

HERRING V. UNITED STATES: MAPP'S “ARTLESS” OVERRULING?

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I. INTRODUCTION

Well before the 2008 term ends, I can safely predict that *Herring v. United States*¹ will be one of the most important cases decided during this term. While arguably a narrow decision, few readers can miss its sweeping logic, effectively eroding the general application of the Fourth Amendment's exclusionary rule.² Commentators have already speculated about the impending demise of *Mapp v. Ohio*,³ the landmark decision requiring states to apply the exclusionary rule as a remedy for Fourth Amendment violations.⁴

Given a long line of decisions eroding *Mapp*,⁵ should the current Court's critics really be surprised at *Mapp*'s impending demise? I think that the answer is an unequivocal “yes,” and that the *Herring* majority's approach is more evidence of how disdainful some members of the Court are about following precedent and observing recognized conventions established by the Court.⁶

Over forty-five years ago, Professor Jerold Israel published an impressive article about the “art of overruling” precedent.⁷ In it, he argued that traditionally the Court has followed certain constraints before it has overruled precedent. Following those constraints demonstrates the Court's commitment to the rule of law, that it is acting “as a disinterested decision-maker applying those fundamental values reflected in the Constitution.”⁸ Professor Israel identified a number of rhetorical arguments that the Court relied on when overruling prece-

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¹ *Herring v. United States*, 129 S. Ct. 695 (2009).

² As cited in a recent article in the *New York Times*, one district court judge has already read *Herring* broadly. Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1. The Fourth Amendment is silent on the appropriate remedy for violations of that amendment. Although civil damages may be available to a person aggrieved by an illegal search, the most common remedy is the exclusion of evidence at trial; hence the term, the “exclusionary rule.” *United States v. Calandra*, 414 U.S. 338, 348 (1974).

³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ Liptak, *supra* note 2.

⁵ See *infra* text accompanying notes 86-116.

⁶ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring).

⁷ Jerold H. Israel, *Gideon v. Wainwright: The “Art” of Overruling*, 1963 SUP. CT. REV. 211 (1963).

⁸ *Id.* at 217.

dent:⁹ an argument that focused on changed conditions, making its earlier precedent inapplicable to the current legal climate; a second argument that focused on lessons of experience, indicating the earlier case failed to meet the test of time; and a third kind of argument that focused on the erosion of the earlier decision, so weakening the earlier decision as to make it unsupportable.¹⁰ Thus, overruling was justified to bring the case law in line with the intervening case law.¹¹ In addition, Professor Israel identified a number of other arguments, including reliance on the fact that earlier precedent may have been decided by a narrow majority of the Court, to justify overruling precedent by suggesting that a case decided by a single vote could not claim wide acceptance.¹²

The central thesis of this essay is that, consistent with the “art of overruling,” the Court could have limited *Mapp*, for example, by extending the good-faith reasonable mistake rationale that animates cases like *United States v. Leon*.¹³ As developed below, the facts of *Herring* are quite similar to the facts of other cases where the Court upheld police conduct that, although erroneous, seemed reasonable; accordingly, excluding the illegally obtained evidence had no value as a deterrent of future conduct in light of the reasonableness of the police officer’s mistake.¹⁴ However, *Herring* goes much further and points towards a much greater tolerance towards police misconduct because it allows the use of illegally seized evidence, unless it was the product of at least reckless conduct on the part of the police. If the Court, in fact, follows *Herring*’s logic and extends that rule to all searches, the Court will have adopted a rule without precedential support. Instead, the Court will be imposing the rule with no authority other than its own *ipse dixit*.

The first part of this essay reviews *Herring*. Thereafter, it explores in more depth Professor Israel’s analysis and applies it first to *Mapp* to demonstrate how the Court has, in fact, honored this convention, and then demonstrates how this Court could, were it inclined towards restraint, justify cutting back on *Mapp*.¹⁵ Finally, this essay demonstrates how radical *Herring*’s analysis really is.

⁹ Professor Israel’s specific thesis was that Justice Black failed to follow those constraints, even though he could have, in *Gideon*. *Id.* at 272. Many justices continue to use similar arguments when they argue in favor of overruling precedent. *See, e.g.*, *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009) (limiting *New York v. Belton*, 453 U.S. 454 (1981)).

¹⁰ Israel, *supra* note 7, at 224-25.

¹¹ *Id.* at 224.

¹² *Id.* at 226.

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

¹⁴ *See infra* text accompanying notes 16-25, 113-116.

¹⁵ I do not support cutting back on *Mapp*’s protection. *See, e.g.*, Michael Vitiello & Jane C. Burger, *Mapp’s Exclusionary Rule: Is the Court Crying Wolf?*, 86 *DICK. L. REV.* 15, 37 (1981). Instead, my thesis is that several members of the right wing of the Court lack the kind of deference to precedent that would allow them to modify *Mapp*; instead, they seem ready to make an unwarranted break from the past.

II. *HERRING v. UNITED STATES*

On July 7, 2004, the petitioner Bennie Dean Herring drove to the Coffee County, Alabama sheriff's department to retrieve something from his vehicle in the police impoundment lot.¹⁶ An investigator asked the county's warrant clerk to see if the sheriff's department had any outstanding warrants for Herring.¹⁷ When she found none, the investigator had her check with Dale County.¹⁸ The Dale County clerk reported that it had an active warrant for Herring's arrest.¹⁹ Relying on that information, the investigator and a sheriff's deputy arrested Herring.²⁰ The search incident to the arrest uncovered methamphetamine and a pistol.²¹ When the Dale County clerk attempted to follow up on her promise to fax the warrant, she was unable to find the warrant.²² She learned that the warrant had been recalled five months earlier, a fact that should have been noted in the computer system.²³ The Dale County clerk immediately called her counterpart in Coffee County to relay the information.²⁴ Herring's arrest and search had already taken place.²⁵

Indicted for violations of federal gun and drug laws, Herring moved unsuccessfully to suppress the evidence.²⁶ The district court adopted the magistrate judge's recommendation, finding that, even if the investigator violated the Fourth Amendment, he acted in good faith because he believed that the warrant was still in effect.²⁷ In fact, the district court adopted the magistrate's rationale that there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes."²⁸ The Eleventh Circuit affirmed.²⁹ In doing so, it observed that, while whoever failed to update the Dale County's records was a law enforcement official, the conduct was merely negligent, and not "a deliberate or tactical choice to act."³⁰ Subsequently, the Court granted review in light of a split among lower courts on the issue.³¹

While raising questions about the legality of the underlying conduct, Chief Justice Roberts, writing for a narrow majority of the Court, began his analysis with the assumption that the original conduct violated the Fourth Amendment and instead, asked whether the reliance on the warrant brought the case within

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

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 699.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (quoting *Herring v. United States*, 492 F.3d 1212, 1218 (11th Cir. 2007)).

