THE IRRELEVANCY OF THE FOURTH AMENDMENT IN THE ROBERTS COURT

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INTRODUCTION

John Roberts Jr. succeeded William Rehnquist as Chief Justice of the Supreme Court on September 29, 2005. Since that time, the Court has granted petitions for certiorari in only a handful of cases to review situations raising Fourth Amendment questions. This contrasts with the Rehnquist era, when it was not unusual for the Court to have six or more cases on the Fourth Amendment *every year*. This article examines the reasons for this shift and predicts the substantial elimination of Fourth Amendment litigation in the Roberts Court.

A principal reason is the change in Chief Justices: during his term, William Rehnquist penned the majority opinion in twenty-five cases. In contrast, John Roberts, during his brief tenure, has written two majority opinions. At bottom, it was Rehnquist's interest in the area that drove much of the volume of cases. However, merely a change in Chief Justices would not make the Amendment "irrelevant." There has to be more support for the claim made in the title to this article.

I offer here three additional points to support that conclusion. The first involves personnel: most of the Justices on the current Court have little interest in Fourth Amendment cases; in the absence of Rehnquist's leadership, they are less likely to grant review in search and seizure cases. The other two reasons are more forward-looking. During the 2008-09 term, *Saucier v. Katz*[1] was overruled by *Pearson v. Callahan*,[2] making review of the merits of Fourth Amendment claims in civil cases much less likely. Also last term, in *Herring v. United States*,[3] the Court offered a vision of a much less robust (and applicable) exclusionary rule. If the broader lan-

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1. 533 U.S. 194 (2001).
2. 129 S. Ct. 808 (2009).
3. 129 S. Ct. 695 (2009).

guage in *Herring* prevails, it will reduce dramatically the situations where that remedy is available in criminal cases; courts will be able to avoid litigating the merits of many Fourth Amendment issues by simply assuming that, even if the Amendment has been violated, the exclusionary rule does not apply. Hence, combining the impact of *Pearson* and *Herring*, there will be fewer lower court cases addressing the merits of the Fourth Amendment and, consequently, fewer cases worthy of Supreme Court review. Thus, even if the exclusionary rule is not overruled, very little litigation, in either criminal or civil cases, will be before the Court raising a Fourth Amendment claim.

This article sets forth the premises of this prediction in three sections. The first examines the current Justices' interests in Fourth Amendment cases, with particular attention paid to the effect of the change in Chief Justice from Rehnquist to Roberts. The second discusses the impact of the overruling of *Saucier*. The third predicts the demise of—or at least broad limitations on—the exclusionary rule. If these premises hold true, the Fourth Amendment, while remaining the most commonly *implicated* aspect of the Constitution, may lose its status as the most frequently *litigated* part. What will remain is a residual, complex jurisprudence with little relevance.

I. THE FOURTH AMENDMENT OPINIONS OF CHIEF JUSTICE REHNQUIST AND THE CURRENT JUSTICES

William Rehnquist served as Chief Justice of the Supreme Court from September 26, 1986 to September 3, 2005. During that period, he wrote an astonishing number of majority opinions on the Fourth Amendment, totaling twenty-five in all. These included many of the most important cases of that time: *Sokolow*; *Sitz*; *Jimeno*; *Evans*; *Ornelas*; *Robinette*; *Carter*; *Knowles*; *Wardlow*; *Bond*; *Knights*; *Arvizu*; *Pringle*; *Flores-Montano*; *Thornton*; *Mena*; and others.[4] In addition, the Rehnquist Court issued ten *per curiam* decisions, and it is fair to say that Rehnquist had something to

4. The complete list is: Muehler v. Mena, 544 U.S. 93 (2005); Thornton v. United States, 541 U.S. 615 (2004); United States v. Flores-Montano, 541 U.S. 149 (2004); Maryland v. Pringle, 540 U.S. 366 (2003); United States v. Arvizu, 534 U.S. 266 (2002); United States v. Knights, 534 U.S. 112 (2001); Florida v. Thomas, 532 U.S. 774 (2001); Bond v. United States, 529 U.S. 334 (2000); Illinois v. Wardlow, 528 U.S. 119 (2000); Wilson v. Layne, 526 U.S. 603 (1999); Knowles v. Iowa, 525 U.S. 113 (1998); Minnesota v. Carter, 525 U.S. 83 (1998); United States v. Ramirez, 523 U.S. 65 (1998); Maryland v. Wilson, 519 U.S. 408 (1997); Ohio v. Robinette, 519 U.S. 33 (1996); Ornelas v. United States, 517 U. S. 690 (1996); Arizona v. Evans, 514 U.S. 1 (1995); Albright v. Oliver, 510 U.S. 266 (1994); Florida v. Jimeno, 500 U.S. 248 (1991); Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990); Florida v. Wells, 495 U.S. 1 (1990); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Graham v. Connor, 490 U.S. 386 (1989); United States v. Sokolow, 490 U.S. 1 (1989); Colorado v. Bertine, 479 U.S. 367 (1987).

do with them, given that he dissented in none of those cases. Indeed, Justice "*Per Curiam*" wrote more majority opinions when Rehnquist was Chief Justice than has any of the current Associate Justices of the Court (excepting only Scalia and Stevens). Rehnquist also served as an Associate Justice of the Supreme Court from January 7, 1972 to the date of his elevation as Chief Justice and, during that period, wrote many of the majority opinions in Fourth Amendment cases.[5] Regardless of whether one agrees with his views, Chief Justice Rehnquist's impact on Fourth Amendment analysis—and his legacy—is substantial.

