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The Supreme Court's Long and Perhaps Unnecessary Struggle to Find a Standard of Culpability to Regulate the Federal Exclusionary Remedy for Fourth/Fourteenth Amendment Violations

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THE SUPREME COURT'S LONG AND PERHAPS UNNECESSARY STRUGGLE TO FIND A STANDARD OF CULPABILITY TO REGULATE THE FEDERAL EXCLUSIONARY REMEDY FOR FOURTH/FOURTEENTH AMENDMENT VIOLATIONS

Melvyn Zarr

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Melvyn Zarr*

I. INTRODUCTION

On January 14, 2009, the United States Supreme Court decided *Herring v. United States*.¹ In *Herring*, the defendant moved to suppress evidence that he alleged was seized as a result of an arrest that violated the Fourth and Fourteenth Amendments to the U.S. Constitution.² The Supreme Court approved the decision below to deny suppression of the evidence.³

The decision set off a flurry of speculation that the Fourth Amendment exclusionary rule would not see its 100th birthday in 2014. A headline in the *New York Times* of January 31 declared: "Supreme Court Edging Closer to Repeal of Evidence Ruling."⁴ Another headline in the *Times*, this one on February 16, asked: "Is the Supreme Court About to Kill off the Exclusionary Rule?"⁵ A headline in the April *ABA Journal* announced that the exclusionary rule was "closer to repeal."⁶

I think that the rumors of the death of the exclusionary rule are exaggerated. *Herring* represents another chapter in a long struggle that the Supreme Court has had with itself to define what sort of fault or culpability on the part of law enforcement officers should lead to suppression.

One could argue that the officer's fault or culpability is sufficiently established if the officer conducts a search or seizure that is unreasonable within the meaning of the Fourth Amendment. That is what the landmark case of *Mapp v. Ohio* seemed to say.⁷ But that is not how the law has developed; something more than a constitutional violation is required for a federal exclusionary or damages remedy. This "something more" originated in actions for damages and then spilled over into the exclusionary rule. A pivotal moment occurred in 1976 in *Stone v. Powell*, when the Court used a cost-benefit balancing approach to limit the applicability of

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1. 129 S. Ct. 695 (2009).

2. *Id.* at 699.

3. *Id.*

4. Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1.

5. Adam Cohen, *Is the Supreme Court About to Kill Off the Exclusionary Rule?*, N.Y. TIMES, Feb. 16, 2009, at A22.

6. David G. Savage, *Who's Policing the Fourth Amendment?*, A.B.A. J., Apr. 2009, at 19.

7. 367 U.S. 643 (1961).

the exclusionary rule.⁸ The costs include the suppression of often reliable evidence of guilt.⁹ The benefits are framed in terms of deterrence of police misconduct.¹⁰ The idea is to balance the costs and benefits in such a way as to avoid an imbalance between the magnitude of the police misconduct and the so-called windfall afforded a criminal defendant.¹¹ Justice White, in his dissenting opinion, accepted the balancing approach and proposed that if an officer's conduct was insufficiently culpable to justify a damages remedy, it should be deemed insufficiently culpable to justify an exclusionary remedy.¹² In succeeding cases, Justice White was able to garner a majority for his alignment of the standards of culpability for the federal exclusionary and damages remedies.¹³

Justice White's program, to be understood, must be put in historical context. *Mapp v. Ohio* involved officer conduct that was not only unconstitutional but truly culpable by any definition. Yet the exclusionary rule that *Mapp* produced called for exclusion of *all* evidence unconstitutionally obtained, whether the violation was determined to be "flagrant" or "technical." Four months before the Court decided *Mapp*, it decided *Monroe v. Pape*, which also involved flagrantly unconstitutional police misconduct.¹⁴ *Monroe* generated a body of federal law on the culpability requirement for a damages remedy. It was this culpability requirement that Justice White was able to import into federal law governing the exclusionary remedy in *United States v. Leon*¹⁵ and *Malley v. Briggs*.¹⁶

The relationship between officer culpability and deterrence is subject to considerable uncertainty. I will not dwell on this now, but it will be a recurring theme. The general idea is that the officer's conduct must be sufficiently culpable to be optimally deterrable. *Herring* emphasizes that deterrence "varies with the culpability of the law enforcement conduct."¹⁷ But if the officer's conduct is only marginally culpable, perhaps it is not a constitutional violation in the first place. We will inquire as we go along whether the Court has been sufficiently attentive to this last point.

Here is how I plan to proceed. In Part II, I will review the foundational cases to identify the kinds of clearly culpable officer conduct that generated the recognition of Fourth/Fourteenth Amendment rights and the establishment of federal exclusionary and damages remedies. Next, in Part III, I will examine the pivotal case of *Stone v. Powell*.¹⁸ Here was a case where the officer conduct was doubtfully culpable. Was this particular case an appropriate vehicle for limiting the exclusionary rule? In what way? Was there a constitutional violation in the first place? In Part IV, I next will examine the cases where Justice White's approach in *Stone v. Powell* was translated into governing law. Next, in Part V, I will discuss

8. 428 U.S. 465 (1976).

9. *Id.* at 489-90.

10. *Id.* at 490-91.

11. *Id.* at 489-90.

12. *Id.* at 541-42 (White, J., dissenting).

13. *See, e.g.,* *United States v. Leon*, 468 U.S. 897 (1984); *Malley v. Briggs*, 475 U.S. 335 (1986).

14. 365 U.S. 167 (1961).

15. 468 U.S. 897.

16. 475 U.S. 335.

17. 129 S. Ct. at 701.

18. 428 U.S. 465.

Hudson v. Michigan,¹⁹ which signaled that a five-four majority had coalesced in the Court to make a fundamental reexamination of the exclusionary rule. Next, in Part VI, I will analyze the five-four majority's struggle in *Herring* to define a standard of culpability limiting the exclusionary rule. I will consider what the standard means, its rationale, and whether the struggle has been necessary. Finally, I will conclude by offering a suggestion as to how the Court might proceed as it struggles onward.

