

Good Faith, New Law, and the Scope of the Exclusionary Rule

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Lower courts recently have divided on whether the good faith exception to the Fourth Amendment exclusionary rule applies to reliance on overturned case law. This Article argues that the Supreme Court should reject the good faith exception in this setting. A suppression remedy for new law creates necessary incentives for criminal defendants to challenge existing precedents. The exclusionary rule deters constitutional violations by creating an environment for appellate decision making in which constitutional errors can be corrected. The costs of the exclusionary rule for overturned law are comparatively minor, as other doctrines already limit the scope of the exclusionary rule. The benefits of the exclusionary rule for reliance on overturned case law exceed its costs, and the rule therefore should be retained.

TABLE OF CONTENTS

INTRODUCTION	1078
I. THE BENEFITS OF THE EXCLUSIONARY RULE FOR CHANGING LAW	1081
A. THE INSTITUTIONAL ACTORS OF FOURTH AMENDMENT LAW	1082
B. DETERRENCE OF INSTITUTIONAL ACTORS IN <i>LEON</i> , <i>KRULL</i> , <i>EVANS</i> , AND <i>HERRING</i>	1084
C. GOOD FAITH, DETERRENCE, AND THE APPELLATE JUDICIARY	1087
D. HOW FOURTH AMENDMENT LAW DEVELOPS	1090
E. THE DETERRENT FUNCTION OF THE EXCLUSIONARY RULE FOR CHANGING LAW	1092
F. ALTERNATIVE REMEDIES CANNOT SUBSTITUTE FOR THE EXCLUSIONARY RULE	1095
II. COSTS OF THE EXCLUSIONARY RULE FOR CHANGING LAW	1097

* Professor, George Washington University Law School. © 2011, Orin S. Kerr. The author thanks Will Baude, Wayne LaFave, and Eve Brensike Primus for comments and Caleb Dulis for research assistance. After this Article was written and accepted for publication, I agreed to represent the petitioner in *Davis v. United States*, which presents the issue described in this Article. To the extent possible, I have kept the Article as I wrote it before accepting that representation. All opinions expressed represent only my own views in my own personal capacity.

- A. FOUR TYPES OF DOCTRINES THAT LIMIT THE SCOPE OF THE EXCLUSIONARY RULE 1099
 - 1. Did the Violation Cause the Discovery of the Evidence? . . . 1099
 - 2. Can the Defendant Assert the Challenge? 1100
 - 3. Does This Type of Violation Support Suppression? 1101
 - 4. Is Suppression an Available Remedy in This Type of Proceeding? 1102
- B. OBJECTIVE GOOD FAITH, SUBJECTIVE GOOD FAITH, AND RETROACTIVITY 1103
- C. THE COSTS OF THE EXCLUSIONARY RULE FOR OVERTURNED LAW . . 1106
- III. WEIGHING COSTS AND BENEFITS UNDER THREE PROPOSED RULES . . . 1108
 - A. COSTS AND BENEFITS UNDER THE TRADITIONAL GOOD FAITH STANDARD 1109
 - B. COSTS AND BENEFITS UNDER THE SETTLED-LAW STANDARD 1112
 - C. COSTS AND BENEFITS UNDER A FIRST-COME, ONLY-SERVED RULE 1115
- CONCLUSION 1118

INTRODUCTION

Imagine a police officer conducts a search that reveals evidence of crime. The search is constitutional according to existing precedents at the time the search occurs. While the case against the suspect is pending, however, the Supreme Court hands down a new decision overturning the precedents. Under the new decision, the officer’s search is unconstitutional. The defendant moves to suppress the new evidence based on the new case, but the government counters that the evidence should be admitted under the good faith exception to the exclusionary rule.¹ According to the government, the evidence should be admitted because the officer relied in good faith on the law at the time the search occurred. Should the court suppress the evidence or admit it?

The answer depends on whether the good faith exception applies to reliance on overturned precedents.² The Supreme Court has never answered this question, but it likely will soon: the Supreme Court presently has a case pending on

1. See, e.g., *United States v. Leon*, 468 U.S. 897, 913 (1984) (introducing the good faith exception).

2. This Article will refer to the proposed exception to the exclusionary rule as the good faith exception for reliance on “overturned law,” “new law,” and “changing law” and it uses the three terms interchangeably. I note this terminology because exactly what standard the exception might adopt is open to question: as Part III explains, there are at least three major ways of framing the exception if it is adopted. For now, the exception can be understood broadly as any exception to the exclusionary rule based on the state of case law at the time of the search or seizure indicating that the search or seizure

its docket, *Davis v. United States*, that presents this precise question.³ And in July 2010, the Department of Justice filed a petition for certiorari asking the Supreme Court to resolve the circuit split.⁴ Whether the good faith exception applies to changing law is an extremely important question, both practically and conceptually. Practically speaking, the issue determines how thousands of Fourth Amendment cases will be litigated as well as whether some defendants are set free or remain in prison. Conceptually speaking, whether the good faith exception applies to changing law raises intriguing questions about the scope of the exclusionary rule. The Supreme Court has emphasized that the exclusionary rule must “pay its way” by deterring constitutional violations.⁵ But how does this framework apply when the usual benchmark for measuring constitutional violations—Supreme Court case law—is itself in flux? No legal scholarship has yet addressed this question in any depth.⁶

This Article argues that the Supreme Court should reject the good faith exception for overturned case law. At first blush, that result may seem counterintuitive. An officer who relies on then-existing law almost certainly has acted in *subjective* good faith. But as the Supreme Court has repeatedly emphasized, whether the exclusionary rule should apply depends on objective weighing of the costs and benefits of suppression rather than an officer’s subjective state of mind.⁷ In most cases, that truism of Fourth Amendment law works to the government’s benefit. It allows officers to make pretext searches and frequently

was lawful. Part III elaborates on how the desirability of the exception changes based on which version of the exception is considered.

3. *United States v. Davis*, 598 F.3d 1259 (11th Cir.), *cert. granted*, 131 S. Ct. 502 (2010); *see also* Petition for Writ of Certiorari at i, *Davis*, 131 S. Ct. 502 (No. 09-11328).

4. *See* Petition for Writ of Certiorari, *United States v. Gonzalez*, No. 10-82 (U.S. July 14, 2010), 79 U.S.L.W. 3062.

5. *See Leon*, 468 U.S. at 907 n.6 (noting that the exclusionary rule “must be carefully limited to the circumstances in which it will pay its way by deterring official unlawfulness” (quoting *Illinois v. Gates*, 462 U.S. 213, 257–58 (1983) (White, J., concurring in the judgment))).

6. The reason is that litigation on this aspect of the good faith exception mostly postdates *Herring v. United States*, 129 S. Ct. 695 (2009). There were sporadic rulings on a good faith exception for new law before *Herring*. *See, e.g., United States v. Jackson*, 825 F.2d 853, 866 (5th Cir. 1987) (en banc) (recognizing such an exception in the case of reliance on overturned circuit precedent); *State v. Ward*, 604 N.W.2d 517 (Wis. 2000) (recognizing such an exception in the case of reliance on overturned state precedent). However, such precedents remained unexplored in the scholarship with the exception of a brief paragraph in one article and a short discussion in Professor LaFave’s treatise, both of which portray the exception as unremarkable. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(h) (3d ed. 1996); Kenneth J. Melilli, *What Nearly a Quarter Century of Experience Has Taught Us About Leon and “Good Faith,”* 2008 UTAH L. REV. 519, 527 (suggesting that the recognition of the good faith exception for changing law in *Jackson* and *Ward* is an uncontroversial extension of good faith precedents). The combination of *Herring* and *Arizona v. Gant*, 129 S. Ct. 1710 (2009), triggered a flood of litigation on whether the good faith exception for new law should apply to the many cases that closely resembled *Gant*. The post-*Herring*, post-*Gant* cases then led to the current deep split and the Justice Department’s petition for certiorari in *Gonzalez*.

7. *See, e.g., Herring*, 129 S. Ct. at 700–01; *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

limits the scope of the exclusionary rule.⁸ This is one circumstance where the truism works in a defendant's favor: weighing of the costs and benefits of exclusion for changing law points to the need to reject a good faith exception for changing law even though it involves officers acting in subjective good faith.

This essay makes two contributions to the voluminous debate on the scope of the exclusionary rule.⁹ The first contribution is an understanding of how the deterrence rationale behind the exclusionary rule applies to appellate courts. Most cases on the exclusionary rule focus on how the exclusionary rule deters the police. A smattering of cases have considered the deterrence of other institutional players in the criminal justice system, such as magistrate judges and legislatures.¹⁰ Whether the Supreme Court should recognize a good faith exception for changing law requires the Court to evaluate the deterrence calculus in the novel context of appellate courts. Specifically, evaluating the exception requires courts to confront how the existence of a suppression remedy facilitates or inhibits accurate Fourth Amendment rulemaking. A suppression remedy for new law ends up playing a critical role in this setting. It ensures the vigorous adversarial advocacy needed for courts to identify optimal Fourth Amendment rules.

The second contribution of this Article is a recognition that measuring the costs of the exclusionary rule in any specific setting must account for, and then subtract, the role of additional doctrines that already limit the scope of the exclusionary remedy. A suppression remedy normally means that *some* guilty people will go free. But sometimes that group is much smaller than first appears. The exclusionary rule is enforced only when five limiting doctrines fail to apply: retroactivity, the fruit of the poisonous tree, inevitable discovery, independent source, and the good faith exception. Appreciating the limiting power of these five doctrines reveals that the cost of an exclusionary rule in the specific instance of changing law is surprisingly modest. The group of defendants who would obtain relief is a fairly narrow group. For the most part, the group consists of those defendants who have not yet had their convictions become final and who never would have been searched in the first place if the Constitution had been followed. In these circumstances, the cost of the exclusionary rule for changing law resembles the cost of following the Constitution going forward.

Putting these contributions together, the Supreme Court should reject the good faith exception for reliance on overturned precedents. The exclusionary

8. See, e.g., *Whren*, 517 U.S. at 812–13 (rejecting the argument that a search for which the officer had objectively reasonable suspicion or probable cause could be invalidated by showing some “ulterior motive”).

9. A Westlaw query of the Journals and Law Review (JLR) database conducted on August 12, 2010, yielded 3,734 hits for articles that mention “fourth amendment” in the same sentence as “exclusionary rule.”

10. See discussion *infra* section I.C.

rule for changing law is critical to the development of Fourth Amendment law, and its costs are relatively modest. Although an officer who conducts a search that is considered lawful at the time has no doubt acted in *subjective* good faith, the objective cost–benefit analysis required by existing law should direct courts to reject the good faith exception for changing law. This remains true regardless of which particular version of the good faith exception courts adopt, including a standard based on qualified immunity, a standard that narrows the exception only to reliance on settled law, and a first-come, only-served rule. In all of these cases, a good faith exception for overturned law would cause more harm than good.

This Article proceeds in three Parts. Part I addresses the benefits of the exclusionary rule for new law in deterring Fourth Amendment violations. It focuses on the role of the exclusionary rule for new law in creating the optimal environment for appellate decision making that accurately balances security and civil liberties interests. Part II turns to the costs of the exclusionary rule for new law in letting criminals go free. It emphasizes the role of additional ameliorative doctrines that already limit the scope of the exclusionary rule. Part III compares the costs and benefits under three different forms of the good faith exception. First, it considers the traditional form of the good faith exception which equates good faith with the standard of qualified immunity. Next, it considers a form of the exception adopted by lower courts that limits the good faith exception to reliance on settled precedents. Finally, it considers a first-come, only-served form of the exception where only the defendant whose case changes the law would get the benefit of the exclusionary rule. Under any approach, the benefits of the exclusionary rule for new law exceed its costs.

I. THE BENEFITS OF THE EXCLUSIONARY RULE FOR CHANGING LAW

The Supreme Court has repeatedly emphasized that the scope of the exclusionary rule must be determined by an objective assessment of costs and benefits.¹¹ A suppression remedy is not a personal right: not every constitutional violation triggers exclusion.¹² Instead, the suppression remedy applies only in circumstances when the utilitarian benefit of deterring constitutional violations outweighs the social cost of allowing guilty people to go free.¹³ The cost–benefit approach to the exclusionary rule first appeared in *United States v. Calandra* in 1974, and it was first applied to create a formal good faith exception in *United States v. Leon* in 1984.¹⁴ To justify an exclusionary rule for violations of changing law, then, the first step is to identify how an exclusionary rule in that setting deters constitutional violations.

11. See, e.g., *Herring*, 129 S. Ct. at 700 (“[T]he benefits of deterrence must outweigh the costs.”).

12. *Id.* (“[T]he exclusionary rule is not an individual right and applies only where it ‘result[s] in appreciable deterrence.’” (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984))).

13. *Id.*

14. *Leon*, 468 U.S. 897; *United States v. Calandra*, 414 U.S. 338, 349 (1974).