The contrast could not be more stark. Chief Justice Roberts came to the Court with virtually no background regarding the Fourth Amendment[6] and, since his elevation, has written two majority opinions[7] (one of which was for an unanimous Court) and one dissent.[8] It is not just a coincidence that the change in Chief Justices marked the point when the number of cases began to decline dramatically.

But some readers must be objecting: the Chief Justice is but one vote in granting petitions for certiorari and, surely, others on the Court will continue the tradition of granting a significant number of petitions in Fourth Amendment cases. To respond to this concern, let's look at who else is on the Court.[9] Justice Alito began his tenure on January 31, 2006. Since that time, he has written no majority opinion, one dissent, and no concurring opinion in a search or seizure case.[10] Justice Breyer, on the Court since August 3, 1994, has written only two majority opinions[11] and has dissented or concurred in twelve other cases. Justice Ginsburg, on the Court since August 10, 1993, has written four majority opinions[12] and eleven concur-

5. A partial list includes: INS v. Delgado, 466 U.S. 210 (1984); Illinois v. Gates, 462 U.S. 213 (1983); Texas v. Brown, 460 U.S. 730 (1983); United States v. Knotts, 460 U.S. 276 (1983); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Scott v. United States, 436 U.S. 128 (1978); United States v. Ceccolini, 435 U.S. 268 (1978); United States v. Ramsey, 431 U.S. 606 (1977); United States v. Robinson, 414 U.S. 218 (1973).

6. See Thomas K. Clancy, Hints of the Future?: John Roberts Jr.'s Fourth Amendment Cases as an Appellate Judge, 35 U. BALT. L. REV. 185 (2005).

7. Herring v. United States, 129 S. Ct. 695(2009); Brigham City v. Stuart, 547 U.S. 398 (2006). Technically, given that the Court de-constitutionalized the Fourth Amendment's exclusionary rule in *United States v. Calandra*, 414 U.S. 338 (1974), the *Herring* decision is not a Fourth Amendment case.

8. Georgia v. Randolph, 547 U.S. 103 (2006).

9. The statistics referring to authorship of opinions are through June 30, 2009. At the time this article was written, Judge Sotomayor's nomination to succeed Associate Justice Souter was pending before the Senate.

10. Alito's lone dissent is in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). He did write the opinion for an unanimous Court in *Pearson v. Callahan*, 128 S. Ct. 808 (2009), which is not a Fourth Amendment case; instead, as discussed *infra*, it addresses the manner in which courts must address the substantive Fourth Amendment and qualified immunity claims in civil suits.

11. Illinois v. Lidster, 540 U.S. 419 (2004); Illinois v. McArthur, 531 U.S. 326 (2001).

12. Arizona v. Johnson, 129 S. Ct. 781 (2009); Florida v. J.L., 529 U.S. 266 (2000); Chandler v.

ring or dissenting opinions. Justice Thomas, on the Court since October 23, 1991, has written five majority opinions[13] and five concurring or dissenting opinions. Justice Souter, on the Court from October 9, 1990 through June 30, 2009, had six majority opinions[14] and ten concurring or dissenting opinions. Justice Kennedy, on the Court since February 18, 1988, has written five majority opinions[15] and thirteen concurring or dissenting opinions.

That leaves the two Associate Justices with the longest tenure. Justice Scalia, on the Court since September 22, 1986, has authored fifteen majority opinions and has dissented or concurred with an opinion fifteen times. Scalia's majority opinions, like Rehnquist's, could be used as a broad survey of modern Supreme Court search and seizure jurisprudence and are often known by their names: *Hicks*; *Griffin; Murray*; *Rodriguez*; *Hodari D.*; *Vernonia School District*; *Whren*; *Houghton; Kyllo*; *Devenpeck*; *Hudson*; *Grubbs*; *Scott v. Harris*; *Virginia v. Moore*.[16] His profound influence is undeniable: in *Hodari D.*, he redefined the concept of a seizure; in *Kyllo*, he broadly attacked the expectation of privacy test and laid the groundwork for redefining what interests are protected by the Amendment; in *Bond* and *Hicks*, he clarified the concept of a search; in *Hudson*, as discussed *infra*, he broadly attacked and undermined the exclusionary rule. In short, Scalia has crafted majority opinions that have fundamentally influenced most aspects of Fourth Amendment jurisprudence.

