Fourth Amendment Remedies and Development of the Law: A Comment on *Camreta v. Greene* and *Davis v. United States*

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The Fourth Amendment regulates an extraordinarily wide range of government conduct. Decisions interpreting the Fourth Amendment are also notoriously fact-specific and often contingent on new technologies. As a result, most Supreme Court terms feature a handful of cases that gradually develop the direction of Fourth Amendment law. In some cases, the Court reaffirms old principles. In other cases, the Court either cuts back on preexisting protections or expands protections beyond prior law. And in some cases, the Court ventures into new territory and settles questions it has never before addressed. The course of Fourth Amendment law slowly develops through the process of case-by-case adjudication.

This method of Fourth Amendment elaboration comes with a notable cost. Fourth Amendment litigation always involves claims against government actors. Someone claims that a government actor violated his Fourth Amendment rights, the government actor denies the claim, and then a court rules. In a judicial system that requires cases and controversies, some remedy must be at stake. The litigation has to matter. As a result, development of the law requires the government to face the prospect of losing whatever remedy is at stake in the case. The potential remedy both provides an incentive to bring Fourth Amendment claims and creates the cases and controversies needed for courts to adjudicate claims and hand down rulings that develop the law.

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The potential losses of law-developing litigation involve genuine social costs because law-developing litigation typically involves facts in which the police are not acting culpably. Remedies against the police are easy to justify when officers act in flagrant violation of the law. But law-developing litigation concerns where the law should go, not where it has been. The point of the litigation is the direction of appellate case law, not the culpability of individual officers. As a result, the costs of remedies when the police lose law-developing litigation are at best a necessary evil. Those costs will be imposed either on society as a whole or else on individual officers who did not act culpably.

The difficult question for Supreme Court justices is how to distribute those costs, and how much and what kind of losses are necessary to develop the law. On one hand, the law must permit enough Fourth Amendment remedies to develop the law in the broad array of contexts in which Fourth Amendment questions arise. On the other hand, the law must limit the remedies to avoid imposing excessive costs on the police and the public in law-settling litigation. Fourth Amendment law provides for several possible remedies, ranging from exclusion of evidence in criminal cases and money damages against officers to injunctive relief. The question is, how should the remedies be designed to best develop the law at the lowest cost?

Last term, the Supreme Court decided two cases that grappled with this question: *Camreta v. Greene*[1] and *Davis v. United States*.[2] Formally speaking, the two cases addressed quite different subjects. *Camreta* involved standing and mootness issues in civil litigation, while *Davis* concerned the scope of the exclusionary rule in criminal cases. But *Camreta* and *Davis* both deal with the basic tension between the costs of Fourth Amendment remedies and the needs of law-developing litigation. Further, both cases share a common theme: *Camreta* and *Davis* suggest that today's justices are more focused on limiting short-term remedial costs than on the long-term needs of elaborating Fourth Amendment law. More specifically, both reflect an optimistic view that Fourth Amendment law development is possible in a regime of zero or very limited remedies. Given the likelihood that more cases revealing a similar optimism are on the

[1] 131 S. Ct. 2020 (2011).

[2] 131 S. Ct. 2419 (2011).

way, *Camreta* and *Davis* provide an opportune moment to explore the intersection of remedies and lawmaking in Fourth Amendment law.

This essay proceeds in five parts. Part I introduces the remedies of Fourth Amendment law and their role in developing the law. Part II discusses *Camreta v. Greene*, and Part III analyzes *Davis v. United States*. Part IV offers a skeptical view of the hope underlying both cases that effective law development is possible in a zone of very limited remedies. Part V imagines what steps the Supreme Court could take to assist the goal of law development if it continues to chip away at Fourth Amendment remedies. It offers two specific proposals. First, the Court could consider a rule on the order of adjudicating claims in suppression motions. Second, the Court could adopt a more active role in adding questions presented when it grants review in Fourth Amendment cases.

I. Fourth Amendment Remedies and Development of the Law

Understanding the role of remedies in the development of Fourth Amendment law requires an understanding of existing remedies and their traditional role in developing search and seizure law. The four most important remedies are motions to suppress, civil damages actions against individual officers, suits against municipalities, and suits seeking injunctive or declaratory relief.

(1) *Motions to Suppress Evidence.* The basic idea of an exclusionary rule is that evidence obtained in violation of the Fourth Amendment often may not be admitted in criminal cases. A defendant who has been charged moves to suppress the evidence, and the court then determines whether the evidence was obtained in violation of the Fourth Amendment and therefore whether to admit or exclude the evidence. If evidence is admitted over the defendant's objection and the defendant is convicted, the defendant can appeal his conviction by challenging the trial judge's evidentiary ruling.

Exclusion of evidence is not automatic when a constitutional violation occurs. Even when a defendant convinces a court that the government violated the Fourth Amendment, doctrines such as standing,[3] inevitable discovery,[4] and attenuated basis[5] sharply limit when

[3] See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978).

[4] See, e.g., Nix v. Williams, 467 U.S. 431 (1984).

[5] See, e.g., Wong Sun v. United States, 371 U.S. 471, 487–88 (1963).

evidence will actually be excluded. Nonetheless, the basic idea of an exclusionary rule is that a defendant can move to suppress evidence in a criminal case against him with the hopes of excluding evidence from trial.

The exclusionary rule has traditionally been the driving force of Fourth Amendment development. Before its introduction in 1914,[6] the development of Fourth Amendment law was essentially unknown. Search and seizure questions arose in litigation only very rarely, and generally in unusual contexts. The first major pronouncement on the meaning of the Fourth Amendment did not arrive until 1878, and it came as mere dicta in a case about federal power to enact postal crimes.[7] The first major Fourth Amendment holding came in an 1886 civil customs dispute,[8] and the second major holding involved a subpoena in a 1906 antitrust case.[9]

The arrival of the exclusionary rule changed everything. Criminal defendants have an obvious incentive to seek suppression because the possibility of suppression is the possibility of freedom. As a result, the exclusionary rule generally ensures significant litigation of any government practice that yields evidence or contraband. The role of the exclusionary rule in developing the law became particularly important following *Mapp v. Ohio* in 1961, which applied the exclusionary rule to the states.[10] Most police practices are state and local, not federal. *Mapp* thus triggered a flood of law-developing cases that articulated and redefined the basic rules of stops and frisks,[11] wiretapping,[12] searches incident to arrest,[13] and many other common police practices. Decades later, the exclusionary rule remains the primary means by which Fourth Amendment law develops.

