The Reality of the Good Faith Exception†

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The Fourth Amendment's primary remedy is the exclusion of unlawfully obtained evidence at trial. But not every defendant whose rights are violated gets a remedy. The most substantial obstacle for defendants is the good faith exception, which directs courts to admit unlawfully collected evidence if the police can show they relied in good faith on existing authority. If the police rely on a statute that turns out to be unconstitutional or on a warrant or precedent that turns out to be invalid, the evidence they obtain will nonetheless be admitted under the good faith exception. The Supreme Court has justified this doctrine on the grounds that excluding evidence is only worthwhile if it deters misconduct by police officers. When officers rely in good faith on existing authority, the Court has found that there is no misconduct to deter, and exclusion is unjustified.

We challenge this conventional account of the good faith exception in several ways. First, we conduct the first large-scale empirical study of the good faith exception. We reveal how often courts use the exception, demonstrate that courts frequently employ it to avoid substantive constitutional rulings, and identify the sources police most frequently rely on when they make good faith exception claims. We then examine the impact of the exception following a major Supreme Court decision expanding Fourth Amendment rights.

Second, we demonstrate that the Supreme Court has badly misconceived the incentives its good faith exception rulings create for police officers. Current law incentivizes police and prosecutors to aggressively interpret old legal authorities to permit the collection of new forms of data and to collect as much data as possible before courts impose a warrant requirement. We identify these incentives and propose reforms to align them with meaningful constitutional protections for personal data.

Finally, we examine how the good faith exception destabilizes the Fourth Amendment as a source of constitutional rights. While certain

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applications of the exception are compatible with a robustly enforced Fourth Amendment, others strike at the heart of the Amendment's protections. The current good faith exception blocks any meaningful remedy for several core violations of the Fourth Amendment, including those targeted by the Framers of the Constitution. It motivates judges to avoid addressing substantive Fourth Amendment questions and contributes to the stagnation of constitutional law. It introduces arbitrariness and inequity into constitutional remedies, insulating discretionary police behavior from review in a manner likely to harm groups disproportionately targeted by the police. And it implicates separation of powers values, preventing the judiciary from acting as an effective structural check on executive or legislative overreach. The Article's analysis, both empirical and theoretical, aims to spur a comprehensive reexamination of the good faith exception.

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INTRODUCTION

Imagine that government investigators obtain a new technology that allows them to monitor the private behavior of citizens in ways unimaginable just decades earlier. This technology is unprecedented; no court has squarely addressed its use, and no legislature has considered its repercussions. We might hope that investigators would be cautious in using this novel technology, given that coordinate branches of government have not had the opportunity to consider it and the public at large is unaware of its capabilities.

Yet current law actively encourages investigators to use novel, potentially unlawful surveillance technologies as much as possible. Under the "good faith exception" in Fourth Amendment law, such practices are protected whenever investigators can claim reliance on tangentially related statutes or court decisions. This doctrine incentivizes investigators to employ novel surveillance tactics aggressively before courts can declare them unconstitutional. At the same time, it permits judges to avoid substantive constitutional rulings on new technologies, impeding the development of Fourth Amendment law and permitting police to engage in unlawful surveillance practices indefinitely.

The good faith exception provides that evidence obtained in good faith reliance on a statute, warrant, or other authority will not be excluded, even if the authority was incorrect and the search for evidence was unconstitutional.[1] For example, if the police conduct a search under an existing statute, the evidence they collect will be admitted at trial even if the statute turns out to violate the Fourth

1. *See, e.g.*, Davis v. United States, 564 U.S. 229, 238–39 (2011).

Amendment.[2] The exception fits into a broader trend of court-generated rules that triage constitutional remedies; these rules include the qualified immunity doctrine and restrictions on *Bivens* claims against federal investigators.[3] Like these doctrines, the good faith exception limits the remedies available for constitutional violations. This in part reflects the reality that policy considerations may compel courts to withhold remedies for some rights violations.[4] But, just as qualified immunity has grown over time into a rule that protects "all but the plainly incompetent or those who knowingly violate the law,"[5] the good faith exception has metastasized into a protection for nearly any investigatory activity with a plausible connection to an existing precedent or statute.[6] And the good faith standard is remarkably lenient, applying to any legal authority that is not plainly unconstitutional or defective.[7]

The Supreme Court has justified the good faith exception on the grounds that excluding evidence is only worthwhile if it deters misconduct by police officers.[8] The Court reasons that police officers acting in good faith reliance on existing law have not engaged in misconduct, and therefore there is nothing to deter.[9] Accordingly, the Court will not exclude evidence when the police can demonstrate good faith reliance on existing authority.[10]

We challenge this conventional account of the good faith exception in several ways. We present the first large-scale empirical study of the good faith exception's impact on Fourth Amendment law. Our study examines over 5,500 cases, including more than 1,100 cases where courts substantively addressed a Fourth Amendment motion to suppress. We find that more than one out of six suppression cases discuss the good faith exception,[11] more than one out of eight apply it, and its use seems to be increasing over time. We then find that in nearly 30% of decisions applying the good faith exception, courts avoided any substantive Fourth Amendment ruling whatsoever. We identify which sources police most

2. Illinois v. Krull, 480 U.S. 340, 349–50 (1987).

3. *See* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 20–21 (2015) ("Since the mid-1970s, the Court has rationed the availability of . . . remedies by installing a threshold requirement that individual rights claimants must typically demonstrate that an offending state official not only violated the Constitution, but did so in an especially flagrant and obvious way.").

4. *See, e.g.*, *id.* at 40–46, 53–69.

5. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

6. At the same time, the good faith exception has grown from an initial form that drew several dissents in *United States v. Leon*, 468 U.S. 897, 928–80 (1984), to a largely accepted doctrine on the Supreme Court. *See* Huq, *supra* note 3, at 51–52.

7. *See Krull*, 480 U.S. at 349–50; *Leon*, 468 U.S. at 923.

8. Davis v. United States, 564 U.S. 229, 237 (2011); *Krull*, 480 U.S. at 353. When exclusion does not discourage constitutional violations, its costs substantially outweigh any remaining benefits. *Krull*, 480 U.S. at 353; *Leon*, 468 U.S. at 909.

9. *Davis*, 564 U.S. at 249–50; *Krull*, 480 U.S. at 349–50.

10. *See, e.g.*, *Krull*, 480 U.S. at 358–60; *Leon*, 468 U.S. at 925–26.

11. By "discuss," we mean that the case substantively talks about the exception, typically in the context of addressing its potential application.

frequently rely on when they make good faith exception claims, compare federal and state uses of the good faith exception, and examine the particular prevalence of the exception in cases decided by the federal courts of appeals.[12] The results demonstrate the exception's broad scope and frequent implementation, even before accounting for the innumerable suppression motions that the exception discourages defendants from filing in the first place. We also quantify the good faith exception's startling prevalence following a transformative doctrinal change on the Supreme Court.

We then reexamine the incentives the good faith exception creates for police and prosecutors. Under current law, the exception motivates officers to implement novel investigatory techniques aggressively while claiming reliance on old or obsolete authorities. For example, the police might interpret an older statute designed to address email surveillance to permit the warrantless collection of cell phone location data.[13] Even after this surveillance is declared unconstitutional, courts will admit the already-collected evidence in criminal trials under the good faith exception.[14] This incentivizes police officials to adopt legally dubious surveillance practices rapidly to clear cases and secure convictions.[15] The police have everything to gain, and nothing to lose, from rushing to use invasive new tactics under current law. We give examples of this process in action, examine problematic claims of reliance on statutes and precedents, and describe several general-purpose statutes on which police might claim reliance to justify novel surveillance practices. We then offer reforms that would limit these harmful incentives and preserve the deterrent function of the exclusionary rule.

Finally, we take a broader theoretical approach, exploring how the good faith exception destabilizes the Fourth Amendment as a source of constitutional rights. Current law fails to address core Fourth Amendment violations by denying suspects a remedy when government agents invade their property under the authority of an unconstitutional statute or executive order. This was the central evil targeted by the Framers in drafting the Fourth Amendment, and withholding any meaningful remedy for it is incompatible with the Amendment's history and purpose.[16] The exception also delays the development of Fourth Amendment jurisprudence, allowing judges to avoid addressing substantive Fourth Amendment issues. It can inequitably deny constitutional remedies to disadvantaged groups disproportionately targeted by the police and introduce arbitrariness into the remedial process. In addition, the exception undermines the structural role of the judiciary as a check on executive and legislative overreach, threatening fundamental separation of powers values. We conclude by reevaluating the Supreme Court's cases on the

12. *See infra* Section II.A.3.

13. The police did precisely this in numerous cases. *See, e.g.*, United States v. Reed, 978 F.3d 538, 540–42 (8th Cir. 2020); United States v. Korte, 918 F.3d 750, 753, 758–59 (9th Cir. 2019); State v. Jones, 137 N.E.3d 661, 674–75 (Ohio Ct. App. 2019).

14. *See, e.g.*, United States v. Herron, 762 F. App'x 25, 30–31 (2d Cir. 2019); United States v. Curtis, 901 F.3d 846, 848 (7th Cir. 2018); State v. Jennings, 942 N.W.2d 753, 765 (Neb. 2020).

15. *See infra* notes 158–64 and accompanying text.

16. *See infra* notes 231–35 and accompanying text.

exception and offering a way forward for Fourth Amendment jurisprudence with a far narrower, reconceptualized approach to good faith reliance.

The Article proceeds in four Parts. Part I reviews the doctrinal origins of the good faith exception and surveys the existing scholarly response to the exception, identifying significant gaps. Part II describes our large-scale empirical study of the good faith exception's prevalence and influence in Fourth Amendment law. Part III analyzes the incentives that good faith exception law creates for law enforcement officials and raises concerns about its tendency to favor the aggressive use of new surveillance tactics. Part IV concludes by critiquing the current good faith exception on several theoretical grounds and offering suggestions for potential reforms to existing doctrine.

I. THE LAW AND THEORY OF THE GOOD FAITH EXCEPTION

A. GOOD FAITH EXCEPTION DOCTRINE

The good faith exception provides that evidence obtained in good faith reliance on a legal authority will not be excluded, even if the authority turns out to be unconstitutional or otherwise defective.[17] For instance, when the police relied on an unconstitutional statute authorizing warrantless inspections of automobile wrecking yards, the evidence they obtained was admitted in a criminal trial under the good faith exception.[18] The Supreme Court created, then expanded, this exception in a series of cases beginning in the mid-1980s.[19]

The exception had humble beginnings in cases where the facts suggested that exclusion would neither serve the ends of justice nor curtail inappropriate investigatory behavior. As this Section illustrates, the cases tend to focus on an individual actor who commits a minor or technical Fourth Amendment violation. From those facts, the Court derives an exception that is seemingly limited to the narrow circumstances before them. Yet, as we will see, many of these holdings have been expansively interpreted to provide blanket protection for officer misconduct in the future.

The story begins with 1984's *United States v. Leon*.[20] Officers applied for a warrant based on a confidential informant's tip about drug sales.[21] After a magistrate judge issued a warrant, officers searched several homes and cars and found significant evidence of drug trafficking.[22] The defendants moved to suppress the evidence because the affidavit supporting the warrant application failed to establish probable cause.[23]

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17. *See, e.g.*, Davis v. United States, 564 U.S. 229, 238–39 (2011).

18. Illinois v. Krull, 480 U.S. 340, 358, 360 (1987).

19. *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984); *Krull*, 480 U.S. at 349; Arizona v. Evans, 514 U.S. 1, 14 (1995); Herring v. United States, 555 U.S. 135, 144 (2009).

20. 468 U.S. 897 (1984).

21. *Id.* at 901–02.

22. *Id.* at 902.

23. *Id.* at 903 & n.2.

The *Leon* Court agreed but declined to exclude the evidence, emphasizing that exclusion is only proper where its "remedial objectives" are served,[24] which primarily includes its "deterrent value" in restraining police misconduct.[25] Those objectives must also overcome the "substantial social costs" of exclusion, which interferes with the jury's fact-finding mission and may permit some guilty criminals to go free.[26] The Court denied that exclusion in this case would deter any misconduct on the part of judges or magistrates.[27] It also would not deter officer misconduct, as the officers had acted in good faith.[28] Thus, the Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[29]

In subsequent decades, the Court justified expansions of the good faith exception by positing that exclusion's only possible benefit was deterring police misconduct. For instance, in *Illinois v. Krull*, the Court applied the good faith rule where officers reasonably relied on a portion of the Illinois vehicle code that allowed warrantless searches of auto parts dealers, even though a federal district court later declared that statute unconstitutional.[30] The *Krull* Court noted that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" on officers.[31] Following a lengthy discussion of *Leon*'s rationale, the Court concluded that excluding evidence when officers reasonably rely on a statute would have "little deterrent effect on the officer's actions" and was thus inappropriate.[32] The Court also reasoned that applying the exclusionary rule would not deter legislators who might pass unconstitutional statutes occasionally despite generally complying with the Fourth Amendment's requirements, and thus would accomplish little to change the underlying legislative problem.[33] Accordingly, the Court applied the good faith exception to the exclusionary rule.[34]

Similar themes arose in the Court's decisions in *Arizona v. Evans* and *Herring v. United States*, which considered exclusion based on negligent data entry errors by clerical employees.[35] In *Evans*, a court clerk failed to withdraw a warrant that had been quashed, leading an officer to arrest the defendant based on the invalid warrant.[36] The Court declined to exclude the evidence, stating that the officer had

24. *Id.* at 908 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
25. *Id.* at 908–10.
26. *Id.* at 907.
27. *See id.* at 918.
28. *See id.* at 926.
29. *Id.* at 922.
30. 480 U.S. 340, 342–44, 346 (1987).
31. *Id.* at 347 (quoting *Leon*, 468 U.S. at 906).
32. *Id.* at 349.
33. *See id.* at 350–51.
34. *Id.* at 360–61.
35. Arizona v. Evans, 514 U.S. 1, 5 (1995); Herring v. United States, 555 U.S. 135, 137–38 (2009).
36. 514 U.S. at 4–5.

reasonably relied on the warrant.[37] Moreover, excluding evidence was unlikely to deter clerical errors by court clerks, who have no stake in any particular case.[38]

Herring concerned an officer's inquiry into outstanding warrants for the defendant.[39] A police clerk in a neighboring county initially found an outstanding arrest warrant in her database, only to later discover that it had been recalled months earlier.[40] Before the clerk could reach the officer, the officer had pulled the defendant over on the basis of the non-existent warrant, then discovered drugs and firearms in the defendant's car pursuant to the unconstitutional arrest.[41] The Supreme Court ruled that the exclusionary rule "applies only where it result[s] in appreciable deterrence" of police misconduct.[42] Furthermore, that benefit "must outweigh the costs" of exclusion, including permitting a guilty criminal to go free and undermining the truth-seeking role of the criminal justice system.[43] The Court thus held that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[44] Accordingly, the rule should only apply where officers engage in "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[45] Because the warrant database error in *Herring* was the product of mere negligence, the Court did not apply the exclusionary rule to the evidence found in the defendant's car.[46]

The Court's decision in *Davis v. United States* two years later reiterated the belief that exclusion's only benefit is the deterrence of police misconduct.[47] The case concerned officers' search of the passenger compartment of a car after arresting the driver and passenger, handcuffing them, and placing them in the back of separate patrol cars.[48] When the search occurred, Supreme Court precedent permitted such warrantless searches;[49] however, while the case was pending on appeal,[50] the Supreme Court decided *Arizona v. Gant*, which declared such automatic searches of the passenger compartment incident to an arrest unconstitutional.[51] The *Davis* Court refused to apply the exclusionary rule to "searches conducted in objectively reasonable reliance on binding appellate precedent."[52]

37. *Id.* at 15–16.
38. *Id.*
39. 555 U.S. at 137–38.
40. *Id.*
41. *Id.*
42. *Id.* at 141 (alteration in original) (quoting United States v. Leon, 468 U.S. 897, 909 (1984)).
43. *Id.*
44. *Id.* at 144.
45. *Id.*
46. *Id.* at 147–48.
47. 564 U.S. 229, 236–37, 246 (2011).
48. *Id.* at 235.
49. *Id.* at 233–35.
50. *Id.* at 236.
51. 556 U.S. 332, 343, 351 (2009).
52. 564 U.S. at 232.

