

Casenote

***Davis* and the Good Faith Exception: Pushing Exclusion to Extinction?**

I. INTRODUCTION

To mitigate the effects of unlawful searches and remain faithful to the Fourth Amendment to the United States Constitution,¹ the United States Supreme Court created the exclusionary rule, which requires lower courts to suppress evidence obtained from illegal searches.² The Court, however, has recognized exceptions to the exclusionary rule, many of which involve police officers' "good faith" reliance on what they believe to be legal authority to search.³ In *Davis v. United States*,⁴ the Supreme Court held that, where a police officer relies on binding precedent in performing a search, the Fourth Amendment exclusionary rule will not be used to suppress evidence stemming from that search.⁵ This holding, however, expanded the exclusionary rule's "good faith exception," thus calling the future of the exclusionary rule into question.

1. U.S. CONST. amend. IV.

2. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

3. *See, e.g., Herring v. United States*, 555 U.S. 135 (2009); *Illinois v. Krull*, 480 U.S. 340 (1987); *United States v. Leon*, 468 U.S. 897 (1984).

4. 131 S. Ct. 2419 (2011).

5. *Id.* at 2429.

II. FACTUAL BACKGROUND

Willie Gene Davis was arrested in Greenville, Alabama for providing the arresting officer with a false name after the car in which he was a passenger was pulled over on a routine traffic stop.⁶ The driver of the vehicle was arrested for driving while intoxicated.⁷ At the time of Davis's arrest, the United States Court of Appeals for the Eleventh Circuit interpreted the United States Supreme Court case *New York v. Belton*⁸ as establishing a bright-line rule allowing a police officer to search a vehicle contemporary to an arrest in connection with that vehicle.⁹ Thus, the arresting officer relied on binding precedent when he handcuffed both Davis and the driver, placed them in separate patrol cars, and searched the vehicle.¹⁰ Upon searching the vehicle, the police officer discovered Davis's pistol. Davis was indicted in the United States District Court for the Middle District of Alabama for being a convicted felon in possession of a firearm.¹¹

Davis filed a motion to suppress the evidence based on the Fourth Amendment's¹² search and seizure clause.¹³ However, the district court denied the motion and Davis was convicted.¹⁴ While Davis's appeal was pending, the Supreme Court held in *Arizona v. Gant*¹⁵ that the *Belton* rule is inapplicable when a person has been subdued following arrest, with Justice Stevens specifying that the rule only applies if the person is "within reaching distance of the passenger compartment at the time of the search."¹⁶ Davis argued that, based on the Court's holding in *Gant*, the exclusionary rule should apply to suppress the evidence gathered through the police officer's search of the car.¹⁷ On appeal, the Eleventh Circuit held that the search violated Davis's Fourth Amendment rights but that the evidence would not be suppressed because doing so would punish the arresting officer for following the law at the time of the arrest, which would not successfully deter future Fourth Amendment violations. Consequently, the Eleventh

6. *Davis v. United States*, 131 S. Ct. 2419, 2425 (2011).

7. *Id.*

8. 453 U.S. 454 (1981).

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

10. *See id.* at 2425-26.

11. *Id.*

12. U.S. CONST. amend. IV.

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

14. *Id.*

15. 556 U.S. 332 (2009).

16. *Id.* at 343 (footnote omitted).

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

Circuit affirmed the conviction.¹⁸ The United States Supreme Court granted certiorari and affirmed the ruling as well.¹⁹

III. LEGAL BACKGROUND

A. *Early Exclusionary Rule*

“[O]ne of the great challenges of crime fighting in a free society is to develop and maintain legal procedures that will make it possible to bring the guilty to justice without subjecting citizens to unreasonable searches”²⁰ The exclusionary rule is a judicial remedy designed to protect against illegal searches, specifically by deterring law enforcement officials from executing such searches.²¹ According to the exclusionary rule, evidence gained from illegal searches and seizures will be suppressed.²² The United States Supreme Court first announced the exclusionary rule in 1914 in *Weeks v. United States*.²³ In *Weeks*, police arrested the defendant without a warrant, entered his house, and rummaged through his belongings. The police removed property from the defendant’s house, including letters and envelopes that provided evidence of his using the mail to sell lottery tickets. After the initial search, police returned with a U.S. Marshal to search for and seize more items. Prior to trial, the defendant applied for the return of his belongings; however, the items were not returned and were instead admitted as evidence to be used against him.²⁴

At trial, the defendant argued that the evidence taken from his home was obtained without a warrant and in violation of the Fourth Amendment.²⁵ In reversing and remanding the case, the Court noted that the Fourth Amendment is intended to limit the power of the government and to “forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law.”²⁶ The Court further noted that, if personal belongings can be seized without a search warrant, the Fourth Amendment “is of no value,

18. *Id.*

19. *Id.* at 2434.