This Part argues that an exclusionary rule for new law is essential to deterring constitutional violations. The exclusionary rule for changing law provides the litigation incentives needed to help courts weigh constitutional interests accurately and thus adopt accurate Fourth Amendment rules. The availability of a suppression remedy gives criminal defendants an incentive to argue for changes in the law by allowing them to benefit if they successfully persuade courts to overturn adverse precedents. Recognizing a good faith exception for changing law would mean that defendants could not benefit from arguments to change that law. Defendants would no longer make such arguments, substantially impairing the adversarial process that the Supreme Court needs to analyze constitutional interests accurately. Recognizing a good faith exception for overturned law would introduce a systemic bias into Fourth Amendment litigation: it would encourage the prosecution to argue for changes in the law in its favor but discourage the same argument from the defense. The result would be a systematic skewing of constitutional arguments in the government's favor which would ensure the retention of erroneous precedents that allow practices that should be recognized as unconstitutional. The exclusionary rule for changing law is therefore necessary because it deters constitutional violations by appellate courts: it provides the litigation incentives needed to ensure accurate Fourth Amendment rulemaking.

This Part begins by introducing the various institutional actors in Fourth Amendment law, and how the deterrence framework has been applied to each of them. The analysis next explores how the exclusionary rule impacts the environment of appellate court decision making in Fourth Amendment cases and how the rule is needed to ensure a balanced and honest presentation of Fourth Amendment arguments that are needed to develop optimal search and seizure rules.

A. THE INSTITUTIONAL ACTORS OF FOURTH AMENDMENT LAW

Fourth Amendment law involves a wide range of different institutional actors. All three branches of government play a role, both in the federal and state system. The Supreme Court of the United States stands at the top, of course. Immediately below the Supreme Court are the circuit courts of appeals and state supreme courts. Federal district courts and state trial and intermediate appellate courts sit on the next rung underneath. Below them are the magistrate judges who review and issue search and arrest warrants; below the magistrate judges are the court clerks, staff, and other court employees who help run the courthouse. Outside of the judiciary, Congress and state legislatures sometimes play a role as well: although they do not directly interpret the Fourth Amendment, they sometimes enact laws regulating police powers that must comply with constitutional requirements.¹⁵

15. *See, e.g.*, 18 U.S.C. §§ 2702–2711 (2006) (regulating government access to records held by internet service providers and the telephone company). For example, § 2703 provides that in order to

The executive branches of the federal and state systems are tasked with investigating cases in compliance with Fourth Amendment law. The President or governor sits at the top of the executive branch efforts, with the federal or state attorney general below that person. Each attorney general then leads an often complex bureaucracy of officials, administrative personnel, policy advisors, and support staff which in turn guides and directs the work of the officers in the field. The officers on the street—police officers, FBI agents, and other law enforcement officers throughout the federal and state systems—then do the actual work of conducting searches and seizures.

The most common way to think about deterrence and the exclusionary rule begins at the end of that long list—the officers on the street. The familiar thinking runs as follows. The cop on the street wants to see bad people go to jail. Under the exclusionary rule, however, the criminal goes free if the constable blunders.¹⁶ To make sure the bad guy goes to jail, the officer will make sure he follows the law. The threat of exclusion aligns an officer's interest in locking away bad guys with the societal interest in officers learning and then following the law.¹⁷

An exclusionary rule for new law plainly cannot deter the police officer on the street. It is fair to expect a police officer to know and be deterred by the law on the books at the time the search occurs. But police officers are not legal scholars, and they do not have crystal balls. As the Supreme Court has noted, the police cannot be “expected to predict the future course of constitutional law.”¹⁸ The concept of deterrence works *ex ante*. Almost by definition, a legal decision made after a search occurred cannot have an *ex ante* deterrent effect.¹⁹ For a cop on the beat, a new appellate decision overturning past precedents is as random as a lightning strike: the officer's following then-existing law is not a personally blameworthy or morally culpable act. The fact that the officer failed to comply with the *new* decision handed down *after* the search simply cannot deter the officer's earlier action.

If measuring the deterrent effect of the exclusionary rule ended there, we could confidently conclude that a suppression remedy for overturned law has no appreciable deterrent effect. Indeed, lower courts that have adopted a good faith

require disclosure of an electronic communication stored for less than 180 days, the government must obtain a warrant. § 2703(a).

16. The famous phrase is Benjamin Cardozo's, who criticized the exclusionary rule on the ground that the “criminal is to go free because the constable has blundered.” *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

17. That is, the bad guy will go to jail only if the rules are followed. Following the law becomes a precondition to a successful conviction.

18. *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (quoting *Procnunier v. Navarette*, 434 U.S. 555, 562 (1978)).

19. Given that people cannot readily be deterred by what they cannot know, the mere possibility of future appellate overruling of precedent should not deter police in any substantial fashion.

exception for changing law generally have rested their analysis on this point.²⁰ That approach is erroneous, however, as it ignores the deterrent effect of the exclusionary rule on *other* actors in the criminal justice system. The Supreme Court has consistently recognized that measuring the deterrent effect of the exclusionary rule looks to more than just the deterrence of the officer on the street: it must consider how an exclusionary rule deters all the different participants in the system in all three branches of government.²¹

B. DETERRENCE OF INSTITUTIONAL ACTORS IN *LEON*, *KRULL*, *EVANS*, AND *HERRING*

A quick tour of the major cases on the good faith exception shows how the deterrence inquiry has been applied to institutional actors beyond the officer on the street. In the first case explicitly adopting a good faith exception, *United States v. Leon*, the Court considered whether the exclusionary rule should apply to searches executed pursuant to warrants that had relatively minor defects.²² To obtain a warrant, the police must go to a magistrate judge and apply for it. They can obtain a warrant only if the magistrate judge agrees that the warrant application is proper. The issue in *Leon* was whether an exclusionary rule for a search executed pursuant to a warrant found later to be lacking in probable cause was needed to ensure compliance with the Fourth Amendment.²³

The Court's conclusion that the good faith exception should apply focused first on whether magistrates would be deterred by exclusion of the evidence. "[W]e discern no basis, and are offered none," the Court concluded, "for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate."²⁴ Judges "have no stake in the outcome of particular criminal prosecutions," the Court reasoned, and thus exclusion "cannot be expected significantly to deter them."²⁵ Nor was an exclusionary rule "necessary meaningfully to inform judicial officers of their errors," which could be important to ensuring future awareness of the need to follow the law.²⁶

The Court then turned to whether exclusion of minor errors would deter the police. The Court decided to consider the deterrence of all the different police officers involved as one collective entity: the deterrence calculus considered "the officers who eventually executed a warrant," "the officers who originally obtained it," and the officers "who provided information material to the probable-cause determination" encompassing both individual officers and "the policies of

20. For example, in *United States v. McCane*, the Tenth Circuit adopted the good faith exception for changing law after concluding that the deterrence calculus applies only to the police. 573 F.3d 1037, 1044 (10th Cir. 2009) ("[T]he purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities . . .").

21. See *infra* section I.B.

22. 468 U.S. 897, 900 (1984).

23. *Id.*

24. *Id.* at 916.

25. *Id.* at 917.

26. *Id.*

their departments.”²⁷ These officers would not be substantially deterred by exclusion because officers ordinarily are not lawyers, and they depend on magistrate judges to make the correct judgments when the violations are technical and not obvious.²⁸

The next important case is *Illinois v. Krull*, which expanded the good faith exception to reliance on a statute authorizing a search.²⁹ Illinois had enacted a statute allowing state authorities to conduct warrantless administrative searches of businesses engaged in selling automobiles and auto parts. An officer made a warrantless inspection of Krull’s wrecking yard in reliance on the statute and found evidence. When Krull moved to suppress the evidence, the state court agreed that the statute authorized more than the Fourth Amendment permitted.³⁰ The question before the Supreme Court was whether the good faith exception applied “when officers act in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment.”³¹

According to the Court, it was obvious that officers would not be deterred by exclusion in such circumstances: after all, they were “simply fulfill[ing] [their] responsibility to enforce the statute as written.”³² The primary issue was how an exclusionary rule would deter legislatures from enacting unconstitutional laws. The Court reasoned that legislatures were not likely to be substantially deterred by exclusion in such circumstances.³³ First, there was no evidence that legislators were enacting unconstitutional laws and thus needed the penalty of suppression to influence their conduct.³⁴ Second, it was unclear that suppression would actually influence legislators: the Court reasoned that “the greatest deterrent to the enactment of unconstitutional statutes by a legislature is the power of the courts to invalidate such statutes,” which could be accomplished without suppression.³⁵

*Arizona v. Evans*³⁶ followed a few years after *Krull*. In *Evans*, a police officer arrested a suspect based on an error in a court database.³⁷ The court clerk had failed to inform the police that the warrant had been withdrawn, leading to

27. *Id.* at 918, 923 n.24 (noting that “[r]eferences to ‘officer’ . . . should not be read too narrowly” and that it is necessary to consider the objective reasonableness of all listed categories of officers in determining whether the good faith exception applies).

28. *Id.* at 921.

29. 480 U.S. 340 (1987).

30. *Id.* at 342–46.

31. *Id.* at 342 (emphasis omitted).

32. *Id.* at 350 (“If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written.”).

33. *Id.* at 352.

34. *Id.* at 351.

35. *Id.* at 352.

36. 514 U.S. 1 (1995).

37. *Id.* at 4–5.

Evans's improper arrest.³⁸ The Court's deterrence analysis focused on whether exclusion would deter the court clerks responsible for maintaining records on arrests.³⁹ As in *Leon* and *Krull*, the Court focused on the realities of whether the nonpolice actors needed to be deterred and whether exclusion would affect their conduct.⁴⁰ Evaluating the realities of how court clerks operate, the Court concluded that court clerks generally followed the law and would not be particularly influenced by suppression:

Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed.⁴¹

*Herring v. United States*⁴² was similar to *Evans*, but with a twist: the database error that permitted the arrest was a negligent error made by a police department in another county rather than a court clerk.⁴³ *Herring's* deterrence analysis considered whether suppression following negligent police errors could considerably deter the police, and more specifically, whether suppression would have a major deterrent effect on police maintenance of arrest databases.⁴⁴ The majority opinion by Chief Justice Roberts concluded that suppression would not have a substantial deterrent effect in such circumstances. There was no indication that police database errors were "routine or widespread," the Court emphasized, and thus that there was a particular problem in need of correction.⁴⁵ Further, merely negligent errors were unlikely to be corrected: "To trigger the exclusionary rule," Chief Justice Roberts explained, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it."⁴⁶

The important lesson of *Leon*, *Krull*, *Evans*, and *Herring* is that the deterrence inquiry considers how suppression would impact the decision making of all of the various players in the criminal justice system. The police matter, of course, but other institutional players matter as well. As a result, accurately assessing deterrence requires studying how each of these institutional players either facilitates or avoids the unconstitutional searches or seizures prohibited by the Fourth Amendment.

This essential point has sometimes been overlooked because the *outcomes* of the Supreme Court's decisions have hinged on whether the exclusionary rule

38. *Id.* at 5.

39. *Id.* at 14–16.

40. *Id.*

41. *Id.* at 15 (citations omitted).

42. 129 S. Ct. 695 (2009).

43. *Id.* at 698.

44. *Id.* at 703.

45. *Id.* at 704.

46. *Id.* at 702.

would deter the police. In every Supreme Court good faith case, the Supreme Court has found the claim of nonpolice deterrence unpersuasive and ruled in favor of the government: the absence of significant police deterrence has proved outcome determinative.⁴⁷ In my view, this reflects that the cases the Supreme Court has decided generally have involved weak claims of deterrence for nonpolice government actors. In Fourth Amendment law, the appellate courts announce the law and the police on the street enforce it. Other institutional actors such as court clerks and legislatures in theory can play a role in the deterrence calculus. But as a practical matter, these institutional actors are outside the law-asserting and law-following *pas de deux* of the appellate courts and the police. As a result, that Supreme Court majorities have not yet been persuaded by a claim of nonpolice deterrence does not mean that no such claim can be made. Rather, the conceptual point remains that courts must consider all of the institutional actors to assess the deterrent role of the exclusionary rule.

C. GOOD FAITH, DETERRENCE, AND THE APPELLATE JUDICIARY

Whether the good faith exception applies to new law poses a novel question because it focuses the deterrence inquiry on an institution never before addressed in the cases—the appellate judiciary, and specifically, the United States Supreme Court. Because suppression for new law cannot deter the police, the remedy must be justified based on how it deters constitutional violations by appellate courts. This seems jarring at first. Appellate courts say what the law is, after all.⁴⁸ Their decisions provide the benchmark by which other institutional actors evaluate the lawfulness of their conduct. And surely appellate courts and the Supreme Court are not “adjuncts to the law enforcement team”⁴⁹ rooting for the police that would have some sort of intent to encourage or allow constitutional violations. How can it be that appellate courts are deterred by an exclusionary rule?