So, let us begin by turning the clock back to 1914 and *Weeks v. United States*.²⁰

II. OFFICER CONDUCT THAT WAS CLEARLY CULPABLE AND VIOLATIVE OF FOURTH/FOURTEENTH AMENDMENT RIGHTS

A. *Weeks v. United States Generates an Exclusionary Remedy for Officer Conduct that Was Clearly Culpable and Violative of Fourth Amendment Rights*

In *Weeks v. United States*, law enforcement officers conducted two searches of the defendant's house.²¹ In the first, local police officers entered the house without a search or arrest warrant and seized some lottery tickets.²² They turned them over to the United States Marshal, who conducted the second search of the house, again without a warrant, and seized certain letters.²³

In denying the defendant's motion to suppress the letters, the federal trial court ruled that it would not inquire into the manner in which they were obtained.²⁴ The Supreme Court disagreed, writing: "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value."²⁵ The marshal's warrantless search was held to be a violation of the Fourth Amendment; not only was the search without a search warrant, but the marshal lacked grounds for getting one from the court.²⁶

The first search, conducted by the local police officers, was a different story. The Fourth Amendment did not apply to their conduct; it applied only to those who acted under federal authority. The federal court could accept the evidence seized in the first search under what came to be known as "the Silver Platter Doctrine," which survived until its demise in 1960 in *Elkins v. United States*.²⁷

Thus, it would be up to states to decide whether to adopt an exclusionary rule as a matter of state law to regulate the conduct of state officers. A dozen years after *Weeks*, fourteen states had adopted an exclusionary rule, and thirty-one states had rejected one. Among the latter, the most famous was a decision by New York

19. 547 U.S. 586 (2006).

20. 232 U.S. 383 (1914).

21. *Id.* at 386.

22. *Id.*

23. *Id.*

24. *Id.* at 388.

25. *Id.* at 393.

26. *Weeks*, 232 U.S. at 393. The Fourth Amendment consists of two clauses: the Unreasonableness Clause (no "unreasonable searches and seizures") and the Warrant Clause ("No Warrant shall issue, but upon probable cause."). U.S. CONST. amend. IV.

27. 364 U.S. 206 (1960).

Judge Benjamin Cardozo.

In *People v. Defore*, Judge Cardozo stated these facts:

A police officer arrested the defendant on a charge that he had stolen an overcoat. The crime, if committed, was petit larceny, a misdemeanor. . . . The defendant when taken into custody was in the hall of his boarding house. The officer after making the arrest entered the defendant's room and searched it. The search produced a bag, and in the bag was a blackjack.²⁸

The search was held to be unlawful under state law. But what was the remedy? "The officer might have been resisted, or sued for damages, or even prosecuted for oppression."²⁹

But suppression of the evidence was not a proper remedy. In one of the law's more famous aphorisms, Judge Cardozo ruled that the criminal defendant should not "go free because the constable has blundered."³⁰ Although famous, this language harbored an ambiguity. What was meant by "blunder"? A mistake? If so, how culpable a mistake? Did the officer mistakenly believe that the defendant's arrest took place close enough to his room that a warrant was unnecessary? The question of how close is close enough has roiled the Supreme Court for forty years, including last Term's decision in *Arizona v. Gant*.³¹ Did the officer know that a warrant was necessary but mistakenly believe that he could get away without obtaining one? Or perhaps something in between?

Judge Cardozo did not attempt to resolve these questions, because he regarded the establishment of an exclusionary rule as something for legislative judgment. Why? Because the establishment of an exclusionary rule involved a balancing of competing interests:

[W]e reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious

The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.³²

Judge Cardozo concluded: "We may not subject society to these dangers until the Legislature has spoken with a clearer voice."³³

*B. Wolf v. Colorado Incorporates Fourth Amendment Rights into the
Due Process Clause of the Fourteenth Amendment
Without Incorporating the Exclusionary Remedy*

There matters rested until 1949. A state was free to reject an exclusionary

28. 242 N.Y. 13, 17 (1926).

29. *Id.* at 19.

30. *Id.* at 21.

31. 129 S. Ct. 1710 (2009).

32. *Defore*, 242 N.Y. at 23-25.

33. *Id.* at 24.

rule, as thirty-one states continued to do. A state was free to adopt an exclusionary rule, as now sixteen states did. Both the right and the remedy were completely matters of state law.

Wolf v. Colorado presented two issues.³⁴ First, should Fourth Amendment rights be incorporated into the Due Process Clause of the Fourteenth Amendment and thus made enforceable against state action? Second, if the right were to be incorporated, should the exclusionary remedy be as well? The Court, per Justice Frankfurter, answered the first question “yes” and the second question “no.” In other words, the federal right would be incorporated, but the federal exclusionary remedy would not be. The states were free to enforce Fourth/Fourteenth Amendment rights by an exclusionary remedy or a damages remedy or both, as they chose.³⁵

In both holdings, Justice Frankfurter was influenced heavily by Justice Cardozo. Justice Cardozo had laid out a theory of selective incorporation of federal rights in *Palko v. Connecticut*, which incorporated only those rights contained in the Bill of Rights that were “implicit in the concept of ordered liberty.”³⁶ Justice Frankfurter held: “The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause.”³⁷

The second holding was influenced by Judge Cardozo’s reasoning in *Defore*. Whether to establish an exclusionary remedy was a policy judgment for the states based on a balancing of interests:

The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. [Note 1: The common law provides actions for damages against the searching officer.] Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action. . . . Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State’s reliance upon other methods which, if consistently enforced, would be equally effective. Weighty testimony against such an insistence on our own view is furnished by the opinion of Mr. Justice (then Judge) Cardozo in *People v. Defore*.³⁸

Justice Murphy, a former prosecutor, dissented, questioning whether a damages remedy would be “equally effective”: “But what an illusory remedy this is, if by ‘remedy’ we mean a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment?”³⁹

34. 338 U.S. 25 (1949).

35. *Id.*

36. 302 U.S. 319, 325 (1937).

