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## TOWARD A GENERAL GOOD FAITH EXCEPTION

Say a police officer asks a judge for a search warrant. Looking over the proposed warrant, the judge concludes that it respects the Fourth Amendment's command: "[N]o 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."<sup>1</sup> So he grants the application and assures the officer of the warrant's validity. The officer carries out the search and turns up evidence of crime: a murder victim's bloodstained clothes. But when the prosecution tries to present this evidence at trial, the defendant objects. It turns out that the judge had made a clerical error: he forgot to incorporate into the warrant a separate paper "particularly describing the . . . things to be seized."<sup>2</sup> All agree that the warrant, and so the search, violated the Constitution. Should the evidence be suppressed?

In *Massachusetts v. Sheppard*,<sup>3</sup> the Supreme Court answered no. That case, alongside its more celebrated companion, *United States v. Leon*,<sup>4</sup> inaugurated what has come to be known as the good faith exception to the Fourth Amendment exclusionary rule. Exclusion, *Leon* explained, is not a constitutional right but a judge-made remedy.<sup>5</sup> And when officers act under a warrant they reasonably but wrongly think valid, this remedy has no place: in this setting, the costs of suppression exceed the benefits.<sup>6</sup> The key caveat, however, is that reliance on the warrant be reasonable. It will not do to execute a warrant so defective on its face that any competent officer would spot its inadequacy.<sup>7</sup>

Now suppose the officer slips up in a different way: he relies on precedent from a neighboring circuit that his jurisdiction later rejects, or in the heat of the moment makes a close call that hindsight reveals was mistaken, or goes into the wrong house because of a miscommunication. Same result? Although it has had thirty years since *Leon* and *Sheppard*, the Supreme Court has yet to give a clear answer. From time to time, it has extended the good faith exception to a new variety of reasonable mistake: the exception now also covers reasonable reliance on a later-invalidated statute, on a court employee's mistaken records, on the police department's own mistaken records (at least sometimes), or on subsequently overturned binding precedent.<sup>8</sup> But

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> *Id.*

<sup>3</sup> 468 U.S. 981 (1984).

<sup>4</sup> 468 U.S. 897 (1984).

<sup>5</sup> *Id.* at 906.

<sup>6</sup> *Id.* at 913.

<sup>7</sup> *Id.* at 923.

<sup>8</sup> See *infra* p. 776.

the Court has assembled this motley crew of protected missteps without announcing any principle that can separate the reasonable mistakes that are covered from those that are not. This haphazard process has begotten chaos in the lower courts. Whenever a new type of reasonable error comes along, it is anybody's guess whether judges will bring it within good faith's reach.

There is a better way. Courts should hold that the good faith exception reaches *every* type of official mistake — so long as the mistake was reasonable. This test would align good faith with the doctrine of qualified immunity, which protects officers from federal liability for constitutional violations whenever they act reasonably but (in hindsight) erroneously.<sup>9</sup> This simple approach would be both sound in principle and beneficial in consequence.

### I. HISTORY OF THE GOOD FAITH EXCEPTION

The Fourth Amendment says that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>10</sup> It does not say that evidence gathered during an unreasonable search or seizure must be suppressed. During most of the first century after the Amendment's adoption, the argument that it compelled suppression was thought so absurd that few criminal defendants even bothered to raise it — and when they did raise it, they failed.<sup>11</sup> The traditional rule was clear: the admissibility of evidence does not turn on the legality of its acquisition.

But the Supreme Court overthrew these principles in a line of cases starting in 1886.<sup>12</sup> It adopted a federal exclusionary rule in *Weeks v. United States*<sup>13</sup> and *Silverthorne Lumber Co. v. United States*,<sup>14</sup> and extended the rule to the states in *Mapp v. Ohio*.<sup>15</sup> Yet the Court struggled to explain just why it was throwing out perfectly reliable evidence of guilt. Some cases said that the Fourth Amendment itself required exclusion.<sup>16</sup> Others attributed the result to a combination of the Fourth Amendment and the Fifth's Self-Incrimination Clause.<sup>17</sup> Still others thought it unseemly for courts to use evidence obtained illegally — to have a hand in what Justice Holmes called law enforcement's

<sup>9</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982).

<sup>10</sup> U.S. CONST. amend. IV.

<sup>11</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786–87 (1994).

<sup>12</sup> See *id.* at 787–88.

<sup>13</sup> 232 U.S. 383 (1914).

<sup>14</sup> 251 U.S. 385 (1920).

<sup>15</sup> 367 U.S. 643 (1961).

<sup>16</sup> *E.g., id.* at 657–58; *Olmstead v. United States*, 277 U.S. 438, 462 (1928).

<sup>17</sup> *E.g., Mapp*, 367 U.S. at 662 (Black, J., concurring); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

“dirty business.”<sup>18</sup> And a few said that nothing short of exclusion would deter unlawful searches and seizures.<sup>19</sup> But whatever the reason, exclusion was more or less the automatic consequence of a violation of the Fourth Amendment.<sup>20</sup>

Writing in 1965, Judge Henry Friendly challenged this reflexive resort to suppression.<sup>21</sup> Why, he asked, should the court exclude evidence when a police officer merely makes a mistake? Laying the foundation for the good faith exception, he wrote that “[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.”<sup>22</sup>

The Supreme Court did not act on Judge Friendly’s proposal in the two decades that followed, though individual Justices endorsed it to one or another degree.<sup>23</sup> But its decisions during that period made its suppression jurisprudence more hospitable to a good faith exception. Discarding the supposition that the Constitution or the need for judicial integrity compels suppression, the Court settled on a pragmatic account of the exclusionary rule: it exists because, and only because, it deters violations of the Fourth Amendment.<sup>24</sup> And exclusion should prevail, the Court added, only when the benefits of added deterrence exceed suppression’s heavy costs.<sup>25</sup> Reasoning from these postulates, the Court announced a series of new limits to the exclusionary rule — for example, making suppression unavailable during grand jury proceedings.<sup>26</sup>

Good faith’s turn finally came in 1984. A pair of cases, *United States v. Leon* and *Massachusetts v. Sheppard*, held that the exclusionary rule does not operate where police reasonably rely on a warrant that turns out to be defective.<sup>27</sup> The criminal is not to go free because the magistrate has blundered. The Court arrived at this result after

<sup>18</sup> *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting); see, e.g., *id.* at 484 (Brandeis, J., dissenting).

<sup>19</sup> E.g., *Elkins v. United States*, 364 U.S. 206, 217 (1960).

<sup>20</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011).

<sup>21</sup> Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951–53 (1965).

<sup>22</sup> *Id.* at 953 (footnote omitted).

<sup>23</sup> See *Illinois v. Gates*, 462 U.S. 213, 259–67 (1983) (White, J., concurring in the judgment); *Stone v. Powell*, 428 U.S. 465, 498–502 (1976) (Burger, C.J., concurring); *id.* at 540–42 (White, J., dissenting); *Brown v. Illinois*, 422 U.S. 590, 611–12 (1975) (Powell, J., concurring in part).

