

NEW POLICE SURVEILLANCE TECHNOLOGIES AND THE GOOD-FAITH EXCEPTION: WARRANTLESS GPS TRACKER EVIDENCE AFTER *UNITED STATES V. JONES*

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I. INTRODUCTION

In *United States v. Jones*, the Supreme Court held—unanimously, and to the surprise of many court watchers—that placing a GPS tracker on a vehicle to monitor its movements on public streets is a “search” for purposes of the Fourth Amendment.¹ *Jones* is a true blockbuster decision, one that may ultimately be deemed as significant to the law of criminal procedure as *Katz v. United States*,² which has anchored Fourth Amendment law for the past forty-five years. In *Jones*, the Court announced an entirely new, independent, and potentially widely applicable test for what constitutes a search under the Fourth Amendment. It also signaled its willingness to dramatically rethink and expand the scope of the traditional *Katz* test in light of new surveillance technologies.

The Court’s holding was limited to the threshold question of what constitutes a search;³ accordingly, the action, in thousands of pending GPS tracker investigations around the country, will now turn to suppression, as pre-*Jones* tracker evidence faces post-*Jones* suppression motions. Whether *Jones* will result in the suppression of warrantless tracker evidence in cases pending as of January 2012 will depend on whether exceptions to the exclusionary rule can be found.

The question of how the exclusionary rule should apply to suppression claims brought under *Jones* is an extraordinarily important one for the future of Fourth Amendment law because it will force courts to confront the general question of how the exclusionary rule should apply to new developments in Fourth Amendment law. How courts answer that question will largely determine whether novel Fourth Amendment claims can be litigated at all. And the possible answers to that question are deeply uncertain because in June 2011, just six months before *Jones*, the Court decided a case, *Davis v. United States*,⁴ that may significantly restrict the reach of the exclusionary rule in cases of changing law. Whether *Davis* has that effect depends on how broadly lower courts interpret its holding, which requires courts to engage in an analysis of the applicable appellate caselaw in a particular jurisdiction at the time of a disputed police action.

In this Article, I set out a general framework for applying *Davis* to all the possible combinations of controlling state and federal appellate caselaw that might apply at a given time to a given search. I then show how the coming flood of *Jones* litigation about pending GPS tracker investigations is the perfect test of my reading of *Davis*—and, more importantly, of *Davis*’s impact on the future of the Fourth Amendment.

II. THE EXCLUSIONARY RULE: BACKGROUND

The exclusionary rule provides that evidence obtained by a Fourth Amendment search carried out without a warrant will be suppressed unless an

¹ *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

² *Katz v. United States*, 389 U.S. 347 (1967).

³ *Jones*, 132 S. Ct. at 947.

⁴ *Davis v. United States*, 131 S. Ct. 2419 (2011).

exception applies.⁵ There are a number of exceptions to the rule, however. Most prominently, if the police have probable cause, then the warrant requirement is excused if there are exigent circumstances.⁶ Furthermore, the exigent circumstances exception applies per se to all searches of vehicles.⁷ So an obvious litigation tactic for the government will be to argue that GPS tracking of a vehicle should be considered a vehicle search.⁸

Even if the police lack probable cause for a search, suppression is still not automatic. There are five general exceptions to the exclusionary rule that can apply to allow the introduction of evidence even where the police had no warrant, no probable cause, and no exigent circumstances or other warrant-rule exception. The “standing” exception provides that even when the police violate the Fourth Amendment, there will be no suppression unless the defendant’s *own* rights were violated.⁹ The independent-source exception provides that there will be no suppression where police obtain evidence through lawful means as well as unlawful.¹⁰ The inevitable-discovery exception provides that there will be no suppression where the investigation would inevitably have turned up the evidence through lawful means (even though police actually got it unlawfully).¹¹ And, the “attenuation” exception provides that there will be no suppression where there is no close causal relationship between the illegality and the discovery of the evidence.¹²

The fifth exception, “good faith,” is in many ways the most important because it kicks in when none of the others apply—in circumstances, in other words, in which there is no claim that the search was actually legal.

In its initial incarnation, in *United States v. Leon*, the good-faith exception was a rule about warrants: if a magistrate issued a warrant that was facially valid, but was later shown to be defective (shown, for example, to lack probable cause), then evidence discovered by officers executing the warrant would not be suppressed.¹³ The Supreme Court has steadily expanded the doctrine, however, to other situations in which the police discover evidence based on a search or arrest later shown to be unlawful. The Court first extended *Leon* to cover an officer’s reasonable reliance on a state statute later held unconstitutional,¹⁴ then to a mistake by a court clerk about the existence of an outstanding

⁵ See, e.g., *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Mapp v. Ohio*, 367 U.S. 643, 648 (1961); *United States v. Calandra*, 414 U.S. 338, 347–48 (1974).

⁶ E.g., *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

⁷ See *California v. Acevedo*, 500 U.S. 565, 580 (1991).

⁸ See Orin Kerr, Jones, *the Automobile Exception, and the Warrant Requirement*, VOLOKH CONSPIRACY (Feb. 2, 2012, 12:45 AM), <http://www.volokh.com/2012/02/02/jones-the-automobile-exception-and-the-warrant-requirement/>. At least one court has said this exception does not apply. *United States v. Ortiz*, No. 11-251-08, 2012 WL 2951391, at *16–19 (E.D. Pa. July 20, 2012) (holding that the vehicle exception does not apply to tracker installation).

⁹ See, e.g., *Brendlin v. California*, 551 U.S. 249, 254–57 (2007); *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). The Court actually uses scare quotes around “standing” to indicate that it is not Article III or prudential standing that is at issue, but simply the application of the Fourth Amendment. See *id.* at 133.

¹⁰ See *Murray v. United States*, 487 U.S. 533, 537 (1988).

¹¹ See *Nix v. Williams*, 467 U.S. 431, 444 (1984).

¹² See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 273–74 (1978).

¹³ *United States v. Leon*, 468 U.S. 897, 922 (1984).

¹⁴ *Illinois v. Krull*, 480 U.S. 340, 359–60 (1987).

warrant,¹⁵ and then, finally, in *Herring v. United States*, to a mistake by a police department clerk about the existence of an outstanding warrant.¹⁶

Herring, at least, was still about warrants: the holding was that when, because of sloppy police recordkeeping, an officer arrested a suspect based on a warrant that was no longer valid, evidence obtained during that arrest need not be suppressed.¹⁷ In 2011, however, the Court, in *Davis v. United States*, extended the doctrine into hitherto untouched territory: an officer's reliance not on a warrant, and not on a state statute, but rather on caselaw.¹⁸ *Davis* holds that the exclusionary rule does not apply to evidence discovered by police conduct that has been expressly authorized by governing appellate caselaw.¹⁹

Jones litigation—litigation about the admissibility of pre-*Jones* tracker evidence—is going to turn on the good-faith doctrine. For example, if—as in *Jones* itself²⁰—the officers lacked probable cause, neither the vehicle exception²¹ nor exigent circumstances²² will apply. And, in such cases—cases, for example, where the tracker was installed largely based on a hunch,²³ and the defendant was not otherwise a target—there will be no viable, independent source or inevitable discovery claim. In those cases—and I have no doubt that they number in the thousands²⁴—the suppression question will turn on the final exception: the “good-faith” rule. Whether the lower courts indeed apply *Davis* to pre-*Jones* GPS tracker searches will depend on the clarity of pre-*Jones* appellate precedent on tracker investigations, and on the lower courts' interpretation of the scope of *Davis*. As it turns out, there is considerable variation in the former²⁵ and significant scholarly disagreement on the latter.²⁶ In this Arti-

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

¹⁶ *Herring v. United States*, 129 S. Ct. 695, 698, 703 (2009).

¹⁷ *Id.* at 703.

¹⁸ *Davis v. United States*, 131 S. Ct. 2419, 2428 (2011).

¹⁹ *Id.*

²⁰ *United States v. Jones*, 132 S. Ct. 945 (2012).

²¹ See *supra* text accompanying notes 7–8.

²² See *supra* text accompanying note 6.

²³ That is to say, based on anything less than the probable cause required by *Jones*.

²⁴ In the wake of *Jones*, the FBI deactivated approximately 3,000 GPS trackers that were attached without warrants. See Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC NEWS (Mar. 7, 2012, 10:40 AM), <http://abcnews.go.com/blogs/politics/2012/03/supreme-court-ruling-prompts-fbi-to-turn-off-3000-tracking-devices/>. According to FBI General Counsel Andrew Weissmann, the agency struggled with how to retrieve many of these devices without turning them on “because now you needed probable cause or reasonable suspicion to do that,” suggesting that such a basis was lacking. *Id.* This does not account, of course, for the trackers employed by the myriad other federal investigative agencies, such as ATF, DEA, and ICE, or state and local agencies.

²⁵ See *infra* Part V.

²⁶ Compare, e.g., James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 395–96 (2011) (arguing that *Davis* really set up a stealth “officer culpability” standard that is equivalent to the traditional qualified immunity standard), and Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 727 (2011) (arguing that *Herring* implicitly adopts the qualified immunity standard as the suppression test), with, e.g., John M. Greabe, *Objecting at the Altar: Why the Herring Good Faith Principle and the Harlow Qualified Immunity Doctrine Should Not Be Married*, 112 COLUM. L. REV. SIDEBAR 1, 1 (2012) (just like it says), Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1079 (2011) (arguing that the good-faith exception should not be extended

cle, I defend what I see as the clearest interpretation of *Davis*, and set out a general framework for applying the *Davis* rule to the array of possible interactions between state and federal precedent that will confront trial courts in the myriad *Davis* scenarios that will arise as technology outpaces caselaw.

The practical question animating this Article is simple: What should happen to all these tracker investigations?²⁷ To develop that answer, I must also answer a theoretical question that has vexed commentators in the wake of *Davis*: How broad is the *Davis* rule? Did *Davis* really push *Leon* all the way to *Harlow*?²⁸ That is, did *Davis* really hold that the suppression test is identical to the qualified immunity test—which turns on whether the officer violated clearly established law?

I argue that the answer is an emphatic “no.” Despite the fears of some commentators,²⁹ that is simply not what *Davis* held. I think courts will read *Davis* as a straightforward adoption of the “settled-law” standard: in order to shelter under the good-faith exception, the officer’s conduct must have been *expressly authorized* by clearly established law.³⁰ *Davis* does not import *Harlow* into *Leon*: in cases of ambiguity or uncertainty, the evidence should be suppressed under *Davis* (because the officer was not expressly authorized by precedent), but the officer will also have qualified immunity (because he did not violate clearly established law).

Several prominent scholars, including Professors Tomkovicz, Greabe, and Laurin, fear that *Davis* has collapsed the suppression test into the qualified immunity test.³¹ I think they are wrong. But, as this Article explains, we don’t have to take my word for it: let’s just follow the GPS tracker cases that are about to explode in the wake of *Jones*. *Jones* provides a perfect test of the application of *Davis* to contexts of legal certainty and uncertainty. The pre-*Jones* appellate caselaw on GPS tracking varied widely, at the state and circuit level, ranging from silence to express disapproval to express approval. If I am right about *Davis*, then we should see different suppression results from jurisdiction to jurisdiction depending on the state of the pre-*Jones* tracker caselaw. In this Article, I make a state-by-state prediction about tracker evidence admissibility post-*Jones*, and set out a general framework for applying *Davis* in the

to changes in the law) [hereinafter Kerr, *Good Faith*], and Ross M. Oklewicz, Comment, *Expanding the Scope of the Good-Faith Exception to the Exclusionary Rule*, 59 AM. U. L. REV. 1715, 1755 (discussing the circuit precedents at issue in *Davis*, and characterizing the contested rule as involving “objectively reasonable reliance on a well-settled and unambiguous decision of an appellate court.”).

²⁷ The day after *Jones* was decided, a former student of mine contacted me. He was working in a DA’s office and had a tracker investigation case that was heading for trial. “What’s going to happen?” he asked. The answer was easy for California, but thinking through the application of *Davis* to the various jurisdictional permutations—and the scholarly disagreement about the reach of *Davis*—persuaded me that someone needed to write this article. I hope I am the first!

²⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), sets out the test for qualified immunity, which provides that government actors have qualified immunity from suit so long as their actions did not violate clearly established law.

²⁹ See *supra* note 26.

³⁰ See Kerr, *Good Faith*, *supra* note 26, at 1112–15.

