

## ***Herring v. United States: A Minnow or a Shark?***

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Although the result in *Herring v. United States* surprised no one, the sweep of the Supreme Court's opinion was breathtaking.<sup>1</sup> The Court declared, "The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level."<sup>2</sup> Early commentary on *Herring* has questioned how seriously this statement should be taken.<sup>3</sup> If accepted at face value, however, this and other declarations in the Court's opinion would mark a revolution in Fourth Amendment jurisprudence. Together with the Court's restriction of civil actions, they would leave most violations of the Fourth Amendment without a remedy. They would create a regime in which courts would make most of their Fourth Amendment rulings in dictum if they decided Fourth Amendment questions at all. The Court's declarations probably would block judicial development of the law of search and seizure, effectively precluding decisions like the one the Supreme Court made three months after *Herring* to limit the power of the police to search an automobile following the arrest of one of its occupants.<sup>4</sup>

The Court, however, left an escape hatch. As the commentators who discount the possible revolution emphasize, the Court's initial statement of its holding was narrow. After noting that *Herring* involved "a negligent bookkeeping error" by a law enforcement officer other than the one who conducted the unlawful search, the Court declared, "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."<sup>5</sup>

This article considers what *Herring* means. After reviewing the facts of the case, it explains why the Supreme Court's decision in *Arizona v. Evans*<sup>6</sup> probably doomed the defendant's claim to an exclusionary remedy from the outset. It then appraises the confusing mix of formulas presented in Chief Justice Roberts's majority opinion, speculates about the Court's internal politics, and examines whether the narrow reading of *Herring* favored by most commentators is

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<sup>1</sup> See *Herring v. United States*, 129 S. Ct. 695 (2009).

<sup>2</sup> *Id.* at 702.

<sup>3</sup> See *infra* text accompanying notes 43–54.

<sup>4</sup> See *Arizona v. Gant*, 129 S. Ct. 1710 (2009); *infra* text accompanying notes 132–49.

<sup>5</sup> *Herring*, 129 S. Ct. at 698.

<sup>6</sup> 514 U.S. 1 (1995).

consistent with the structure and language of the opinion. It disputes recent speculation that the decisions in *Herring* and in *Hudson v. Michigan*<sup>7</sup> portend the end of the exclusionary rule, but it recognizes that the Court may leave only a stump in place.

The article then examines in detail both *Herring*'s initial formulation of its holding and its broader declarations. Commentators stress that the initial formulation limits the Court's holding to cases of negligence "attenuated" from the defendant's arrest. *Herring*, however, did not use the word "attenuated" in the way the Court had used it for 70 years—to refer to situations in which the causal chain between a Fourth Amendment violation and the seizure of evidence had been broken. Nothing happened in *Herring* to break the causal chain, and the Court did not reveal which factual circumstances of the case led it to use the arguably critical term.

The largest part of this article explores the implications of the Court's broader declarations—declarations suggesting that the exclusionary remedy may be limited to cases of "deliberate, reckless, or grossly negligent error, or in some cases recurring or systemic negligence." The article first considers the relationship between this restriction of the exclusionary rule and the restriction announced three years ago in *Hudson v. Michigan*. *Hudson* threatens to withdraw the exclusionary remedy whenever the police have conducted a search in an unconstitutional manner, but it leaves this remedy in place when the police have searched without probable cause and without any likelihood of obtaining it. *Herring*, however, may transform the way courts address questions of probable cause by requiring them to ask, not whether an officer had probable cause for a search, but whether the officer was grossly negligent in concluding that he had probable cause.

The article then considers whether the *Herring* standard is objective or subjective, an issue on which the Court appeared to make conflicting statements, and it challenges the Court's claim that its broader formulations had been "set forth" in earlier decisions.

Much of this article explains how the Court's broader formulations threaten to block the development of Fourth Amendment law. The article considers four cases in which the Supreme Court suppressed evidence although the officers who seized it were not grossly negligent—or negligent at all—and in which their police departments were not "systemically" negligent. In each of these cases, the Court either reconsidered the law in effect at the time of the search or settled an unresolved legal question. If *Herring*'s broader formulations had applied, the reasonableness of the officers and of their departments would have required courts to admit the challenged evidence, and the Court would have had no occasion to alter or clarify the law. *Herring* departs from the Court's historic view of exclusion by treating it as a remedy for police misconduct rather than as a remedy for unreasonable searches.

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<sup>7</sup> 547 U.S. 586 (2006).

A similar problem of constitutional stagnation arises from the qualified immunity that the Supreme Court affords police officers in civil damage actions,<sup>8</sup> and this article reviews the Court's efforts to address this difficulty. For a time, the Court required courts to resolve constitutional issues in dictum,<sup>9</sup> but it abandoned this requirement in a decision one week after *Herring*.<sup>10</sup> Although the Court continues to allow judges to resolve constitutional issues in dictum, judges show little inclination to do so. Moreover, people subjected to possibly, but not clearly, unlawful searches are unlikely to hire lawyers to seek toothless judicial pronouncements in their favor. Approving both qualified immunity in civil cases and the restriction of the exclusionary rule suggested by *Herring's* broader statements would bring judicial articulation of the law of the Fourth Amendment to a halt.

This article notes that Supreme Court's invention of qualified immunity for police officers was as great a departure from the remedial scheme known to the Framers of the Fourth Amendment as the Court's invention of the exclusionary rule. In the Founding era, courts held officers strictly liable in damages for every wrongful search and seizure. Courts also failed to recognize any defense of good faith or reasonable mistake of law in 1871 when Congress authorized federal civil lawsuits against state officers who violate federal rights. The Supreme Court's substitution of exclusion for damages as the primary remedy for unlawful searches, however, has had beneficial consequences. It has better protected the police from unfair liability, better safeguarded Fourth Amendment rights, and made criminal law enforcement more effective. Motions to suppress have proven a significantly more satisfactory mechanism for developing Fourth Amendment law than damage actions. Qualified immunity in civil damage actions makes more sense than *Herring's* threatened restriction of the exclusionary rule.

*Herring's* broader formulations would not only block the development of Fourth Amendment law but also leave most of the people whom the police have searched unlawfully without a remedy. A final section of this article contends that these formulations depart from the understanding of the Framers that "where there is a legal right there is also a legal remedy."<sup>11</sup>

## I. THE CASE

By now, Bennie Dean Herring must have learned one of life's important lessons: Never bring methamphetamine and an unlawful pistol with you when you

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<sup>8</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (declaring that a plaintiff may recover damages only when an officer "violate[d] clearly established . . . rights of which a reasonable person would have known").

<sup>9</sup> See *Saucier v. Katz*, 533 U.S. 194 (2001).

<sup>10</sup> See *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

<sup>11</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*23.

visit the sheriff's department. Herring must also understand that adherence to this principle is especially important when one of the sheriff's officers is your enemy.

Sheriff's Inspector Mark Anderson's pursuit of Herring was not simply the product of his zeal to ferret out crime. Only the dissenting justices in *Herring* considered the fact worth mentioning, but "Herring had told the district attorney, among others, of his suspicion that Anderson had been involved in the killing of a local teenager, and Anderson had pursued Herring to get him to drop the accusations."<sup>12</sup>

When Herring drove a truck to the Sheriff's Department of Coffee County, Alabama to retrieve some property from another truck that had been impounded, someone told Inspector Anderson of his arrival. Anderson asked the department's warrant clerk to check whether there was a warrant for Herring's arrest. When the clerk said no, Anderson asked her to check with the warrant clerk of the Dale County Sheriff's Department. This clerk said yes. According to the Dale County clerk, a warrant ordered Herring's arrest for failing to appear in that county on a felony charge. Anderson, who evidently had mastered the Supreme Court decisions allowing the police to search a vehicle when they can arrange to arrest a person inside it,<sup>13</sup> allowed Herring to drive his truck from the Sheriff's Department. He and another officer followed the truck, pulled it over, and arrested Herring. A search incident to the arrest revealed methamphetamine in Herring's pocket and a pistol in the truck.

Within minutes of Herring's arrest and before Anderson left the scene, the Coffee County warrant clerk informed him of a serious mistake. No outstanding warrant authorized the arrest. After checking the Dale County computer files and telling the Coffee County clerk that a warrant existed, the Dale County clerk tried to locate this document. She discovered that the court had recalled it five months earlier.<sup>14</sup> At that time, someone in the Dale County Sheriff's Department had removed the warrant from the department's files and returned it to the court, but departing from the Sheriff's Department's usual practice, this clerk had neglected to correct the computer files.

The government conceded that the careless record-keeping of the Dale County Sheriff's Department had led to an unreasonable search in violation of the Fourth Amendment. The issue in *Herring* was whether the unlawfully seized evidence would be admitted.

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<sup>12</sup> *Herring v. United States*, 129 S. Ct. 695, 705 (2009) (Ginsburg, J., dissenting). The defendant's brief notes, "Shortly before the events leading to petitioner's arrest, Inspector Anderson and another officer had appeared at petitioner's house, pressing him to drop his complaints." Brief of Petitioner at 4 n.2, *Herring v. United States*, 129 S. Ct. 695 (2009) (No. 07-513).

<sup>13</sup> See *Thornton v. United States*, 541 U.S. 615, 623-24 (2004); *New York v. Belton*, 453 U.S. 454, 460 (1981). Three months after the decision in *Herring*, the Court retreated from these decisions. See *Arizona v. Gant*, 129 S. Ct. 1710, 1723-24 (2009); see also *infra* text accompanying notes 132-49.

<sup>14</sup> Herring testified without contradiction that the court recalled the warrant because it had been improperly issued. Brief for Petitioner, *supra* note 12, at 3 n.1.

## II. ARIZONA V. EVANS

Fourteen years before *Herring*, the Supreme Court had decided an almost identical case, *Arizona v. Evans*.<sup>15</sup> In *Evans* as in *Herring*, a negligent clerk failed to remove a withdrawn arrest warrant from a computer file, and a police officer relying on this file made an arrest and seized evidence. Although the Supreme Court assumed that the seizure was unlawful, it admitted the unlawfully seized evidence. The defendant in *Herring* noted only one factual distinction between his case and its predecessor. In *Herring*, the negligent clerk was a police officer. In *Evans*, the Supreme Court had assumed that the offending clerk was a court employee.

*Evans* had indicated that this difference might be significant. It was the third in a series of Supreme Court decisions declaring the exclusionary rule inapplicable to violations of the Fourth Amendment by people other than police officers. In *United States v. Leon*, the Supreme Court declared the exclusionary remedy unavailable when judges violate the Fourth Amendment,<sup>16</sup> and in *Illinois v. Krull*, it held the remedy unavailable when legislators violate the Fourth Amendment.<sup>17</sup> In *Evans*, the Court held exclusion unavailable when a court clerk's negligence led to an unreasonable search, but it expressly reserved the question whether negligence by a police clerk might lead to a different outcome.<sup>18</sup>

The Supreme Court's suggestion in *Evans* and its predecessors that identical wrongs by two public officials should have different remedies (and that wrongs by some officials should have no remedy at all) rested on crude group stereotypes. The Court noted in *Evans* that the defendant had offered "no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion."<sup>19</sup> Moreover,

there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees . . . . Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions.<sup>20</sup>

The clear implication of the Court's statements was that police officers "are inclined to ignore or subvert the Fourth Amendment" and that "lawlessness among

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<sup>15</sup> 514 U.S. 1 (1995).

<sup>16</sup> See *United States v. Leon*, 468 U.S. 897, 926 (1984).

<sup>17</sup> See *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987).

<sup>18</sup> *Evans*, 514 U.S. at 16–17 n.5.

<sup>19</sup> *Id.* at 14–15.

<sup>20</sup> *Id.* at 15 (citation omitted).

these actors requires application of the extreme sanction of exclusion.” The Court’s statements would not have distinguished court employees from police officers otherwise.<sup>21</sup>

The Supreme Court’s negative view of the police might not fit all officers and agencies. A future opinion might therefore take the process of judging groups a bit farther:

Everything we have seen on television suggests that the Los Angeles Police Department is inclined to ignore or subvert the Fourth Amendment. We recall the beating of Rodney King, the perjury of Mark Fuhrman, the shooting of Javier Ovando, the shooting of Ronald Stokes, the framing of Geronimo Pratt, the detention of Joe Morgan, and the Rampart police scandal (which led to vacating 106 convictions because more than 70 officers lied, planted evidence, and committed other crimes).<sup>22</sup> We saw that film about the civil commitment of Christine Collins too.<sup>23</sup> Yet the Police Department of Burlington, Vermont appears to be a model law enforcement agency.<sup>24</sup> We are aware of no evidence that the Burlington Police Department is inclined to ignore or subvert the Fourth Amendment. We therefore will apply the exclusionary rule when a Los Angeles police officer violates the Fourth Amendment but not when a Burlington officer violates the Fourth Amendment.

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<sup>21</sup> When courts take it upon themselves to determine which occupational groups are inclined to ignore or subvert the Fourth Amendment, they may confront some close cases. I once was on a panel with Michael Angarola, the prosecutor who argued and won *Illinois v. Krull*, 480 U.S. 340 (1987). The occasion is a bittersweet memory, for Angarola was killed by a reckless driver as he drove home after our panel. Angarola commented, “Because the Supreme Court had said in *Leon* that judges are not inclined to ignore or subvert the Fourth Amendment, I argued that legislators are not inclined to ignore or subvert the Fourth Amendment. Of course I said that tongue in cheek.” Note that even prosecutors sometimes snicker at the Supreme Court’s exclusionary rule decisions.

<sup>22</sup> See Los Angeles Police Department, WIKIPEDIA, [http://en.wikipedia.org/wiki/Los\\_Angeles\\_Police\\_Department](http://en.wikipedia.org/wiki/Los_Angeles_Police_Department) (last visited Sept. 16, 2009).

<sup>23</sup> *CHANGELING* (Universal Pictures 2008) (starring Angelina Jolie). Captain J. J. Jones of the Los Angeles Police Department arranged Collins’s commitment in 1928 after she insisted that a boy claiming to be her vanished son Walter was an imposter and after she produced dental records to prove it. Walter apparently had been abducted and murdered, but when a boy in Iowa claimed that he was Walter, the police arranged a media-event reunion between him and Collins. The police “hoped to negate the bad publicity they had received for their inability to solve [Walter’s] case and others [and] also hoped the uplifting human interest story would deflect attention from a series of corruption scandals that had sullied the department’s reputation.” See Wineville Chicken Coop Murders, WIKIPEDIA, [http://en.wikipedia.org/wiki/Wineville\\_Chicken\\_Coop\\_Murders](http://en.wikipedia.org/wiki/Wineville_Chicken_Coop_Murders) (last visited Sept. 16, 2009).

<sup>24</sup> See the department’s website at <http://www.police.ci.burlington.vt.us/> (last visited Oct. 5, 2009), noting among other nice things a 2001 Community Policing Award from the International Association of Chiefs of Police.

As this imaginary opinion suggests, the Supreme Court's judgment of groups was not only invidious but unnecessary. A case in which a Burlington police officer violates the Fourth Amendment does not differ in any significant respect from one in which a Los Angeles officer violates the Fourth Amendment. Ninety-eight percent of the Burlington officer's colleagues might be fine public servants and fifty-three percent of the Los Angeles officer's colleagues might be thugs, but the acts of these other officers would not be before the Court. Differentiating two otherwise identical Fourth Amendment violations on the ground that one was committed by a court employee and the other by a police officer would similarly fail to treat like cases alike. If court employees do not violate the Fourth Amendment very often, applying the exclusionary rule to their conduct would not lead to the suppression of evidence very often. Much is lost when courts judge groups rather than people and when, rather than decide the case before them, they devise rules for hypothesized clusters of cases.<sup>25</sup>

Moreover, the Court's analysis rested on an oversimplified view of how the exclusionary rule achieves its instrumental goals.<sup>26</sup> On the one hand, the Court insulted a second occupational group by indicating that court employees do not care whether their mistakes and deliberate wrongs cause the dismissal of otherwise well-founded criminal charges. On the other hand, the Court assumed that the exclusionary rule influences the police only by frustrating their distinctive lust for punishment. The Court apparently has not noticed that the rule works in a more positive way by allowing the courts to give guidance to officials who ultimately prove willing to receive it.<sup>27</sup>

The Supreme Court's distinction between police officers and everyone else was strained,<sup>28</sup> and the distinction would have seemed especially artificial if

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<sup>25</sup> See generally Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) [hereinafter Alschuler, *Bright Line Fever and the Fourth Amendment*].