<sup>24</sup> E.g., *United States v. Calandra*, 414 U.S. 338, 348 (1974).

<sup>25</sup> *Id.* at 349–52.

<sup>26</sup> *Id.*; see also, e.g., *United States v. Havens*, 446 U.S. 620, 627–28 (1980) (holding illegally obtained evidence admissible during cross-examination of defendant); *Powell*, 428 U.S. at 464–65 (holding suppression claims unreviewable on habeas corpus); *United States v. Janis*, 428 U.S. 433, 459–60 (1976) (holding evidence obtained illegally by states admissible during federal civil tax proceedings).

<sup>27</sup> *United States v. Leon*, 468 U.S. 897, 922 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88 (1984).

balancing costs and benefits. Far from engaging in the sort of flagrant misconduct that is exclusion's core concern, the Court explained, a police officer who trusts a judge's warrant acts "as a reasonable officer would and should."<sup>28</sup> This reasonable police behavior, the Court concluded, did not call for the severe sanction of suppression.<sup>29</sup>

*Leon* did not, however, exempt the whole genus of objectively reasonable mistakes from exclusion's province. Its holding instead reached only one species of error: objectively reasonable reliance on a subsequently invalidated search warrant.<sup>30</sup>

But a legal principle, once introduced, tends "to expand itself to the limit of its logic."<sup>31</sup> So it was with good faith. In 1987, *Illinois v. Krull*<sup>32</sup> extended its domain from later-invalidated judicial warrants to later-invalidated legislative enactments.<sup>33</sup> *Arizona v. Evans*<sup>34</sup> enlarged it further in 1995 to reliance on court clerks' recordkeeping mistakes.<sup>35</sup> *Herring v. United States*,<sup>36</sup> decided in 2009, brought in reliance on the police department's own recordkeeping mistakes (at least where those mistakes result from "isolated negligence attenuated from the arrest," rather than systemic error or gross negligence).<sup>37</sup> And *Davis v. United States*,<sup>38</sup> decided in 2011, added reliance on appellate precedent binding at the time of the search but later overturned.<sup>39</sup>

The two latest cases in this progression gave the good faith exception a wide compass. *Herring* cited Judge Friendly's article<sup>40</sup> and said that the propriety of exclusion "varies with the culpability of the law enforcement conduct."<sup>41</sup> Yet other parts of the opinion were more equivocal, and in any event the Court's holding only covered mistakes in police databases.<sup>42</sup> *Davis* spoke with more force. Although its holding reached only "searches conducted in objectively reasonable reliance on binding appellate precedent,"<sup>43</sup> it said in dictum that the good faith exception extends to *any* case where "the police act with an objectively 'reasonable good-faith belief' that their conduct is law-

<sup>28</sup> *Leon*, 468 U.S. at 920 (quoting *Powell*, 428 U.S. at 539–40 (White, J., dissenting)).

<sup>29</sup> *Id.* at 922.

<sup>30</sup> *Id.* at 913–14.

<sup>31</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

<sup>32</sup> 480 U.S. 340 (1987).

<sup>33</sup> *Id.* at 349–50.

<sup>34</sup> 514 U.S. 1 (1995).

<sup>35</sup> *Id.* at 3–4.

<sup>36</sup> 129 S. Ct. 695 (2009).

<sup>37</sup> *Id.* at 698.

<sup>38</sup> 131 S. Ct. 2419 (2011).

<sup>39</sup> *Id.* at 2423–24.

<sup>40</sup> 129 S. Ct. at 702.

<sup>41</sup> *Id.* at 701.

<sup>42</sup> *Id.* at 698.

<sup>43</sup> 131 S. Ct. at 2423–24; *accord id.* at 2435 (Sotomayor, J., concurring in the judgment).

ful.”<sup>44</sup> Dissenting, Justice Breyer wrote that the logical endpoint of the Court’s approach is an exclusionary rule that operates “against only those searches and seizures that are *egregiously* unreasonable.”<sup>45</sup>

## II. HOW GOOD FAITH WORKS TODAY

Although the label suggests otherwise, a court applying the good faith rule is not to search the mind of the searcher to determine whether he acted in “good faith.” The court must instead answer an objective question: was it reasonable for the officer to behave as he did under the circumstances?<sup>46</sup> For example, suppose a judge had to decide whether an officer reasonably relied on a bad warrant. He would ask: Was it apparent that the issuing magistrate abdicated his judicial role? Was the supporting affidavit so bare of probable cause that belief in the warrant’s validity was irresponsible? Was the warrant so defective on its face that the officer should have recognized its inadequacy?<sup>47</sup> He would not ask: Did the officer know or suspect that the warrant was invalid?

Although it is settled that *only* objectively reasonable errors come within good faith’s metes and bounds, it is not yet settled whether *all* objectively reasonable errors do so. The Supreme Court has not yet held that they do, and even after *Davis* lower courts continue to resist this possibility.<sup>48</sup>

How, then, are we supposed to figure out *which* reasonable mistakes the good faith principle covers? Remarkably, the Supreme Court has never given a clear answer to this question. Instead, every time the Court has added a new type of mistake to its list of eligible errors, it has explained the outcome by pointing to the costs and benefits of suppression under the circumstances.<sup>49</sup> Following the Supreme Court’s lead, the lower courts have reached a consensus that the applicability of the good faith exception turns on a balancing of pros and cons.<sup>50</sup>

<sup>44</sup> *Id.* at 2427 (majority opinion) (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)).

<sup>45</sup> *Id.* at 2440 (Breyer, J., dissenting).

<sup>46</sup> *Leon*, 468 U.S. at 922 n.23.

<sup>47</sup> *Id.* at 923.

<sup>48</sup> *See, e.g.*, *United States v. Sparks*, 711 F.3d 58, 63–64 (1st Cir. 2013); *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) (per curiam); *United States v. Kinison*, 710 F.3d 678, 685 (6th Cir. 2013); *United States v. Edwards*, 666 F.3d 877, 886–87 (4th Cir. 2011); *Smallwood v. State*, 113 So. 3d 724, 738–39 (Fla. 2013); *Briscoe v. State*, 30 A.3d 870, 883 (Md. 2011); *State v. Bromm*, 826 N.W.2d 270, 276 (Neb. 2013).

<sup>49</sup> *See Davis*, 131 S. Ct. at 2428–29; *Herring v. United States*, 129 S. Ct. 695, 704 (2009); *Arizona v. Evans*, 514 U.S. 1, 12–16 (1995); *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987).