³¹ See, e.g., Laurin, *supra* note 26, at 744; Greabe, *supra* note 26, at 1; Tomkovicz, *supra* note 26, at 396–97.

various combinations of state/circuit precedent that can apply. If the lower courts adopt my preferred reading of *Davis*—as some already have—then the framework sketched here should apply to all novel surveillance technologies.

III. UNITED STATES V. JONES

In *Jones*, the Supreme Court had to decide whether the installation and monitoring of a GPS tracker on a suspect's car was a "search" within the meaning of the Fourth Amendment. The use of trackers had not been thought by law enforcement to be a Fourth Amendment search. Prior to *Jones*, virtually every court to consider the question had held that attaching tracking devices and monitoring cars' movements was not a search.³² The courts relied on two Supreme Court cases from the 1960s, *Knotts*³³ and *Karo*,³⁴ which involved monitoring of "beepers" (pre-GPS tracking devices). The key fact in those cases (at least everyone thought so until *Jones*) was that the cars were being monitored while they were on public roads, where anyone could see them, and thus there was no invasion of a reasonable expectation of privacy.³⁵

Then, in 2010, the D.C. Circuit held, in a surprising decision, that long-term GPS monitoring *is* a search because the accumulation of many individual pieces of information about location creates a "mosaic" that reveals so much about a person that it violates his reasonable expectation of privacy.³⁶ The Supreme Court took the case and many observers (including me, I must admit) predicted that the Court would summarily reject the "mosaic theory" and explicitly affirm what the other circuits had held: that GPS tracking is not a search.

Instead, the Court agreed 9-0 that the GPS tracking at issue in the case was a search. But the Court fragmented badly on *why*. Four justices (Alito, Ginsburg, Breyer, and Kagan) endorsed the mosaic theory, and would hold that long-term monitoring invades a reasonable expectation of privacy.³⁷ And the majority (Scalia, Thomas, Roberts, Kennedy, and Sotomayor) poured out a sparkling new wine from a very old bottle, announcing a common-law trespass test that is now a new rule, complementing *Katz*: whenever the police engage in conduct that would have been a common-law trespass in 1791, and do so for the purpose of gaining information, they have engaged in a "search."³⁸ Justice Sotomayor, in what will likely be remembered as a bold strategic stroke of doctrine shaping, endorsed both the "trespass-rule" theory (with her vote), and the reasonable-expectation-of-privacy theory (with her written opinion, which

³² See *infra* Part V.

³³ *United States v. Knotts*, 460 U.S. 276, 277 (1983).

³⁴ *United States v. Karo*, 468 U.S. 705, 708 (1984).

³⁵ *Jones* tells us that the key fact of these cases was actually that the physical installation of the device in each case did not constitute a trespass on a 1791 common law analysis. *United States v. Jones*, 132 S. Ct. 945, 951–52 (2012); see also *id.* at 957–58 (Alito, J., concurring).

³⁶ *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010).

³⁷ *Jones*, 132 S. Ct. at 957.

³⁸ *Id.* at 949 ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.").

concur with the Alito opinion and announced a readiness to dramatically expand the *Katz* analysis for the social media age).³⁹

There are myriad fascinating potential consequences of *Jones* that will be written about at length this season;⁴⁰ but here I am interested in only one point: before January 23, 2012, GPS tracking *was not* a search,⁴¹ and after January 23, 2012, it *was* a search. This Article is about how the suppression rules treat such changes in the law—how courts should deal with cases adjudicated *after Jones* with evidence obtained *before Jones*.

IV. THE “GOOD-FAITH RELIANCE ON PRECEDENT” RULE: EXPRESS AUTHORIZATION?

A. *United States v. Davis*

In June 2011, in *United States v. Davis*, the Supreme Court announced what I will call the “faith-in-caselaw” exception to the exclusionary rule. In *Davis*, the prior legal rule at issue was the “vehicle-search-incident-to-arrest” rule from *New York v. Belton*.⁴² The *Belton* rule, as adumbrated by the circuits, was about as clear and unambiguous as one could want: lower courts, including the Eleventh Circuit, had uniformly interpreted it as a bright-line rule that searches of the interior of the car were per se permissible incident to the arrest of an occupant.⁴³ That is what the police did in *Davis*, in reliance on *Belton* and the Eleventh Circuit’s decision in *Gonzalez*, which “read *Belton* to establish a bright-line rule.”⁴⁴

But then, in between the arrest and the appeal, *Gant*⁴⁵ came along, limited *Belton*,⁴⁶ overruled the bright-line circuit interpretations, and held such car searches violated the Fourth Amendment.⁴⁷ So the *Davis* question was whether

³⁹ *Id.* at 954–57 (Sotomayor, J., concurring).

⁴⁰ Here are a few: Is common-law trespass now a viable basis for Fourth Amendment challenges once again, now that the Court has stated that *Katz* did not narrow the scope of the Fourth Amendment from its original trespass-based scope? How about the curtilage cases, then? How about *Place* (seizing luggage under *Terry*)? What about Justice Sotomayor’s suggestion that the Court re-think the whole *Katz* framework for the social media age? Or is Scalia trying to introduce a stalking horse for throwing out *Katz* altogether? How about standing in tracker cases? Will passengers in cars be covered, or just drivers—or even just owners? How about the practical effect on criminal investigation? *See, e.g., de Vogue, supra* note 24 (discussing the FBI’s decision to turn off more than 3,000 trackers currently being used in investigations).

⁴¹ Except in D.C., *Jones*, 132 S. Ct. at 954, *aff’g* 625 F.3d 766 (D.C. Cir. 2010), and for state-law purposes in Delaware, Massachusetts, New York, and Oregon. *See infra* Part V.

⁴² *New York v. Belton*, 453 U.S. 454, 460 (1981).

⁴³ *See Davis v. United States*, 131 S. Ct. 2419, 2424 (2011) (quoting *Belton*’s self-description as announcing a “straightforward” and “workable rule,” and explaining that “[f]or years, *Belton* was widely understood to have set down a simple, bright-line rule.”).

⁴⁴ *Id.* at 2426.

⁴⁵ *Arizona v. Gant*, 556 U.S. 332 (2009).

⁴⁶ Or, as the dissenters argued, overruled it. *Id.* at 356 (Alito, J., dissenting).

⁴⁷ *Id.* at 351.

evidence found in *Belton*-rule vehicle searches needed to be suppressed in cases still pending at the time *Gant* was decided.⁴⁸

The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent. At the time of the search at issue here, we had not yet decided *Arizona v. Gant*, and the Eleventh Circuit had interpreted our decision in *New York v. Belton*, to establish a bright-line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest. The search incident to Davis's arrest in this case followed the Eleventh Circuit's *Gonzalez* precedent to the letter. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.⁴⁹

The Court held that the evidence from such searches should not be suppressed because the exclusionary rule could not "pay its way" in cases where the police conduct was expressly authorized by governing caselaw.⁵⁰ "The rule's sole purpose," explained the Court, "is to deter future Fourth Amendment violations."⁵¹ In *Davis*, the police had "followed the Eleventh Circuit's *Gonzalez* precedent to the letter."⁵² It was undisputed that the prior caselaw clearly and affirmatively authorized the action. This "acknowledged absence of police culpability dooms Davis's claim."⁵³

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn "what is required of them" under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than "ac[t] as a reasonable officer would and should act" under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from "do[ing] his duty."⁵⁴

B. *Two Possible Good-Faith Rules*

The scope of *Davis*'s "faith-in-caselaw" rule is a question of enormous importance for the practice and theory of criminal investigation. There are two possible rules one could extract from *Davis*.⁵⁵ One possibility is a "permitted-unless-prohibited" rule—that is, evidence will *not* be suppressed unless the police conduct *violated* a clearly established holding. The other possibility is a

⁴⁸ *Davis*, 131 S. Ct. at 2423–24. This was an important question, because there were many such cases. The vehicle search incident to arrest was a particular rich vein of "get-lucky" contraband busts.

⁴⁹ *Id.* at 2428 (citations omitted).

⁵⁰ *Id.*

⁵¹ *Id.* at 2426.

⁵² *Id.* at 2428.

⁵³ *Id.*

⁵⁴ *Id.* at 2429 (internal citations omitted).

⁵⁵ They are familiar to fans of the old "prohibited-unless-permitted" jokes, e.g., "In the U.S., everything not prohibited is permitted. In Russia, everything not permitted is prohibited." Then comes the punch line, naming a country where everything permitted is prohibited.

“prohibited-unless-permitted” rule—that is, evidence *will* be suppressed unless the police conduct was *expressly authorized* by a clearly established holding.

The two rules give the same suppression result whenever the governing appellate court has squarely decided a question. If the caselaw says, “Cops get to search the vehicle just because they arrested someone who was in it,” then evidence found during any such search conducted while that case is good law will not be suppressed. And if the caselaw says, “Cops do *not* get to search the vehicle just because they arrested someone who was in it,” then evidence found during any such search conducted while that case is good law, will be suppressed.

The difference between the two rules is in the vast gray area between express prohibition and express authorization. Fourth Amendment law will always be painted in shades of gray across much of its scope because of the Darwinian struggle between cops and robbers.⁵⁶ Each side is continually pursuing new strategies and technologies to gain an advantage. It takes time for caselaw to catch up.⁵⁷ So where a court has not yet expressly ruled on the legitimacy of a particular tactic—say, whether planting a GPS tracker on a car and monitoring its movements on public streets is a “search”—the police conduct will be neither expressly prohibited nor expressly permitted. And then the legal question that arises when a court finally does decide that some tactic is a search is: Should evidence obtained *then* with that tactic, at a time when there was no express rule either way, be admitted *now*, when there *is* a clear prohibition? That’s where the two possible constructions of the “faith-in-caselaw” rule give different answers.

The question, in short, is whether *Davis* provides for good-faith shelter in contexts of legal ambiguity. And *Davis* itself did not involve such a context—*Davis* is about a search that had been expressly authorized by the governing appellate court, interpreting a Supreme Court case that for thirty years had been thought by every criminal lawyer in the country to stand for a bright-line rule authorizing that search.⁵⁸ And the holding tracks that posture. The Court is concerned with situations in which governing precedent *expressly authorizes* the police conduct. *Davis* has nothing to say—to my ears, at least—about ambiguity or silence in the caselaw. The penultimate sentence of the decision is the most explicit statement of the holding: “We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.”⁵⁹ What’s the referent of that “therefore”? It is this (a sentence up): “It is one thing for the criminal to go free because the constable has blundered. It is quite another to set the criminal free because the constable has scrupulously adhered to governing law.”⁶⁰

So is *Davis* announcing a “prohibited-unless-permitted” rule? I certainly think so. Here are the three most obvious reasons:

⁵⁶ See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 486 (2011).

⁵⁷ *Id.*

⁵⁸ *Davis*, 131 S. Ct. at 2424.

⁵⁹ *Id.* at 2434.

⁶⁰ *Id.*

(a) The Court says “expressly authorized.” If the majority were trying to parallel the qualified immunity caselaw, it would have used language that paralleled the qualified immunity caselaw. But the Court didn’t. It explicitly used a formula that was well understood to state a different test.⁶¹ And there’s not a word in *Davis* about police reliance on ambiguity or uncertainty in the law.

(b) The facts in *Davis* did not involve a gray area where caselaw was silent or ambiguous. They involved express authorization.

(c) Perhaps most importantly, the Eleventh Circuit case that the Court affirmed not only announced an explicit express-authorization holding, but also repeatedly and explicitly rejected a “permitted-unless-prohibited” rule, emphasizing that the good-faith exception did not extend to ambiguous or unsettled caselaw.⁶² The Eleventh Circuit said exclusion is still the remedy unless the law is clearly settled; because officers are not expected to engage in nuanced legal analysis, the courts should not incentivize officers to push doctrinal boundaries. “[O]ur precedent . . . must be unequivocal before we will suspend the exclusionary rule’s operation,” the court explained.⁶³

If the Supreme Court was announcing a different, broader test in *Davis*—one implicated neither by the facts of the case nor by the Eleventh Circuit opinion—it surely would have said so.

Here’s what *Davis* involves, in the Court’s own words: a “bright-line rule” that expressly authorizes a search, where the police “followed the . . . precedent to the letter” and “scrupulously adhered to governing law.”⁶⁴ Nothing in *Davis* suggests that the “faith-in-caselaw” rule should extend to ambiguity or silence. Nothing in *Davis* suggests that police conduct should be sheltered from triggering suppression simply on the ground that the police conduct had not yet been explicitly prohibited.