[6] See Weeks v. United States, 232 U.S. 383 (1914) (applying the exclusionary rule to the Fourth Amendment violations).

[7] Ex Parte Jackson, 96 U. S. 727, 732–33 (1878) (articulating rules for searching and seizing postal mail).

[8] Boyd v. United States, 116 U.S. 616 (1886).

[9] Hale v. Henkel, 201 U.S. 43 (1906).

[10] 367 U.S. 643 (1961).

[11] Terry v. Ohio, 392 U.S. 1 (1968).

[12] Berger v. New York, 388 U.S. 41 (1967).

[13] Chimel v. California, 395 U. S. 752 (1969).

(2) *Damages actions Against Individual Government Agents.* Civil damages suits against government agents in their individual capacities are a second remedy for search and seizure violations. At common law, the law of unreasonable search and seizure developed in significant part as a defense to common-law tort claims against government officials.[14] The victim of a search would sue the searching officer for trespass or some other tort, and the officer would invoke the authorization of a warrant or existing search doctrine as a defense.[15]

Modern civil Fourth Amendment suits vaguely resemble common-law tort actions, but they differ in three substantial ways. First, modern Fourth Amendment litigation is based on relatively recent and mostly judge-made causes of action. In 1961, the Supreme Court invented modern Fourth Amendment civil litigation against state and local officials in *Monroe v. Pape*.[16] *Pape* adopted a highly expansive interpretation of a rarely invoked 19th-century statute, 42 U.S.C. § 1983, so as to permit federal civil cases for constitutional violations without requiring any common-law tort to be established. In 1971, the Court created a similar cause of action against federal officials in *Bivens v. Six Unknown Federal Narcotics Agents*.[17] Under these modern precedents, a person who has suffered a Fourth Amendment violation can bring a suit for damages in federal court.

Second, the doctrine of qualified immunity provides another difference between traditional tort suits and modern Fourth Amendment civil litigation. Qualified immunity dictates that government officials sued for Fourth Amendment violations in their individual capacities are liable only if their conduct violated ''clearly established'' rights of which a reasonable officer would be aware.[18] The plaintiff cannot recover unless the violation was flagrant. The notion of applying qualified immunity to civil Fourth Amendment claims against the police is surprisingly recent: It dates back only to 1967,[19]

[14] The leading case is Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.).

[15] See *id*.

[16] 365 U.S. 167 (1961).

[17] 403 U.S. 388 (1971).

[18] Wilson v. Layne, 526 U.S. 603, 614–15 (1999).

[19] See Pierson v. Ray, 386 U.S. 547, 555 (1967). Remarkably, the rule of qualified immunity for police in Fourth Amendment cases was introduced in a short paragraph by Chief Justice Earl Warren. It was based only on the common-law precedent that an officer was not personally liable if he arrested someone based on probable cause

shortly after the Court enabled civil suits in *Monroe v. Pape*. By the 1980s, however, the doctrine of qualified immunity had become a firmly-established defense to Fourth Amendment claims.[20]

Third, governments generally play a role in defending Fourth Amendment civil claims. Although such suits are formally filed against officers in their personal capacities, officers are typically defended either by government lawyers or by private attorneys hired pursuant to insurance arrangements, contracts, or provisions in state law. Practices vary widely. For the most part, however, federal or state attorneys defend claims asserted against federal or state officials,[21] while claims against county and local officials may be defended either by county or local attorneys, or by private attorneys.[22] In most instances, governments play a critical role in determining how the cases are defended.

Civil damages suits against government officials have traditionally played only a modest role in the development of Fourth Amendment law. This circumstance is true for two main reasons. First, relatively few people sue for Fourth Amendment violations. Innocent victims generally lack sufficient damages to make such claims worthwhile. Guilty defendants often cannot sue as a result of *Heck v. Humphrey*, which held that criminal defendants cannot bring civil claims for constitutional violations that implicitly challenge their convictions.[23] As a result, Fourth Amendment law development in civil damages actions usually involves very narrow types of facts—such as excessive force claims—that do not challenge convictions and can assert damages beyond the search or seizure.

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who later turned out to be innocent. *Id*. The fact that an officer cannot be held liable for arresting someone with probable cause who turns out to be innocent is a curious precedent for a subsequent rule that an officer cannot be held liable for arresting someone when probable cause does not exist.

[20] See, e.g., Mitchell v. Forsyth, 472 U.S. 511 (1985); Anderson v. Creighton, 483 U.S. 635 (1987).

[21] See, e.g., United States Attorney's Manual, § 4-5.400.

[22] See, e.g., N.M. Stat. Ann. § 41-4-4(B) (providing for representation of public employees sued in the course of their official duties "[u]nless an insurance carrier provides a defense").

[23] 512 U.S. 477 (1994).

The second reason civil suits play only a modest role in law development has been the role of qualified immunity. Law-developing litigation typically involves close questions on which prior precedents are divided. In those circumstances, the illegality of police conduct will not be clearly established and officers will receive qualified immunity. Qualified immunity inhibits law-development in these circumstances in two ways. First, it discourages civil suits from being filed by making the recovery of damages much less likely. Second, it enables courts to reject claims on qualified immunity grounds without handing down a Fourth Amendment ruling that could develop the law.