37. *Wolf*, 338 U.S. at 27-28.

38. *Id.* at 30-32 & n.1.

39. *Id.* at 42-43 (Murphy, J., dissenting).

How culpable was the officers' conduct in *Wolf*? How deterrable? There is not a word about the facts in Justice Frankfurter's opinion; for him, this was an abstract exercise in federalism balancing of interests.

Five years later in *Irvine v. California*, defense counsel argued that the applicability of the federal exclusionary remedy to the states should vary with the culpability of the officer.⁴⁰ Justice Jackson's opinion for the court flatly rejected this:

It is suggested . . . that although we affirmed the conviction in *Wolf*, we should reverse here because this invasion of privacy is more shocking, more offensive, than the one involved there. The opinions in *Wolf* were written entirely in the abstract and did not disclose the details of the constitutional violation. . . . [A] distinction of the kind urged would leave the rule . . . indefinite. . . . That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police.⁴¹

But the trend in the states was beginning to shift. The year after *Irvine v. California*, the California Supreme Court in 1955 adopted the exclusionary remedy, after concluding that the damages remedy had "completely failed to secure compliance with the constitutional provisions."⁴²

This is where matters stood when Dollree Mapp's case arrived in the Supreme Court in 1961.

C. Mapp v. Ohio Incorporates the Exclusionary Rule

To say that the police officers in *Mapp v. Ohio* had merely "blundered" would fail to capture the culpability of their conduct.⁴³ See how Justice Clark tells the story:

On May 23, 1957, three Cleveland police officers arrived at [Miss Mapp's] residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant,

40. 347 U.S. 128, 133-34 (1954).

41. *Id.* at 133-36.

42. *People v. Cahan*, 282 P.2d 905, 911 (Cal. 1955).

43. 367 U.S. 643 (1961).

was held up by one of the officers. She grabbed the “warrant” and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been “belligerent” in resisting their official rescue of the “warrant” from her person. Running roughshod over appellant, a policeman “grabbed” her, “twisted [her] hand,” and she “yelled [and] pleaded with him” because “it was hurting.” Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child’s bedroom, the living room, the kitchen and a dinette. . . .

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for.⁴⁴

The officers’ conduct satisfied any reasonable definition of “culpable.” They knew they needed a warrant, they did not get one, but instead pretended they had one. They forcibly entered and searched the residence without a warrant and roughed up Ms. Mapp.

In the intervening dozen years since *Wolf v. Colorado*, five of the Justices had concluded that a damages remedy of the kind relied upon by *Wolf* was “worthless and futile” and that an exclusionary remedy was necessary.⁴⁵ Justice Clark’s majority opinion read:

Today we once again examine *Wolf*’s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right. . . . [W]ithout [exclusion] the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty.” . . .

Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.⁴⁶

The need for an exclusionary remedy thus was framed in terms of “flagrant abuse,” “brutish means,” and “rude invasions.”

Yet the exclusionary rule that *Mapp* established was framed in broader terms. It required exclusion of “all evidence” unconstitutionally obtained: “We hold that *all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”⁴⁷ Ever since *Mapp*, the Court has struggled in applying the exclusionary rule to cases presenting less culpable conduct, as we shall see.

The disjunction between the kind of officer conduct that prompted the rule and the terms of the rule itself did not go unnoticed. In a famous law review article

44. *Id.* at 644-45 (footnote omitted).

45. *Id.* at 652.

46. *Id.* at 654, 656, 660.

47. *Id.* at 655 (emphasis added).

published four years after *Mapp*, Judge Henry Friendly drew a distinction between an officer's "technical error" in an on-the-spot judgment and a "flagrant or deliberate" violation of rights; only the latter, he argued, required suppression.⁴⁸

Judge Friendly's distinction left open a large middle ground. What should be done about cases presenting more than "technical error" but less than "flagrant or deliberate" conduct? These middle-ground cases, of course, would arise.⁴⁹

D. Monroe v. Pape Generates a Federal Damages Remedy for Officer Conduct that Was Clearly Culpable and Violative of Fourth/Fourteenth Amendment Rights

Shortly before the Court declared in *Mapp* that state damages remedies were "worthless and futile" to enforce Fourth/Fourteenth Amendment rights, the Court began the development of a federal action for damages to enforce those rights. In *Monroe v. Pape*,⁵⁰ the conduct of the officers was even more culpable than that in *Mapp*. The case came to the Court from a decision granting a motion to dismiss for failure to state a claim.⁵¹ The plaintiffs' complaint had alleged that the officers, acting without a search or arrest warrant, had done the following:

[O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.⁵²

48. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 952-53 (1965).

49. Although the focus here is on the standard of culpability, other means of limiting the exclusionary remedy should be noted. One prominent means is to limit exclusion to the prosecution's case-in-chief, permitting its use for impeachment purposes. Last Term, the Court explained the impeachment exception as follows:

Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are "outweighed by the need to prevent perjury and to assure the integrity of the trial process." . . . Once the defendant testifies in a way that contradicts prior statements, denying the prosecution use of "the traditional truth-testing devices of the adversary process" . . . is a high price to pay.

Kansas v. Ventris, 129 S. Ct. 1841, 1846 (2009) (citations omitted).

50. 365 U.S. 167 (1961).

51. *Id.* at 170.

52. *Id.* at 203 (Frankfurter, J., dissenting) (footnote omitted).

Obviously, no exclusionary remedy was available for the Monroe family, as no criminal proceedings resulted from this flagrant police misconduct; for the Monroes, it was damages or nothing.