³¹ *Id.*

exceptions to the exclusionary rule.³² Chief Justice Roberts described several principles that, despite considerable debate, a majority of the justices over the past forty years have been able to establish as part of the Court's post-*Mapp* case law. For example, because the exclusionary rule is not constitutionally mandated,³³ the Court applies the exclusionary rule only if its application serves its purpose as a deterrent of police conduct that violates the Fourth Amendment.³⁴ Further, even if the application of the rule would have a deterrent effect, the Court now requires that "the benefits of deterrence must outweigh the costs,"³⁵ and those costs may be substantial (including the release of potentially dangerous defendants).³⁶

Chief Justice Roberts then reviewed the case law establishing a good-faith reasonableness exception to the application of the exclusionary rule,³⁷ starting with *Leon* and ending with other post-*Mapp* cases like *Illinois v. Krull*,³⁸ and *Arizona v. Evans*.³⁹ Although criticized as beyond the initial rationale of *Leon*,⁴⁰ *Krull* extended *Leon*'s holding to police reliance on a statute later found unconstitutional.⁴¹ *Evans* extended the good-faith reasonableness exception to cover police reliance on erroneous information in a court's database that a warrant was outstanding for Evans' arrest.⁴²

While *Evans* is quite similar on its facts to *Herring*, *Evans* left open the question faced in *Herring*. In *Evans*, the court, not law enforcement, maintained the files.⁴³ Accordingly, the Court left open the question "whether the evidence should be suppressed if police personnel were responsible for the error."⁴⁴

Existing precedent, including *Leon*, *Krull*, *Evans*, and other post-*Mapp* cases that cabined the exclusionary rule,⁴⁵ crafted an exception that required good faith on the officer's part and, more importantly, insisted that the officer's reliance on other actors in the system must be reasonable.⁴⁶ In reliance⁴⁷ on

³² *Id.* Chief Justice Roberts stated the precise question before the Court: "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?" *Id.* at 698.

³³ *Id.* at 699-700.

³⁴ *Id.*

³⁵ *Id.* at 700-01.

³⁶ *Id.*

³⁷ *Id.* at 701.

³⁸ *Illinois v. Krull*, 480 U.S. 340 (1987).

³⁹ *Arizona v. Evans*, 514 U.S. 1 (1995).

⁴⁰ The central premise of *Leon* was that magistrates were not involved in ferreting out crime and did not need to be deterred by the possible application of the exclusionary rule. Subsequent cases have extended the good-faith reasonableness exception to other actors, not just judicial officers. *United States v. Leon*, 468 U.S. 897, 913-17 (1984). For criticism of cases like *Krull*, see Justice O'Connor's dissent, arguing, in part, that *Leon* turned "explicitly on the tradition of judicial independence," unlike the legislature that acted explicitly to assist law enforcement. *Krull*, 480 U.S. at 365.

⁴¹ *Krull*, 480 U.S. at 349-50.

⁴² *Herring*, 129 S. Ct. at 701.

⁴³ *Evans*, 514 U.S. at 5.

⁴⁴ *Id.* at 16 n.5.

⁴⁵ See discussion *infra* notes 48-49.

⁴⁶ See, e.g., *United States v. Leon*, 468 U.S. 897, 913 (1984).

language from *Leon*⁴⁸ and *Krull*,⁴⁹ *Herring* lays out a much more permissive rule regarding violations of the Fourth Amendment. Building on the thesis of Judge Friendly's law review article on the exclusionary rule,⁵⁰ the Court contended that the exclusionary rule should be limited to "flagrant or deliberate" violations of Fourth Amendment rights.⁵¹ Ignoring many Supreme Court cases in which the Court suppressed evidence based on conduct that was arguably reasonable under the totality of the circumstances,⁵² the Court suggested that the exclusionary rule case law, like *Weeks v. United States*⁵³ and *Mapp*, turned on the flagrant conduct of the police.⁵⁴ According to Chief Justice Roberts, "An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place."⁵⁵ Further, "[S]ince *Leon*," according to Chief Justice Roberts, "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 this."⁵⁶

Summing up its view, the Court stated, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."⁵⁷ Thus, according to *Herring*, the exclusionary rule is premised on a showing of "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."⁵⁸

The remaining portion of the decision returned to the application of its analysis to the facts before the Court. It suggested how a defendant might make a sufficient showing of reckless conduct; for example, if he can show that

⁴⁷ As developed below, the reliance is misleading.

⁴⁸ "As we said in *Leon*, 'an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule." *Herring v. United States*, 129 S. Ct. 695, 701 (2009) (quoting *Leon*, 468 U.S. at 911). Quite distinctly, *Leon* did not excuse police for negligent conduct; instead, its core holding focused on the reasonableness of police reliance on the magistrate's issuance of the warrant. *Leon*, 468 U.S. at 913.

⁴⁹ "Similarly, in *Krull*, we elaborated that 'evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Herring*, 129 S. Ct. at 701 (second internal quotation marks omitted) (quoting *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987)). Like *Leon*, *Krull* was premised on the reasonableness of the officer's belief. *Krull*, 480 U.S. at 349.

⁵⁰ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953 (1965).