Citing *Herring*, the Court again emphasized that the "sole purpose" of exclusion "is to deter future Fourth Amendment violations"[53] and balanced that interest alone against the "substantial social costs" of exclusion.[54] The car search in *Davis* followed existing precedent "to the letter," and thus was not the kind of culpable conduct that could be deterred.[55] The Court also emphasized that the facts did not involve any "recurring or systemic negligence" by officers.[56] Because exclusion would only deter "conscientious police work," it was inappropriate in this case.[57]

In sum, the good faith cases permit investigators to rely on warrants, statutes, administrative errors, and overturned cases. All those permissions are based on a deterrence theory that has grown in prominence since *Leon*.[58] The cases assert that the sole purpose of exclusion is to deter officer misconduct, and no such deterrence is possible where officers reasonably rely on legal authority.

B. EXISTING SCHOLARSHIP

The majority of the scholarship discussing the good faith exception is critical of the Court's approach.[59] Many commentators object to the exception on the basis that the exclusionary rule should operate whenever the Fourth Amendment is violated, with no exceptions for good faith, inevitable discovery, or anything else.[60] They generally argue that judicial integrity or fundamental fairness demand a trial process free of unlawfully obtained evidence and that no consequentialist consideration can outweigh this deontological imperative.[61] For example, David Gray argues that the exclusionary rule's justifications are retributive and absolute rather than consequentialist, and thus the rule should be subject to no exceptions.[62] Robert Bloom and David Fentin contend that judicial integrity requires that no unlawfully seized evidence be admitted in a courtroom, lest it

53. *Id.* at 236–37 (collecting cases).

54. *Id.* at 237 (quoting United States v. Leon, 468 U.S. 897, 907 (1984)).

55. *Id.* at 239–40.

56. *Id.* at 240 (quoting Herring v. United States, 555 U.S. 135, 144 (2009)).

57. *Id.* at 241.

58. *See, e.g.*, *id.* at 236–37; *Herring*, 555 U.S. at 141; Arizona v. Evans, 514 U.S. 1, 10 (1995); Illinois v. Krull, 480 U.S. 340, 347 (1987).

59. *See, e.g.*, David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 2 (2013); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 370–71 (1981); Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 75–76 (2010); *see also* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1889 & nn. 14–17 (2014) (collecting sources); Nadia Banteka, *Police Ignorance and (Un)Reasonable Fourth Amendment Exclusion*, 75 VAND. L. REV. 365, 368 & nn. 4–6 (2022) (same).

60. *See, e.g.*, Gray, *supra* note 59, at 3–4, 23, 42, 47; Mertens & Wasserstrom, *supra* note 59, at 371, 424; Re, *supra* note 59, at 1895–96.

61. *See e.g.*, Gray, *supra* note 59, at 22–26; Mertens & Wasserstrom, *supra* note 59, at 383; Re, *supra* note 59, at 1947.

62. Gray, *supra* note 59, at 22–26.

taint the judicial process or "bring the administration of justice into disrepute."[63] Andrew Taslitz raises a similar objection, arguing that the good faith exception "places the judicial imprimatur on a violation of constitutional rights."[64]

Other scholars have endorsed the exception but have proposed combining the good faith analysis with the underlying determination of whether the investigative activity was reasonable. Nadia Banteka has argued that unlawful searches conducted in good faith reliance on existing authority are reasonable from the officer's perspective and therefore not a violation of the Fourth Amendment.[65] Banteka recommends that courts only assess officer reasonableness, without addressing the underlying constitutionality of the search or seizure at issue.[66] This would incorporate the good faith exception into the substance of the Fourth Amendment itself. Similarly, Richard Re has suggested that in good faith cases, "the officer's reliance on the warrant, the statute, or the judicial decision was 'reasonable' and so compliant with the Fourth Amendment."[67] Good faith decisions could thus be reinterpreted as applications of the Fourth Amendment's language prohibiting unreasonable searches and seizures, rather than an exception to the usual exclusionary remedy for a Fourth Amendment violation.[68]

For better or worse, existing good faith exception scholarship has not met the Supreme Court on its own terms. It has neither addressed the Court's incentives arguments on their merits nor offered any empirical evidence on the exception in practice, despite the Court's avowed interest in such data.[69]

This Article fills that gap by empirically analyzing the good faith exception and its effects in real cases. It then addresses the incentives the exception creates for law enforcement to push the envelope in their investigative techniques and stretch their understanding of outdated statutes and precedents.[70] Ultimately, this

63. Bloom & Fentin, *supra* note 59, at 78–79 (quoting Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 24(2) (U.K.)).

64. Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 575 (2006).

65. Banteka, *supra* note 59, at 368 ("[W]hen courts ask whether the police acted in good faith reasonable reliance on law, they . . . ask whether the police officer's reasonable mistake of law means there was a violation of the defendant's Fourth Amendment rights in the first place.").

66. *Id.* at 385–86.

67. Re, *supra* note 59, at 1943.

68. *Id.* at 1942–43. According to Richard Re, "this area of law should actually be referred to as a collection of exceptions for 'reasonable reliance.'" *Id.* at 1943.

69. *See* United States v. Leon, 468 U.S. 897, 918 (1984) (discussing the absence of empirical evidence on the potential deterrent effect of the exclusionary rule when officers act in good faith); *id.* at 928 (Blackmun, J., concurring) (stating that the Court should reconsider the good faith exception if empirical evidence demonstrates that it reduces police compliance with the Fourth Amendment).

70. Those incentives would remain strong even if the Court were to collapse good faith analysis into the substantive analysis of Fourth Amendment reasonableness, so long as the Court continues to grant broad leeway to law enforcement overinterpretation of statutes and precedents. To be clear, we do not take a specific position on whether the Court should adopt the suggestion to collapse good faith analysis into substantive consideration of the Fourth Amendment reasonableness of investigative activity. Though there may be benefits to that consolidated approach, we do share the concern that doing so would reduce courts' ability to generate new substantive Fourth Amendment doctrine without exclusion, thereby generating new Fourth Amendment protections that will at least apply to future defendants.

Article takes a less absolutist theoretical approach to the exception. Instead, it critiques it on historical, equitable, structural, and practical grounds rather than as an infringement of an unlimited right to exclusion.

II. THE GOOD FAITH EXCEPTION'S IMPACT

While the good faith exception has generated substantial scholarly attention, very little is known about the empirical realities of the exception in practice.[71] The Supreme Court has largely assumed that the exception will be rarely used, without directly addressing the issue. In *United States v. Leon*, the Court expressed skepticism that magistrates will erroneously approve search warrants without probable cause very often and contended, without further analysis, that this is not "a problem of major proportions."[72] Likewise, in *Illinois v. Krull*, the Court suggested that legislatures passing surveillance laws of dubious constitutionality was likely to be a rare event.[73] The Court seems to envision the good faith exception as a rarely employed stopgap for use in atypical cases where a legislature or magistrate has erred in some subtle way. Defenses of the good faith exception in the legal literature similarly tend to argue that the good faith exception is not commonly used, either because its scope is limited or because police officers have other motivations to avoid making mistakes in warrant applications or statute-based searches.[74]

Some scholars and treatises, by contrast, have assumed that the good faith exception has already largely undermined the exclusionary rule. They posit that only a "minuscule category of cases" will be eligible for suppression,[75] while "a great number . . . of unreasonable searches and seizures will be immunized" from suppression following *Herring v. United States* and *Davis v. United States*.[76] As a

Banteka herself notes this possible critique of her proposal. *See* Banteka, *supra* note 59, at 392–93. But whether or not courts adopt the consolidated approach, significant reconsideration of the scope of the reasonableness analysis in many good faith exception precedents is necessary to limit the expansive understanding of "reasonable" law enforcement interpretation of existing statutes and precedents, especially in light of the empirical data presented below.

71. *See, e.g.*, State v. Oakes, 598 A.2d 119, 126 (Vt. 1991) (noting the absence of empirical data on the costs and benefits of the good faith exception and the difficulty of assessing its effects); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 595–98 (2011) (noting the lack of, and the difficulty of producing, relevant empirical data on the exclusionary rule).

72. 468 U.S. at 916 n.14.

73. *See* 480 U.S. 340, 352 n.8 (1987).

74. *See e.g.*, Derik T. Fettig, *When "Good Faith" Makes Good Sense: Applying* Leon*'s Exception to the Exclusionary Rule to the Government's Reasonable Reliance on Title III Wiretap Orders*, 49 HARV. J. ON LEGIS. 373, 405–06 (2012); Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After* Herring v. United States, 43 CREIGHTON L. REV. 175, 196 (2009); Note, *Toward a General Good Faith Exception*, 127 HARV. L. REV. 773, 781 (2013).

75. James J. Tomkovicz, Davis v. United States*: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 396 (2011).

76. Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1208–09 (2012).

result, the "exclusionary rule in its robust form is no more,"[77] and "its role has waned considerably"[78] since *United States v. Leon*.

While assumptions abound on both sides of the good faith exception debate, there has been little or no empirical evidence to date on the general prevalence of the good faith exception in Fourth Amendment suppression cases. Empirical studies on the good faith exception have been limited to small-scale studies of the exception's effects on a particular legal issue.[79] In the absence of a comprehensive study, it can be difficult to know just how troubling the good faith exception may be.

The first Section below presents the results of our novel empirical study, indicating that the good faith exception plays a major role in litigated cases. It describes our methods, discusses the relevance of selection effects, and reports our results. The second Section then describes the results of our analysis of a database of Fourth Amendment cases applying the major 2018 decision *Carpenter v. United States*.[80] It examines the prevalence and power of the good faith exception following a substantial change in Fourth Amendment doctrine.

The good faith exception greatly reduces the likelihood that defendants can exclude evidence in certain cases, even if their Fourth Amendment challenge is otherwise successful.[81] At the same time, the exception does not dictate outcomes in the majority of litigated Fourth Amendment exclusion cases. That is, most Fourth Amendment suppression cases do not involve a ruling on good faith exception grounds. Nonetheless, we find that the good faith exception deprives the Fourth Amendment of meaningful influence in a substantial number of litigated criminal cases. Further, its dampening effects on potential suppression claims are likely to be, if anything, even greater than these numbers indicate.

A. AN EMPIRICAL OVERVIEW OF THE GOOD FAITH EXCEPTION

1. Methods

We obtained every available published and unpublished judgment in United States federal and state courts mentioning the Fourth Amendment or a motion to suppress during the months of July 2015, July 2018, and July 2021.[82] These three sample periods generated a large number of cases and allowed for some tentative observation of change over time. The month of July was selected randomly.

77. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 527 (2013).

78. David J. Twombly, Note, *The Good-Faith Exception and Unsettled Law: A Study of GPS Tracking Cases After* United States v. Jones, 74 OHIO ST. L.J. 807, 812 (2013).

79. *See, e.g.*, *id.* at 821–28.

80. 585 U.S. 296 (2018).

81. *See infra* Section II.A.3.

82. These three months were selected as representative months from the period following the Supreme Court's most recent good faith exception case. In other words, they represent courts' applications of current Supreme Court caselaw on the good faith exception. Relevant opinions and judgments were located using Bloomberg Law's opinion database and docket access service, with searches for "Fourth Amendment," "U.S. Const. amend. IV," "motion to suppress," "suppression motion," "move! to suppress," "move! to exclude," or "motion to exclude." Additional opinions were gathered by searching Westlaw and LEXIS for the same keywords.

Across these three sample periods, we reviewed a total of 5,531 cases involving the Fourth Amendment, motions to suppress, or both.[83] This dataset was compiled from opinions available on Bloomberg Law, Westlaw, and LEXIS, as well as available written judgments accessible via PACER or other docket services.[84] Cases were read and hand-coded by a large team of student coders and the authors. Each student-coded case that substantively addressed a Fourth Amendment suppression motion ($n = 1{,}161$) was re-coded by one of the authors to ensure accuracy. These 1,161 cases represent every available Fourth Amendment suppression judgment during the study periods.

Coders recorded the name, date, citation, and jurisdiction of each case. They then read each case thoroughly and recorded whether the case involved a request for suppression of evidence under the Fourth Amendment, discussed the good faith exception,[85] and applied the good faith exception to deny the suppression of evidence; whether the court made a substantive ruling prior to using the exception; and which authority the police relied on in good faith (warrant, statute, precedent, or administrative error).

2. Selection Effects

It is important to note what this unique empirical study finds and does not find. It provides, for the first time, a broad view of the effects of the good faith exception in litigated Fourth Amendment cases, providing a baseline for future scholarship on the exception and its practical impacts. But no study of good faith exception cases can determine the precise effect the exception has had on litigant behavior. This is due to selection effects, which occur when a change in law (such as the development of the good faith exception) produces a change in the set of cases that get litigated. In other words, many defendants and their attorneys

83. There were 2,019 total cases coded in July 2015; 1,872 total cases in July 2018; and 1,640 total cases in July 2021. The term "cases" here encompasses rare cases where courts reached decisions on two separate Fourth Amendment search issues. When these analyses were separate from each other, they were coded as two distinct cases. *See* United States v. Lambus, 897 F.3d 368 (2d Cir. 2018); United States v. Curry, No. 20-cr-65, 2021 WL 2936024 (S.D. Ohio July 13, 2021); United States v. Okparaeka, No. 17-CR-225, 2018 WL 3323822 (S.D.N.Y. July 5, 2018); United States v. Montgomery, No. 14-cr-205, 2018 WL 3621015 (W.D. Pa. July 30, 2018); United States v. Crumble, No. 14–362, 2015 WL 13687910, at *8–9 (D. Minn. July 22, 2015). There were also instances of separate decisions made in the same case over time, where courts issued separate opinions addressing different issues. *See, e.g.*, United States v. Ford, No. 13-CR-215, 2015 WL 4497979 (E.D. Tex. July 22, 2015) (addressing a motion to suppress evidence and statements from a stop and search on June 26, 2013, and a request for a *Franks v. Delaware* hearing); United States v. Ford, No. 13-CR-215, 2015 WL 4497957 (E.D. Tex. July 22, 2015) (addressing a motion to suppress evidence and statements from a stop and search on November 23, 2012).

84. *See* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1105–06 (2021) (noting the presence of numerous federal merits decisions labeled "judgments," which, unlike decisions labeled "opinions of the court," are not publicly available and are generally accessible only on PACER or a derivative service thereof). "Judgments" are often not substantive, but occasionally do go into as much detail as opinions of the court. *Id.*

85. *See supra* note 11.

likely decline to file suppression motions because of the good faith exception,[86] which in many cases lowers their chances of success to near-zero.[87] There is no effective way of measuring how many non-cases the good faith exception has produced. But it has likely produced many such non-cases over the years.[88] Thus, if anything, our analysis below likely *understates* the significant impact of the good faith exception on defendants. That said, selection effects are likely to have less impact on criminal litigation and Fourth Amendment suppression motions than on civil litigation, in part because criminal litigants often have less to lose from filing low-probability motions.[89]

In addition, judges may resolve some suppression motions without opinions or judgments detectable on a docket search. Rulings on suppression motions without any written explanation are outside of our dataset.[90]

In this study, we measure the effect of the good faith exception on cases where courts address a Fourth Amendment suppression claim and give some reason or reasons for their decisions. Among this large set of cases, we find a substantial

86. *See* State v. Oakes, 598 A.2d 119, 126 (Vt. 1991) (quoting Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 112 (1984) (discussing the effects of the good faith exception on defendants' litigation decisions)).

87. *See id.* at 123 n.9, 126 (discussing the already low rates of successful suppression motions and the likely impact of the good faith exception).

88. *See id.* at 126 (describing Fourth Amendment cases that defendants are unlikely to litigate due to the good faith exception). *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5, 24–29 (1984) (predicting that litigants will adjust their litigation behavior in most contexts to avoid litigation when win probability is low).

89. Defendants may choose to bring low-win-probability suppression motions before deciding to plead guilty, for example, on the assumption that busy prosecutors will be motivated to accept pleas even after they defeat a suppression motion. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–76 (2004) (describing the incentives prosecutors face to plead out cases). Defendants with publicly funded defense attorneys or appearing pro se may also perceive few direct costs of litigation. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1226–27 & n.32 (2013); *see also* Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 237, 247 (1996) (discussing clients' increased willingness to litigate when paying attorneys on a contingency, rather than hourly, basis due to lower perceived costs of litigation). The cost of pleading guilty or otherwise surrendering on the suppression issue might be especially high relative to the cost of litigating a suppression motion, leading defendants to litigate more frequently than usual. *See* Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018–2021*, 135 HARV. L. REV. 1790, 1810 n.140 (2022). Defendants may also be motivated to appeal denied suppression motions, even if their appeal has little chance of succeeding. *See* Robertson *supra*, at 1226–27. Likewise, defendants already convicted and in prison cannot plead guilty and are strongly motivated to petition for post-conviction relief even with very weak claims. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1632–34, 1639 n.281 (2003).