<sup>50</sup> *See, e.g.*, *United States v. Sparks*, 711 F.3d 58, 63 (1st Cir. 2013); *United States v. Julius*, 610 F.3d 60, 66–67 (2d Cir. 2010); *Virgin Islands v. John*, 654 F.3d 412, 420 (3d Cir. 2011); *United States v. Davis*, 690 F.3d 226, 253 (4th Cir. 2012); *United States v. Allen*, 625 F.3d 830, 836 (5th Cir. 2010); *United States v. Clariot*, 655 F.3d 550, 555–56 (6th Cir. 2011); *United States v. Elst*, 579 F.3d 740, 747 (7th Cir. 2009); *United States v. Hamilton*, 591 F.3d 1017, 1028 (8th Cir. 2010); *Unit-*

But this is a faux consensus: nobody agrees about just how this comparison of costs and benefits works. For starters, every court seems to have its own notion about the proper level of generality at which to carry out the weighing. Categorical balancing was the order of the day when the Seventh Circuit held that the good faith exception never protects an erroneous reasonable-suspicion determination.<sup>51</sup> But case-by-case balancing prevailed when the Fourth Circuit suppressed evidence seized during a strip search in Baltimore: the court decided, on account of the frequency with which “Baltimore City police officers” conducted similar searches, that the deterrence was worth the price.<sup>52</sup> (Perhaps — who can tell? — the court would have come out the other way had the search happened in Annapolis.) Other cases fall between these extremes.<sup>53</sup>

Courts also differ over whether to rely on empirical data. Some appellate judges, thinking hard facts essential to proper performance of their duty, insist on sending cases back to district courts for factual findings on the deterrent effects of suppression.<sup>54</sup> Others, perhaps questioning the wisdom of commissioning a new judicial empirical study in every case, are content to balance away without aid of trial court findings.<sup>55</sup>

How to fit in “culpability,” a concept underlined in both *Herring* and *Davis*, provokes further disagreement. Some courts say that lack of police culpability automatically immobilizes the exclusionary rule.<sup>56</sup> Others agree with Justice Sotomayor’s view that absence of culpability “may inform the overarching inquiry.”<sup>57</sup> Still others give it almost no weight at all.<sup>58</sup> A separate theory holds that the culpability framework provides an “alternative” test that stands apart from cost-benefit balancing.<sup>59</sup> Complicating matters, some seem to think that assessing

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ed States v. Song Ja Cha, 597 F.3d 995, 1005 (9th Cir. 2010); United States v. McCane, 573 F.3d 1037, 1044 (10th Cir. 2009); United States v. Owens, 445 F. App’x 248, 250 (11th Cir. 2011).

<sup>51</sup> United States v. Bohman, 683 F.3d 861, 866–67 (7th Cir. 2012).

<sup>52</sup> *Edwards*, 666 F.3d at 886.

<sup>53</sup> Compare, e.g., *Julius*, 610 F.3d at 68 (case-by-case), with, e.g., *Owens*, 445 F. App’x at 251 (categorical).

<sup>54</sup> E.g., United States v. Nicholson, 721 F.3d 1236, 1257 (10th Cir. 2013) (Gorsuch, J., dissenting); United States v. Master, 614 F.3d 236, 243 (6th Cir. 2010).

<sup>55</sup> E.g., *Bohman*, 683 F.3d at 866–67; *Song Ja Cha*, 597 F.3d at 1005.

<sup>56</sup> E.g., United States v. Kinison, 710 F.3d 678, 687 (6th Cir. 2013); United States v. Davis, 690 F.3d 226, 252–53 (4th Cir. 2012).

<sup>57</sup> *Davis v. United States*, 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring in the judgment); accord, e.g., United States v. Wright, 493 F. App’x 265, 271–72 (3d Cir. 2012); *Julius*, 610 F.3d at 67.

<sup>58</sup> E.g., *Bohman*, 683 F.3d at 866–67; *State v. Handy*, 18 A.3d 179, 187 (N.J. 2011).

<sup>59</sup> *Nicholson*, 721 F.3d at 1257 (Gorsuch, J., dissenting).

culpability requires probing the minds of searching officers,<sup>60</sup> while others insist that the inquiry remains objective.<sup>61</sup>

Every court thus appears to use its own home-brewed formula to calculate good faith's reach. As one might expect, this theoretical disagreement about the governing standard has produced practical disagreement about results. Here is a sampling of the concrete questions that have divided courts during just the last four years: Does the good faith exception apply at all when the police make mistakes of law?<sup>62</sup> When they rely on persuasive authority later rejected rather than binding authority later overturned?<sup>63</sup> When they read binding precedents reasonably, but wrongly?<sup>64</sup> When they make a borderline call that turns out to be mistaken?<sup>65</sup> When there are no relevant precedents at all?<sup>66</sup> When they engage in negligence that is not, as in *Herring*, "attenuated" from the search?<sup>67</sup> And what is "attenuation" anyway?<sup>68</sup>

### III. THE CASE FOR A GENERAL GOOD FAITH EXCEPTION

Here is one way to dispel the confusion: the good faith exception should extend to *any* kind of objectively reasonable official mistake.

This move would coordinate the good faith exception with the doctrine of qualified immunity, which shields public officials who act reasonably from monetary liability in *Bivens* actions<sup>69</sup> and § 1983 suits.<sup>70</sup> In one way, qualified immunity and good faith already coincide: both protect only objectively reasonable behavior. In fact, "the same standard of objective reasonableness . . . applied in the context of a

<sup>60</sup> *Id.*; *Wright*, 493 F. App'x at 271.

<sup>61</sup> *United States v. Rosa*, 626 F.3d 56, 64–65 (2d Cir. 2010); *State v. Johnson*, 354 S.W.3d 627, 633–34 (Mo. 2011) (en banc).

<sup>62</sup> *Compare* *People v. Robinson*, 224 P.3d 55, 69 (Cal. 2010) (yes), *with* *United States v. Song Ja Cha*, 597 F.3d 995, 1005 (9th Cir. 2010) (no).

<sup>63</sup> *Compare* *United States v. Baez*, 878 F. Supp. 2d 288, 295–97 (D. Mass. 2012) (yes), *and* *United States v. Sparks*, 711 F.3d 58, 63–64 (1st Cir. 2013) (maybe), *with* *United States v. Martin*, 712 F.3d 1080, 1082 (7th Cir. 2013) (per curiam) (probably no), *and* *United States v. Robinson*, 903 F. Supp. 2d 766, 783–84 (E.D. Mo. 2012) (definitely no).

<sup>64</sup> *Compare* *United States v. Davis*, 690 F.3d 226, 254–55 (4th Cir. 2012) (yes), *with* *United States v. Bohman*, 683 F.3d 861, 866–67 (7th Cir. 2012) (no).

<sup>65</sup> *Compare* *United States v. Burgard*, 675 F.3d 1029, 1035–36 (7th Cir. 2012) (maybe sometimes), *with* *Bohman*, 683 F.3d at 866–67 (no).

<sup>66</sup> *Compare* *Virgin Islands v. John*, 654 F.3d 412, 426 (3d Cir. 2011) (Fuentes, J., dissenting) (yes), *with* *Smallwood v. State*, 113 So. 3d 724, 738 (Fla. 2013) (no).

<sup>67</sup> *Compare* *Robinson*, 224 P.3d at 69 (yes), *with* *State v. Handy*, 18 A.3d 179, 187 (N.J. 2011) (no).

<sup>68</sup> *Compare* *United States v. Cote*, 72 M.J. 41, 46 n.11 (C.A.A.F. 2013) (explaining that an error is attenuated if committed by someone other than the officer conducting the search), *with* *Handy*, 18 A.3d at 187 (deeming an error not attenuated, even though committed by someone other than the officer conducting the seizure).