The officers' defense was not that they were justified in doing what they had done, but that what they were alleged to have done was *so* flagrant that it violated state law and should be heard in state rather than federal court.⁵³

The Court interpreted the federal remedial statute to permit the action to proceed.⁵⁴ The Court did not address what, if any, culpability element a plaintiff would need to satisfy, in addition to showing a constitutional violation, in order to obtain damages under Section 1983.⁵⁵ It merely noted that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."⁵⁶

III. OFFICER CONDUCT DOUBTFULLY CULPABLE: *STONE V. POWELL*

A. Was There a Fourth/Fourteenth Amendment Violation in *Stone v. Powell*?

Stone v. Powell presented facts that, unlike those in *Mapp* and *Monroe*, involved officer conduct that was doubtfully culpable or violative of Fourth/Fourteenth Amendment rights.⁵⁷

Defendant Lloyd Powell was arrested under a local vagrancy ordinance; the search incident to the arrest produced a murder weapon.⁵⁸ Powell argued that the ordinance was unconstitutional and thus tainted the arrest and search.⁵⁹ The state courts upheld the ordinance and his murder conviction.⁶⁰ The federal district court on habeas held that the arresting officer had probable cause to arrest under the ordinance, whether or not it was constitutional; thus the arrest and search were constitutional.⁶¹ After seven years of litigation, the Ninth Circuit Court of Appeals held the ordinance unconstitutional and reversed the district court on the ground that the ordinance's unconstitutionality invalidated the arrest and search.⁶²

Because the case came to the Supreme Court in a habeas posture, the Court never addressed the constitutionality of Powell's arrest. But three years later, when a similar case came to the Court on direct review, the Court held that an arrest could be constitutional even though the underlying ordinance was subsequently invalidated.

In *Michigan v. DeFillippo*, the Court stated the question presented as follows: "The question presented by this case is whether an arrest made in good-faith reliance on an ordinance, which at the time had not been declared unconstitutional,

53. *Id.* at 172.

54. *Id.* at 183, 185 (interpreting 42 U.S.C. § 1983, which provides a civil action for persons deprived of constitutional rights).

55. *Id.* at 187.

56. 365 U.S. at 187.

57. 428 U.S. 465.

58. *Id.* at 469.

59. *Id.* at 470.

60. *Id.*

61. *Id.*

62. *Id.* at 471.

is valid regardless of a subsequent judicial determination of its unconstitutionality.”⁶³ The Court upheld the arrest, ruling that probable cause should not be negated “simply because [the officer] should have known the ordinance was invalid and would be judicially declared unconstitutional.”⁶⁴ The Court reasoned:

A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.⁶⁵

Thus, in hindsight, Lloyd Powell’s arrest was probably constitutional.

*B. Justice Powell’s Cost-Benefit Balancing Approach
and Its Application to Federal Habeas*

For Justice Powell, writing the majority (6-3) opinion, the issue was not whether defendant Powell’s arrest was constitutional, but what level of deference should be paid by a federal habeas court to the judgment of the state court. Justice Powell’s answer was that the habeas court’s standard of review of Fourth/Fourteenth Amendment claims should be highly deferential: As long as the defendant received an opportunity for full and fair litigation in the state courts, the judgment of constitutionality would stand.⁶⁶ Put another way, the Fourth/Fourteenth Amendment exclusionary rule would continue to apply with full force in the state courts and in the Supreme Court on direct review, but it would have sharply limited applicability on federal habeas.

Justice Powell reached that result by employing a cost-benefit balancing approach: The costs of applying the Fourth/Fourteenth Amendment exclusionary rule on habeas would be balanced against the benefits.⁶⁷

Justice Powell identified the principal benefit of exclusion as “deterrence of police conduct that violates Fourth Amendment rights.”⁶⁸ The costs of exclusion were canvassed in greater detail:

The costs of applying the exclusionary rule . . . are well known. . . . Application of the rule . . . deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although

63. 443 U.S. 31, 36 (1979).

64. *Id.* at 37.

65. *Id.* at 37-38.

66. *Stone*, 428 U.S. at 481-82.

67. *Id.* at 489.

68. *Id.* at 486.

the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.⁶⁹

Thus the goal of this approach was to prevent an imbalance between the magnitude of the officer's "error" and the perceived "windfall" afforded a criminal defendant.

*C. Justice White's Proposal to Apply the Balancing Approach
to the Exclusionary Rule Generally*

Justice White dissented from Justice Powell's decision largely to foreclose the applicability of the exclusionary rule to federal habeas. But, more importantly, he shared Justice Powell's cost-benefit balancing approach; what he proposed was to apply the approach to the exclusionary rule generally. Thus, he proposed that the rule should be "substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief."⁷⁰

Justice White's reference to the officer's reasonable good faith belief suggested an alignment between the standard of culpability for the exclusionary remedy and the standard of culpability for the damages remedy. If the officer's conduct was insufficiently culpable to justify damages, it should be insufficiently culpable to justify exclusion: "If the defendant in criminal cases may not recover [damages] for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf."⁷¹

This requires a brief look at how the standard of culpability had developed in federal damages cases.

In *Pierson v. Ray*, the Court held that officers sued for damages under Section 1983 for Fourth/Fourteenth Amendment violations had at their disposal a "defense" of "good faith and probable cause."⁷² The Court wrote, "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Section 1983."⁷³

Although this was in form a "defense," in function a plaintiff had an informal burden to negate "good faith" by showing some sort of culpability of the officer. By 1976 the Court had refined what a plaintiff "characteristically" had to show:

Characteristically the Court has . . . identif[ied] the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a

69. *Id.* at 489-91 (footnote omitted).

70. *Id.* at 538 (White, J., dissenting).

71. *Id.* at 541-42.

72. 386 U.S. 547, 557 (1967).

73. *Id.*

deprivation of constitutional rights or other injury.”⁷⁴

Thus, functionally, a plaintiff had to meet an objective or subjective test of officer culpability in order to obtain damages.

Subsequent to 1976, in *Harlow v. Fitzgerald*, the Court eliminated the subjective test and framed the objective test in terms such that a plaintiff would have the functional, informal burden to show that the officer had violated “clearly established” constitutional rights “of which a reasonable person would have known.”⁷⁵

In *United States v. Leon*,⁷⁶ as we will see next, Justice White was able to muster a majority to adopt his proposal to modify the exclusionary rule by applying *Stone*’s cost-benefit balancing approach to the rule generally.

