[236] and improperly injected subjectivity into Fourth Amendment analysis.[237] The Court, obsessively worrying about choking on the "bitter pill" of the exclusionary rule, should have instead considered the danger that it might end up "strang[ling]" the Fourth Amendment.[238]

---

234 Davis v. United States, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting).
235 *Id.* at 2428-29 (majority opinion).
236 *See Leon*, 468 U.S. at 960 (Stevens, J., dissenting).
237 *See* Whren v. United States, 517 U.S. 806, 813 (1996).
238 *See Leon*, 468 U.S. at 928-29 (Brennan, J., dissenting).