The exclusionary rule has a deterrent effect on appellate courts by ensuring that litigants make essential arguments to the courts in an open and vigorous adversarial setting. In Fourth Amendment law, the appellate courts announce what the law is, and the police then act within the zone of power conferred by the appellate court decisions. Appellate courts are not deterred directly by a threat of suppression. The deterrence works indirectly, through the impact of a suppression remedy on appellate litigation. Courts are deterred by persuasive

47. This has led to broad statements in some opinions that could be read out of context as suggesting that only police deterrence matters. *See, e.g., id.* at 698 (“Our cases establish that . . . suppression . . . turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.”). Such statements have to be read in the context of the cases in which they arose. The Court would not have given the attention it did to nonpolice deterrence in the good faith cases if such considerations were not important.

48. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

49. *Arizona v. Evans*, 514 U.S. 1, 15 (1995).

legal arguments being brought to their attention and forcefully argued. The availability of a suppression remedy creates the incentives needed to ensure the adversarial litigation that courts need to reach accurate constitutional decisions. In other words, the exclusionary rule deters constitutional wrongs by creating an environment in which litigants can identify constitutional wrongs and bring them to the attention of appellate courts.

Appreciating the force of this argument requires a quick detour into how the Supreme Court treats new decisions overturning prior law. The widely shared assumption in our legal culture is that when the Supreme Court hands down a new decision overturning prior case law—whether it is lower court case law or Supreme Court case law—the Supreme Court has itself changed the law. When the law recognized in court was *A* one day, and the new Supreme Court decision saying the law is *B* comes down the next day, the common understanding is that the Supreme Court changed the law from *A* to *B*. From this starting point, it seems strange to speak of appellate-court deterrence. Deterrence requires a benchmark from which to measure correct and incorrect. If the appellate courts say what the law is, the correct answer is whatever the courts say it is. The notion of appellate-court deterrence seems incoherent from this perspective because a court cannot be both correct a priori (as the benchmark used by other actors) and yet also need to be deterred into changing the law to some objectively correct (but not yet recognized) legal position.

The Supreme Court's formalist approach to overturned case law solves this jurisprudential puzzle. The Supreme Court has made clear that when it overturns a precedent it has not "changed" the law but rather has corrected a mistake.⁵⁰ The new decision is presumed to be right and the overturned precedent is presumed to be wrong, so the new decision has replaced an incorrect reading of the law with a correct one. The Court made this point most forcefully in its recent decision in *Danforth v. Minnesota*.⁵¹ *Danforth* considered whether a state could apply a federal constitutional rule retroactively during collateral review proceedings even though federal law barred such retroactive application in federal court.⁵² Before answering that question affirmatively, the Court went out of its way to explain that the very concept of "retroactivity" is misleading because it assumes that courts create rules:

[W]e note at the outset that the very word "retroactivity" is misleading because it speaks in temporal terms. "Retroactivity" suggests that when we declare that a new constitutional rule of criminal procedure is "nonretroactive," we are implying that the right at issue was not in existence prior to the date the "new rule" was announced. . . . [T]he source

50. See *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (arguing that "prospective decisionmaking is incompatible with the judicial role" and characterizing the Court's decisions as "*declaring* what the law already is" rather than "*creating* the law").

51. 552 U.S. 264 (2008).

52. *Id.* at 266.

of a “new rule” is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the “retroactivity” of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.⁵³

Under this framework, courts enable constitutional violations when they interpret the constitution incorrectly in ways that permit what should be forbidden. If a precedent says that the police can do *X*, but the Constitution, if properly construed, would say *X* is unlawful, then the incorrect precedent approves (and therefore facilitates) constitutional wrongs.

This perspective explains the deterrent impact of the exclusionary rule. Deterring constitutional violations by appellate courts means creating the optimal environment for those courts to recognize prior constitutional errors. For this reason, incentives must permit identification of and challenge to erroneous precedents. The core question is whether the exclusionary rule provides a significant mechanism for appellate courts to encounter the arguments they need to recognize that the law has gone off track. The ultimate goal is for the appellate court to recognize that the precedents guiding the police officer’s behavior improperly approved conduct that was unconstitutional. The court can then overturn its own precedent, or the precedent of lower courts, and set the law on a better path.

This approach to appellate-court deterrence makes sense even outside the Supreme Court’s formalist framework. The Fourth Amendment requires a careful balancing of interests between the government and its citizens.⁵⁴ In an adversarial system premised on litigants making arguments and courts evaluating them, courts can arrive at optimal Fourth Amendment rules only if both sides of the balance make the best arguments on their respective sides. The government is best suited to articulate the public’s interest in security from crime, and the defense is best suited to articulate the public’s interest in security from excessive government power. If one side lacks an incentive to point out how existing precedents weigh those interests, the law will, over time, become unbalanced. Being unbalanced, the law will be inaccurate: it will no longer fully value the constitutional interests on both sides of the reasonableness fulcrum.

As this analysis suggests, appellate-court deterrence operates quite differently from police deterrence. Appellate-court deterrence works by persuasion rather than by threat. The exclusionary rule deters police conduct by threat: the threat of exclusion causes police officers to identify and then avoid the constitutional violation. The officer needs to know the facts and what the courts have said

53. *Id.* at 271.

54. *See, e.g.*, *Samson v. California*, 547 U.S. 843, 864 (2006) (“[T]he question in every case must be . . . the balance of legitimate expectations of privacy, on the one hand, and the State’s interests in conducting the relevant search . . .”).

about the law, and he can then steer clear of the constitutional violation. That explains the Supreme Court's focus on *mens rea* in *Herring v. United States*, the case on negligent errors in a police database, and why it does not apply to appellate-court deterrence.⁵⁵ "To trigger the exclusionary rule," the Chief Justice wrote, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it."⁵⁶

That is true with police deterrence, but it is not true with appellate-court deterrence. Appellate-court deterrence works through the usual process of appellate court decision making. Judges are deterred not by threat of penalty but by force of reason. The arguments themselves deter courts by persuading judges as they study briefs, read cases, and hear oral arguments. Whether constitutional errors occur does not reflect individual culpability or require *mens rea*. Rather, it reflects whether the litigation environment is conducive to accurate constitutional rulemaking.

Despite these differences, a failure of appellate-court deterrence has the same impact as a failure of police deterrence. Avoidance of Fourth Amendment violations requires both types of deterrence to operate together. The appellate courts must accurately assess Fourth Amendment interests to announce a rule, and the police must accurately follow the rule announced. A failure by the appellate courts to accurately assess Fourth Amendment interests in the course of announcing the law has the same impact as the failure of the police to follow the law. From the standpoint of enforcing constitutional rights, it makes no difference whether the breakdown occurs at the stage in which the appellate courts interpret the law or the stage in which the police decide to conduct searches and seizures.

D. HOW FOURTH AMENDMENT LAW DEVELOPS

To appreciate the deterrent role of the exclusionary rule for changing law, it is essential to understand how Fourth Amendment law develops. Fourth Amendment law concerns the balance between police power and civil liberties in how the government investigates criminal activity.⁵⁷ The law develops in a case-by-case fashion.⁵⁸ As a particular law enforcement technique begins to be used, defendants move to suppress evidence based on that technique. Cases begin to appear that answer how the law should apply to those new facts. Sometimes all the lower courts agree on how the law should treat a set of facts, and the law never develops past that point. The treatise writers treat the lower court decisions as having settled the law. Because the lower courts agree, the Supreme Court stays out.

55. 129 S. Ct. 695 (2009).

56. *Id.* at 702.

57. *See Samson*, 547 U.S. at 864.

58. *See, e.g., See v. City of Seattle*, 387 U.S. 541, 546 (1967) ("Any constitutional challenge [to an administrative search program] can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness.").

But sometimes the lower courts begin to disagree. One circuit will say the technique is lawful, and another circuit will say it's not. A third might say it's lawful sometimes but not other times. Now things get interesting. The Supreme Court's docket is largely driven by lower court disagreement: the Supreme Court generally waits for lower courts to disagree before agreeing to hear a case.⁵⁹ As a result, a circuit split leads litigants to file petitions for certiorari seeking Supreme Court review. Litigants who have lost in the lower courts because the circuit law was against them will ask the Supreme Court to change the law and overturn the circuit decision. After the split exists and the issue has percolated in the lower courts, the Supreme Court will take one of those lower court cases and decide what law governs the new technique. The government will argue that the technique should be deemed legal; the defense will argue that the technique should be deemed illegal. The Supreme Court decides the case and then settles the law.

Occasionally, some of the Justices will decide they want to revisit one of their past decisions. Usually the Justices send early signals in the form of concurrences or dissents in somewhat related cases or, in some instances, in dissents from denial of certiorari. The signals will indicate that Justice's view (or the view of several Justices) that the law has gone off track. Once again, this signal normally will generate cert petitions: litigants will take positions that mirror those of the signaling Justices, and they will ask the courts to change the law. If four or more Justices want to rethink the old precedent, the Court will take the case and decide, *de novo*, whether its old precedent is correct. Once again, the government will argue that the technique should be deemed legal; the defense will argue that the technique should be deemed illegal. The new Supreme Court decision then resettles the law.

The recent litigation leading up to *Arizona v. Gant*⁶⁰ provides an example. In *Belton v. New York*, the Supreme Court appeared to adopt a bright-line rule that after an arrest at an automobile, the entire passenger compartment of the vehicle can be searched incident to arrest.⁶¹ Lower courts mostly interpreted *Belton* accordingly, and the police took advantage of the resulting rule: following an arrest at a car, they would put the arrestee in the back of a squad car and then search the passenger compartment of his car.⁶² The Supreme Court revisited *Belton* in part in *Thornton v. United States*, and at the time it appeared to largely reaffirm this reading, albeit on very narrow grounds and by a bare majority opinion.⁶³

But *Thornton* suggested that *Belton*'s days might be numbered. Justice Scalia

59. See SUP. CT. R. 10 (listing "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" as one of the "compelling reasons" for which the Court will grant certiorari).

60. 129 S. Ct. 1710 (2009).

61. 453 U.S. 454, 462–63 (1981).

62. See, e.g., *United States v. Humphrey*, 208 F.3d 1190, 1201–02 (10th Cir. 2000).

63. 541 U.S. 615, 617, 624 (2004) (5–4 decision).

concurring in the judgment, joined by Justice Ginsburg, indicating his disagreement with the lower court readings of *Belton* and announcing that in his view the law had gone too far.⁶⁴ Justice O'Connor chimed in with a separate concurrence, indicating that she would likely have joined Scalia and Ginsburg if the issue had been briefed.⁶⁵ And Justice Stevens dissented entirely in *Thornton*, joined by Justice Souter: Justice Stevens had not agreed with the bright-line rule of *Belton* when it had been announced in 1981, and his dissent adhered to his view.⁶⁶ Counting up the Justices who seemed unhappy with the bright-line approach of *Belton* yielded five votes, enough for a new Court majority.

Of course, the five unhappy votes in *Thornton* did not demonstrate that *Belton* was no longer good law, or even that it would be overturned in the future. Justice O'Connor's opinion was a hint, not a holding. The votes to grant cert in a future case might not materialize. And changes in personnel might take away one or more votes (indeed, Justice O'Connor resigned a year later). But the signs were clear enough that litigants and lower courts were emboldened. Criminal defendants began to challenge the widely shared view of *Belton*, and the Arizona Supreme Court agreed with such a challenge in *State v. Gant* and essentially adopted Justice Scalia's concurrence in *Thornton*.⁶⁷ The Supreme Court granted cert in *Gant*⁶⁸ and then adopted a new approach to search incident to arrest for cars that essentially was a compromise between the prior announced views of Justice Stevens and Justice Scalia.⁶⁹

E. THE DETERRENT FUNCTION OF THE EXCLUSIONARY RULE FOR CHANGING LAW

The exclusionary rule for new law provides the linchpin that makes this process work. The process of Fourth Amendment development only works if litigants have a reason to ask the Supreme Court to change the law. And the exclusionary rule for changing law on direct appeal provides the critical incentive *ex ante*: the exclusionary rule gives criminal defendants an incentive to ask for changes in the law because it creates a possibility they might benefit from those changes.

Without an exclusionary rule for new law, defendants will have no reason to ask courts to change the law to help them. Every victory will be a Pyrrhic victory: for criminal defendants, the new game of Fourth Amendment litigation will be "heads you win, tails I lose." Paul Mishkin noted this dynamic decades ago in his famous article about retroactivity, *The High Court, the Great Writ*,

64. *Id.* at 625–32 (Scalia, J., concurring in the judgment).

65. *Id.* at 624–25 (O'Connor, J., concurring in part).

66. *Id.* at 633–36 (Stevens, J., dissenting).

67. *State v. Gant*, 162 P.3d 640, 643 & n.2 (Ariz. 2007).

68. *Arizona v. Gant*, 538 U.S. 976 (2008).