⁵¹ *Herring*, 129 S. Ct. at 702.

⁵² See, e.g., *Payton v. New York*, 445 U.S. 573, 602-03 (1980) (suppressing evidence despite police reliance on a statute authorizing in-home arrest without a warrant); *Chimel v. California*, 395 U.S. 752, 768 (1969) (overruling precedent that allowed police to make a full in-home search when a lawful arrest took place in the home).

⁵³ *Weeks v. United States*, 232 U.S. 383 (1914). In *Weeks*, officers entered the defendant's home by using a key shown to them by one of Weeks's neighbors, confiscated papers, and returned later with a federal marshal. *Id.* at 386.

⁵⁴ *Herring*, 129 S. Ct. at 702 ("Equally flagrant conduct was at issue in *Mapp v. Ohio* . . .").

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

police have knowingly made false entries or have been reckless in the way that they have maintained their warrant system.⁵⁹

III. THE ART OF OVERRULING PRECEDENT

A lot has changed since Professor Israel wrote his article on the art of overruling precedent. Presidential candidates have made the Court a campaign issue.⁶⁰ Mostly Republican Presidents have had the chance to effect a make-over of the Court.⁶¹ Despite fears of counter-revolutions undoing Warren Court precedent,⁶² by and large justices have continued to follow the conventions that Israel observed in his article.⁶³ As developed in this section, those conventions are an important part of the rule of law.

The Court has long recognized that *stare decisis* has a more limited application in constitutional cases than in cases involving statutory construction, a difference premised on the greater difficulty in amending the Constitution.⁶⁴ At the same time, adherence to precedent furthers important values. Foreswearing one's own view of the law in deference to existing case law demonstrates a justice's commitment to the rule of law.⁶⁵ While the Critical Legal Studies movement reminded us that the law is indeterminate,⁶⁶ we would have far more cynicism about the law if justices did not feel constrained by precedent. Israel notes, "[T]he view of the Court as an impersonal adjudicator has depended to some degree on the assumption that the judge, unlike the legislator, is sharply restricted in relying upon his personal predilections by the necessity of following the decisions of his predecessors."⁶⁷

⁵⁹ *Id.* at 703.

⁶⁰ See Vitiello & Burger, *supra* note 15, at 15-16 (discussing how Nixon and Reagan made campaign promises to appoint conservative judges if elected).

⁶¹ President Johnson appointed Abe Fortas in 1965 and Thurgood Marshall in 1967; President Nixon appointed Warren Earl Burger in 1969, Harry Blackmun in 1970, Lewis Powell in 1972, and William Rehnquist in 1972; President Ford appointed John Paul Stevens in 1975; President Reagan appointed Sandra Day O'Connor in 1981, Antonin Scalia in 1986, and Anthony Kennedy in 1988; President George H. W. Bush appointed David Souter in 1990 and Clarence Thomas in 1991; President Clinton appointed Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994; President George W. Bush appointed John Roberts in 2005 and Samuel Alito in 2006. Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Oct. 24, 2009).

⁶² See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1986).

⁶³ For example, almost certainly, Justices O'Connor, Kennedy and Souter were appointed to the Court with an eye towards their overruling *Roe v. Wade*. Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court from Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1145-46 (2006). When they had the chance to do so, they refused, based on principles of *stare decisis*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992).

⁶⁴ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting).

⁶⁵ Or, as Professor Israel frames the point, it furthers the image of the Court as "a disinterested decision-maker applying those fundamental values reflected in the Constitution." Israel, *supra* note 7, at 216-17.

⁶⁶ Jerry L. Anderson, *Law School Enters the Matrix: Teaching Critical Legal Studies*, 54 J. LEGAL EDUC. 201, 201 (2004).

⁶⁷ Israel, *supra* note 7, at 217.

Flowing from the need to maintain the image as “impersonal adjudicator” is a need to follow the kinds of arguments identified by Professor Israel when the Court overrules precedent. Overruling precedent invites the conclusion that the change in the law is the result of the change in court personnel and not the result of an objective process of doctrinal evolution.⁶⁸

Israel identified several “techniques” that many justices have used when the Court has overruled precedent. Most justices recognize that the “‘law may grow to meet changing conditions’” and that they reject “‘slavish adherence to authority where new conditions require new rules of conduct.’”⁶⁹ As a result, justices have relied on “changed conditions” to justify departure from precedent.⁷⁰

A second technique focuses on the lessons of experience. Israel cited a number of instances in which the Court relied on this rationale in overturning precedent.⁷¹ At times, the Court has concluded that its earlier doctrine has not achieved the original goal, requiring a rethinking of its position in light of the unintended consequences of its case law.⁷²

Israel found a third technique in a majority of decisions overruling precedent: the Court has supported its decision by demonstrating the erosion of the precedent to be overruled. Relying on intervening case law allows the Court to demonstrate the inconsistency between the decision being reexamined and subsequent developments; thus, the Court is left with “no choice but to overrule the earlier decision, since that ruling is totally irreconcilable with subsequent cases.”⁷³ Consequently, the Court may argue that the decision to overrule is not the result of a group of like-minded newcomers to the bench, but the work of justices who have decided the cases in the interim, often over a period of years. The change in the law is, therefore, not a sudden shift, but a long process of evolution.⁷⁴ The Court may also be able to point to earlier precedent, predating the case about to be overruled, as a way to show that the Court is

⁶⁸ *Id.* at 218-19.

⁶⁹ *Id.* at 219 (quoting *Mahnich v. S.S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting)). Although Israel was writing long before the debate over originalism, not even Justice Scalia adheres to a strict original understanding of the Constitution. For example, while writing to uphold the historical rule of in-hand service, Justice Scalia did not argue in favor of returning to the original understanding of due process found in *Pennoyer v. Neff*, 95 U.S. 714 (1877). See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (Scalia, J., plurality opinion).