I have written elsewhere:

[O]ver the course of the twentieth century, courts (the U.S. Supreme Court in particular) came to see litigants as trimmings for their rulings. They focused less on corrective justice and more on concerns like efficiency, deterrence, cost-benefit analysis, the systemic reform of defective institutions, and shaping "the law." As a result, the sense of individual worth and individual entitlement that has distinguished our culture from some others has diminished, and marking a conceptual line between judicial decisions and legislative enactments has become more difficult.

ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 102 (2000).

<sup>26</sup> Like other commentators and like the Supreme Court when it created the rule, I have argued that an appropriate vision of the rule must accommodate both instrumental and corrective concerns. See Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 IOWA L. REV. 1741, 1748–54 (2008).

<sup>27</sup> See *infra* text accompanying notes 155–57, 189, 249–50.

<sup>28</sup> I developed this point more thoroughly in commentary on the first Supreme Court decision declaring that the exclusionary rule is only for cops. See Albert W. Alschuler, "Close Enough for Government Work": *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 351–57.

everything had been made to turn on the different titles given to government employees performing essentially the same task. Although the vote to admit the unlawfully obtained evidence in *Herring* was close—five to four—almost no one expected Herring to win his case. Most Court watchers were prepared for a shell game. A Supreme Court opinion had declared in 1995, “Because the exclusionary rule was designed for cops, not for clerks, we decline to apply it to clerks.” The Court’s 2009 decision would say, “And because there is no difference between clerks and cops, we decline to apply it to cops.”

Chief Justice Roberts’s opinion for the majority did not play this shell game. Although the majority relied heavily on *Evans* and its predecessors, it did not suggest that these cases were indistinguishable from *Herring*. The Court simply noted without comment that the *dissenters* in *Evans* had called the distinction between police errors and judicial errors “artificial.”<sup>29</sup> These dissenters—Justices Ginsburg and Stevens—were among the dissenters in *Herring*.

### III. *HERRING* IN THE COURT OF APPEALS AND THE SUPREME COURT

In the Eleventh Circuit, Judge Ed Carnes wrote an elegant, careful, and cautious opinion in support of the expected result in *Herring*.<sup>30</sup> He observed that the Fourth Amendment violation arose from “a negligent failure to act, not a deliberate or tactical choice to act.”<sup>31</sup> “Deterrents work best,” he said, “where the targeted conduct results from conscious decision making . . . .”<sup>32</sup> Judge Carnes reviewed several non-exclusionary “incentives for keeping records current.”<sup>33</sup> He noted that the error in Dale County appeared to be aberrational and declared, “If faulty record-keeping were to become endemic in that county, . . . officers in Coffee County might have a difficult time establishing that their reliance on records from their neighboring county was objectively reasonable.”<sup>34</sup> He forcefully rejected the claim that *Arizona v. Evans* was on point: “[T]his effort by the government to justify its capture of Herring red-handed relies on a red herring.”<sup>35</sup> He emphasized particularly

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<sup>29</sup> *Herring v. United States*, 129 S. Ct. 695, 701 n.3 (2009) (citing *Arizona v. Evans*, 514 U.S. 1, 29 (Ginsburg, J., dissenting)).

<sup>30</sup> *United States v. Herring*, 492 F.3d 1212 (11th Cir. 2007), *aff’d*, 129 S. Ct. 695 (2009). During his years in the Alabama Attorney General’s Office, Judge Carnes was known as “the premier death penalty advocate in the country.” His nomination to the Eleventh Circuit by President George H.W. Bush was approved by a Senate vote of 62 to 36 after a Democratic filibuster and a delay of eight months. See Edward Earl Carnes, WIKIPEDIA, [http://en.wikipedia.org/wiki/Edward\\_Earl\\_Carnes](http://en.wikipedia.org/wiki/Edward_Earl_Carnes) (last visited Sept. 16, 2009).

<sup>31</sup> *Herring*, 492 F.3d at 1218.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1218–19.

<sup>35</sup> *Id.* at 1216. Like Judge Carnes, commentators on *Herring* have noticed that the defendant shares his last name with a fish. Craig Bradley’s commentary is titled “Red *Herring* or the Death of

the unique circumstance here that the exclusionary sanction would be levied not in a case brought by officers of the department that was guilty of the negligent record keeping, but instead it would scuttle a case brought by officers of a different department in another county, one whose officers and personnel were entirely innocent of any wrongdoing or carelessness. . . . Hoping to gain a beneficial deterrent effect on Dale County personnel by excluding evidence in a case brought by Coffee County officers would be like telling a student that if he skips school one of his classmates will be punished.<sup>36</sup>

Unlike Judge Carnes, Chief Justice Roberts is no minimalist. Although his opinion for the Supreme Court began with a reasonably limited statement of the Court's holding, it ended by appearing to restrict the exclusionary rule dramatically in a way not sought by the government.

In the opening paragraph of his opinion, the Chief Justice posed the issue this way: "What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?"<sup>37</sup> In the second paragraph, he gave this answer: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."<sup>38</sup>

Even this initial formulation of the ruling in *Herring* was broader than the one made by the Eleventh Circuit. The Supreme Court's statement of the issue made no mention of the circumstance that had seemed most salient to Judge Carnes and his court. Chief Justice Roberts might have asked, "What if the arresting officer's belief turns out to be wrong because of a negligent bookkeeping error by a police employee in another county?" Instead, Roberts asked about the significance of a negligent error by *any* officer other than the one who conducted the search. His opinion implied that even negligence by another officer in the same police agency might be regarded as "attenuated."<sup>39</sup>

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the Exclusionary Rule?" Craig M. Bradley, *Red Herring or the Death of the Exclusionary Rule?*, TRIAL, Apr. 2009, at 52. Wayne LaFave's is called "The Smell of *Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule." Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009). LaFave remarks that "this *Herring* is no mere herring; it is surströmming, which (as any Swede can tell you) is touted as a 'delicacy' but is actually attended by both a loathsome smell that 'grows progressively stronger' and a dangerous capacity to 'explode' beyond its existing boundaries." *Id.* at 758.

<sup>36</sup> *Herring*, 492 F.3d at 1218.

<sup>37</sup> *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

<sup>38</sup> *Id.*

<sup>39</sup> Withholding the exclusionary remedy whenever an innocent officer has relied on misinformation provided by another member of his department would notably limit the application of the exclusionary rule. See *infra* text accompanying notes 82–84.

After reciting the facts of the case and reviewing the Supreme Court's exclusionary rule decisions (particularly *Leon* and *Evans*), the majority made this declaration of principle: "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level."<sup>40</sup> The Court remarked that "since *Leon*, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than [it was in this case]."<sup>41</sup> In its concluding paragraph, the Court offered this formulation, one that omitted the earlier reference to gross negligence: "[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'"<sup>42</sup>

This article will refer to the Supreme Court's declaration that the exclusionary rule does not apply to the products of "isolated negligence attenuated from the arrest" as its "little blast" statement. It will refer to the Court's declarations that only gross negligence, systemic negligence or worse can lead to the exclusion of evidence as its "big blast" statements. Several commentators and the dissenting Justices in *Herring* have concluded that only the Court's "little blast" statement matters for now.

#### IV. HOW TO READ A JUDICIAL OPINION: HAVE THE RULES CHANGED?

##### A. *Some Understandings of Herring*

On the day *Herring* was decided, Tom Goldstein, a Washington lawyer who has argued twenty-one cases before the Supreme Court,<sup>43</sup> blogged, "[M]y preliminary reaction is that we will at some point soon regard today's *Herring* decision as one of the most important [Fourth Amendment] rulings . . . in the last quarter century."<sup>44</sup> He wrote, "Today, the Supreme Court holds that negligent errors by the police generally do not trigger the exclusionary rule. . . . Put another way, the Supreme Court today extended the good faith exception to ordinary police conduct."<sup>45</sup> Goldstein apparently believed, however, that the Court's holding was limited to conduct "attenuated from the arrest." He simply predicted that the Court

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<sup>40</sup> *Herring*, 129 S. Ct. at 702.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 704.

<sup>43</sup> See Thomas Goldstein—Biography, <http://www.akingump.com/tgoldstein/> (last visited, Oct. 5, 2009).

<sup>44</sup> Tom Goldstein, *The Surpassing Significance of Herring*, SCOTUS BLOG, Jan. 14, 2009, <http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/>.

<sup>45</sup> *Id.*

would take the “next logical step” of “abandoning the ‘attenuation’ reference altogether” in about two years.<sup>46</sup>

Replying to Goldstein, Orin Kerr called *Herring* “a minor case” and “a narrow and interstitial decision, not one that is rocking the boat.”<sup>47</sup> Earlier in the day, before Goldstein’s commentary appeared, Kerr had offered his initial impression of *Herring*, calling it “almost a replay” of *Arizona v. Evans*.<sup>48</sup> In his reply to Goldstein, Kerr offered two reasons for discounting the Court’s “big blast” statements. First, creating a general good faith exception for police conduct “would be an extraordinary shift in Fourth Amendment law that would effectively overrule a ton of cases.” Second, the “issue wasn’t raised by the briefs or argument.”<sup>49</sup> A writer who imagines that the Supreme Court would not make a revolutionary ruling sought by none of the parties is not much of a Court watcher.<sup>50</sup> Moreover, it seems odd to suppose the Court would not do something when the Court might have done it already. Determining what the Court had done required an assessment of its language, but Kerr did not indicate what meaning, if any, he attributed to the Court’s “big blast” statements.

Wayne LaFave, America’s preeminent Fourth Amendment scholar, wrote that “the Court’s holding only covers such negligence as is ‘attenuated’ from the subsequent search or seizure.” He regards *Herring* as a “scary” decision, but only because the Court’s analysis “far outruns the holding” and the case “seem[s] to set the table for a more ominous holding on some future occasion.”<sup>51</sup> Craig Bradley commented that although *Herring* “inched closer to destroying the constitutional protection of the exclusionary rule,” the case “itself represents another chip out of the exclusionary rule, albeit a minor one since most illegal searches will not be attenuated from the error that caused them.”<sup>52</sup>

The dissenters described the majority’s holding similarly: “The Court holds that suppression was unwarranted because the exclusionary rule’s ‘core concerns’ are not raised by an isolated, negligent record-keeping error attenuated from the arrest.”<sup>53</sup> The dissenting opinions discussed the importance of accurate record-keeping in law enforcement and the ability of the exclusionary rule to encourage it,

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<sup>46</sup> *Id.*

<sup>47</sup> Orin Kerr, *Responding to Tom Goldstein on Herring*, THE VOLOKH CONSPIRACY, Jan. 14, 2009, [http://volokh.com/archives/archive\\_2009\\_01-11-2009\\_01\\_17.shtml#1231961926](http://volokh.com/archives/archive_2009_01-11-2009_01_17.shtml#1231961926).

<sup>48</sup> Orin Kerr, *Supreme Court Hands Down Herring v. United States*, THE VOLOKH CONSPIRACY, Jan. 14, 2009, [http://volokh.com/archives/archive\\_2009\\_01\\_11-2009\\_01\\_17.shtml#123195480](http://volokh.com/archives/archive_2009_01_11-2009_01_17.shtml#123195480).

<sup>49</sup> Kerr, *supra* note 47.

<sup>50</sup> *See, e.g.*, *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *Teague v. Lane*, 489 U.S. 288 (1989); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>51</sup> LaFave, *supra* note 35, at 770.

<sup>52</sup> Bradley, *supra* note 35, at 54.

<sup>53</sup> *Herring v. United States*, 129 S. Ct. 695, 706 (2009) (Ginsburg, J., dissenting).

but they did not sound the alarm about the dangers of limiting the exclusionary remedy to cases of grossly negligent errors.<sup>54</sup> The dissenters seemed not to notice (or pretended not to notice) the majority's "big blast" statements. Perhaps the dissenters hope that the question of exclusion will not arise again, and if it does, they may plan to be "shocked" that anyone would misread the narrow decision in *Herring*.

*B. Parsing Strange: Trying to Take the Court's Language Seriously*

The level of police culpability needed to trigger the Fourth Amendment exclusionary rule is one question, and attenuation is another.<sup>55</sup> The Court's "big blast" statements in *Herring* concerned only the required level of culpability. They appeared to declare without qualification that, in the absence of systemic negligence, only deliberate, reckless, and grossly negligent conduct would lead to suppression. These broad statements said nothing about attenuation. Why would they not count until the Court declared in a second case, "We really mean it"?

Lawyers once distinguished between *obiter dictum*, which was not binding, and the *ratio decidendi* of a case, which was.<sup>56</sup> The *Herring* Court's "big blast" statements look more like *ratio decidendi* (or the Court's "reason for deciding" as it did<sup>57</sup>) than like *obiter dicta* (or things "said by the way."<sup>58</sup>) Unlike the Court's unexplained references to attenuation, these statements appeared as part of a sustained argument. The Court wrote in a footnote following the first of these statements, "We do not quarrel with Justice Ginsburg's claim that 'liability for negligence . . . creates an incentive to act with greater care . . . .' But our cases

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<sup>54</sup> The dissenters did take issue with the majority's claim that "[t]he exclusionary rule . . . is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless," and they argued that "liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care." *Id.* at 708.

<sup>55</sup> The issues are related, for courts may follow the consequences of deliberate misconduct farther than the consequences of negligent error. *See* *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (declaring that courts must consider "the purpose and flagrancy of the official misconduct" in determining how far the causal chain from a Fourth Amendment violation extends).

<sup>56</sup> *See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE §§ 907–908 at 97 (Robert Campbell ed., 1874) ("[L]aw made judicially must be found in the general grounds or reasons of judicial decisions . . . . The general reasons or principles of a judicial decision, as thus abstracted from any peculiarities of the case, are commonly styled, by writers on jurisprudence, the *ratio decidendi*."); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431 (1989).

<sup>57</sup> *See* *Ratio Decidendi*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Ratio\\_decidendi](http://en.wikipedia.org/wiki/Ratio_decidendi) (last visited Sept. 15, 2009); J. L. Montrose, *Ratio Decidendi and the House of Lords*, 20 MOD. L. REV. 124, 124 (1957).

<sup>58</sup> *See* *Obiter Dictum*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Obiter\\_dictum](http://en.wikipedia.org/wiki/Obiter_dictum) (last visited Sept. 15, 2009).

require any deterrence to ‘be weighed against the substantial social costs exacted by the exclusionary rule, and here exclusion is not worth the cost.’”<sup>59</sup>

To be sure, only the Court’s “little blast” statement appeared in a sentence that used the words “we hold.” When lawyers fussed about those Latin terms, however, they did not suppose that every sentence in an opinion other than the one that used those words could be disregarded.

The *Herring* Court’s “big blast” statements are consistent with its “little blast” statement. Indeed, they seem to swallow it. A monarch’s decree might announce in its opening paragraph that all bachelors must report for induction. It might explain later that bachelors must report because they are men, and earlier decrees, properly understood, establish that all men must report. The monarch’s mode of expression would be odd, but his decree would seem to leave no room for a subordinate authority to conclude that married men may stay home.

One wonders whether the early commentators on *Herring* would read a decision expanding the exclusionary remedy in the same way they read the Supreme Court’s decision restricting it. A court might say in the opening paragraph of an opinion, “In this case, police officers deliberately violated the Fourth Amendment as part of a systematic campaign of harassment. We hold that when a Fourth Amendment violation is both systematic and purposeful, the evidence it uncovers must be suppressed.” Later in the same opinion, the court might announce, “As laid out in our cases, the exclusionary rule applies whenever a Fourth Amendment violation is negligent or worse. The violation in this case clearly exceeds that level.” Would the commentators view the court’s second statement only as a possible portent for the future?