69. *Arizona v. Gant*, 129 S. Ct. at 1723 (holding that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest").

and the Due Process of Time and Law.⁷⁰ Mishkin's discussion of how the availability of a remedy alters the incentives of litigation is equally true regardless of whether the label used is retroactivity or good faith:

The effective operation of the regular judicial process depends upon parties raising issues for decision and presenting (ordinarily through adversary argument) the considerations relevant to the wise resolution of those issues. The performance of these functions by litigants depends, not unnaturally, upon the incentive supplied by the possibility of winning a rewarding judgment. When a new rule of law is given purely prospective effect, it of course does not determine the judgment awarded in the case in which it is announced. It follows that if parties anticipate such a prospective limitation, they will have no stimulus to argue for change in the law.⁷¹

Of course, even *with* an available remedy, defendants will ask for changes in the law only rarely. If the courts are showing no signs of changing the law, or if the rules are stable and widely accepted, such claims will fall on deaf ears: asking for a change in law in such circumstances will seem quixotic at best and might damage counsel's credibility with the court. But when the law is unstable, either due to a circuit split or separate opinions indicating that changes are possible, the (generally remote) prospect of benefiting from a new Supreme Court rule is the carrot that keeps litigants asking for changes in the law. And in those circumstances, the requests for changes in the law provide the fuel needed to make the system run. The requests give the Supreme Court the cases, and the forthright arguments for and against different legal rules, that allow the Court to rule and thereby settle the law.

If courts removed the remedy by recognizing a good faith exception for changing law, defendants who did still wish to challenge the government would have two options. First, they could make disingenuous arguments for new law while maintaining that that existing law *already* recognized their position. According to the Supreme Court, the standard adopted to determine when the good faith exception applies is the objective reasonableness standard found in qualified immunity doctrine.⁷² The question is whether an objectively reasonable officer would realize his conduct was unlawful.⁷³ Instead of arguing that the existing law was unsatisfactory and arguing for a change, defendants could argue, with a wink and a nod, that the law was already as they wished it to be—and indeed that it was so obviously the law that a reasonable police officer would know it.

70. Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60–62 (1965).

71. *Id.* at 60–61.

72. *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)).

73. *United States v. Leon*, 468 U.S. 897, 919 n.20. Part III of this Article considers possible variations from this standard, such as limiting the good faith exception for changing law to reliance on settled law.

This approach is unsatisfactory because it would place courts in the unhappy position of having to go along with the deception. To provide relief, and to recognize errors in the law, courts would be forced to pretend that their new rule was always the law—even in the lower courts—and that it was so clearly the law that any reasonable person should have known it. The more significant the change sought by the defendant, the greater the deception would be that the courts would need to countenance.

Alternatively, some defendants might be willing to make legal arguments simply for the sake of constitutional principle knowing they would not benefit. This is particularly likely in cases litigated by repeat players such as public defenders who may have broader ideological commitments.⁷⁴ Although this might occur on occasion, it suffers from the same difficulty that the Supreme Court has identified in the context of standing doctrine and qualified immunity: there is a critical difference between the kind of hypothetical and abstract litigation that occurs when a litigant has no stake in a case as compared to the real and concrete litigation that occurs when he does.⁷⁵ As Justice Kennedy recognized in his concurrence in *Lujan v. Defenders of Wildlife*:

[T]he party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.⁷⁶

The problem is that strategy to win a cause often differs from the strategy to win a case. On the whole, lawyers at the Supreme Court increase their chances of victory by making narrow arguments.⁷⁷ The more narrow the argument, the more likely it is that five Justices will agree: the narrow argument will raise fewer potential uncertainties and unintended consequences as compared to a broad one. Lawyers committed to ensuring victory for their clients tend to make the narrowest arguments they can: they focus on the facts and ask for just enough to win. In the Fourth Amendment setting, this lets the law evolve case

74. Yale Kamisar, Gates, “*Probable Cause*,” “*Good Faith*,” and *Beyond*, 69 IOWA L. REV. 551, 603–04 (1984) (arguing that public defenders will litigate for constitutional change even if relief is only purely prospective).

75. See *Pearson v. Callahan*, 129 S. Ct. 808, 820 (2009) (noting that in the context of qualified immunity, requiring courts to decide the merits of Fourth Amendment questions when actual liability hinges on objective reasonableness “may create a risk of bad decisionmaking” because it can lead to “cases in which the briefing of constitutional questions is woefully inadequate”).

76. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)) (internal quotation marks omitted).

77. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 19–20 (2008).

by case. But a lawyer who knows her side will lose no matter what—because the good faith exception will apply—has no such constraints. A lawyer who is arguing for a cause in the abstract is likely to swing for the fences. She will be more likely to make broad arguments that are unlikely to resonate with the Justices in the center that control the course of doctrinal change. As Article III standing doctrine recognizes, that sort of abstract interest in a claim does not accurately and fully represent the interests of the actual individuals with a real stake in the issue.

An exclusionary rule for overturned law deters constitutional violations by ensuring that litigation incentives do not become entirely one-sided. The prosecution always benefits from decisions changing the Fourth Amendment law in its favor. If a court accepts the government's argument, the new decision would apply immediately to that case and all other cases on direct review. The new decision would apply even if the police acted in bad faith and believed that their conduct was unconstitutional: the court would announce the government's conduct lawful, and thus there would be no constitutional wrong to remedy.⁷⁸ But with a good faith exception for new law, criminal defendants would not receive reciprocity. The law would become a one-way street, resulting in a systematic bias in favor of expanded government power arising simply from the structure of litigation incentives. Prosecutors would control when and in what case the Supreme Court heard claims to change the law, and all those claims would nearly always be claims to expand government power. The Supreme Court would be denied the regular process of settling the law from both sides, with both arguments in favor of expanded power and arguments against it.

The exclusionary rule for changing law is needed to deter appellate courts from authorizing constitutional violations because application of the exclusionary rule is the only way that the constitutional violations will be corrected. Without the exclusionary rule, the courts will go on authorizing constitutional violations indefinitely. With the exclusionary rule in place, however, litigants can point out the error in existing law that prompts the Supreme Court to accept a case that will allow it, within the confines of the case or controversy requirement, to correct the error and end the constitutional violations.

F. ALTERNATIVE REMEDIES CANNOT SUBSTITUTE FOR THE EXCLUSIONARY RULE

A final consideration is whether alternative remedies narrow the deterrent role of the exclusionary rule. If other remedies can provide the needed deterrent effect, the exclusionary rule may not add appreciably to it.⁷⁹ There are four

78. If a court concludes that the government did not violate any rights, the defendant will necessarily lose his challenge.

79. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 597–99 (2006) (discussing the role of civil suits in deterring knock-and-announce violations in the course of concluding that the exclusionary rule is not needed to deter such violations); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044–45 (1984) (discussing the role of alternative enforcement methods in determining the deterrent impact of an exclusionary rule in civil deportation hearings).

different kinds of remedies to consider: civil suits seeking damages, civil suits seeking injunctive relief, civil suits seeking declaratory judgment, and the possibility of criminal prosecution. None of these four alternative remedies can play a substantial role in facilitating the correction of constitutional errors by appellate courts.

Civil suits seeking money damages cannot provide for appellate-court deterrence because of the doctrine of qualified immunity.⁸⁰ Under the doctrine of qualified immunity, which attaches when suing police officers that conducted searches and seizures,⁸¹ arguing for a change in Fourth Amendment law in a civil action is pointless. Because qualified immunity applies unless the legal violation was “clearly established” at the time of the search or seizure,⁸² qualified immunity will attach in every case. No violation can be clearly established if existing appellate court precedent indicates that it is actually *lawful*.

The Supreme Court noted the limitations of civil remedies in this setting in *Arizona v. Gant*.⁸³ “Because a broad reading of *Belton* has been widely accepted,” the Court explained, “the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding” despite *Gant*’s overruling those precedents.⁸⁴ To be sure, it is theoretically possible that the Supreme Court could overturn precedent in a civil case and rule in favor of a plaintiff on a Fourth Amendment question on that basis before ruling against the plaintiff on qualified immunity grounds. Such an outcome is highly unlikely, however.⁸⁵ As far as I know, it has never happened before. The much more likely path in a civil suit seeking a change in Fourth Amendment law is for the lower courts to toss out the suit on qualified immunity grounds without even reaching the merits of the Fourth Amendment claim. The merits will never reach the Supreme Court. As a result, civil suits for money damages do not appear to provide the necessary mechanism to correct constitutional errors.

Civil suits seeking injunctive relief cannot provide the needed mechanism because of Article III’s limits on Fourth Amendment injunctions. Under *City of Los Angeles v. Lyons*, a plaintiff bringing a Fourth Amendment case seeking injunctive relief must show “a real and immediate threat” that a specific search or seizure that occurred before will occur again in the future in order to establish a case or controversy.⁸⁶ As a practical matter, this requirement limits

80. See *Harlow v. Fitzgerald*, 457 U.S. 800, 807–08 (1982) (discussing the doctrine of qualified immunity).

81. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

82. *Id.* at 614 (“Since the police action in this case violated petitioners’ Fourth Amendment right, we now must decide whether this right was clearly established at the time of the search.”).

83. 129 S. Ct. 1710 (2009).

84. *Id.* at 1722 n.11.

85. Such an event is particularly unlikely in light of *Pearson v. Callahan*, which gives courts discretion to resolve Fourth Amendment civil cases on qualified immunity grounds without addressing the merits under the Fourth Amendment. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

86. 461 U.S. 95, 99 (1983).

injunctions in Fourth Amendment cases to the adjudication of “ongoing programs” like roadblocks and drug-testing programs.⁸⁷ The ongoing nature of the program is needed to create a case or controversy. Because few Fourth Amendment challenges involve ongoing programs, as compared to individual searches and seizures, lawsuits seeking injunctive relief cannot create the necessary environment in most instances to permit appellate courts to reconsider their prior precedents.

Civil lawsuits seeking declaratory judgment face similar limitations. For a plaintiff to have standing to seek a declaratory judgment in a Fourth Amendment case, the plaintiff must show that the challenged conduct is ongoing and that a declaratory judgment would redress his injury.⁸⁸ As with the limits of injunctions, this limits Fourth Amendment declaratory judgment actions to challenges to ongoing programs. Such challenges are rare: most Fourth Amendment challenges focus on discrete actions by specific officers. As a result, civil suits seeking declaratory judgment in Fourth Amendment cases cannot substitute for the deterrent impact of an exclusionary rule.

Finally, criminal prosecutions cannot provide a way to correct erroneous precedents. Federal law provides a criminal sanction against a government official who “willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States,” which includes Fourth Amendment rights.⁸⁹ However, this statute does not provide a way to correct constitutional errors by appellate courts. To ensure fair notice to the police as to what conduct is criminal, the Supreme Court has interpreted the statute as incorporating the standard of qualified immunity law: no criminal case can be brought for a violation of constitutional rights unless the constitutional right was clearly established at the time of the alleged violation.⁹⁰ This is a sensible result. It would be inconsistent with the constitutional prohibition on ex post facto laws to punish the police for conduct that was deemed legal at the time it occurred.⁹¹ But it also means that criminal prosecutions cannot substitute for the exclusionary rule in providing a means to correct erroneous constitutional precedents.

II. COSTS OF THE EXCLUSIONARY RULE FOR CHANGING LAW

Having assessed the benefits of the exclusionary rule for new law, this Article now considers its costs. At first blush, the costs of the exclusionary rule are obvious: probative evidence will be excluded. If that evidence plays a critical role in a criminal case, a guilty person will go free (or else never will be

87. Orin S. Kerr, *The Limits of Fourth Amendment Injunctions*, 7 J. TELECOMM. & HIGH TECH. L. 127, 130 (2009).

88. *See, e.g.,* *Mayfield v. United States*, 599 F.3d 964, 969–73 (9th Cir. 2010) (requiring plaintiff seeking a declaratory judgment to show an ongoing injury and redressability).

89. 18 U.S.C. § 242 (2006).

90. *United States v. Lainier*, 520 U.S. 259, 270–71 (1997).

91. *See* U.S. CONST. art. I, § 9, cl. 3 & § 10, cl. 1.

charged). The retributive and utilitarian purposes of criminal law hinge on the enforcement of criminal law. To the extent suppression of evidence lessens enforcement, it counters the very purposes of criminal law and criminal punishment.

There are limits to this concern, however, that are rarely recognized and yet prove vital to assessing the costs of suppression for changing law. Measuring the costs of the exclusionary rule in any specific setting must account for, and then subtract, the role of additional doctrines that already limit the scope of the exclusionary remedy. A range of different doctrines limit the scope of the exclusionary rule. Some of those doctrines look to whether there is sufficient connection between the constitutional violation and the discovery of the evidence to warrant suppression. Others look to whether the defendant is one of the individuals who is permitted to assert the challenge. Some doctrines look at whether the violation is the kind of constitutional violation that supports suppression. And other doctrines look to whether suppression is an available remedy for that kind of hearing. Courts exclude evidence only when all four types of doctrinal inquiries produce the same affirmative answer. As a result, the costs of the exclusionary rule in a particular doctrinal setting must subtract the role of the other ameliorative doctrines that *already* limit the scope of the suppression remedy.