90. Unpublished state court decisions may also not be available on any opinion collection service or searchable filing system. While these difficulties in dataset collection could, in theory, affect our results, there is no practical reason to think they affect our findings on the percentage of litigated cases resolved under the good faith exception. In any event, similar issues affect any broad study of judicial decisions. *See, e.g.*, Samuel P. Baumgartner & Christopher A. Whytock, *Enforcement of Foreign Judgments, Systemic Calibration, and the Global Law Market*, 23 THEORETICAL INQUIRIES L. 119, 132 n.52 (2022) (describing the absence of state decisions from the PACER service); Edward K. Cheng, *Detection and Correction of Case-Publication Bias*, 47 J. LEGAL STUD. 151, 151–52 (2018) (discussing the absence of judicial decisions not recorded in a written judgment in jurisprudential studies).

number resolved under the good faith exception. We further analyze these cases to determine which authorities the police tend to rely on in good faith exception cases and the tendencies of courts to use the exception to avoid addressing the merits of constitutional claims.

3. Results and Analysis

We reviewed 5,531 cases mentioning the Fourth Amendment or a motion to suppress and identified 1,161 cases where courts substantively addressed a motion to suppress evidence under the Fourth Amendment. There were 1,640 total cases and 324 suppression cases in July 2021; 1,872 total cases and 368 suppression cases in July 2018; and 2,019 total cases and 469 suppression cases in July 2015.

Of the 1,161 cases involving a motion to suppress under the Fourth Amendment, 214 cases, or 18.4%, discussed the good faith exception at some point. Put another way, more than one out of every six suppression cases in the dataset involved the court discussing the good faith exception. In 147, or 12.7%, of the suppression cases, the court held that the good faith exception applied, barring exclusion of evidence even if the searches at issue were illegal. Accordingly, in more than one out of every eight suppression cases in the dataset, the court ruled that the good faith exception applied. In short, we find a substantial proportion of cases where suppression is off the table due to the good faith exception, even as suppression remains available in most cases. Table 1 summarizes the dataset and courts' uses of the good faith exception.

TABLE 1. GOOD FAITH EXCEPTION (GFE) PREVALENCE IN FOURTH AMENDMENT SUPPRESSION CASES

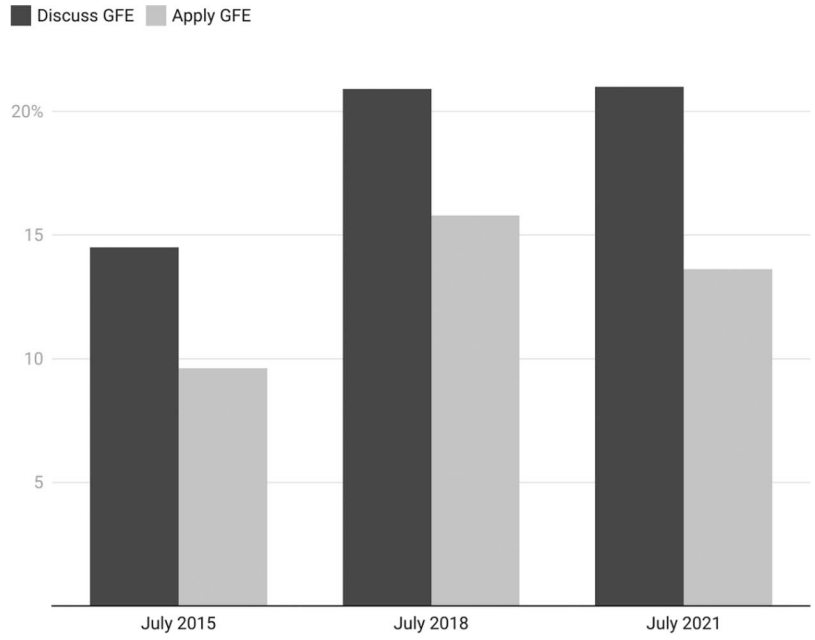
Fourth Amendment Suppression Cases	Total	July 2021	July 2018	July 2015
All Cases	1161	324	368	469
Cases Discussing GFE	214 (18.4%)	69 (21.0%)	77 (20.9%)	68 (14.5%)
Cases Applying GFE	147 (12.7%)	44 (13.6%)	58 (15.8%)	45 (9.6%)

Across our sample periods, the use of the good faith exception has increased since July 2015. In July 2015, 14.5% of all suppression cases discussed the good faith exception, and 9.6% of cases found that the exception applied. Those numbers rose to 20.9% and 15.8% in July 2018, a statistically significant increase.[91] Rates remained similar in July 2021, at 21.0% and 13.6%, respectively.[92] Figure 1 depicts this increase in the prevalence of good faith exception discussions and rulings.

91. The difference in good faith exception prevalence between July 2015 and July 2018 was statistically significant at the .01 level, in a two-proportion z-test (p-value = .004).

92. There was no statistically significant decrease in good faith exception applications between 2018 and 2021, in a two-proportion z-test (p-value = .791).

Figure 1. Good Faith Exception (GFE) Prevalence Over Time—Proportion of Fourth Amendment Suppression Cases Involving the Good Faith Exception



Our data suggests that the use of the good faith exception may have increased in recent years. Courts and government attorneys may have grown more familiar with the exception over time, making litigants more likely to assert it and judges more likely to invoke it. Prior studies have indicated that familiarity with a doctrine can lead to the persistent use of that doctrine.[93] Alternatively, an increase might be driven in part by increasingly aggressive police reliance on statutes, due to the incentives for abuse that we identify below in Section III.A. Consistent with this theory, we observe an increase in statutory reliance in 2018 and 2021 relative to 2015.[94] To be sure, we only gathered data from three sample months in the period from 2015 to 2021, and additional research will be necessary to confirm that the use of the good faith exception has increased during that time. However, our empirical and theoretical analysis is consistent with such an increase.

93. *See* Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 920–22 (2015).

94. We observe no rulings involving good faith reliance on statutes in 2015, compared to eleven such rulings in 2018 and five such rulings in 2021. *See also infra* note 105 and accompanying text.

a. Federal and State Decisions

Interestingly, good faith exception prevalence differed significantly between federal and state cases.[95] Application of the good faith exception was largely a federal phenomenon, with high rates of application in federal cases and low rates of application in state cases. Of the 567 Fourth Amendment suppression cases in federal court, 159 cases, or 28.0%, discussed the good faith exception. In 123 cases, or 21.7%, a federal court held that the good faith exception applied. In more than one in every five federal suppression cases, the good faith exception precluded a suppression remedy.

By contrast, of the 594 Fourth Amendment suppression cases in state court, only fifty-five cases, or 9.3%, discussed the good faith exception to the Fourth Amendment. And only twenty-four state cases, or 4.0%, ruled that the good faith exception applied. The proportion of state cases resolved on good faith exception grounds was fairly small, and the difference with federal cases quite dramatic.[96] Table 2 summarizes this data.

TABLE 2. FEDERAL VS. STATE GOOD FAITH EXCEPTION PREVALENCE IN FOURTH AMENDMENT SUPPRESSION CASES

Federal Cases	**Total**
All Cases	567
Cases Discussing GFE	159 (28.0%)
GFE Applies	123 (21.7%)
State Cases	**Total**
All Cases	594
Cases Discussing GFE	55 (9.3%)
GFE Applies	24 (4.0%)

We observed a similar federal/state split in good faith exception prevalence in our analysis of another large dataset of Fourth Amendment cases, discussed below in Section II.B.[97] This dataset differed substantially from the one described above; it comprised every lower court case citing a major Supreme Court case, *Carpenter v. United States*,[98] for the first thirty-three months following *Carpenter*'s publication.[99] The consistent federal/state splits across datasets suggest an enduring difference in the use of the good faith exception between federal and state courts.

95. The difference in good faith exception prevalence between federal and state courts was statistically significant at the .01 level, in a two-proportion z-test (p-value $< .001$).

96. *See supra* note 95 for a discussion of statistical significance.

97. *See infra* notes 133–36 and accompanying text (discussing federal versus state good faith exception rates in cases applying a major Supreme Court Fourth Amendment case).

98. 585 U.S. 296 (2018).

99. *See infra* notes 120–22 and accompanying text.

There are several possible explanations for the disparity in good faith exception prevalence in federal and state courts. Federal government attorneys may be more sophisticated than their state counterparts and thus more apt to raise the good faith exception when it applies or to aggressively assert it in borderline cases.[100] Federal judges may likewise be more sophisticated than state judges and thus more likely to employ an applicable doctrine.[101] Federal judges might be more time constrained than state judges on average and therefore more prone to employing the good faith exception as a way to save time and effort in resolving Fourth Amendment cases.[102] Courts in states with no good faith exception doctrine as a matter of state constitutional law might also be reluctant to apply it under federal constitutional law, despite its availability.[103] Finally, the complexity of surveillance issues may be greater in federal cases, which often involve the FBI or other sophisticated officers with access to the latest surveillance technologies.[104] In cases involving novel or highly technical surveillance practices, courts may be less confident in their substantive Fourth Amendment rulings and thus more likely to invoke the good faith exception.

b. Types of Authority

We examined the types of legal authority on which the police relied in good faith exception cases. Warrants were by far the most-relied-on authority, followed by statutes, then precedents, and then administrative errors. Out of 147 cases applying the good faith exception, 115 (78.2%) involved a warrant, fifteen (10.2%) involved a statute, twelve (8.2%) involved a precedent, and five (3.4%) involved an administrative error.[105] While the non-warrant subsets in our sample were not large, they suggest that several hundreds of cases have been resolved by relying on precedent since 2015 and that additional hundreds of cases have been

100. *See infra* Part III (discussing incentives to push the envelope on good faith exception arguments in the context of reliance on statutes and precedents).

101. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120–24 (1977).

102. While there are more federal cases overall that do not reach a substantive ruling and resolve the Fourth Amendment issue on good faith exception grounds alone (32 federal cases to 14 state cases), the rate of these substance-avoiding cases is lower in federal cases than in state cases. In federal cases where the good faith exception applied, 26.0% of opinions avoided the substantive issue and resolved the issue on good faith exception grounds alone. In state cases where the good faith exception applied, 58.3% of opinions avoided the substantive issue. This difference between federal and state cases was statistically significant at the .01 level, in a two-proportion z-test (p-value = .002).

103. *See, e.g.*, State v. New, 770 S.E.2d 239, 242–43 (Ga. Ct. App. 2015).

104. *See, e.g.*, *In re* Search of Info. that is Stored at the Premises Controlled by Google LLC, 579 F. Supp. 3d 62, 90–91 (D.D.C. 2021) (approving as reasonable the government's geofence warrant directing Google to disclose the identities of multiple cell phone users in a particular area); United States v. Ellis, 270 F. Supp. 3d 1134, 1139, 1156–57 (N.D. Cal. 2017) (applying the good faith exception where FBI agents used a cell site simulator to obtain cell phone locations); United States v. Scott, No. 14-20780, 2015 WL 4644963, at *6–7 (E.D. Mich. Aug. 5, 2015) (explaining how FBI task force agents obtained cell tower records in a carjacking investigation).

105. In July 2021, there were thirty-eight warrant cases, four statute cases, one precedent case, and one administrative error case. In July 2018, there were forty-two warrant cases, eleven statute cases, two precedent cases, and three administrative error cases. In July 2015, there were thirty-five warrant cases, zero statute cases, nine precedent cases, and one administrative error case.

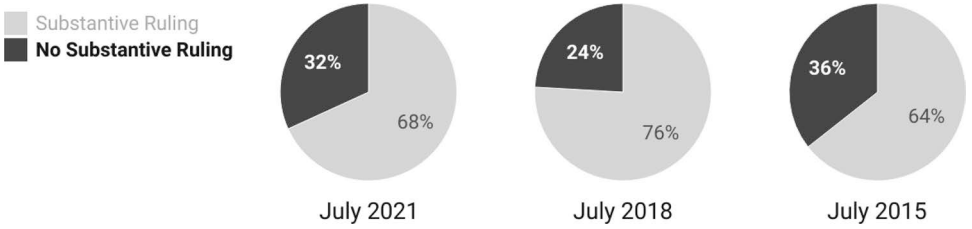
resolved by relying on statutes. Meanwhile, cases denying suppression on the grounds that police relied on a potentially faulty warrant likely number in the thousands.

c. Avoidance of Substantive Rulings

One concern raised by the good faith exception is that courts may use it to avoid making substantive rulings on Fourth Amendment issues. Courts can instead simply apply the good faith exception and deny exclusion on that ground alone, without addressing the underlying Fourth Amendment question.[106] Courts can even, in theory, find good faith reliance on a legal authority repeatedly without ever having to address whether the authority is unconstitutional.

In the dataset, most courts applying the good faith exception did address the substantive issue first before reaching the good faith exception issue. Still, of the 147 cases applying the good faith exception, courts avoided any substantive ruling in forty-four of them, or 29.9% of the total.[107] This finding suggests that over several years, hundreds or thousands of cases will be resolved solely based on the good faith exception, with the courts avoiding the underlying substantive issue entirely. The resulting lack of substantive decisions on an issue may slow the development of the law and leave parties without recourse in subsequent Fourth Amendment disputes.[108] Figure 2 depicts cases avoiding substantive rulings across the three study periods.

Figure 2. Good Faith Exception Cases Avoiding Substantive Rulings



106. *See, e.g.*, United States v. Tolbert, 326 F. Supp. 3d 1211, 1217 (D.N.M. 2018); United States v. Suellentrop, No. 17 CR 435, 2018 WL 4693082, at *14 (E.D. Mo. July 23, 2018); *infra* notes 240–44 and accompanying text.

107. In July 2021, fourteen of forty-four (31.8%) good faith exception cases avoided a substantive ruling. In July 2018, fourteen of fifty-eight (24.1%) good faith exception cases avoided a substantive ruling. In July 2015, sixteen of forty-five (35.6%) good faith exception cases avoided a substantive ruling. For a comparison of federal and state avoidance of substantive issues, see *supra* note 102 and accompanying text.

108. *See infra* notes 240–44 and accompanying text.

d. Court of Appeals and District Court Decisions

Finally, the differences between federal court of appeal decisions and federal district court decisions in the dataset were relatively minor. Both applied the good faith exception at fairly high rates. There were 128 Fourth Amendment suppression cases in the federal courts of appeals, of which twenty-seven (21.1%) discussed the good faith exception. In twenty-one cases (16.4%), the court of appeals held that the good faith exception applied. By comparison, there were 439 Fourth Amendment suppression cases in the district courts, of which 132 (30.1%) discussed the good faith exception. In 102 cases (23.3%), the district court held that the good faith exception applied. Federal district courts applied the good faith exception at somewhat higher rates than federal courts of appeals, but this difference was not statistically significant.[109]

One difference between courts of appeals and district courts did stand out, however. Courts of appeals used the good faith exception to avoid addressing substantive issues more frequently than district courts, and this difference was statistically significant.[110] The court avoided reaching the substantive Fourth Amendment issue in 52.4% of good faith exception cases in courts of appeals.[111] That is significantly higher than the 20.6% avoidance rate in federal district court cases.[112] Overall, the courts of appeals avoided substantive issues on good faith grounds at nearly double the rate of the district courts, even accounting for the district courts' somewhat higher rates of applying the exception.[113] This raises additional concerns that the good faith exception is impeding the development of Fourth Amendment law.[114] Courts of appeals can create binding precedents to clarify the law going forward, whereas district court decisions generally lack precedential force.[115] When courts of appeals decline to reach substantive issues,

109. The difference in good faith exception prevalence between federal district courts and courts of appeals was not statistically significant at the .05 level, in a two-proportion z-test (p-value = .099). However, the difference in discussions of the good faith exception was statistically significant at the .05 level, in a two-proportion z-test (p-value = .047).

110. This difference between district and appeals courts' use of the good faith exception to avoid addressing substantive issues was statistically significant at the .01 level, in a two-proportion z-test (p-value = .009).

111. A court of appeals avoided reaching the substantive issue in twelve out of twenty-one good faith exception cases.

112. A district court avoided reaching the substantive issue in twenty-one out of 102 good faith exception cases.

113. In total, courts of appeals avoided the substantive issue on good faith grounds in 9.4% of all Fourth Amendment suppression cases, compared to a 4.8% avoidance rate in the district courts.

114. *See* James P. Fleissner, *Glide Path to an "Inclusionary Rule": How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule*, 48 MERCER L. REV. 1023, 1045–46 (1997); Mertens & Wasserstrom, *supra* note 59, at 371.