20. Timothy Lynch, *In Defense of the Exclusionary Rule*, CATO INSTITUTE (Oct. 1, 1998), <http://www.cato.org/pubs/pas/pa-319.pdf>.

21. *United States v. Calandra*, 414 U.S. 338, 354 (1974).

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

23. 232 U.S. 383, 398 (1914).

24. *Id.* at 386-89.

25. *Id.* at 388; U.S. CONST. amend. IV.

26. *Weeks*, 232 U.S. at 391-92.

and . . . might as well be stricken from the Constitution.²⁷ This case created the exclusionary rule for the federal government, holding that it was error to admit evidence gained from an illegal search and seizure at trial.²⁸

In *Mapp v. Ohio*,²⁹ the Supreme Court extended the application of the exclusionary rule to the states.³⁰ In *Mapp*, police entered and searched a woman's home without a warrant and used materials found there to secure her conviction.³¹ The State relied on *Wolf v. Colorado*,³² where the Court held that suppression of evidence gained through an unreasonable search is not required in a state court prosecution.³³ In reviewing *Wolf* and opting to apply the exclusionary rule to states through the Fourteenth Amendment,³⁴ the Court noted the necessity for applying the same rule to the states as to the federal government.³⁵ As a result of *Mapp*, evidence gained through illegal searches or seizures will be suppressed at trial in both federal and state courts.³⁶

B. *Creation of the Good Faith Exception to the Exclusionary Rule*

The exclusionary rule does not apply in every circumstance in which a police officer gains evidence through a warrantless search. The United States Supreme Court created a "good faith exception" to the exclusionary rule in *United States v. Leon*³⁷ for cases where officers rely on a warrant that they believe is valid but is later determined to be invalid.³⁸ In *Leon*, the officer procured what he believed to be a valid search warrant for drugs within three residences. The district court judge later found that the warrant lacked probable cause. However, the searches produced drug evidence that was used to charge the defendants with conspiracy to possess and distribute cocaine. At trial, the defendants moved to suppress the evidence. Although the district court

27. *Id.* at 393.

28. *Id.* at 398-99.

29. 367 U.S. 643 (1961).

30. *Id.* at 655.

31. *Id.* at 644-45.

32. 338 U.S. 25 (1949).

33. *Mapp*, 367 U.S. at 645-46 (citing *Wolf*, 338 U.S. at 33).

34. U.S. CONST. amend. XIV.

35. *Mapp*, 367 U.S. at 655-57. In *Mapp*, the Supreme Court noted that applying different standards for federal and state governments encouraged federal officers to "step across the street to the State's attorney" where prosecution based on unconstitutionally seized evidence was allowed. *Id.* at 658. Thus, not applying the exclusionary rule to states allowed them to disregard the Fourth Amendment, to a degree. *Id.*

36. *Id.* at 655-57.

37. 468 U.S. 897 (1984).

38. *Id.* at 911-12.

acknowledged that the officer acted in good faith in his reliance on the warrant, it declined to hold that an officer acting in good faith should serve as an exception to the exclusionary rule. Thus, evidence from the search was suppressed. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision, also declining to recognize a good faith exception.³⁹ The United States Supreme Court, however, reversed the Ninth Circuit's decision, recognizing a good faith exception to the exclusionary rule.⁴⁰

The driving policy behind the Supreme Court's creation of an exclusionary rule was to deter law enforcement officers from acting unlawfully.⁴¹ The Court recognized in *Leon*, however, that when officers act in good faith, they believe they are acting lawfully and, therefore, excluding such evidence does not serve the deterrent purpose of the exclusionary rule.⁴² In such cases, the magistrate judge who issued the warrant is to be faulted rather than the police officer, but the Court noted in *Leon* that the purpose of the exclusionary rule is not to deter magistrates.⁴³ The Court ultimately based its decision on a cost-benefit analysis, recognizing the substantial costs paid by society in restricting the truth-finding process thereby allowing guilty defendants to go free if evidence against them is suppressed.⁴⁴ Furthermore, the Court noted that if officers rely on what they believe to be a valid warrant, the benefits of suppressing evidence would be minimal.⁴⁵

C. *Development of the Good Faith Exception to the Exclusionary Rule*

After the inception of the good faith exception to the exclusionary rule, the Court continued to recognize other situations in which the exclusionary rule did not apply.⁴⁶ In *Illinois v. Krull*,⁴⁷ the Court held that evidence would not be suppressed when a police officer relied on a statute allowing warrantless searches, even when the statute was later determined to violate the Fourth Amendment.⁴⁸ In that case, a police officer searched a junkyard for stolen cars in reliance on an Illinois

39. *Id.* at 902-05.