IV. OFFICER CONDUCT DOUBTFULLY CULPABLE: *UNITED STATES V. LEON*

A. *Was There a Fourth/Fourteenth Amendment Violation in Leon?*

In *United States v. Leon*, the lower federal courts had invalidated a search warrant on the ground that it was unsupported by probable cause and thus violated the Warrant Clause of the Fourth Amendment, which declares that “no Warrant shall issue, but upon probable cause.”⁷⁷ The resultant search was therefore invalidated under the Unreasonableness Clause.⁷⁸

In seeking Supreme Court review, the prosecution in *Leon* did not urge the warrant’s validity, but instead argued that the exclusionary rule should be modified along the lines suggested by Justice White eight years earlier:

The Government’s petition for certiorari expressly declined to seek review of the lower courts’ determinations that the search warrant was unsupported by probable cause and presented only the question “[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.”⁷⁹

In writing the majority (6-3) opinion, Justice White recognized the Court’s power to address the issue of constitutional violation: “[I]t undoubtedly is within our power to consider the question whether probable cause existed under the ‘totality of the circumstances’ test announced last Term in *Illinois v. Gates*.”⁸⁰

Unsurprisingly, Justice White “[chose] to exercise”⁸¹ the power to address the modification of the exclusionary rule. He stated the question presented:

This case presents the question whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution’s case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant

74. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

75. *Id.* at 818.

76. 468 U.S. 897.

77. U.S. CONST. amend. IV.

78. 468 U.S. 897. *See also supra* note 26.

79. *Id.* at 905.

80. *Id.*

81. *Id.*

issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.⁸²

This skipping over the issue of constitutional violation to get to the issue of remedy drew a charge of judicial activism from Justice Stevens in dissent:

[T]here is . . . a substantial question whether the warrant complied with the Fourth Amendment. There was a strong dissent on the probable-cause issue when *Leon* was before the Court of Appeals, and that dissent has been given added force by this Court's intervening decision in *Illinois v. Gates* . . . , which constituted a significant development in the law. It is probable, though admittedly not certain, that the Court of Appeals would now conclude that the warrant in *Leon* satisfied the Fourth Amendment if it were given the opportunity to reconsider the issue in the light of *Gates*. . . .

The Court seems determined to decide [this case] on the broadest possible grounds; such determination is utterly at odds with the Court's traditional practice as well as any principled notion of judicial restraint.⁸³

Justice Stevens also chastised the majority for its illogic as well as its activism: "We cannot intelligibly assume, *arguendo*, that a search was constitutionally unreasonable but that the seized evidence is admissible because the same search was reasonable."⁸⁴

Could there have been an argument, based on the reasoning of *Michigan v. DeFillippo*, that "officers acting in reasonable reliance on a search warrant" could sometimes conduct a search that was constitutionally reasonable?⁸⁵ Justice White noted *DeFillippo* but referred to it as a decision "not involving the scope of the rule."⁸⁶

Justice White did address the possibility that, if this kind of skipping became commonplace in the lower courts, the development of constitutional rights might become frozen and never become clearly established enough to justify either exclusionary or damages relief.⁸⁷ Justice White was satisfied that the lower court would "exercise an informed discretion in making this choice":

Nor are we persuaded that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. 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. . . . As cases addressing questions of good-faith immunity under 42 U.S.C. § 1983 . . . make clear, courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases. . . .

We have no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing . . . courts to exercise an informed discretion in making

82. *Id.* at 900.

83. *Id.* at 960, 961-62 (Stevens, J., dissenting).

84. 468 U.S. at 961.

85. *Id.* at 900 (majority opinion).

86. *Id.* at 911.

87. *Id.*

this choice.⁸⁸

Had Justice White himself exercised “an informed discretion” in making his choice? In possible defense of his choice, Justice White dropped a footnote to the above-quoted text to suggest that skipping had the virtue of easing pressure on judges to “bend” constitutional standards.⁸⁹ Quoting a commentator, the footnote read:

It has been suggested, in fact, that “the recognition of a ‘penumbral zone,’ within which an inadvertent mistake would not call for exclusion . . . will make it less tempting for judges to bend [F]ourth [A]mendment standards to avoid releasing a possibly dangerous criminal because of a minor and unintentional miscalculation by the police.”⁹⁰

The price of avoiding this bending of constitutional standards was to make possibly unnecessary remedial law.

B. Justice White Converts His Stone v. Powell Proposal into Law

Justice White “modified” the exclusionary rule along the lines he had proposed in *Stone v. Powell* by employing the cost-benefit balancing approach of that case:

Whether the exclusionary sanction is appropriately imposed in a particular case . . . must be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case in chief of inherently trustworthy tangible evidence.⁹¹

. . . . [T]he balancing approach that has evolved during the years of experience with the rule provides strong support for the modification currently urged upon us.⁹²

Here, as in *Stone v. Powell*,⁹³ the goal was to prevent an imbalance between the magnitude of the police misconduct and the “windfall” afforded a criminal defendant:

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. . . . Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.⁹⁴

In order to prevent this imbalance, the “flagrancy of the police misconduct” had to be carefully weighed: “[An] assessment of the flagrancy of the police misconduct constitutes an important step in the calculus.”⁹⁵

The greater the flagrancy or culpability of the misconduct, the more the balance tipped toward exclusion; the less the flagrancy or culpability, the less the balance tipped toward exclusion. *Leon*, Justice White held, was an example of the

88. *Id.* at 924-25 (footnote omitted).

89. *Id.* at 925, n.26.

90. 426 U.S. at 925, n.26.

91. *Id.* at 906-07.

92. *Id.* at 913.

93. 428 U.S. at 490.

94. *Leon*, 468 U.S. at 907-08.