<sup>69</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>70</sup> 42 U.S.C. § 1983 (2006); *see* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982).

suppression hearing in *Leon* defines the qualified immunity accorded an officer' who obtained or relied on an allegedly invalid warrant."<sup>71</sup> In another way, the two doctrines diverge: the good faith exception (so far) only covers some kinds of reasonable mistakes, but qualified immunity covers reasonable mistakes of every description.<sup>72</sup> Adopting a general good faith exception would eliminate this disparity.<sup>73</sup>

What, concretely, would change? To start, good faith would track qualified immunity in reaching all reasonable factual or clerical mistakes.<sup>74</sup> There would be no need to ask, as many courts do after *Herring*, whether the mistake was "attenuated" from the search. More significantly, a broader range of legal errors would come within good faith's radius. Like qualified immunity, the good faith exception would touch any official conduct that does not violate "clearly established" law.<sup>75</sup> Exclusion would intrude only when case law speaks with such clarity that any "reasonable official would understand" that the search or seizure offends the Fourth Amendment.<sup>76</sup> This standard does not "require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate."<sup>77</sup>

Expanding the good faith principle would yield benefits beyond an elegant symmetry between suppression motions and civil suits. The expansion makes sense, no matter how one looks at it: with a theoretical interest in the purpose of the exclusionary rule (section III.A), or a lawyerly interest in its doctrine (section III.B), or an economic interest in the incentives it creates (section III.C), or a procedural interest in its effects on criminal trials (section III.D), or even an administrative interest in its workability (section III.E).

#### A. Purpose of Exclusion

Exclusion exists to deter. And it will continue to deter, even when trimmed by an across-the-board good faith exception. It will still operate whenever the police plainly violate an established Fourth

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<sup>71</sup> *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 n.1 (2012) (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986) (citation omitted)).

<sup>72</sup> *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

<sup>73</sup> See *Stone v. Powell*, 428 U.S. 465, 540-42 (1976) (White, J., dissenting) (arguing that if a search does not trigger civil liability, neither should it trigger exclusion). See generally Jennifer E. Laurin, Essay, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (discussing how exclusionary rule jurisprudence borrows from constitutional tort doctrine).

<sup>74</sup> See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 565 n.9 (2004) (suggesting qualified immunity may be appropriate if an officer, distracted by an ongoing emergency, were to make a mistake on a warrant application).

<sup>75</sup> *Harlow*, 457 U.S. at 818.

<sup>76</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

<sup>77</sup> *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

Amendment right. To be sure, the deterrent of exclusion would no longer superintend reasonable missteps. But that is as it should be.

In the first place, police already have good reasons to avoid many of the mistakes that would come within the perimeter of an enlarged good faith exception.<sup>78</sup> For example, they have built-in incentives to avoid erroneous reliance on exigency or consent or some other exception to the so-called warrant requirement.<sup>79</sup> An officer who gets a valid warrant *guarantees* that his evidence against the suspect will come in, and that the suspect's lawsuit against him will be thrown out.<sup>80</sup> But an officer who performs a warrantless search must gamble. He must hope that judges inspecting his conduct months or perhaps years later will agree he behaved reasonably — if they do not, he will lose his time to a civil trial, his money to a damages award, and his evidence to a suppression motion.

Police have even stronger reason to avoid factual and clerical fumbles, like arresting a person or raiding a house or tracking a car that is not their intended target. Thrift provides one motive to avoid mix-ups: police departments have limited money and manpower, which they will not wish to squander searching the wrong places and seizing the wrong people.<sup>81</sup> Prudence provides another: police need to know with whom they are dealing in order to gauge the threat to their safety and to take appropriate precautions.<sup>82</sup> An officer who charges into one person's house thinking it to be another's acts at peril.

To the extent incentives to overstep authority or to avoid exercising due care remain in place, remedies besides exclusion can oust them. It makes scant sense to deploy one sanction against every shade of official misbehavior, from raiding a home with neither warrant nor suspicion all the way down to making a clerical omission on a warrant because of momentary inattention.<sup>83</sup> “It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy . . . to every case of difficulty.”<sup>84</sup>

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<sup>78</sup> Cf. *Hudson v. Michigan*, 547 U.S. 586, 596 (2006) (“[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act.”).

<sup>79</sup> “Requirement” is a misnomer because there are so many exceptions. See *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring in the judgment); Amar, *supra* note 11, at 762–71.

<sup>80</sup> See Amar, *supra* note 11, at 778.

<sup>81</sup> Cf. *Florida v. Harris*, 133 S. Ct. 1050, 1057 (2013) (noting that “law enforcement units have their own strong incentive” to use accurate drug-detection dogs because inaccurate alerts “wast[e] limited time and resources”).

<sup>82</sup> *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004).

<sup>83</sup> Friendly, *supra* note 21, at 953; see also, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

<sup>84</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*17.

In the main, the legal system uses strict liability and liability for negligence to deter ordinary mistakes,<sup>85</sup> reserving the harsher sanctions of the criminal law for more flagrant wrongs.<sup>86</sup> Analogy suggests that tort liability will also suffice to deter missteps relating to searches and seizures. Chief among available civil remedies are *Bivens* actions (for federal officers) and suits under § 1983 (for state officers) — and the latter come with attorneys' fees.<sup>87</sup> True, officers will enjoy qualified immunity for reasonable mistakes, but the Supreme Court has assumed in related settings that even “the *threat* of litigation and liability will adequately deter [them] . . . no matter that they may enjoy qualified immunity.”<sup>88</sup> Quite apart from these federal remedies, injured plaintiffs can also bring state tort actions to which qualified immunity is no bar: “conversion, false arrest and imprisonment, trespass to land and to chattels, assault, battery, infliction of emotional distress, and invasion of the right of privacy.”<sup>89</sup> That is not all. Municipalities, which cannot claim qualified immunity, are liable under § 1983 for inadequate training of police — a likely source of officer mistakes.<sup>90</sup> Internal police discipline and citizen review can also discourage errors.<sup>91</sup>

So when it comes to mistakes, exclusion is overkill. The exclusionary rule exacts a heavy toll: it suppresses reliable evidence, sets the guilty at large, and impairs the public reputation of the courts.<sup>92</sup> Common sense rebels at paying this price “where the worst that can be said is that a policeman placed a bit too much credence on the reliability of an informer.”<sup>93</sup>

But there is a more fundamental point. Because the exclusionary rule is a judicial improvisation, not a constitutional command, it is the *judges'* burden to justify its expansion.<sup>94</sup> Even if exclusion held sway only in the national courts, this burden would be a heavy one: rules that keep relevant and reliable evidence out of court should be neither “lightly created nor expansively construed, for they are in derogation

<sup>85</sup> See generally Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

<sup>86</sup> Friendly, *supra* note 21, at 951–52.

<sup>87</sup> See 42 U.S.C. § 1988 (2006).

<sup>88</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (emphasis added).

<sup>89</sup> Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53.