⁷⁰ Israel, *supra* note 7, at 220. *Brown v. Board of Education*, 347 U.S. 483 (1954), may be the most famous example demonstrating this kind of argument. In that case, the Court cited the fact that the role of public schools had changed so significantly since *Plessy v. Ferguson* established the principle of separate but equal. It also cited changes in psychological understanding of how children develop. *Id.* at 492-94.

⁷¹ Israel, *supra* note 7, at 221. Among the most famous of these cases is *Mapp*. See *infra* text accompanying notes 76-85.

⁷² *Id.* at 222-23. For a quite recent example of this kind of argument see *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009), which notes that “[t]he experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded.”

⁷³ Israel, *supra* note 7, at 224.

⁷⁴ *Id.* at 225. For a very recent example of this kind of argument, see *Gant*, 129 S. Ct. at 1723, which notes that the dissent “ignores the checkered history of the search-incident-to-arrest exception.”

going back to an earlier rule; in effect, the case to be overruled was the aberration, not the current Court's decision.

Finally, Israel identified some other arguments the Court has relied upon. For example, a case decided by a closely divided Court may not be entitled to the same deference as a decision with the full backing of the Court.⁷⁵ Presumably, the fact that the Court was closely divided, especially in light of a powerful dissent, suggests that the decision was controversial even from the outset.

Mapp represents a good case to explore Israel's thesis. Justice Clark faced significant challenges in preparing his majority opinion. Notably, only twelve years earlier, the Court in *Wolf v. Colorado*⁷⁶ rejected the proposition that the Fourth Amendment required the states to exclude evidence taken in violation of the Fourth Amendment.⁷⁷ Justice Clark's majority relied on the techniques that Professor Israel identified. For example, the Court relied on several post-*Wolf* decisions that had eroded the foundations of *Wolf*.⁷⁸ Specifically, Justice Clark pointed to the expansion of standing, the rejection of the "silver platter" doctrine⁷⁹ and the use of injunctions to prevent federal officials from giving state officials illegally-seized evidence.⁸⁰

In addition, the Court emphasized the pre-*Wolf* case law.⁸¹ In effect, Justice Clark implied that the earlier case law like *Weeks* had it right. That is, *Weeks* and the post-*Wolf* cases like *Elkins v. United States*⁸² were logically consistent, providing necessary protection against Fourth Amendment violations. Thus, *Mapp* was simply bringing case law in line with that earlier precedent. Hence, *Wolf*, not *Mapp*, was the aberration.

Further, the Court was reexamining the issue in part because *Wolf* was "bottomed on factual considerations"⁸³ now seen to be incorrect. Specifically, *Wolf* relied on the fact that a "particularly impressive" number of states rejected the application of the exclusionary rule.⁸⁴ In the interim, "more than half of those since passing upon [whether to adopt the exclusionary rule] . . . have wholly or partly adopted or adhered to the *Weeks* rule."⁸⁵ Thus, *Wolf* failed the lesson of experience.

⁷⁵ Israel, *supra* note 7, at 226; *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 115 (1941) (citing the fact that the case that the Court was overruling was decided by a bare majority, over a "now classic dissent" of Justice Holmes).

⁷⁶ *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁷⁷ *Id.* at 33.

⁷⁸ *See Mapp v. Ohio*, 367 U.S. 643, 653 (1961); *Elkins v. United States*, 364 U.S. 206, 208 (1960) (rejecting the silver platter doctrine); *Jones v. United States*, 362 U.S. 257, 264-65 (1960) (expanding standing for Fourth Amendment violations); *Rea v. United States*, 350 U.S. 214, 217 (1956) (allowing use of injunctions to prevent federal officials from handing state officials evidence illegally seized).

⁷⁹ The "silver platter" doctrine described the situation in which state officials, not subject to the exclusionary rule, could conduct an illegal search and merely hand over the evidence to federal authorities. *See Mapp*, 367 U.S. at 653.

⁸⁰ *See id.*; *Rea*, 350 U.S. at 217 (allowing use of injunctions to prevent federal officials from handing state officials evidence illegally seized).

⁸¹ *Mapp*, 367 U.S. at 649-50.

⁸² *Elkins v. United States*, 364 U.S. 206 (1960).

⁸³ *Mapp*, 367 U.S. at 651.

⁸⁴ *Wolf v. Colorado*, 338 U.S. 25, 29 (1949).

⁸⁵ *Mapp*, 367 U.S. at 651.

As Professor Israel demonstrates, *Mapp* is hardly unique in following these kinds of arguments. And as argued above, their importance is significant: these arguments are part of the rule of law. They allow the Court to evolve doctrine without leaving the Court open to the claim that the current decision is merely a preference of a new majority of the Court.

IV. EXTENDING PRECEDENT

A day after the Court announced its decision in *Herring*, a student in my Criminal Procedure course asked for my views on the opinion. At that point, I had only read a media account of the Court's decision and said that it was at most a minor extension of the Court's precedent. I was quite shortsighted in my response. In this section, however, I argue how the Court might have reached its conclusion that the evidence should have not been suppressed without an unwarranted departure from existing case law.

Mapp has had a rocky history, starting not long after the Court's decision. *Mapp* made clear that the exclusionary rule was grounded in the Constitution.⁸⁶ Further, Justice Clark identified two purposes that the rule served: deterrence of illegal police conduct and judicial integrity.⁸⁷ Within a few years, however, the Court emphasized the deterrence rationale as the primary purpose of the rule when it denied retroactive effect to its holding in *Mapp*; applying the rule retroactively makes little sense if the rule is designed to deter illegal police conduct.⁸⁸

During the 1970s and 1980s, after rapid changes in Court personnel, the Court narrowed the exclusionary rule in a series of decisions.⁸⁹ The Court grounded those decisions, such as *Linkletter v. Walker*,⁹⁰ in the view that the primary purpose of the exclusionary rule was deterrence of illegal police conduct.⁹¹ For example, in *United States v. Calandra*,⁹² the Court both ignored the judicial integrity rationale and refused to extend the exclusionary rule to grand jury proceedings. Instead, the Court relied on a cost-benefit analysis, whereby any marginal deterrence might be outweighed by the cost to society of suppressing the evidence.⁹³ Two years later, Justice Blackmun cited *Calandra* for the proposition that the Court "has established that the 'prime purpose' of

⁸⁶ *Id.* at 655; *see also id.* at 675-76 (Harlan, J., dissenting) (assuming as much).