Professor Tomkovicz thinks otherwise. He claims that the rhetoric of the *Davis* opinion, referring to “officer culpability,” and following on *Hudson v. Michigan*⁶⁵ and *Herring*,⁶⁶ suggests a new test for suppression that will be identical to the test for qualified immunity and will require violation of an express prohibition.⁶⁷ With all due respect to Professor Tomkovicz, I think he drastically overreads *Davis*. I yield to no one in my disapproval of the putative nuptials of *Leon* and *Harlow*, but I just can’t agree that the *Davis* Court is popping the question.

Professor Tomkovicz is, of course, correct that *Davis* refers to “police culpability” as a sine qua non of suppression.⁶⁸ The Court says that the cost-benefit inquiry must focus on the “flagrancy of the police misconduct,” that the “deterrence benefits of exclusion ‘vary with the culpability of the law enforce-

⁶¹ See, e.g., *United States v. McCane*, 573 F.3d 1037, 1044 (10th Cir. 2009); *United States v. Debruhl*, 993 A.2d 571, 578 (D.C. 2010). Indeed, Professor Kerr—who argued *Davis* in the Supreme Court—had proposed an “express authorization” test as a soft landing, in an article published before the argument. Kerr, *Good Faith*, *supra* note 26, at 1114–15.

⁶² See *United States v. Davis*, 598 F.3d 1259, 1266–68 (11th Cir. 2010).

⁶³ *Id.* at 1266.

⁶⁴ *Davis*, 131 S. Ct. at 2428, 2434.

⁶⁵ *Hudson v. Michigan*, 547 U.S. 586 (2006).

⁶⁶ *Herring v. United States*, 555 U.S. 135 (2009).

⁶⁷ Tomkovicz, *supra* note 26, at 392–94.

⁶⁸ *Id.* at 393.

ment conduct' at issue," and that "in 27 years [since *Leon*] we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct."⁶⁹

But the question is not *whether* culpability is part of the inquiry; the question is *what constitutes* culpability? Will an officer be deemed culpable for good-faith purposes if he engages in conduct that the courts have never ruled on?

Take a simple hypothetical. Say you are a police officer. You make a traffic stop. You run the driver's license, and you see a "failure-to-appear" warrant from a previous traffic ticket. So you arrest him. You do a full-person search incident to the arrest. You turn up nothing incriminating, just a little cash, some keys, and a smart-phone. Can you search the phone? Well, you start with a physical search. You pop open the case to see if there are drugs concealed inside. Nothing. So you turn it on and start clicking through it. This is a pure "get-lucky" search: you have no basis to suspect that you'll find anything in particular; you're just searching because you can. You read the guy's address book, you look at all his pictures, you read his e-mails and texts. You open a web browser and his Facebook page comes up, logged in and ready to go. You start clicking around, looking at the guy's whole life history. Completely by chance, you stumble across some evidence. You follow the evidence, the guy gets charged.

Now, a week before trial (and a year after your search) the governing appellate court finally issues a decision on cell phone searches incident to arrest. And it says: Stop it! It announces, say, a *Gant*-type rule, to wit, "Searches of cell phone contents are not permitted incident to arrest unless there is reason to believe that the phone contains evidence of the crime of arrest."

Well, your search was certainly not that. But at the time you carried out the search there was no case on point. The best you had was *United States v. Robinson*, which was about searching a coat pocket.⁷⁰ So should the Facebook evidence and its fruits be suppressed?⁷¹

Do I have to say again how important the *Davis* question is? The current law on searches of smartphones incident to arrest is *anything* but clear.⁷² Some jurisdictions have nothing; some have pragmatic container analogies; some have "go-for-it!" rules. So the big question forced on us by *Davis* is: *What do we want police doing in situations of legal uncertainty?* If *Davis* actually announced a "permitted-unless-prohibited" rule, as the scholars noted above think it did, then all of your get-lucky evidence comes in, because the courts didn't yet have any clear caselaw on searching smartphones.⁷³ If *Davis* actually announced a "prohibited-unless-permitted" rule, as I think it did, then all of that

⁶⁹ *Davis*, 131 S. Ct. at 2427, 2429.

⁷⁰ *United States v. Robinson*, 414 U.S. 218, 218 (1973).

⁷¹ *See, e.g.*, *Hawkins v. State*, 704 S.E.2d 886, 892 (Ga. Ct. App. 2010), *aff'd*, 723 S.E.2d 924 (Ga. 2012) (analyzing scope of permissible cell phone search incident to arrest).

⁷² *E.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 810 (7th Cir. 2012).

⁷³ And as I explain below, if that becomes the rule, then that hypothetical appellate case ruling your search illegal could never even arise.

evidence will be suppressed, because there was no case expressly authorizing it.

In terms of incentives, then, the “permitted-unless-prohibited” rule would create an enormous incentive for the police to push boundaries wherever the caselaw left exploitable gaps. “Hey, you never said I couldn’t do *that*” would become an absolute inoculation against suppression, in cases where a court ultimately ruled the search illegal. The message to police would be, “Keep pushing until they tell you to stop, and then push somewhere else.” And nothing in *Davis* suggests that is the message the Court wants to send. Indeed, *Davis* suggests quite the opposite.⁷⁴

I think the Court’s reliance on the traditional concept of the “good cop” is highly significant. Professor Tomkovicz sees the “good cop” rhetoric as transforming the test into one of individual police culpability, where suppression is a “punishment” for the bad cop.⁷⁵ But the “good cop” approach is more informative, I think, on the question of whether the “express authorization” test means what it says. The deterrence rationale for suppression supposes that we want cops to behave in certain ways, and when they do what we want there is no point in suppressing the evidence they obtain. Within the *Leon* context of facially valid warrants, it is easy: we want cops going to magistrates and using a minimal level of interpretive skills in reading the warrant.

But *Davis* forces us to think about what we want cops to be doing *with respect to appellate caselaw*. It’s a question I think a lot about—I used to talk with agents about caselaw all the time. Nowadays, I regularly bring cops to my criminal procedure classes, and I always ask them to talk about their relationship to caselaw. And I think the “good cop” analysis here is easy: we want cops relying on caselaw when caselaw expressly authorizes a search, but we do *not* want them relying on gaps and ambiguities in caselaw to push the Fourth Amendment envelope.⁷⁶

No one claims that part of being a good cop is generating creative applications of ambiguous law that might justify warrantless searches.⁷⁷ That is not

⁷⁴ See *Davis*, 131 S. Ct. at 2428–29.

⁷⁵ See Tomkovicz, *supra* note 26 at 393–94.

⁷⁶ There’s no better illustration of what happens when law enforcement pushes the limits of ambiguous judicial endorsements of tactics than what school administrators did with *New Jersey v. T.L.O.*, 469 U.S. 325, 346–47 (1985) (search of purse permissible with articulable individual suspicion that student was hiding drugs therein); Administrators kept pushing on the boundaries of their searching authority, and the doctrine has morphed into *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661–65 (1995) (drug testing requirement for high school athletes permissible on showing of actual drug problem at school centering on athletes), and then into *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002) (drug testing requirement for all extracurricular activities permissible absent any school-specific concerns whatsoever, because a “nationwide drug epidemic” was a “pressing concern in every school”), and then into such farcical but all too real episodes as the Rancho Bernardo assistant principal who lined up girls for thong inspections at a school dance. (Seriously: see Eleanor Yang, *Rancho Bernardo High Official Suspended Over Underwear Inspection*, SAN DIEGO UNION-TRIB. (May 1, 2002), <http://legacy.utsandiego.com/news/northcounty/20020501—n75890.html>).

⁷⁷ The best recent survey of this problem and potential solutions is Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1408 (2011).

how cops think of their relationship to caselaw,⁷⁸ it is not how prosecutors think of cops' relationship to caselaw,⁷⁹ and it is not how judges think of cops' relationship to caselaw.⁸⁰

Davis makes sense as progeny of *Leon* and *Herring* only on the "express authorization" reading. It makes little sense on any terms if its holding is taken to mean that where caselaw is ambiguous, there will never be suppression.

So, I think *Davis* provides a good-faith shelter for evidence obtained in searches in which the police relied on caselaw that, at the time of the search, expressly authorized a particular practice. I think it does not provide a shelter where caselaw at the time of the search was ambiguous.

This question is extraordinarily important for everyone in the cops-and-robbers business. In a case in which the police find evidence by engaging in conduct that has been held, by the time of trial, to violate the Fourth Amendment (and no other exceptions apply), the evidence will be suppressed, or not, based on what the binding appellate precedent in the jurisdiction had to say about that sort of conduct at the time of the search. On my reading of *Davis*, the evidence will be suppressed unless the caselaw *expressly authorized* the search. Under the Tomkovicz et al. reading that *Davis* has collapsed the suppression test into the qualified immunity test, the evidence will be suppressed only when the caselaw *expressly prohibited* the search.

The distinction between the two readings will make a huge difference in practice because criminal investigation, by its nature, pushes into gray areas in the law: police conduct that was neither expressly authorized nor expressly prohibited. And this will be an ongoing dynamic, as every year's law-enforcement procurement convention introduces new investigative technologies that present courts with new analytical challenges.

V. APPLYING THE FAITH-IN-CASELAW TEST: A GENERAL FRAMEWORK

In a *Davis* scenario, the Supreme Court will change a rule, declaring conduct previously deemed lawful to be unlawful. In *Gant*, it was car searches incident to arrest;⁸¹ in *Jones*, it was GPS trackers.⁸² The question is whether

⁷⁸ See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, LEGAL HANDBOOK FOR SPECIAL AGENTS, 7-4 *Waiver of Rights*, 5-7 (1993) (providing for consultation with AUSA in situations of legal ambiguity).

⁷⁹ See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 755-56 (2003).

⁸⁰ See, e.g., *Pierson v. Ray*, 386 U.S. 547, 557 (1967) ("[A] police officer is not charged with predicting the future course of constitutional law."). Of course, that's a qualified immunity case, but the underlying point is exactly the same: the reason we give cops immunity when the law is unsettled is that we don't expect that their job duties include close parsing of ambiguous caselaw. When the law is uncertain, they're supposed to get guidance. See also *United States v. Johnson*, 457 U.S. 537, 561 (1982) ("If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior."). And it's important to emphasize that we're not talking about second-guessing cops in emergencies. There's already an exigent circumstances exception. *Davis* claims will never involve emergencies; rather, they involve the explicit justification of particular search conduct by pointing to caselaw.

⁸¹ *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

evidence obtained by that conduct prior to the new decision should be admissible after the new decision. I have set out all the possibilities for prior caselaw in a *Davis* scenario in the following chart. The relevant courts are the state courts or the governing circuit, and the relevant positions are: approve (it is not a search); disapprove (it is a search); silence⁸³ (no caselaw). So with three values and two variables, there are nine (3²) possible combinations, as illustrated below:

1			2			3		
	State	Circuit		State	Circuit		State	Circuit
Approve	X	X	Approve	X		Approve	X	
Disapprove			Disapprove		X	Disapprove		
Silent			Silent			Silent		X

4			5			6		
	State	Circuit		State	Circuit		State	Circuit
Approve		X	Approve			Approve		
Disapprove	X		Disapprove	X	X	Disapprove	X	
Silent			Silent			Silent		X

7			8			9		
	State	Circuit		State	Circuit		State	Circuit
Approve		X	Approve			Approve		
Disapprove			Disapprove		X	Disapprove		
Silent	X		Silent	X		Silent	X	X

My analytic framework will apply to all future *Davis* issues—of which there will be many because *Davis* issues will arise now every time the Supreme Court announces or alters a Fourth Amendment rule, and that happens once a term at least. For a given investigative technique in a given jurisdiction, one of these boxes will apply.⁸⁴ What follows are my predictions about how the courts will treat *Davis* claims for each combination of state and federal caselaw. Obviously, we all have *Jones* on our minds right now, but I have written the explanations below in general terms—so you can pull out the chart next time the Supreme Court changes another rule.⁸⁵

BOX 1—State Approval/Federal Approval:

These cases are the easiest: prior to the new Supreme Court case, there was controlling authority from both the state and federal courts expressly authorizing the conduct. *Davis* will shelter evidence gained from that conduct in those states.

⁸² *United States v. Jones*, 132 S. Ct. 945, 948 (2012).

⁸³ You could have more combinations—such as “approved but distinguished.” I would treat such precedent as “silent.”

⁸⁴ For example, as to *Jones*, California is in Box 1: pre-*Jones*, both state caselaw and Ninth Circuit caselaw held that tracker installation and use was not a search. *See, e.g.*, *United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999); *People v. Zichwic*, 114 Cal. Rptr. 2d 733, 742 (Cal. Ct. App. 2001). Evidence obtained in pre-*Jones* tracker investigations in California thus would shelter under *Davis*, so there would be no suppression.