40. *Id.* at 905.

41. *See Weeks*, 352 U.S. at 394.

42. 468 U.S. at 919 n.20 (citations omitted) (noting that the reliance must be based on an objectively reasonable standard rather than the subjective good faith of individuals).

43. *Id.* at 917.

44. *See id.* at 907.

45. *Id.* at 908.

46. *See Herring v. United States*, 555 U.S. 135 (2009); *Illinois v. Krull*, 480 U.S. 340 (1987).

47. 480 U.S. 340 (1987).

48. *Id.* at 349-50.

statute authorizing him to do so without a warrant. The officer found three stolen cars and arrested the license owner and the attendant present when the officer searched the yard. On the day after the search, a ruling from the United States District Court for the Northern District of Illinois held warrantless searches of licensees to be unconstitutional. As a result, the defendants moved to suppress the evidence obtained from the search.⁴⁹

The trial court granted the defendants' motion to suppress.⁵⁰ The Appellate Court of Illinois remanded the case to the trial court to assess the officer's good faith adherence to the law. On remand, the trial court followed its initial holding, reasoning that an officer's good faith reliance is only applicable when the officer has a warrant. The Illinois Supreme Court affirmed, declining to recognize a good faith exception for an officer's reliance upon a statute.⁵¹

The United States Supreme Court granted certiorari and compared the facts of *Krull* to those of *Leon*, observing that, in both cases, the officers acted in ways they believed were lawful.⁵² The Court emphasized the objectively reasonable nature of the officer's reliance on a statute.⁵³ Thus, excluding evidence obtained in this manner would have little deterrent effect, similar to the officer's reliance on a facially valid warrant in *Leon*.⁵⁴ As a result of this reasoning, the Court expanded the good faith exception to include an officer's good faith reliance on a statute.⁵⁵

The Supreme Court has also established that an officer's reliance on information that is incorrect due to court clerk error does not require suppression of evidence.⁵⁶ In *Arizona v. Evans*,⁵⁷ a police officer stopped Evans for a traffic violation and, upon entering Evans's name in the system, saw an outstanding misdemeanor warrant for his arrest. The officer then searched Evans's car and found a bag of marijuana. Upon learning of the arrest, the Justice Court realized that the arrest warrant for Evans had been quashed and, therefore, was an invalid warrant at the time of his arrest. The trial court granted Evans's motion to suppress the evidence, reasoning that the State was at fault for the mistake. The Arizona Court of Appeals reversed, following the

49. *Id.* at 343-44.

50. *Id.* at 344.

51. *Id.* at 344-46.

52. *Id.* at 348-49.

53. *Id.* at 356-57.

54. *Id.* at 349-50.

55. *Id.* at 359-60 & n.17.

56. *Arizona v. Evans*, 514 U.S. 1, 14-15 (1995).

57. 514 U.S. 1 (1995).

United States Supreme Court's reasoning in exclusionary rule cases that the purpose of the rule is not to deter court employees, and thus, the purpose of the rule would not be served by excluding evidence obtained following a court clerk's error. The Arizona Supreme Court reversed, holding that excluding evidence resulting from clerical errors would result in greater efficiency and fewer errors.⁵⁸ The United States Supreme Court granted certiorari and reversed the Arizona Supreme Court's ruling.⁵⁹ This decision was significant because it marked the first instance where the good faith exception applied and a warrant was not present—the exception applied even if the officer thought that a valid warrant existed.⁶⁰ The Supreme Court used its rationale from *Leon* to conclude that excluding evidence at trial that was obtained as a result of clerical errors would not deter such errors in the future.⁶¹ The Supreme Court, citing *Leon*, noted that the purpose of the exclusionary rule was to deter police misconduct, not the misconduct of court employees.⁶²

The Supreme Court further expanded the good faith exception to apply to good faith reliance on warrants that are invalid due to negligence.⁶³ In *Herring v. United States*,⁶⁴ a police officer performed an arrest believing the warrant he possessed was valid, when, in actuality, it had been recalled five months earlier. The defendant was indicted in federal court for illegally possessing a gun and drugs, which were found during a search incident to his arrest. The Eleventh Circuit Court of Appeals affirmed the United States District Court for the Middle District of Alabama's denial of the defendant's suppression motion on the grounds that the officer believed the warrant was still outstanding. The Eleventh Circuit noted that, because the error resulted from negligence in failing to update the database, excluding the evidence would serve little to no deterrent effect.⁶⁵ The United States Supreme Court

58. *Id.* at 4-6.