95. *Id.* at 911.

latter: “We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”⁹⁶

As to the standard of culpability, it was variously phrased as “objective reasonableness,”⁹⁷ “objective good faith,”⁹⁸ or “objectively reasonable reliance.”⁹⁹ Whatever the precise definition, it was obviously close to the standard for damages established two years earlier in *Harlow v. Fitzgerald*.¹⁰⁰ Two years after *Leon*, Justice White made the alignment of the standards explicit when he wrote for the Court in *Malley v. Briggs*: “[W]e hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* . . . defines the qualified immunity accorded an officer [in an action for damages].”¹⁰¹

Justice White described the standard as providing “ample protection to all but the plainly incompetent or those who knowingly violate the law.”¹⁰² What Justice White seemed to be suggesting was that officers “who knowingly violate the law,” such as the officers in *Weeks*, *Mapp*, and *Monroe*, would be subject to an “objective reasonableness” standard. Whether this standard was a good fit with those facts was left unaddressed, as was whether a “knowing” standard was really “objective”—puzzling questions that would recur in *Herring*.

What this alignment of the standards meant was that for some low-culpability federal constitutional violations, there would be a federal right without a federal remedy. Functionally, this represented a partial return to the regime of *Wolf v. Colorado*, where it would fall to the states to decide what remedy should attend a Fourth/Fourteenth Amendment violation. But nowhere in Justice White’s opinions does he indicate any recognition of this functional partial resurrection of *Wolf*.

C. What Is the Rationale of Exclusion?

The stated rationale of exclusion is labeled “deterrence.” In *Leon*, Justice White declared that the exclusionary rule “is designed to deter police misconduct.”¹⁰³ But how do the Justices know what standard of culpability will yield optimal deterrence? Is this an empirical judgment? If so, what is the evidence for it? If not, is “deterrence” the best label to explain what is sought to be achieved by exclusion?

Justice Blackmun’s concurrence pointed out that Justice White’s opinion lacked empirical support; instead, it rested on “untested predictions about police conduct”:

By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should

96. *Id.* at 922.

97. *Id.* at 923, n.24.

98. *Id.* at 908.

99. *Id.* at 922.

100. 457 U.S. at 807-08.

101. 475 U.S. at 344.

102. *Id.* at 341.

103. 468 U.S. at 916.

emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here. The logic of a decision that rests on untested predictions about police conduct demands no less.¹⁰⁴

It is hard to shake the suspicion that what is going on here might be better captured by the label “sanction.” And there are clues in Justice White’s opinion that point in that direction. He described exclusion as an “extreme sanction”¹⁰⁵ and as “[p]enalizing the officer.”¹⁰⁶ We will have occasion to ponder this further when we come to *Herring*.

D. Two Post-Leon Cases Where the Prosecution Conceded a Constitutional Violation

In *Illinois v. Krull*, an officer relied upon a state statute authorizing warrantless administrative inspections of automobile dealers’ records and vehicles.¹⁰⁷ Subsequently, the Illinois Supreme Court invalidated the statute on Fourth/Fourteenth Amendment grounds and upheld suppression of the evidence seized by the officer. In seeking review by the United States Supreme Court, the prosecution did not challenge the invalidation of the statute, nor did the prosecution argue that since the officer acted in reasonable reliance on the statute the inspection was constitutionally permissible.¹⁰⁸ Rather, the prosecution sought a good-faith exception to the exclusionary rule along the lines of *Leon*.¹⁰⁹

The Court granted review on the terms sought by the prosecution, writing: “We granted certiorari . . . to consider whether a good-faith exception to the Fourth Amendment exclusionary rule applies when an officer’s reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional.”¹¹⁰

The Court saw the case as a logical successor to *Leon*, stating:

In *United States v. Leon* . . . this Court ruled that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate, but where the warrant was ultimately found to be unsupported by probable cause. . . . The present case presents the question whether a similar exception to the exclusionary rule should be recognized when officers act in objectively reasonable reliance upon a *statute* authorizing warrantless administrative searches, but where the statute is ultimately found to violate the Fourth Amendment.¹¹¹

The Court applied the same kind of cost-benefit balancing analysis as in *Leon*:

104. *Id.* at 927-28 (Blackmun, J., concurring).

105. *Id.* at 916 (majority opinion).

106. *Id.* at 921.

107. 480 U.S. 340 (1987).

108. *Id.* at 345-46.

109. *Id.* at 346.

110. *Id.*

111. *Id.* at 342 (citations omitted).

As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced. Thus in various circumstances, the Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process.

... The approach used in *Leon* is equally applicable to the present case. ... To paraphrase the Court's comment in *Leon*: "Penalizing the officer for the [Legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations."¹¹²

And the Court held that the officer's reliance on the statute was objectively reasonable: "Assuming, as we do for purposes of this case, that the Illinois Supreme Court was correct in its constitutional analysis, th[e] defect in the statute was not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable."¹¹³

In *Arizona v. Evans*, an officer relied upon a computer record indicating that there was an outstanding arrest warrant for the defendant.¹¹⁴ The computer record turned out to be inaccurate, and the defendant moved to suppress the evidence seized as a result of the arrest. In the Supreme Court, the prosecution made no argument that the officer's reasonable reliance on the record made the arrest constitutionally reasonable: "Petitioner has conceded that respondent's arrest violated the Fourth Amendment. ... We decline to review that determination."¹¹⁵

Again, the Court followed the reasoning of *Leon*: Applying the reasoning of *Leon* to the facts of this case, we conclude that the decision of the Arizona Supreme Court must be reversed. ... If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction.¹¹⁶

The Court did not address the question whether a different result would obtain if the error had been committed by police personnel.¹¹⁷ That question, however, would appear in *Herring*.

V. *HUDSON V. MICHIGAN* TRANSFORMS THE *MAPP* RULE INTO THE *MAPP* "DICTA"

Hudson v. Michigan presented the question whether a categorical exception should be made to the exclusionary rule for a category of Fourth Amendment law called "knock-and-announce."¹¹⁸ In *Hudson*, the prosecution conceded on appeal that officers executing a search warrant had not waited long enough between knocking and entering, and thus had failed to comply with the "knock-and-announce" requirement.¹¹⁹ Justice Scalia, for a five-Justice majority, was happy to

112. *Id.* at 347, 349-50.