Concerns with law development briefly led the Court to try a different approach. From *Saucier v. Katz*[24] in 2001 until *Pearson v. Callahan*[25] in 2009, courts had to adjudicate the merits of Fourth Amendment civil claims before turning to qualified immunity. ''[T]he process for the law's elaboration from case to case'' would be threatened, *Saucier* reasoned, if ''a court simply . . . skip[ped] ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.''[26] The Court reversed course in *Pearson*, however, and restored each court's discretion to decide whether to enter Fourth Amendment rulings when qualified immunity applied. Although *Saucier* had the advantage of law development, *Pearson* recognized, it often required courts to reach out to answer difficult Fourth Amendment questions that were poorly litigated and unlikely to be adjudicated effectively.

(3) *Civil Suits against Municipalities.* Fourth Amendment civil suits against governments or against officers in their official capacities are generally barred by sovereign immunity principles.[27] One narrow exception exists: City and town governments organized as municipalities can be sued for damages in some circumstances. In particular, a municipality can be sued under Section 1983 if a municipal employee conducts a search or seizure when following a policy or

[24] 533 U.S. 194 (2001).

[25] 555 U.S. 223 (2009).

[26] Saucier, 533 U.S. at 201.

[27] See, e.g., FDIC v. Meyer, 510 U.S. 471, 477–78 (1994) (constitutional tort suits against federal government barred by sovereign immunity); Louis Jaffe, Suits against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).

custom adopted by the municipality.[28] The basic idea is that the municipal policy means that the municipality itself is responsible for the conduct and can be sued directly for damages. Qualified immunity does not apply.[29]

Municipal liability has played only a very minor role in the growth of Fourth Amendment law because it applies only in a narrow context. For the most part, the municipality must first have a formal policy or pervasive custom concerning the relevant kind of search or seizure. But it rarely does. While city cops may conduct many kinds of searches or seizures, they do so mostly out of habit or training in the police academy rather than because the city adopted the practice as a policy. Even if the policy exists and a municipal employee follows it, finding a plaintiff to sue can be difficult thanks to the bar of *Heck v. Humphrey*.[30] And if a practice does not occur at the municipal level, such as the many high-technology surveillance methods that tend to be focused at the federal level, then municipal liability cannot reach that practice at all. For all these reasons, municipal liability has played a limited role in Fourth Amendment law development.

(4) *Injunctive and Declaratory Relief.* Civil suits brought under Section 1983 or *Bivens* seeking injunctive or declaratory relief provide another potential engine for the elaboration of Fourth Amendment law doctrine. From the standpoint of settling the law, the chief benefit of pursuing injunctive or declaratory relief is that it avoids qualified immunity. Such relief is forward-looking, not backward-looking, so no immunity applies.

Injunctive and declaratory relief have traditionally played a modest role in the establishment of Fourth Amendment doctrine, however, because a forward-looking remedy requires evidence that the plaintiff will be subject to a particular search or seizure in the future. Under *City of Los Angeles v. Lyons*,[31] a plaintiff seeking injunctive relief must show ''a real and immediate threat'' that he will be subject to a specific search or seizure in the future in order to establish a case or controversy. Similar standards apply when plaintiffs seek

[28] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–714 (1978).

[29] Owen v. City of Independence, 445 U.S. 622, 650 (1980).

[30] 512 U.S. 477 (1994).

[31] 461 U.S. 95 (1983).

declaratory relief.[32] These requirements effectively limit injunctive and declaratory relief to cases involving ongoing programs that affect many people. This limitation has enabled law development in Fourth Amendment challenges to drug-testing schemes and roadblock programs, but not the routine run of searches and seizures.

With the basic remedies of Fourth Amendment law explained, we can now turn to the Supreme Court's two new cases on Fourth Amendment remedies and development of the law. The first is *Camreta v. Greene*, and the second is *Davis v. United States.*

II. *Camreta v. Greene*

Camreta v. Greene involved a civil suit brought by the mother of a nine-year-old girl. Bob Camreta, a state child protective services worker, had reason to fear that the child's father had sexually molested her. Camreta joined a county police officer, James Alford, to investigate the allegations by interviewing the child at school.[33] Camreta conducted the interview in a private room. It lasted two hours. During the interview, the child made statements that Camreta believed implicated the child's parents. Camreta sought and obtained a court order temporarily removing the child from her parents' custody. Further investigation by the state proved inconclusive as to whether the sexual abuse had occurred, and eventually the child was returned to her mother's custody.

The child's mother, Sarah Greene, then filed suit against Camreta and Alford under Section 1983. She argued that Camreta and Alford violated the child's Fourth Amendment rights by detaining her at school for the interview without first obtaining a warrant. The district court concluded that the interview was constitutional, and further that qualified immunity attached because the interview complied with state law and no precedent had held that such interviews were unconstitutional.[34]

On appeal, the Ninth Circuit Court of Appeals took its time. Twenty-one months passed between argument and decision.[35] When

[32] Golden v. Zwickler, 394 U. S. 103, 109–10 (1969).

[33] 131 S. Ct. 2020 (2010).

[34] Greene v. Camreta, No. Civ. 05-6047-AA, 2006 WL 758547 (D. Or. Mar.23, 2006).

[35] The oral argument was held March 6, 2008. The decision was handed down December 10, 2009.

the decision finally came down, however, it was a doozy. On one hand, the Ninth Circuit agreed that qualified immunity attached so Camreta and Alford could not be held liable.[36] At the same time, Judge Marsha Berzon's majority opinion reasoned that the need to clarify the law justified reaching out to answer the Fourth Amendment issue. Judge Berzon then announced a new and rather remarkable Fourth Amendment rule: Once a criminal investigation has been opened into child abuse, the government must obtain a warrant to interview a child about the abuse in the presence of a police officer.[37]

In theory, the *Camreta* suit was filed against two government employees in their individual capacities, Camreta and Alford. But both employees were represented by their employers: Camreta was represented by the state of Oregon, and Alford by Deschutes County. From their perspective, the Ninth Circuit ruling surely seemed a pyrrhic victory. They won the lawsuit on immunity grounds but lost a major Fourth Amendment ruling along the way. Going forward, the broad impact of the ruling was far more significant than the outcome of one case. Even worse, the state and county had no obvious means of seeking review of the Fourth Amendment portion of the Ninth Circuit's ruling. They won the case, and winning parties generally cannot appeal. The winning officials petitioned the Supreme Court anyway, seeking a reversal of the Fourth Amendment ruling.