59. *Id.* at 6.

60. See Sean D. Doherty, *The End of an Era: Closing the Exclusionary Debate Under Herring v. United States*, 37 HOFSTRA L. REV. 839, 850 (2009).

61. *Evans*, 514 U.S. at 14.

62. *Id.* (citing *Leon*, 468 U.S. at 916).

63. *Herring*, 555 U.S. at 136-37; see also N. Puffer, *(Red) Herring v. United States Revisited*, NEOHAPSIS SECURITY BLOG, <http://labs.neohapsis.com/2011/01/05/redherring-v-united-states-revisited/> (last visited Feb. 10, 2012) (noting different opinions regarding the Court's goal behind *Herring*, with one side believing that *Herring* signified a move by the Court toward eliminating the exclusionary rule, and the other side believing that *Herring* constituted a proper constitutional interpretation, aiming to protect citizens from police intrusions).

64. 555 U.S. 135 (2009).

65. *Id.* at 137-39.

granted certiorari and affirmed the Eleventh Circuit's holding.⁶⁶ The Supreme Court analyzed the case through the lens of *Leon*, weighing the costs of suppressing the evidence with the benefits, ultimately deciding that, with the goal of exclusion being deterrence, the benefits of using exclusion to deter negligence are slim to none.⁶⁷ The Supreme Court noted that had the database entries been made recklessly or knowingly, deterrence would be more effective.⁶⁸ The Court would continue to use this policy of deterrence when deciding whether the good faith exception would apply in *Davis*.

IV. COURT'S RATIONALE

A. *Majority Opinion*

Justice Alito wrote for the Supreme Court majority in *Davis v. United States*,⁶⁹ reaffirming the goal of the exclusionary rule as deterring violations of the Fourth Amendment⁷⁰ and recognizing the social costs associated with excluding evidence of criminal activity.⁷¹ Negative consequences include the prosecution's inability to use accurate information on which a defendant's legal guilt hinges.⁷² Therefore, the Supreme Court acknowledged that based on the social costs, the exclusionary rule should not apply whenever a Fourth Amendment violation occurs, but rather only when the benefits of suppressing evidence outweigh the costs.⁷³ Justice Alito recognized that the exclusionary rule was created by the Supreme Court to preserve the constitutional guaranty of the Fourth Amendment, as the Fourth Amendment does not expressly include protections against evidence obtained illegally.⁷⁴ He emphasized that this rule is "not a personal constitutional right" and, thus, should only be used when it satisfies the goal for which it was designed to meet.⁷⁵

66. *Id.* at 139.

67. *Id.* at 146 (quoting *Leon*, 468 U.S. at 922).

68. *Id.* See Michael Vitiello, *Herring v. United States: Mapp's "Artless" Overruling?* 10 NEV. L.J. 164, 165 (2009) (arguing that by allowing illegally seized evidence, unless it was obtained recklessly, *Herring* actually encourages more tolerance of misconduct by law enforcement officers).

69. 131 S. Ct. 2419 (2011).

70. U.S. CONST. amend. IV.

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

72. *Id.* at 2427.

73. *Id.*

74. *Id.* at 2426.

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

In *United States v. Leon*,⁷⁶ the Supreme Court recognized the difficulty in deterring Fourth Amendment violations when police act with objectively reasonable good faith, compared to the deterrent possibilities of deliberate, reckless, or grossly negligent acts.⁷⁷ Justice Alito noted that, in *Davis*, the police officer acted in objectively reasonable good faith because he relied on binding appellate precedent.⁷⁸ If anything, he acted *responsibly* by following the law as it existed at that time and, therefore, did not demonstrate the bad faith needed to make deterrence successful.⁷⁹ The Supreme Court noted that the good faith exception developed in *Leon* has never been used to deter non-culpable police conduct.⁸⁰ This is because excluding evidence where police have relied on the law in obtaining the evidence would deter police from carefully following the law. By holding that the exclusionary rule does not apply when a police officer relies on binding precedent that is later overruled in performing a search, the Supreme Court reaffirmed the ability of police officers to follow the law as it exists in their jurisdictions.⁸¹