One argument based on language, however, supports the commentators’ understanding of *Herring*. If the Supreme Court had decided that negligence should not lead to suppression even when it was “unattenuated”—that is, if the Court had concluded that ordinary negligence should never lead to suppression—it would have had no occasion to say that negligence should not lead to suppression when it was attenuated. Giving effect to the Court’s “big blast” statements wipes out a statement that the Court presumably meant seriously—the “little blast” statement that the Court described as its holding. Because the “big blast” statements swallow the “little blast” statement altogether, both cannot be “operative” at the same time.<sup>60</sup> In this situation, lower courts ought to make operative only the statement that the Court called its holding. Perhaps the “big blast” statements should be regarded as the Supreme Court’s announcement that it intends to let the second shoe drop when the issue arises again. Although these

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<sup>59</sup> *Herring*, 129 S. Ct. at 702–03 n.4 (quoting *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987)) (internal citations omitted).

<sup>60</sup> During the Watergate crisis, President Nixon’s press secretary, Ron Ziegler, gave reporters a new statement of the President and declared that some of the President’s earlier statements were “inoperative.” See WILLIAM SAFIRE, *SAFIRE’S NEW POLITICAL DICTIONARY: THE DEFINITIVE GUIDE TO THE NEW LANGUAGE OF POLITICS* 346 (rev. ed. 1993) (describing Ziegler’s news conference and defining “inoperative” as “a correction without an apology, leaving the corrector in a deep hole”).

statements may not be holding, they may not be open to much argument either.<sup>61</sup> There may be no Latin term for them except *perplexi fiat*.

### C. *The Games Justices Play*

Because no coherent speaker would make *Herring's* “big blast” statements and its “little blast” statement at the same time, one can infer that the appearance of these statements in the same opinion was the product of strategic gamesmanship. John Roberts, who once declared that as Chief Justice he would be merely an umpire, is evidently an operator instead.<sup>62</sup> Perhaps the early commentators on *Herring* saw no reason to use old Latin terms and to parse the Supreme Court’s language because they understood that the rules have changed. The Court’s opinions must now be read as political compacts rather than as principled statements of reasons.

One cannot be sure what game led to *Herring's* mix of formulas, but one imagines that it had something to do with Justice Anthony Kennedy (aka the Supreme Court’s swing vote, the man in the driver’s seat, the Court’s loose cannon, the Prince of Denmark, and the second most powerful man in America). Perhaps Chief Justice Roberts provided a narrow formulation of the Court’s holding early in his opinion to bring aboard Justice Kennedy, and perhaps Roberts then slipped the broader “big blast” formulations past him. In one variation of this scenario, an initial draft of Roberts’s opinion might have offered only the “big blast” formulations; Kennedy might have sought revision; and Roberts might then have revised his opinion only in part.

Yet this scenario seems improbable. Even if Justice Kennedy initially failed to notice the range of statements to which he was acceding, a dissenting justice or an alert law clerk probably would have had a conversation with him about it. As the indispensable fifth vote, Kennedy probably had the bargaining power to excise the “big blast” statements from Chief Justice Roberts’s opinion if he wished to do so. He certainly could have disassociated himself from these statements in a concurring opinion.

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<sup>61</sup> What weight to give the Court’s “big blast” statements is an issue of practical importance for lower court judges, but the issue does not matter much to the Supreme Court. When the question arises in the next case, the Court may graciously concede that *Herring* concerned only “attenuated” negligence but then announce that the “big blast” statements do supply an appropriate general rule.

<sup>62</sup> Roberts said at his confirmation hearings:

Judges are like umpires. Umpires don’t make the rules; they apply them.

The role of an umpire and a judge is critical. They make sure everybody plays by the rules.

But it is a limited role. Nobody ever went to a ballgame to see the umpire. . . .

Mr. Chairman, I come before the committee with no agenda. I have no platform.

Judges are not politicians who can promise to do certain things in exchange for votes.

*Court in Transition: ‘I Come Before the Committee With No Agenda. I Have No Platform,’* N.Y. TIMES, Sept. 13, 2005, at A28.

The question then becomes why Justice Kennedy approved the entire range of formulations in *Herring*. Perhaps he was waiting to decide what he believes—or else to determine what political response the Court’s “big” and “little blast” statements would generate. More charitably, Justice Kennedy might have chosen to allow the issue to “percolate” so that he and the rest of the Court could gain the “wisdom” of lower courts and commentators before resolving it definitively.<sup>63</sup> On any of these hypotheses, the “big blast” statements of the majority opinion are merely trial balloons, and they may still fall like lead.<sup>64</sup> Everything depends on the inscrutable one, who did not let us know where things stand.

#### V. IS THE EXCLUSIONARY RULE LIKELY TO VANISH?

Three years ago, the Supreme Court sharply limited the exclusionary rule in *Hudson v. Michigan*.<sup>65</sup> *Hudson* prompted speculation that the Court was likely to scrap the rule altogether,<sup>66</sup> and *Herring* added to this speculation.<sup>67</sup> Yet Justice Kennedy, who supplied the fifth vote for both decisions, declared in his *Hudson* concurrence, “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”<sup>68</sup> Because the number of exclusionary rule skeptics on the Supreme Court is unlikely to increase in the administration of President Obama, Justice Kennedy has the power to deliver on this promise. Moreover, *Herring*’s “big blast” statements appear to be a considered reformulation of the rule—one that would leave at least a stump in place. In these statements, Chief Justice Roberts and the Supreme Court’s other conservatives voiced their willingness to exclude evidence in cases of “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>69</sup>

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<sup>63</sup> *But see* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) (“[T]o . . . suggest that it is actually desirable to allow important questions of federal law to ‘percolate’ in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion; at best it is making a virtue of necessity.”).

<sup>64</sup> Of course a nicer way to float a trial balloon would have been to call it a balloon: “We may someday have occasion to hold that evidence should be excluded only in cases of deliberate, reckless, and grossly negligent error. But the parties have neither briefed nor argued this question, and we need not resolve it to decide this case.”

<sup>65</sup> *See Hudson v. Michigan*, 547 U.S. 586 (2006). I discuss *Hudson* in the text accompanying notes 88–97 *infra*.

<sup>66</sup> *See, e.g.,* David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005–2006 CATO SUP. CT. REV. 283 (2006); *The Supreme Court—Leading Cases*, 120 HARV. L. REV. 173, 174 (2006) (declaring that “the Court may rely on *Hudson* in the future to eliminate the rule altogether”).

<sup>67</sup> *See, e.g.,* Adam Cohen, *Is the Supreme Court About to Kill Off the Exclusionary Rule?*, N.Y. TIMES, Feb. 16, 2009, at A22; Bradley, *supra* note 35, at 52 (declaring that *Herring* “inched closer to destroying the constitutional protection of the exclusionary rule”).

<sup>68</sup> *Hudson*, 547 U.S. at 603.

<sup>69</sup> *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

*Herring*'s "big blast" statements may provide a test of whether one is a pessimist or an optimist. If these statements prove to be the rule, the glass will be nine-tenths empty, but it will also be one-tenth full. In one withered form or another, the exclusionary rule will survive.<sup>70</sup>

#### VI. ATTENUATED? WHY ATTENUATED?

Only the word "attenuated" in the *Herring* opinion has given the commentators reason to believe that the opinion's "big blast" statements are not yet the law. The opinion used this possibly limiting word three times.

The word first appeared in the "little blast" statement: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."<sup>71</sup> It then appeared in a description of the Eleventh Circuit's ruling: "Because the error was merely negligent and attenuated from the arrest, the Eleventh Circuit concluded that the benefit of suppressing the evidence 'would be marginal or nonexistent . . .'"<sup>72</sup> And the word appeared again shortly before the first of the "big blast" statements: "An error that arises from nonrecurring and attenuated negligence is . . . far removed from the core concerns that led us to adopt the rule . . ."<sup>73</sup> Following this last reference to attenuation, the "big blast" statements took over.

The Court did not explain what it meant by the word attenuated. It plainly did not mean what it had meant in many other Fourth Amendment decisions that had used this word over the course of seventy years. In 1939, in *Nardone v. United States*, the Court noted that the causal connection between the government's unlawful conduct and its proof could "become so attenuated as to dissipate the taint."<sup>74</sup> At least ten Supreme Court opinions have repeated *Nardone*'s language in the course of resolving issues of causation.<sup>75</sup> The Court has spoke of attenuation,

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<sup>70</sup> Tracey Maclin still expects the Supreme Court to abolish the exclusionary rule. He envisions a conversation in which Justice Scalia reminds Justice Kennedy that they will not hold power forever and in which Scalia urges Kennedy to join in abolishing the rule. Maclin sees Kennedy as yielding to Scalia's persuasion. Tracey Maclin, *The Fourth Amendment and the Exclusionary Rule*, Address to the Hoffinger Criminal Justice Colloquium, New York Univ. School of Law (Feb. 24, 2009). In my view, both sides of the conversation that Maclin imagines are highly improbable, but the Court's "maximalist" approach to judging (include the "big blast" statements whenever you can) encourages the kind of speculation in which Maclin engaged.

<sup>71</sup> *Herring*, 129 S. Ct. at 698.

<sup>72</sup> *Id.* at 699.

<sup>73</sup> *Id.* at 702.

<sup>74</sup> *Nardone v. United States*, 308 U.S. 338, 341 (1939).

<sup>75</sup> See *Murray v. United States*, 487 U.S. 533, 536–37 (1988); *United States v. Leon*, 468 U.S. 897, 911 (1984); *Segura v. United States*, 468 U.S. 796, 805 (1984); *Taylor v. Alabama*, 457 U.S. 687, 692 (1982); *United States v. Crews*, 445 U.S. 463, 470 (1980); *Dunaway v. New York*, 442 U.S. 200, 216 (1979); *United States v. Ceccolini*, 435 U.S. 268, 273–74 (1978); *Parker v. North Carolina*,

for example, when an independent intervening cause such as a defendant's unprompted decision to confess or a witness's unprompted decision to cooperate has broken the causal chain.<sup>76</sup>

The negligence of the Dale County clerk in *Herring* was plainly both a but-for and a proximate cause of the defendant's unlawful arrest. This clerk was negligent precisely because another officer might have used the false information he left in the computer file to make an arrest without probable cause. Nothing whatsoever had happened to "dissipate" or "attenuate" his error. Although the clerk's error occurred five months before Herring's arrest, the passage of time certainly did not "dissipate the taint" or break the causal chain. To the contrary, Dale County's failure to check its electronic record against its paper record during the five-month period might have been regarded as aggravating the initial wrong.<sup>77</sup>

When *Herring* spoke of attenuation, it apparently did not mean that the causal chain had been broken. It did not discuss this conventional causal issue at all. Rather, the Court used the word attenuation in a new way without explaining its meaning. The Court's claim that the negligence of the Dale County clerk was attenuated might have been triggered simply by the fact that a police officer other than the clerk himself conducted the unlawful search, by the fact that a police agency other than the clerk's agency conducted the unlawful search, or by something else.<sup>78</sup>

The fact that the error was made by a police officer in Dale County and the arrest by a police officer in Coffee County was crucial to the Eleventh Circuit's decision in *Herring*. That court emphasized the difficulty of deterring one agency's misconduct by excluding evidence another agency had seized.<sup>79</sup> If negligence is "attenuated" only when one police agency made the error and another conducted the search, *Herring* could prove to be a reasonably narrow ruling even in an era when police agencies share information with one another on a grand scale.<sup>80</sup>

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397 U.S. 790, 796 (1970); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); *Costello v. United States*, 365 U.S. 265, 278–79 (1961).

The exclusionary rule suppresses evidence only when a constitutional violation is a proximate cause of the government's receipt of this evidence. Rather than speak of proximate causation in exclusionary rule cases, however, the Court has spoken of "attenuation" and "dissipation of the taint." Its use of these metaphors apparently has led it to no different results than it would have reached if it had used more conventional causal language.

<sup>76</sup> See *Wong Sun v. United States*, 371 U.S. 471, 487, 491 (1963); *United States v. Ceccolini*, 435 U.S. 268, 274 (1978).

<sup>77</sup> See *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

<sup>78</sup> Wayne LaFave suggests six possibilities. See LaFave, *supra* note 35, at 771–72. The Supreme Court also used the word "attenuated" in an odd and unconventional way in *Hudson v. Michigan*, 547 U.S. 586, 592–93 (2006). See Alschuler, *supra* note 26, at 1761 n.77.

<sup>79</sup> See *Herring*, 492 F.3d at 1218.

<sup>80</sup> Justice Ginsburg wrote in her *Herring* dissent:

Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded.

Nothing in *Herring* suggests, however, that its doctrine of attenuation is limited to cases in which one agency made the error and another made the search. At the outset of its opinion, the Court posed the question without reference to this fact: “What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?”<sup>81</sup> The Court made no argument resembling the Eleventh Circuit’s argument that punishing one agency for the wrongs of another “would be like telling a student that if he skips school one of his classmates will be punished.”<sup>82</sup>

A ruling that negligence is attenuated whenever one officer made the error and another made the search would sweep broadly, for police officers often rely on information supplied by supervisors, dispatchers, and other officers within their departments. Moreover, such a ruling would neuter the Supreme Court’s decision in *Whiteley v. Warden*.<sup>83</sup> In *Whiteley*, a police officer arrested a suspect on the basis of a radio bulletin, but the bulletin had been issued without probable cause. The Court held, in effect, that the initial police error was not attenuated simply because a reasonable officer acting in good faith had made the arrest, and it ordered the evidence this officer had seized suppressed. In *Arizona v. Evans*, however, the Court treated *Whiteley* as a decision about whether the officer’s arrest violated the Fourth Amendment rather than about whether the exclusionary rule applied.<sup>84</sup>

When an officer has obtained evidence unlawfully and this evidence supplies probable cause for a search, may the officer launder his violation of the Fourth Amendment by passing the task of searching to a second officer who then conducts the search in good faith? Indeed, may an officer without any grounds for a search avoid the risk of exclusion simply by telling another officer that grounds exist? Does *Herring* teach a new Bible lesson: “Behold, the good faith of an officer who searches doth heal and attenuate the sins of all others”?

The size of the Supreme Court’s bathtub and its answers to these questions are unknown. At the same time it pronounced the error of the Dale County clerk “attenuated,” the Supreme Court wrote, “In analyzing the applicability of the [exclusionary] rule, *Leon* admonished that we must consider the actions of all the

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Police today can access databases that include not only the updated National Crime Information Center (NCIC), but also terrorist watchlists, the Federal Government’s employee eligibility system, and various commercial databases . . . .

The risk of error stemming from these databases is not slim. *Herring*’s *amici* warn that law enforcement databases are insufficiently monitored and often out of date. *Herring*, 129 S. Ct. at 708–09 (Ginsburg, J., dissenting).

<sup>81</sup> *Herring*, 129 S. Ct. at 698.

<sup>82</sup> *United States v. Herring*, 492 F.3d 1212, 1218 (11th Cir. 2007).

<sup>83</sup> 401 U.S. 560 (1971).

<sup>84</sup> *See Arizona v. Evans*, 514 U.S. 1, 13 (1995) (dismissing *Whiteley* with the observation that it was decided when “the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation”).

police officers involved.”<sup>85</sup> The Court then quoted *Leon*’s language: “It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.”<sup>86</sup>

In all three of its references to attenuation, the *Herring* Court spoke of the attenuation of negligence. The Court indicated that more serious police wrongdoing (the “deliberate, reckless, and grossly negligent misconduct” of the Court’s “big blast” statements) could not be laundered or at least could not be laundered so easily. If, for example, the Dale County clerk had been grossly negligent, the fact that another police officer in another agency made the arrest might not have attenuated his error.<sup>87</sup>

In *Herring*, the Supreme Court departed from the causal analysis it formerly had used to determine when the exclusionary rule applied. It did not ask whether the Dale County clerk’s error was a proximate cause of the seizure of Herring’s drugs or whether Inspector Anderson’s actions “dissipated the taint” of this error. Instead, it provided attenuation by fiat without revealing which circumstances of the case were decisive. The kindest thing that can be said about the Court’s unprincipled limitation of the exclusionary rule in its “little blast” statement is that the principled limitation of the rule suggested by its “big blast” statements would be worse.