Once the case reached the Supreme Court, the focus shifted from the merits of the Fourth Amendment question to the procedural issue of whether government officials can obtain Supreme Court review of the merits of adverse Fourth Amendment rulings when they won below on immunity grounds. This inquiry ultimately divided into three questions: First, whether Article III standing existed to allow the Court to adjudicate the Fourth Amendment issue given that it had no impact on the lawsuit below; second, whether the Court should decline to review the claim as a matter of prudential policy; and third, whether the case was moot because several years had passed since the interview had occurred.

Justice Elena Kagan's majority opinion concluded that the Court normally can review such claims, but not in this specific case. Article

[36] Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009).

[37] *Id*. at 1030.

III standing existed to allow review of the Fourth Amendment ruling. According to Justice Kagan, an immunized government official has a ''personal stake''[38] in the outcome that creates standing ''[i]f the official regularly engages in that conduct as part of his job . . . .''[39] Because the official must ''change the way he performs his duties or risk a meritorious damages action'' the next time around, Kagan reasoned that the official has a personal interest in ''gain[ing] clearance to engage in the conduct in the future.''[40] Further, the child could be interviewed again and therefore had a stake in whether a warrant was obtained in a possible future interview.[41]

The next question was whether the Court should decline to hear such cases on prudential grounds based on the Court's usual practice of declining to review the petitions of winning parties. Justice Kagan concluded that the ''special'' context of qualified immunity justified ''bending [the] usual rule.''[42] The Court allowed lower courts to make law-developing Fourth Amendment rulings even when the courts rejected cases on qualified immunity grounds. If lower courts could hand down rulings to clarify the law even when qualified immunity existed, Justice Kagan reasoned, then surely so could the Supreme Court given its greater role in clarifying Fourth Amendment law.[43] This was necessary in part because any alternative would give the state officials an unenviable choice should they wish to challenge the lower court ruling: If they were denied an avenue of appellate review, officials would have to defy the ruling and face damages in order to try to challenge that ruling the next time around.[44] The way out was to give officials the opportunity to seek Supreme Court review.

After ruling that the Supreme Court generally could review claims from immunized state officials, the Court dismissed the case as moot because the parties were no longer in the same position as they were when the suit was filed. The child had moved to Florida and was

[38] Camreta v. Greene, 131 S. Ct. 2020, 2029 (2011).

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*. at 2030.

[43] *Id*. at 2032.

[44] *Id*.

now almost 18 years old. Because she was outside the Ninth Circuit and was likely about to graduate from high school, there was ''not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation.''[45] The intervening time and distance meant that there was no live controversy and the case was moot. The Court then opted for what it termed a ''unique'' disposition of the case: It tossed out the Ninth Circuit's new Fourth Amendment rule but retained its qualified immunity decision. In effect, the Supreme Court rewrote the Ninth Circuit's opinion by removing the part that had announced the new Fourth Amendment rule.[46]

In dissent, Justice Anthony Kennedy (joined by Justice Clarence Thomas) criticized the majority for departing from its usual requirements of cases and controversies in order to try to solve the difficulties created by the Court's willingness to have lower courts decide the merits of Fourth Amendment cases even when qualified immunity attached.[47] Instead of creating a new and unclear exception to the usual rule that prevailing parties cannot appeal, Kennedy suggested, the better approach might be to prohibit lower courts from settling Fourth Amendment questions when qualified immunity applied.[48] This change would eliminate the concern with ''locked in'' circuit precedents. While it would also inhibit law development, Kennedy acknowledged, the law could be developed in other contexts, such as motions to suppress.

III. *Davis v. United States*

The second case to consider is *Davis v. United States*, which involved the scope of the exclusionary rule when the Supreme Court adopts a new interpretation of the Fourth Amendment.[49] Willie Gene Davis was a passenger in a car that an officer stopped for a traffic violation. Davis provided the officer a false name and was arrested. The officer placed Davis in the back of his squad car and then

[45] *Id.* at 2034.

[46] *Id*. at 2036.

[47] *Id*. at 2042–44 (Kennedy, J., dissenting). Justice Antonin Scalia also filed a brief concurrence, and Justice Sonia Sotomayor concurred in the judgment joined by Justice Stephen Breyer.

[48] *Id*. at 2044–45.

[49] 131 S. Ct. 2419 (2011).

searched the car incident to arrest. The officer found a gun in Davis's jacket left on the front passenger seat. Davis turned out to have a felony record, and he was later charged in federal court for being a felon in possession of a gun. Shortly after Davis's indictment, the Supreme Court agreed to revisit the scope of the search-incident-to-arrest exception to the Fourth Amendment.

A bit of background is helpful. In 1981, in *New York v. Belton*,[50] the Supreme Court held that the police can routinely search the passenger compartment of a car after arresting its driver or passenger. *Belton* was widely understood to permit the police to lock an arrested driver or passenger in the back of the officer's squad car and then search the passenger compartment of the car. This holding was known as ''the *Belton* rule.'' The Supreme Court appeared to accept that interpretation in a 2004 case, *Thornton v. United States*,[51] although separate opinions in *Thornton* suggested that the *Belton* rule was on thin ice and might be narrowed in a future decision.[52] When the Supreme Court granted certiorari to review the *Belton* rule in *Arizona v. Gant*,[53] it became clear that the rule might be overturned.

The certiorari grant in *Gant* created an opportunity for Davis. Under *Belton*, and the lower court precedent interpreting it, the officer's search of the car was constitutional. But the Supreme Court would soon consider overturning *Belton*. Under the retroactivity principle established by *Griffith v. Kentucky*,[54] whatever new decision was handed down in *Gant* would apply fully to all other cases not yet final. Because *Gant* would be handed down before Davis's case was final, Davis would receive the full benefit of whatever rule was handed down in *Gant*.