Justice Alito noted the necessity for culpable action as a prerequisite for deterrence, writing that “th[e] acknowledged absence of police culpability dooms Davis’s claim.”⁸² The majority viewed culpable conduct as that which is deliberate, reckless, or grossly negligent, opining that other conduct is not “deliberate enough to yield ‘meaningful’ deterrence.”⁸³ The Supreme Court held that the officer’s reliance on binding precedent did not create sufficient culpability.⁸⁴ Conse-

76. 468 U.S. 897 (1984).

77. See *Davis*, 131 S. Ct. at 2427-28 (quoting *Leon*, 468 U.S. at 908-09, 919).

78. *Id.* at 2428-29.

79. *Id.*

80. *Id.* at 2429.

81. *Id.*; see also Sherry F. Colb, *Why Suppress Illegally Obtained Evidence? The U.S. Supreme Court Decides Davis v. United States*, VERDICT (July 27, 2011), <http://verdict.justia.com/2011/07/27/why-suppress-illegally-obtained-evidence>. Colb argues that suppression can deter even non-culpable, yet blameworthy, police conduct, because each time a search leads to suppression, “the connection between the search and the negative outcome is strengthened in the minds of police.” *Id.* Colb compares the situation to learning not to return to a restaurant from which you became sick with food poisoning. *Id.* In both situations, the police and the patron would likely equate a negative consequence with an action and would thereafter refrain from engaging in the behavior that resulted in the negative consequence. *Id.*

82. *Davis*, 131 S. Ct. at 2428.

83. *Id.*

84. *Id.* at 2428-29.

quently, deterring such behavior would not be conducive to supporting the goal of the exclusionary rule.⁸⁵

B. *Concurring Opinion*

In her concurrence, Justice Sotomayor agreed that applying the exclusionary rule in *Davis* would not have a deterrent effect, and, thus, the Supreme Court correctly refrained from suppressing the evidence.⁸⁶ However, she noted that the Supreme Court's holding does not apply to cases where officers rely on unsettled search and seizure law, referring to such kinds of cases as "markedly different."⁸⁷ She cited *United States v. Johnson*,⁸⁸ where the Supreme Court held that the exclusionary rule would apply where the law was not concrete, such as precedent.⁸⁹ As *Davis* pertains to an officer relying on binding law, Justice Sotomayor focused her concurrence on establishing that the Supreme Court's decision remained within the framework of settled Fourth Amendment law, possibly in an attempt to alert others to the limitations of the holding.⁹⁰ Further, whereas the majority focused on the importance of police culpability, Justice Sotomayor expressed her belief that police culpability is "not itself dispositive."⁹¹ She noted that precedent does not exist to support the court's denial of the exclusionary rule based on non-culpable police behavior if excluding it would deter police misconduct.⁹²

C. *Dissenting Opinion*

In his dissenting opinion, Justice Breyer focused on retroactivity.⁹³ He noted how the Supreme Court relied on binding precedent in applying the retroactivity principal to *Davis*.⁹⁴ Justice Breyer argued

85. *Id.* at 2429.

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

87. *Id.*

88. 457 U.S. 537 (1982).

89. *Id.* at 561.

90. *See Davis*, 131 S. Ct. at 2435.

91. *Id.*

92. *Id.* at 2436; *see also* Lyle Denniston, *Opinion Analysis: The Fading "Exclusionary Rule,"* SCOTUSBLOG (June 25, 2011, 8:58 AM), <http://www.scotusblog.com/?p=122938> (noting Justice Sotomayor's attempt to minimize the importance of examining police culpability).

93. *Davis*, 131 S. Ct. at 2436-40 (Breyer, J., dissenting).