115. *See, e.g.*, Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011))); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 800–02 (2012) (describing the lack of formal deference and a variety of forms of informal deference extended by district courts to prior district court decisions).

those issues are likely to remain ambiguous and prone to misinterpretation or abuse by government actors.[116] The constitutionality of license plate reader cameras and the scope of the private search doctrine are just a few of the important issues appeals courts have recently avoided on good faith exception grounds.[117] This lack of jurisprudential development in the courts of appeals is also likely to dissuade the Supreme Court from addressing Fourth Amendment issues because it impedes the formation of circuit splits, the disagreements between courts of appeals that often give rise to Supreme Court review.[118]

B. THE GOOD FAITH EXCEPTION FOLLOWING A TRANSFORMATIVE DOCTRINAL CHANGE

In light of the above findings, we also assessed the effects of the good faith exception in the wake of a major doctrinal change in Fourth Amendment surveillance law. A recent study on the aftermath of a major Fourth Amendment case[119] and our further analysis of the relevant dataset confirm that the good faith exception dramatically blunted the effects of a pro-defendant Fourth Amendment ruling. The practical result was that large numbers of defendants were ultimately convicted based on illegally obtained evidence.

In prior work, one author of this Article conducted a large-scale study of the jurisprudential effects of *Carpenter v. United States*, a landmark case which held that cell phone location tracking violates the Fourth Amendment if done without a warrant.[120] The study analyzed every opinion and judgment applying *Carpenter* from its publication on June 22, 2018, through March 31, 2021.[121] The final dataset consisted of 857 total judgments or opinions, 399 of which applied *Carpenter* substantively.[122] The study found widespread adoption of *Carpenter* among the lower courts and identified the factors that drove outcomes in post-*Carpenter* cases.[123]

That study's dataset also reveals a remarkably large proportion of cases applying *Carpenter* that were resolved under the good faith exception.[124] Indeed, application of the good faith exception was the most common outcome in cases applying *Carpenter*.[125] There were 144 cases (36.1%) applying the good faith

116. *See infra* Part III; *infra* Section IV.B.

117. *See, e.g.*, United States v. Mapson, 96 F.4th 1323, 1334 (11th Cir. 2024) (declining to address the constitutionality of location tracking using license plate reader cameras and applying the good faith exception); United States v. Fall, 955 F.3d 363, 371 (4th Cir. 2020) (declining to address the scope of the private search doctrine and applying the good faith exception).

118. *See, e.g.*, Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1575 (2008) (noting that a large proportion of the Supreme Court's docket involves circuit splits, and "the presence of a circuit split greatly increases the chances of having certiorari granted" on a given issue).

119. Tokson, *supra* note 89, at 1840–41.

120. 585 U.S. 296, 316, 320 (2018). *Carpenter* substantially transformed the law of Fourth Amendment searches, establishing that, in some cases, people can retain Fourth Amendment rights in cell-site location data even if they disclose that data to a third-party service provider. *Id.* at 309–10.

121. Tokson, *supra* note 89, at 1807.

122. *Id.* at 1808.

123. *Id.* at 1851.

124. *Id.*

125. *Id.* at 1840.

exception and never addressing whether a search occurred, compared to 143 cases (35.8%) finding no Fourth Amendment search, 74 cases (18.5%) finding a search, and 38 cases (9.5%) being resolved on other grounds such as harmless error.[126] Including cases that addressed whether a search occurred and then applied the good faith exception, there were 155 cases resolved on the basis of the good faith exception, or 38.8% of all cases in the dataset.[127] In other words, the exception had an extraordinarily powerful impact on case outcomes in post-*Carpenter* law.

Of course, the number of *Carpenter* cases "resolved via the good faith exception will decrease over time, as fewer cases are tried involving pre-*Carpenter* searches of cell phone data."[128] But high proportions of cases in the dataset—roughly 30% of all cases—were still being resolved on good faith grounds several years after *Carpenter* was decided.[129] The vast majority of these good faith cases involve government officials obtaining historical cell phone location data without warrants,[130] the practice declared unconstitutional in *Carpenter*.[131] Going forward, it is likely that hundreds of defendants will eventually be convicted on the basis of these unconstitutional searches.[132]

That study also examined the differences in federal and state courts' applications of the good faith exception in the *Carpenter* dataset.[133] Federal cases applying *Carpenter* were resolved under the good faith exception in 117 out of 277 cases (42.2%).[134] This compares to only 27 out of 122 state cases (22.1%).[135] This federal versus state disparity comports with the findings reported in Section II.A above. Together, these numbers suggest federal courts

126. *Id.* at 1809.

127. *Id.* at 1840 n.301.

128. *Id.* at 1840.

129. *Id.* For example, nearly 40% of cases decided in the first quarter of 2021, almost three years after *Carpenter* was decided, were resolved based on the good faith exception. *Id.* at 1841 fig.3.

130. *Id.* at 1840.

131. Carpenter v. United States, 585 U.S. 296, 316, 320 (2018). Most other good faith cases in the dataset involved real-time cell phone location tracking, cell-site simulators that capture nearby cell phone users' information, or "tower dumps," which refer to the collection of all cell phone numbers communicating with a given cell phone tower at a certain time. *See* Tokson, *supra* note 89, at 1811; *see also, e.g.*, United States v. Green, 981 F.3d 945, 957 (11th Cir. 2020) (addressing real-time cell phone location tracking data); United States v. Chavez, No. 15-CR-00285, 2019 WL 1003357, at *17 (N.D. Cal. Mar. 1, 2019) (examining cell-site simulator and real-time location tracking); United States v. Pendergrass, No. 17-CR-315, 2018 WL 7283631, at *3 n.2, *13 (N.D. Ga. Sept. 11, 2018) (assessing "tower dump" surveillance).

132. *See* Tokson, *supra* note 89, at 1840.

133. *See id.* at 1811–14.

134. *Id.* at 1811.

135. *Id.* at 1812. Most good faith cases in the *Carpenter* dataset did not overtly address the substantive Fourth Amendment issue before applying the good faith exception. *See id.* at 1840 & n.301. However, in many cases this may be because it became obvious after *Carpenter* that warrantless cell phone location tracking was a Fourth Amendment violation, and courts may not have felt compelled to say so overtly.

likely have a general tendency to invoke the good faith exception more frequently than state courts.[136]

The remarkable prevalence of the good faith exception in general, and its role in dampening a recent pro-privacy legal change, should raise serious concerns about current law and the incentives it creates. As examined in Part III, existing good faith doctrine may incentivize the police to aggressively apply new surveillance practices to secure convictions, even when those practices are likely unconstitutional.

III. LAW ENFORCEMENT INCENTIVES

The modern Supreme Court has characterized deterrence of Fourth Amendment violations as the "sole purpose" of the exclusionary rule.[137] The exclusionary rule is not considered a constitutional requirement, but rather a prudential doctrine that can only be justified if it efficiently incentivizes legal actors to comply with the Fourth Amendment.[138] This is a particularly narrow view of the central Fourth Amendment remedy, especially when compared to prior Supreme Court justifications of the exclusionary rule.[139] In practice, this narrow view substantially limits the scope of the exclusionary rule in modern cases.[140]

Yet the Court has narrowed the exclusionary rule even more in its recent good faith exception jurisprudence. These decisions have made clear that evidence will not be excluded to deter violations by court clerks, police administrative staff, magistrates, or legislators.[141] Rather, the Court has focused on deterrence of police officers and their direct superiors; it has limited exclusion to violations

136. Alternatively, the disparity in the *Carpenter* dataset might reflect a longer delay between investigation by federal officials and consequent trial or appellate adjudication in the federal system relative to the state system. Or it might be the result of there being more pending cases in the federal system involving the collection of cell phone location data when *Carpenter* was decided. The *Carpenter* dataset is not detailed enough to shed light on these latter issues.

137. Davis v. United States, 564 U.S. 229, 236–37 (2011).

138. *See id.*

139. While the Court has characterized deterrence as the primary or sole purpose of the exclusionary rule, the rule's original purposes included preserving judicial integrity and constraining the government writ large. *See* Bloom & Fentin, *supra* note 59, at 47–48. In addition to deterrence, exclusion serves as "a constraint on the power of the sovereign, not merely some of its agents." Herring v. United States, 555 U.S. 135, 151–52 (2009) (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

140. There are several doctrines premised on this theory of deterrence that limit the scope of the exclusionary rule. The inevitable discovery doctrine provides that evidence may be introduced contrary to the exclusionary rule if it would inevitably have been obtained even absent the Fourth Amendment violation. Nix v. Williams, 467 U.S. 431, 444 (1984). Similarly, the independent source doctrine allows for the introduction of evidence obtained in violation of the Fourth Amendment if the government can establish "that it had an independent, legitimate source for the disputed evidence." Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 103 (1964) (White, J., concurring). Attenuation refers to the connection between the Fourth Amendment violation and the discovery of challenged evidence. *See* United States v. Ceccolini, 435 U.S. 268, 273–74 (1978). If the connection has become so attenuated as to dissipate the taint, then the court may allow admission of the challenged evidence. *Id.* at 274.

141. *See, e.g.*, *Herring*, 555 U.S. at 146–48; *Evans*, 514 U.S. at 14; Illinois v. Krull, 480 U.S. 340, 352 (1987); United States v. Leon, 468 U.S. 897, 917 (1984).

caused by "the behavior of individual law enforcement officers or the policies of their departments."[142] The Court's logic is that the "threat of exclusion" can only be expected to deter persons who have a "stake in the outcome of particular criminal prosecutions."[143]

We will challenge this remarkably narrow view of the exclusionary rule and its purposes in Part IV. This Part, by contrast, takes current law and the Court's conceptual approach as given. It examines whether current good faith exception doctrine effectively deters law enforcement officials from violating individuals' Fourth Amendment rights. Ultimately, it finds that existing law does not adequately deter Fourth Amendment violations or the widespread use of constitutionally questionable forms of surveillance. Rather, modern good faith exception law incentivizes constitutional violations in ways that courts have failed to recognize. For example, it allows the police to use old, general-purpose statutes to justify new and invasive forms of surveillance. This creates incentives for officers to rapidly adopt aggressive surveillance tactics. When courts eventually strike these unconstitutional tactics down, the good faith exception ensures that the evidence will still be admitted in court. The police have nothing to lose, and much to gain, from employing intrusive new surveillance practices under current law.

This Part first examines the problematic incentives created by the doctrine of good faith reliance on unconstitutional statutes. It then examines similarly detrimental incentives in the context of police reliance on precedent. Finally, it describes potential reforms to realign police incentives with substantive Fourth Amendment law and discourage the aggressive use of potentially unlawful surveillance practices.

A. PROBLEMATIC RELIANCE ON STATUTORY LAW

1. Surveillance Incentives

In the wake of a recent major change to Fourth Amendment law in *Carpenter v. United States*, a remarkably high proportion of cases were resolved under the good faith exception.[144] The government is likely to secure hundreds of convictions using unlawfully obtained evidence in these cases.[145] This Section examines the powerful incentives that the good faith exception creates for law enforcement to aggressively interpret old statutes in ways that permit the use of new surveillance practices.

Why were so many cases resolved under the good faith exception following *Carpenter v. United States*? Partly, it was because some circuit courts had expressly declared that cell phone location tracking was constitutional prior to *Carpenter*.[146] Yet the majority of good faith cases were decided in jurisdictions

142. *See Leon*, 468 U.S. at 918.

143. *Id.* at 917.

144. *See* 585 U.S. 296, 215 (2018); *supra* Section II.B.

145. *See* Tokson, *supra* note 89, at 1840.

146. Prior to *Carpenter*, several circuits permitted warrantless cell phone location tracking so long as it did not reveal details of activity within the confines of the home. *See, e.g.*, United States v. Graham,

without court of appeals opinions.[147] In these cases, the authority the police relied on was an old statute that did not mention cell phone location data at all.

The Stored Communications Act of 1986 (SCA) allows police to obtain court orders for "a record or other information pertaining to a . . . customer" of an electronic service provider.[148] In 1986, this typically referred to non-content email metadata: lists of incoming and outgoing email addresses, logs of account usage, and email header information minus the subject line.[149] These early forms of non-content data were thought to be far less revealing than the contents of emails, much like the envelope of a letter is considered less sensitive than the contents of the letter.[150] Congress accordingly permitted government officials to obtain non-content information with an easy-to-obtain court order.[151]

Decades later, government investigators interpreted this provision to apply to cell phone location data.[152] But this provision was enacted long before cell phones were widely used or cell site location records became a target of law enforcement officers.[153] Congress certainly did not intend to weigh in on whether cell phone location tracking was constitutional.[154]

Yet this provision has now been the basis for a huge number of good faith exception cases in which the police unconstitutionally collected cell phone location

824 F.3d 421, 424, 428 (4th Cir. 2016) (en banc); United States v. Davis, 785 F.3d 498, 511 (11th Cir. 2015) (en banc); *In re* Application of U.S. for Hist. Cell Site Data, 724 F.3d 600, 612, 615 (5th Cir. 2013).

147. *See* Tokson, *supra* note 89, at 1842.

148. 18 U.S.C. § 2703(c)(1).

149. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1228 (2004).

150. *Id.*

151. Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 593 & n.69 (2011). The Stored Communications Act was passed in 1986 as part of the Electronic Communications Privacy Act (ECPA). Kerr, *supra* note 149, at 1208. For a critique of the ECPA's lenient standard for non-content data, see Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1286–88 (2004).

152. *See, e.g.*, United States v. Reed, 978 F.3d 538, 540 (8th Cir. 2020); United States v. Korte, 918 F.3d 750, 759 (9th Cir. 2019). There has been some controversy in cases involving real-time location surveillance over whether a cell phone might qualify as a tracking device under 18 U.S.C. § 3117, but even if a cell phone qualified under that statute, the statute does not appear to impose any additional requirements for the collection of cell phone location data. *See* 18 U.S.C. § 3117(a) (limiting the jurisdictional reach of warrants or other court orders for tracking devices, but imposing no other restrictions); United States v. Ackies, 918 F.3d 190, 194 (1st Cir. 2019) (holding that a cell phone was not a tracking device under 18 U.S.C. § 3117); *In re* Use of Cell-Site Simulator to Locate a Cellular Device Associated with One Cellular Tel. Pursuant to Rule 41, 531 F. Supp. 3d 1, 7–8 (D.D.C. 2021) (concluding that a cell-site simulator is not a tracking device under 18 U.S.C. § 3117 because "it does not install, maintain, or remove the targeted cell phone from the suspect's person or property").

153. *See* M. Wesley Clark, *Cell Phones as Tracking Devices*, 41 VAL. U. L. REV. 1413, 1472 (2007).

154. *See id.* at 1472–73. Indeed, it is clear that "Congress had little clue about what technology was coming down the pike." *Id.* at 1473; *see also* Press Release, Reps. Zoe Lofgren Introduces Bipartisan ECPA Reform Bill (Mar. 6, 2013), https://lofgren.house.gov/media/press-releases/reps-zoe-lofgren-introduces-bipartisan-ecpa-reform-bill [https://perma.cc/E8FH-8HZ4] (discussing the need to modernize the outdated Electronic Communications Privacy Act).

data.[155] Numerous courts have held that the government is allowed to introduce such data at trial because the police "relied" on a generic statute that says nothing about cell phones or location data.[156] This approach rewards the government for its questionable interpretation of the SCA and aggressive use of an invasive—and ultimately unconstitutional—surveillance method.

This creates powerful incentives for the police to engage in unconstitutional searches by using obsolete or general-purpose statutes to obtain new forms of personal data. To start, consider police and prosecutor incentives to make arrests, clear cases, and obtain convictions. Police bureaucracies are subject to political pressure to reduce crime, and they generally try to motivate individual officers to solve crimes.[157] Officers are frequently evaluated based on their "'clearance rate,' the rate at which [they] solve[] a case by making an arrest of the suspected perpetrator."[158] Officers are also indirectly motivated to help secure convictions, and the prosecutors who influence the police bureaucracy are directly and powerfully motivated to pursue convictions.[159] Prosecutors may be evaluated by their superiors based on their conviction rates, and those with high conviction rates may be more likely to receive promotions.[160] District attorney offices may also tout their conviction statistics as a whole to political authorities, and office conviction rates may come up in budget negotiations.[161]

Good faith doctrine interacts with these incentives in harmful ways, motivating police officers and their superiors to aggressively employ new surveillance technologies. When the police encounter a new surveillance practice that is arguably permitted by an old statute, they have an incentive to use that practice to secure as many convictions as possible before courts prohibit it.[162] And the prosecutors who work closely with police departments have an incentive to interpret old statutes to permit even the most invasive new forms of police surveillance.[163] In other words, the government can maximize convictions and case-clearance rates by adopting legally questionable surveillance practices and accelerating the use of such practices as quickly as possible, before courts impose warrant requirements.[164]

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155. *See, e.g.*, *Reed*, 978 F.3d at 540, 542; United States v. Pendergrass, No. 17-CR-315, 2018 WL 7283631, at *14 (N.D. Ga. Sept. 11, 2018); State v. Jennings, 942 N.W.2d 753, 765 (Neb. 2020).