⁸⁵ For example, when the Court decides whether bringing a drug dog to the front door of a house to sniff the air is a “search.” *See Florida v. Jardines*, 132 S. Ct. 995 (2012).

BOX 2—State Approval/Federal Disapproval:

Here the state courts have authorized the conduct, but the circuit court held it to violate the Fourth Amendment.⁸⁶ Clearly, there will be no *Davis* claim available in federal investigations. But will there be one for state officers? The answer is likely yes because state courts need not follow circuit courts, even on questions of federal constitutional interpretation. As it happens, we had no such scenario in *Jones*, but it will surely happen in future cases.

BOX 3—State Approval/Federal Silence:

Here the state courts have approved the conduct, and the circuit court has not spoken. So a *state* officer would, I think, have a strong *Davis* claim. But what about a federal agent who engaged in the conduct—for example, warrantless GPS tracking—while investigating a federal crime for prosecution in federal court? Would there be *Davis* shelter in federal court for this federal investigation on the basis of the state court decision? The best answer is no. There should not be a good-faith shelter claim for several obvious reasons: federal agents do not base their conduct on state law; state laws generally do not constrain federal agents in their investigations;⁸⁷ state interpretations of the Fourth Amendment do not govern federal trials; and the Supreme Court has expressly held that adherence to or violation of state law is irrelevant to a federal Fourth Amendment analysis.⁸⁸ Accordingly, a federal district judge hearing a federal Fourth Amendment claim would not defer to what the state courts in the district had to say about the matter. So any concept of “good-faith reliance” here would be misplaced.

BOX 4—State Disapproval/Federal Approval:

Here the two authorities disagree, so the suppression decision should turn on whether the investigation and prosecution was federal or state. Federal investigations should shelter; state investigations should not. Oregon, for example, was in Box 4 on GPS tracking: the state courts held tracking to be a search,⁸⁹ but the Ninth Circuit held it not to be a search.⁹⁰ *Davis* shelter in such scenarios should turn on whether the investigation was state or federal because

⁸⁶ We had such a scenario here in California for about a year, under *Brendlin*. *Brendlin v. California*, 551 U.S. 249 (2007). The state supreme court held that passengers in vehicles were not actually “seized” in traffic stops, so they had no standing to raise suppression claims if the stop was illegal. *Id.* at 253.

⁸⁷ See, e.g., Caleb E. Mason, *The Police-Prosecutor Relationship and the No-Contact Rule: Conflicting Incentives After Montejo v. Louisiana and Maryland v. Shatzer*, 58 CLEV. ST. L. REV. 747, 755 (2010).

⁸⁸ *Virginia v. Moore*, 553 U.S. 164, 171 (2008).

⁸⁹ Oregon is not unique here, even in the tracking context. Colorado, for example, rejected even the *Karo* “beeper” rule. See *People v. Oates*, 698 P.2d 811, 815–16 (Colo. 1985) (“[I]n interpreting article II, section 7 of the Colorado Constitution, we are not bound by the decisions of the United States Supreme Court construing the federal constitution. . . . We conclude that the broader definition of what constitutes a legitimate expectation of privacy under the Colorado Constitution encompasses the expectation that purchased commercial goods will be free of government surveillance devices such as beepers. We therefore depart from the reasoning in *Karo* and hold that the installation and continued presence of the beeper in this case infringed upon the legitimate expectations of privacy of at least one defendant, and

federal agents, as noted above, are not constrained by state-court Fourth Amendment interpretations or state constitutional protections. A federal agent in Oregon would properly ignore Oregon law and rely on the Ninth Circuit.⁹¹ So federal-investigation tracker evidence will be admitted, under *Davis*, in federal trials. But it's hard to see how *state* investigations could possibly shelter under *Davis*. A state officer, investigating a state crime for prosecution in state court, is bound by the state court's interpretation of the law.⁹² (And the Oregon case was decided under the *state* constitution, anyway.) So *Davis* could not protect tracker evidence in state cases.⁹³

therefore constituted a search requiring a warrant under article II, section 7 of the Colorado Constitution.”).

⁹⁰ *United States v. Pineda-Morena*, 591 F.3d 1212, 1216 (9th Cir. 2010).

⁹¹ This does *not* apply to federal prosecutors, who, while not bound by state evidence rules, *are* bound by state ethics rules. *See* Mason, *supra* note 87, at 755.

⁹² I will note, but leave aside here, the fascinating and unresolved question about how, absent a Supreme Court decision, conflicts between a state's highest court and the governing federal circuit are to be resolved. *See, e.g.*, Donald H. Ziegler, *Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 WM. & MARY L. REV. 1143, 1151–68 (1999) (noting the variety of approaches state courts adopt toward lower federal courts on questions of federal law, and collecting cases). These conflicts could be about the meaning of either state or federal law, and the Supreme Court has never announced a rule for deciding who takes precedence. For example, the Sixth Circuit and the Ohio Supreme Court are currently engaged in a running conflict over the application of the Fourteenth Amendment and *Bush v. Gore* to state voting-booth allocation decisions. *See* *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 239–40 (6th Cir. 2011). Or, to give another recent example, the Ninth Circuit held California's Proposition 8 unconstitutional, *see* *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012); the California Supreme Court had previously upheld it, *see* *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009). Now as it happens, the state-court challenge had not raised any federal constitutional issues, *see id.* at 78 n.11 (“In these cases, [the] petitioners have not raised any federal constitutional challenge to Proposition 8.”). But suppose it had: the state supreme court could and would have decided them. And suppose it had upheld the statute on federal constitutional grounds too—as it very well might have, *see id.* at 130 (Moreno, J., dissenting) (explaining that per California precedent, the equal protection provisions of the state constitution have always been interpreted to be at least as protective as those of the federal constitution). So in such a scenario, what happens? Both sides rush to their respective trial courts to get injunctions. The federal injunction says do *x*, *e.g.*, issue the marriage license; the state injunction says do not do *x*. What advice would *you* give the county official? Would we really be in a no-man's land of dueling orders? The naïve citizen, after having learned in school or heard on TV that our Constitution creates the perfect federal-state balance, might be surprised to learn that there is actually no agreed-upon procedure for settling this question. As Ziegler, *supra*, documents, most of the time such questions never get settled at all. Ziegler, *supra*, at 1152–53.

⁹³ Other states make it easier. In California, for example, a constitutional amendment, Proposition 8 (not *that* one—an earlier one) provides that California's state-constitution Fourth Amendment language is “pegged” to the Supreme Court's interpretation of the federal Fourth Amendment. Proposition 8 (1982) (codified as CAL. CONST. art. I, § 28); *see also* Steven D. Blades, Comment, *Proposition 8: It May Go Beyond the Fourth Amendment*, 19 SW. U. L. REV. 57, 57, 65 (1990). Other states do the same thing through caselaw. *See, e.g.*, *North Carolina v. Hendricks*, 258 S.E.2d 872, 877 (“[T]here is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States.”).

BOX 5—State and Federal Disapproval:

This one is easy—no shelter.

BOX 6—State Disapproval/Federal Silence:

Here the federal circuit court has not spoken, but the state court has disapproved the conduct. Delaware, Massachusetts, and New York are in Box 6: the pre-*Jones* caselaw consisted of disapproval (“it is a search”) from the state court, and silence from the First, Second, and Third Circuits. Pre-*Jones* tracker investigations in these states are highly unlikely to get *Davis* shelter.

BOX 7—State Silence/Federal Approval:

How about investigations in states with no state caselaw, and approval from the circuit? For GPS tracking, twenty-one states in the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits had no prior state caselaw.⁹⁴ In those states, pre-*Jones*, the governing federal circuit had held that tracker use is not a search, and the state courts had not said anything. Federal agents in those states therefore have a straightforward *Davis* claim.

As for state police in those states, prosecutors would certainly make a shelter claim under *Davis*, arguing that state officers reasonably relied on the governing appellate caselaw. But this argument is vulnerable on two fronts. First, as a practical matter, the federal Fourth Amendment analysis might not be dispositive if the state’s Fourth Amendment is interpreted more strictly by state courts than the federal Fourth Amendment is by federal courts. State investigations must comply with the state constitution as well as the federal constitution. So as to *state* constitutional violations, the police were acting under pure uncertainty. The Colorado Supreme Court’s rejection of *Karo* should make this perfectly clear.⁹⁵

Second, while state courts are bound by Supreme Court decisions as to the meaning of the federal Fourth Amendment, they need not, as outlined above,⁹⁶ follow the regional federal circuit courts, even in interpreting the federal Constitution. Thus (as in the pre-*Jones* tracker cases at issue here), when there is no Supreme Court decision on point with respect to a particular type of investigative conduct, there is always the possibility that a state court could issue a ruling interpreting not just the state but also the *federal* Fourth Amendment as prohibiting the conduct, despite the existence of a federal circuit precedent approving it. In a posture of state-court silence on tracking, therefore, it does not make sense to say that *state* police were “expressly authorized” to engage in the conduct. For those reasons, *Davis* should be inapplicable to states with no clear state-court decisions on tracking.

Of course, state prosecutors will undoubtedly argue otherwise, and it is certainly possible that some state courts will agree with them. Much may

⁹⁴ In order by circuit: Louisiana, Mississippi, Texas, Illinois, Indiana, Wisconsin, Arkansas, Iowa, Minnesota, Missouri, North Dakota, Nebraska, South Dakota, Alaska, Arizona, Hawaii, Idaho, Montana, Alabama, Florida, Georgia. (California, Oregon, and Nevada had prior state caselaw).

⁹⁵ *People v. Oates*, 698 P.2d 811, 815–16 (Colo. 1985).

⁹⁶ See *supra* text accompanying notes 86–95.

depend on the particular relationship between the state and federal Fourth Amendment language for a particular state. For example, in California, the state constitution “pegs” the state’s constitutional amendment language to the federal Fourth Amendment.⁹⁷ (The state courts might still disagree with the Ninth Circuit about the meaning of the federal Fourth Amendment, to be sure.)

This is an important question because most law enforcement is done at the state level, and most cases are state cases. For example, *Davis* itself started as a state investigation; the evidence found in the state search led to a federal prosecution. In a posture in which the search in question was expressly disapproved by the state court, but approved by the relevant federal circuit court, how should state police make investigatory decisions? If you are the duty DA and you get the call, what do you say? “Well, Detective, the evidence will be suppressed in state court, but if you find anything the feds might want, it will be admitted in federal court?”⁹⁸ What then? Did the state officers have any reason to think that their search was going to turn up evidence for a federal prosecution?

And state investigations that lead to federal prosecutions are very common.⁹⁹ *Davis* itself, for example, was just a run-of-the-mill arrest. Because the search turned up a gun and Davis had a rap sheet, the case was referred to the feds for felon-in-possession-of-firearm prosecution. The Department of Justice has a program called Project Safe Neighborhoods that encourages such referrals.¹⁰⁰ In a case like *Davis*, the police officers have no idea, at the time they do the search, that the evidence may ultimately be destined for admission in federal court. So, for a good-faith analysis, we should at least be curious about the governing *state law*, in addition to wanting to know the status of governing federal circuit law. Yet the Court in *Davis* never even mentions Alabama’s then-governing caselaw on *Belton* searches.¹⁰¹

⁹⁷ That’s the other Prop 8, from back in 1982. See *supra* note 93.

⁹⁸ This scenario is not at all implausible: it is what happened, for example, in *Arizona v. Gant*, where the Ninth Circuit had approved the per se *Belton* rule for vehicle searches incident to arrest, but the Arizona state courts had rejected it. 556 U.S. 332, 356 (2009). So prior to the Supreme Court’s decision in *Gant*, evidence found in an incident-to-arrest vehicle search would have been inadmissible in state court but admissible in federal court.

⁹⁹ See e.g., *Prosecutorial Discretion*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 227, 228–29 n.678 (2011). As a federal prosecutor, I prosecuted many cases involving state investigations that were adopted by federal agencies for prosecution in federal court, often under initiatives such as *Project Safe Neighborhoods* or *Secure Communities*. See generally Edmund F. McGarrell et al., *Project Safe Neighborhoods—A National Program to Reduce Gun Crime*, FINAL PROJECT REP. (Nat’l Inst. of Just./Mich. St. U. Sch. of Crim. Just., East Lansing, MI), Feb. 2009 available at <https://www.ncjrs.gov/pdffiles1/nij/grants/226686.pdf>; SECURE COMMUNITIES, http://www.ice.gov/secure_communities/ (last visited Nov. 20, 2012).