94. *Id.* at 2436. That precedent includes *Griffith v. Kentucky*, 479 U.S. 314 (1987), where the Court overturned *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Griffith*, the Court reasoned that the *Linkletter* approach to retroactivity was "unfair and unworkable." *Davis*, 131 S. Ct. at 2436 (citing *Griffith*, 479 U.S. at 3287). Under the *Griffith* standard, new criminal rules were applied in all cases, even those that were pending at the time of

that to follow retroactivity precedent means that *Gant* must be applied to Davis's case.⁹⁵ While the dissent argued that retroactivity precedent is determinative of the remedy,⁹⁶ the majority felt that remedy is a separate consideration.⁹⁷ Thus, according to the majority, Davis could have invoked this principal as a means for seeking relief, but the suppression of evidence is still dependent on whether exclusionary rule purposes are satisfied.⁹⁸ Therefore, because applying the exclusionary rule in *Davis* did not satisfy the purpose of the rule, refraining from applying it was proper.⁹⁹

Justice Breyer's dissent also raised concerns about workability and fairness.¹⁰⁰ He maintained that the Supreme Court's good faith exception, based on "objectively reasonable' police 'reliance on binding appellate precedent,'" would lead to complications due to the difficulty of defining the words in this key phrase.¹⁰¹ He noted that confusion may occur in determining whether rules can be considered "binding appellate precedent."¹⁰² Such confusion may result if the appellate cases present either a general rule with distinguishable facts or similar facts but no general rule, or if an appellate jurisdiction is the only jurisdiction to refrain from having adopted a specific rule.¹⁰³ With regard to fairness, Justice Breyer argued against applying a new rule to certain defendants and a different rule to other defendants whose cases are still pending.¹⁰⁴

Justice Breyer also noted that the Supreme Court's ruling in *Davis* threatened to weaken the exclusionary rule.¹⁰⁵ He noted that the

the change in law or interpretation. *Id.*

95. *Id.*

96. *Id.* at 2436-37.

97. *Id.* at 2430-32 (majority opinion).

98. *Id.* at 2431. The majority opinion addressed the retroactivity issue by explaining that while *Griffith* (or retroactivity) does apply to Davis's case, *Griffith* (or retroactivity) merely "lifts what would otherwise be a categorical bar to obtaining redress for the government's violation of a newly announced constitutional rule" rather than determining a defendant's remedy. *Id.* at 2430-31.

99. *Id.* at 2429.

100. *Id.* at 2437-38 (Breyer, J., dissenting).

101. *Id.* at 2437. Justice Breyer wrote, regarding the application of the phrase "binding appellate precedent," that it "often requires resolution of complex questions of degree [F]uture litigants . . . will now have to create distinctions to show that previous Circuit precedent was not 'binding' lest they find relief foreclosed even if they win their constitutional claim." *Id.* (citation and internal quotation marks omitted).

102. *Id.* (citation and internal quotation marks omitted).

103. *Id.*

104. *Id.* at 2437-38.

105. *Id.* at 2438.

Supreme Court has found “good faith” exceptions to suppression in only a few, specific circumstances, and he supported the notion that such circumstances should be limited.¹⁰⁶ Justice Breyer feared that applying the exclusionary rule only to culpable behavior would “swallow the exclusionary rule” by limiting its application and therefore eroding the Fourth Amendment.¹⁰⁷

V. IMPLICATIONS

A. *Implications for Law Enforcement*

As a result of the United States Supreme Court’s holding in *Davis v. United States*,¹⁰⁸ law enforcement officers can act upon search and seizure law as it exists in their jurisdictions without fear that evidence they obtain will be made useless through the exclusionary rule.¹⁰⁹ By following the law as it is written, officers abide by the principles that their law enforcement duties uphold. As the Court noted, excluding evidence following an officer’s reliance upon the law would deter “conscientious police work.”¹¹⁰ Rather than discouraging police from learning and applying the law, the Court chose to reward law enforcement officers for knowing and acting upon the law. With the *Davis* holding, law enforcement officers can perform searches with confidence that their efforts will not be nullified through the exclusionary rule so long as they perform the searches in accordance with the law. The Supreme Court noted that deterring police from following the law and performing their duties in enforcing the law “is not the kind of deterrence the exclusionary rule seeks to foster.”¹¹¹ As noted above, the exclusionary rule was designed to weed out culpable police activity.¹¹² In *Davis*, the Court reaffirmed that responsible police activity is not the target of this rule.¹¹³

106. *Id.* at 2439 (internal quotation marks omitted).

107. *Id.* Justice Breyer stated that, rather than following the majority’s opinion, he would follow *Griffith*, applying *Gant* retroactively, and suppress the evidence used to convict *Davis*. *Id.*

108. 131 S. Ct. 2419 (2011).