Importantly, the retroactivity rule announced in *Griffith* was established only after the Court had tried and ultimately rejected a very different approach. Starting in 1965, in *Linkletter v. Walker*,[55] the Court experimented with limited retroactivity in an attempt to cabin the

[50] 453 U.S. 454 (1981).

[51] 541 U.S. 615 (2004).

[52] See *id*. at 624–25 (O'Connor, J., concurring in part); *id*. at 625–32 (Scalia, J., concurring in the judgment).

[53] Arizona v. Gant, 552 U.S. 1230 (2008) (granting writ of certiorari).

[54] 479 U.S. 314 (1987).

[55] 381 U.S. 618 (1965).

exclusionary rule when criminal procedure rights expand. During the *Linkletter* era, the defendant in the actual case announcing a new criminal procedure rule received different treatment from all others in the pipeline. A decision applied retroactively to the defendant in the one case announcing the new rule to ensure that the decision was not dicta and to maintain an incentive to challenge the law.[56] The new decision did not apply retroactively to the other cases still in the pipeline, however, because such a decision would threaten many convictions and was not necessary to deter the police because they had acted in good faith.[57] But the Supreme Court had rejected that approach to retroactivity in *Griffith*, on the ground that basic principles of adjudication required treating the first case like all other cases on direct review.[58] Under *Griffith*, new criminal procedure decisions are retroactive to all cases not yet final.[59]

Soon after Davis filed his notice of appeal, the Supreme Court decided *Gant*. *Gant* rejected the *Belton* rule and announced a new and more defendant-friendly rule: Searches of cars are generally not permitted incident to arrest unless one of two exceptions applies. First, the driver or passenger must be within reaching distance of the car at the time of the search or, second, there must be reason to believe evidence relating to the crime of arrest was inside the car.[60] Because neither exception applied to the search of Davis's car, *Gant* rendered the search of Davis's car unconstitutional. And because Davis's case was not yet final, the retroactivity rule of *Griffith* ensured that Davis could benefit fully from *Gant*.

On direct appeal before the Eleventh Circuit, Judge Phyllis Kravitch agreed that Davis's Fourth Amendment rights had been violated and that *Gant* applied retroactively to Davis's case. Judge Kravitch nonetheless affirmed the conviction, ruling that the good-faith exception to the exclusionary rule applied.[61] Judge Kravitch reasoned that

[56] See, e.g., Stovall v. Denno, 388 U.S. 293, 301 (1967).

[57] See, e.g., Desist v. United States, 394 U.S. 244, 253 (1969).

[58] See Griffith, 479 U.S. at 320–28.

[59] *Id*. at 328.

[60] Arizona v. Gant, 129 S. Ct. 1710, 1723 (2009) (''Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.'').

[61] United States v. Davis, 598 F.3d 1259 (11th Cir. 2010).

the purpose of the exclusionary rule was to deter police wrongdoing and that the police could not be deterred by a Supreme Court ruling handed down after a search. Because the officers had relied in good faith on Eleventh Circuit precedent interpreting *Belton*, the good-faith exception applied and the court affirmed the conviction.[62] Judge Kravitch recognized that such a rule could weaken defendants' incentive to argue for changes in the law, but she reasoned that the exclusionary rule was about deterrence, not ''foster[ing] the development of Fourth Amendment law.''[63]

The Supreme Court affirmed the Eleventh Circuit in a decision by Justice Samuel Alito. According to Justice Alito, the ''bitter pill''[64] of the exclusionary rule could only be justified by wrongful police conduct. The police in *Davis* had followed then-existing law, however, and therefore had not acted wrongfully. To the contrary, the police had acted in an exemplary manner by following existing precedent ''to the letter.''[65] The police had done what they should have done, and therefore there was nothing to deter and the exclusionary rule had no place.

Justice Alito saw no conflict between the Court's ruling and the retroactivity principles established by *Griffith v. Kentucky*. According to him, retroactivity simply ''raises the question'' of whether the suppression remedy applies by allowing a defendant to ''invoke'' the new rule.[66] But whether a defendant can invoke the new rule is different from whether a remedy is actually available to enforce it. Justice Alito reasoned that the availability of a remedy was a question of the good-faith exception, not retroactivity. Thus there was no contradiction between concluding that *Gant* applied retroactively and concluding that Davis could not obtain a remedy because his search preceded *Gant*.

Justice Alito next considered the defendant's argument that the absence of a remedy would stunt the development of Fourth Amendment law by discouraging defense challenges to precedents. Such considerations were irrelevant, Alito concluded, because ''the *sole*

[62] *Id*. at 1266.

[63] *Id*. at 1266 n.8.

[64] Davis, 131 S. Ct. at 2427.

[65] *Id*. at 2428.

[66] *Id*. at 2431.

purpose of the exclusionary rule is to deter misconduct by law enforcement.''[67] Even assuming law development was relevant, lower court precedents could still be challenged: A good-faith exception for binding precedent permitted defendants in one circuit to challenge precedents in other circuits, which might then lead to a circuit split that could, in turn, prompt Supreme Court review. Concerns that the Court's rule would insulate Supreme Court decisions from review were overblown because defendants could still frame their arguments as efforts to distinguish binding cases rather than overturn them.

Alito did not entirely shut the door to relief when a defendant successfully persuades the Court to overturn its own precedent. In such a case, the Court would at least consider granting relief:

> Davis's argument might suggest that—to prevent Fourth Amendment law from becoming ossified—the petitioner in a case that results in the overruling of one of this Court's Fourth Amendment precedents should be given the benefit of the victory by permitting the suppression of evidence in that one case. . . . Therefore, in a future case, we could, if necessary, recognize a limited exception to the good-faith exception for a defendant who obtains a judgment overruling one of our Fourth Amendment precedents.[68]

Because the relevant change in the law had already occurred in *Gant*, relief was clearly unavailable in *Davis*.