<sup>90</sup> *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

<sup>91</sup> *Cf. Hudson v. Michigan*, 547 U.S. 586, 597–99 (2006).

<sup>92</sup> See Amar, *supra* note 11, at 799; Posner, *supra* note 89, at 58; William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 443–44 (1997).

<sup>93</sup> Friendly, *supra* note 21, at 953.

<sup>94</sup> *Cf. Maryland v. Shatzer*, 130 S. Ct. 1213, 1220 (2010) (making a similar point about court-made prophylactic rules); *Arizona v. Roberson*, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting) (same).

of the search for truth.”<sup>95</sup> But the lift is heavier still because the federal rule of exclusion binds the states. Even Congress, armed with express power to enforce the Fourteenth Amendment, may impose remedial measures upon the states only after making rigorous demonstration of their necessity.<sup>96</sup> Federal courts, unable to claim any such textual warrant for shoring up the Constitution, should hardly be held to a lower standard.<sup>97</sup>

So it is not enough to say that exclusion works a bit better than the alternatives. Maybe it does. The question is instead whether the need for additional deterrence is so pressing, the cost-benefit comparison so lopsided, and the imperative for a coast-to-coast solution so acute that federal judicial insistence upon exclusion becomes meet. So far as reasonable mistakes go, at least, the answer is clear.

### B. Doctrine

No holding of the Supreme Court either compels or forecloses extending the good faith exception to every species of reasonable police mistake. But the outcomes of the Court’s good faith cases, from *Leon* to *Davis*, support just such an extension. It is a familiar application of the common law method for a court first to decide a series of particular cases, and then to extrapolate from them a unifying principle — a line of best fit, as it were.<sup>98</sup> A general good faith exception explains the outcome in every Supreme Court good faith case and contradicts the outcome in none.

What’s more, it is difficult to come up with any other principle up to this task. The leading alternative proposes excluding evidence when police stumble but mobilizing the good faith doctrine when someone else, like a judge or court employee, goes astray.<sup>99</sup> But this test cannot account for *Herring*, which involved a police recordkeeping mistake. Besides, this approach has little to commend it. When a wayward warrant leads to an unconstitutional search, the magistrate has admittedly made a mistake. But the officer conducting the search has *also* made a mistake (albeit a reasonable one): just as the magistrate violated the Warrant Clause when he issued the warrant, so did the officer violate the Reasonableness Clause when he executed it. The superficially appealing distinction between police error and errors by others, then, is really a distinction between cases in which only the

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<sup>95</sup> *United States v. Nixon*, 418 U.S. 683, 710 (1974).

<sup>96</sup> *See, e.g., Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>97</sup> *See* Paul G. Cassell, *The Paths Not Taken: The Supreme Court’s Failures in Dickerson*, 99 MICH. L. REV. 898, 920 (2001).

<sup>98</sup> *See* CARDOZO, *supra* note 31, at 23.

<sup>99</sup> *Herring v. United States*, 129 S. Ct. 695, 710–11 (2009) (Breyer, J., dissenting).

police err and cases in which the police and somebody else both err. It is scarcely logical to exclude evidence when there is only one mistake, but admit it when there are two.

In any event, extending the good faith exception to all reasonable mistakes would fit not only with the prior cases' outcomes but also with their reasoning. Every good faith case from *Leon* onward says or implies that flagrancy of police misconduct is an element of the suppression calculus, with *Herring* and *Davis* featuring the point prominently.<sup>100</sup> *Davis* even says that "absence of police culpability dooms" a motion to suppress.<sup>101</sup> But so far as culpability goes, a police officer who follows subsequently overruled binding precedent (as in *Davis*) is on a parity with an officer who acts reasonably in the face of conflicting cases.<sup>102</sup> And an officer who relies on a recordkeeping error (as in *Herring*) differs little from an officer who succumbs to some other kind of clerical error. If the good faith exception is to turn on culpability, it must reach *any* type of reasonable mistake.

Bringing the qualified immunity decisions into the picture only strengthens the case for a broader good faith rule. Qualified immunity's objective reasonableness standard, the Supreme Court has said, is designed to permit liability when public officials "exercise power irresponsibly" but to preclude it "when they perform their duties reasonably."<sup>103</sup> So qualified immunity and the good faith exception share a common aim: "irresponsible" sounds a lot like "culpable." It follows that they should also share a common test.

Finally, a general good faith exception respects the exclusionary rule's foundational cases.<sup>104</sup> In *Weeks v. United States*, officers broke into the suspect's house, searched his room, seized some papers, and came back later to look around some more — all this, not just without a warrant, but without even enough information to get a warrant.<sup>105</sup> Acting "without a shadow of authority," the federal officials in *Silverthorne Lumber Co. v. United States* "made a clean sweep of all the books, papers and documents" in the defendants' office.<sup>106</sup> And in *Mapp v. Ohio*, a band of officers forced their way into Mapp's home; prevented her lawyer from entering; waved a piece of paper purported to be a warrant; forcibly resisted her attempt to take the "warrant"

<sup>100</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2427–29, 2432–33 (2011); *Herring*, 129 S. Ct. at 698, 701–02; *Arizona v. Evans*, 514 U.S. 1, 11–14 (1995); *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987); *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984); *United States v. Leon*, 468 U.S. 897, 911 (1984).

<sup>101</sup> 131 S. Ct. at 2428.

<sup>102</sup> Cf. *id.* at 2439 (Breyer, J., dissenting).

<sup>103</sup> *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

<sup>104</sup> See *Herring*, 129 S. Ct. at 701–02.

<sup>105</sup> *Weeks v. United States*, 232 U.S. 383, 386, 393–94 (1914).

<sup>106</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390 (1920).

from them; handcuffed her and twisted her hand; searched her bedroom, her child's bedroom, and the rest of the house; and rifled through her photograph album and personal papers.<sup>107</sup> Searches of this genre are a far cry from the errors of judgment that fall within good faith's bailiwick.

### C. *Overdeterrence*

A severe penalty deters not only unlawful conduct, but also lawful conduct close to the legal boundary. And the more uncertain the boundary, the more certain the overdeterrence. The Supreme Court has accounted for this phenomenon in other legal contexts. For example, First Amendment doctrine requires precision in speech regulation because vague laws chill too much legitimate speech.<sup>108</sup> And antitrust law does not lightly impose criminal liability for violating its amorphous rules, lest cautious businesses refrain from too much "salutary and procompetitive conduct."<sup>109</sup>

So too should courts account for overdeterrence in search and seizure law. The staples of Fourth Amendment doctrine — probable cause, reasonable suspicion, exigent circumstances — all call for application of that most mercurial of legal standards, the totality of the circumstances test.<sup>110</sup> And even when the law is clear, the facts might not be — and that matters because the legality of a search tends to depend a lot on facts.<sup>111</sup> Faced with the severe sanction of exclusion if a judge, in the reflective atmosphere of a courtroom, disagrees with his on-the-spot application of hazy principles to uncertain facts, an officer might forgo a search or seizure altogether.<sup>112</sup> Forgone lawful searches and seizures translate into forgone solving of crimes, forgone punishment of the guilty, even forgone protection of police from avoidable violence.