113. 480 U.S. at 359.

114. 514 U.S. 1 (1995).

115. *Id.* at 6, n.1 (citations omitted).

116. *Id.* at 14.

117. *Id.* at 15.

118. 547 U.S. 586, 588 (2006).

119. *Id.* at 590.

accept this concession: “Happily . . . issues [of compliance] do not confront us here. From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation. The issue here is remedy . . . [and] whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement.”¹²⁰

In deciding whether there should be a categorical exception to the exclusionary rule for knock-and-announce violations, Justice Scalia followed *Leon*’s cost-benefit balancing approach. He wrote:

The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule. . . .

The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card.

... If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases and the destruction of evidence in many others.¹²¹

The benefits, on the other hand, were “not worth a lot”:

Next to these “substantial social costs” we must consider the deterrence benefits. . . .

To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. . . . [I]gnoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which if there is even “reasonable suspicion” of their existence, *suspend the knock-and-announce requirement anyway*. Massive deterrence is hardly required.¹²²

Hudson is less important for this holding than for the words that Justice Scalia had for *Mapp v. Ohio* on its forty-fifth anniversary (four days later). *Mapp* was told that a lot had happened since its “heyday.”¹²³ *Leon* had made it clear that something more than a constitutional violation was required for an exclusionary remedy: “Suppression of evidence . . . has always been our last resort, not our first impulse. The exclusionary rule generates ‘substantial social costs’ . . . which sometimes include setting the guilty free and the dangerous at large. . . . We have rejected ‘[i]ndiscriminate application’ of the rule.”¹²⁴

The *Mapp* rule that “all” evidence unconstitutionally seized had to be suppressed should now be viewed, according to Justice Scalia, as “[e]xpansive

120. *Id.*

121. *Id.* at 595.

122. *Id.* at 596 (emphasis in original).

123. *Id.* at 597.

124. *Hudson*, 547 U.S. at 591 (citations omitted).

dicta”: “Expansive dicta in *Mapp* . . . suggested wide scope for the exclusionary rule. . . . ([A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court’).”¹²⁵ The “new” rule was now the *Leon* rule.

How did Justice Kennedy, Justice Scalia’s crucial fifth vote, regard Justice Scalia’s treatment of *Mapp*? In an opinion concurring in part and concurring in the judgment, Justice Kennedy delphically assured the reader that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”¹²⁶ But which of “our precedents” did Justice Kennedy have in mind? More would be revealed in *Herring*.

VI. *HERRING V. UNITED STATES*

A. *Was There a Fourth/Fourteenth Amendment Violation in Herring?*

In *Herring v. United States*, the defendant claimed that his arrest by local law enforcement officers in Coffee County, Alabama, had violated his Fourth/Fourteenth Amendment rights.¹²⁷ Here are the facts of the arrest as set forth in the majority opinion by Chief Justice Roberts:

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff’s Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county’s warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring’s arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County’s computer database, Morgan replied that there was an active arrest warrant for Herring’s failure to appear on a felony charge. Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him.¹²⁸

There had, however, been a “mix-up” by personnel in the sheriff’s office in the neighboring county (Dale County); their computer records failed to show that the warrant had been “recalled”:

There had, however been a mistake about the warrant. The Dale [C]ounty [S]heriff’s computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk’s office or a judge’s chambers calls Morgan, who enters the information in the sheriff’s computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mix[-]up, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already

125. *Id.* (citations omitted).

126. *Id.* at 603 (Kennedy, J., concurring in part).

127. 129 S. Ct. 695, 698.

128. *Id.* at 698.

been arrested and found with [a] gun and drugs, just a few hundred yards from the sheriff's office.¹²⁹

The defendant moved to suppress the gun and drugs seized incident to his arrest; the prosecution argued that, notwithstanding the "mix-up," the arresting officers had probable cause to believe that there was an active felony warrant for his arrest.¹³⁰

The federal district court, in the exercise of its "informed discretion,"¹³¹ skipped over the issue of whether there had been an unconstitutional arrest and denied suppression on the ground that "the arresting officers had acted in a good-faith belief that the warrant was still outstanding."¹³² The Court of Appeals applied *Leon*'s cost-benefit balancing approach and affirmed.¹³³ It reasoned that, because the database error "was merely negligent and attenuated from the arrest," the benefit of suppressing the evidence "would be marginal or nonexistent."¹³⁴

Chief Justice Roberts' majority (5-4) opinion stated that the arresting officers "did nothing improper."¹³⁵ But he noted that the Court of Appeals had concluded that "somebody in Dale County should have updated the computer database. . . ."¹³⁶

Did this failure to update a database constitute a Fourth/Fourteenth Amendment violation? The parties assumed that this was so, and Chief Justice Roberts accepted their assumption:

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. . . . For purposes of deciding this case, however, we accept the parties' assumption that there *was* a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.¹³⁷

Was this a sound assumption? Chief Justice Roberts concluded that the error "was the result of isolated negligence attenuated from the arrest."¹³⁸ But he did not pause to question the assumption of unconstitutionality. Instead, he put the question presented as whether the exclusionary rule should be applied when "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[.]"¹³⁹

B. What Was the Majority's Standard of Culpability?

In conducting the *Leon* cost-benefit balancing analysis, Chief Justice Roberts succinctly stated that the extent to which suppression is justified by deterrence

129. *Id.*

130. *Id.* at 699.

131. *Leon*, 468 U.S. at 925.

132. *Herring*, 129 S. Ct. at 699.

133. *Id.*

134. *Id.*

135. *Id.* at 700.

136. *Id.*

137. *Id.* at 699 (emphasis added).

138. *Herring*, 129 S. Ct. at 698.

139. *Id.*

principles “varies with the culpability of the law enforcement conduct.”¹⁴⁰ This required a definition of “culpability,” which he then supplied:

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. 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.¹⁴¹

Chief Justice Roberts grounded this definition in the history of the exclusionary rule, which arose from police conduct that was “intentional” or “flagrant”:

[T]he abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. In *Weeks* . . . a foundational exclusionary rule case, the officers had broken into the defendant’s home. . . .