⁸⁷ *Id.* at 656, 659 (majority opinion).

⁸⁸ *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965).

⁸⁹ President Nixon ran on a law and order platform in the 1968 election and within his first two years made four appointments to the Court. George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 172 (2001); Members of the Supreme Court of the United States, *supra* note 61. No one could miss new Chief Justice Warren Burger's hostility to the exclusionary rule. *See* Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 1 (1964).

⁹⁰ *Linkletter v. Walker*, 381 U.S. 618 (1965).

⁹¹ *Id.* at 637. In that case, while stating that *Mapp* applied to cases that were on direct appeal when the Court decided *Mapp*, the Court refused to apply its holding to state court convictions that had become final before its decision. *Id.* at 619 n.1.

⁹² *United States v. Calandra*, 414 U.S. 338 (1974).

⁹³ *Id.* at 349.

the rule, if not the sole one, 'is to deter future unlawful police conduct.'⁹⁴ Using the balancing process, the Court rejected the extension of the rule to civil tax assessment proceedings⁹⁵ and to habeas corpus proceedings so long as the prisoner had a fair hearing in the state criminal proceedings.⁹⁶

In addition to the cost-benefit analysis cases, the Court also began to accept the argument that, because the purpose of the exclusionary rule was deterring illegal police conduct, applying the rule to a police officer acting in good-faith made little sense. Thus, in *United States v. Peltier*,⁹⁷ the Court refused to give retroactive effect to its earlier decision disallowing roving patrols to make random stops.⁹⁸ In *Peltier*, then-Justice Rehnquist spoke broadly when he stated that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."⁹⁹ Furthermore, in *Michigan v. DeFillippo*,¹⁰⁰ the Court extended the good-faith analysis where it found that an officer is entitled to make an arrest for a substantive offense, even if the statute governing the arrest is later found unconstitutional. "A prudent officer," argued Chief Justice Burger, "should not have been required to anticipate that a court would later hold the ordinance unconstitutional."¹⁰¹

By the 1980s, four justices had indicated their willingness to adopt a good-faith exception to the exclusionary rule.¹⁰² Anticipating that the Court was ready to adopt a wholesale good-faith exception, the Fifth Circuit en banc stated, largely in dicta, that the Court had essentially adopted a good-faith exception as long as the officer's mistake was a technical violation of the Fourth Amendment.¹⁰³ Indeed, the line of cases described above led commentators, including me, to predict that the Court would adopt a broad good-faith exception to the rule once President Reagan made appointments to the Court.¹⁰⁴

⁹⁴ *United States v. Janis*, 428 U.S. 433, 446 (1976) (quoting *Calandra*, 414 U.S. at 347).

⁹⁵ *Id.* at 454.

⁹⁶ *Stone v. Powell*, 428 U.S. 465, 494-95 (1976). Using similar analysis elsewhere, the Court also held that the state may use illegally-seized evidence to impeach a defendant's statements made on direct examination. *United States v. Havens*, 446 U.S. 620, 627-28 (1980).

⁹⁷ *United States v. Peltier*, 422 U.S. 531 (1975).

⁹⁸ *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

⁹⁹ *Peltier*, 422 U.S. at 542.

¹⁰⁰ *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

¹⁰¹ *Id.* at 37-38.

¹⁰² See *United States v. Williams*, 622 F.2d 830, 840-41 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981). See also Edna F. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 635 (1978). By 1980, Chief Justice Burger and Justices White, Powell, and Rehnquist had argued for a good-faith exception. *Id.* at 635 n.6.

¹⁰³ *Williams*, 622 F.2d at 841. Judge Rubin noted in his special concurrence that "five members of the Court up to now have not suggested [the rule's] qualification, and they constitute a majority." *Id.* at 849. As any student of the Fourth Amendment recognizes, the Court has often created highly technical distinctions. As a result, an officer acting reasonably and in good faith may nonetheless violate the Fourth Amendment.

¹⁰⁴ See Vitiello & Burger, *supra* note 15, at 15-16, 24-26.

I proved to be a mediocre prognosticator. Instead, the 1980s saw a continued expansion of the good-faith exception, rather than its wholesale adoption. In the companion cases of *Leon*¹⁰⁵ and *Massachusetts v. Sheppard*,¹⁰⁶ the Court permitted the use of evidence at trial that was seized pursuant to technically defective search warrants. Despite the technical illegality of the police conduct, *Leon* announced a good-faith exception to the exclusionary rule. Or it did, sort of. Specifically, Justice White argued that the inquiry into the officer's good faith required an inquiry into whether "a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization" of the warrant.¹⁰⁷

While Justice White's opinion noted the frequent criticisms of the exclusionary rule (e.g., its substantial social costs and impairment of the truth-finding function of the judge and jury),¹⁰⁸ his overall analysis did not justify the broader good-faith exception to non-warrant situations. Importantly, he contended that the exclusionary rule was aimed at police misconduct and that no evidence demonstrated that judicial officers "are inclined to ignore or subvert the Fourth Amendment."¹⁰⁹ The majority found no reason to believe that suppressing evidence would deter misconduct by judges and magistrates.¹¹⁰

Whatever the wisdom of Justice White's majority opinion,¹¹¹ its focus on deterring police, not magistrates, gave a possible limitation to the good-faith rule. Subsequently, the Court has continued to expand the good-faith rule, including to situations in which the police act in good-faith without a warrant. For example, in *Krull*, the Court found that the exclusionary rule should not apply when an officer objectively and reasonably relied on a state statute authorizing an administrative search.¹¹² No doubt, the extension in *Krull* does no violence to the rationale in *Leon* on the theory that the exclusionary rule is not likely to deter legislators.