The adoption of a general good faith exception would go a long way toward addressing this problem of overdeterrence. If the extreme remedy of suppression were available only when police commit a clear violation of the Constitution — when it is unreasonable to think the search reasonable — officers would become less likely to abandon perfectly lawful searches out of an abundance of caution.

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<sup>107</sup> *Mapp v. Ohio*, 367 U.S. 643, 644–45 (1961).

<sup>108</sup> *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997).

<sup>109</sup> *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978).

<sup>110</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013); *United States v. Arvizu*, 534 U.S. 266, 274 (2002); *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

<sup>111</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>112</sup> See Posner, *supra* note 89, at 55.

This idea has not escaped the Supreme Court's attention. For example, *Hudson v. Michigan*<sup>113</sup> brought this issue into focus when it held suppression categorically unavailable for violations of the Fourth Amendment's knock-and-announce rule. Thanks to the rule's "reasonable wait time" standard,<sup>114</sup> explained the Court, the amount of time officers must wait after knocking and announcing "is necessarily uncertain."<sup>115</sup> If crossing this faint line triggered the "massive remedy" of exclusion, "officers would be inclined to wait longer than the law requires — producing preventable violence against officers in some cases, and the destruction of evidence in many others."<sup>116</sup> But one could say much the same thing about *any* case in which a search's compatibility with the Fourth Amendment is "uncertain" — that is to say, about *any* case covered by a general good faith exception.

The Court's qualified immunity cases are also alert to the problem of overdeterrence. If anything, that problem is their driving concern. These cases repeatedly recognize the importance of ensuring that officials are "neither deterred nor detracted from the vigorous performance" of their functions.<sup>117</sup> Officials must be shielded from liability for mere reasonable errors of judgment, lest "fear of personal monetary liability . . . unduly inhibit . . . the discharge of their duties."<sup>118</sup> But if avoiding overdeterrence requires withholding damages for reasonable mistakes, why doesn't it also compel withholding suppression for the very same mistakes?

To be sure, damages and suppression are different. But the differences only strengthen the case against suppression. If exclusion is at all defensible as a deterrent, it must be presumed to deter more than damages — if it deterred less, why have it?<sup>119</sup> (No wonder exclusion's defenders routinely claim that it deters more than tort remedies.<sup>120</sup>) But acceptance of this premise just seals the case for a general good faith exception. If damages for reasonable errors would deter too much legitimate law enforcement, and suppression deters more than

<sup>113</sup> 547 U.S. 586 (2006).

<sup>114</sup> *Id.* at 595 (quoting *United States v. Banks*, 540 U.S. 31, 41 (2003)) (internal quotation marks omitted).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009); *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

<sup>118</sup> *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

<sup>119</sup> It is sometimes argued that damages are *so* potent that they produce even more overdeterrence than exclusion. *See, e.g., Stuntz, supra* note 92, at 445–47. If that were so, however, the solution would not be to use exclusion, but to scale back the availability of damages (say, by capping them) to produce the desired level of deterrence. *See Posner, supra* note 89, at 54.

<sup>120</sup> *See, e.g., Hudson*, 547 U.S. at 610 (Breyer, J., dissenting); 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, 1387–89 (1983).

damages, then suppression for reasonable errors must also deter too much legitimate law enforcement.

#### *D. Effects on Criminal Trials*

The exclusionary rule generates a lot of suppression motions: “tens of thousands” every year, by one count.<sup>121</sup> In many of these cases, deciding whether the government complied with the Constitution will be hard. Fourth Amendment law, after all, is a regime not of rules but of standards — vague standards. Worse, it is a regime of fact-intensive standards, an infelicity that limits the guidance that precedents can provide. (How often will a trial judge find an appellate case whose facts duplicate the facts at hand?) So the motion to suppress will often cast the judge upon his own judgment and require extensive litigation to resolve.

A general good faith exception homes in on these hard cases and banishes them from the criminal courtroom. As Judge Friendly said, “[R]ecognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve [courts] of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one.”<sup>122</sup> To be sure, the exception will raise close cases of its own. But it tends to be easier to decide whether someone has erred flagrantly than to decide whether he has erred at all.<sup>123</sup> That is why, for example, a common defense of *Chevron* and *Seminole Rock* deference is that they conserve judicial resources: it is simpler to decide whether an agency’s interpretation of a statute or regulation is reasonable than to decide whether it is right.<sup>124</sup>

Adopting a general good faith exception would thus lighten the workload of criminal courts. The criminal justice system would be better for the change, and not just because judges would have less to do. A suppression proceeding diverts the court’s energies from what should be its central mission: finding out if the defendant did the crime.<sup>125</sup> By allowing courts to spend less time ascertaining the meaning of the Fourth Amendment, a general good faith exception enables them to spend more time verifying guilt and innocence.

The Supreme Court’s decisions confirm the propriety of accounting for costs of litigation when fixing the boundaries of the exclusionary

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<sup>121</sup> Stuntz, *supra* note 92, at 444.

<sup>122</sup> Friendly, *supra* note 21, at 953.

<sup>123</sup> See Matthew C. Stephenson, *The Costs of Voting Rule Chevron: A Comment on Gersen and Vermeule’s Proposal*, 116 YALE L.J. POCKET PART 238, 239 (2007), <http://www.yalelawjournal.org/images/pdf/99.pdf>.

<sup>124</sup> See, e.g., ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 205–29 (2006).

<sup>125</sup> See *Stone v. Powell*, 428 U.S. 465, 489–90 (1976).

rule. These costs feature prominently in many modern opinions refusing to extend the rule to proceedings other than criminal trials.<sup>126</sup> Even more to the point, *Hudson v. Michigan* explained that the difficulty of checking compliance with knock-and-announce supports dispensing with exclusion for knock-and-announce violations.<sup>127</sup> In the same way, the difficulty of resolving novel Fourth Amendment questions supports a general good faith exception.

### E. Administrability

The lower courts have distilled a cost-benefit balancing test from the Supreme Court's good faith precedents. The chaos that this test has produced is argument enough against perpetuating its use. Adjustments will not help: the test is rotten at its core. Comparing advantages and disadvantages is fair enough when fashioning a general rule — when deciding whether to have a good faith exception at all, or whether exclusion should operate against knock-and-announce violations,<sup>128</sup> or in parole revocation hearings.<sup>129</sup> The court balances once and for all, and then it moves on. Not so, however, if each case requires the court to strike the balance afresh — if cost-benefit analysis is not used to develop the governing rule, but *is* the governing rule. Assessing the probable effects of exclusion is never easy, and the challenge is “made all the more complex by the grand societal scale on which the measurement is supposed to take place.”<sup>130</sup> Besides being hard to administer, this cost-benefit inquiry is also unpredictable. Different judges will have very different ideas about how much exclusion deters, how grave are the consequences of setting guilty criminals free, and how to go about comparing the two.