Equally flagrant conduct was at issue in *Mapp v. Ohio*. . . . 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. And in fact 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 this.¹⁴²

Notwithstanding his inclusion of “deliberate conduct” in his definition, Chief Justice Roberts characterized the standard of culpability as “objective.”¹⁴³ Perhaps he did this to keep faith with *Leon*. But he cited as support a footnote in Justice Ginsburg’s dissent. If one looks at the footnote, it is obvious that Justice Ginsburg was needling the Chief Justice, not supporting him. She writes: “It is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police.”¹⁴⁴

Harlow v. Fitzgerald had adopted an “objective” standard of culpability in actions for damages because of the burdens and realities of this kind of civil litigation. But why restrict the standard of culpability for exclusion to an “objective” standard in cases of “intentional” or “flagrant” conduct like *Weeks* or *Mapp*?

Applying the standard of culpability to the arresting officers, Chief Justice Roberts held that they were insufficiently culpable to support an exclusionary remedy: “In *Leon* we held that ‘the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.’ . . . The same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.”¹⁴⁵

140. *Id.* at 701.

141. *Id.* at 702.

142. *Id.*

143. *Id.* at 703.

144. *Herring*, 129 S. Ct. at 710, n.7.

145. *Id.* at 703 (citations omitted).

Applying the standard of culpability to the “somebody in Dale County,”¹⁴⁶ Chief Justice Roberts adopted the court of Appeals’ finding of “fact” that the error was “negligent” but not “reckless” as “crucial to our holding.” He reasoned, “The Eleventh Circuit . . . concluded that this error was negligent, but did not find it to be reckless or deliberate. . . . That fact is crucial to our holding.”¹⁴⁷

This is puzzling. Negligence is not a “fact,” but a mixed question of law and fact. Chief Justice Roberts is himself functionally defining the error here as “isolated negligence”¹⁴⁸ or “nonrecurring and attenuated negligence”¹⁴⁹ and not “reckless.” “[N]o such showings were made here,” he wrote.¹⁵⁰

Thus, Chief Justice Roberts’s standard of culpability is not only uncertain in its definition, but puzzling in its application. All that remains to hit the trifecta is an uncertain rationale.

C. What Is the Rationale of Exclusion?

In her dissent, Justice Ginsburg wondered why the majority considered negligent conduct insufficiently deterrable:

The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless. . . . The suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care.

That the mistake here involved the failure to make a computer entry hardly means that application of the exclusionary rule would have minimal value. . . .

Is it not altogether obvious that the Department could take further precautions to ensure the integrity of its database?¹⁵¹

Chief Justice Roberts replied that deterrence of negligent conduct did not “pay its way” and was “not worth the cost”:

In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system . . . we 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.”¹⁵²

We do not quarrel with Justice Ginsburg’s claim that “liability for negligence . . . creates an incentive to act with greater care,” and we do not suggest that the exclusion of this evidence could have *no* deterrent effect. But our cases require any deterrence to “be weighed against the ‘substantial social costs exacted by the exclusionary rule,’” and here exclusion is not worth the cost.¹⁵³

When the majority holds that deterrence of negligent conduct does not “pay its

146. *Id.* at 700.

147. *Id.*

148. *Id.* at 698.

149. *Id.* at 702.

150. *Herring*, 129 S. Ct. at 704.

151. *Id.* at 708 (Ginsburg, J., dissenting).

152. *Id.* at 704 (majority opinion).

153. *Id.* at 702 (emphasis in original) (internal citations omitted).

way” or is not “worth the cost,” how do these Justices know that? Is this a matter of empirical fact? If so, where is the evidence for it? If not, is “deterrence” the best explanation?

A simpler explanation would be that some negligent conduct is not constitutionally unreasonable. And where conduct is judged constitutionally unreasonable, then the more supportable inquiry would be whether the conduct is judged sufficiently culpable to deserve the *sanction* of suppression.

VII. CONCLUSION

In *Herring*, the Court skipped over the issue of constitutional violation by “somebody” in order to produce an uncertain definition, application, and rationale of the standard of culpability for the exclusionary remedy. In doing so, did the Court exercise “an informed discretion”?¹⁵⁴ I doubt it. I recognize the generally understood proposition that decision of a constitutional question should be avoided if possible. But this avoidance strategy typically arises when a law of a lesser order—statute, regulation, or rule—can be interpreted to avoid the constitutional question. In those cases, avoidance of decision of a constitutional question is a prudential course to steer the Court in a more prudent direction. But avoidance here works in the opposite direction. It steers the Court into making a judgment about whether an officer's conduct was sufficiently culpable to produce “deterrence” that is “worth the cost,” instead of making a judgment about whether the conduct was culpable enough to be constitutionally unreasonable. The latter judgment rests on a firmer judicial foundation. This is particularly true in the case of the Court's suggested inquiry into “systemic negligence.” A judgment about what it takes to achieve worthwhile “deterrence” of the system as a whole is surely more speculative than a judgment about whether the system has functioned in a constitutionally reasonable manner.

If the Court would attend with greater care to the issue of constitutional violation, that might either obviate decision of the remedial issue or cast light on how it should be decided. If the Court decided that there was sufficient culpability to make out a constitutional violation, it could then use that decision to inform its judgment of what additional culpability was required for the exclusionary remedy and why that was so.

Later this past Term, the Court supplied an illustration of how the constitutional analysis could inform the remedial analysis. In *Safford United School District v. Redding*, the Court first satisfied itself that school officials had committed a Fourth/Fourteenth Amendment violation by strip-searching a student, before holding that this violation was not culpable enough to justify a damages remedy.¹⁵⁵ This could be a useful lesson for the *Herring* majority as it struggles onward.

154. *Leon*, 468 U.S. at 925.

155. 129 S. Ct. 2633 (2009).