## VII. WHAT THE SUPREME COURT’S “BIG BLAST” WOULD MEAN

### A. *The One-Two Punch*

In 2006, in *Hudson v. Michigan*, the Supreme Court held the exclusionary remedy unavailable when the police had violated the Fourth Amendment by failing to knock and announce their presence before conducting a search.<sup>88</sup> The Court offered three alternative grounds for its decision, all of them sweeping. The most significant was that the knock-and-announce violation was not a but-for cause of the government’s seizure. According to the Court, the police would have found and seized the defendant’s drugs even if they had knocked.<sup>89</sup>

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<sup>85</sup> *Herring*, 129 S. Ct. at 699.

<sup>86</sup> *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984), *quoted in Herring*, 129 U.S. at 699–700. What was going on? Were the actions of the Dale County clerk “objectively reasonable”?

<sup>87</sup> *See Herring*, 129 S. Ct. at 700 (“[The Eleventh Circuit concluded that the error of the Dale County clerk] was negligent, but did not find it to be reckless or deliberate. That fact is crucial to our holding that this error is not enough by itself to require ‘the extreme sanction of exclusion.’” (quoting *Leon*, 468 U.S. at 916) (footnote omitted)); *cf. Brown v. Illinois*, 422 U.S. 590, 602–04 (1975) (declaring that courts must consider “the purpose and flagrancy of the official misconduct” in determining whether the “taint” of an unconstitutional arrest has been “attenuate[d]”).

<sup>88</sup> *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

<sup>89</sup> *Id.* at 592. The other grounds were (1) that suppression is inappropriate “when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated

*Hudson's* approach to causation departed radically from that of earlier exclusionary rule decisions and from the approach employed by common law courts in civil damage actions at the time of the framing of the Fourth Amendment. In earlier exclusionary rule decisions and in damage actions, courts did not ask whether the officers who conducted a search would have obtained the same evidence if they had knocked or if they had complied with other legal obligations—in particular, the requirement of a search warrant. Instead, officers who entered without knocking or without warrants were regarded as trespassers, and courts held them strictly liable for any harm they produced. The courts asked only whether the officers' wrongful presence was a cause of their seizure, and it always was.<sup>90</sup>

If taken seriously, *Hudson's* approach to causation would require the Supreme Court to overrule *Weeks v. United States*,<sup>91</sup> *Mapp v. Ohio*,<sup>92</sup> and more than twenty-five other cases in which it excluded evidence simply because the police failed to obtain a warrant before searching.<sup>93</sup> In many of these cases, the police had clear probable cause to search, but the Court held this fact immaterial.<sup>94</sup> In these no-warrant cases as in *Hudson*, the police omitted a step the Constitution required them to take. In these cases as in *Hudson*, the police probably would have taken the required step if blocked from taking the illegal shortcut they took. And in these cases as in *Hudson*, the police would have obtained the challenged evidence lawfully if they had taken the required step. Indeed, *Hudson's* approach to causation would withdraw the exclusionary remedy from all cases in which the police had probable cause to search but conducted their search in an unconstitutional manner. *Hudson* accepted the argument, "If we hadn't done it wrong, we would have done it right."<sup>95</sup>

*Hudson*, however, left the exclusionary rule intact when the police searched without probable cause and without much likelihood of obtaining it.<sup>96</sup> When the

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would not be served by suppression of the evidence obtained," *id.* at 593, and (2) that the "deterrence benefits" of applying the exclusionary rule to the fruits of knock-and-announce violations would not outweigh the "substantial social costs." *Id.* at 594 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)). I discuss these rulings in Alschuler, *supra* note 26.

<sup>90</sup> See Alschuler, *supra* note 26, at 1783–85.

<sup>91</sup> 232 U.S. 383 (1914).

<sup>92</sup> 367 U.S. 643 (1961).

<sup>93</sup> See Alschuler, *supra* note 26, at 1778 & n.190.

<sup>94</sup> See, e.g., *Agnello v. United States*, 269 U.S. 20, 33 (1925) ("Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.").

<sup>95</sup> This paraphrase of the argument that prevailed in *Hudson* was offered in 1992 by Judge Sam Ervin III. *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992) (Ervin, C.J.).

<sup>96</sup> *Hudson* did allow officers who searched without probable cause to show that, if they had not jumped the gun, they later would have searched with probable cause. In these circumstances, the officers' initial search without probable cause would not have been a but-for cause of the

Fourth Amendment told the police to stay out rather than to conduct a search in a particular manner, their violation of the Amendment still led to suppression. *Herring's* “big blast” statements, however, would withdraw the exclusionary remedy from many cases in which the police searched without probable cause. If the “big blast” statements prove authoritative, courts will no longer ask whether an officer had probable cause to search. They will ask instead whether the officer was grossly negligent in concluding that he had probable cause. In the absence of “systemic” negligence, mistakes of fact, mistakes of law, and errors of judgment by the police will lead to suppression only when they amount to gross negligence or worse.<sup>97</sup>

The five remaining sections of this article will explore the implications of *Herring's* “big blast” restriction of the exclusionary rule. The section after this one will note the Court’s befuddlement about whether its standard was objective or subjective. Then a brief section will consider the Court’s claim that the “big blast” standard had been “set forth” in earlier decisions. A third section will explain how the “big blast” standard is likely to block the development of Fourth Amendment law. A fourth section will compare the “big blast” standard with the doctrine of qualified immunity that the Court has approved in civil damage actions. And a final section will show how implementation of the “big blast” standard would defy the intention of the Framers by leaving most Fourth Amendment violations without a remedy.

#### B. A Subjective or an Objective Standard?

A good law student who has finished his first year of study knows the difference between subjective and objective standards of liability. A subjective standard requires an assessment of an actor’s state of mind. An objective standard does not. An objective standard is likely to evaluate an actor’s conduct only by asking what a hypothetical reasonable person would have known, foreseen, or done.

By the time a good student becomes Chief Justice of the United States, he may have forgotten what he learned in law school. Chief Justice Roberts’s opinion in *Herring* sent objective and subjective pronouncements flying in all directions. Although the Supreme Court proclaimed unambiguously that its standard was objective, it also unambiguously invited courts to examine the mental states of police officers.

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government’s receipt of the challenged evidence; this evidence “inevitably” would have been discovered lawfully. See Alschuler, *supra* note 26, at 1800–15 (noting that *Hudson's* requirement of but-for causation and the inevitable discovery doctrine of *Nix v. Williams*, 467 U.S. 431 (1984), are clones).

<sup>97</sup> Many police errors can be classified as mistakes of fact, mistakes of law, or mistakes of judgment, but some cannot. For example, the negligent Dale County clerk in *Herring* did not have a mistaken belief of any kind and did not consciously make an improper judgment. He simply failed to do his job.

Some history may help to bring the issue into focus. When the Supreme Court first afforded police officers “qualified immunity” from civil lawsuits for violating Constitutional rights, it approved a partly subjective standard. *Pierson v. Ray* declared in 1967 that officers would be immune from suit if they “reasonably believed in good faith that [their conduct] was constitutional.”<sup>98</sup> As a good law student could tell you, one part of the *Pierson* standard was subjective (what did the officer believe?) and the other part objective (was the officer’s belief reasonable?). *Wood v. Strickland* added in 1975 that an officer would not be entitled to immunity “if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate . . . constitutional rights . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights.”<sup>99</sup>

In 1982, however, the Court abandoned these formulations and substituted a purely objective standard. It observed in *Harlow v. Fitzgerald* that “[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial.”<sup>100</sup> It then declared that officers would be immune from suit unless their conduct “violate[d] clearly established . . . rights of which a reasonable person would have known.”<sup>101</sup> In 1987, in *Anderson v. Creighton*, the Court reiterated that an officer’s “subjective beliefs about the search are irrelevant.”<sup>102</sup>

In 1984, in *United States v. Leon*, the Supreme Court admitted unlawfully obtained evidence when police officers had seized this evidence “in objectively reasonable reliance on a subsequently invalidated search warrant.”<sup>103</sup> The Court compared its “objective” restriction of the exclusionary rule to the standard it previously had approved in civil damage actions:

In *Harlow*, we eliminated the subjective component of the qualified immunity public officials enjoy in suits seeking damages for alleged deprivations of constitutional rights. . . . [W]e also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant. . . . [W]e believe that “sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.” . . . Accordingly, our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well

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<sup>98</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

<sup>99</sup> *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

<sup>100</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 815–16 (1982).

<sup>101</sup> *Id.* at 818.

<sup>102</sup> *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

<sup>103</sup> *United States v. Leon*, 468 U.S. 897, 922 (1984).

trained officer would have known that the search was illegal despite the magistrate's authorization.<sup>104</sup>

Despite the Court's declaration that its standard was objective, its opinion repeatedly used the term "good faith." The Court, however, accompanied its use of this apparently subjective term with an odd and oxymoronic modifier; it spoke of "objective good faith." Proof that a particular officer had acted in bad faith appeared to be irrelevant. The test was simply whether a reasonably well trained officer would have known that his search was unlawful.

*Herring* emphasized the objectivity of *Leon's* standard, and Chief Justice Roberts's opinion initially seemed to clarify the law by acknowledging that the Court's references to good faith were misleading. The *Herring* opinion described the holding in *Leon* by saying, "When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant."<sup>105</sup> It added, "We (perhaps confusingly) called this objectively reasonable reliance 'good faith.'"<sup>106</sup>

The first of the Court's "big blast" statements, however, sent courts rushing into the minds of police officers: "As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level."<sup>107</sup> Only the words "grossly negligent" and "systemic negligence" in the Court's formulation clearly establish objective standards. The word "deliberate" speaks unambiguously of the officer's state of mind. Even if there can be such a thing as "objective good faith," there is no such thing as "objectively deliberate wrongdoing."<sup>108</sup>

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<sup>104</sup> *Id.* at 922 n.23 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

<sup>105</sup> *Herring v. United States*, 129 S. Ct. 695, 701 (2009).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 702.

<sup>108</sup> If viewed in isolation, the Court's statement that the exclusionary rule "serves to deter" deliberate, reckless, and grossly negligent conduct could be reconciled with its endorsement of an objective standard. An objective standard can indeed "serve to deter" deliberate wrongdoing, and even when deliberate wrongdoing is a court's target, it may favor an objective standard for administrative reasons. The Court, however, promptly treated its "big blast" declaration, not as a statement of fact, but as a legal standard. The next sentence of its opinion declared, "The error in this case does not rise to that level." The Court thus considered whether the error in *Herring* "rose to the level" of mental culpability that the "big blast" statements had indicated would justify suppression. It seemed to invite other courts to do likewise. *Cf. id.* at 700 ("[The Eleventh Circuit concluded that the error of the Dale County clerk] was negligent, but did not find it to be reckless or deliberate. . . . That fact is crucial to our holding that this error is not enough by itself to require 'the extreme sanction of exclusion.'). Moreover, the words "deliberate," "reckless," "grossly negligent," and "systemic" appear to be carefully chosen; they *look* like part of a legal standard. Finally, there is a disconnect between *Herring's* "big blast" standard and the objective standard of *United States v. Leon* that the

*Herring* offered no indication of what it meant by the word reckless, and the word is ambiguous. The Supreme Court once said that this word usually establishes an objective standard in civil cases and a subjective standard in criminal cases.<sup>109</sup> As recklessness is understood even in many civil cases, however, it refers to a subjective state of mind. Indeed, the case in which the Supreme Court offered its generalization was a civil case in which the court approved a subjective standard.<sup>110</sup>

The Model Penal Code defines recklessness as *conscious* advertence to a substantial and unjustifiable risk,<sup>111</sup> and most state legislatures have approved the Model Penal Code definition.<sup>112</sup> As early as 1876, the Supreme Court rejected the suggestion that recklessness and gross negligence are equivalent.<sup>113</sup> Although the Court recognized that the term gross negligence is “doubtless to be understood as meaning a greater want of care than is implied by the term ‘ordinary negligence,’”<sup>114</sup> it held that something more was needed to justify an award of punitive damages. To recover punitive damages, a plaintiff would be required to establish “that reckless indifference to the rights of others which is equivalent to an intentional violation of them.”<sup>115</sup> More recently, in the line of cases that began with *New York Times v. Sullivan*,<sup>116</sup> the Court has said that “actual malice” in a defamation action can be established by “reckless disregard for the truth.”<sup>117</sup> It has observed that this standard of recklessness “is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a ‘high degree of awareness of . . . probable falsity.’”<sup>118</sup> The Court also has held that a reference to “reckless indifference” in Title VII’s provision on punitive damages establishes a subjective standard.<sup>119</sup>

*Herring* reinforced the sense that its standard was partly subjective when, immediately after its initial “big blast” statement, it wrote, “Our decision in *Franks*

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Court purported to endorse. The *Leon* standard of “objective reasonableness” is one of ordinary, not gross, negligence. See *infra* text accompanying notes 129–30. It would be odd to say, “Our ordinary negligence standard serves to deter gross negligence. The error in this case does not rise to that level.”

<sup>109</sup> See *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994).

<sup>110</sup> See *id.* at 838–39.

<sup>111</sup> MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962).

<sup>112</sup> MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt., at 232–33 (1985).

<sup>113</sup> *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 492–95 (1875).

<sup>114</sup> *Id.* at 495.

<sup>115</sup> *Id.* at 493.

<sup>116</sup> 376 U.S. 254 (1964).

<sup>117</sup> See, e.g., *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 342 (1974).

<sup>118</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

<sup>119</sup> *Kolstad v. ADA*, 527 U.S. 526, 535–36 (1999).

*v. Delaware* . . . provides an analogy.”<sup>120</sup> Although Supreme Court decisions generally have insisted on the use of objective standards to evaluate police conduct,<sup>121</sup> *Franks* was an exception. The question in this case was whether a magistrate’s determination of the credibility of an officer who had filed an affidavit for a search warrant could be reconsidered by other judges. Roughly half the states had answered this question no,<sup>122</sup> but in *Franks* the Supreme Court said yes. At the same time, the Court emphasized that reconsideration of the magistrate’s decision was to be exceptional: “There must be allegations of deliberate falsehood or of reckless disregard for the truth [on the part of the affiant], and those allegations must be accompanied by an offer of proof. . . . Allegations of negligence or innocent mistake are insufficient.”<sup>123</sup> Because, unlike *Franks*, *Herring* presented no issue of deference to a prior judicial determination, the analogy between *Franks* and *Herring* was not close. Like the “big blast” statements of *Herring*, however, *Franks* provided a remedy for deliberate and reckless police misconduct but not for negligent error.

By declaring the exclusionary remedy available in cases of deliberate, reckless, and grossly negligent misconduct, the Supreme Court appeared to establish a partly subjective standard. As soon as it had set forth this standard, however, the Court insisted that it had done no such thing:

The pertinent analysis of deterrence and culpability is objective, not an “inquiry into the subjective awareness of arresting officers.” We have already held that “our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal.”<sup>124</sup>

The Court then declared that courts could consider “a particular officer’s knowledge and experience . . . but not his subjective intent.”<sup>125</sup> It did not explain how a court could determine whether an officer had violated the Constitution deliberately without examining his intent.

Almost immediately after declaring that its standard was objective, the Court reverted to the language of subjectivity: “If the police have been shown . . . to have

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<sup>120</sup> *Herring v. United States*, 129 S. Ct. 695, 703 (2009) (citing *Franks v. Delaware*, 438 U.S. 154 (1978)).

<sup>121</sup> See, e.g., *Whren v. United States*, 517 U.S. 806, 812–13 (1996).

<sup>122</sup> See *Franks v. Delaware*, 438 U.S. 154, 158 & n.3 (1978).

<sup>123</sup> *Id.* at 171.