109. See Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1083 (2011).

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

111. *Id.*

112. See *id.* at 2427-29.

113. See *id.* at 2426-28.

B. Weakening of the Exclusionary Rule

While the holding in *Davis* may instill confidence in law enforcement personnel, there is concern among others about how this holding may signify a move toward the end of the exclusionary rule.¹¹⁴ As the Supreme Court continues to recognize scenarios in which the good faith exception can be used, the power of the exclusionary rule decreases.¹¹⁵ Some, such as Justice Scalia, think the exclusionary rule is not necessary anymore because of the increased professionalism of the police.¹¹⁶ According to Justice Scalia, retaining the exclusionary rule “would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost a half century ago.”¹¹⁷ However, it is unclear whether this increased professionalism is actually a consequence of the exclusionary rule.¹¹⁸ If that is the case, it seems that the exclusionary rule has actually worked to effectively deter police misconduct.

Some opponents of the rule rely on statistical evidence indicating an increase in crime where evidence was excluded,¹¹⁹ although statistical evidence is not necessarily determinative.¹²⁰ Proponents of the rule argue for the necessity of protecting constitutional guarantees by deterring unconstitutional police activity.¹²¹ Police are in a position of power and have the authority to use force, and thus, proponents argue that the exclusionary rule is necessary to keep law enforcement officers in check.¹²² Furthermore, the Supreme Court reserves the authority

114. See, e.g., James P. Fleissner, *Glide Path to an “Inclusionary Rule”: How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule*, 48 MERCER L. REV. 1023, 1023-24 (1997).

115. See Doherty, *supra* note 60, at 840.

116. See JOSHUA DRESSLER & ALAN C. MICHAELS, 1 UNDERSTANDING CRIMINAL PROCEDURE 56 (2010) (citing *Hudson v. Michigan*, 547 U.S. 586, 597 (2006)).

117. *Id.* (quoting *Hudson*, 547 U.S. at 597).

118. Radley Balko, *Eroding the Exclusionary Rule*, FOX NEWS (Jan. 26, 2009), <http://www.foxnews.com/story/0,2933,482904,00.html> (noting criminologist Dr. Sam Walker’s opinion that increased professionalism of police departments resulted from Supreme Court protections in the 1960s and 70s).

119. Paul H. Rubin, *The Exclusionary Rule’s Hidden Costs*, WALL STREET J. (Feb. 28, 2009), <http://online.wsj.com/article/SB123578433303098429.html>. Rubin refers to a study performed that compared crime rates in states that used a state-created exclusionary rule rather than the Supreme Court’s exclusionary rule. *Id.* The statistics showed a 3.9% increase for larceny, 4.4% increase for auto theft, 6.3% increase for burglary, 7.7% increase for robbery, and 18% increase for assault. *Id.*

120. DRESSLER & MICHAELS, *supra* note 116, at 358.

121. *Id.*

122. See Balko, *supra* note 118.

to abolish the exclusionary rule, as this remedy was created by the Supreme Court.¹²³ With this authority in hand, many interpret the Court's creation of new exceptions as evidence that it is moving in the direction of abolition.¹²⁴

The holding in *Davis* significantly changed the exclusionary rule. While *United States v. Leon*,¹²⁵ *Illinois v. Krull*,¹²⁶ and *Herring v. United States*¹²⁷ provide exceptions for good faith reliance on a statute and warrants, *Davis* involves reliance on case law, specifically case law interpreting the Constitution.¹²⁸ Thus, the holding expands the kind of law (on which the officer relies) that is included within the good faith exception.¹²⁹

Furthermore, *Davis* narrows the scope of the exclusionary rule. In general, the good faith exception narrowed the scope of the exclusionary rule from its earliest days by limiting the situations in which evidence could be excluded.¹³⁰ As such situations grow in number, the situations in which evidence can still be excluded become fewer.¹³¹ Currently, the exclusionary rule only applies in situations where the benefits of its application, namely police deterrence, outweigh its costs and where one of the numerous exceptions does not apply.¹³² *Davis* narrowed the exclusionary rule by strongly affirming that evidence will only be excluded when police disregard Fourth Amendment¹³³ rights by acting "deliberately, recklessly, or with gross negligence."¹³⁴ Although the Supreme Court addressed the applicability of the exclusionary rule to culpable conduct in *Herring*, the Supreme Court's holding in *Davis* illustrates that culpable conduct is a requirement for exclusion.¹³⁵

123. DRESSLER & MICHAELS, *supra* note 116, at 353.

124. *See id.* at 354.

125. 468 U.S. 897 (1984).

126. 480 U.S. 340 (1987).

127. 555 U.S. 135 (2009).