Justice Stephen Breyer dissented, joined by Justice Ruth Bader Ginsburg.[69] The majority's attempted distinction between retroactivity and the good-faith exception was ''highly artificial,''[70] Breyer contended, and amounted to overturning the rule of *Griffith* in Fourth Amendment cases. If the Court did ultimately recognize that the first case must be treated differently from later cases to ensure incentives to argue for changes in the law, then the Court had simply recreated all the problems it had faced during the *Linkletter* retroactivity era. On the other hand, if the Court rejected a remedy even in the first case, then the Court had eliminated all incentives to

[67] *Id*. at 2432 (emphasis in the original) (citations omitted).

[68] *Id*. at 2433–34.

[69] *Id*. at 2436–40 (Breyer, J., dissenting).

[70] *Id*. at 2437 (Breyer, J., dissenting).

challenge the law: The defendant would lose on relief even if he won on the merits, and would no longer challenge adverse precedents.[71]

IV. The Hope of Law Development without Remedies

Both *Camreta v. Greene* and *Davis v. United States* wrestle with the tension between the development of Fourth Amendment law and the availability of Fourth Amendment remedies. The case-by-case elaboration of Fourth Amendment law requires a stream of cases, and a stream of cases generally demands remedies to create cases and controversies and to encourage claims to be brought. The proper scope of those remedies raises difficult questions. Their potential costs are obvious in the short run. Criminals may go free, and police officers may be held personally liable. The long-term benefits are harder to assess. For generalist justices, the broad arc of Fourth Amendment development is at best an abstraction. And how clear is ''clear enough'' for Fourth Amendment law? Searches and seizures touch on so many types of government conduct, and the Supreme Court addresses so few of them, that the clarity of Fourth Amendment law may strike the justices as a difficult variable to measure and value.

Both *Camreta* and *Davis* suggest that today's justices are more focused on limiting the short-term costs of Fourth Amendment litigation than on the needs of developing Fourth Amendment law. Both cases experiment with Fourth Amendment law development in a regime of zero or extremely limited remedies. In *Davis*, the Court's wish to limit the exclusionary rule for Fourth Amendment violations triggered what amounts in practice to a Fourth Amendment exception from traditional retroactivity rules. The growth of the law was treated at most as an afterthought—something that might justify a very minor tweak down the road if necessary but was much less significant than the costs of suppression. While *Camreta* discussed the needs of law development, it did so only within the confines of the Court's embrace of qualified immunity and the recent rule of *Pearson v. Callahan*. The justices' desire to allow law development within the zone of qualified immunity pushed the Court to find a way to review lower court decisions in a remedy-free zone.

[71] *Id.* at 2438 (Breyer, J., dissenting).

More broadly, *Camreta* and *Davis* suggest a hope that remedies can be minimized in Fourth Amendment litigation without substantially affecting the substance of Fourth Amendment law. In civil cases, the thinking runs, state officials will want ''clearance'' from Fourth Amendment restrictions and civil plaintiffs will litigate because they fear being searched or seized again in the future. In criminal cases, defendants will somehow make the needed challenges even if no remedies are available. Put together, *Camreta* and *Davis* hint at a Field of Dreams-like optimism about Fourth Amendment remedies and law development. As long as the courts are open, claims will be litigated that enable law development regardless of the remedies. Build it and they will come.

This optimism isn't new. *Camreta* builds on the Court's 2009 decision in *Pearson v. Callahan*,[72] which overturned the law-developing two-step requirement of *Saucier v. Katz*.[73] *Davis* builds on the Court's 2009 decision in *Herring v. United States*,[74] which introduced the focus on culpability as a key to the application of the exclusionary rule. In each of those cases, the Court has moved toward less law development, fewer remedies, or both. Significantly, the trend is coming from all directions simultaneously. When the Court chips away at law development in civil cases, it points to the continuing availability of law development using other remedies, such as the exclusionary rule.[75] When the Court chips away at the exclusionary rule, it points to the continuing availability of law development with other remedies, including civil liability.[76] Cases in each context point to the others, but all seem to be moving in the same direction at the same time.[77]

[72] 555 U.S. 223 (2009).

[73] 533 U.S. 194 (2001).

[74] 555 U.S. 135 (2009).

[75] See, e.g., Pearson v. Callahan, 555 U.S. 223, 242–43 (2009) (noting that ''the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity.'').

[76] Davis, 131 S. Ct. at 2433. Justice Alito authored the opinions in both *Davis* and *Pearson*.

[77] Several cases point to the continuing availability of municipal liability and injunctive or declaratory relief, although those remedies are so narrow they are almost never a significant engine of Fourth Amendment law development. See Orin S. Kerr, The Limits of Fourth Amendment Injunctions, 7 J. Telecom. & High Tech. L. 127 (2009).

How far might the justices go? The opinions leave some major hints. On its face, for example, *Davis* only concerns objectively reasonable reliance on ''binding precedent.''[78] If the exclusionary rule solely concerns culpability, however, its hard to see why binding precedent is required. Reliance on binding precedent seems inherently reasonable, but reliance is often reasonable without binding precedent. A local police officer who conducts a search widely upheld among the circuits but not yet addressed by the federal circuit in his jurisdiction is no more culpable than an officer who conducts a search upheld only by his regional circuit. If the former has acted reasonably, then surely so has the latter. Given that the deferential standard of qualified immunity law has been the standard of objective reasonableness in Fourth Amendment law,[79] and has been equated in some contexts with the good-faith exception to the exclusionary rule,[80] the Court may be headed toward limiting the exclusionary rule to the rare instances when police conduct is so egregious that qualified immunity does not apply.[81]

[78] See Davis, 131 S. Ct. at 2428 (''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.''). Exactly what counts as ''binding'' precedent can be unclear. A federal circuit precedent is binding in federal court but not binding in state court. Similarly, a state supreme court case is binding in state court but not in federal court. If a federal circuit has approved a search but the state supreme court has not, does the exclusionary rule apply in state court but not in federal court? Given the concurrent jurisdiction of many criminal cases, especially drug cases, this would be a very odd result.