<sup>124</sup> *Herring*, 129 S. Ct. at 703 (internal citation omitted).

<sup>125</sup> *Id.* This formulation appeared to depart from the standard of *Leon*. The reason for hypothesizing a “reasonably well trained officer” was to avoid inquiries about the extent of “a particular officer’s knowledge.” The *Leon* Court believed that sending courts “into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.” *United States v. Leon*, 468 U.S. 897, 922 n.23 (1983) (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.”<sup>126</sup> In the final paragraph of its opinion, the Court omitted its earlier reference to the objective concept of gross negligence and spoke only of recklessness when restating its governing principle: “[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’”<sup>127</sup>

Whether the Court’s “big blast” standard allows defendants to prove that officers deliberately or recklessly violated the Constitution—that is, whether this standard means what it says—is anyone’s guess. Perhaps the only question is whether a reasonably well-trained officer would have known that his conduct was unlawful. The Court’s treatment of objectivity and subjectivity was a befuddle-muddle. If new rules for reading judicial opinions now apply, however, the Court’s lack of precision may not matter. Whether the Court’s standard was objective or subjective, its “real” meaning was clear. Lower courts may now declare, “The search was unlawful, but it was close enough for government work.” Parsing the Court’s standard is for sissies.

### C. *As Laid Out in Our Cases?*

The Supreme Court introduced its principal “big blast” statement with an invocation of precedent: “As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>128</sup> No decision prior to *Herring*, however, had suggested or implied that the exclusionary rule should be limited in the way the Court proposed.

The exception to the exclusionary rule approved in *Leon*, *Krull*, and *Evans* applied only when officers relied on an apparently authoritative assurance by an official other than a police officer that their conduct would be lawful.<sup>129</sup> Moreover, even when this exception applied, ordinary negligence by the police led to suppression. The *Leon* formulations—“objectively reasonable reliance on a subsequently invalidated warrant,” “objective good faith,” and “whether a reasonably well trained officer would have known that the search was illegal”—required only ordinary, not gross negligence to justify exclusion.

*Leon* did weaken the exclusionary rule. Its ordinary negligence standard demanded less of the police than the standard it replaced. Earlier, a familiar rule of strict liability applied to the police, just as it does to the rest of us: Ignorance of the law is no excuse. *Leon* held that, when an officer relied reasonably on a

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<sup>126</sup> *Herring*, 129 S. Ct. at 703 (emphasis added).

<sup>127</sup> *Id.* at 704.

<sup>128</sup> *Id.* at 702 (emphasis added).

<sup>129</sup> See *supra* text accompanying notes 15–20.

subsequently invalidated warrant, his reasonable mistake of law precluded exclusion. (The Court had no need to rule that an officer's reasonable mistake of fact precludes exclusion, for when an officer reasonably believes in facts that would justify his search, he does not violate the Fourth Amendment.<sup>130</sup>)

*Herring's* "big blast" statements would wipe out the limitation of the *Leon-Krull-Evans* exception to cases in which the police have obtained warrants, relied on subsequently invalidated statutes, or otherwise obtained authoritative assurances that their conduct would be lawful. Eliminating this limitation and creating a general "objective reasonableness" exception to the exclusionary rule would greatly diminish the rule, but the *Herring* Court apparently wanted more. *Herring's* "big blast" statements would preclude exclusion even when an officer was not "objectively reasonable" as long as he was not grossly negligent. Declaring that this standard had been "laid out in our cases" tookchutzpa.<sup>131</sup>

#### D. Freezing the Law in Its Tracks

##### 1. Four Rulings the "Big Blast" Would Have Blocked

###### i. *Arizona v. Gant*

Three months after the decision in *Herring*, the Supreme Court excluded evidence in a case in which the police had not engaged in deliberate, reckless, or grossly negligent misconduct. In fact, the Court excluded evidence in a case in which the police had not been negligent at all. The Court's ruling in this case—*Arizona v. Gant*<sup>132</sup>—would not have happened if its "big blast" statements had been the law when the case arose.<sup>133</sup> *Gant* reveals why the existence of the

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<sup>130</sup> For example, when the police arrested the innocent Miller in the reasonable but mistaken belief that he was the guilty Hill, their arrest was supported by probable cause and was lawful. *See Hill v. California*, 401 U.S. 797 (1971). Similarly, when an officer reasonably but mistakenly believed that a person who consented to a search was authorized to do so, his ensuing search was reasonable and was lawful. *See Illinois v. Rodriguez*, 497 U.S. 177 (1990). As the Supreme Court noted in *Herring*, "When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase 'probable cause' confirms that the Fourth Amendment does not demand all possible precision." 129 S. Ct. at 699. *Herring*, however, seems to envision cases in which the police have made unreasonable but not "grossly" unreasonable factual mistakes—cases in which they have violated the Fourth Amendment but in which the exclusionary remedy should be unavailable.

<sup>131</sup> As noted above, *Franks v. Delaware*, 438 U.S. 154 (1978), did not propose limiting the application of the exclusionary rule to cases of grossly negligent misconduct. This case demanded conscious wrongdoing by the police (deliberate or reckless misconduct) when the issue was whether to set aside a judge's prior determination of an officer's credibility. *Id.* at 171–72.

<sup>132</sup> 129 S. Ct. 1710 (2009).

<sup>133</sup> The parties in *Gant* argued only the question of Fourth Amendment law that the case presented. The State of Arizona did not ask the Court to admit the drugs seized from Rodney Gant's car even if their seizure had been unlawful. If the "big blast" statements had been the law, however,

exclusionary rule is critical to the development of Fourth Amendment law and why *Herring's* “big blast” modification of the rule probably would bring development of the law of search and seizure to a halt. *Gant* and other cases like it also reveal that *Herring* rests on a fundamental misconception of how the exclusionary rule achieves its goals.

Prior to the decision in *Gant*, the Supreme Court had allowed the police to search at will virtually every motorist and every automobile on the highway. Only a genius who could drive for an extended period without violating any traffic law could escape a search of his person and his vehicle. The Court's authorization of general searches on the highway proceeded from four decisions. It reconsidered one of these decisions in *Gant*.

One decision held that the Fourth Amendment allows an officer to make a custodial arrest for any traffic offense, however minor. The officer need have no reason to doubt that the arrestee would respond to a traffic citation.<sup>134</sup>

A second decision held that a custodial arrest for a minor traffic offense is not invalid either because the officer's subjective reason for making it is to search the arrestee's vehicle without probable cause or because—objectively—the police never stop motorists for this offense except when seeking an opportunity to search for evidence of other crimes.<sup>135</sup> A police officer who wishes to take a motorist into custody and search for drugs need only follow the motorist until he swerves slightly over the center line, fails adequately to signal a lane change, or slightly exceeds the speed limit.<sup>136</sup>

A third decision held that an officer who makes a custodial arrest for a traffic offense may make a full search of the arrestee's person incident to this arrest. The officer need not consider the search necessary to prevent the destruction of evidence or to protect the officer.<sup>137</sup>

A fourth decision—*New York v. Belton*—held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>138</sup> *Belton* said that the search could occur although all occupants had been removed from the vehicle and that it could extend to “closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.”<sup>139</sup>

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a prosecutor could have defeated the defendant's motion to suppress simply by showing that the officer who seized *Gant's* drugs was not grossly negligent.

<sup>134</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

<sup>135</sup> *Whren v. United States*, 517 U.S. 806, 813–16 (1996).

<sup>136</sup> *Atwater*, which followed *Whren*, upheld a custodial arrest for a seatbelt violation although the arrest apparently was motivated by the arresting officer's personal animus toward the driver. *See Atwater*, 532 U.S. at 323–24.

<sup>137</sup> *United States v. Robinson*, 414 U.S. 218, 235 (1973).

<sup>138</sup> *New York v. Belton*, 453 U.S. 454, 460 (1981).

<sup>139</sup> *Id.* at 460 n.4.

A later decision—*Thornton v. United States*—extended the *Belton* rule to a case in which a suspect had been arrested outside an automobile but recently had been its occupant.<sup>140</sup>

The Supreme Court observed in *Gant*, “The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision’s clarity and its fidelity to Fourth Amendment principles.”<sup>141</sup> The Court purported to give *Belton* a narrow reading by disregarding the rule that it articulated and by confining it to its facts (facts that the *Belton* Court itself had not mentioned).<sup>142</sup> The dissenters in *Gant* commented, “Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so.”<sup>143</sup> *Gant* permitted the search of a vehicle as an incident of an arrest only “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” (a situation that the Court recognized would be rare), or “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”<sup>144</sup>

At the suppression hearing in *Gant*, counsel asked Officer Griffith, one of the officers who conducted the search, why he had made it. Officer Griffith replied, “Because the law says we can do it,”<sup>145</sup> and he was correct. The *Gant* majority acknowledged that its reading of *Belton* was exceptional and that “our [*Belton*] opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.”<sup>146</sup>

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<sup>140</sup> *Thornton v. United States*, 541 U.S. 615 (2004). In fact, the police do not often make custodial arrests for traffic offenses simply to search the offenders’ vehicles for drugs. They usually can search the offenders’ vehicles without taking the offenders themselves into custody. When an officer asks someone he has stopped on the highway to consent to a search, the motorist rarely replies, “Not today, Officer.” In fact, a majority of the Americans who believe they will not incur adverse consequences by declining police requests to search their automobiles appear to be on the Supreme Court.

<sup>141</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009).

<sup>142</sup> *See id.* at 1717 & n.1 (reciting facts not mentioned by the *Belton* Court but mentioned in briefs filed by prosecutors).

<sup>143</sup> *Id.* at 1726 (Alito, J., dissenting).

<sup>144</sup> *Id.* at 1719 (majority opinion) (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)). The principles that justify searches incident to arrest plainly do not justify searching an automobile simply because it is “reasonable to believe evidence relevant to the crime of arrest might be found in” it. Justice Scalia appears to be the only member of the Supreme Court who truly believes that such a search for evidence is constitutional. The other four members of the *Gant* majority, however, needed his vote. Even more clearly than the opinion in *Herring*, the opinion in *Gant* must be read as a political compact rather than a coherent statement of principles.

Under the ruling in *Gant*, Investigator Mark Anderson’s search of Bennie Dean Herring’s truck would have been unlawful even if there had been an outstanding warrant for Herring’s arrest. Anderson’s search of Herring’s person, however, would have been permissible.

<sup>145</sup> *Id.* at 1715.

<sup>146</sup> *Id.* at 1718.

Officer Griffith and the other officer who made the search in *Gant* did not violate the Fourth Amendment deliberately, recklessly, or negligently. Moreover, the police agency that employed these officers, the Tucson Police Department, was not guilty of “systemic” negligence. Like the officers themselves, the department complied with the requirements of the Fourth Amendment as the Supreme Court had articulated them.

If any negligence caused the unlawful search in *Gant*, it was that of the Supreme Court justices who had declared open season on motorists.<sup>147</sup> But calling judges negligent simply because they took a different view of the Fourth Amendment than the one that ultimately prevailed would be odd. In *Gant*, the Supreme Court excluded evidence in the absence of negligence by anyone.

Only the exclusionary rule gave the Supreme Court the opportunity to correct the error it had made in *Belton*. The question of *Belton*’s scope and validity could not have arisen in a civil case, for the officers who searched *Gant*’s automobile would have been immune from suit. As the Court observed in *Gant*, “Because a broad reading of *Belton* has been widely accepted, the doctrine of qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding.”<sup>148</sup> And if *Herring*’s “big blast” statement had been the law, the Supreme Court would not have had an opportunity to revise *Belton*. Because the police were not grossly or “systemically” negligent, a lower court judge would have denied *Gant*’s motion to suppress, and that would have been the end of it.<sup>149</sup>

## ii. *Georgia v. Randolph*

Other cases teach the same lesson. Chief Justice Roberts’ opinion in *Herring* declared, “[S]ince *Leon*, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than [it was in this case].”<sup>150</sup> Because the Supreme

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<sup>147</sup> Under *Leon*, the negligence and even the deliberate wrongdoing of judges cannot lead to suppression. See *United States v. Leon*, 468 U.S. 897, 915–18 (1984).

<sup>148</sup> *Gant*, 129 S. Ct. at 1722 n.11. The issue is a bit more complicated than this paragraph reveals, for a court might have resolved the Fourth Amendment issue in dictum before declaring Officer Griffith and his colleague immune from suit. At one time, the Supreme Court in fact required lower courts to follow that course. See *infra* text accompanying notes 164–75. When Officer Griffith and his colleague would clearly have been entitled to immunity, however, it is inconceivable that *Gant* would have sued them. *Gant* could not have obtained even a favorable dictum from lower court judges bound to follow the *Belton* rule. He would have been required to lose his case, appeal and ultimately persuade the Supreme Court to take a case that he could not win because of the defendants’ immunity. Only the Supreme Court could have given him a toothless dictum disavowing (or narrowing) the *Belton* rule. There is no reason to believe that *Gant* would have been the least bit interested.

<sup>149</sup> Again, this issue is a bit more complicated than this paragraph reveals. See *infra* text accompanying notes 164–88.

<sup>150</sup> *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

Court has rarely excluded unlawfully obtained evidence in the period since *Leon*, one would not have been surprised to find this statement true, but it was not true. Chief Justice Roberts apparently had forgotten the Court's decision in *Georgia v. Randolph*, in which he filed a dissenting opinion.<sup>151</sup>

*Randolph* held that a wife could not consent to a search of her marital residence when her husband was present and objected to the search. Sergeant Murray, the officer who requested the wife's consent and acted upon it, did not violate the Fourth Amendment "intentionally" and was not "culpable" in any way. He was certainly less culpable than the negligent Dale County clerk in *Herring*. At the time Sergeant Murray made his search, most courts would have called it lawful.<sup>152</sup>

As many of these courts saw it, the question was not whether one spouse could waive the other's Fourth Amendment rights but whether this spouse could exercise his own property rights. As Judge Offa Shivers Lattimore of the Texas Court of Criminal Appeals explained in 1933:

Nowhere in our [community property] statute is the husband given any more right or control over the home or homestead than the wife. He has no more power or dominion to say who may or may not enter the house than she has. In fact and in reason she usually occupies and possesses the house occupied as a home every hour of the day, while the man chiefly uses it as a place to eat and sleep. Ordinarily, she has as much intelligence as he, is as interested in and amenable to the laws as he; she is no longer a slave or a chattel, but her husband's equal and often his superior, and we confess our inability to differentiate as between her right and that of her husband to give legal authority to any person, be he officer or otherwise, to enter and search.<sup>153</sup>

Judge Lattimore was not negligent in voicing this opinion; the many other state and federal judges who rejected the position the Supreme Court later took in *Randolph* were not negligent; Chief Justice Roberts and the other dissenters in *Randolph* were not negligent; and Sergeant Murray was not negligent either. Although Sergeant Murray was not at all culpable, the exclusionary rule enabled the Supreme Court to review his conduct and to resolve a previously unsettled issue of Fourth Amendment law. This issue would not have come before the Court if the exclusionary rule had been available only "to deter deliberate, reckless, or

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<sup>151</sup> *Georgia v. Randolph*, 547 U.S. 103 (2006).

<sup>152</sup> The Supreme Court acknowledged in *Randolph* that all four of the federal courts of appeals that had considered the issue had held that a spouse could consent to a search of his home over the other spouse's objection. So had a majority of the state courts that had addressed the issue. *Id.* at 108 n.1.

<sup>153</sup> *Cass v. State*, 61 S.W.2d 500, 501 (Tex. Crim. App. 1933).

grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>154</sup>

The exclusionary rule may not in fact significantly “deter” or “punish” deliberate police misconduct,<sup>155</sup> but by enabling the courts to articulate Fourth Amendment norms, the rule can and has influenced police conduct.<sup>156</sup> Although many Supreme Court justices appear to be exclusionary rule skeptics, none of them appear to regard their discussion of the substantive Fourth Amendment issues presented by cases like *Gant* and *Randolph* as inconsequential. One imagines that *Gant* already has greatly reduced (and perhaps even ended) the practice of making traffic arrests in order to search vehicles for drugs as an incident of these arrests. Similarly, the decision in *Randolph* must at least have diminished the likelihood that the police will accept one occupant’s invitation to search when another occupant objects to their entry.