¹⁰⁰ I had a number of these cases. State police or DAs would refer cases where the guy had a gun and a rap sheet, and we would bring 922 charges. See 18 U.S.C. § 922 (2006).

¹⁰¹ I looked it up, though. As it happens, Alabama state caselaw expressly authorized the search too: *State v. Gargus*, 855 So. 2d 587, 590 (Ala. Crim. App. 2003) (quoting *State v. Otwell*, 733 So. 2d 950, 954 (Ala. Crim. App. 1999)) (“ ‘When officers lawfully arrest an automobile occupant, they may search the passenger compartment of the automobile as a contemporaneous incident of the arrest, and they also may examine the contents of containers found in the automobile.’ ”). But you read it here first; from the Supreme Court’s *Davis* decision, you would never know that the state courts had even considered the issue!

BOX 8—State Silence/Federal Disapproval:

These cases should be easy because there is no caselaw expressly approving the practice.

BOX 9—State Silence/Federal Silence:

What's the *Davis* outcome in jurisdictions with no state or federal caselaw saying anything at all about the investigatory conduct? In the case of GPS trackers, that's a pretty large swath of the country. Could the government perhaps invoke *Knotts* and *Karo* and get a good-faith exception from suppression on the grounds that a reasonable officer could have read *Knotts* and *Karo* as holding that installing and monitoring a GPS tracker is not a search? If so, then the impact of *Jones* on pending tracker investigations is literally nil. And the *Davis* argument for good faith here is not crazy; after all, the majority of courts that considered the question read *Knotts* and *Karo* that way.

That outcome is unlikely, however, given the quite emphatic holding by the *Jones* Court that all those other courts were wrong and that *Knotts* and *Karo* did not expressly authorize the non-consensual installation of a tracker. The Court points out that neither *Knotts* nor *Karo* involved the non-consensual installation of a tracker. Accordingly, the *Davis* rebuttal would go, neither *Knotts* nor *Karo* could possibly have expressly authorized the non-consensual installation of a tracker. And since *Davis* is about express authorization (rather than the possibility of creative analogizing), its shelter should extend only to tracker investigations undertaken in circuits which had explicitly (though, in hindsight, erroneously) interpreted *Knotts* and *Karo* to cover tracker installation.

The Box 9 states, with state and federal silence on trackers, will present the ideal test of my reading of *Davis*. In these jurisdictions, qualified immunity would undoubtedly apply (because there was no clearly established law). But on my reading of *Davis*, so would suppression (because there was no express authorization). Under the Tomkovicz reading of *Davis*, there would be no suppression of evidence in this scenario because the test would be the same as qualified immunity.

So I'm throwing down the gauntlet: let's watch *Davis* tracker cases in Colorado, Connecticut, Kansas, Kentucky, Maine, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, Virginia, West Virginia, and Wyoming. Those are the jurisdictions that had, as of January 2012, when *Jones* was decided, neither controlling state caselaw nor controlling federal circuit law authorizing warrantless GPS tracking.

The picture as of January 2012 for GPS tracking appears to have looked like this:

	Search	Not a Search	Silent
Circuits	DC	Fifth, Seventh, Eighth, Ninth, Eleventh	First, Second, Third, Fourth, Sixth, Tenth
States	Delaware, Massachusetts, New York, Oregon	California, Nevada, Washington	All the rest

VI. *DAVIS* APPLIED TO *JONES*

In the GPS tracker scenario, there was no *Belton*—no Supreme Court case expressly stating that warrantless, exception-less GPS tracking was permissible because it was not a search.¹⁰² There *were* five circuits with bright-line holdings that installation and monitoring was not a search. There were also three states with that express holding from their highest courts.

That leaves six circuits¹⁰³ and forty-seven states with no caselaw expressly on point. I predict this will make for different suppression outcomes in different places and jurisdictions based on differing pre-*Jones* caselaw on trackers. I also predict that we will be able to see what *Davis* really stands for by tracking suppression motions in tracker cases across jurisdictions.

A. Predictions

1. State Prosecutions

Davis shelter will apply only in those states with state caselaw holding that GPS tracking is not a search. Those states are, as noted above: California, Nevada, and Washington. I conclude that *Davis* will not provide shelter for state tracker evidence in state prosecutions in any of the other forty-seven states.

2. Federal Prosecutions

Davis shelter will apply to evidence from investigations in the Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits: in Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada,¹⁰⁴

¹⁰² The Supreme Court cases most on point, *Knotts* and *Karo*, did not—as the *Jones* majority takes pains to explain—involve nonconsensual placement of the tracking device on the suspect’s vehicle. The *Jones* Court reads *Knotts* and *Karo* as authorizing only tracking devices placed on an object *with the owner’s consent*. See *United States v. Jones*, 132 S. Ct. 945, 951–52 (2012). And no one disputes that consensual installation was unambiguously the factual scenario presented by those cases.

¹⁰³ Because the DC Circuit followed *Maynard*, which governed for the eighteen months before *Jones*. *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) (The D.C. Cir. decided *Maynard* on Aug. 6, 2010 and followed the decision until the Supreme Court decided *Jones* on Jan. 23, 2012).

¹⁰⁴ After this Article was written, my prediction was borne out by a ruling regarding an ATF case in U.S. District Court in Nevada. See *United States v. Fata*, No. 2:11-cr-00188-RLH-CWH, 2012 WL 1716207, at *1 (D. Nev. May 14, 2012) (order adopting Report and Recommendation of United States Magistrate Judge, *United States v. Fata*, No. 2:11-cr-00188-RLH, 2012 WL 1715496, at *6 (D. Nev. Mar. 15, 2012)) (holding evidence obtained by the

North Dakota, Oregon, South Dakota, Texas, Washington, and Wisconsin. In the other states, it will not apply.

3. *Test of the Meaning of Davis*

There remain twenty-four states that had neither federal nor state tracker caselaw: Colorado, Connecticut, Kansas, Kentucky, Maine, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virgin Islands, Virginia, West Virginia, Utah, and Wyoming. All those states are in Box 9, with no binding, on-point appellate authority at the state or federal level. So we will have plenty of opportunity to see what the lower courts think *Davis* means. In my view, *Davis* cannot provide good-faith shelter in those states, to either state or federal investigations, because there was no pre-*Jones* caselaw expressly authorizing warrantless tracking.

B. *How “Express” Does the Caselaw Have to Be?*

This is a significant question, because if you read “express authorization” broadly enough, you would find it even where the Supreme Court later stepped in and corrected everyone’s misreading of the prior caselaw. That is what happened with *Knotts* and *Karo*. Everyone—every court to consider the question—held that those cases authorized warrantless tracking of any vehicle in a public place.¹⁰⁵ If courts now apply *Davis* to hold that *Knotts* and *Karo* “expressly authorized” warrantless tracking—despite the insistence by the *Jones* Court that they did no such thing—then *Jones* itself will have little impact.

But I am doubtful that any court would so hold. It is clear that the circuit opinions applying *Knotts* and *Karo* to GPS tracking expressly authorized it. No doubt about that. But it is hard for me to see, after *Jones*, any lower court holding that *Knotts* and *Karo* themselves expressly authorized GPS tracking as well. Such a holding would be directly contrary to *Jones*.

C. *DOJ Strategy After Jones: High Stakes and the Coming Splits*

1. *Pushing the Limits of Davis*

The government’s strategy is already evident. It will defend warrantless tracker suppression claims by invoking *Davis*.¹⁰⁶ The government’s strategy throws into stark relief the interpretive dichotomy (prohibited-unless-permitted vs. permitted-unless-prohibited) sketched above. For example, in *United States v. Robinson*, the tracking was done in Missouri, part of the Eighth Circuit,

use of a GPS device should not be suppressed and that the use of a GPS device was lawful under both *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010) and *Davis v. United States*, 131 S. Ct. 2419, 2433 (2011), because “placement of the GPS device and the subsequent monitoring was done in reasonable reliance on then binding appellate precedent.”).

¹⁰⁵ See, e.g., *United States v. Cuevas-Perez*, 640 F.3d 272 (2011), vacated 132 S. Ct. 1534 (2012) (vacated and remanded “in light of *United States v. Jones*.”).

¹⁰⁶ See, e.g., Government’s Request for Supplemental Briefing on Defendant’s Motion to Suppress GPS Tracking Evidence at 2–3, *United States v. Robinson*, 4:11-cr-00361-AGF (E.D. Mo. Jan. 23, 2012), ECF No. 49.

which had no tracker caselaw. Nevertheless, the government argued that the evidence should still shelter under *Davis* because *other* circuits had held that tracker use was not a search, and because no circuit had yet held that it *was* a search:

In the instant case, in attaching the GPS tracker to defendant's automobile without a warrant, and tracking the automobile's movements through use of the GPS tracker, the agents relied upon and strictly adhered to then controlling appellate court opinions that addressed the specific issue and which had found no requirement for a court ordered warrant. *See* [] *United States v. Garcia*, 474 F.3d 994, 996–98 (7th Cir. 2007); *United States v. McIver*, 186 F.3d 1119, 1226–27 (9th Cir. 1999); *United States v. Pineda-Morena*, 591 F.3d 1212 (9th Cir. 2010). At the time the agents here utilized the GPS tracker on defendant's automobile, the government was unaware of any appellate court that had determined that a warrant was required to place such a tracker on a vehicle. Subsequently, the Eighth Circuit can be found to have ratified the agents' conduct here in a case with markedly similar underlying facts, *United States v. Marquez*, 605 F.3d 604 (8th Cir. 2010), following and applying the logic of the Seventh and Ninth Circuits in finding that a warrant was not required for the placement and use of a GPS tracker. *See also* [] *United States v. Hernandez*, 647 F.3d 216, 220 n.4 (5th Cir. 2011); *United States v. Cuevas-Perez*, 640 F.3d 272, 273 (7th Cir. 2011). The District of Columbia Circuit Court of Appeals' opinions underlying *Jones* and which found a warrant requirement, *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) and *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010) were not issued until approximately seven months *after* the agents here had installed the GPS tracker. Thus, it is the government's position, relying upon *Davis*, *supra*, that the Supreme Court's recent opinion in *Jones* does not require the exclusion of the GPS tracking evidence in the instant case. The agents here acted reasonably and responsibly, and with the good faith belief that their conduct was lawful, and there is no need to deter their innocent conduct through application of the exclusionary rule.¹⁰⁷

The argument shows considerable chutzpah. First, it asserts that *Davis*'s "binding appellate precedent" language should be read to include *other* circuits' caselaw—that caselaw from the Seventh and Ninth Circuits should be treated as "binding appellate caselaw" in the Eighth Circuit! This is an extraordinary claim, and the government cites no authority for the proposition that Seventh and Ninth Circuit cases are binding in the Eighth Circuit. There are, of course, no such authorities. Circuit caselaw is binding only within the circuit. So is the government suggesting that when *Davis* said "binding appellate caselaw" it just meant "binding appellate caselaw *somewhere*"? Apparently, it is. I don't know how else to read the government's claim that agents in Missouri, in the Eighth Circuit, relied on "then-controlling appellate opinions" from the Seventh and Ninth Circuits.

The idea that officers can rely on out-of-circuit caselaw is part of qualified immunity doctrine; the Supreme Court said so in *Pearson v. Callahan*.¹⁰⁸ The Court explained that although the Tenth Circuit had not yet ruled on the legality of the search in question, every circuit that had ruled on such a search had approved it: "The officers here were entitled to rely on these cases, even though

¹⁰⁷ *Id.* (emphasis in original).

¹⁰⁸ *Pearson v. Callahan*, 555 U.S. 223, 244–45 (2009).

their own Federal Circuit had not yet ruled on ‘consent-once-removed’ entries.”¹⁰⁹

But this is a Fourth Amendment suppression claim, not a qualified immunity claim, and no legal authority has ever held that the *Davis* “express authorization” standard should be read as *identical* to the qualified immunity standard. Nor, to my knowledge, has the government expressly argued for such equivalence. Perhaps prosecutors agree with me that that argument is too much for the language, posture, and facts of *Davis* to bear. Without that argument, though, the government’s discussion of *Davis* seems quite tenuous. In its *Robinson* pleadings, the government begins its discussion of *Davis* by acknowledging that *Marquez*, the Eighth Circuit case authorizing warrantless tracking, was not decided until after the tracking had been done. The government then makes the rather amazing argument that good faith should still apply because the subsequent *Marquez* holding reflected a “view” of the law that was shared by the agents. Here’s the full argument:

However, a review of *Marquez* certainly gives a clear understanding of the view of the applicable law in the Eighth Circuit at the time the GPS tracker was utilized in this case. It might not have been the “law” of the land, but it gives this Court an understanding of the “lay” of the land in the Eighth Circuit at the pertinent time, and it is consistent with the previously cited cases from the Seventh and Ninth Circuits.¹¹⁰

The pleading then repeats the passage cited above, arguing that the out-of-circuit caselaw should be good enough for *Davis* purposes.¹¹¹ In my view, the argument that an agent in one circuit could claim “good-faith reliance” on caselaw from another circuit is not colorable. Nor is the government’s proposal that the Eighth Circuit “ratified” the agents’ conduct by *later* deciding that GPS tracking was not a search. I cannot imagine that any court, on *Robinson*-type facts, would hold that the tracking was “expressly authorized,” or that there’s some sort of brand-new “ratification” exception to the exclusionary rule.