Finally, in *Arizona v. Evans*,¹¹³ the Court addressed another search without a warrant. In that case, the police officer relied on his patrol car's computer that indicated an outstanding misdemeanor warrant for Evans's arrest.¹¹⁴ The warrant had in fact been quashed, but a clerk failed to update the computer records.¹¹⁵ Given *Leon*'s reasoning, the Court found extending the good-faith exception relatively easy under the facts before the Court. One can substitute

¹⁰⁵ *United States v. Leon*, 468 U.S. 897, 926 (1984).

¹⁰⁶ *Massachusetts v. Sheppard*, 468 U.S. 981, 990-91 (1984).

¹⁰⁷ *Leon*, 468 U.S. at 922 n.23.

¹⁰⁸ *Id.* at 907-08.

¹⁰⁹ *Id.* at 916.

¹¹⁰ *Id.* at 916-17.

¹¹¹ See Justice Brennan's dissent in which he stated that the Court created "a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' . . . are made to disappear with a mere wave of the hand." *Id.* at 929 (Brennan, J., dissenting).

¹¹² *Illinois v. Krull*, 480 U.S. 340, 358 (1987).

¹¹³ *Arizona v. Evans*, 514 U.S. 1 (1995).

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.* at 4-5.

“court employee” for magistrate or judge in *Leon*’s discussion and justify the holding in *Evans*.¹¹⁶

Although the result in *Herring* is not surprising given the long line of case law dating back over thirty years, the way in which the majority reached that result certainly is. As developed below, Chief Justice Roberts did not write a narrow opinion moving incrementally; instead, the opinion uses some rather surprising language, unsupported by existing case law. Had the majority written with restraint, it could have achieved the same result, with much greater legitimacy.

As the Court recognized in *Herring*, the precise question that the Court left open in *Evans* was “whether the evidence should be suppressed if police personnel were responsible for the error.”¹¹⁷ Resolving that question was somewhat more difficult than was the situation in *Evans*. After all, as I indicated above, the *Evans* Court merely substituted “court employee” for magistrate or judge, which was not a great leap of logic. In *Herring*, *Leon*’s logic would have to be extended to police personnel, constituting a break from *Leon*’s insistence that the purpose of the exclusionary rule was to deter police conduct and not that of judicial officers. Obviously, the exclusionary rule is designed to deter law enforcement personnel and, in *Herring*, an unidentified employee of a neighboring sheriff’s department negligently failed to correct the record.¹¹⁸

Nonetheless, the Court could have extended *Leon* to the facts of *Herring* without great violence to precedent. After all, the investigator had no reason to suspect that the report of a warrant was inaccurate. I suspect that the record was entirely silent on how often Coffee County sheriffs relied on information from the neighboring county and how often that information turned out to be erroneous. Short of some evidence suggesting general incompetence on the part of Dale County employees, a reasonable officer no doubt could rely in good faith on the representation that an outstanding warrant existed. Commentators have noted that much of *Leon*’s reasoning relates generally to police conduct, with or without a warrant, and might, therefore, lead to a general good-faith rule for all police conduct.¹¹⁹ But extending *Leon* in *Herring* would have been a small step; indeed, the Court could have left open whether its holding would apply if the investigator’s own sheriff’s department made the clerical mistake. That question would be a more difficult one to analyze; for example, the investigator might have information about frequency of errors and know whether the responsible personnel have an incentive to permit lax procedures with an eye towards expanding police power. This question was not present by *Herring*’s facts.

However, Chief Justice Roberts took a different course in *Herring*.

¹¹⁶ *Id.* at 16.

¹¹⁷ *Id.* at 16 n.5.

¹¹⁸ *Herring v. United States*, 129 S. Ct. 695, 701-02 (2009) (citing the Eleventh Circuit’s conclusion that the failure to update the computer record was negligent, but not reckless or deliberate).

¹¹⁹ See, e.g., Craig M. Bradley, *The “Good Faith Exception” Cases: Reasonable Exercises in Futility*, 60 *IND. L.J.* 287, 298-99 (1985).

V. HERRING'S RADICAL LEAP

After discussing the cases from *Mapp* to *Leon* to *Evans*, the Court did not simply apply that case law. Instead, it made a number of statements suggesting a radical departure from existing precedent. Indeed, it did so by taking a number of statements out of context and misrepresenting existing case law, while ignoring other case law. Here is that story.

Citing earlier case law, the majority opinion suggested that the exclusionary rule applies only to knowing violations of the Fourth Amendment.¹²⁰ Glossing over *Leon*'s insistence that the standard is a negligence standard, Chief Justice Roberts cited Judge Henry Friendly's law review article, in which he argued, "The beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights."¹²¹ Chief Justice Roberts then reviewed the early exclusionary rule cases and concluded that, in all of them, "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional."¹²² According to Chief Justice Roberts, "[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 [the conduct involved in *Herring*]."¹²³ Thus, "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."¹²⁴

As discussed above, the Court could have decided *Herring* by narrowly extending earlier precedent. Specifically, it could have extended *Evans* to police bureaucracy. But the Court's broad language suggests a wholesale expansion of police power. For example, assume that in 1999, an officer boarded a Greyhound bus stopped at a checkpoint and routinely squeezed luggage in the overhead rack of the bus. Assume also, that she believed that when the public had access to an area or information, the police could engage in the same conduct as could members of the public. Her belief in such a proposition would hardly have been unreasonable in light of numerous cases grounded on that argument.¹²⁵ No one would have called her conduct willful, reckless or grossly negligent – or even negligent. However, despite the reasonableness of the officer's mistake, the Court had no trouble finding not only that the officer's conduct was illegal, but also that the evidence should be suppressed.¹²⁶

Similarly, imagine a police officer in 2000, relying on lower court case law, deciding that he could lawfully use a thermal imager to develop probable cause that the occupant of a home was growing marijuana. Given a split

¹²⁰ *Herring*, 129 S. Ct. at 702.

¹²¹ *Id.* (quoting Friendly, *supra* note 50, at 953).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (emphasis added).