### iii. *Delaware v. Prouse*

*Delaware v. Prouse* was another Supreme Court decision that *Herring*’s “big blast” standard would have precluded.<sup>157</sup> In *Prouse*, the Court declared random automobile stops to check drivers’ licenses unconstitutional, yet the officer who made the stop in *Prouse* was not negligent. Until *Prouse*, the legality of random stops to check drivers’ licenses was unsettled, and many lower court decisions had upheld them.<sup>158</sup>

William Mertens and Silas Wasserstrom noted the response of the Metropolitan Police Department of the District of Columbia to the ruling in *Prouse*.<sup>159</sup> Although the department previously had permitted license-check stops

<sup>154</sup> See *Herring*, 129 S. Ct. at 702.

<sup>155</sup> See Alschuler, *supra* note 26, at 1750–52; Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1370–74 (2008).

<sup>156</sup> I have written elsewhere:

Critics of the exclusionary rule may have followed too closely Justice Holmes’s advice to view the law from the perspective of a “bad man” who wishes only to evade it. From a “bad cop” perspective, it is easy to ridicule the exclusionary rule’s supposed deterrent effect. . . . [A]lthough the “bad cop” deserves careful attention, the “good cop” merits notice as well.

Albert W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 197, 203–04 (Eugene W. Hickok, Jr. ed., 1991) [hereinafter Alschuler, *Fourth Amendment Remedies*].

<sup>157</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>158</sup> See, e.g., *United States v. Kelley*, 462 F.2d 372 (4th Cir. 1972); *United States v. Lepinski*, 460 F.2d 234 (10th Cir. 1972); *United States v. Turner*, 442 F.2d 1146 (8th Cir. 1971); *State v. Allen*, 194 S.E.2d 9 (N.C. 1973); *State v. Gray*, 285 A.2d 1 (N.J. 1971). See generally Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666 (1974).

<sup>159</sup> See William Mertens & Silas Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399–400 (1981).

in reliance on local judicial decisions, the chief of police issued a telex within hours of the decision forbidding this practice. According to Mertens and Wasserstrom, the response of the Delaware State Police was similar. These police responses not only showed the receptiveness of police agencies to legal rulings; they also showed the importance of the exclusionary rule in generating these rulings. If, in 1971, the exclusionary rule had been limited to cases of deliberate, reckless, or grossly negligent misconduct, there would have been no Supreme Court decision on the legality of automobile stops to check licenses. Random vehicle stops might have continued in the District of Columbia and throughout America to this day.

#### iv. *Katz v. United States*

The “big blast” statements of *Herring* also would have blocked the twentieth century’s most significant Fourth Amendment decision apart from *Weeks* and *Mapp*, the decisions that created the exclusionary rule and extended it to the states.<sup>160</sup> In *Katz v. United States*, the Supreme Court recognized that the Fourth Amendment protects privacy as well as property, and it overruled earlier decisions that wiretapping accomplished without any trespass upon a person’s property could not violate the amendment.<sup>161</sup> Yet the agents who attached surveillance equipment to the outside of a telephone booth that they expected Charley Katz to use did not know that the Supreme Court was about to overrule its earlier decisions. These agents complied with the law as they reasonably understood it and were not negligent or otherwise at fault. If *Herring*’s “big blast” statements had been the law, Charley Katz would have lost his motion to suppress, and the *Katz* revolution would not have happened.<sup>162</sup>

## 2. Constitutional Stagnation in Civil and Criminal Litigation: Learning From Experience

*Herring*’s “big blast” statements would restrict the exclusionary rule even more severely than the doctrine of qualified immunity restricts civil actions for damages against police officers. Like the *Leon* exception to the exclusionary rule, the doctrine of qualified immunity applies when officers could reasonably believe their actions lawful; the leading Supreme Court decision, which speaks of “clearly established . . . rights of which a reasonable person would have known,” does not

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<sup>160</sup> See *Weeks v. United States*, 232 U.S. 383 (1914) (applying the exclusionary rule in federal cases); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to the states).

<sup>161</sup> *Katz v. United States*, 389 U.S. 347, 353 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942)).

<sup>162</sup> Other landmark Supreme Court decisions that *Herring*’s “big blast” statements would have precluded include *Chimel v. California*, 395 U.S. 752, 768 (1969) (limiting the scope of searches incident to arrest) and *Payton v. New York*, 445 U.S. 573, 602–03 (1980) (requiring the police to obtain an arrest warrant before making an arrest in a home).

establish a gross negligence standard.<sup>163</sup> Nevertheless, the Supreme Court has recognized that its doctrine of qualified immunity in civil cases is likely to block the development of constitutional law.<sup>164</sup> For a time, the Court sought to address this problem by forcing lower courts to address constitutional issues in dicta, but in a decision one week after *Herring*, the Court abandoned this effort.<sup>165</sup>

The combination of qualified immunity in damage actions with ordinary principles of judicial restraint appears to make the problem of constitutional stagnation intractable. When plaintiffs always lose unless the rights they allege are “clearly established,” rights not yet “clearly established” can never become established. Determining that a losing party’s claim was valid (although not clearly established) would be a gratuitous pronouncement having no bearing on the outcome of the case. In lawyer’s language, a gratuitous pronouncement having no bearing on the outcome of the case is dictum or even, perhaps, an advisory opinion.<sup>166</sup> Courts have been especially wary of gratuitous pronouncements on questions of constitutional law, for the Supreme Court has said that a court should not resolve these issues in advance of necessity.<sup>167</sup>

In *Saucier v. Katz*, the Supreme Court sought to cut the knot by abandoning customary principles of judicial restraint and directing lower courts to resolve constitutional issues in dictum.<sup>168</sup> It declared that the “initial inquiry” for a “court

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<sup>163</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Perhaps one could quarrel with this conclusion by pouncing on the word “clearly.” But *Harlow* does not refer to rights so clearly established that only a grossly negligent police officer would have been unaware of them; it speaks of rights of which a reasonable person would have known. *Id.*

<sup>164</sup> If anyone had brought a civil damage action against any of the officers who conducted the unlawful searches in *Gant*, *Randolph*, *Prouse*, or *Katz*, he would have lost. These officers did not violate “clearly established . . . rights of which a reasonable person would have known.”

<sup>165</sup> See *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

<sup>166</sup> In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court denied that a resolution of the merits of a Fourth Amendment claim having no bearing on the outcome of a case would qualify as the sort of advisory opinion that Article III of the Constitution forbids. See *id.* at 924; *Muskrat v. United States*, 219 U.S. 346, 356 (1911). The Court was probably correct. See Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, 16 GEO. MASON L. REV. 53 (2008). But see Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 920 (2005). Whether or not the resolution of a legal issue without consequences for the case at hand violates Article III, it certainly looks like an advisory opinion of some sort. See *Leon*, 468 U.S. at 956–57 n.15 (Brennan, J., dissenting) (“Despite the Court’s confident prediction that such review will continue to be conducted, . . . it is difficult to believe that busy courts faced with heavy dockets will take the time to render essentially advisory opinions concerning the constitutionality of the magistrate’s decision before considering the officer’s good faith.”).

<sup>167</sup> See, e.g., *Liverpool, N.Y. & Philadelphia S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885) (“[We are bound] never to anticipate a question of constitutional law in advance of the necessity of deciding it . . . .”); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”).

<sup>168</sup> *Saucier v. Katz*, 533 U.S. 194 (2001).

required to rule upon [a] qualified immunity issue” must be whether “the facts alleged show the officer's conduct violated a constitutional right.” Only after answering this question affirmatively could a court consider whether the right was “clearly established” at the time of the defendant’s act.<sup>169</sup> The Court said that this order of proceeding would allow “for the law’s elaboration from case to case.”<sup>170</sup>

The *Saucier* decision brought howls from lower court judges.<sup>171</sup> In 2004, three years after *Saucier*, three Supreme Court Justices urged its reconsideration.<sup>172</sup> In 2007, one of these Justices declared, “I would end the failed *Saucier* experiment now.”<sup>173</sup> In 2008, the Supreme Court directed the parties in *Pearson v. Callahan* to brief a question that neither of them had raised—“[w]hether the Court’s decision in *Saucier v. Katz* . . . should be overruled.”<sup>174</sup> And in 2009, one week after *Herring*, the Supreme Court unanimously overruled *Saucier*.<sup>175</sup> The Court’s opinion was joined even by the author of the *Saucier* opinion, Justice Kennedy.

Although Justice Alito’s opinion in *Pearson v. Callahan* presented compelling reasons for abandoning *Saucier*, it left the Court without a strong answer to the problem of constitutional stagnation. The Court declared that, although *Saucier* sequencing “should no longer be regarded as mandatory,” it was “often appropriate.” “The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first . . . .”<sup>176</sup> *Leon* had taken the same position when it restricted the Fourth Amendment exclusionary rule:

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 whether the Fourth Amendment has been violated. . . . If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.<sup>177</sup>

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<sup>169</sup> *Id.* at 201.

<sup>170</sup> *Id.*

<sup>171</sup> See *Pearson v. Callahan*, 129 S. Ct. 808, 817 (2009) (“Lower court judges, who have had the task of applying the *Saucier* rule on a regular basis for the past eight years, have not been reticent in their criticism of *Saucier*’s ‘rigid order of battle.’”).

<sup>172</sup> *Brosseau v. Haugen*, 543 U.S. 194, 201–02 (2004) (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring).

<sup>173</sup> *Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., concurring).

<sup>174</sup> *Pearson v. Callahan*, 128 S. Ct. 1702 (2008).

<sup>175</sup> *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

<sup>176</sup> *Id.* at 818.

<sup>177</sup> *United States v. Leon*, 468 U.S. 897, 924–25 (1984).

Were *Herring*'s "big blast" statements to confine the exclusionary rule to cases of grossly negligent misconduct or worse, the Court presumably would give the same answer to stagnation that it offered in *Pearson* and *Leon*: Judges may still resolve Fourth Amendment issues in dictum if they like.

There is no reason to believe that judges want to. A recent study reported that judges did faithfully comply with *Saucier*. In ninety-eight percent of the cases in which they sustained defendants' claims of immunity, they also ruled on whether the facts alleged by the plaintiff would establish a constitutional violation. During an earlier period in which judges could proceed directly to the question of immunity, however, they addressed the merits of the complaint in only forty-one percent of the cases they dismissed.<sup>178</sup>

Even if judges were more anxious to make major constitutional rulings in dictum than they are now, they could not solve the problem of stagnation. The defendants in *Gant*, *Randolph*, *Prouse*, and *Katz* were all represented by private counsel, and few defendants would be willing to pay lawyers to seek statements in dicta that could not benefit them. In each of these cases, a good lawyer would have advised his client that he would surely lose under the "big blast" standard.

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<sup>178</sup> Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 424–25 (2009). Between the time in which judges had unfettered discretion over sequencing and the time in which *Saucier* mandated "merits first" sequencing, the Supreme Court encouraged but did not require the *Saucier* solution. During this intermediate period, judges addressed the merits of the plaintiff's complaint in sixty-five percent of the cases they dismissed. *Id.*

When a plaintiff sues Officer Krupke for failing to give him a delicious cheese sandwich, it may not matter much whether a court dismisses the complaint because the plaintiff failed to allege the violation of a right or because he failed to allege the violation of a clearly established right. (Even in this sort of case, the more cautious course is to dismiss because the plaintiff failed to allege the violation of a clearly established right. Judges ought to prefer this course whenever the existence of the right might reasonably be disputed.) More worrisome are cases in which a court declares that the right claimed by the plaintiff is "established" but not "clearly established" and in which the court then dismisses the plaintiff's complaint.

A declaration that the plaintiff's complaint is meritless provides a reason for the court's dismissal. If this declaration is objectionable, the reason is only that a narrower ground of decision was available. Yet a declaration that a losing plaintiff's complaint would prevail in a world without immunity does not provide a reason for the court's decision; this declaration is pure obiter dictum. Declarations of this sort were unusual before *Saucier* and did not increase significantly in the *Saucier* period. See Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667 (2009). Yet declarations of this sort would be necessary in a regime of qualified immunity to produce dicta resembling the rulings of *Gant*, *Randolph*, *Prouse*, and *Katz*. The Supreme Court itself has made declarations of this sort twice. See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (declaring that school officials violated the Fourth Amendment by ordering the strip search of a junior high school student but that the officials were immune from suit); *Wilson v. Layne*, 526 U.S. 603 (1999) (declaring that police officers violated the Fourth Amendment by bringing a newspaper reporter and photographer with them when they entered a private residence to make an arrest but that the officers were immune from suit).

No rational court could have found that the officers who seized the critical evidence were grossly negligent.<sup>179</sup>

Perhaps civil liberties organizations and public defender agencies seeking the welfare of future clients would still seek favorable dicta from the courts<sup>180</sup>—but perhaps not.<sup>181</sup> If they did, constitutional adjudication might become largely the acceptance or rejection of the agenda of institutional law offices. With the “big blast” standard in place, decisions like *Katz*, if they happened, would be remembered not for their stirring landmark rulings but for their stirring landmark dicta.

When the Supreme Court overruled *Saucier*, it said:

[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 . . . damages actions . . . also arise in cases in which that defense is not available, such as criminal cases and . . . cases against a municipality, as well as . . . cases against individuals where injunctive relief is sought . . . .<sup>182</sup>

The Supreme Court has restricted both actions against municipalities and injunctive actions so severely that neither is likely to serve as a vehicle for the development of Fourth Amendment law. The Court allows recovery from municipalities only when an officer’s unlawful actions can “fairly be said to represent official policy,”<sup>183</sup> and it has said that only violations by officials expressly given “final policymaking authority” by law can meet this standard.<sup>184</sup> To obtain injunctive relief, a plaintiff must show a “threat of injury . . . [that is] both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”<sup>185</sup> When a plaintiff could establish only that Los Angeles police officers had subjected him to an unlawful chokehold and that these officers often applied chokeholds unlawfully,

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<sup>179</sup> A non-indigent defendant would be especially unlikely to seek the reconsideration of an appellate precedent, for a trial court bound by this precedent could not give him even a comforting dictum. The defendant would be required to lose at trial and then appeal a case he could not win in the hope of obtaining a declaration that, in a world without *Herring*, he would have been more successful. See *supra* note 148.

<sup>180</sup> See Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1613–14 (1975).

<sup>181</sup> See Mertens & Wasserstrom, *supra* note 159, at 451 n.494; Yale Kamisar, Gates, “*Probable Cause*,” “*Good Faith*,” and *Beyond*,” 69 IOWA L. REV. 551, 603–04 (1983); Walter V. Schaefer, *Prospective Rulings: Two Perspectives*, 1982 SUP. CT. REV. 1, 22; Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 61 (1965).

<sup>182</sup> *Pearson v. Callahan*, 129 S. Ct. 808, 821–22 (2009).

<sup>183</sup> *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

<sup>184</sup> *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

<sup>185</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

the Court held that he did not meet this standard. The chance that the plaintiff himself would be choked again was not high enough.<sup>186</sup>

As the *Pearson* Court indicated, Fourth Amendment issues frequently arise in criminal cases. The exclusionary rule has enabled courts to develop the law of search and seizure in these cases to a far greater extent than they ever did in civil actions even before the invention of qualified immunity.<sup>187</sup>

The Supreme Court's assurance one week after *Herring* that judges in criminal cases will continue to resolve constitutional claims may suggest that commentators are correct to discount *Herring's* "big blast" statements. For these statements would restrict the availability of the exclusionary remedy as much as (and indeed more than) the doctrine of qualified immunity restricts the availability of civil damages.<sup>188</sup> Courts limited by the doctrine of qualified immunity in civil cases and by the Court's "big blast" standard in criminal cases could address the merits of debatable Fourth Amendment claims only in dicta that litigants would be unlikely to seek and judges to give. The Supreme Court would have brought the development of the law of search and seizure to a standstill, and decisions like *Gant*, *Randolph*, *Prouse*, and *Katz* would not happen.