Appreciating the role of other ameliorative doctrines reveals that the cost of an exclusionary rule in the specific instance of changing law is modest. The group of defendants who would obtain relief generally are a small group: they are only those defendants who have not yet had their convictions become final and who never would have been searched in the first place if the Constitution had been followed. In these circumstances, the cost of the exclusionary rule for changing law resembles the cost of following the Constitution going forward. Part of the difficulty is that the good faith exception has traditionally been an exception about the *type* of constitutional violation rather than its timing. As a result, the good faith exception can still apply based on the kind of constitutional violation that occurs even if there is no good faith exception for overturned law. If a constitutional violation is so minor that the exclusionary rule is not justified, that same good faith exception will apply regardless of whether the officer could have known of the violation or not. A good faith exception for overturned law thus repeats a cost-benefit inquiry performed elsewhere: it is best understood as a thinly veiled retroactivity inquiry instead of an instance of the good faith exception.

This Part begins by introducing the four kinds of limiting doctrines that the Supreme Court has recognized for the exclusionary rule. It then explains why a good faith exception for changing law simply repeats the questions asked by retroactivity law: the good faith doctrine has traditionally been a limit on the kinds of violations that lead to suppression, whereas here it is being reframed to decide which defendant can bring the case (the traditional retroactivity question). The Part concludes by showing that the cost of the exclusionary rule for

changing law is modest in light of the other ameliorative doctrines that reflect the same cost–benefit approach to the exclusionary rule.

A. FOUR TYPES OF DOCTRINES THAT LIMIT THE SCOPE OF THE EXCLUSIONARY RULE

When the government conducts an unconstitutional search, and that search leads to evidence, application of the exclusionary remedy depends on four basic questions: First, is there sufficient causation between the constitutional violation and the discovery of the evidence to warrant suppression? Second, is the defendant one of the individuals who is permitted to assert the challenge? Third, is this the kind of constitutional violation that supports suppression? And fourth, is this particular proceeding a type of proceeding in which the exclusionary rule applies? The exclusionary rule applies only if the answer to all four questions is yes.

Each of these four questions has its own set of doctrinal boxes, but in every box the doctrines are framed by one overriding pragmatic question: how far does the exclusionary rule need to go to deter constitutional violations but still permit a well-functioning criminal justice system? In each box, the goal of the doctrine is to have the exclusionary rule be broad enough but no broader: the exclusionary rule needs to go far enough to deter wrongdoing and permit a well-functioning criminal justice system, while not punishing the public too much by suppressing evidence when suppression is not needed.

1. Did the Violation Cause the Discovery of the Evidence?

Consider the first question: whether there is a sufficient connection between the constitutional violation and the discovery of the evidence to warrant suppression. Three doctrines address this question: the fruit of the poisonous tree, inevitable discovery, and independent source. Taken together, the three doctrines raise a traditional causation inquiry. The fruit of the poisonous tree doctrine looks to whether the constitutional violation was the proximate cause of the discovery of the evidence.⁹² The inevitable discovery doctrine and the independent source doctrine ask whether the constitutional violation was a but-for cause of the discovered evidence. The independent source doctrine asks whether the government discovered the same evidence in some alternative lawful way;⁹³ the inevitable discovery doctrine applies when no independent source exists and instead asks the hypothetical question of whether the government would have found the evidence anyway had the unconstitutional search never occurred.⁹⁴

The goal of all three doctrines is to balance the benefits of deterrence with the costs of the exclusionary rule. Suppression of evidence deters constitutional

92. See *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (holding that the exclusionary rule applies when evidence has been “come at by exploitation” of an illegal search).

93. See *Murray v. United States*, 487 U.S. 533, 537 (1988).

94. See *Nix v. Williams*, 467 U.S. 431, 449–50 (1984).

violations that are the proximate cause of the discovery of the evidence.⁹⁵ In such circumstances, the remedy of suppression is tailored to the natural and foreseeable evidence discovered by the unlawful act. The deterrence works naturally: the government is punished by suppression of the evidence directly connected to its misconduct. On the other hand, the cost of suppression is too high to justify exclusion if either the evidence is too attenuated from the violation or the evidence would have been or was discovered through some alternative constitutional means. The three doctrines therefore limit the exclusionary rule to those cases in which the deterrent function of the law outweighs the cost of the exclusionary rule.

2. Can the Defendant Assert the Challenge?

The next question asks whether the defendant is one of the individuals who is permitted to assert the challenge. In Fourth Amendment law, two doctrines focus on this question: standing and retroactivity. Both doctrines assume that a constitutional violation occurred and that it led directly to the discovery of the evidence at issue. These doctrines instead ask whether the particular defendant asking for relief is permitted to bring the claim.

The first limitation, standing, simply asks whether the defendant's own constitutional rights were violated.⁹⁶ A defendant cannot move to suppress evidence based on the government violating someone else's rights: Fourth Amendment rights are personal.⁹⁷ A defendant cannot challenge the search of another person or of property in which he does not retain an interest sufficient to bestow Fourth Amendment rights, even if that search leads to evidence that is used against him in court.⁹⁸

The second limitation, retroactivity, asks whether the defendant can take advantage of a new decision announcing that conduct previously declared constitutional is now declared unconstitutional. The Supreme Court's approach to retroactivity has varied over time,⁹⁹ but presently adopts a simple rule. Under modern retroactivity law, defendants who have their cases in the pipeline get the benefit of the exclusionary rule with new law on direct review,¹⁰⁰ but defendants whose cases have become final cannot get the benefit of the exclusionary

95. See *Brown v. Illinois*, 422 U.S. 590, 599–600, 602 (1975) (exclusionary rule does not apply for evidence obtained in violation of the Fifth Amendment when there is an “act of free will” sufficient to “purge the primary taint” of the illegality and break the “causal chain” between the illegal interrogation and the evidence discovered).

96. See *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). To be clear, the Supreme Court has instructed that courts should not speak of “standing” as an independent doctrine, and should instead ask whether the defendant's reasonable expectation of privacy was violated. *Id.* at 139–40. Courts continue to refer to standing, however, so I will do the same.

97. *Id.* at 133–34 (“Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”).

98. *Id.*

99. See *Danforth v. Minnesota*, 552 U.S. 264, 271–75 (2008) (reciting the history of retroactivity law).

100. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

rule on collateral review.¹⁰¹

Both standing and retroactivity doctrine are explicitly based on the balance between deterrence and maintenance of an effective criminal justice system.¹⁰² On one hand, the exclusionary rule needs to be broad enough to deter violations, which permits defendants to challenge violations of their own rights as well as new law on direct appeal.¹⁰³ On the other hand, the exclusionary rule is not used when it is not necessary to deter misconduct,¹⁰⁴ and therefore prisoners cannot benefit from new law on collateral review.¹⁰⁵ As with the causation doctrines, the existing doctrines that define who can raise a challenge limit the exclusionary rule to those circumstances in which the deterrent impact of exclusion outweighs the costs of upset cases.

3. Does This Type of Violation Support Suppression?

A third type of doctrine that limits the exclusionary rule focuses on the type of violation that occurred. This is the traditional focus of the good faith exception. This inquiry is necessary because Fourth Amendment law contains many rules, some of which are essential and some of which are technical. Consider the case of an officer executing a warrant at a suspect's home. The warrant itself must satisfy particularity and probable cause; the warrant must be filed out correctly; the officer must normally knock and announce his presence before entering; and the officer must execute the warrant reasonably.¹⁰⁶ The reasonable execution requirement may include limitations on where the officer looks for evidence, who the officer detains, and even whether the officer points a weapon at anyone in the home without cause.¹⁰⁷ Although all would hope that the police execute warrants in full compliance with these various rules, the reality is that an officer tasked with all of these requirements may easily commit some sort of technical violation of them. The good faith exception recognizes that suppression is an extravagant remedy given the diversity, complexity, and sheer number of Fourth Amendment rules.¹⁰⁸

Once again, the doctrine balances the need for deterrence with the cost of the

101. *Stone v. Powell*, 428 U.S. 465, 494–95 (1976).

102. *See Rakas*, 439 U.S. at 137–38 (discussing “deterrent values” and “social cost[s]” of extending standing to challenge a search (internal quotation marks omitted)); *Linkletter v. Walker*, 381 U.S. 618, 636–37 (1965) (discussing deterrent effect and effect on “administration of justice” of retroactivity of the exclusionary rule).

103. *See Griffith*, 479 U.S. at 328.

104. *See Rakas*, 439 U.S. at 134 n.3 (noting the “deterrence aim” of the exclusionary rule).

105. *Stone*, 428 U.S. at 494–95 (1976).

106. *See Groh v. Ramirez*, 540 U.S. 551, 568 (2004) (Kennedy, J., dissenting) (listing the many Fourth Amendment responsibilities of a police officer executing a warrant).

107. *See, e.g., Los Angeles County, California v. Rettele*, 550 U.S. 609, 613–15 (2007) (discussing detention of individuals during execution of warrants); *Horton v. California*, 496 U.S. 128, 143 n.1 (1990) (limitation on where officer looks for evidence); *Baird v. Renbarger*, 576 F.3d 340, 346–47 (7th Cir. 2009) (pointing a weapon during execution of warrant can violate Fourth Amendment).

108. *See Groh*, 540 U.S. at 568 (recognizing that “[a]n officer who complies fully with all of [the warrant execution] duties can be excused” when the warrant itself contains a clerical error).

exclusionary rule. If every violation led to suppression, the police would be discouraged from desirable techniques that are heavily regulated by Fourth Amendment rules (such as warrant searches) and might instead try to rely on less desirable methods that are not (such as exigent circumstance searches). And nearly flawless investigations might still lead to suppression, resulting in lost criminal cases. The good faith exception addresses this concern by distinguishing major Fourth Amendment violations from technical ones. Major types of constitutional violations require deterrence; minor ones do not. Thus, the good faith exception applies if the police execute a warrant that contains a technical defect;¹⁰⁹ if the police violate the knock-and-announce rule;¹¹⁰ if the police obtained the warrant based on erroneous information in a court database;¹¹¹ or if the police obtained the warrant based on erroneous information negligently entered into a police database.¹¹² On the other hand, the good faith exception does not apply, and the evidence is excluded, if the constitutional violation is a more serious one such as a major error in a warrant.¹¹³

4. Is Suppression an Available Remedy in This Type of Proceeding?

The fourth limitation on the scope of the exclusionary rule focuses on the type of hearing at which suppression is available. Suppression is an available remedy for Fourth Amendment violations at trial on the merits and on direct appeal.¹¹⁴ In contrast, suppression is not an available remedy during habeas proceedings,¹¹⁵ in grand jury proceedings,¹¹⁶ during parole board hearings,¹¹⁷ for civil deportation hearings,¹¹⁸ during federal tax assessment hearings where the challenged evidence was collected by state officials,¹¹⁹ or “in a wide range of administrative proceedings, all the way from FTC hearings to uncover discriminatory pricing practices to hearings to suspend or expel a student from school.”¹²⁰ Although the Supreme Court has never addressed the issue, the federal circuit courts also have uniformly held that the exclusionary rule generally does not apply at sentencing; that is, the fruits of unlawful searches and seizures that were suppressed at trial can nonetheless generally be used and

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

110. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

111. *Arizona v. Evans*, 514 U.S. 1, 3–4 (1995).

112. *Herring v. United States*, 129 S. Ct. 695, 698, 704 (2009).

113. *See Leon*, 468 U.S. at 923 (noting that the good faith exception does not apply if an officer relied on a warrant based on an affidavit clearly insufficient to show probable cause, or if a warrant is obviously facially deficient).

114. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

115. *Stone v. Powell*, 428 U.S. 465, 494 (1976).

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

117. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998).

118. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984).

119. *United States v. Janis*, 428 U.S. 433, 454 (1976).

120. LAFAYE, *supra* note 6, § 3.1(g) (citation omitted).

considered during posttrial sentencing proceedings.¹²¹

As with the earlier three limitations on the scope of the exclusionary rule, these limitations arise out of cost–benefit balancing between the deterrent impact of exclusion and the public benefit of use of the information.¹²² Indeed, the first case to introduce the cost–benefit balancing approach to the exclusionary rule was *United States v. Calandra*, which held that the deterrent benefits of an exclusionary rule during grand jury proceedings were outweighed by its costs.¹²³ These decisions have generally reasoned that the availability of suppression at the trial stage of criminal proceedings is sufficient to achieve the deterrent impact of the exclusionary rule.¹²⁴ Additional deterrence beyond that achieved by the threat of suppression at criminal trials is not necessary in light of the costs to the truth-seeking function of court and administrative proceedings.¹²⁵

B. OBJECTIVE GOOD FAITH, SUBJECTIVE GOOD FAITH, AND RETROACTIVITY

Understanding the context of the good faith exception reveals the unusual nature of the proposed good faith exception for overturned law. Until now, cases on the good faith exception always have concerned whether the type of violation should support suppression (category 3) rather than whether the defendant making the claim is among the class entitled to relief (category 2). The notion of a good faith exception for overturned law jumps the traditional categories. The proposed exception conflates the traditional terrain of the good faith exception with the traditional terrain of retroactivity law.