But the *second* argument in the *Robinson* motion is where the real action is. Here the government picks up on the suggestion by Professor Tomkovicz et al. that the Court may be moving toward aligning the good-faith test with the qualified-immunity test. Though the government (carefully?) does not mention qualified immunity, it suggests that “no one had said we couldn’t do it” should be a viable Fourth Amendment defense: “At the time the agents here utilized the GPS tracker on defendant’s automobile, the government was unaware of any appellate court that had determined that a warrant was required to place such a tracker on a vehicle.”¹¹²

That’s swinging for the fences: the government is asking the court to apply the good-faith exception to police conduct that had *not* been expressly author-

¹⁰⁹ *Id.* at 244.

¹¹⁰ Government’s Response to Defendant’s Objections to the Magistrate’s Report and Recommendation at 6, *United States v. Robinson*, No. 4:11-cr-00361-AGF (E.D. Mo. Feb. 13, 2012), ECF No. 53.

¹¹¹ *Id.*

¹¹² *Id.* at 9. In October 2012, the court ruled consistent with the predictions of this Article. Order at 2, *United States v. Robinson*, No. 4:11-cr-00361-AGF (E.D. Mo. Oct. 15, 2012), ECF No. 148.

ized by the governing appellate court, on the grounds that it hadn't yet been expressly *prohibited*. As the government is presumably well aware, if courts buy this one, then *Jones* will have virtually no effect on any evidence obtained by warrantless tracker searches before January 23, 2012, no matter when the cases are ultimately charged and tried.

2. Early Signals from District Courts

As of May 2012, eight district courts have ruled on motions to suppress pre-*Jones* tracker evidence in the face of *Davis* arguments made by the government. Five of those courts are in the Ninth Circuit, where the answer is easy: binding appellate authority from the Ninth Circuit had held that GPS tracking was not a search, so *Davis* applies.¹¹³ One court (N.D. Iowa) is in the Eighth Circuit,¹¹⁴ but unlike the *Robinson* case discussed above, the tracking was done after the Eighth Circuit had held in *Marquez* that GPS tracking was not a search. So there too the answer was easy: *Davis* applies.

One court (E.D. Mich.) is in the Sixth Circuit,¹¹⁵ which had no tracker caselaw, and the court avoided the *Davis* question, deciding the motion on standing and inevitable discovery grounds. The court, however, came right out and said that if it had to decide the *Davis* issue, it would accept the government's permitted-unless-prohibited theory.¹¹⁶

Finally, one court (E.D. Pa.) is in the Third Circuit,¹¹⁷ which also had no tracker caselaw, and squarely decided the *Davis* question along precisely the lines I have argued for herein: absence of caselaw is not express authorization, so *Davis* does not apply.

These three decisions are illustrative of the choices facing district courts, and the questions the circuits will need to decide.

a. Unwarranted Extensions of *Davis*

In my view, two of the district courts erroneously accepted the government's argument that *Davis* shelter should apply whenever no binding caselaw had prohibited the practice. As explained above, that is not what *Davis* says, and as explained below, that is a bad rule both theoretically and practically. It

¹¹³ United States v. Fata, No. 2:11-cr-00188-RLH, 2012 WL 1716207 at *1 (D. Nev. May 14, 2012) (order adopting Report and Recommendation of United States Magistrate Judge, United States v. Fata, No. 2:11-cr-00188-RLH, 2012 WL 1715496 at *6 (D. Nev. Mar. 15, 2012)); United States v. Aquilar, No. 4:11-cr-298-BLW, 2012 WL 1600276 at *2 (D. Idaho May 7, 2012); United States v. Heath, No. CR 12-4-H-DWM, 2012 WL 1574123 at *1 (D. Mont. May 3, 2012); United States v. Leon, No. CR 09-00452 JMS, 2012 WL 1081962 at *5 (D. Haw. Mar. 28, 2012); United States v. Nwobi, No. CR 10-952(C) GHK-7, 2012 WL 769746 at *2 (C.D. Cal. Mar. 7, 2012).

¹¹⁴ United States v. Amaya, No. CR 11-4065-MWB, 2012 WL 1188456 at *5 (N.D. Iowa Apr. 10, 2012) *opinion withdrawn in part on reconsideration*, 2012 WL 1523045 at *2 (N.D. Iowa May 1, 2012).

¹¹⁵ See United States v. Luna-Santillanes, No. 11-20492, 2012 WL 1019601 (E.D. Mich. Mar. 26, 2012).

¹¹⁶ *Id.* at *9 n.5. Though obviously dicta from a district court means relatively little. And one of the district courts in the Ninth Circuit also accepted the permitted-unless-prohibited theory on the issue of *monitoring* as opposed to *installing* trackers. *Leon*, 2012 WL 1081962, at *5.

¹¹⁷ United States v. Katzin, No. 11-226, 2012 WL 1646894 (E.D. Pa. May 9, 2012).

will be important for the circuits to scrutinize such rulings carefully when they come up on appeal—my primary goal here is to provide assistance to the circuits in that task.

i. Eastern District of Michigan: United States v. Luna-Santillanes

In *Luna-Santillanes*, the court avoided taking on the *Davis* argument directly but stated in a footnote that if the issue arose it would give *Davis* shelter in the face of circuit silence:

In light of the Court's decision, it is unnecessary to consider the government's additional argument that, because the use of a GPS device on a vehicle without first obtaining a search warrant was a widely-accepted practice in the police community that had not been held unconstitutional by the Sixth Circuit Court of Appeals, the *Leon* good faith exception to the exclusionary rule would apply. If this Court were to consider this additional argument, it would find it persuasive. As the United States Supreme Court recently held in *United States v. Davis*, "[b]ecause suppression would do nothing to deter police misconduct in these circumstances, . . . searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."¹¹⁸

I hope that any lawyer will see what's wrong with the court's reasoning here. The error—to my mind, at any rate—is plain: only the second half of the quotation (the part following the ellipsis) is the holding of *Davis*. And that holding obviously cannot apply in a circuit that had no binding appellate precedent on the conduct at issue. The government's argument that warrantless GPS tracking "was a widely-accepted practice in the police community that had not been held unconstitutional by the Sixth Circuit" is a non sequitur, because *Davis* simply did not hold that widely accepted practices that had not yet been held unconstitutional are entitled to good-faith shelter. "You never told me I couldn't" is just not the same thing as "you expressly told me I could." The district court seems to miss—or worse, to deny?—the difference. I doubt such reasoning would prevail in an appellate court or in the Supreme Court.¹¹⁹

*ii. District of Hawaii: United States v. Leon*¹²⁰

The district court in the fortuitously captioned *Leon* made the same error. In *Leon*, the good faith issue arose because the court separated, in its analysis, the *installation* of the tracker and the *monitoring* of the tracker. The court held that *Davis* shelter applied to the installation because warrantless installation of trackers "was specifically authorized by binding Ninth Circuit precedent—*United States v. McIver*, 186 F.3d 1119 ([9th Cir.] 1999)."¹²¹ As to long-term monitoring of the tracker, the Ninth Circuit had endorsed that too, in *United States v. Pineda-Moreno*.¹²² But the monitoring in *Leon* had taken place before *Pineda-Moreno* was decided. So as to the monitoring, the district court

¹¹⁸ *Luna-Santillanes*, 2012 WL 1019601, at *9 n.5 (citation omitted).

¹¹⁹ Which is not to say that the Supreme Court might not eventually announce such a holding. It could, of course—but it would be a new holding; it is not the holding of *Davis*.

¹²⁰ *Leon*, 2012 WL 1081962.

¹²¹ *Id.* at *4.

¹²² *United States v. Pineda-Moreno*, 591 F.3d 1212, 1215 (9th Cir. 2010).

treated the situation as one of appellate-court silence—but applied *Davis* anyway:

Prior to 2009, only one circuit court addressed the constitutionality of GPS monitoring. *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), largely relying on *Knotts*, held that the use of the GPS device did not implicate the Fourth Amendment. . . . In contrast, as of 2009, no circuit court had held that the prolonged use of a GPS device to be [sic] unconstitutional.

Given the state of the law in 2009, the evidence clearly establishes that the DEA agents did not “exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.” Instead, they acted with an objectively reasonable good-faith belief that their conduct was fully compliant with then-existing Fourth Amendment jurisprudence.¹²³

The court’s assertions are true but irrelevant, just as the *Luna-Santillanes* court’s were. It is true that the agents did not intend to violate the suspect’s Fourth Amendment rights and that they reasonably thought that warrantless GPS tracking was consistent with existing Fourth Amendment law. (I thought so too. I gave agents that exact advice; everyone did, right up until January 24, 2012.) But, like the *Luna-Santillanes* court, the *Leon* court conflates an agent’s reasonable interpretation of the Fourth Amendment in the face of judicial silence with the actual *Davis* threshold—express approval by binding appellate precedent.

The *Leon* court also mentions the “post-hoc ratification” argument discussed above, and while not explicitly adopting it, gives it warm regards:

And although not directly relevant to the agents’ objectively reasonable good-faith belief as of 2009, three judges of the Ninth Circuit found the prolonged use of a GPS tracking device constitutional in 2010. *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010). And in doing so, the court relied almost exclusively on *Knotts*. This after-the-fact ruling provides further support that the agents acted with an objectively reasonable good-faith belief—a court would be hard-pressed to place culpability on the agents for their actions in 2009 when, one year later, three judges of the Ninth Circuit relied on *Knotts* to conclude that the prolonged use of a GPS tracking device did not violate the Fourth Amendment.¹²⁴

I do not know any other way to say this: the district court’s analysis has no basis in existing doctrine. While the district court may think that the underlying spirit of *Davis* is to give good-faith shelter whenever an agent did not specifically intend to violate the Fourth Amendment, that’s not what *Davis* held. An officer’s reasonable belief that his conduct is consistent with the Fourth Amendment is just not the same as prior express authorization of that conduct by binding appellate precedent. The *Leon* court, like the *Luna-Santillanes* court, ignores the difference. I doubt future circuit panels will.

iii. *Eastern District of Pennsylvania: United States v. Katzin*¹²⁵

The first district court decision I have seen to reject the “silence = shelter” *Davis* argument is *Katzin*, from the Eastern District of Pennsylvania. The court

¹²³ *Leon*, 2012 WL 1081962, at *5 (some internal citations omitted).

¹²⁴ *Id.*

¹²⁵ *United States v. Katzin*, No. 11-226, 2012 WL 1646894 (E.D. Pa. May 9, 2012).

held that express authorization is different from silence, and that only express authorization triggers *Davis* shelter.¹²⁶ The court began by noting that at the time of the tracking, its own Third Circuit was silent on the matter, and there was a split among the circuits.¹²⁷ The court then acknowledged the *Leon* and *Luna-Santillanes* decisions discussed above, and explained why it was not persuaded to follow them:

Certainly an argument could be made—and the Government in this case clearly makes it—that the more general good faith exception language found in *Davis* and other similar cases would allow for an individualized determination of whether the officer’s actions were objectively reasonable in each specific case.

However, to move beyond the strict *Davis* holding sharpens the instruments that can effectively eviscerate the exclusionary rule entirely. In this case, at the time the GPS device was placed on the Dodge Caravan there were four circuit courts of appeals that arguably could have supported the Government’s conduct and one that would not have, meaning that fewer than half of the circuits had even weighed in on the question. If law enforcement is permitted to rely on authority from a minority of other circuits to support the constitutionality of its investigatory practices, where does a district court draw the line when binding precedent later renders those practices unconstitutional? Is law enforcement reliance on a significant minority or, somewhat better, a bare majority of circuits to have addressed the topic enough, or is an overwhelming majority, if not unanimity, required? Does it matter *which* circuits (or which panels in which circuits) support or condemn the investigatory practice? Does it matter how many circuits have squarely addressed the issue? The difficulty presented by the dilemma ought to be manifest.¹²⁸

I agree. And so, I would argue, would the *Davis* majority itself. The “express authorization” rule is easily administrable: you look at the governing circuit court and see what it said. A “reasonable prediction based on out-of-circuit caselaw” rule is not easily administrable—indeed, I would say it would not be administrable at all.