### 3. The Exclusionary Rule in Perspective

A comparison of *Herring* with *Gant*, *Randolph*, *Prouse*, and *Katz* reveals that the Supreme Court has been thinking about the exclusionary rule in the wrong way. Exclusion is not simply a remedy for police misconduct. In addition, the rule affords judges the only significant opportunity they have to articulate the law of the Fourth Amendment. The repeated articulation of Fourth Amendment norms, not only in notable Supreme Court decisions like *Gant*, *Randolph*, *Prouse*, and *Katz*, but also in everyday interaction between courts and local police departments can influence police conduct for the better.

The Supreme Court currently addresses exclusionary rule issues only by balancing the costs of exclusion in particular situations against the deterrent benefits.<sup>189</sup> The Court should broaden its focus and recognize the need for *some* remedial mechanism by which courts can articulate the law of the Fourth Amendment. A Court that understood this need could not approve both qualified

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<sup>186</sup> *Id.* at 105–10. See also *Rizzo v. Goode*, 423 U.S. 362 (1976); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

<sup>187</sup> Before the Supreme Court extended the federal exclusionary rule to the states, see *Mapp v. Ohio*, 367 U.S. 643 (1961), Fourth Amendment issues almost never came before the courts in states without exclusionary rules of their own. See *Alschuler*, *supra* note 26, at 1751.

<sup>188</sup> See *supra* text at note 163.

<sup>189</sup> See, e.g., *Herring v. United States*, 129 S. Ct. 695, 700 (2009); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362–63 (1998); *Arizona v. Evans*, 514 U.S. 1, 10–11 (1995); *Illinois v. Krull*, 480 U.S. 340, 347 (1987); *United States v. Leon*, 468 U.S. 897, 906 (1984); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984); *United States v. Janis*, 428 U.S. 433, 446–47 (1976); *United States v. Calandra*, 414 U.S. 338, 347 (1974).

immunity in civil cases and *Herring's* “big blast” restriction of the exclusionary rule.

*Pearson* may be correct that, when the exclusionary rule assures the courts’ resolution of nearly the entire range of Fourth Amendment issues, civil remedies need not be available for most Fourth Amendment violations.<sup>190</sup> Equally, the exclusionary rule might not be needed if an effective and widely available civil remedy allowed the courts to develop and enforce Fourth Amendment norms.<sup>191</sup> The next section of this article will suggest, however, that when the issue is posed as an either-or choice (as of course it need not be), exclusion is a far more effective and appropriate mechanism than civil damage actions for developing the law of the Fourth Amendment.

### E. Originalism vs. Fair and Effective Remedies

#### 1. Some History

Critics of the exclusionary rule note that it did not exist at the time of the framing of the Fourth Amendment.<sup>192</sup> At that time, however, officers who conducted illegal searches and seizures were held strictly liable in damages. These officers had no immunity from civil lawsuits.

Akhil Amar characterizes the landmark 1763 decision in *Wilkes v. Wood* as “the paradigm search and seizure case for Americans” and “probably the most famous case in late eighteenth-century America, period.”<sup>193</sup> *Wilkes* illustrates the remedy for unlawful seizures that the Framers of the Fourth Amendment knew.<sup>194</sup>

The British Secretary of State, Lord Halifax, had issued a warrant to search for and seize an allegedly seditious publication, *The North Briton*, No. 45. The defendant, Robert Wood, was alleged to have aided in the execution of this

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<sup>190</sup> This article does not consider how important damage actions are to the development of the law in other areas.

<sup>191</sup> After referring to the view that the law should provide a remedy for every wrong, Ann Woolhandler writes, “A less extreme position is that the legal system need not provide compensation for every cognizable harm caused by government, but should not systematically fail to review any particular class of illegal official behavior.” Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 471 (1986).

<sup>192</sup> See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 21 (1997) (“Supporters of the exclusionary rule cannot point to a single major statement from the Founding [era] . . . supporting Fourth Amendment exclusion of evidence in a criminal trial.”). See also William C. Heffernan, *Foreword: The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 835–36 (2000) (“As is well known, at the time of the Fourth Amendment’s adoption, courts offered money damages, but not exclusion, for violations of the rules of search and seizure. Neither the framers nor the common-law judges who rendered opinions concerning search and seizure ever intimated that courts should consider exclusion as a remedy for violations of these rules.”).

<sup>193</sup> AMAR, *supra* note 192, at 11.

<sup>194</sup> See *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.).

warrant. Wood's counsel did not argue that Wood had acted in "good faith" or in "objectively reasonable reliance" on the warrant. No one apparently cared. Counsel simply argued that the warrant was valid. Warrants of the same sort "had been issued as far back as the Courts of Justice could lead them"; they had "existed before, at, and since the Revolution"; and they "had been till this case unimpeached."<sup>195</sup>

Lord Chief Justice Pratt declared the warrant invalid. He observed that it specified "no offenders names" and allowed "messengers to search wherever their suspicions may chance to fall."<sup>196</sup> Calling the warrant "totally subversive of the liberty of the subject," he encouraged the jury to award sizeable damages,<sup>197</sup> and the jurors evidently heard him. After retiring for half an hour, they returned a verdict for the plaintiff in the amount of one thousand pounds.<sup>198</sup> The equivalent sum today would be \$217,000.<sup>199</sup> Because the warrant was invalid, it gave Wood no privilege, and without a privilege, he was strictly liable for his trespass.

A familiar federal civil rights statute, 42 U.S.C § 1983, now imposes liability on state officials who violate the Constitution. On its face, the language of this statute leaves no room for immunity:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>200</sup>

Section 1983 was enacted as part of the Ku Klux Klan Act of 1871, and its history indicates that Congress meant what it said.<sup>201</sup> Despite this history and the

<sup>195</sup> *Id.* at 493.

<sup>196</sup> *Id.* at 498.

<sup>197</sup> *Id.* at 498–99.

<sup>198</sup> *Id.* at 499.

<sup>199</sup> Two online calculators supplied this figure. See CoinMill.com-The Currency Converter, <http://coinmill.com> (last visited Sept. 15, 2009); MeasuringWorth, <http://measuringworth.com> (last visited Sept. 15, 2009).

<sup>200</sup> 42 U.S.C. § 1983 (2006).

<sup>201</sup> The Act was thought necessary because officials at all levels of state government were denying the rights of blacks and civil rights workers in the states of the former Confederacy. Opponents protested that the measure would subject even judges and legislators who acted in good faith to liability. One representative, for example, claimed that "every judge in the State court and every other officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles suspended over him by a silken thread . . ." He added:

[I]f the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or

statute's unqualified language, the Supreme Court held in 1951 that it did not authorize suits against state legislators. The Court concluded that Congress could not have meant to abrogate the established immunity of these officials from civil lawsuits.<sup>202</sup> The Court also held in 1967 that judges were immune from suit. It observed in *Pierson v. Ray*, "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."<sup>203</sup>

Despite the text and history of § 1983, the exemption of legislators and judges from the statute's reach was plausibly justified on the ground that "members of the 42d Congress were familiar with common-law principles . . . and . . . likely intended these . . . principles to obtain, absent specific provisions to the contrary."<sup>204</sup> When *Pierson* announced the qualified immunity of police officers, however, history offered no support.

Unlike the defendant in *Wilkes v. Wood*, the police defendants in *Pierson v. Ray* did not rely on a warrant that a court later declared invalid. "Their claim [was] rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they [mistakenly] believed to be valid."<sup>205</sup> Just as *Illinois v. Krull* later held the exclusionary remedy unavailable when the police made a search in reasonable reliance on a subsequently invalidated statute,<sup>206</sup> *Pierson* concluded that an officer's reasonable reliance on an invalid statute should preclude his liability in a civil action for damages. The Court observed that "a police officer is not charged with predicting the future course of constitutional law."<sup>207</sup>

Cases in which police officers rely on legislative assurances that their conduct will be lawful are strong cases of "objective reasonableness." If the law prior to

make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable . . . at the suit of any knave . . . under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States . . .

Cong. Globe, 42d Cong., 1<sup>st</sup> Sess. 365–66 (1871) (remarks of Representative Arthur).

No proponent of the legislation denied that it would have the effect its opponents claimed, suggested that the statute implicitly incorporated common law immunities, or offered an amendment to allay the opponents' fears. "There is not a single statement in the legislative history . . . indicating that some classes of defendants would be immune from liability." David Achtenberg, *Legal Theory: Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. REV. 497, 502 (1992). See also Allen H. Denson, Commentary, *Neither Clear nor Established: The Problem with Objective Legal Reasonableness*, 59 ALA. L. REV. 747, 749–50 (2008) (declaring it "almost certain" that "the drafters [of § 1983] did not intend to incorporate state common law immunity doctrines.").

<sup>202</sup> See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

<sup>203</sup> *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967).

<sup>204</sup> *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

<sup>205</sup> *Pierson*, 386 U.S. at 555.

<sup>206</sup> See *Illinois v. Krull*, 480 U.S. 340 (1987).

<sup>207</sup> *Pierson*, 386 U.S. at 557.

*Pierson* had afforded any “good faith” immunity to officers who conducted unlawful searches, it surely would have done so in these cases. But *Pierson*’s recognition of the officers’ immunity was inconsistent with the common law and many of the Court’s own decisions. The Court previously had declared, “An unconstitutional law will be treated by the courts as null and void,”<sup>208</sup> and in accordance with this view, the Court treated seizures by officers who relied on unconstitutional statutes as though the statutes had never existed. Because an invalid law, like an invalid warrant, could confer no privilege, the officers were trespassers.

Courts and commentators in fact rationalized the immunity of legislators and other officials who exercised discretion on the ground that the executive officers who carried out their policies remained liable. Damage actions against these executive officers could test the constitutionality of statutes and other restrictive governmental measures. Common law immunities required plaintiffs to seek redress from some officials rather than others, but these immunities rarely left a right without a remedy.<sup>209</sup>

*Scott v. Donald*, decided in 1897, illustrates how the Supreme Court approached damage actions against enforcement officers before *Pierson*.<sup>210</sup> A South Carolina statute permitted a state commissioner and county dispensers to import liquor into the state and sell it. This statute declared that any liquor brought into the state by anyone else was contraband, and it authorized “any state constable, sheriff or policeman” to seize this liquor.<sup>211</sup> In *Donald*, a private party who had imported liquor into South Carolina for his own use sued some state constables who had seized it.

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<sup>208</sup> *Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1875). See also *Minnesota Sugar Co. v. Iverson*, 97 N.W. 454, 457 (Minn. 1903) (“It has again and again been held that an unconstitutional statute is simply a statute in form, is not law, and under every circumstance or condition lacks the force of law, and, further, that it is of no more saving effect to justify action taken under it than as though it had never been enacted.”); *Adsit v. Sec’y of State*, 48 N.W. 31, 33 (Mich. 1891) (“An unconstitutional law is no law, and in no case can it be made a justification in law for any action or non-action.”); *Dennison Mfg. Co. v. Wright*, 120 S.E. 120, 124 (Ga. 1923) (“As an unconstitutional act confers no authority upon an officer, his acts thereunder are the same as if no statute on the subject existed.”); *Norwood v. Goldsmith*, 53 So. 84, 87–88 (Ala. 1910) (“Every executive officer, or every person for that matter, is presumed to know the law—a presumption often violent but always necessary. . . . [A]n unconstitutional law affords no justification to a state officer for an act injurious to an individual.”).

<sup>209</sup> See 3 WILLIAM BLACKSTONE, COMMENTARIES \*255 (“[I]njuries to the rights of *property* can scarcely be committed by the crown without the intervention of its officers; for whom the law in matters of right entertains no respect or delicacy.”). See also *Marbury v. Madison*, 5 (1 Cranch) U.S. 137, 165 (1803). Common law immunities did occasionally leave a right without any remedy. For example, the common law provided no remedy for slander in the course of a legislative debate. See U.S. CONST. art. I, § 6, cl. 1.

<sup>210</sup> *Scott v. Donald*, 165 U.S. 58 (1897).

<sup>211</sup> *Id.* at 66 n.1 (setting forth the entire statute, including § 25 in which the quoted language appears).

Although the Supreme Court held the South Carolina statute invalid because it discriminated against interstate commerce, the statute's unconstitutionality was far from clear. One Justice dissented from the Court's ruling,<sup>212</sup> and the majority declared:

We cheerfully concede that the law in question was passed in the *bona fide* exercise of the police power. We disclaim any imputation to the law-makers of South Carolina of a design, under the guise of a domestic regulation, to interfere with the rights and privileges of either her own citizens or those of her sister States, which are secured to them by the Constitution and laws of the United States.

But, as we have had more than one occasion to observe, our willingness to believe that this statute was enacted in good faith . . . cannot control the final determination whether the statute . . . is not repugnant to the Constitution of the United States.<sup>213</sup>

The defendants who seized the plaintiff's liquor presumably had at least as much reason to believe their actions lawful as the South Carolina legislature did. Nevertheless, the Court affirmed a jury's verdict against them. It responded to the defendants' argument that the value of the liquor they seized was below the jurisdictional amount required for a federal lawsuit by saying that the plaintiffs' pleadings appropriately alleged a case for punitive damages.<sup>214</sup>

Ann Woolhandler observes that *Pierson v. Ray* "eviscerated the historic role of damages actions against individual officials as a means to test the constitutionality of legislation. . . . [W]hat was once perhaps the easiest theory for recovery of damages . . . (that is, behavior of an official under unconstitutional legislation), now became one of the most difficult."<sup>215</sup>

The *Pierson* Court did make a feeble effort to invoke precedent. It said, "Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved."<sup>216</sup> It added that the Supreme Court of Mississippi, the

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<sup>212</sup> *Id.* at 102–07 (Brown, J., dissenting).

<sup>213</sup> *Id.* at 91.

<sup>214</sup> *Id.* at 71–90. The Court's ruling on this point was dubious. Although an officer's good faith provided no defense against an award of compensatory damages, it usually precluded an award of punitive damages. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 124 (1804). See also Woolhandler, *supra* note 191, at 415–16. The defendants in *Donald* recognized that the plaintiff's complaints alleged the defendants' bad faith and were therefore sufficient on their face, but they argued that the plaintiff's allegations were fraudulent (in other words, that the claim of bad faith was made in bad faith). By declaring only that the complaints were sufficient on their face, the Court disregarded the defendants' argument. *Donald*, 165 U.S. at 78–86, 89.

<sup>215</sup> Woolhandler, *supra* note 191, at 465.

<sup>216</sup> *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

state in which *Pierson* arose, had recognized a defense of good faith and probable cause when an official acted in reliance on an unconstitutional statute.<sup>217</sup>

An officer, however, has no need for immunity when he makes a felony arrest on probable cause, for even if the suspect proves to be innocent, the officer's arrest is lawful.<sup>218</sup> An officer who arrests an innocent suspect on probable cause has made a mistake of fact, not law, and the concept of probable cause evaluates his actions from an *ex ante* perspective.<sup>219</sup> Moreover, Mississippi recognized its defense of good faith reliance on an unconstitutional statute (a defense of mistake of law) only in 1943, seventy-three years after the enactment of § 1983. The authors of the 1871 statute could not have intended to incorporate a defense not yet in existence. Indeed, even in 1943, the defense was available in only a small minority of states. As the Mississippi court acknowledged, most courts took the same view that the Supreme Court had taken in *Scott v. Donald* and other cases—“that the officer acts at his peril and as a statute which violates the Constitution is a nullity, the officer is subject to liability for acting thereon.”<sup>220</sup>

The Warren Court approved qualified immunity, not because § 1983 incorporated a well understood historical practice, but because qualified immunity seemed like a good idea at the time. The Court declared, “A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”<sup>221</sup> *Harlow v. Fitzgerald* later revised the *Pierson* standard by balancing interests without any pretense of historical support.<sup>222</sup> The Court itself later acknowledged that *Harlow* “completely reformulated qualified immunity along principles not at all embodied in the common law.”<sup>223</sup> A justice who favored giving § 1983 its original meaning or who sought to restore the remedial regime favored by the Framers of the Fourth Amendment could not have approved of either *Pierson* or *Harlow*. Unlike other instances of Warren Court activism, however (for example, the extension of the exclusionary rule to the states), the Court's whole-cloth invention of qualified immunity for police officers has met with the whole-hearted approval of the Burger, Rehnquist, and Roberts Courts.