Such a conflation presumably has arisen in part because of the poorly chosen label for the good faith exception and in part because of the Supreme Court's recent decision in *Herring v. United States*. As the Supreme Court noted in *Herring*, the label “good faith” arguably is a bit of a misnomer.¹²⁶ The phrase implies a subjective inquiry: whether a person acts in good faith or bad faith is normally a question of subjective *mens rea*. But the good faith exception requires an objective inquiry into costs and benefits, not a subjective inquiry into good faith. When applied to overturned law, it asks exactly the same

121. *United States v. Ryan*, 236 F.3d 1268, 1271–72 (10th Cir. 2001) (holding accordingly, and noting that “all nine other circuits to have considered this issue have determined that, in most circumstances, the exclusionary rule does not bar the introduction of the fruits of illegal searches and seizures during sentencing proceedings”). There are some exceptions to this rule. See LAFAYE, *supra* note 6, § 3.1(f) & nn.153–54.

122. See, e.g., *Lopez-Mendoza*, 468 U.S. at 1040–50.

123. 414 U.S. 338, 349–52 (1974).

124. See, e.g., *Stone v. Powell*, 428 U.S. 465, 493 (1976) (“We adhere to the view that these [cost–benefit] considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions. But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs.”).

125. *Id.* at 493–94.

126. *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (noting that in *Leon*, the Court “(perhaps confusingly) called this objectively reasonable reliance ‘good faith’”).

question traditionally asked and answered by retroactivity doctrine: whether a defendant can take advantage of a new decision announcing that conduct previously thought to be constitutional is now considered unconstitutional.

The seeds of the misunderstanding arguably trace back to *United States v. Leon*, the case that introduced the good faith exception.¹²⁷ In *Leon*, an officer executed a warrant that lacked probable cause.¹²⁸ *Leon* was the perfect test case for the government to seek a new exception to the exclusionary rule for two reasons. First, whether probable cause was actually lacking remained uncertain. The Court of Appeals divided two to one on the question, with then-Judge, now-Justice Anthony Kennedy dissenting.¹²⁹ As the Supreme Court indicated, there was “evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause.”¹³⁰ Second, the officer who executed the warrant acted not only responsibly but remarkably cautiously: the officer had consulted with three different prosecutors about the lawfulness of the warrant before executing it, all of whom apparently told him that the evidence for probable cause was sufficient.¹³¹ In response to the government’s request, the trial judge made a specific factual finding that the police officer who executed the warrant had acted in subjective good faith.¹³²

The express finding of subjective good faith in *Leon*, paired with the uncertainty that any violation actually existed, permitted the government to argue for an exception to the exclusionary rule for minor violations in *Leon* under the guise of seeking an exception for “good faith.”¹³³ The two will often appear together, to be sure. Because police officers presumably focus on more significant and obvious Fourth Amendment problems, an officer might reasonably overlook minor violations while acting in subjective good faith. But the two concepts are actually quite different. An officer might be fully aware that a technical defect exists, while he might also be genuinely and reasonably confused about a major Fourth Amendment problem.

The *Leon* opinion blurred the distinction, if only rhetorically, by referring

127. 468 U.S. 897 (1984).

128. *Id.* at 900.

129. *See* *United States v. Leon*, No. 82-1093, 1983 WL 486883, at *2-3 (9th Cir. Jan. 19, 1983). Kennedy wrote: “Whatever the merits of the exclusionary rule, its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation for it is on-going criminal activity. I would reverse the order suppressing the evidence.” *Id.* at *3 (Kennedy, J., dissenting).

130. *Leon*, 468 U.S. at 926.

131. *Id.* at 904 n.4 (quoting the trial judge as saying: “I will say certainly in my view, there is not any question about good faith. [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—and I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true.” (brackets in original)).

132. *Id.* at 904.

133. *See* Brief for the United States at 19, *Leon*, 468 U.S. 897 (Nos. 82-1771, 82-963, 82-1711), 1983 WL 482697, at *19. The government’s brief argued for a “reasonable mistake” doctrine, and emphasized that some errors are not as easily recognized as others. *Id.* at 19, 44-45, 1983 WL 482697, at *19, *44-45.

throughout to an exception for “objective good faith” police conduct. The Court’s qualified immunity case law had used the same phrase to refer only to objective conduct: the Court had previously referred to qualified immunity as “good faith” immunity, which the Court explained had an objective part and a subjective part.¹³⁴ Further, the *Leon* opinion made clear that the Court had in mind an objective inquiry into costs and benefits: the proper inquiry was objective reasonableness, not subjective good faith. But the phrase “good faith” has led some courts to assume that the good faith exception applies when an officer acts in subjective good faith, not when an officer commits only minor types of Fourth Amendment violations.¹³⁵

The Supreme Court’s recent decision in *Herring* further blurred the categories. Although *Herring* recognized that the good faith exception is objective,¹³⁶ Chief Justice Roberts incorporated the subjective *mens rea* of the violation into the Court’s assessment of objective deterrence. Determining the scope of the good faith exception requires identifying a category of violation and determining if the exclusionary rule is needed for that type. Somewhat oddly, the *Herring* court defined its category of cases over which the objective exception applies by reference to the subjective *mens rea* of the police in that case. “To trigger the exclusionary rule,” the Chief Justice wrote, “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it.”¹³⁷ He continued: “[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.”¹³⁸ This approach blurred the subjective–objective line by incorporating the subjective *mens rea* of the police into the set of cases over which the costs and benefits must be balanced.

Whatever label courts use, the analytical question posed by the application of the good faith exception for overturned law is the same as the question posed by the Supreme Court’s retroactivity case law. The goal of retroactivity law in criminal procedure, as the Supreme Court explained in *Desist v. United States*, is to apply the exclusionary remedy only if it would serve “the deterrent purpose of the exclusionary rule” in light of the fact that retroactive application, and its resulting application of the exclusionary rule, would “overturn convictions

134. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1983) (referring to the qualified immunity defense as the “good faith” immunity defense, and noting that it has both an objective and a subjective element).

135. See, e.g., *United States v. Riccardi*, 405 F.3d 852, 863–64 (10th Cir. 2005).

136. Chief Justice Roberts described the holding of *Leon* as follows: “When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted ‘in objectively reasonable reliance’ on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance ‘good faith.’” *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (citation omitted) (quoting *Leon*, 468 U.S. at 922 & n.23).

137. *Id.* at 702.

138. *Id.*

based on fair reliance upon [overruled] decisions.”¹³⁹ The cost–benefit framework for reliance on overturned case law developed in the retroactivity setting helped inspire the good faith exception in *Leon*: as the Court noted in *Leon*, “the balancing approach that has evolved during the years of experience” in the retroactivity setting “provides strong support for the modification currently urged upon us” in the good faith exception.¹⁴⁰

The proposed good faith exception for overturned law completes the circle. It asks the same question as retroactivity, using the same doctrinal test, by bringing the framework back to its beginnings. Indeed, in the late 1960s and early 1970s, the Supreme Court regularly described its retroactivity doctrine by reference to the officers’ good faith. Retroactivity doctrine hinged on whether “law enforcement officers reasonably believed *in good faith* that evidence they had seized was admissible at trial . . . even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.”¹⁴¹ This is the same standard as the proposed good faith exception for changing law. Even the language is the same. Whether or not the good faith exception for changing law should be recognized, the doctrine is simply retroactivity doctrine with a slight disguise.

C. THE COSTS OF THE EXCLUSIONARY RULE FOR OVERTURNED LAW

Whether courts use the label of “good faith” or “retroactivity,” the various ameliorative doctrines considerably narrow the costs of the exclusionary rule for new legal decisions. The exclusionary rule would have costs only when six requirements are met: (a) the illegal search or seizure directly caused the discovery of the evidence (fruit of the poisonous tree), (b) the government would not have discovered the evidence had the unconstitutional search never occurred (inevitable discovery), (c) the government did not obtain the evidence in some other way (independent source), (d) the defendant’s own rights were violated (standing), (e) the kind of constitutional violation is the kind of violation for which the Supreme Court has concluded that suppression is necessary (good faith), and (f) the exclusionary rule applies to that type of proceeding.

To see the impact of these doctrines, imagine you are a police officer contemplating whether to conduct a search. Specifically, imagine you are the police officer in *Arizona v. Gant*. You have just put Mr. Gant in the squad car and are contemplating whether to search the car for evidence. You think your search is lawful, but imagine that you realize the Supreme Court might change the law any day now and the exclusionary rule might apply by the time any case resulting from your search would be litigated. You can imagine several futures. First, it’s possible that the Supreme Court will change the law but your

139. 394 U.S. 244, 253 (1969).

140. *Leon*, 468 U.S. at 913.

141. *United States v. Peltier*, 422 U.S. 531, 537 (1975) (emphasis added).

particular search will still be lawful under the new rule. In that case, any evidence you find will be admissible. Second, it's possible that there is or will be another alternative legal means of finding the evidence. In that case, the evidence will be admitted under the inevitable discovery or independent source doctrines. Third, it's possible that the driver of the car who you put in the squad car doesn't own the car and doesn't have rights in it. In that case, the evidence will be admitted because the defendant doesn't have standing. Fourth, it's possible that the kind of violation you might be about to make will be ruled a minor violation for which suppression is not available under the good faith exception.

Even this overstates the likelihood of an exclusionary remedy. If the conviction becomes final before the Supreme Court replaces *Belton*, the defendant will be unable to take advantage of the new rule: under *Stone v. Powell*, the new rule will not be available during a habeas corpus action.¹⁴² Also, the Supreme Court might not change the law until the case has gone to trial, and the defendant might not raise a challenge to the search that was lawful at the time it occurred. In that case, the standard of review would drop to plain error, and the evidence would come in under the deferential plain error standard.¹⁴³ Even if the defense lawyer had a crystal ball and saw the future violation, or was just lucky in raising the issue, the harmless error doctrine might apply and preserve the conviction. From your perspective, you would know that the evidence would likely come in through *some* possible means even if the Supreme Court overturns the existing doctrine.¹⁴⁴

Looking at these doctrines together, the exclusionary rule for new law only provides relief in very limited circumstances. The search or seizure generally will be one that would have not occurred if the Constitution had been followed. The violation has to be a major violation, not a minor one. And the case needs

142. 428 U.S. 465, 494 (1976).

143. *See, e.g.*, *United States v. Dietz*, 577 F.3d 672, 688 (6th Cir. 2009) (holding that no plain error occurred when an officer followed pre-*Gant* case law on searches incident to arrest).

144. *Powell v. Nevada*, 511 U.S. 79 (1994), provides a helpful example. Although *Powell* was held by the police for a longer period than was authorized by *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)—a case decided while *Powell*'s appeal was on direct review—the Supreme Court held that *McLaughlin* was retroactive to *Powell*'s case but stressed that this did not mean *Powell* was entitled to relief:

It does not necessarily follow, however, that *Powell* must be set free, or gain other relief, for several questions remain open for decision on remand. In particular, the Nevada Supreme Court has not yet closely considered the appropriate remedy for a delay in determining probable cause (an issue not resolved by *McLaughlin*), or the consequences of *Powell*'s failure to raise the federal question, or the district attorney's argument that introduction at trial of what *Powell* said on November 7, 1989, was "harmless" in view of a similar, albeit shorter, statement *Powell* made on November 3, prior to his arrest.

Powell, 511 U.S. at 84 (citation and internal quotation marks omitted). There remained a range of different ways the evidence could be admitted despite the constitutional violation. On remand, the Nevada Supreme Court upheld *Powell*'s conviction despite the Constitutional violation. *See Powell v. State*, 930 P.2d 1123, 1126 (Nev. 1997).

to be on direct appeal following a challenge to the practice at the trial level. Further, each of these limitations must be and have been justified on their own cost–benefit criteria individually.

At that point, whether the costs of the exclusionary rule are significant will become closely aligned with whether a person agrees with the new Fourth Amendment rule the Supreme Court has adopted. To those who disagree with the new rule, the costs are that some individuals will go free who should not. But to those who agree with the new rule, the cost will be only that some people who should not have ever been arrested will be restored to how they should have been treated. Consider *Arizona v. Gant*, which dramatically changed the law of searches incident to arrest for automobiles and led to the flood of cases on whether the good faith exception applies to changing law.¹⁴⁵ The majority decision in *Gant* concluded that it was not constitutionally reasonable based on a balance of legitimate interests for the police to have searched *Gant*'s car while *Gant* was arrested and in the back of the squad car.¹⁴⁶ The search went too far and should not have been allowed. That is, a weighing of the interests produced the result that the government should not have known about the drugs in *Gant*'s car in the first place.

In this setting, applying a “good faith” exception to *Gant* and other cases with identical searches before *Gant* is akin to revisiting *Gant* and concluding that the *Gant* court got it wrong. Applying the exclusionary rule for *Gant* violations puts everybody back where they would have been had the police done what was permitted in *Gant*. Did the *Gant* court accurately gauge the competing costs and benefits of allowing the search in that case? Whatever the answer, presumably that answer should be settled by the Supreme Court in announcing the new rule, not by a later court under the guise of the good faith exception.