Similarly, the line between reliance on circuit court precedent and reliance on Supreme Court precedent remains murky. Eleventh Circuit precedent on *Belton* had simply recited the *Belton* rule in a case with facts quite similar to *Belton*. See United States v. Gonzalez, 71 F.3d 819, 822, 824–27 (11th Cir. 1996). Justice Alito announced in *Davis* that the officer had reasonably relied on circuit precedent rather than Supreme Court precedent. Davis, 131 S. Ct. at 2434 (stating that the police ''reasonably relied on binding Circuit precedent''). It is difficult to know why that was true. It would be odd if mere recognition of a Supreme Court precedent by a circuit court transformed an officer's search from one made in objective reliance on Supreme Court precedent to one made in objective reliance on circuit court precedent.

[79] See Pearson, 555 U.S. at 243–44.

[80] See Malley v. Briggs, 475 U. S. 335, 344–45 (1986).

[81] Cf. Jennifer E. Laurin, Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence, 111 Colum. L. Rev. 670 (2011). See also Davis, 131 S. Ct. at 2434–36 (Sotomayor, J., concurring in the judgment) (noting that the good-faith exception does not necessarily apply when the governing law is uncertain).

My own preference would be for the Court to reverse course and retain more robust remedies for Fourth Amendment violations. The importance of Fourth Amendment law development is far greater than a majority of the current Court realizes. Many of the doctrines that limit Fourth Amendment remedies do so without hindering law development, and they should be retained.[82] But the Court should be wary of adopting a remedies scheme that leaves law development to hope, or that imagines it can occur without real remedies. Governments employ about 870,000 law enforcement officers in the United States,[83] and the Fourth Amendment regulates them together with many other government actors. Effective regulation of these officers' conduct requires real stakes in litigation over a wide range of cases.

This is particularly true given the close connection between the Fourth Amendment and developing technology. The bad guys are constantly coming up with new ways to commit crimes, and the police are constantly devising new ways to catch them. The introduction of new technology in criminal investigations often raises fresh and difficult questions of Fourth Amendment law. The new technology changes the implication of the old rules, and the question is if and how the Fourth Amendment should adapt.[84] The strong Fourth Amendment remedies of the past have ensured that the law governing older technologies is largely settled and clear. Every cop knows how the law applies to the ubiquitous traffic stop that governs that

[82] For example, I would retain the current doctrines on standing, inevitable discovery, independent source, and the fruit of the poisonous tree. For a range of reasons beyond the scope of this essay, these doctrines limit the scope of the exclusionary rule in ways that do not substantially interfere with its role in elaborating the scope of Fourth Amendment law.

[83] As of 2008, there were 765,000 sworn law enforcement personnel with general arrest powers at the state and local levels. See Brian A. Reaves, Census of State and Local Law Enforcement Agencies, 1 (2008), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/csllea08.pdf. As of 2004, there were 105,000 sworn law enforcement personnel with general arrest powers at the federal level. See Brian A. Reaves, Census of Federal, Law Enforcement Agencies, 1 (2004), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fleo04.pdf. If we assume the numbers today roughly match the numbers from 2004 and 2008, the combined total is 870,000 law enforcement officers.

[84] See Orin S. Kerr, An Equilibrium-Adjustment Theory of the Fourth Amendment, 125 Harv. L. Rev. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract;usid=1748222.

great 20th-century technology, the automobile. But the law governing new technologies is murky, and the limited remedies of the Fourth Amendment are largely to blame.

Consider the long road to the first appellate ruling on whether the Fourth Amendment protects email. Although email has been used widely since the early 1990s, the first circuit court decision on how the Fourth Amendment applies to email was not handed down until 2007.[85] That Sixth Circuit decision was overturned on remedies grounds without reaching the merits, however: The en banc court ruled that the limits of injunctive remedies precluded relief.[86] Next, the Eleventh Circuit ruled on the subject in 2010.[87] That opinion too was overturned on remedies grounds without reaching the merits: The panel granted rehearing and issued a new opinion deciding the case on qualified immunity grounds.[88]

The first appellate ruling on the Fourth Amendment and email that has stayed on the books appeared only recently, and it required reaching out despite the prevailing remedies scheme to get there. In December 2010, the Sixth Circuit revisited Fourth Amendment protection for email in reviewing a motion to suppress.[89] The government's brief sought to have the court decide the case on remedies grounds by invoking the good-faith exception for reliance on statutory law, without reaching whether the Fourth Amendment had been violated.[90] The Sixth Circuit rebuffed the government's approach and instead handed down a ruling on the merits. According to the Sixth Circuit, deciding the case on the good-faith exception would make the limited remedies ''a perpetual shield against the consequences of government violations.''[91]

While a single circuit court ruling now addresses email protection, it has been a long road thanks to the Court's narrow remedies scheme. And how long would the road have been if remedies had been cut back even more?

[85] Warshak v. United States, 490 F.3d 455, 460 (6th Cir. 2007).

[86] Warshak v. United States, 532 F.3d 521 (6th Cir. 2008).

[87] Rehberg v. Paulk, 598 F.3d 1268 (11th Cir. 2010).

[88] Rehberg v. Paulk, 611 F.3d 828 (11th Cir. 2010) cert. granted, 131 S. Ct. 1678 (2011).

[89] United States v. Warshak, 631 F.3d 266 (6th Cir. 2010).

[90] Brief for Plaintiff-Appellee United States at 105–20, United States v. Warshak 631 F.3d 266 (6th Cir. 2010) (No. 08-3997), 2009 WL 3392997.

[91] Warshak, 631 F.3d at 282 n.13.

V. The Future of Law Development without Remedies

Whatever my own preferences, it appears likely that the Supreme Court will soon take more steps toward requiring Fourth Amendment development in a zone of limited or no remedies. Let's assume that prediction comes true. In 10 or 20 years, Fourth Amendment remedies will be more limited than they are today. The question becomes, what legal rules or procedures might enhance law development in that future? Fourth Amendment remedies are a well-covered subject in the literature, and perhaps there are no new proposals under the sun. But let me offer two ideas that may be among the more fruitful: a *Saucier*-like rule for motions to suppress and active involvement of the justices in adding questions presented in Supreme Court litigation.