156. *See, e.g.*, United States v. Herron, 762 F. App'x 25, 31 (2d Cir. 2019); *Korte*, 918 F.3d at 759; United States v. Curtis, 901 F.3d 846, 848 (7th Cir. 2018).

157. Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 132 (2005).

158. *Id.* These incentives can also motivate officers to value arrests even when no crime has been reported. *Id.* at 132–33.

159. *See id.* at 133; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135–36 (2004).

160. Medwed, *supra* note 159, at 134–35 & n.40.

161. *Id.* at 135.

162. Tokson, *supra* note 89, at 1796.

163. *See infra* note 173; Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1596–97; Medwed, *supra* note 159, at 135.

164. Tokson, *supra* note 89, at 1841–43.

Imagine that the police encounter a new surveillance technology or practice, the use of which may be unconstitutional. Perhaps they want to obtain a suspect's direct messages on a new social media app, for example. Is there a statute that might permit the police to obtain direct messages without a warrant? Indeed, there is. An SCA provision, 18 U.S.C. § 2703(a), permits the government to obtain the contents of communications stored for longer than 180 days with a subpoena, which is relatively easy to obtain.[165] Another provision, 18 U.S.C. § 2703(b), likely permits the government to obtain the contents of communications via subpoena even if they have not been stored for 180 days, as long as the communications have already been opened by the recipient and are not kept in "electronic storage" as defined in the Act.[166] This loophole in the Act is the result of its obsolescence; it was written to address early-stage email systems with transmission and storage protocols very different from those used today for emails or direct messages.[167] But a police officer could, in good faith, conclude that the Stored Communications Act allows the government to obtain the contents of direct messages with a mere subpoena.[168] Indeed, the Department of Justice reached exactly that conclusion in its manual on obtaining electronic evidence

165. *See* Tokson, *supra* note 151, at 593–94, 594 n.75. While § 2703(a) also requires notice of the subpoena to the subscriber, it provides that the investigatory agent in charge may continually delay notice for numerous purposes, including "seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 2705(a)(1)(A), (a)(2)(E). There is no judicial review of the agent's decision. 18 U.S.C. § 2705(a)(1)(B); *see* C. L. "Butch" Otter & Elizabeth Barker Brandt, *Preserving the Foundation of Liberty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 261, 267 n.25 (2005) (arguing that § 2705's notice provisions are "not an effective limit" on the government's ability "to search surreptitiously").

166. *See* 18 U.S.C. § 2510(17) (defining "electronic storage" under the Act to cover only communications stored for the purposes of transmission or backup protection); Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens*, 72 GEO. WASH. L. REV. 1375, 1418–19 (2004) (discussing competing interpretations of "electronic storage" and related concepts).

167. *See* Kerr, *supra* note 149, at 1214, 1230, 1233–34; Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1572 (2004). The relevant statutory provision governing remote computing services, 18 U.S.C. § 2703(b), was originally directed toward corporate entities. *See* S. REP. NO. 99-541, at 10–11 (1986). In 1986, when the ECPA was passed, small businesses sometimes used third-party remote-data-processing services to assist them in managing computerized data. *See id.*; H.R. REP. NO. 99-647, at 23 (1986); Bellia, *supra* note 166, at 1425–26. This data was generally nonsensitive, and Congress provided it with only minimal statutory protection. *See* 18 U.S.C. § 2703(b). Today, billions of Internet users employ cloud-computing services such as Google Documents to create documents and spreadsheets; store personal photos, videos, or other files; or to back up their entire hard drives on remote servers. *See* John B. Horrigan, *Cloud Computing Gains in Currency*, PEW RES. CTR. (Sept. 12, 2008), http://pewresearch.org/pubs/948/cloud-computing-gains-in-currency [https://perma.cc/T2WV-TES7]; Fabio Duarte, *Google Workspace User Stats (2024)*, EXPLODING TOPICS (Dec. 6, 2023), https://explodingtopics.com/blog/google-workspace-stats [https://perma.cc/58SZ-W4ZC]. Under the ECPA, these files, documents, and photos may be obtainable with a simple subpoena. *See* 18 U.S.C. §§ 2703(b), 2510(12).

168. *See supra* note 165 and accompanying text. On the ease of obtaining subpoenas under the ECPA, see, for example, Tokson, *supra* note 151, at 593–94.

in criminal investigations.[169] And the legislative history of the statute suggests that this interpretation is likely correct as a statutory matter.[170]

To be sure, obtaining the contents of personal communications without a warrant is probably unconstitutional, as several Supreme Court justices have indicated in dicta or in separate opinions[171] and as one circuit court has already ruled.[172] Accordingly, investigators might make the strategic choice to only occasionally push the envelope on warrantless searches of message contents.[173] Yet, the question remains unresolved, such that a government official might reasonably rely on the SCA to obtain a person's direct messages without a warrant.[174] The good faith standard is especially lenient in this context, applying to any statute that is not "clearly unconstitutional."[175]

As a result, even if the government were to lose on the Fourth Amendment's application to direct messages, it could still admit the messages in a given case by

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169. COMPUT. CRIME & INTELL. PROP. SECTION, U.S. DEP'T OF JUST., SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 125–26, 128 (3d ed. 2009), https://www.justice.gov/d9/criminal-ccips/legacy/2015/01/14/ssmanual2009_002.pdf [https://perma.cc/9U9J-FNRG]. To be sure, government officials have, thus far, rarely attempted to obtain email or message contents without a warrant, presumably because courts are very likely to declare such contents protected by the Fourth Amendment. But they do occasionally obtain email or message contents without a warrant. *See, e.g.*, Rehberg v. Paulk, 611 F.3d 828, 835 (11th Cir. 2010); Walker v. Coffey, 905 F.3d 138, 142 (3d Cir. 2018); Anzaldua v. Ne. Ambulance & Fire Prot. Dist., 793 F.3d 822, 831 (8th Cir. 2015); Theofel v. Farey-Jones, 359 F.3d 1066, 1071 (9th Cir. 2004). And the option to do so without constitutional check is open to them thanks to the good faith exception.

170. Congress apparently did not contemplate in 1986 that emails or messages would be stored after opening them directly on a personal device, likely due to the severe data-storage constraints that characterized personal computer systems of the 1980s. *See* H.R. REP. NO. 99-647, at 63 (1986) (noting that an email would be held in storage at the email service provider's facility "until the addressee requests it"); *supra* note 166. Courts are split on the question, but the government's argument is sufficiently plausible to allow it to immediately obtain opened emails in the large majority of jurisdictions that have either not decided the issue or have resolved it in the government's favor. *Compare Theofel*, 359 F.3d at 1077 (holding that opened emails remained in "electronic storage" under the SCA), Hately v. Watts, 917 F.3d 770, 773 (4th Cir. 2019) (same), *and* Pure Power Boot Camp v. Warrior Fitness Boot Camp, 587 F. Supp. 2d 548, 556 (S.D.N.Y. 2008) (same), *with Anzaldua*, 793 F.3d at 842 (holding that sent and draft emails are not in electronic storage under the SCA), United States v. Weaver, 636 F. Supp. 2d 769, 773 (C.D. Ill. 2009) (holding that opened emails are not in electronic storage under the SCA), Bansal v. Russ, 513 F. Supp. 2d 264, 276 (E.D. Pa. 2007) (same), *and* Jennings v. Jennings, 736 S.E.2d 242, 245 (S.C. 2012) (same).

171. *See* Carpenter v. United States, 585 U.S. 296, 400 (2018) (Gorsuch, J., dissenting) (stating that "[w]hatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest"); *id.* at 332 (Kennedy, J., dissenting) (stating that "*Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party").

172. *See* United States v. Warshak, 631 F.3d 266, 282 (6th Cir. 2010).

173. For example, the DOJ may want to avoid creating a negative precedent, or it may seek to maintain a strategic ambiguity around the constitutionality of obtaining message contents in case there is a need to obtain such contents through the SCA later. In any event, the government has collected the contents of digital communications in several cases and benefitted from courts' reluctance to weigh in on novel Fourth Amendment issues. *See, e.g.*, *Rehberg*, 611 F.3d at 846–47; *Walker*, 905 F.3d at 146, 149–50; *Anzaldua*, 793 F.3d at 842.

174. *Rehberg*, 611 F.3d at 846–47; *Walker*, 905 F.3d at 149–50.

175. Illinois v. Krull, 480 U.S. 340, 349–50 (1987).

claiming good faith reliance on the SCA. And in many cases, courts will sidestep the substantive Fourth Amendment question entirely and issue a ruling solely on good faith grounds.[176] In situations like this, the exclusionary rule has lost all of its deterrent force.[177] The personal messages gathered under the SCA will not be excluded even after courts rule that collecting the messages was unconstitutional. And the same will be true in many other contexts, even where the surveillance at issue is extremely likely to be unconstitutional.[178]

2. General-Purpose Statutes

Given the lenient standards of current good faith exception law, government officers can use older, general-purpose statutes to justify aggressive and often unconstitutional new forms of surveillance. There are many general-purpose statutes that permit the collection of sensitive forms of personal data. For example, the Pen Register Act permits the government to intercept virtually any form of non-content data that is transmitted as part of an electronic communication.[179] This includes dialed telephone numbers and email address information but might also include IP addresses, text message metadata, location data, URLs, and more.[180] Customs statute 19 U.S.C. § 1509 permits the U.S. Bureau of Customs and Border Protection to examine any record "which may be relevant to [a Customs] investigation."[181] A provision of the Controlled Substances Act permits

176. *See supra* Section II.A.3.c. As the Sixth Circuit aptly noted, "[i]f every court confronted with a novel Fourth Amendment question were to skip directly to good faith, the government would be given *carte blanche* to violate constitutionally protected privacy rights, provided, of course, that a statute supposedly permits them to do so." *Warshak*, 631 F.3d at 282 n.13.

177. Other considerations—like the high likelihood of losing on appeal and the personal reputations of prosecutors—may hold the government back from aggressively collecting message contents. Still, the government has collected the contents of such communications in several cases and benefitted from courts' reluctance to weigh in on novel Fourth Amendment issues. *See supra* note 173.

178. For example, the good faith exception might protect unconstitutional searches of private documents stored on cloud servers or audio recordings of the inside of a home captured by an Amazon Alexa or other smart speaker. *See* Tokson, *supra* note 151, at 585; Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 GEO. WASH. L. REV. 1, 54 (2020); Andrew Guthrie Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 557–61 (2017); Bihter Ozedirne, *Fourth Amendment Particularity in the Cloud*, 33 BERKELEY TECH. L.J. 1223, 1224–25 (2018).

179. *See* 18 U.S.C. §§ 3122, 3127(3). Government officials must obtain a court order prior to intercepting non-content data that is transmitted as part of an electronic communication by certifying "that the information likely to be obtained is relevant to an ongoing criminal investigation." 18 U.S.C. § 3122(b)(2). This is an extremely easy standard to meet, and approval of court-order applications of Section 3122 is essentially automatic. *See* Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law*, 50 WM. & MARY L. REV. 2105, 2120 (2009); Susan Freiwald, *Online Surveillance: Remembering the Lessons of the Wiretap Act*, 56 ALA. L. REV. 9, 62 (2004).

180. *See* 18 U.S.C. § 3127(3)–(4); Tokson, *supra* note 179, at 2120.

181. 19 U.S.C. § 1509(a)(1). Such investigations might cover a variety of crimes related to smuggling or importation of contraband. *See* Peter M. Gerhart, *Judicial Review of Customs Service Actions*, 9 LAW & POL'Y INT'L BUS. 1101, 1102, 1107 (1977). This provision has often been used to obtain digital data and subscriber information associated with internet and social media accounts. *See, e.g.*, United States v. Murray, No. 18-CR-0053, 2021 WL 4237124, at *1 (E.D. Wash. Sept. 16, 2021) (describing how Customs agents received subscriber information of an internet user under 19 U.S.C. § 1509); Harper v. United States, No. 19-cv-02012, 2019 WL 7858529, at *1, *3 (C.D. Cal. Sept. 12,

the DOJ to subpoena "any records" that are "relevant or material" to a drug investigation,[182] providing the government with a sweeping investigative power that has thus far been subject to only minimal Fourth Amendment scrutiny.[183] A separate statute grants a similar subpoena power to the DOJ over crimes involving sex offenses against children, failures to register as a sex offender, threats against officials with Secret Service protection, and health care fraud.[184] Even Section 2703(d) of the Stored Communications Act, declared unconstitutional as applied to cell phone location data in *Carpenter*, continues to serve as the basis for good faith exception rulings in recent cases. For example, several post-*Carpenter* cases have ruled in favor of the government on good faith exception grounds in cases involving 2703(d) orders for "tower dumps," where the police obtain all the cell phone numbers that connected to a particular cell tower during a particular interval of time.[185]

Many state statutes likewise permit government officials to obtain wide varieties of digital and other records without securing a warrant or even establishing reasonable suspicion under the Fourth Amendment.[186] For example, Arizona law permits state officials to obtain the contents of oral, wire, or electronic communications stored by third parties with a subpoena or court order and with prior notice to the subscriber or party, and requires only that the communications be "relevant to an ongoing criminal investigation."[187] This is even broader and more permissive than the federal statutes governing stored electronic communications.[188]

Most of these statutes require only that the records at issue be "relevant" to an ongoing investigation. This is an extremely low bar to clear. Virtually any record

2019) (upholding a summons under 19 U.S.C. § 1509 for social media login records and subscriber information); United States v. Jenkins, No. 18-cr-00181, 2019 WL 1568154, at *1, *3 (N.D. Ga. Apr. 11, 2019) (upholding a summons under 19 U.S.C. § 1509 for a wide variety of computer data, login and logout times of specific accounts, dialed telephone numbers, user dates of birth, and more).

182. 21 U.S.C. § 876(a); *see also* Inspector General Act of 1978, 5 U.S.C. § 406(a)(4) (empowering the Inspector General's office to subpoena all records "necessary in the performance of" its duties).

183. *See, e.g.*, United States v. Phibbs, 999 F.2d 1053, 1077 (6th Cir. 1993) (reviewing subpoena under 21 U.S.C. § 876(a) only on reasonableness grounds); United States v. Golden Valley Elec. Ass'n, 689 F.3d 1108, 1113 (9th Cir. 2012) (same).

184. 18 U.S.C. § 3486. Various government officials investigating these crimes can subpoena "any records or other things relevant to the investigation." 18 U.S.C. § 3486(a)(1)(B)(i).

185. *E.g.*, United States v. Patterson, No. 19CR3011, 2020 WL 6334399, at *3 (D. Neb. Aug. 5, 2020); United States v. Walker, No. 18-CR-37-FL-1, 2020 WL 4065980, at *8 (E.D.N.C. July 20, 2020). In addition, a federal district court applied the good faith exception to cell phone location data collected before *Carpenter* but analyzed after the Supreme Court declared § 2703(d) unconstitutional as applied to such data, establishing that the police can prevail on good faith exception grounds even when they knowingly review unlawfully collected data. United States v. George, No. 18-cr-266, 2020 WL 1689715, at *1–3 (E.D. Cal. Apr. 7, 2020).

186. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3016 (permitting the acquisition of "oral, wire and electronic communications" stored by third parties with a subpoena or court order if relevant to an ongoing investigation); OHIO REV. CODE ANN. § 2317.02(B)(2)(a) (directing a "health care provider" to supply patient alcohol- and drug-test results to law enforcement when the requesting officer indicates in a written statement to the health care provider that the individual is the subject of an "official criminal investigation . . . or proceeding"); MINN. STAT. ANN. § 609.5311 (providing for the seizure, with or without a warrant, of all personal records associated with a controlled substance offense).