How much simpler to have done with this weighing of pluses and minuses, and to ask just one question: was the officer's mistake, whether of fact or law, a reasonable one? This approach would save the court from conducting a society-wide appraisal of costs and benefits, instead fixing its attention on the facts of the case at hand. And it would be objective, avoiding any need to figure out what was going on inside the officer's head.

Parallelism with qualified immunity only intensifies these administrative advantages. Qualified immunity's objective reasonableness

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<sup>126</sup> See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 366 (1998) (parole revocation hearings); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048–49 (1984) (deportation proceedings); *United States v. Calandra*, 414 U.S. 338, 349–50 (1974) (grand jury proceedings).

<sup>127</sup> *Hudson v. Michigan*, 547 U.S. 586, 595 (2006); see also *id.* at 604 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>128</sup> *Hudson*, 547 U.S. 586.

<sup>129</sup> *Scott*, 524 U.S. 357.

<sup>130</sup> *United States v. Nicholson*, 721 F.3d 1236, 1256 (10th Cir. 2013) (Gorsuch, J., dissenting).

standard has been around since 1982,<sup>131</sup> and courts have worked out — in detail — how it operates. A robust body of cases shows how to apply it in Fourth Amendment disputes,<sup>132</sup> and an even larger body of cases, arising under other constitutional provisions, makes for a plentiful source of useful analogies. Equally important, qualified immunity cases are a mainstay of federal dockets.<sup>133</sup> So federal judges, at least, have experience deciding whether a constitutional violation falls within the zone of reasonable mistake. More broadly, the law abounds in rules that require judges to distinguish reasonable from unreasonable legal conclusions: *Chevron* deference,<sup>134</sup> *Seminole Rock* deference,<sup>135</sup> and the federal habeas corpus statute,<sup>136</sup> to name just a few. So a general good faith exception, implemented with an objective reasonableness standard, would call upon judges to perform a familiar task and with the aid of a familiar body of precedents.

Like any legal doctrine, the qualified immunity test has its share of flaws.<sup>137</sup> But making it the measure of the good faith exception would at least be an improvement over the confusion that prevails today.

#### IV. OBJECTIONS

##### A. *Exclusion as Constitutional Command*

One common argument against a general good faith exception — and it is an argument against *any* good faith exception — puts exclusion on a constitutional plane. The Fourth Amendment, or perhaps the Fourth combined with the Fifth, is said to compel the exclusion of evidence obtained during an unreasonable search or seizure.<sup>138</sup> But the Supreme Court has long rejected the claim that exclusion is a con-

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<sup>131</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>132</sup> See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083–85 (2011); *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643–44 (2009); *Pearson v. Callahan*, 129 S. Ct. 808, 822–23 (2009); *Saucier v. Katz*, 533 U.S. 194, 200–09 (2001).

<sup>133</sup> See *Romo v. Largen*, 723 F.3d 670, 680 (6th Cir. 2013) (Sutton, J., concurring in part and concurring in the judgment).

<sup>134</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that courts must defer to an agency’s reasonable interpretation of a statute that it administers).

<sup>135</sup> See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) (holding that courts must defer to an agency’s reasonable interpretation of its own regulations).

<sup>136</sup> 28 U.S.C. § 2254(d) (2006) (“An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .”).

<sup>137</sup> See generally John C. Jeffries, Jr., Lecture, *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851 (2010).

<sup>138</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 944–48 (1984) (Brennan, J., dissenting).

stitutional requirement.<sup>139</sup> With good reason: the idea is destitute of textual and historical defense.<sup>140</sup> If this discredited theory were reinvigorated today, not only *Leon* and its follow-on cases, but also many other established precedents limiting the exclusionary rule, would go by the boards.<sup>141</sup>

Truth be told, however, it is hardly apparent that even clothing exclusion in constitutional garb would preclude a general good faith exception. After all, qualified immunity shields officers from liability for reasonable mistakes in *Bivens* suits, even though the *Bivens* cause of action is (supposedly) implicit in the Fourth Amendment itself.<sup>142</sup> It would be a topsy-turvy Constitution indeed whose judicially discovered “implications” give the guilty criminal defendant an exclusionary windfall, yet leave the innocent tort plaintiff empty-handed, for the same search.

### B. *Exclusion as Safeguard of Judicial Integrity*

Another argument against an expanded good faith exception trumpets the interest in judicial integrity. Exclusion of illegally obtained evidence, it is said, allows “the judiciary to avoid the taint of partnership in official lawlessness.”<sup>143</sup> But the Supreme Court’s modern cases have rejected this basis for suppression too (although one does still encounter it in dissents).<sup>144</sup> Besides, it is something of a mystery how a rule that suppresses reliable evidence, and so increases the inaccuracy of verdicts, *enhances* the integrity of courts. And it is even more of a mystery how desire to promote judicial integrity entitles the Supreme Court to force suppression upon state judiciaries. But we may let these points pass. Even on its own terms, the judicial-integrity argument does not support rejection of reliable evidence on account of reasonable police mistakes.

Mistakes happen. When one occurs during trial, the legal system does not respond by insisting on its correction at all costs. Rather, procedural law teems with rules that overlook reasonable mistakes.

<sup>139</sup> See *United States v. Calandra*, 414 U.S. 338, 347–48 (1974).

<sup>140</sup> See *Amar*, *supra* note 11, at 790.

<sup>141</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586 (2006) (knock-and-announce violations); *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (parole revocation hearings); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation proceedings); *United States v. Havens*, 446 U.S. 620 (1980) (impeachment of defendant’s testimony elicited by the prosecution); *Stone v. Powell*, 428 U.S. 465 (1976) (habeas corpus cases); *United States v. Janis*, 428 U.S. 433 (1976) (civil tax proceedings); *Calandra*, 414 U.S. 338 (grand jury proceedings); *Walder v. United States*, 347 U.S. 62 (1954) (impeachment of defendant’s testimony elicited by the defense).

<sup>142</sup> See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

<sup>143</sup> *Calandra*, 414 U.S. at 357 (Brennan, J., dissenting).

<sup>144</sup> Compare *Herring v. United States*, 129 S. Ct. 695, 700 n.2 (2009), *with id.* at 707 (Ginsburg, J., dissenting).

The plain error rule in federal criminal procedure is one example: if the defendant neglects to object to an erroneous ruling during the trial, the appellate court must let the decision stand unless the mistake amounts (among other things) to “plain error.”<sup>145</sup> The federal habeas corpus statute contains another: if a state court rejects a criminal defendant’s claim on the merits, a federal court entertaining a habeas corpus petition must abide by that determination, even if it was wrong, so long as it was reasonable.<sup>146</sup> These and similar rules show that judicial integrity can survive overlooking a reasonable constitutional error by a judge, committed in open court, in the middle of the trial. It can also survive overlooking a similar error by a policeman “on the spot and without a set of the *United States Reports* in his hands.”<sup>147</sup>

The experience of the rest of the world only confirms the anomaly of insisting upon suppression, under the banner of judicial integrity, when the police merely make a reasonable mistake. Many foreign countries do not exclude the fruits of unlawful searches at all.<sup>148</sup> Of those that do, not one deems an indiscriminate rule of exclusion necessary for preservation of judicial integrity.<sup>149</sup> Canada, for example, excludes illegally obtained evidence lest its admission “bring the administration [of justice] into disrepute” — but as “a general rule” evidence is admissible if discovered because of a “good faith infringement” rather than a “deliberate and egregious” violation.<sup>150</sup> And Australian judges have discretion to exclude illegally obtained evidence in order to vindicate “the public interest in maintaining the integrity of the courts” — but “the nature, seriousness and the effect of the illegal or improper conduct” are among the “most important” factors guiding their decision.<sup>151</sup>

### C. Exclusion as Vehicle for Law Development

A final argument claims that an expanded good faith exception would arrest development of search and seizure law.<sup>152</sup> If exclusion were available only for violations of clearly established law, the argument goes, defendants would have little incentive to bring suppression

<sup>145</sup> FED. R. CRIM. P. 52(b); see also *United States v. Olano*, 507 U.S. 725, 731–37 (1993).