If the Court eventually aligns the exclusionary rule with qualified immunity, the development of the Fourth Amendment would be sharply stunted. Because liability would attach only when the constitutional violation seemed rather obvious, law-developing claims would arise mostly when the lack of a suppression was clear. If that comes to pass, some sort of *Saucier* rule governing the reaching of merits claims may become necessary. When it remained good law, *Saucier* required courts to first evaluate the merits of Fourth Amendment claims and then to turn, if necessary, to qualified immunity. A similar rule could require courts to evaluate the merits of Fourth Amendment claims in motions to suppress before proceeding to the remedy.

At first blush, such a rule might seem quite unlikely to be adopted. The Court recently rejected *Saucier* in *Pearson*,[92] and the Court has traditionally rejected a *Saucier*-type rule in the suppression context.[93] The critical difference is the tremendous loss of law-developing litigation that would follow adoption of a qualified immunity standard. The extent of law development in Fourth Amendment damages cases is relatively modest, as is law development in the context

[92] 555 U.S. 223 (2009).

[93] United States v. Leon, 468 U.S. 897, 924–25 (1984) (''There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question of whether the Fourth Amendment has been violated.'').

of defective warrants where the good-faith exception originally arose.[94]

The exclusionary rule is different. It has served as the engine of settling Fourth Amendment law since its inception. Without an exclusionary rule, many of the basic rules of Fourth Amendment law that govern everyday interactions with the police might still be unclear.[95] The loss of clarity that would follow adopting the qualified immunity standard for all suppression claims would be dramatic. In my view, that difference could justify different treatment. If the Court insists on moving toward law development in a zone of limited remedies, it may need a *Saucier*-like rule to ensure that limited remedies don't end law development.

An alternative approach would be for the Supreme Court to take a more active role in law development by adding questions presented when it agrees to review Fourth Amendment claims. In most Supreme Court litigation, the petitioner crafts the questions the Court should answer. When the Court grants a petition for certiorari, it usually adopts the question presented by the petition in whole or in part. The Court always has the option of adding questions, however. If the remedies of Fourth Amendment law recede, the Court may need to fuel law development by adding its own questions for parties to brief that the Court can then decide.

This process already occurs occasionally in Fourth Amendment litigation, and there is some evidence of a recent uptick in its frequency. In *Pearson v. Callahan*, the Court added the question of whether to overturn *Saucier*.[96] And earlier this year, the Supreme Court added the question of whether police installation of a GPS

[94] See *id*.

[95] Experience with the Electronic Communications Privacy Act, the federal statute that governs email and computer network privacy, provides a helpful illustration. Congress passed the ECPA in 1986 without a statutory suppression remedy. The lack of a suppression remedy has made the statute a source of remarkable confusion: Legal challenges brought under the statute do not arise in the context in which the statute was intended to be used, meaning that there is no case law answering how the statute applies in many routine settings. See generally Orin S. Kerr, Lifting the ''Fog'' of Internet Surveillance: How a Suppression Remedy Would Change Computer Crime Law, 54 Hastings L.J. 805 (2003).

[96] Pearson, 555 U.S. at 227 (''In granting review, we required the parties to address the additional question whether the mandatory procedure set out in Saucier should be retained.'').

device on a car is a search or seizure when it granted certiorari in *United States v. Jones*.[97] In *Pearson*, the petitioners did not think to petition for review on the issue added by the Court because it was not a question that affected the parties' rights. In *Jones*, the respondent's brief opposing certiorari suggested the addtional question,[98] and the Court added it even though it had not been decided below and there was no circuit split. The Court's decision to add the questions presented pushed the law along, facilitating new holdings that would not have occured without the Court's initiative.

This solution is admittedly imperfect. It requires the justices to know what issues need review without much guidance by the parties. Given that the justices are generalists, that sort of forethought will arise only sporadically. Plus, if the issue added does not clearly affect the rights of the parties, the parties may see little reason to litigate it fully. In *Pearson*, for example, the parties had no particular stake in the future of *Saucier*. Because *Pearson* was briefed and argued by private lawyers without government involvement, and overturning *Saucier* only concerned the order of issues rather than their resolution, the parties had little interest in litigating the question. The petitioners' brief devoted only six pages to overturning *Saucier* and the respondent's brief gave it only eight pages.[99] Substantial contributions by various amici filled the gap, to be sure, but the basic point about adding questions with no obvious stakes to the parties remains.

Despite these problems, there may be no better options if the Supreme Court substantially cuts back on Fourth Amendment remedies. If the remedies needed to drive litigation and generate cases wither away, the Court itself may be best situated to restore cases to the docket by adding questions beyond those raised in petitions for certiorari.

[97] See United States v. Jones, No. 10-1259, 2011 WL 1456728, at *1 (June 27, 2011) (''In addition to the question presented by the petition, the parties are directed to brief and argue the following question: 'Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.'').

[98] See Brief in Opposition at 33–34, United States v. Jones (No. 10-1259), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/Jones-BIO.pdf.

[99] See Brief for Petitioners at 55–60, Pearson v. Callahan, 555 U.S. 223 (2009) (No. 07-751) 2008 WL 4154542 at 55–60; Brief for Respondent at 48–56, Pearson v. Callahan, 555 U.S. 223 (2009) (No. 07-751), 2008 WL 3895481 at *48–56.

Conclusion

The debate over Fourth Amendment remedies has traditionally focused on deterrence. Despite this focus, remedies such as suppression and damages have had an equally significant role over time in ensuring the case-by-case elaboration of Fourth Amendment law. This term's decisions in *Camreta v. Greene* and *Davis v. United States* suggest that today's Court is willing to limit those remedies—and to bend traditional principles of adjudication—to lessen their costs. If that trend continues, the development of Fourth Amendment law may be threatened. Whether the police are following the law may be subsumed by the more pressing question of whether anyone knows what law the police are supposed to follow. Such concerns may seem abstract to the justices today. But today's decisions on remedies will have a major impact on tomorrow's decisions about Fourth Amendment substance. A greater eye toward the law-developing function of remedies today will pay dividends in the future.