Furthermore, said the *Katzin* court, the “silence = shelter” rule is bad constitutional doctrine:

Extending *Davis* also would move law enforcement further from the solid ground on which other good faith exceptions to the exclusionary rule stand. Those exceptions generally involve reliance on unequivocally binding legal authority, *see Illinois v. Krull* (good faith exception covers subsequently invalidated statutes); *United States v. Leon* (law enforcement acted in good faith relying on a judicially approved warrant later found to be improvidently granted) or isolated non-recurring errors, *see Herring v. United States*. Essentially, in each of these cases, the mistake was made by some other neutral branch of government, and not by law enforcement, or else, as in *Herring*, was not the product of a conscious decision; neither of those categories encompass the conduct in this case.¹²⁹

And finally, it’s bad practical policy:

Other familiar policy issues persuade the Court that a *Davis*-like good faith exception to the exclusionary rule should not be stretched to authorize the warrantless GPS tracker here. The Supreme Court’s general language describing the exclusionary

¹²⁶ *Id.* at *9–10.

¹²⁷ *Id.* at *7.

¹²⁸ *Id.* at *9 (emphasis in original) (footnote omitted).

¹²⁹ *Id.* (citations omitted).

rule states that it applies in cases of “recurring or systemic negligence.” The risk of institutionalizing a policy of permitting reliance on non-binding authority, particularly in the face of other, contrary non-binding authority, at least borders on being categorized as systemic negligence. Indeed, opening to the Government the shelter of the good faith exception in this case would encourage law enforcement to beg forgiveness rather than ask permission in ambiguous situations involving the basic civil rights.¹³⁰

The court’s concern nicely encapsulates the basic questions at the heart of the good-faith doctrine: What incentives do we want to create for the police on the constitutional borderlines of investigations? And do we want the courts to have any role in creating and enforcing those incentives? As these early cases indicate, there’s a circuit split brewing here, and the courts of appeals—and ultimately the Supreme Court—will have to answer those questions directly.

D. Future Technologies

Jones is that rare Fourth Amendment case where the government put all its marbles on the “not-a-search” argument and did not even raise possible exceptions.¹³¹ So the Court actually reached the substantive Fourth Amendment issue. But while it is true that police probably now need to get warrants to place trackers on vehicles, and any warrantless-tracker evidence obtained after January 23, 2012, will most likely be suppressed, when it comes to *other* new technologies that may end up being litigated in the future, if the government can consistently make and win the sort of “permitted-unless-prohibited” arguments examined above, then the good-faith exception would *always apply* to as-yet-unlitigated search contexts. And if the good-faith exception applies, then courts do not need to (and thus you can be sure will not) reach the underlying substantive question of whether the conduct violates the Fourth Amendment. Thus, the stakes are pretty high here: it would be a very big deal if the “permitted-until-expressly-prohibited” good-faith argument gains wide acceptance.

Consider some crazy new technology—a portable handheld scanner, say, that can sense the infrared radiation emitted by a person’s body and display the outline of any solid object inside the person’s clothing (for example, a gun) that is obstructing that radiation.¹³² Assume that the device is highly reliable, so that courts would uncontroversially agree that seeing a gun-shaped outline on the display screen is probable cause to believe that the person is carrying a concealed gun. Say some departments start buying units and deploying them at random around the city. When they get a hit, they have probable cause, and they arrest, search, and charge. The suppression question in such cases would be simple: Was the random, suspicionless use of the scanner itself a “search”?¹³³ If so, everything is suppressed; if not, everything comes in.

¹³⁰ *Id.* (citations omitted).

¹³¹ *United States v. Jones*, 132 S. Ct. 945, 951–53 (2012).

¹³² The New York City Police Department was testing such technology in January 2012. *See, e.g.*, Al Baker, *Police Working on Technology to Detect Concealed Guns*, N.Y. TIMES BLOG (Jan. 17, 2012, 4:39 PM), <http://cityroom.blogs.nytimes.com/2012/01/17/police-working-on-technology-to-detect-concealed-guns/?scp=1&sq=firearms%20detector&st=cse>.

¹³³ *Cf. United States v. Place*, 462 U.S. 696, 707 (1983) (holding that it is not a “search,” for Fourth Amendment purposes, for a trained narcotics canine to screen luggage which is located in a public place).

So what do you do if you are a judge faced with this novel substantive Fourth Amendment claim? You start to ponder it: well, on the one hand this is sort of like *Kyllo*, isn't it?¹³⁴ It is a new technology, not in public use. It can reveal contraband, but also perfectly legal stuff you're trying to keep private—and for goodness' sake, it's an *infrared scanner*, the exact same type of scanner as in *Kyllo*!¹³⁵

On the other hand, this defendant was walking on a public street, so we surely have a diminished expectation of privacy as compared with *Kyllo*. Is *Kyllo* really about the sanctity of the home? Do we have exactly the same sort of privacy rights in the contents of our waistbands as we do in the contents of our bedrooms?

And then the government cuts off your pondering with its good-faith argument: “Look, Your Honor, you don't even need to *reach* the question of whether this is a search because it is undisputed that this is a first-impression issue. The defense doesn't dispute the fact that there are no cases on portable body scanners at all, and that, a fortiori, no case has ever prohibited their use without a warrant. Thus, because there was no case prohibiting what the officers did, the evidence should shelter under *Davis* and come in.”

As things stand right now, the defense could jump up and respond along the lines sketched out in this article: “No, Your Honor, that is not at all what *Davis* says. *Davis* says that good faith applies if the conduct in question was expressly authorized by binding appellate caselaw. Now, we agree that there are no cases at all on portable body scanners. And that means that, a fortiori, there are no cases expressly authorizing their use without a warrant. Thus, because there was no binding appellate authority expressly authorizing what the officers did, the evidence cannot shelter under *Davis*. So, because there is no good-faith claim available, this Court *does* have to reach the merits and decide whether this is a search.”

So which will it be? The point of this Article is simple: if the government wins that argument about the meaning of *Davis*, then there will *never* be a ruling on whether the use of a new technology constitutes a “search.” On the government's argument, if it is new and untested, it is *therefore* sheltered by *Davis*.

Professor Justin Marceau, writing just before *Davis*, articulated the problem well:

[S]ettled law permitting a particular police practice (search or seizure) could take on a sort of stone-tablets character—qualified immunity would prevent a successful civil action, and settled expectations and reasonable officer reliance would also preclude exclusion, thus rendering a merits decision unnecessary in both domains. Just as federal courts balked at the *Saucier* [*v. Katz*] mandate that they decide the constitutional question before addressing whether the law was clearly established for purposes of qualified immunity if a broad reading of *Herring* [*v. United States*] ultimately prevails—whether it is called “good faith” or simply a cost-benefit calculation—then there will be no incentive, and certainly no mandate, for judges to revisit settled

¹³⁴ *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (finding that police performed a “search,” for the purposes of the Fourth Amendment, when they used a thermal imager to gain information about activity within a home).

¹³⁵ *Id.* at 29.

questions of Fourth Amendment law. The problem of missing Fourth Amendment merits decisions could quickly become acute.¹³⁶

So if it is an important part of our constitutional order that courts get a chance to make these core constitutional rulings on rapidly evolving law enforcement technology, then *Davis* should be construed narrowly, to only shelter *expressly authorized* techniques.

This argument can be made at three different levels: the more abstract policy level of the preceding paragraph; the creative “deterrence of appellate-judge error” level as attempted by Professor Orin Kerr in *Davis*;¹³⁷ or, most intuitively, at the street level of deterrence of bad police behavior. I argue simply that for Fourth Amendment purposes, the warrantless use of new investigative technologies that have never been ruled on by the courts is *exactly* the sort of police behavior that the Fourth Amendment is intended to deter.

E. Is There Any Guidance from Pre-Kyllo Thermal Imaging Evidence After Kyllo?

One might expect to find some interesting parallels in the post-*Kyllo* litigation over warrantless thermal imaging scans. I have not, however, found any case in which the thermal imaging evidence was introduced directly, as opposed to serving as probable cause for a warrant application. The reason is obvious: the only value of thermal imaging is to determine whether there is likely a “marijuana grow” in a house, so there would of course have to be a warrant to go in and find the marijuana. (GPS evidence about movements, though, will have its own evidentiary value and may well be introduced directly.) Thus, it does not appear that the government ever sought to simply admit the warrantless thermal imaging scan evidence itself. Rather, the thermal imaging scan was always used as the basis for getting a warrant. The search would then reveal the “marijuana grow” itself. Accordingly, the only post-*Kyllo* good-faith caselaw on thermal imaging was ordinary *Leon* caselaw:¹³⁸ the police had gotten a warrant that was facially valid, issued by a magistrate, and based on probable cause. A reasonable officer could rely on the warrant; end of story.

A 2003 Seventh Circuit decision is illustrative:

Thus, to the extent that any actor can be said to have been at fault, it was not the officers who sought, obtained, and executed the warrant, but rather the magistrate who, lacking the requisite prescience (not to mention authority, given *Myers*) to declare the unconstitutionality of the scan, relied on the then-controlling precedent to deny its issuance. On the other hand, the belief of an officer—warrant-in-hand—that probable cause existed to search Acker’s residence was entirely reasonable. . . . [L]aw enforcement agents properly left the probable cause determination, and its attendant constitutional and precedential considerations, to the better judgment of the magistrate. . . . [A]ny error that is said to have occurred must be attrib-

¹³⁶ Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 747–48 (2011) (footnotes omitted).

¹³⁷ Brief for Petitioner at 37–39, *Davis v. United States*, 131 S. Ct. 2419 (2011) (No. 09-11328), 2010 WL 5168874 at *37–39.

¹³⁸ *United States v. Leon*, 468 U.S. 897, 926 (1984) (insulating reliance on facially valid warrants).

uted to the magistrate, and not law enforcement agents, for the former was in a relatively better position to divine the as-yet unannounced unconstitutionality of the thermal imaging scan. Second, the candor of police with respect to the scan precludes a court's refusal to apply the good-faith exception on the basis of police dishonesty or recklessness before the issuing magistrate, the first of the four enumerated situations in which the exception will not apply. Both points highlight the reality that exclusion of the challenged evidence would not adequately advance the purpose of deterring police misconduct, but rather would penalize police for magistral mistake.¹³⁹

So the magistrate issued a warrant that was valid under then-controlling caselaw. And indeed the Seventh Circuit had a 1995 case that had expressly held that warrantless thermal imaging was not a search.¹⁴⁰

And the Seventh Circuit was not alone. The Ninth Circuit *Kyllo* panel had pointed to the Fifth, Seventh, Eighth, and Eleventh Circuits for the proposition that thermal imaging was not a search.¹⁴¹ Likewise, the Sixth Circuit, which had no pre-*Kyllo* thermal imaging precedent, suggested post-*Kyllo* that the key point was that the magistrate had issued a warrant that an officer was entitled to rely on.¹⁴²

Nor can we glean anything from the post-remand history of *Kyllo* itself. It might have seemed a good vehicle for the government to pursue a good-faith claim. But the *Kyllo* docket indicates that the U.S. Attorney's office decided there was no point trying to squeeze any more blood from the stone. After the Supreme Court's decision, the government moved to dismiss.¹⁴³

So *Kyllo* doesn't help much in predicting what will happen to tracker cases after *Jones*. It is clear that where the tracker evidence was used to secure a warrant, the familiar *Leon* analysis will apply. But where there was no warrant—pure *Davis* claims—we are on terra nova. I think the framework I have set forth in this article is the best guide to what is likely to happen.

VII. CODA: CIVIL DAMAGES AS AN ALTERNATIVE? QUALIFIED IMMUNITY AFTER *PEARSON V. CALLAHAN*

As Professor Kerr argued unsuccessfully in *Davis*, the utility of the suppression remedy is not solely in deterring bad police behavior. It has another, perhaps equally significant, jurisprudential function: getting Fourth Amendment claims in front of courts in the first place. As Kerr has argued for the past decade, of all the provisions within the Bill of Rights, the Fourth Amendment is the most sensitive to technological development, and thus the most in need of

¹³⁹ *United States v. 15324 Cnty. Highway E.*, 332 F.3d 1070, 1075–76 (7th Cir. 2003) (footnote omitted).