¹²⁵ The officer could rely on a host of cases so holding. See, e.g., *Florida v. Riley*, 488 U.S. 445, 449-50 (1989); *California v. Greenwood*, 486 U.S. 35, 41 (1988); *California v. Ciraolo*, 476 U.S. 207, 214-15 (1986); *Oliver v. United States*, 466 U.S. 170, 179 (1984).

¹²⁶ *Bond v. United States*, 529 U.S. 334, 338-39 (2000).

among lower courts on the question, no one could seriously contend that the officer's mistake was unreasonable. Despite that, the Court in *Kyllo v. United States*¹²⁷ never hinted that an officer's good-faith reasonable mistake was relevant to the application of the exclusionary rule.

Thus, while the Court's Fourth Amendment jurisprudence has expanded police power in recent years, the Court has nonetheless suppressed evidence in several cases without suggesting that the objective good-faith exception applies to warrantless police action. Further, nothing in those cases suggests a watering down of the "reasonableness" requirement of the mistake.

Some commentators have noted that *Leon*'s rationale spoke narrowly and broadly.¹²⁸ By its terms, the good-faith reasonableness exception was limited to police reliance on a warrant and the absence of incentive by magistrates to circumvent the Fourth Amendment.¹²⁹ But an officer acting on a good-faith reasonable belief would seem to be beyond deterrence: he reasonably believes that his actions are lawful. Further, it may not be possible to deter an officer acting unreasonably, but in good faith.¹³⁰ Despite those theoretical arguments, to date, the Court has not seriously suggested that a defendant must show that police acted culpably outside situations like *Leon*, *Krull*, and *Evans*.

Thus, Chief Justice Roberts's statement in *Herring* 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 [the conduct involved in *Herring*],"¹³¹ is, at a minimum, misleading. Applied literally, the Chief Justice's statement would work a dramatic shift in Fourth Amendment case law because it suggests that courts may allow the use of any improperly obtained evidence unless the defendant shows some kind of culpable conduct on the part of the police. The Court's characterization of cases like *Weeks* and *Mapp* as involving flagrant and patently unconstitutional conduct¹³² is revisionist history: Chief Justice Roberts cites no case prior to *Herring* that had attempted to limit the Fourth Amendment in such a way. Indeed, the Court repeatedly suppressed evidence in case after case since *Mapp* without the Court characterizing the police conduct as flagrant, patently unconstitutional, or even negligent.¹³³

Adopting a rule requiring a showing of culpable conduct to invoke the exclusionary rule would further erode Fourth Amendment protection in an era that has seen dramatic erosion of our privacy. Even before the War on Terror,

¹²⁷ *Kyllo v. United States*, 533 U.S. 27 (2001).

¹²⁸ 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 20.06, at 393-94 (4th ed. 2006).

¹²⁹ *United States v. Leon*, 468 U.S. 897, 913-17 (1984).

¹³⁰ Whether a person who is acting unreasonably but in good faith can be deterred continues to divide scholars, both in this setting and in the substantive criminal law. See, e.g., O. W. HOLMES, JR., THE COMMON LAW 48 (1881); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 369-71 (1994).

¹³¹ *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

¹³² *Id.* at 702.

¹³³ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001); *Bond v. United States*, 529 U.S. 334, 338-39 (2000); *Arizona v. Hicks*, 480 U.S. 321, 326-28 (1987).

the Court eroded the meaning of probable cause.¹³⁴ It narrowed the class of defendants who could raise Fourth Amendment objections.¹³⁵ It has abandoned the Warren Court analysis of the Fourth Amendment that stated a preference for probable cause and search warrants absent a narrow exception.¹³⁶ Instead, the Court has frequently used the need for bright-line rules to expand police power beyond underlying justifications.¹³⁷ It has placed pretext searches off limits.¹³⁸ It has refused to limit the police's power to make custodial arrests, even for trivial traffic offenses.¹³⁹ Even before Congress enacted legislation limiting state prisoners' ability to challenge their convictions on habeas corpus,¹⁴⁰ the Court relegated state prisoners (except for the exceedingly few who succeeded in getting review granted via the writ of certiorari) to review in state court.¹⁴¹ This is only a partial list of areas where the Court has cut back on Fourth Amendment protection since the high water mark of the Warren Court years.

¹³⁴ See *Illinois v. Gates*, 462 U.S. 213, 246 (1983) (rejecting the two-pronged test of *Spinelli v. United States*, 393 U.S. 410 (1969), as too rigid, and replacing that test with a more flexible totality of the circumstances test).

¹³⁵ See *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980) (holding that ownership of property in another person's purse did not entitle the petitioner to challenge a search); *Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978) (holding that property or possessory interest is required in order to challenge a search).

¹³⁶ See Justice Scalia's concurring opinion in *California v. Acevedo*, in which he discusses the erosion of the probable cause and warrant requirements. *California v. Acevedo*, 500 U.S. 565, 581-84 (1991) (Scalia, J., concurring); see also *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (allowing search of objects in an automobile capable of concealing objects of the search). Under the Warren Court approach, if the police relied on an exception to the requirement of probable cause and a warrant, their conduct was constrained by the underlying rationale that justified the exception. Thus, in *Chimel v. California*, 395 U.S. 752, 768 (1969), when conducting a search incident to a lawful arrest, police were allowed to search only in the area where an arrestee could grab a weapon or evidence that he might then destroy. To search beyond that limited area would be to search in an area not justified by the underlying rationale for the exception to the general rule.

¹³⁷ See, e.g., *Thornton v. United States*, 541 U.S. 615, 622-23 (2004) (stating that there is a "need for a clear rule, readily understood by police officers"); *New York v. Belton*, 453 U.S. 454, 459-60 (1981) (arguing for a "straightforward rule, easily applied, and predictably enforced"); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (rejecting "case-by-case adjudication" of Fourth Amendment issues).