III. WEIGHING COSTS AND BENEFITS UNDER THREE PROPOSED RULES

Now it's time to weigh costs and benefits of applying the exclusionary rule for new law on direct review. Doing so requires comparing the harm caused to the functioning and integrity of the development of criminal procedure law if the good faith exception applies to changing law with the harm caused by not punishing some people who committed crimes if the exception is rejected. This sort of weighing can be difficult to do, as it requires comparing constitutional apples with constitutional oranges. No conversion chart exists for converting lost chances at punishment for unknown crimes with damage to the system of criminal procedure law. Nonetheless, the doctrine requires the comparison, so it is to that comparison that we now turn.

This Part will compare the costs and benefits of the exclusionary rule for new law under three different assumptions. The assumptions reflect three different

145. 129 S. Ct. 1710 (2009).

146. *Id.* at 1719.

versions of the good faith exception that the Supreme Court might plausibly consider. First, the Court may consider a good faith standard for changing law that adopts the traditional good faith standard from qualified immunity law. Under this first approach, applying the good faith exception means that the exclusionary rule does not apply unless it would be clear to a reasonable officer that the search was unconstitutional at the time it occurred.¹⁴⁷ Second, the Court may consider a variation of the good faith standard that several lower courts have adopted. Under this second approach to good faith, the exception applies only when the overturned precedents had clearly established at the time that the search was constitutional.¹⁴⁸ Third, the Court may consider a first-come, only-served rule, by which the defendant in the case announcing the new rule gets the benefit of the new rule but other similarly situated defendants with cases on direct review do not. Under this third approach to good faith, the initial case is an exception to the exception: the good faith exception does not apply to the first case announcing the new rule, while it otherwise applies to other cases in the pipeline.

Evaluating the costs and benefits of the exclusionary rule for overturned law therefore requires several comparisons rather than one. First, we must assess the costs and benefits of the exclusionary rule assuming that the choices are either an exclusionary rule or else a good faith exception that adopts the traditional qualified immunity standard. Second, we must assess the costs and benefits of the exclusionary rule assuming that the choices are either an exclusionary rule or else a good faith exception for reliance on settled precedents. Finally, we must assess the costs and benefits assuming that the choices are an exclusionary rule or a good faith exception with its own exception for the case in which the new rule is announced. Under any of these approaches, the benefits of the exclusionary rule exceed its cost.

A. COSTS AND BENEFITS UNDER THE TRADITIONAL GOOD FAITH STANDARD

Under the traditional good faith standard, applying the good faith exception requires asking whether a reasonable officer would recognize that the search or seizure is unconstitutional. As the Supreme Court has made clear, the traditional standard of the good faith exception evaluates the second question by using a familiar test from qualified immunity law.¹⁴⁹ Where the good faith exception applies, it adopts “the same standard of objective reasonableness that . . . defines the qualified immunity accorded an officer” in a civil case.¹⁵⁰

147. *See infra* notes 149–51 and accompanying text.

148. *See, e.g.*, *United States v. Debruhl*, 993 A.2d 571, 578 (D.C. 2010) (“To be clear: the good faith exception cannot excuse a police officer’s mistake of law; the exception applies only when a Supreme Court ruling upsets clearly settled law on which the officer had reasonably relied before the high Court’s decision placed the mistake of law on the lower court, not on the officer.”).

149. *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004).

150. *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (referring to qualified immunity as “good faith” immunity).

The exclusionary rule applies only if the legal violation is a clear one that no reasonable person could miss.¹⁵¹ No exclusionary rule applies unless the unconstitutionality is manifest.

Applying this standard requires answering an important preliminary question: who must have acted reasonably under this standard? Good faith requires objective reasonableness, but the objective reasonableness of one institutional player may differ from that of another. In a civil qualified immunity case, the “who” question will be readily apparent. Each defendant’s liability hinges on her own conduct, so each defendant’s conduct can be evaluated for its own objective reasonableness.¹⁵² The good faith exception in the criminal setting is conceptually different. When a defendant moves to suppress evidence, she challenges the introduction of evidence in her case generally rather than a specific person’s act. The “who” of the good faith standard remains undefined.

The Supreme Court’s good faith cases indicate that the “who” that matters is the police, considered as a collective entity.¹⁵³ The relevant question asks whether the police violated the defendant’s clearly established constitutional rights, much like in a civil case against the searching officers.¹⁵⁴ For example, in *Illinois v. Krull*, the Supreme Court held that police reliance on an unconstitutional statute does not avoid the exclusionary rule if the statute’s unconstitutionality was clear.¹⁵⁵ In such a case, the good faith exception is in play generally but a reasonable officer would know the statute was unconstitutional: reliance on the plainly unconstitutional statute could not be in good faith.¹⁵⁶ Similarly, in *United States v. Leon*, the Supreme Court recognized that a police officer could not rely in good faith on a warrant that had obvious defects.¹⁵⁷ “[A] warrant may be so facially deficient,” the Court noted, “that the executing officers cannot reasonably presume it to be valid.”¹⁵⁸ Although the good faith exception was in play generally when the police relied on a defective warrant, the exclusionary rule nonetheless applied if the constitutional error was so clear that no reasonable officer could believe the warrant was constitutional.

Applying this standard to changing law, the traditional version of the good faith exception in the case of changing law should focus on whether a reason-

151. See *Malley v. Briggs*, 475 U. S. 335, 341 (1986) (noting that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law”).

152. That is, assuming that the defendants did not act in concert.

153. See *Herring v. United States*, 129 S. Ct. 695, 699 (2009) (“In analyzing the applicability of the rule, *Leon* admonished that we must consider the actions of all the police officers involved.” (citing *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984) (“It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.”))).

154. *Groh v. Ramirez*, 540 U.S. 551, 565 n.8. (2004).

155. 480 U.S. 340, 355 (1987).

156. *Id.* at 354 (“In an effort to suppress evidence, a defendant has no reason not to argue that a police officer’s reliance on a warrant or statute was not objectively reasonable and therefore cannot be considered to have been in good faith.”).

157. 468 U.S. 897 (1984).

158. *Id.* at 923.

able officer would realize that the appellate precedents were incorrect and should be overturned. If a reasonable officer would realize that the appellate precedents authorizing the search were plainly incorrect, the exclusionary rule should not apply. In contrast, if a reasonable officer could reasonably believe that the appellate precedents construed the Constitution correctly in permitting his conduct, the good faith exception should apply.

The costs of applying this form of the good faith exception exceed its benefits. Because police officers cannot be expected to predict the future course of constitutional law, it likely never would be unreasonable for an officer to rely on precedent authorizing his search.¹⁵⁹ Although we can expect officers to know the law the courts announce, it is hard to imagine circumstances in which an officer should know courts have erred. Indeed, if the good faith and qualified immunity standards are the same, no direct precedent approving the search may even be necessary.¹⁶⁰ As long as the officer relied on some precedent somewhere that allowed the search, and the weight of case law was not otherwise clearly against that precedent, the officer should be allowed to rely in good faith on that precedent if the Supreme Court later overturns it.¹⁶¹

Under these circumstances, recognizing a good faith exception would have a devastating effect on the deterrent role of the exclusionary rule. The introduction of some case law authorizing a search or seizure practice would generally insulate that practice from exclusionary rule challenges if an appellate court later ruled the practice unconstitutional. Indeed, no requirement of a precedent being formally overturned would apply. As long as the unconstitutionality of the practice was not clearly established at the time of the search, a subsequent judicial decision holding that the practice violated the constitution would nonetheless mean that the exclusionary rule did not apply because it was reasonable for the officer to believe that the search was constitutional.¹⁶²

Applying the traditional approach of the good faith exception to new law would significantly reduce defense attorney incentives to challenge conduct as

159. *See* *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (“[A] police officer is not charged with predicting the future course of constitutional law.”).

160. Because qualified immunity attaches unless clear precedent indicates the conduct is unlawful, the absence of case law generally means that qualified immunity is available. By analogy, under the traditional standard, the good faith exception should be triggered unless there is clear case law indicating that the search or seizure violates the Fourth Amendment. Whether this is so depends on how a court decides to interpret the good faith exception. For example, a court might require the government to identify a case on which the police officer relied, and might limit the scope of the good faith exception to reliance on that case. However, it is also possible to frame the good faith exception for new law more broadly as simply incorporating the qualified immunity standard in the suppression context.

161. *See* *Wilson v. Layne*, 526 U.S. 603, 617–18 (1999); *see also* *Groh v. Ramirez*, 540 U.S. 551, 566 (2004) (Kennedy, J., dissenting) (“An officer conducting a search is entitled to qualified immunity if a reasonable officer could have believed that the search was lawful in light of clearly established law and the information the searching officers possessed. . . . [T]his is the same objective reasonableness standard applied under the ‘good faith’ exception to the exclusionary rule.” (emphasis added) (citations and internal quotation marks omitted) (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987))).

162. *Wilson*, 526 U.S. at 617–18.

unconstitutional. Attorneys would have no reason to argue for express changes in the law. At the same time, the costs of an exclusionary rule in such a setting would be relatively low, as explained in Part II. Indeed, depending on how it applied, a good faith exception for new law might mean that defense attorneys would have less incentive to raise challenges involving circuit splits or other uncertain areas of law. Once again, the litigation incentives would be strongly asymmetric: the government would always have an incentive to push the envelope, as it would always obtain relief if it won on the merits. The combination of aggressive government positions and tepid or nonexistent defense attorney challenges would systematically bias Fourth Amendment litigation in the government's favor.

On balance, the exclusionary rule is worth its costs for new law under the traditional standard. The rule is necessary to ensure that defendants have the *ex ante* incentives to argue for changes in the law that recognize and attempt to correct constitutional errors that balance government and privacy rights incorrectly.

B. COSTS AND BENEFITS UNDER THE SETTLED-LAW STANDARD

The next issue to consider is how the cost-benefit analysis changes if the good faith exception applies only to settled law. Several lower courts have adopted such a standard.¹⁶³ Under this approach, recognizing the good faith exception for overturned law requires next asking whether the officer relied on clear and settled precedent. If clear and settled precedent authorized the search, then the good faith exception applies and the evidence is admitted.¹⁶⁴ On the other hand, if the law at the time of the search was not entirely clear, then the officer cannot rely in good faith on it.¹⁶⁵

Before proceeding, let's focus on the differences between this approach and the traditional good faith standard. Where it applies, the good faith exception traditionally adopts the standard of qualified immunity law. Recognizing a good faith exception means applying the exclusionary rule only if the violation should be clear to a reasonable officer. The settled-law approach adopted by several lower courts flips this standard on its head. Under the settled-law standard, recognizing the good faith exception means applying the exclusionary rule only if the law would be murky to a reasonable officer. Legal ambiguity

163. *See, e.g.,* *United States v. Davis*, 598 F.3d 1259, 1264 (11th Cir. 2010) (holding “that the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overturned”); *United States v. McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009) (holding that the good faith exception applies to “a search justified under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by a Supreme Court decision”); *United States v. DeBruhl*, 993 A.2d 571, 578 (D.C. 2010) (interpreting the good faith exception for new law to apply “only when a Supreme Court ruling upsets clearly settled law on which the officer had reasonably relied before the high Court’s decision placed the mistake of law on the lower court, not on the officer”).

164. *See, e.g.,* *McCane*, 573 F.3d at 1044.

165. *See, e.g.,* *DeBruhl*, 993 A.2d at 578.

Table 1: The Traditional Standard Versus the Settled-Law Standard

State of the Law When Search Occurred	<i>Traditional Standard</i>	<i>Settled-Law Standard</i>
<i>Precedents indicate search was clearly lawful</i>	Admitted	Admitted
<i>Precedents left lawfulness of search unclear</i>	Admitted	Excluded
<i>Precedents indicate search was clearly unlawful</i>	Excluded	Excluded

means that the evidence is excluded rather than that it is admitted. This chart summarizes the differences between the two standards:

As the chart suggests, the major difference between the traditional standard and the settled-law standard arises when the precedents on the technique are murky at the time the search occurs. Under the traditional standard, recognizing a good faith exception for new law means that the evidence in such circumstances will be admitted. Under the settled-law standard, recognizing a good faith exception for new law means that the evidence in such circumstances will be suppressed.¹⁶⁶

Does the settled-law approach offer a better way to recognize a good faith exception for changing law? In my view, it does not. Once again, the exclusionary rule's benefits exceed its costs. The problem is that the costs and the benefits of the exclusionary rule for changing law remain surprisingly similar regardless of which standard applies. Differences exist, but they are modest, and they cut both ways. As a result, the cost-benefit balance under the settled-law approach is roughly the same as the balance under the traditional standard. The exclusionary rule pays its way under either assumption.