187. ARIZ. REV. STAT. ANN. §§ 13-3016(B)(2)–(3), 13-3018.

188. *See* 18 U.S.C. § 2703; *supra* notes 165–70.

will be relevant to an investigation,[189] if only because it can help to rule out suspects if nothing is found. Essentially nothing prevents the government from obtaining any record mentioned in these statutes. For instance, judicial scrutiny of the "relevant to an ongoing criminal investigation" standard of the Pen Register Act is virtually nonexistent.[190] Courts act as a "rubber stamp" for Pen Register Act certifications, approving them without engaging in any investigation or review.[191] The broad statutes described above, and many others,[192] can provide a basis for the government to obtain a massive variety and quantity of sensitive digital information. Even if the surveillance is eventually found unconstitutional, the government can claim good faith reliance on these general-purpose statutes in order to admit the evidence gathered at trial. As discussed below in Section III.C, the doctrine that permits this is ripe for reform.

B. PROBLEMATIC RELIANCE ON PRECEDENT

The good faith exception has also expanded in the context of police reliance on controlling precedent. As outlined in Section I.A, the Court held in *Davis v. United States* that the good faith exception applied when the police relied on binding circuit precedent specifically authorizing a police practice.[193] *Davis* did not address the possibility that the police might rely on ambiguous or vague precedents, neither endorsing that approach nor ruling it out. Lower courts have subsequently interpreted *Davis* in ways that encourage aggressive surveillance, allowing police officers to claim reliance on vague precedents addressing different forms of surveillance from the ones in the instant case.[194] This approach incentivizes officers to push constitutional boundaries whenever they can point to an existing precedent that arguably justifies their actions.[195]

The clearest example of this phenomenon can be seen in lower court cases involving the warrantless use of tracking devices to monitor a suspect's vehicle. In the early 1980s, the Supreme Court permitted the use of radio-beeper tracking

189. *Cf.* United States v. R. Enters., 498 U.S. 292, 297, 301 (1991) (noting, in the context of a grand jury investigation, that virtually any form of information may be pertinent to an investigation into potential crimes and therefore the only time information is irrelevant to an investigation is when "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the . . . investigation").

190. *See* Freiwald, *supra* note 179, at 62.

191. *See id.*; Tokson, *supra* note 179, at 2120.

192. *See, e.g.*, 26 U.S.C. § 7602(a)(1) (permitting the IRS to obtain any "books, papers, records, or other data which may be relevant or material" to a tax inquiry).

193. Davis v. United States, 564 U.S. 229, 241 (2011).

194. *See, e.g.*, United States v. Asghedom, 646 F. App'x 830, 834 (11th Cir. 2016) (applying the good faith exception to admit evidence obtained from a GPS tracking device affixed to a vehicle on the basis of appellant precedent involving a different technology); United States v. Gary, 790 F.3d 704, 705, 709 (7th Cir. 2015) (ruling that police could rely in good faith on general principles from prior cases in conducting a search incident to arrest of a cell phone); United States v. Jenkins, No. 18-cr-00181, 2019 WL 1568154, at *3, *5 (N.D. Ga. Apr. 11, 2019) (holding that the good faith exception would apply to a request for IP addresses despite a lack of binding precedent on which to rely).

195. As noted earlier, prosecutors face similar incentives. *See supra* note 163 and accompanying text.

devices, stating that a person traveling in a car "has no reasonable expectation of privacy in his movements from one place to another" and thus their use was not a search under the Fourth Amendment.[196] In 2012's *United States v. Jones*, the Court held that the "installation of a GPS device on a [suspect's] vehicle" without a valid warrant and the "use of that device to monitor the vehicle's movements constitutes a 'search'" under the Fourth Amendment.[197] The Court distinguished its prior 1980s cases, *United States v. Knotts* and *United States v. Karo*, on several grounds.[198] Those cases did not involve the physical installation of a tracking device because the radio devices were pre-installed in containers that the suspects later purchased.[199] The primitive devices addressed in these early cases had limited capabilities and required monitoring by nearby police officers with a radio receiver.[200] Finally, *Knotts* expressly reserved the question whether "different constitutional principles may be applicable" to more advanced surveillance techniques.[201]

Lower courts have nonetheless declared that the good faith exception applies to GPS installation and surveillance because police officers could reasonably extend the general principles of *Knotts* and *Karo* to this new scenario.[202] Courts reached this conclusion notwithstanding that GPS trackers were installed via intrusions on personal property, were far more capable than radio trackers, and were used to monitor suspects for longer periods.[203] In doing so, these courts have massively expanded the scope of the good faith exception. Officers no longer need to wait for a court in their jurisdiction to address a new surveillance question. They need only point to the absence of contrary precedent and a general legal principle from a prior case that might extend to the new issue.[204] The presumption is in favor of constitutionality, until officers hear otherwise.

This expansion of the scope of the good faith exception incentivizes officers to adopt aggressive and often erroneous interpretations of prior law to justify the use of new surveillance practices. Even when the officers' interpretations are wrong, their violations of the Constitution will not result in the exclusion of evidence because the good faith exception will apply. Under this approach,

196. United States v. Knotts, 460 U.S. 276, 281 (1983).

197. 565 U.S. 400, 404 (2012).

198. *Id.* at 408–10 (distinguishing the facts of *Jones* from the Court's precedent in *Knotts*, 460 U.S. 276, and United States v. Karo, 468 U.S. 705 (1984)).

199. *Id.* (first citing *Knotts*, 460 U.S. at 278; and then citing *Karo*, 468 U.S. at 708, 713).

200. *See id.* at 409 n.6. A concurrence joined by four Justices and endorsed by a fifth distinguished *Karo* and *Knotts* from *Jones* on similar grounds. *See id.* at 429 n.10 (Alito, J., concurring); *id.* at 415 (Sotomayor, J., concurring) (endorsing the reasoning of Justice Alito's concurrence).

201. *Id.* at 409 n.6 (majority opinion) (quoting *Knotts*, 460 U.S. at 284).

202. *See, e.g.*, United States v. Stephens, 764 F.3d 327, 329, 338 (4th Cir. 2014); United States v. Sparks, 711 F.3d 58, 65, 67 (1st Cir. 2013).

203. *See Stephens*, 764 F.3d at 337–38; *Sparks*, 711 F.3d at 66–67.

204. *See supra* note 202 and accompanying text; *infra* notes 208–10 and accompanying text.

police have every incentive to "[k]eep pushing until they tell you to stop, and then push somewhere else."[205]

Nor is this dramatic expansion of the good faith exception confined to a few outlier circuits or to this one issue. It has become the consensus approach, applied in a variety of areas. The First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits, as well as several state appellate courts, have adopted this good faith exception approach with respect to GPS tracking.[206] Many courts adopted a similar standard after the Supreme Court's decision in *Riley v. California*,[207] which prohibited police from searching cell phones incident to arrest.[208] Several courts have even held that the police may rely on nonbinding precedents from other circuits to justify their surveillance techniques.[209] And some courts have been even more explicit about expanding the good faith exception, suggesting that evidence will *never* be excluded so long as the surveillance practice used by police has not already been declared unconstitutional.[210] These lower courts threaten to erode the Fourth Amendment itself, limiting its relevance to day-to-day policing and confining it to only the most flagrant violations.

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205. Caleb Mason, *New Police Surveillance Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After* United States v. Jones, 13 NEV. L.J. 60, 71 (2012). Defendants also have less incentive to challenge even novel surveillance practices because they will frequently be unable to exclude the evidence against them even if they prevail on the Fourth Amendment issue. *See* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1082 (2011).

206. *E.g.*, United States v. Baez, 744 F.3d 30, 31, 34–36 (1st Cir. 2014); United States v. Aguiar, 737 F.3d 251, 262 (2d Cir. 2013); United States v. Katzin, 769 F.3d 163, 173–74, 184 (3d Cir. 2014); *Stephens*, 764 F.3d at 329, 338; United States v. Brown, 744 F.3d 474, 478 (7th Cir. 2014); United States v. Robinson, 781 F.3d 453, 458–59, 459 n.2 (8th Cir. 2015); United States v. Hohn, 606 F. App'x 902, 906–07 (10th Cir. 2015); United States v. Ransfer, 749 F.3d 914, 924–25 (11th Cir. 2014); People v. LeFlore, 32 N.E.3d 1043, 1048, 1052, 1062 (Ill. 2015); People v. Woods, No. 311452, 2013 WL 6690679, at *7 (Mich. Ct. App. Dec. 19, 2013).

207. 573 U.S. 373, 385–86 (2014).

208. *Id.* at 386; *see* United States v. Gary, 790 F.3d 704, 705, 709–10 (7th Cir. 2015) (holding that general search-incident-to-arrest principles provide a basis for good faith reliance on precedent in conducting a search incident to arrest of a cell phone); United States v. Clark, 29 F. Supp. 3d 1131, 1145 (E.D. Tenn. 2014) ("Supreme Court authority regarding searches of other types of containers found on an arrestee's person . . . in combination with the decisions of all circuit courts to have addressed the issue . . . render the actions of [the officer] objectively reasonable under the reasoning of *Davis*.").

209. *E.g.*, United States v. Gordon, No. 11–cr–20752, 2013 WL 791622, at *8 (E.D. Mich. Mar. 4, 2013); United States v. Rose, 914 F. Supp. 2d, 15, 22–24 (D. Mass. 2012); United States v. Oladosu, 887 F. Supp. 2d 437, 448 (D.R.I. 2012).

210. *See Stephens*, 764 F.3d at 337 n.11 (endorsing, in dicta, the position that the good faith exception should be implemented similarly to qualified immunity, which precludes a damages remedy for all but the most obvious of Fourth Amendment violations); United States v. Leon, 856 F. Supp. 2d 1188, 1193 (D. Haw. 2012) (citing the silence of most courts on a Fourth Amendment issue as a basis for the application of the good faith exception); United States v. Luna-Santillanes, No. 11–20492, 2012 WL 1019601, at *9 n.5 (E.D. Mich. Mar. 26, 2012) (finding persuasive the argument that police could claim good faith reliance on "a widely-accepted practice in the police community that had not been held unconstitutional" in the jurisdiction).

C. POTENTIAL REFORMS

The current good faith exception encourages officers to adopt new surveillance through dubious reliance on existing statutes or precedents taken out of their factual contexts.[211] Courts can address these problems by rethinking, and narrowing, the good faith exception. The Supreme Court can start by limiting the statute-based good faith exception to situations where a law specifically addresses a particular surveillance practice. *Illinois v. Krull* held that an officer who relied on a statute specifically authorizing the inspection of automobile wrecking yards was entitled to the good faith exception when he inspected a wrecking yard without a warrant.[212] But the reasoning of *Krull* seems to justify reliance on any statute, no matter how broad.[213] In practice, it permits officers to rely on general statutes that permit sweeping surveillance of personal data and do not specifically address the surveillance practice at issue.[214]

The Supreme Court should make clear that police who "rely" on a general-purpose statute to authorize a novel form of surveillance will not be able to claim the good faith exception. Such statutes create broad legal frameworks and do not purport to weigh in on the constitutionality of specific police practices. They provide no legislative judgment on which an officer can rely. Rather, in this context, courts should interpret statutes to only endorse those forms of surveillance they directly address. To rule otherwise is to create the very incentives that the Court claims it abhors—incentives for law enforcement to rapidly apply unconstitutional surveillance practices, based on dubious interpretations of obsolete statutes.[215]

In addition, the Supreme Court should make clear that the good faith exception only applies to binding precedent that directly addresses a specific surveillance

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211. The good faith exception thus operates similarly to the Court's Fourth Amendment standing doctrine, which incentivizes officers to violate the Fourth Amendment by warrantlessly investigating other individuals besides the target of the prosecution. *See* Gray, *supra* note 59, at 52–53. Indeed, the IRS has actively encouraged investigators to use the standing doctrine to violate the Fourth Amendment, for instance, by illegally searching a banker for information that will be used to later prosecute his clients. *Id.* at 53–54 (citing United States v. Payner, 447 U.S. 727, 739 (1980)).

212. 480 U.S. 340, 360 (1987).

213. *Id.* at 349–50.

214. *See, e.g.*, *In re* Application of U.S. for Ord. Directing Provider of Elec. Commc'n Serv. to Disclose Recs. to Gov't, 620 F.3d 304, 308 (3d Cir. 2010) (finding that cell site location information "falls within the scope of [18 U.S.C.] § 2703(c)(1)"); *In re* Applications of U.S. for Ords. Pursuant to Title 18, U.S. Code Section 2703(d), 509 F. Supp. 2d 76, 80 (D. Mass. 2007) ("[H]istorical cell site information clearly satisfies each of the three definitional requirements of section 2703(c) . . . .").

215. *See Krull*, 480 U.S. at 349–50 (arguing that police will not be incentivized to violate the Constitution by the application of the good faith exception to statutes); *see also* Withrow v. Williams, 507 U.S. 680, 686 (1993) ("The [exclusionary] rule serves . . . to deter future Fourth Amendment violations."); United States v. Calandra, 414 U.S. 338, 348 (1974) (stating that the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect"); Elkins v. United States, 364 U.S. 206, 217 (1960) (stating that the exclusionary rule's purpose "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

practice.[216] This bright-line rule would be easy to administer and would limit the reach of the good faith exception, preventing it from swallowing the exclusionary rule.[217] The current lower court standard, by contrast, eliminates the exclusionary rule whenever the government can make a colorable argument based on prior cases.[218] It incentivizes the government to push doctrinal boundaries, enabling the use of unconstitutional surveillance. The Supreme Court should recognize the problem and eliminate this loophole. This would be consistent with its decision in *Davis*, which involved an old precedent that expressly authorized the police practice in question.[219] Because the police in *Davis* had "followed the . . . precedent to the letter" and "scrupulously adhered to governing law," they qualified for the good faith exception.[220] Future cases should require the same specificity before the police can claim reliance on a precedent.[221]

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216. The reforms suggested in this Article are limited to proposed changes to Supreme Court precedent. Legislative reforms might also be possible but are outside the scope of this Article's proposals.

217. *See* Mason, *supra* note 205, at 86.

218. *See supra* notes 207–09, 214, and accompanying text.

219. *Davis v. United States*, 564 U.S. 229 (2011), affirmed an Eleventh Circuit opinion making clear that "our precedent on a given point must be unequivocal before we will suspend the exclusionary rule's operation." United States v. Davis, 598 F.3d 1259, 1266 (11th Cir. 2010).

220. *See Davis*, 564 U.S. at 239, 249.

221. Defenders of the good faith exception might respond that additional exclusion would incentivize criminal behavior by defendants who recognize that evidence may be excluded from trial even when officers were trying to investigate within constitutional bounds. For instance, in *Lange v. California*, Justice Thomas argued that whenever the exclusionary rule is enforced, society pays a "high cost" in the form of evidence being removed from the fact-finder's purview. 594 U.S. 295, 318 (2021) (Thomas, J., concurring in part and concurring in the judgment). In *Lange*, Justice Thomas argues that excluding evidence obtained while pursuing a fleeing misdemeanant would incentivize suspects to flee more often. *See id.* Justice Thomas's position is based upon an unsupported assumption that exclusion encourages more crime. Even if criminal defendants could rely on the courts to consistently apply a robust version of the exclusionary rule—which, as this Article highlights, is far from the reality in modern courtrooms—they would still have little incentive to commit more crime on that basis alone. The exclusionary rule only accrues to a defendant's benefit after officers have arrested them, prosecutors have charged them, and eventually a judge has excluded evidence. This could be years after the crime itself occurred, with the defendant often sitting in a jail cell in the interim. Further, depending upon the nature of the crime and the type of evidence excluded, that decision alone may not bring the prosecution to an end if the remaining evidence is still sufficient to prove the crime, or some lesser charge, beyond a reasonable doubt. Though an exclusionary outcome is certainly more preferable for a defendant than a conviction that leads to decades behind bars, it is far from a free pass for criminal activity. Additionally, in cases where officers quickly deploy new investigative technologies and techniques, and the good faith exception renders the evidence that they discover admissible, there is even less incentive for suspects to risk committing more crimes because the exclusionary rule could eventually come to their rescue. At the time they committed their crimes, the suspects likely did not even understand the officers' technical capabilities to investigate and gather such evidence. If the defendants are unaware of those techniques, there is no way exclusion of evidence collected by officers could influence defendants' behavior.