¹⁴⁰ *United States v. Myers*, 46 F.3d 668, 669 (7th Cir. 1995).

¹⁴¹ *United States v. Kyllo*, 190 F.3d 1041, 1046 (9th Cir. 1999) (citing *United States v. Robinson*, 62 F.3d 1325 (11th Cir. 1995); *Myers*, 46 F.3d at 669; *United States v. Ishmael*, 48 F.3d 850, 853 (5th Cir. 1995); *United States v. Pinson*, 24 F.3d 1056, 1059 (8th Cir. 1994)).

¹⁴² *United States v. Jarrell*, 68 F. App'x 622, 626 (6th Cir. 2003) (“Jarrell argues that because there was a split in the circuit courts regarding use of thermal imaging at the time the warrant was issued, Agent Watters's reliance on the warrant, which included the thermal imaging, was not made in good faith. The Court disagrees.”).

¹⁴³ See Mot. to Dismiss by Government, *United States v. Kyllo*, No. 3:92CR00051 (D. Or. Sept. 25, 2001), ECF No. 210.

continual judicial re-evaluation by the courts as the technological balance in the cops-and-robbers arms race shifts and as society's privacy expectations and the collateral damage thereto shift as well.¹⁴⁴ And the only way to get Fourth Amendment doctrine in front of courts is through suppression claims.¹⁴⁵ At argument in *Davis*, Professor Kerr made the prescient but unfortunately doomed argument that the practical impact of the Court's new good-faith rule will be to chill much pre-trial Fourth Amendment litigation and thus stymie the development of Fourth Amendment law.¹⁴⁶

The Court, however, seemed disappointingly comfortable with the assumption that there are alternative mechanisms, besides suppression, for ensuring lawful police conduct.¹⁴⁷ In recent years, starting perhaps with *Hudson v. Michigan* (no suppression for knock-and-announce violations),¹⁴⁸ the meme that "there are other deterrents out there" has been a popular one in the Court's Fourth Amendment cases.¹⁴⁹ It remains to be seen, however, whether those other deterrents can bear scrutiny as viable alternatives to suppression.

The § 1983 plaintiffs' bar has been regularly invoked as a substitute for suppression.¹⁵⁰ But in damages cases, the application of *Davis* to *Jones* claims highlights the pernicious effects of a significant but underreported decision from two terms ago: *Pearson v. Callahan*.¹⁵¹

In *Pearson*, federal agents entered Pearson's home without a warrant to search for drugs.¹⁵² The asserted justification was that a cooperating informant, whom Pearson had invited into his house (to make the purchase), could then invite in the police.¹⁵³ Pearson sued for damages.¹⁵⁴ The Tenth Circuit had not yet ruled on this "consent-once-removed" doctrine as it applied to informants, though other circuits had.¹⁵⁵ The prevailing rule in § 1983 cases, per *Saucier v. Katz*, was that the court had to decide the substantive constitutional question first, before deciding whether the rule was clearly established.¹⁵⁶ The whole point of the *Saucier* rule was to avoid the constitutional "stagnation" that would

¹⁴⁴ See, e.g., Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 364–65, 401 (2003).

¹⁴⁵ Indeed, as Kerr himself has forcefully argued recently in the context of computer searches, no Fourth Amendment claim should be deemed ripe until there has been an actual search producing actual evidence. See, e.g., Brief for Professor Orin S. Kerr as Amicus Curiae Supporting the Appellant in Favor of Reversal at 2–3, *In re Applications of the United States of America For Historical Cell-Site Data*, No. 11-20884 (5th Cir. Feb. 22, 2012), available at <http://www.volokh.com/wp-content/uploads/2012/02/Kerr-Amicus-No-11-20884.pdf>.

¹⁴⁶ See Transcript of Oral Argument at 16–17, *Davis v. United States*, 131 S. Ct. 2419 (2012) (No. 09-11328), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-11328.pdf; see also *Davis*, 131 S. Ct. at 2433.

¹⁴⁷ *Davis*, 131 S. Ct. at 2423–24.

¹⁴⁸ *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

¹⁴⁹ See, e.g., *id.*

¹⁵⁰ See *id.* at 603 (Kennedy, J., concurring).

¹⁵¹ *Pearson v. Callahan*, 555 U.S. 223 (2009).

¹⁵² *Id.* at 227.

¹⁵³ *Id.* at 229.

¹⁵⁴ *Id.* at 227.

¹⁵⁵ *Id.* at 229–30.

¹⁵⁶ *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

ensue if courts could avoid deciding constitutional questions solely on the ground that the law was unsettled and thus qualified immunity applied.¹⁵⁷

So the lower court ruled that the “consent-once-removed” doctrine was unconstitutional (under *Georgia v. Randolph*).¹⁵⁸ When the case reached the Supreme Court, the Court decided it had had enough of the *Saucier* rule, and it held that the “substantive-question-first” procedure would no longer be mandatory. For unsettled areas of law, courts will be free to simply grant qualified immunity without ever reaching the underlying constitutional question.

The Court dismissed the concern that doing away with the *Saucier* rule would result in constitutional stagnation. Indeed, the Court specifically cited suppression litigation in criminal cases as an alternative vehicle for development of Fourth Amendment law!

[T]he development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity. Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See [*Cnty. of Sacramento v. Lewis* (noting that qualified immunity is unavailable “in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion.”)].¹⁵⁹

This comment in *Pearson* is another reason why lower courts—and the Supreme Court itself, when the question comes to it—should not read *Davis* as establishing a qualified-immunity standard for the good-faith exception: the Court itself has recognized that suppression claims are the primary mechanism for the development of Fourth Amendment law. If suppression is now ruled out absent an express appellate prohibition of a particular practice, there will be no viable mechanism by which Fourth Amendment law can evolve to keep pace with technology.

Fourth Amendment violations are already categorically excluded as habeas grounds, for starters, so post-conviction collateral challenges are out.¹⁶⁰ The only litigation option left is § 1983 damages claims by innocent people harmed by new technological surveillance, for example: warrantless GPS tracker searches.

And it is in such claims that the pernicious impact of *Pearson* will be most clearly felt. Take a simple hypothetical: say the police decide, on whatever grounds, to place trackers on a number of vehicles as part of a conspiracy investigation. Some of the leads pan out and charges are filed. The probable cause narrative in the indictment lays out all the cars tracked and where they went. One of those cars is our plaintiff’s. He is a prominent public figure, and the filing of indictment generates great publicity when the media sees that he was one of the targets. He is never charged with any crime, but the revelations

¹⁵⁷ *Pearson*, 555 U.S. at 232.

¹⁵⁸ *Callahan v. Millard Cnty.*, 494 F.3d 891, 902–03 n.3 (10th Cir. 2007) (citing *Georgia v. Randolph*, 547 U.S. 103 (2006) (holding that one cotenant cannot consent to search over the objections of another on-scene tenant)).

¹⁵⁹ *Pearson*, 555 U.S. at 242–43 (citations omitted).

¹⁶⁰ *Stone v. Powell*, 428 U.S. 465, 480 (1976).

about where he was spending his time are reported in the media, and he suffers significant harms in his personal and professional life.

You can fill in whatever prurient details you want. The point is this can easily happen. Here you have a guy who was illegally searched, and the illegal search caused him damages. Isn't that a cause of action? Sure, but the cops' defense is qualified immunity. Prior to *Pearson*, the required analysis was the "*Saucier* two-step."¹⁶¹ The court had to decide *first* whether there was a constitutional violation, and only *then*, if there was, whether the law was clearly established. Under *Saucier*, the law would evolve—even if the cops in this case were off the hook, the rule would be clearly established for the next case because the court would have to decide the substance first.

But *Pearson* threw out the two-step rule, and held that courts could decide the "clearly-established" question first, if they chose.¹⁶² As commentators have pointed out—and as the Court was aware—this change will have the same side effect as *Davis*: freezing the constitutional landscape in place because no new constitutional claims can ever be recognized.¹⁶³ The virtue of the *Saucier* two-step was the same as the exclusionary rule: it forced courts to actually adjudicate constitutional claims in novel factual settings. A *Saucier* ruling finding a violation but granting qualified immunity on the second prong still made law, though the plaintiff himself wouldn't recover, because once step one was decided ("this conduct violates the Constitution") the law becomes clearly established, so that future violators won't have immunity. But if step one never gets decided then gray areas remain forever gray, and violators remain forever immune.

It is a perfect Catch-22: under *Pearson*, courts can refrain from deciding the constitutional question simply because they have not yet decided the constitutional question. Under the *Saucier* rule, litigants (and perhaps more importantly, good lawyers) have an incentive to bring § 1983 claims in novel settings because even if they don't get damages they can move the law. Not anymore, under *Pearson*.

Now, of course, in *Jones*, the Court *did* decide the constitutional question.¹⁶⁴ But what about *future* Fourth Amendment claims involving established police conduct that, because of technological changes, comes to have new and pernicious privacy impacts? This is *exactly* what Justice Sotomayor is talking about in her concurrence: the government's ability to store, forever, and in readily searchable format, a lifetime's worth of data on everyone in the country, should make us re-think, she argued, the *Smith* "pen-register" rule that a person

¹⁶¹ See *Pearson*, 555 U.S. at 232.

¹⁶² *Id.* at 236.

¹⁶³ See, e.g., Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 428 n.121 (2009); Goutam U. Jois, *Pearson, Iqbal, and Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901, 924 (2010).

¹⁶⁴ The government had not made the good faith argument or any other arguments below, other than the "not-a-search" argument, so the Court held all other arguments forfeited. *United States v. Jones*, 132 S. Ct. 945, 954 (2012). Practice lesson: it never hurts to throw on a belt as well as the suspenders.

categorically forfeits any privacy claim in information voluntarily disclosed to a third person.¹⁶⁵

Okay, fair enough. But how do we re-think it? Well, before *Davis* and *Pearson*, we could re-think it in two ways. Criminal defendants could argue suppression claims, and civil plaintiffs could sue for damages. But under *Davis* and *Pearson*, both of those routes are wiped out. There is nothing to litigate in a criminal case if there is no suppression remedy, and there is no suppression remedy under *Davis* if existing caselaw authorizes the practice.¹⁶⁶ And civil plaintiffs are out of luck because whenever the facts are sufficiently novel to support a claim that a given practice outruns existing Fourth Amendment authorization, there will, by definition, be qualified immunity.¹⁶⁷

Perhaps some sort of civil remedy can be coaxed into life from the ashes of *Saucier*. For example, Professor James Pfander has proposed allowing constitutional tort claims for nominal damages as a compromise of sorts. There is no need for qualified immunity, he argues, if there is no threat of personal monetary liability.¹⁶⁸ Thus, the socially beneficial effects of the *Saucier* two-step could be realized. The merits could still be reached, and the law could still evolve.

By expressly declaring in the complaint that they do not intend to seek and will not accept any compensatory or punitive damages or an award of costs and attorney's fees (and thereby confining themselves to nominal damages alone), plaintiffs would waive the money damages aspect of constitutional tort litigation that threatens official defendants with personal liability. By removing the threat of personal liability, and with it much of the justification for qualified immunity, the suit for nominal damages would allow the plaintiff to secure a constitutional decision even where the law was not clearly established.¹⁶⁹

But that is just a proposal. Right now, there is no such rule, and all § 1983 plaintiffs are stuck with *Pearson*. The only hope, then, for continuing evolution of Fourth Amendment doctrine lies in courts' adopting a narrow reading of *Davis*. Under a narrow reading, as articulated in this Essay, the "good-faith-reliance-on-caselaw" exception will only apply when caselaw expressly authorizes the precise police practice at issue. Where technological, procedural, or societal changes have been interposed between the caselaw and the practice, *Davis* will not apply. Only if courts adopt that narrow reading of *Davis* will the Fourth Amendment continue to respond to technological change.

¹⁶⁵ *Id.* at 956–57 (Sotomayor, J., concurring).

¹⁶⁶ What do you bet that trial judges are going to use *Davis* as an analogue to *Pearson*, too (deciding the good-faith question *precisely* to avoid issuing a substantive Fourth Amendment ruling)?

¹⁶⁷ Qualified immunity obtained unless the police violated "clearly established" law—which obviously there won't be in a novel and contested area. *Pearson*, 555 U.S. at 231.

¹⁶⁸ James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1601 (2011).

¹⁶⁹ *Id.* at 1607–08 (footnotes omitted).