¹³⁸ *Whren v. United States*, 517 U.S. 806 (1996). In *Whren*, officers involved in narcotics enforcement made a stop of a driver for a traffic violation under facts where no one could seriously argue that the officers intended to cite the driver for a violation of traffic laws. *Id.* at 808-09. But the Court held, in effect, that a suspect cannot demonstrate the officer's subjective motivation in making the traffic stop as long as the officer had objective grounds that the suspect violated traffic laws. *Id.* at 809, 813.

¹³⁹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323-24, 354-55 (2001) (holding that the Fourth Amendment does not forbid a warrantless arrest for a misdemeanor seatbelt violation). Until this term, as long as the arrest was lawful, the police could then conduct a full search of the interior compartment of the vehicle. See, e.g., *Thornton*, 541 U.S. at 623-24; *Belton*, 453 U.S. at 462-63. Interestingly, the same Court that decided *Herring* narrowed the scope of police searches when the search of the vehicle is justified as a search incident to the arrest. See *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009).

¹⁴⁰ 28 U.S.C. § 2263 (2006).

¹⁴¹ *Stone v. Powell*, 428 U.S. 465, 485-86 (1976).

I read *Herring* as signaling its willingness to make a quantum leap away from existing precedent. I suspect that in the appropriate case, the Court will make the quantum leap and hold that courts should exclude evidence only if the police conduct is culpable as used in *Herring*. Thus, even in cases of individual acts of negligence, the Court seems poised to adopt its revisionist view of its case law as somehow limited only to flagrant or deliberate misconduct.

*Hudson v. Michigan*¹⁴² includes some additional support for this thesis. In that case, the Court refused to extend the exclusionary rule to a violation of the knock-and-announce rule.¹⁴³ In so holding, the majority relied on alternative remedies to victims of illegal police conduct.¹⁴⁴ In a bit of rhetorical flourish, Justice Scalia wrote that:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.¹⁴⁵

For example, according to Justice Scalia, Dollree Mapp had no civil remedy under Section 1983.¹⁴⁶ Subsequently, however, the Court expanded the application of Section 1983 to allow suits against municipalities¹⁴⁷ and held that the Fourth Amendment allowed a private right of action against federal officers.¹⁴⁸ Thus, she would have a federal constitutional tort claim were her case to arise today.

Further, Justice Scalia relied on the increased police professionalism as another reason why the Court could dispense with the exclusionary rule in *Hudson*. He cited increasing evidence that police departments “take the constitutional rights of citizens seriously,” citing “‘wide-ranging reforms in the education, training, and supervision of police officers.’”¹⁴⁹

The four-justice dissent in *Hudson* pointed out some of the problems with this line of reasoning. For example, according to Justice Breyer, “[T]he majority, as it candidly admits, has simply ‘assumed’ that, ‘[a]s far as [it] know[s], civil liability is an effective deterrent’”¹⁵⁰ The dissent could have cited the additional fact that Justice Scalia has hardly demonstrated a liberal attitude towards expanding the scope of Section 1983.¹⁵¹ Furthermore, as many schol-

¹⁴² *Hudson v. Michigan*, 547 U.S. 586 (2006).

¹⁴³ *Id.* at 589-90.

¹⁴⁴ *Id.* at 595-97.

¹⁴⁵ *Id.* at 597.

¹⁴⁶ *Id.*

¹⁴⁷ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 701 (1978).

¹⁴⁸ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

¹⁴⁹ *Hudson*, 547 U.S. at 599 (quoting S. WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, at 51 (1993)).

¹⁵⁰ *Id.* at 611 (Breyer, J., dissenting) (alterations in original).

¹⁵¹ Justice Scalia joined Justice Thomas’s plurality opinion in *Chavez v. Martinez*, 538 U.S. 760 (2003). For a list and discussion of cases joined by Justice Scalia that limit section 1983 rights, see RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 173-75* (1997).

ars believe, civil actions are “few and far between, and therefore relatively punishmentless as punishing mechanisms”¹⁵²

Most of us who study criminal justice probably gagged at Justice Scalia’s assurance that increased police professionalism diminishes the need for the exclusionary rule. Like Samuel Walker, the criminologist whose work Justice Scalia cited for that proposition,¹⁵³ observers of the criminal justice system know that the exclusionary rule created the incentive to train police to comply with the Fourth Amendment.¹⁵⁴

Elsewhere, Justice Scalia has claimed that his originalist approach to the Constitution prevents justices from imposing their values on the public in the guise of the law.¹⁵⁵ Others have demonstrated the inadequacies of the originalist methodology.¹⁵⁶ But, as Professor Israel has argued, adherence to stare decisis advances the rule of law. Adhering to precedent that spans a significant period of time means that a justice is not following an idiosyncratic view of the law or one’s own subjective view of the law. Moreover, even when justices evolve doctrine slowly, they build on decisions by the previous generation of justices and thus, are not open to the criticism that their view of the law breaks from the past. *Herring*, however, shows no similar deference to the past and therefore, leaves the emerging majority open to the criticism that the new rules are true *ipse dixit*. *Herring* signifies the rule of men, not the rule of law.¹⁵⁷

¹⁵² Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 385 (1999) (footnote omitted); see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974).

¹⁵³ Samuel Walker, *Thanks for Nothing Nino*, L.A. TIMES, June 25, 2006, at M5, available at <http://articles.latimes.com/2006/jun/25/opinion/oe-walker25>.

¹⁵⁴ See, e.g., DRESSLER & MICHAELS, *supra* note 128, at 377-78.

¹⁵⁵ See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

¹⁵⁶ See, e.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1089-91 (1981); Ronald Dworkin, *Bork’s Jurisprudence*, 57 U. CHI. L. REV. 657, 660 (1990) (book review).

¹⁵⁷ My only hesitation in reaching this conclusion is Justice Kennedy’s concurring opinion in *Hudson*, in which he stated, “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.” 547 U.S. 586, 603 (2006) (Kennedy, J., concurring). I have trouble squaring his position *Hudson* and the majority opinion in *Herring*. I hope that I am mistaken in my reading of *Herring*, but its drift seems inescapable.