IV. BEYOND INCENTIVES: A RE-EXAMINATION OF THE GOOD FAITH EXCEPTION

Our data and analysis above uncover several disturbing trends in Fourth Amendment law.[222] We likewise demonstrate that the current good faith exception incentivizes dubious police behavior on the constitutional margins.[223] Yet, the problems with the good faith exception go far beyond the perverse incentives it creates for government officials. This Part explores those deeper problems. First, in many cases, the exception precludes an effective remedy for core violations of the Fourth Amendment. Second, the good faith exception can make the distribution of remedies arbitrary and inequitable, dependent on timing and luck rather than on constitutional harm. Third, it may insulate discretionary police behavior from constitutional review in a manner that disadvantages groups that are disproportionately targeted by the police. Fourth, a robust Fourth Amendment remedy is also, in many cases, a necessary judicial response to executive overreach and a structural necessity in our tripartite government. Finally, this Part offers suggestions for reevaluating, modifying, and, in some cases, overturning existing good faith exception doctrine. As this Part details, the good faith exception as currently applied threatens to substantially undermine the Fourth Amendment right.

A. FOURTH AMENDMENT PRINCIPLES

The good faith exception is part of a broader remedial structure for Fourth Amendment violations that has been significantly weakened in the last forty years.[224] This Section seeks to place the good faith exception's growth in the context of that weakening of Fourth Amendment protections. A useful remedial structure for Fourth Amendment violations should at a minimum ensure that "government actors generally operate within the bounds of the law."[225] And it should provide meaningful remedies for individuals whose rights have been violated, with limited exceptions necessitated by public policy.[226] The good faith exception undermines these constitutional requirements. The practical meaning

222. *See supra* Section II.A. Also concerning is the fact that, even if the Supreme Court finds that a new investigative technique is unconstitutional, case outcomes will lag due to the good faith exception. *See supra* Section II.B.

223. *See supra* Part III.

224. As Aziz Huq has pointed out, "settled constitutional rules are daily broken." Huq, *supra* note 3, at 3. Some constitutional rules "are often observed now only in the breach." *Id.*

225. *See* James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 120 (2009) (noting that civil *Bivens* actions seeking damages from federal officials for violations of the Constitution fall into such a "remedial framework" seeking to hold government actors accountable for acting "within the bounds of the law").

226. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787 (1991) (discussing the basic functions of remedies in the constitutional scheme, including redressing individual violations and reinforcing structural values); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2544 (1996) ("[T]here seems little reason to believe that police officers who . . . realize that there will be no sanction within the criminal process for violating constitutional rights, will nonetheless refrain from such violations as a result of such alternative sanctions.").

of Fourth Amendment rights generally depends on their enforceability. Simply noting violations of the Fourth Amendment while denying any remedy fails to demonstrate respect for these rights.

Twenty-five years ago, Carol Steiker noted that police will "see little reason to continue to obey conduct rules that are consistently unenforced in criminal prosecutions."[227] The good faith exception is likely to bear out this prediction. It merges the substantive Fourth Amendment rules that govern investigators' conduct with remedial doctrines that offer few or no penalties for violations. In a substantial portion of all Fourth Amendment suppression cases—12.7% of such cases in our study—the good faith exception has undermined the practical force of the Fourth Amendment's rules by disallowing the exclusion of evidence.

This might be constitutionally permissible if the good faith exception were limited to rare cases involving merely technical Fourth Amendment violations or actual reliance on interpretive errors by magistrates. But the good faith exception goes far beyond these cases.[228] It strikes at the very core of the Fourth Amendment right, denying suspects a remedy when government agents invade their property under the authority of an unconstitutional statute or executive order.[229] This was the central evil that the Founders meant to eradicate via the Fourth Amendment.[230]

The Fourth Amendment largely arose as a response to a series of cases in which English officers empowered by general warrants entered the homes of citizens to search for evidence of libel against the King.[231] These general warrants were authorized either by statute or direct executive order.[232] The resulting invasive searches angered the colonists, and no less an authority than John Adams wrote that outrage over these general warrants (i.e., "writs of assistance") authorized by parliamentary statute gave rise to "the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain."[233] Adams concluded that

227. Steiker, *supra* note 226, at 2543. Steiker specifically theorized that "[i]f a generalized good-faith exception were upheld and interpreted expansively, the Court could achieve through a reworking of constitutional remedy what it has been unwilling to accomplish directly through a reworking of constitutional right—the establishment of a general standard of 'reasonableness' as the governing enforceable Fourth Amendment norm." *Id.* at 2514.

228. *See supra* Section II.A.

229. *See, e.g.*, Herring v. United States, 555 U.S. 135, 146 (2009); Illinois v. Krull, 480 U.S. 340, 359–60 (1987).

230. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 624–26 (1886); Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 633 (2018); Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 72 (2012).

231. *See, e.g.*, Entick v. Carrington (1765) 95 Eng. Rep. 807, 807–08 (KB); Wilkes v. Wood (1763) 98 Eng. Rep. 489, 498 (KB).

232. John Adams, *No. 44. Petition of Lechmere (Argument on Writs of Assistance)*, *in* 2 LEGAL PAPERS OF JOHN ADAMS, 106, 108–11, 111 n.15 (L. Kinvin Wroth & Hiller B. Zobel eds., 1968) (discussing the basis of the writs of assistance in a series of Parliamentary Acts permitting searches of suspected contraband goods); *Boyd*, 116 U.S. at 625–26 (discussing "the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994) ("In colonial America, Crown executive officials, including royal Governors, also claimed authority to issue warrants.").

233. Adams, *supra* note 232, at 107; *see* Paxton's Case, Mass. (1 Quincy) 51, 51, 56–57 (1761).

"[t]hen and there the child Independence was born."[234] Similarly, the colonists celebrated cases where citizens sued Crown officers acting in reliance on general warrants issued by executive officers, winning large damage awards.[235]

A search conducted in reliance on an unconstitutional law is the quintessential "unreasonable search" against which the Fourth Amendment protects. Such a search lacks the specific justification for government intrusion that the drafters of the Fourth Amendment sought to require centuries ago. A remedial doctrine that precludes any meaningful remedy for the core evil targeted by the Fourth Amendment is not consistent with respect for a fundamental constitutional right. Currently, many applications of the good faith exception functionally repeal part of the core of the Fourth Amendment. These applications should be declared unconstitutional.

B. DELAY AND STAGNATION

As discussed above, the good faith exception allows courts to continue approving unconstitutional practices for years after the Supreme Court has clarified that those practices are unlawful.[236] This imposes a lengthy period of delay following any rights-affirming Supreme Court decision involving a statute or precedent or type of warrant.[237] Even when the Court declares an investigatory technique unconstitutional, it can take years for the consequences of the decision to be felt; all the cases that preceded that change are essentially grandfathered into constitutionality.[238] This, too, evinces disrespect for Fourth Amendment rights. It produces a massive body of cases in which courts find or assume a constitutional violation and then declare that no remedy is available for that violation.[239]

In addition, the good faith exception impedes the development of constitutional law and contributes to jurisprudential stagnation surrounding the Fourth Amendment. Lower courts can avoid deciding whether new surveillance techniques are unconstitutional by holding that the police relied in good faith on existing authority and leaving it at that.[240] In roughly 30% of cases in our dataset applying the good faith exception, courts avoided resolving the substantive

234. Adams, *supra* note 232, at 107.

235. *See Entick*, 95 Eng. Rep. at 811 (awarding 300 pounds in damages); *Wilkes*, 98 Eng. Rep. at 499 (awarding 1000 pounds in damages); Tokson, *supra* note 230, at 633 (giving an overview of these cases and their implications); Amar, *supra* note 232, at 798, 814 (discussing punitive damages in early trespass cases).

236. *See supra* Section II.B.

237. *See supra* Section II.B. For example, nearly 40% of cases decided in the first quarter of 2021, almost three years after *Carpenter v. United States*, 585 U.S. 296 (2018), was decided, were resolved based on the good faith exception. The delays came despite the fact that most of those cases involved location tracking using cell phones similar to that in *Carpenter*. *See, e.g.*, United States v. Felder, 993 F.3d 57, 75 (2d Cir. 2021); United States v. Kent, No. 17-CR-0039, 2021 WL 621430, at *2 (N.D. Ga. Jan. 28, 2021).

238. *See supra* Section II.B.

239. *See* Tokson, *supra* note 89, at 1840.

240. *See, e.g.*, United States v. Mayo, 615 F. Supp. 3d 914, 923 (S.D. Iowa 2022); United States v. Tolbert, 326 F. Supp. 3d 1211, 1217 (D.N.M. 2018); United States v. Rose, 914 F. Supp. 2d 15, 24 (D. Mass. 2012).

Fourth Amendment issue.[241] This effect was especially pronounced in the federal courts of appeals, which avoided substantive issues in 52.4% of good faith cases.[242] And this avoidance of substantive rulings in the circuit courts contributes to the pronounced lack of Fourth Amendment cases at the Supreme Court in the past several years, by preventing the formation of circuit splits.[243] The reluctance of courts to substantively address Fourth Amendment issues leaves the law ambiguous and subject to misinterpretation and abuse.[244] Defendants will also be less inclined to litigate Fourth Amendment violations if no remedy is available, further impeding the development of Fourth Amendment doctrine.[245] These effects are particularly concerning in the modern surveillance context, where new technologies regularly pose novel Fourth Amendment questions that courts are called upon to resolve.[246] In an area that requires regular intervention by courts to keep up with the pace of technological change, the good faith exception contributes to a harmful legal stagnation.[247]

C. EQUITY AND THE DISTRIBUTION OF REMEDIES

The good faith exception introduces luck and arbitrariness into the distribution of Fourth Amendment remedies. Violations of the same Fourth Amendment right can result in very different remedial consequences, depending on extraneous factors.[248] Suspects targeted by invasive surveillance practices not yet declared unconstitutional by a high court will receive no remedy, while suspects targeted later in time will be able to exclude evidence. Likewise, individuals suffering flagrantly unconstitutional searches will receive a remedy, while those suffering unconstitutional searches that can be flimsily justified by reliance on a generic statute or precedent will receive none. The fault of the officers, not the violated rights of the targeted individual, now dictates the application of Fourth Amendment remedies.[249]

The overall lack of effective remedies likewise indicates that those whose rights are violated most frequently—criminal defendants, who are

241. *See supra* Section II.A.3.c.

242. *See supra* Section II.A.3.d.

243. *See supra* note 118 and accompanying text.

244. *See supra* Part III.

245. Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 253 ("The case-by-case elaboration of Fourth Amendment law requires a stream of cases, and a stream of cases generally demands remedies to create cases and controversies and to encourage claims to be brought.").

246. *See* Matthew Tokson & Ari Ezra Waldman, *Social Norms in Fourth Amendment Law*, 120 MICH. L. REV. 265, 307–08 (2021).

247. *See id.* at 304–08 (discussing the importance of judicial resolutions of Fourth Amendment questions involving new surveillance technologies); *supra* notes 116–18 and accompanying text (describing the inhibitory effect on Supreme Court review of circuit court reluctance to rule on substantive Fourth Amendment issues).

248. *Compare* United States v. Pacheco-Alvarez, 227 F. Supp. 3d 863, 893 (S.D. Ohio 2016) (suppressing evidence obtained via unlawful warrantless arrest), *with* United States v. Brown, 618 F. App'x 743, 745–46 (4th Cir. 2015) (declining on good faith exception grounds to suppress evidence obtained via unlawful warrantless arrest following clerical error).

249. *See* Huq, *supra* note 3, at 6.

disproportionately young Brown and Black men[250]—receive only limited protection in our constitutional order. This in turn reinforces systemic racial inequalities endemic to American criminal justice.[251] Courts are less likely to offer remedies for violations committed by "dispersed, discretion-exercising officials," like the police, than they are for constitutional violations by centralized legal authorities, such as regulatory bodies.[252] Fourth Amendment violations committed by individual investigators and line officers, though frequent, are less visible and less likely to be remedied by the courts, in part due to the good faith exception.[253] And those violations tend to be most common against communities with the least political power.[254]

When a court provides a remedy to the parties before it, it not only materially changes their positions, but it also sends an important message about the dignity of those parties.[255] The good faith exception undermines defendants' dignity, at least to some degree—it suggests that violations of their constitutional rights are tolerable because their rights are merely theoretical. Symbolically and practically, the good faith exception diminishes the rights of the most frequent victims of police violations.

D. THE STRUCTURAL JUSTIFICATION FOR EXCLUSION

The good faith exception can also undermine vital separation of powers principles. The exclusionary rule is often a necessary judicial check on the Executive Branch.[256] Without it, courts would frequently be powerless to check executive

250. While Black and Hispanic individuals make up roughly one third of the U.S. population, they constitute nearly 56% of the U.S. incarcerated population. *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet [https://perma.cc/8FRN-RYEH] (last visited Dec. 29, 2024). "[S]ome prosecutors . . . file charges against [Black defendants] for low-level drug offenses more frequently than against whit[e] [defendants], even though studies show that white" use of such drugs is higher. Timothy Williams, *Black People Are Charged at a Higher Rate than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html. In addition, "African Americans are held in state prisons at a rate five times that of whites." JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 218 (2017).

251. *See Criminal Justice Fact Sheet*, *supra* note 250 (reporting that Black defendants are 22% more likely to be exonerated for "convictions involving police misconduct").

252. Huq, *supra* note 3, at 73–74; *see also* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 799 n.104 (2006).

253. *See* Huq, *supra* note 3, at 74.

254. *Id*. This may explain why the Court, perhaps without malicious intent, has made so many drastic changes to the remedies available for Fourth Amendment violations in the last half-century. Changes to such remedial rules "lack . . . visibility to the public" and "feel less dramatic and 'political' than, say, overturning *Miranda* outright." Steiker, *supra* note 226, at 2542. Such considerations may also have motivated what Barry Friedman has called the "stealth overruling" of *Miranda* rights. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 4 (2010).

255. *See* Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1288 (2021).

256. *See* Fallon & Meltzer, *supra* note 226, at 1789 (arguing that the most "fundamental" or "unyielding" role of constitutional remedies is "ensuring governmental faithfulness to law").

officers who violate constitutional rights.[257] As Professor David Pozen has noted, constitutional doctrine typically does not consider the good or bad faith of government actors themselves when determining the constitutionality of their actions.[258] In part, this is because our constitutional structure actually assumes that government actors will often act in bad faith; government is inhabited by men, not angels, and thus actors within the branches of government will pursue their own interests rather than strive for the best possible outcomes in good faith.[259] The system of checks and balances rests on this assumption, taming the ulterior motives of government actors by pitting their self-interests against each other.[260] Thus, constitutionality does not typically turn upon an analysis of motives, which are already assumed to be at least self-interested and quite frequently the product of bad faith.

The good faith exception turns that assumption on its head. Rather than presuming that executive actors are likely to behave badly, the good faith exception presumes that individual officers have acted in good faith.[261] But our constitutional structure typically relies on the judiciary to assume the opposite—that executive investigators will typically behave opportunistically, if not in deliberate bad faith.[262] That assumption is necessary for the judicial branch to play its role as an effective check on executive overreach in the investigatory process.[263] It suggests that assumptions of investigatory good faith should be significantly tempered in Fourth Amendment jurisprudence.[264]

Likewise, it undermines the separation of powers to deprive courts of any meaningful remedy against unconstitutional searches conducted in reliance on an unconstitutional statute. Though courts may extend "a presumption of constitutional validity" to the legislature,[265] once that presumption has been rebutted, the judiciary

257. *See id*. at 1739 n.27.

258. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 888–89 (2016).

259. *Id*. at 914 (citing THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003)).

260. *Id*.; THE FEDERALIST NO. 51, *supra* note 259 ("Ambition must be made to counteract ambition.").

261. Pozen, *supra* note 258, at 898–99 ("[T]he Court has narrowed its focus to objective reasonableness and 'purged' any consideration of motive from the qualified immunity analysis, as well as from its Fourth Amendment jurisprudence generally—thus disavowing the core conception of bad faith in its efforts to police the police.").

262. David Pozen also suggests that opportunism is a form of bad faith in many legal constructs. *See id*. at 894 ("Spanning the subjective–objective divide, many examples of legal bad faith seem to involve opportunism.").

263. Gold, *supra* note 163, at 1594 ("[B]y holding that *judicial* suppression was not a necessary consequence of a Fourth Amendment violation, [the Supreme Court] left the Fourth Amendment right institutionally underenforced. In so doing, the Court repositioned itself institutionally as a deferential, secondary check on Fourth Amendment enforcement and refused to afford a remedy for some executive branch violations.").

264. This is especially true given a criminal suspect's inability to act as a check on the likely opportunism and bad faith of executive investigators. As David Pozen notes, "judicial enforcement of bad faith makes more sense where self-help and reputational sanctions are likely to be ineffective," and that should apply to the criminal process where "[c]riminal suspects cannot as a rule unilaterally counteract the abuses of their jailers." Pozen, *supra* note 258, at 915.