<sup>146</sup> 28 U.S.C. § 2254(d) (2006).

<sup>147</sup> Friendly, *supra* note 21, at 952.

<sup>148</sup> See Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 376 (2001).

<sup>149</sup> See *id.* at 399.

<sup>150</sup> *R. v. Grant*, [2009] 2 S.C.R. 353, 413 (Can.).

<sup>151</sup> *Ridgeway v The Queen* (1995) 184 CLR 19, 38 (Austl.) (Mason, CJ, Deane and Dawson, JJ); see also *Evidence Act 1995* (Cth) s 138 (Austl.).

<sup>152</sup> See, e.g., Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2010–2011 CATO SUP. CT. REV. 237, 258–59; Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1082 (2011).

motions challenging searches of unsettled legality. And even if a defendant does present such a motion, the court may bypass the constitutional question and rule for the government under the good faith rule.<sup>153</sup> Exclusion must remain available even for searches whose illegality was previously unsettled, the argument concludes, so that criminal trials can continue serving as vehicles to develop Fourth Amendment doctrine.

But the Supreme Court has never embraced, and in *Davis* rejected, the premise that desire for legal development can justify suppression.<sup>154</sup> Rightly so. Exclusion exists to encourage police to comply with the Constitution, not to enable judges to write more opinions. Were it otherwise, imposition of the exclusionary rule upon the states would be indefensible. Prescribing new rules to the states for the purpose of preventing constitutional violations may be a modern innovation, but it has at least now become a familiar feature of the legal landscape.<sup>155</sup> By contrast, there is no precedent for forcing a rule of evidence upon the states just to allow judges to decide more constitutional cases.

Indeed, the argument that courts should extend the exclusionary rule for the purpose of producing more constitutional litigation turns Article III of the Constitution upside down. The Constitution does not invest federal courts with freestanding power to interpret law. Rather, judicial power is power to decide concrete “Cases” or “Controversies.”<sup>156</sup> But as *Marbury v. Madison*<sup>157</sup> reports, “Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>158</sup> This “necessity” is the source of judicial authority to “say what the law is.”<sup>159</sup> Courts may therefore pronounce law when, and only when, it is necessary to resolve the case or controversy at hand.<sup>160</sup> They are supposed to develop law so that they can decide cases, not — as the law-development rationale for exclusion presumes — manufacture cases so that they can develop more law.

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<sup>153</sup> May, not must. See *United States v. Leon*, 468 U.S. 897, 925 (1984) (“If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.”).

<sup>154</sup> *Davis v. United States*, 131 S. Ct. 2419, 2432–33 (2011).

<sup>155</sup> See, e.g., *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>156</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>157</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>158</sup> *Id.* at 177.

<sup>159</sup> *Id.*

<sup>160</sup> See generally *United States v. Windsor*, 133 S. Ct. 2675, 2698–703 (2013) (Scalia, J., dissenting).

In any event, search and seizure law faces no danger of grinding to a stop. Other engines, civil suit prime among them, will drive its progress. One might fear that these alternative avenues will prove inadequate, perhaps because qualified immunity inhibits evolution of doctrine in civil cases in the same way a general good faith exception would in criminal cases. But this concern is overblown. First, qualified immunity does not shield municipalities, which are liable under § 1983 for constitutional violations that result from municipal policies or customs.<sup>161</sup> Next, qualified immunity does not preclude prospective relief (injunctions or declaratory judgments).<sup>162</sup> And even when qualified immunity is in play, a court may pronounce a holding on whether the defendant violated the Constitution before reaching the qualified immunity inquiry.<sup>163</sup>

Experience confirms that search and seizure law can develop just fine without exclusion's help. The exclusionary rule applies only in criminal trials, but the Fourth Amendment applies to *all* searches and seizures, not just those meant to ferret out crime.<sup>164</sup> Yet there is no sign of paralysis in the law governing administrative searches, or school searches, or jail safety searches, or searches of government employees at their workplaces. The law of searches for evidence of crime will fare no worse. If it turns out otherwise, there would *still* be no need to insist on suppression. Assuming the propriety of creating new remedies for the sake of making more law, a better solution would be to suspend qualified immunity in suits for nominal damages.<sup>165</sup>

Shifting development of Fourth Amendment precedent from suppression hearings to civil suits can only have a salutary effect on search and seizure law. As Professor Akhil Reed Amar observes, the criminal defendant makes "an awkward champion of the Fourth Amendment."<sup>166</sup> He will often be unsympathetic, litigate on bad facts, or lack a good lawyer.<sup>167</sup> He will tend to urge the legal rule most likely to keep evidence of his guilt out of the case at hand — not the rule that best protects ordinary citizens' interests in bodily integrity, in property, in tranquility, or in freedom from coercive or violent searches.<sup>168</sup> From the perspective of the people whom the Fourth Amendment se-

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<sup>161</sup> *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

<sup>162</sup> *Id.*

<sup>163</sup> *Pearson v. Callahan*, 129 S. Ct. 808, 815–22 (2009).

<sup>164</sup> See Amar, *supra* note 11, at 758.

<sup>165</sup> *Camreta v. Greene*, 131 S. Ct. 2020, 2044 (2011) (Kennedy, J., dissenting); James E. Pfander, Essay, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).

<sup>166</sup> Amar, *supra* note 11, at 796.

<sup>167</sup> *Id.*

<sup>168</sup> Stuntz, *supra* note 92, at 450.

cures against unreasonable searches and seizures, the civil suit is a far better setting than the suppression hearing for making new law.

#### CONCLUSION

Almost half a century has passed since Judge Friendly first proposed exempting all reasonable mistakes from the exclusionary rule. Ever since *Leon*, the “Supreme Court has been inching in this direction.”<sup>169</sup> But unanchored incrementalism at the Supreme Court has produced erratic cost-benefit balancing in the lower courts. Courts should get past this muddle by extending the good faith exception to *all* objectively reasonable official behavior. To do so would heed the exclusionary rule’s first principles, respect precedent, avoid undue interference with activities of law enforcement, improve criminal trials, and yield a workable and predictable good faith exception.

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<sup>169</sup> Michael Boudin, Madison Lecture, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. REV. 975, 990 (2007).