Let's begin with the harms to deterrence of the exclusionary rule. Using the settled-law standard does slightly decrease the harm to deterrence caused by the good faith exception for overturned law relative to the traditional approach. Defendants still would be unable to argue successfully for direct changes in the law. However, they would at least retain the incentive to challenge government practices when the law was unclear. By slightly narrowing the circumstances in which the good faith exception can be successfully invoked, the settled-law standard would slightly lessen the deterrent role of an exclusionary rule relative to the alternative good faith exception for new law. Exactly how much of a difference it would make depends on the details of how a court measures when the permissibility of a search is a matter of "settled precedent." What courts can settle precedent, for example? Can state courts? Only federal courts? Either

166. *See, e.g., id.*

way, the settled-law approach does slightly lessen the benefits of an exclusionary rule for overturned law.

On the other hand, the settled-law approach also raises costs. If courts were to adopt the traditional approach to the good faith exception, few defendants could successfully argue for suppression and few guilty defendants could go free. That is not true with the settled-law approach. Under the settled-law approach, defendants can go free whenever the prior law was unclear. The good faith exception would not apply, and the evidence would be suppressed, whenever the precedent allowing the search was not clear and settled. Only case law unambiguously approving a search at the time it occurred would ensure that the guilty would not go free. The settled-law approach to the good faith exception therefore leads to substantially more defendants going free than would the traditional approach.

Table 2: Costs and Benefits Under Both Standards

	<i>Exclusionary rule instead of traditional good faith exception</i>	<i>Exclusionary rule instead of settled-law standard to good faith exception</i>
<i>Benefits of Exclusionary Rule</i>	<ul style="list-style-type: none"> • Defendants argue to overturn law • Defendants argue to clarify law 	<ul style="list-style-type: none"> • Defendants argue to overturn law
<i>Costs of Exclusionary Rule</i>	<ul style="list-style-type: none"> • Defendants may go free if law changes 	<ul style="list-style-type: none"> • Defendants may go free if law changes • Defendants may go free if law clarified in government's favor

Comparing the costs and benefits of the settled-law approach to the traditional approach, the surprising result is that the two prove relatively similar. In both cases, defendants have no reason to argue for changes in the law. If the law is settled against them, defendants cannot benefit from articulating to courts why the law should be changed. The settled-law approach raises both the costs and the benefits of the exclusionary rule relative to the traditional standard. But the overall framework and net balance between costs and benefits remain basically the same.

This may seem counterintuitive. Lower courts that have adopted the settled-law approach have presented it as a narrow and cautious common-sense judgment. Surely a police officer is not in any way culpable for relying on settled law in a circuit that expressly authorizes his conduct. Although an officer might be blamed for pushing the boundaries when the law is clear, the thinking runs, we cannot expect an officer to predict that the courts will overturn clear law that

expressly and directly permits a particular kind of search. From this perspective, it might seem like the settled-law approach is a major improvement over the traditional standard from qualified immunity law. The settled-law approach narrows the circumstances in which an officer's reliance on the law can be in good faith.

But that is incorrect. Whether a good faith exception should be recognized for overturned law rests only on its costs and benefits. It does not rest on culpability of the police. Indeed, as qualified immunity doctrine recognizes, the police are not culpable for relying on modest or uncertain precedents just as they are not culpable for relying on clear ones.¹⁶⁷ The precise clarity of the law is interesting for legal scholars. But we cannot reasonably expect a police officer engaged in the often dangerous and fast-paced task of ferreting out crime to ponder jurisprudential niceties of legal ambiguity. Where the law is unclear, we do not expect police officers to shy away from investigations or to refrain from making their best guesses as to how the law will develop.¹⁶⁸ The case for the good faith exception rests on its deterrent role in shaping appellate court decisions, not on any perceived blameworthiness of the police in relying on precedent. As a result, limiting the good faith exception to clearly settled law does not actually limit the exception in any way that relates to the normative goals of the good faith exception.

C. COSTS AND BENEFITS UNDER A FIRST-COME, ONLY-SERVED RULE

A final alternative worth considering is a first-come, only-served rule. Under this approach, a defendant would receive the benefit of the exclusionary rule if (and only if) his case were the actual decision in which the new rule was announced or the older decision was overturned. The good faith exception would apply to all other similarly situated defendants, either under the traditional standard or the settled-law standard. As a practical matter, a first-come, only-served rule applies the good faith exception but carves out an exception for the first case: it would treat the first case differently than all other cases to provide an incentive for defendants to challenge existing precedents. This is perhaps more of a hypothetical standard than a real one: as far as I can tell, neither the U.S. Department of Justice, state prosecutors, nor any court has proposed this approach to the good faith exception.¹⁶⁹ However, the rule does

167. *Wilson*, 526 U.S. at 618.

168. *Id.* (recognizing that police officers are not expected "to predict the future course of constitutional law").

169. The exclusionary rule was actually applied in *Gant*, the first case to announce the new rule of *Gant*. As a result, if the good faith exception applies in subsequent cases, it might be argued that as a practical matter a first-come, only-served rule is in place. However, the Justice Department has contended that the good faith exception was not applied in *Gant* only because the state did not ask for the exception:

Indeed, *Gant* had no occasion to (directly) address whether the good faith exception should apply because the State in *Gant* focused entirely on the constitutionality of the search and failed to argue as an alternative that the good faith exception would warrant reversal. The Court's silence on a point not argued does not preclude the government from advancing, and

hold out a possible compromise between allowing a good faith exception for overturned law in every case and rejecting it in every case.

In my view, the first-come, only-served rule offers a superior cost-benefit balance to either the uniform traditional standard or settled-law standard. The chief benefit of the first-come, only-served rule is that it maintains at least some incentive to make arguments to change the law. A defendant will not know if his case will be the one case in which a new rule is adopted. The odds would be long in any one case. At the same time, a first-come, only-served rule would at least hold open the theoretical possibility of relief that might encourage arguments for legal change to be made. Further, once a court agrees to hear a case to consider overturning its precedent, and the matter is scheduled for briefing, a lawyer for a criminal defendant will know that his case is the one case in which relief is available. As a result, courts considering such arguments will receive the open and earnest advocacy necessary from both sides to help it measure the interests on both sides and render more accurate decisions. And the cost will be relatively low: the only defendants who might be set free are the lucky ones whose cases reach the U.S. Supreme Court, state supreme courts, or en banc circuit court—the courts that have the power to overturn binding precedents in their respective systems. On the whole, then, the first-come, only-served rule is superior from a cost-benefit perspective than the full-blown good faith exception under either the settled-law standard or the traditional standard.

At the same time, the first-come, only-served rule has a considerable difficulty that likely explains why no court or party has so far suggested it as a solution to the good faith exception for overturned law. The problem is that the first-come, only-served rule appears functionally identical to the regime of retroactivity law that the Warren Court adopted in 1965 in *Linkletter v. Walker* and elaborated upon in *Stovall v. Denno* two years later.¹⁷⁰ Under *Linkletter* and *Stovall*, the exclusionary rule would apply to the first case announcing the new rule: Dollree Mapp, Ernesto Miranda, Charles Katz, and the like all received the benefit of the new law in the case that bore their names.¹⁷¹ However, all other cases in the direct review pipeline when the new case was decided received different treatment. In their cases, the remedy of the exclusionary remedy was available only if the rules applied “retroactively,” which was the case only if it would serve “the deterrent purpose of the exclusionary rule” in light of the fact that retroactive application would “overturn convictions based on fair reliance

the court of appeals from accepting, the good faith exception as a basis for affirming petitioner’s conviction.

Brief for the United States in Opposition at 10, *McCane v. United States*, No. 09-042 (U.S. 2010), available at <http://www.justice.gov/osg/briefs/2009/0responses/2009-0402.resp.pdf>. Thus the Justice Department appears to argue that the good faith exception should have applied even in *Gant* itself.

170. *Stovall v. Denno*, 388 U.S. 293, 296 (1967); *Linkletter v. Walker*, 381 U.S. 618, 620 (1965).

171. See *Katz v. United States*, 389 U.S. 347 (1967); *Miranda v. Arizona*, 384 U.S. 486 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

upon [overruled] decisions.”¹⁷²

As a practical matter, the *Linkletter–Stovall* regime meant that the other cases in the direct review pipeline were not entitled to relief when the Supreme Court handed down a new decision overturning the law in a defendant’s favor. For example, in *Desist v. United States*,¹⁷³ the suspect’s business was bugged by the government for about a year from April 1962 to April 1963, all without a warrant.¹⁷⁴ A few years later, in February 1965, Charles Katz entered a bugged public phone booth in Los Angeles and called bookies to place illegal bets.¹⁷⁵ Katz’s case reached the Supreme Court first, however, and in 1967 the Supreme Court held in *Katz v. United States* that the bugging violated the Fourth Amendment and required reversal of Katz’s conviction.¹⁷⁶ When *Desist*’s case reached the Supreme Court in 1969, the Court held that *Desist* was too late because retroactive application of *Katz* to cases involving surveillance before *Katz* was unjustifiable on deterrence and reliance grounds: “Exclusion of electronic eavesdropping evidence seized before *Katz* would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Katz* decisions, and would not serve to deter similar searches and seizures in the future.”¹⁷⁷ The Court therefore affirmed *Desist*’s conviction.

The close similarity between the *Linkletter–Stovall* approach to retroactivity and a first-come, only-served approach to a good faith exception for overturned law suggests that the Supreme Court’s unhappy experience with the former provides a significant reason to reject the latter. The history here is well known and was recited at length by the Supreme Court as recently as *Danforth v. Minnesota* in 2008.¹⁷⁸ In brief, the combination of Justice Harlan’s dissents and withering scholarly criticism led the Court to overturn *Linkletter* and embrace full retroactivity for all new cases on direct review at the time of the new decision in *Griffith v. Kentucky*.¹⁷⁹ First, the first-come, only-served rule created tremendous inequality by forcing the Supreme Court to choose who would go free and who would stay in jail by selecting which case to agree to hear to announce the new rule.¹⁸⁰ Second, the rule reflected a legislative approach to constitutional law: instead of applying the new rule to all similarly situated cases, the Court would “fish[] one case from the stream of appellate review, us[e] it as a vehicle for pronouncing new constitutional standards, and then permit[] a stream of similar cases subsequently to flow by unaffected by that new rule.”¹⁸¹

172. *Desist v. United States*, 394 U.S. 244, 253 (1969).

173. *Id.*

174. *United States v. Desist*, 277 F. Supp. 690, 691 (S.D.N.Y. 1967).

175. *Katz v. United States*, 369 F.3d 130, 131–32 (9th Cir. 1966).

176. *Katz*, 389 U.S. at 359.

177. *Desist*, 394 U.S. at 253.

178. 552 U.S. 264, 269–71 (2008).

179. 479 U.S. 314, 316 (1987).

180. *Desist*, 394 U.S. at 258–59 (Harlan, J., dissenting).

181. *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

Given that neither the Justice Department nor any court seems to have endorsed a first-come, only-served rule, extended analysis of this alternative may be unnecessary. More broadly, the question boils down to whether the Court was right to overturn the *Linkletter–Stovall* regime. The literature on that topic is vast, and I cannot add to it here.¹⁸² Here I make only a narrow point: although a first-come, only-served rule is superior to recognizing a general good faith exception for overturned law, such an approach would open the Pandora's Box of retroactivity law that the Court was thought to have closed in *Griffith*. Whatever the relative merits of *Linkletter* and *Griffith*, the difficult questions of retroactivity law should be addressed directly rather than through an expansion of the good faith exception.

CONCLUSION

The Supreme Court's recent decision in *Herring v. United States* has rejuvenated the perennial debate on the scope of the exclusionary rule.¹⁸³ Although to some observers *Herring* signals a sea change,¹⁸⁴ its language and analysis is consistent with how the Supreme Court has treated the exclusionary rule since *United States v. Calandra* almost four decades ago.¹⁸⁵ The exclusionary rule must pay its own way: the scope of the suppression remedy depends on whether the deterrent impact of exclusion outweighs the costs of potential lost evidence.

By focusing on deterrence in the novel context of appellate court decision making, this Article has argued that the costs and benefits of the exclusionary rule require a suppression remedy for overturned law. The exclusionary rule is critical because it provides the basic building block for the development of Fourth Amendment law. Defendants must have an incentive to argue for changes in the law in their favor, just as the government already does. Only the exclusionary rule can provide that incentive. Further, the exclusionary rule for changed law comes with a low price tag. It applies only on direct review, when the unconstitutionality was the direct cause of the evidence, and when the type of violation is sufficiently serious that the good faith exception does not apply independently.

In these circumstances, the exclusionary rule pays its way. The Supreme Court should reject the good faith exception in this circumstance and retain the traditional retroactivity rule that the exclusionary rule can apply to new cases on direct review.

182. See, e.g., James B. Haddad, "Retroactivity Should Be Rethought": A Call for the End of the *Linkletter Doctrine*, 60 J. CRIM. L. CRIMINOLOGY & POL. SCI. 417 (1969); Mishkin, *supra* note 70; Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999).

183. 129 S. Ct. 695 (2009).

184. See, e.g., Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 413, 416 (2009) (describing *Herring* as "[o]ne of the most important criminal cases of the year," and arguing that it "effected the biggest change in the exclusionary rule since *Mapp v. Ohio* applied the rule to the states in 1961").

185. See *United States v. Calandra*, 414 U.S. 338, 347 (1974).