265. Illinois v. Krull, 480 U.S. 340, 351 (1987) (citing McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802, 808–09 (1969)).

should assert the primacy of the Constitution.[266] This is, as Justice John Marshall put it, "the very essence of judicial duty."[267] The good faith exception interferes with this duty, allowing legislatures to shield unconstitutional acts so long as their statutes are not obviously unconstitutional.[268] The judiciary must do more if it is to effectively check legislative authorizations of invasive surveillance.

Even if there are necessary exceptions to the exclusionary rule's applications, courts must be able to respond substantively to constitutional violations.[269] Merely acknowledging that a violation has occurred is not enough to meaningfully check a coordinate branch that has broken its constitutional restraints—restraints that are essential to our government of separated, balanced powers.

There may be other paths for a judicial check on political branch violations of Fourth Amendment rights. An effective tort remedy—one widely available to citizens irrespective of their means or backgrounds and one that broadly applies to investigatory misconduct even on relatively novel facts—might provide that path. But to date, no such tort remedy has emerged.[270] Section 1983 litigation, for reasons well-worn in the academic literature and popular debate, has not met that standard.[271]

As this Article has noted, the good faith exception permits judges to avoid making substantive Fourth Amendment rulings because no remedy is likely to result, even if a violation has occurred.[272] Judges may find the ease of this

266. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

267. *Id.* at 178.

268. *See Krull*, 480 U.S. at 349–50 ("Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law.").

269. *See* Fallon & Meltzer, *supra* note 226, at 1736 (arguing for a regime of constitutional remedies that both provides relief to individual victims in most cases and provides remedies "adequate to keep government within the bounds of law").

270. *See* Bloom & Fentin, *supra* note 59, at 66 ("The civil liability approach is most seriously flawed because it ignores the well-documented failure of tort actions to impact the behavior of government officials.").

271. *See, e.g.*, Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914, 923–25 (2015); Alan K. Chen, *Rosy Pictures and Renegade Officials: The Slow Death of* Monroe v. Pape, 78 UMKC L. REV. 889, 910 (2010). Other theories that support the exclusionary rule, such as Richard Re's due process approach, seek a balance between Fourth Amendment protections and other constitutional clauses. *See* Re, *supra* note 59, at 1912. Re argues that court reliance upon a Fourth Amendment violation to impose a conviction would deprive the defendant of his liberty without due process, violating the Due Process Clause. *Id.* Re also suggests that the good faith exception is largely a misnomer; it concerns officers' reasonable reliance on factual and legal authority, rather than any remedial exception. *Id.* at 1943. Such actions are not unreasonable searches at all. *Id.* This approach is difficult to reconcile with the history of unreasonable searches discussed *supra* in Section IV.A. Government officials relying on unconstitutional statutes or executive writs to conduct surveillance were the core violations that motivated the passage of the Fourth Amendment. *See supra* notes 231–35 and accompanying text. Even setting this aside, much would rest on how wide a range of interpretations of a seemingly irrelevant statute or inapplicable precedent a court considers reasonable. As our discussion above demonstrates, many courts have interpreted the good faith exception so broadly that they accept dubious claims that officers relied on existing legal authority to justify their actions. *See supra* Sections III.A–B.

272. *See supra* Section II.A.3.c.

approach appealing, especially in complex or novel cases.[273] Yet, if courts are reluctant to create new precedents that would curb overreach in the investigatory process, they are not fulfilling their structural role as a check on the other branches. The structure of our government demands a more robust response from the judiciary to curb executive and legislative excess.

E. REEVALUATING GOOD FAITH CASES

The principles discussed above compel reconsideration of the Supreme Court's precedents on the good faith exception. This is especially necessary when the source of the constitutional offense is a non-judicial branch of government. The core evil the Fourth Amendment was designed to prohibit, at its inception, was officer reliance on overbroad statutes or executive writs that authorized unreasonable searches and seizures.[274] Yet several good faith cases fail to acknowledge the structural need for exclusion in situations where members of a non-judicial branch have apparently authorized unconstitutional conduct. While the good faith exception is lawful in some of its applications, it should likely be limited to scenarios that involve reliance on judicial-branch pronouncements of law.

The application of the good faith exception to unconstitutional statutes should itself be deemed unconstitutional. *Illinois v. Krull*, where the Court applied the good faith exception to an officer's reliance on a statute,[275] should be reexamined and ultimately overturned. To be fair, the investigating officers had little reason to think that the statute at issue in *Krull* would later be declared unconstitutional.[276] But the decision's expansive language—which again emphasized that the prime reason for exclusion was to deter officer misconduct[277]—permits officers to push constitutional boundaries and rely on vague statutes with questionable relevance to new investigatory tactics.[278] Worse, government officials undermine a core purpose of the Fourth Amendment by relying on unconstitutional statutes to withhold remedies.[279] Deterring "indiscriminate general searches" was the "moving force behind the Fourth Amendment."[280] *Krull* is ultimately inconsistent with the Fourth Amendment's history and purpose, and it undermines effective deterrence. It should be reversed.[281]

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273. *See* Tokson, *supra* note 93, at 912–13 (discussing the effort and time costs for judges to resolve complex cases).

274. *See supra* notes 231–35 and accompanying text.

275. 480 U.S. 340, 360–61 (1987).

276. *Id.* at 344, 349.

277. *Id.* at 347.

278. As noted earlier, lower courts have generally permitted officers to claim reliance on nearly any statute that could be expansively interpreted to permit the investigatory technique at issue. *See supra* Section III.A.

279. *Krull*, 480 U.S. at 362 (O'Connor, J., dissenting).

280. *Id.* (collecting cases).

281. *Krull* facilitates executive as well as legislative overreach. When the good faith exception provides blanket protection for reliance on generic or obsolete statutes, it allows executive action on the constitutional margins, authorized by another non-judicial branch, to go unchecked by the judiciary. Courts should actively intervene to block this inappropriate statutory reliance, ensuring that investigators do not abuse their authority.

Likewise, constitutional errors committed when officers rely on other executive agents deserve closer scrutiny. For instance, the Court's decision in *Herring v. United States*, permitting reliance on data-entry errors by a warrant clerk,[282] raises systemic and separation of powers concerns. At the systemic level, exclusion in situations like *Herring* would create incentives for officers and departments to avoid negligent mistakes. Indeed, the sheriff's department in that case had no routine practice in place to ensure the accuracy of its warrant database.[283] Following the *Herring* decision, no police department has an incentive to create such a plan. Negligence in handling warrants may result in unlawful arrests, searches incident to arrest, or harmful interactions between officers and innocent suspects.[284] Officer negligence creates a broad risk worthy of deterrence.

The Court in *Herring* also ignored the constitutional need for real remedies for constitutional violations. The database error in *Herring* led to an unconstitutional search. The Court permitted that violation because it was merely negligent. But constitutional violations undermine the Fourth Amendment no matter what *mens rea* the offending entity held at the time. The *Herring* decision reiterates the message that Fourth Amendment rights do not matter, especially for those most frequently arrested and charged with crimes. There must be meaningful relief for obvious Fourth Amendment violations, lest the Amendment's protections become purely hypothetical.

Addressing such negligence is also vital in light of the structural imperative to check executive overreach. Executive officials permitting other executive officials to conduct unreasonable searches[285] violates both Fourth Amendment and separation of powers principles. While the invalid warrants at issue in the seminal founding-era cases were intentionally issued by executive officers,[286] it likewise implicates the separation of powers when executive officers negligently cause false warrants to be served.[287] In both cases, the executive branch circumvents the judiciary and justifies its own privacy and property invasions. *Herring* was a missed opportunity for the judiciary to limit improper executive activity.

What about good faith reliance on an erroneous warrant? The classic good faith exception established in *United States v. Leon*[288] is more justifiable than the later iterations of the exception, but admitting evidence obtained in reliance on an invalid warrant still raises substantial concerns. In *Leon*'s favor, there are no major

282. 555 U.S. 135, 137–38, 147–48 (2009).

283. *Id.* at 154 (Ginsburg, J., dissenting).

284. *See* Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 780–81 (2009); Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 466–67 (2009).

285. *See, e.g.*, Entick v. Carrington (1765) 95 Eng. Rep. 807, 817 (KB) (invalidating a warrant issued by Secretary of State); Wilkes v. Wood (1763) 98 Eng. Rep. 489, 492, 499 (KB) (same); Amar, *supra* note 232, at 772–73, 780–81 (discussing the invalidity of general warrants issued by executive officials, the possibility of liability for officers issuing such warrants, and the greater validity of warrants issued by judges).

286. *See supra* note 285.

287. *See, e.g.*, *Herring*, 555 U.S. at 137–38.

288. 468 U.S. 897 (1984).

incentive-based concerns surrounding officers' good faith reliance on search warrants, unlike reliance on general-purpose statutes or general precedents.[289] Indeed, several aspects of Fourth Amendment doctrine encourage officers to pursue warrants, and warranted searches are generally less problematic than unwarranted ones.[290] Purported reliance on a facially-valid warrant granted in a particular case by a neutral judge is generally less concerning than purported reliance on broad statutes or precedents.

Nonetheless, the sheer volume of warrant reliance cases observed in our dataset may raise concerns that courts are too quick to find good faith reliance on erroneous warrants.[291] The arbitrariness of the good faith exception's application in these cases also raises concerns about inequality in the distribution of constitutional remedies.[292] Moreover, any application of the good faith exception may partially devalue defendants' constitutional rights.[293]

Equally troubling is the tendency of many judges in these cases to avoid reaching a merits decision altogether. In 24.3% of the cases in our dataset finding good faith reliance on warrants, courts never reached any conclusion about the substantive issue, instead deciding that the officer's reliance was in good faith and ending the inquiry there.[294] This tendency leaves Fourth Amendment law less developed and less clear, and impedes the development of on-point precedents that might inform a future case. Lower courts should be admonished—and perhaps even

289. One subtle concern in this and other Fourth Amendment contexts is that the Court may be cognitively motivated to rule in favor of sympathetic officers committing minor constitutional transgressions in low-stakes investigations. Avani Mehta Sood has used cognitive experiments to demonstrate that judges may use "motivated cognition" to subconsciously reason towards a preferred result in criminal cases, depending upon the moral blameworthiness of the parties. Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1546–47 (2015). Sood also posits that "the nature of a defendant's underlying crime may have played a role even in the high-profile foundational Supreme Court cases that established the exclusionary doctrine." *Id.* at 1553. Another potential incentive-based concern might simply be that, in the absence of the good faith exception, police officers could be more motivated at the margins to bolster their warrant applications by gathering additional evidence before applying or by declining to apply in marginal cases.

290. *See, e.g.*, Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1638–52 (2012) (enumerating several practical and legal benefits of warrants, including effective deterrence of police misconduct); Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L.J. 743, 768–73 (2010) (discussing warrant-search success rates and comparing them with the substantially lower success rates observed for warrantless searches); Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 922–25 (2009) (comparing with-warrant and warrantless searches and finding high success rates and accurate listings of items to be seized for with-warrant searches); *cf.* Jessica Miller Schreifels & Aubrey Wieber, *Warrants Approved in Just Minutes: Are Utah Judges Really Reading Them Before Signing Off?*, SALT LAKE TRIB. (Jan. 16, 2018, 10:13 AM), http://www.sltrib.com/news/2018/01/14/warrants-approved-in-just-minutes-are-utah-judges-really-reading-them-before-signing-off (reporting that Utah state records on electronic warrants, i.e., e-warrants, indicate that judges rapidly approve e-warrants, often after fewer than 10 minutes of review, and approve roughly 98% of all e-warrant applications).

291. *See supra* Section II.A.3.

292. *See supra* Section IV.C.

293. *See id.*

294. *See supra* Sections II.A.3.b–c.

required—to address the merits of a constitutional claim first and the good faith exception second. Courts of appeals might even occasionally remand cases that lower courts have resolved on good faith exception grounds for a determination on the merits without reaching the good faith issue on appeal.[295]

Officer reliance on precedents that are later overturned raises a similarly complex question. When officers rely on directly controlling precedents authorizing some form of surveillance, as in *Davis v. United States*, application of the good faith exception raises relatively few concerns.[296] Police reliance on a directly applicable judicial decision raises no separation of powers issues or adverse incentives, and officers cannot second-guess such decisions when they squarely apply.

This is not to say that *Davis* raises no practical or jurisprudential concerns. Its language has often been construed by lower courts to permit officers to push constitutional boundaries when precedents are unclear or only address tenuously analogous contexts.[297] Some good faith reliance on precedent is defensible, but it should be limited to clear, directly applicable decisions. The expansive version of *Davis* that stands today creates perverse incentives and risks authorizing unconstitutional searches on a broad scale.[298]

Davis may also need to be modified slightly to avoid the ossification of Fourth Amendment law. One risk posed by the precedent-based good faith exception is that it will remove any incentive for defendants to challenge erroneous precedents. Even if they win on the merits, their "victory" is "Pyrrhic" because the good faith exception ensures that the evidence against them will be admitted.[299] Courts might consider granting exclusion to the particular defendant who successfully challenges an existing Fourth Amendment precedent to incentivize future challenges.[300]

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295. Appeals courts might also review good faith exception determinations de novo in those jurisdictions where they do not already, but many jurisdictions already engage in de novo review of the legal determination that the good faith exception applies. *See, e.g.*, United States v. Jackson, 67 F.3d 1359, 1366 (8th Cir. 1995) ("Turning to the two prongs of the *Leon* test, we defer to a finding of good faith unless clearly erroneous, but subject conclusions about the objective reasonableness of the officers' reliance to de novo review."); United States v. Maggitt, 778 F.2d 1029, 1035 (5th Cir. 1985) ("[T]he issue of objective reasonableness of officers' reliance on a search warrant is a question of law reviewable *de novo* in this Court."); United States v. Hendricks, 743 F.2d 653, 656 (9th Cir. 1984) ("Although the lower court did not have occasion to determine whether the officers acted in good faith, if the record is adequate we can reach that issue for the first time on appeal since the district court's determination of good faith would be subject to *de novo* review as a mixed question of fact and law . . . ."); State v. Zwickl, 393 P.3d 621, 628 (Kan. 2017) ("[A]n appellate court considers whether the factual underpinnings of a district court's decision were supported by substantial competent evidence and then reviews de novo the ultimate legal conclusion drawn from those facts.").

296. *See* Davis v. United States, 564 U.S. 229, 236 (2011) (explaining the lower court's decision to apply the good faith exception because penalizing the arresting officer for following binding appellate precedent would not deter Fourth Amendment violations).

297. *See, e.g.*, United States v. Caesar, 2 F.4th 160, 169 (3d Cir. 2021); Virgin Islands v. John, 654 F.3d 412, 417 (3d Cir. 2011).

298. *See supra* Section III.B.

299. Kerr, *supra* note 205, at 1092.

300. *See id.*; *Davis*, 564 U.S. at 248 (noting that, in a future case, it might be appropriate to "permit[] the suppression of evidence in that one case" which results in the "overruling of one of [the Supreme

CONCLUSION

This Article has reexamined the law and theory of the good faith exception. It finds that the exception, originally confined to narrow circumstances, is turning into a protection for nearly any investigatory activity with an arguable connection to an existing precedent or statute. Our study is the first to empirically demonstrate the exception's substantial influence on modern Fourth Amendment law. Courts rely on the exception with remarkable frequency, and a large proportion of courts invoking the exception avoid any substantive constitutional ruling, stunting the development of Fourth Amendment doctrine.

Further, our close theoretical examination of the good faith exception reveals that it incentivizes police and prosecutors to push the boundaries of constitutionality by aggressively employing invasive tactics with flimsy legal support. In addition, the exception denies a real remedy for core Fourth Amendment violations: when government agents rely on overbroad statutes or executive writs that authorize unreasonable searches. In its current form, the exception violates the constitutional rights of those most in need of Fourth Amendment protection, while undermining the structural role of the judiciary as a check on executive overreach. The Supreme Court should transform its good faith exception jurisprudence and address the exception's detrimental impacts on policing, privacy, and Fourth Amendment rights.

Court's] Fourth Amendment precedents"). The flip side of this reform might be a lower rate of overturning cases, however. The good faith exception can help motivate judges to overturn bad precedents in cases involving unsympathetic defendants. That is, courts under *Davis* can overturn a precedent but nonetheless admit evidence against a defendant, which may make them less hesitant to rule in favor of a robust Fourth Amendment right. *See* Sood, *supra* note 289, at 1563, 1580. A similar argument could be made in the context of unconstitutional statutes, but there are several compelling reasons not to apply a good faith exception in that setting that do not apply to the context of judicial precedents.