128. *See Davis*, 131 S. Ct. at 2429.

129. Brief for Petitioner at 43-46, *Davis*, 131 S. Ct. 2419 (No. 09-11328); *see Kerr, supra* note 109, at 1080. Although the expansion of the good faith rule does weaken the exclusionary rule, Kerr notes the minor cost of maintaining an exclusionary rule in circumstance of changing law, based on the small group of defendants who would be able to obtain relief. *See Kerr, supra* note 109, at 1080.

130. EMILY C. BARBOUR, CONG. RESEARCH SERV., R41774, DAVIS V. UNITED STATES: RETROACTIVITY AND THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE 1 (2011).

131. *See id.* at 1-2.

132. *Id.* at 2.

133. U.S. CONST. amend. IV.

134. *Davis*, 131 S. Ct. at 2428.

135. *See Denniston, supra* note 92.

The holding made another significant development by applying the good faith exception to a warrantless search.¹³⁶ Legal scholars have tracked the weakening of the exclusionary rule through the good faith exception for years.¹³⁷ Professor James P. Fleissner wrote fifteen years ago, prior to both *Herring* and *Davis*, about concerns that the good faith exception would swallow the exclusionary rule.¹³⁸ The good faith exception has been expanded even further since that time. He opined, “I fear that the [e]xclusionary [r]ule will be converted into a rule of inclusion. I see the principal vehicle for traveling this glide path as the continued expansion of the good faith exception to the [e]xclusionary [r]ule.”¹³⁹ Although such a case was not before the Supreme Court at the time, Professor Fleissner noted that the negative implications of a holding extending the exception to warrantless searches would not only include allowing the use of illegally seized evidence, but would also diminish law enforcement training incentives.¹⁴⁰ As *Davis* involved a warrantless search of a vehicle, its holding expanded the good faith exception beyond cases requiring warrants.¹⁴¹

The exclusionary rule exists as a remedy to Fourth Amendment violations. As the exclusionary rule becomes increasingly weakened, it is important to consider whether alternative remedies exist that would afford the same constitutional protections.¹⁴² Professor Orin Kerr argues that other alternatives do not exist.¹⁴³ Civil lawsuits seeking damages will be futile, because the doctrine of qualified immunity will shield law enforcement officers from liability.¹⁴⁴ According to Kerr, Article III’s¹⁴⁵ requirement for showing “a real and immediate threat” for Fourth Amendment injunctions will prohibit civil lawsuits seeking injunctive relief.¹⁴⁶ Civil lawsuits seeking declaratory judgment will be limited to ongoing conduct, based on the requirement that the plaintiff show that a Fourth Amendment violation is ongoing and that

136. See *Davis*, 131 S. Ct. at 2429.

137. See, e.g., Fleissner, *supra* note 114.

138. *Id.*

139. *Id.* at 1024.

140. *Id.* at 1033.

141. It is worth noting, however, that although the *Davis* holding expands the good faith exception to warrantless searches, it does not yet apply to *all* warrantless searches. The case specifically applies to a warrantless search where the officer relied on binding precedent in determining the legality of the search.

142. See Kerr, *supra* note 109, at 1095-97.

143. *Id.*

144. *Id.* at 1096-97.

145. U.S. CONST. art. III.

146. See Kerr, *supra* note 109, at 1096-97 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

it would be solved by a declaratory judgment.¹⁴⁷ Furthermore, criminal prosecutions will be ineffective because federal law, via 18 U.S.C. § 242,¹⁴⁸ which allows for criminal action against government officials who violate the Constitution, does not include a means for correcting appellate court constitutional error.¹⁴⁹

Given that other means for correcting Fourth Amendment violations are not readily available, the Supreme Court should think twice before further weakening the protections given to citizens through the exclusionary rule. In *Davis*, the Supreme Court expanded the good faith exception to apply to reliance on binding appellate precedent. This expansion arguably weakened the good faith exception, potentially paving the way for an end to the exclusionary rule. While some may welcome this change, others who view the exclusionary rule as an important protection of Fourth Amendment guarantees fear the rule's demise. In *Davis*, the Supreme Court applied the good faith exception to a warrantless search, likely paving the way for more cases involving such searches. Consequently, the legal community should anticipate significant developments in exclusionary rule case law in years to come.

ELEANOR DE GOLIAN

147. *Id.* at 1097.

148. 18 U.S.C. § 242 (2006). Section 242 provides as follows:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Id.

149. Kerr, *supra* note 109, at 1096-97.