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<sup>217</sup> *Id.*

<sup>218</sup> See *United States v. Watson*, 423 U.S. 411, 418 (1976) (noting “the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.”).

<sup>219</sup> See *supra* note 130.

<sup>220</sup> *Golden v. Thompson*, 11 So. 2d 906, 907–08 (Miss. 1943). Mississippi was not the first state to provide a defense to officials who relied on subsequently invalidated statutes, ordinances, or warrants, but I have not found any decision recognizing this defense prior to the enactment of § 1983. The earliest I have discovered is *Henke v. McCord*, 7 N.W. 623, 626 (Ia. 1880).

<sup>221</sup> *Pierson*, 386 U.S. at 555.

<sup>222</sup> *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>223</sup> *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (Scalia, J.).

*Mapp* and *Pierson* made exclusion rather than damages the primary remedy for unlawful searches and seizures, and although neither the elevation of exclusion nor the demotion of damages was justified by history, the Warren Court's new remedial regime has had beneficial consequences. This regime serves three objectives better than its predecessor. It (i) better protects the police from unfair liability, (ii) better safeguards Fourth Amendment rights, and (iii) makes criminal law enforcement more effective.

## 2. Fairness

As *Pierson* recognized and earlier cases like *Wilkes v. Wood* and *Scott v. Donald* did not, holding an officer personally liable in damages when he has done his job as well as anyone could ask is unfair. The remedial regime familiar to the Framers and to the authors of § 1983 would have treated the officers who conducted the searches in *Gant*, *Randolph*, *Prouse*, and *Katz* shabbily even if, as is now almost always the case, the officers' employers indemnified them for the amounts that courts and juries required them to pay. When the issue is one of judging individual officers, qualified immunity makes sense.

A motion to suppress evidence, however, does not place an officer on trial in the same way that a lawsuit to recover damages from him does. Robert Wood, who may have assumed that Lord Halifax had the authority to order a seizure of *The North Britton*, No. 45, probably resented the court's order to pay 1000 pounds in damages more than he would have resented the exclusion of *The North Britton* from evidence. Suppression does not punish a law enforcement officer, disparage his integrity or competence, or cost him money. A hearing on a motion to suppress focuses on the officer's acts. It permits the seemingly paradoxical judgment that although the officers who made the searches in *Gant*, *Randolph*, *Prouse*, and *Katz* were reasonable people behaving reasonably, they made unreasonable searches. An exclusionary remedy is fairer to the police than strict liability in damages. On the assumption that one remedy or another for Fourth Amendment violations ought to remain, *Pierson*'s restriction of civil damage actions makes much more sense than *Herring*'s "big blast" restriction of the exclusionary rule.

## 3. Safeguarding Rights

When the Supreme Court held in *Hudson v. Michigan* that the unlawful failure of the police to knock and announce their presence would not lead to the suppression of evidence, it declared, "As far as we know, civil liability is an effective deterrent here."<sup>224</sup>

If civil liability were truly effective, however, one would expect the reports to reveal at least a few cases in which plaintiffs had recovered more than nominal damages for knock-and-announce violations, yet neither counsel nor the Court in

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<sup>224</sup> *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006).

*Hudson* could find even one. At the same time, as the dissenting justices noted, the knock-and-announce violations reported in the exclusionary rule cases were “legion.”<sup>225</sup>

The majority seemed untroubled that the remedy it proposed to substitute for exclusion was invisible. It wrote, “[W]e do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury.”<sup>226</sup>

This comment missed the point. The fact that most knock-and-announce violations produce only nominal injury is one reason why conventional civil damage actions cannot effectively prevent them. The Supreme Court has held that “when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.”<sup>227</sup> Under this standard, the victim of a knock-and-announce violation typically stands to recover no more than the cost of repairing a broken door and perhaps some compensation for short-term emotional distress.<sup>228</sup> However terrified the victim might have been when the police broke down his door, he is unlikely to find a lawsuit worth the bother. In addition, most victims of police abuse are not well-advised. They lack easy access to lawyers. They may fear reprisals. They are likely to seem unattractive to jurors. Juries prepared to support their local police may nullify these victims’ constitutional rights.<sup>229</sup>

Both before and after the Supreme Court invented qualified immunity, civil lawsuits to enforce Fourth Amendment rights were infrequent. Only the exclusionary rule has permitted the judicial articulation and reiteration of Fourth Amendment standards. This rule has made the Fourth Amendment more than “a form of words.”<sup>230</sup> The exclusionary rule appears to be one of the law’s success stories.<sup>231</sup>

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<sup>225</sup> *Id.* at 610 (Breyer, J., dissenting).

<sup>226</sup> *Id.* at 598.

<sup>227</sup> *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

<sup>228</sup> *See Chatman v. Slagle*, 107 F.3d 380, 385 (6th Cir. 1997) (holding that a plaintiff may recover damages for the emotional distress inflicted by an unlawful search even when that distress is not “severe”). In appropriate cases, juries may also award punitive damages in § 1983 actions. *See Smith v. Wade*, 461 U.S. 30, 35 (1983).

<sup>229</sup> *See* Caleb Foote’s classic article, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 499–500 (1955).

<sup>230</sup> *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J., dissenting) (declaring that the failure to exclude evidence derived from an unlawful search would “reduce[ ] the Fourth Amendment to a form of words”).

<sup>231</sup> As Wayne LaFave notes, the rule’s influence is apparent “in the use of search warrants where virtually none had been used before, stepped-up efforts to educate the police on the law of search and seizure where such training had been virtually nonexistent, and the creation and development of working relationships between police and prosecutors . . . .” 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.2(b) at 33 (4th ed. 2004) (footnotes and citations omitted). I consider the effect of the exclusionary rule on police behavior in Alschuler, *supra* note 155, at 1367–74.

#### 4. Promoting Effective Law Enforcement

Our legal system could implement a stronger civil enforcement mechanism than the one it has. For example, it could resurrect the one known to the Framers. This mechanism would give the police no immunity from suit and hold them liable even when they acted in reasonable reliance on existing law. It would also invite jurors to place any value they liked on the loss of intangible rights. The restoration of this mechanism in the name of constitutional originalism or in the belief that sanctions are most effective when applied directly to the individuals responsible for a violation<sup>232</sup> would bring much valuable law enforcement to a halt.

Although law enforcement benefits the public, damage actions of the kind that existed in 1791 inflict the burdens of excess and mistake on individual officers. This mismatch easily could lead officers to play it safer than they should. As long as an action conceivably might be held illegal, an officer faced with the prospect of damage liability would have little to gain and much to lose by making it.

Myron Orfield once asked twenty-two Chicago narcotics officers whether “they thought a ‘system in which victims of improper searches could sue police officers directly would be better than the exclusionary rule.’” All of the officers answered no. When Orfield then asked, “What would be the effect of civil suits for damages on police work?,” twenty-one of the twenty-two officers said that the police would be afraid to conduct searches they should make.<sup>233</sup> One high-ranking officer surprised Orfield with his knowledge of Supreme Court decisions. He referred to a proposal for increasing the effectiveness of civil remedies that Chief Justice Burger had advanced in a dissenting opinion<sup>234</sup> and said, “If they ever try that one, we’re going to stop doing anything.”<sup>235</sup>

At its inception, the Fourth Amendment exclusionary rule rested primarily on what Yale Kamisar called “a principled basis” rather than “an empirical proposition.”<sup>236</sup> The authors of this rule thought it better “that some criminals should escape than that the government should play an ignoble part.”<sup>237</sup> They did not regard themselves as devising a mechanism that would influence police officers neither too much nor too little.

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<sup>232</sup> See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 725 (1970) (“A prime defect of the exclusionary rule is that police who have been guilty of improper behavior are not affected in their person or their pocketbook by the application of the rule.”); *Irvine v. California*, 347 U.S. 128, 136 (1954) (Jackson, J., plurality opinion) (“Rejection of the evidence does nothing to punish the wrong-doing official . . .”).

<sup>233</sup> Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1053 (1987).

<sup>234</sup> See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 421–22 (1971) (Burger, C.J., dissenting).

<sup>235</sup> See Alschuler, *Fourth Amendment Remedies*, *supra* note 156, at 205.

<sup>236</sup> Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 565 (1983).

<sup>237</sup> *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

The exclusionary rule, however, has proven a fairer and more effective mechanism for influencing police conduct than civil damage actions. It has allowed courts to develop the law of the Fourth Amendment in rulings with enough bite to be taken seriously, but it has not, by threatening the pocketbooks of individual officers or their employers, led the police to resolve all doubts against making a search or seizure that any court or jury might hold unlawful.

#### F. *Rights Without Remedies*

The majority in *Herring* did not question the dissenting Justices' statement that its decision would "leave[] Herring, and others like him, with no remedy for violations of their constitutional rights."<sup>238</sup> The Court did not argue that a remedy other than exclusion would be less costly to society and did not reiterate *Hudson's* declaration that "[a]s far as we know, civil liability is an effective deterrent here."<sup>239</sup> The Supreme Court of the United States simply told Herring to lump it.

Indeed, the Court's "big blast" statements apparently would require most of the people whom the police have searched and arrested unlawfully to lump it. The Court's qualified immunity standard seems to block damage awards for most Fourth Amendment violations,<sup>240</sup> and the "big blast" standard would restrict the exclusionary remedy at least as severely.<sup>241</sup>

Critics of the exclusionary rule object that the rule departs from the intention of the Framers, but leaving most Fourth Amendment violations without a remedy would be a more flagrant departure. As the second Justice Harlan observed, the Framers "appeared to link 'rights' and 'remedies' in a 1:1 correlation."<sup>242</sup> They applauded Blackstone's declaration that "where there is a legal right, there is also a legal remedy."<sup>243</sup> Notably, in *Marbury v. Madison*, Chief Justice Marshall quoted Blackstone's language and added:

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<sup>238</sup> *Herring v. United States*, 129 S. Ct. 695, 709 (2009) (Ginsburg, J., dissenting). The dissenters added, "There can be no serious assertion that relief is available under 42 U.S.C. § 1983. The arresting officer would be sheltered by qualified immunity . . . and the police department itself is not liable for the negligent acts of its employees . . . . Moreover, identifying the department employee who committed the error may be impossible." *Id.*

<sup>239</sup> *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

<sup>240</sup> *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (declaring that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

<sup>241</sup> *See supra* text accompanying note 163.

<sup>242</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring).

<sup>243</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*23. *See also id.* at \*109 ("[I]t is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.").

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.<sup>244</sup>

The defendant in *Marbury v. Madison* was the man who drafted the Fourth Amendment. He disagreed often with Chief Justice Marshall, but not on this point. James Madison noted in the *Federalist Papers*, “[A] right implies a remedy.”<sup>245</sup>

In accordance with the view that a right implies a remedy, the courts of the Founding generation held officers personally liable in damages for every wrongful search and seizure.<sup>246</sup> Yet today the Supreme Court threatens to leave most violations of the Fourth Amendment without any remedy, not even on paper. There are no originalists there.

#### VIII. CONCLUSION

Most of this article has been devoted to criticism of a Supreme Court decision that probably has not happened yet (although one cannot be sure). Perhaps I have been too alarmist, and perhaps *Herring*'s “big blast” statements were never meant to announce or even threaten a Fourth Amendment revolution. Nevertheless, these statements are, as Wayne LaFave says, “scary,”<sup>247</sup> and this article has sought to explain why.

On their face, the “big blast” statements may not seem very frightening, especially to someone who approaches the exclusionary rule with presuppositions about its goals and methods that many people apparently share. Judge Cardozo's familiar paraphrase of the rule declares, “The criminal is to go free because the constable has blundered,”<sup>248</sup> and many fair-minded people including Judge Cardozo have opposed the exclusion of unlawfully obtained evidence altogether. The “big blast” statements are more protective of Fourth Amendment rights. They would retain the rule when the constable has done something worse than blunder—when he has violated the Fourth Amendment deliberately or recklessly or when his violation was grossly negligent. In addition, the “big blast” standard would exclude evidence even when the constable who seized it did not blunder if his department's “systemic” practices required correction. When one looks only to the

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<sup>244</sup> *Marbury v. Madison*, 5 (1 Cranch) U.S. 137, 163 (1803).

<sup>245</sup> THE FEDERALIST NO. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961).

<sup>246</sup> See *supra* text accompanying notes 192–223.

<sup>247</sup> See LaFave, *supra* note 35, at 770.

<sup>248</sup> *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

“constable” and the “criminal,” *Herring’s* “big blast” statements may seem, not scary, but moderate.

This article has contended, however, that the Supreme Court and most other observers have been looking at the exclusionary rule in the wrong way. This rule is not about disciplining constables by freeing criminals and frustrating the constables’ blood lust. It is not about punishment at all. It is about affording judges an opportunity to articulate the law of the Fourth Amendment in rulings with enough edge that constables are likely to take them seriously. It is about providing legal guidance to constables who, sooner or later, may be willing to receive it.

The exclusionary rule has in fact transformed American policing. Legal rulings that probably would not have happened without the rule have changed what the police do. For example, the police no longer make random stops to check driver’s licenses; they rarely enter dwellings without either consent or a search warrant; and although their practices were different only a year ago before the Supreme Court decided *Gant*,<sup>249</sup> few officers now make custodial arrests for traffic violations in order to search automobiles for drugs. Moreover, every ruling by a trial judge about whether the police had justification for a search contributes to a sense of what is permissible, and the accumulation of these rulings influences behavior.<sup>250</sup> When one stops thinking about gangbuster police officers determined to get away with as much as they can and starts thinking about how the exclusionary rule enables the courts to develop and reinforce legal norms, the effect of the rule is difficult to miss.

*Herring’s* “big blast” statements, by shifting attention from the reasonableness of the search to the reasonableness of the constable, threaten to bring the development of Fourth Amendment law to an end. Because a constable does not act unreasonably when he makes an arguably lawful search, courts have no occasion to determine whether the arguably lawful search is lawful in fact. Under a “negligent constable” standard, courts treat every arguably lawful act as

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<sup>249</sup> *Arizona v. Gant*, 129 S. Ct. 1710 (2009). See *supra* text accompanying notes 132–49.

<sup>250</sup> I once wrote:

[E]very ruling in a system of case-by-case adjudication becomes part of a dialogue between judges and law enforcement officers. This dialogue can—and has in fact—established standards that may not be subject to precise verbalization. All of us can recognize that the roundup of twenty-four suspects in *Davis v. Mississippi* [394 U.S. 721 (1969)] lacked probable cause, yet none of us may be able to define [the term probable cause] or articulate with precision the standard we have employed. The reason for our common understanding is not that the roundup would have been indefensible if its costs and benefits had been judged afresh; this highly intrusive police action did enable law enforcement officers to apprehend the perpetrator of a brutal crime. Nevertheless, a long course of adjudication under the fourth amendment had given expression to a set of values, and this course of adjudication had effectively settled the probable cause issue in *Davis* before it arose. Our traditional regime of case-by-case adjudication plainly does communicate.

Alschuler, *Bright Line Fever and the Fourth Amendment*, *supra* note 25, at 256.

though it were lawful; and under a “grossly negligent constable” standard, they treat every act close to being arguably lawful as though it were lawful. As Ann Woolhandler observes, “Entitlement to immunity based on being close to a legal standard rather than on the legal standard itself naturally tends to obscure and dilute the underlying rule.”<sup>251</sup> A standard of “close enough for government work” would freeze the law of search and seizure and leave most Fourth Amendment violations without a remedy. This standard would be an affront to the Constitution and to the rule of law.

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<sup>251</sup> Woolhandler, *supra* note 191, at 473.