Justice Stevens has served on the Court since December 19, 1975, and his term has encompassed the tenure of three different Chief Justices. He has written only twelve majority or lead opinions,[17] averaging one every

Miller, 520 U.S. 305 (1997); Powell v. Nevada, 511 U.S. 79 (1994).

13. Samson v. California, 547 U.S. 843 (2006); Board of Educ. v. Earls, 536 U.S. 822 (2002); Florida v. White, 526 U.S. 559 (1999); Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357 (1998); Wilson v. Arkansas, 514 U.S. 927 (1995).

14. Safford Unified School District #1 v. Redding, 129 S. Ct. 2633 (2009); Brendlin v. California, 127 S. Ct. 2400 (2007); Georgia v. Randolph, 547 U.S. 103 (2006); United States v. Banks, 540 U.S. 31 (2003); Atwater v. City of Largo Vista, 532 U.S. 318 (2001); County of Sacramento v. Lewis, 523 U.S. 833 (1998).

15. Hiibel v. Sixth Jud. Dist., 542 U.S. 177 (2004); United States v. Drayton, 536 U.S. 194 (2002); Saucier v. Katz, 533 U.S. 194 (2001); Skinner v. Ry. Labor Executives' Assoc., 489 U.S. 602 (1989); Nat'l Treasury Employees' Union v. Von Raab, 489 U.S. 656 (1989).

16. Virginia v. Moore, 128 S. Ct. 1598 (2008); Scott v. Harris, 550 U.S. 372 (2007); Hudson v. Michigan, 547 U.S. 586 (2006); United States v. Grubbs, 547 U.S. 90 (2006); Devenpeck v. Alford, 543 U.S. 146 (2004); Kyllo v. United States, 533 U.S. 27 (2001); Wyoming v. Houghton, 526 U.S. 295 (1999); Whren v. United States, 517 U.S. 806 (1996); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); California v. Hodari D., 499 U.S. 621 (1991); Illinois v. Rodriguez, 497 U.S. 177 (1990); Brower v. County of Inyo, 489 U.S. 593 (1989); Murray v. United States, 487 U.S. 533 (1988); Griffin v. Wisconsin, 483 U.S. 868 (1987); Arizona v. Hicks, 480 U.S. 321 (1987).

17. Arizona v. Gant, 129 S. Ct. 1710 (2009); Illinois v. Caballes, 543 U.S. 405 (2005); Groh v. Ramirez, 540 U.S. 551 (2004); Ferguson v. City of Charleston, 532 U.S. 67 (2001); Richards v. Wisconsin, 520 U.S. 385 (1997); Horton v. California, 496 U.S. 128 (1990); Maryland v. Garrison, 480 U.S. 79 (1987); United States v. Jacobsen, 466 U.S. 109 (1984); United States v. Ross, 456 U.S. 798

three years. Nonetheless, the list is impressive: *Payton*; *Walter*; *Summers*; *Ross*; *Jacobsen*; *Maryland v. Garrison*; *Horton*; *Richards*; *Ferguson*; *Groh*; Caballes; and *Gant*. Within that list is a mixed record of siding with individuals and governmental interests. Indeed, Stevens has seen many changes on the Court and some of those changes include his own views.[18] More remarkable than the number of majority opinions, however, is the vast number of his dissents and concurring opinions, which are—by my count—seventy-five.[19]

So, what conclusions should be drawn from these statistics? Two current members are interested in the Fourth Amendment: Scalia, who seeks to eliminate the exclusionary rule and expand the use of qualified immunity analysis; and Stevens, who seems to need to comment on search and seizure matters but has had little influence on the development of those principles. When it comes to search and seizure, it is now Scalia's Court.

Frankly, there are few other contestants for that title. To put it charitably, the current "liberal" justices' records are both sparse and mixed. To be less charitable, those records are at best undistinguished. They have neither collectively nor individually produced a coherent vision of the Fourth Amendment that stands in contrast to Scalia's. None has offered a framework for the proper relationship of the individual to society. Sure, there have been objections. For example, Stevens in *Hodari D.* maintained that the Court's (Scalia's) definition of a seizure was too favorable to the government.[20] But one cannot look at the body of Stevens' work and find a workable theory that offers a coherent accommodation between liberty and collective security or an effective counterbalance to Scalia's views. To take

(1982); Michigan v. Summers, 452 U.S. 692 (1981); Walter v. United States, 447 U.S. 649 (1980); Payton v. New York, 445 U.S. 573 (1980).

18. In *Groh v. Ramirez*, 540 U.S. 551 (2004), Justice Stevens for the majority found a violation of the particularity requirement so significant in the drafting of a warrant that the officers were not entitled to qualified immunity. In contrast, in *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), in a concurring opinion, Stevens asserted that a warrant with a similar deficiency did not offend the Fourth Amendment and the Court did not even have to reach the good faith claim. *See* United States v. Leon, 468 U.S. 897, 963—66 (1984) (Stevens. J., concurring) (discussing reasons why *Sheppard* warrant valid).

19. Perhaps Justice Stevens' most influential dissent was in *California v. Hodari D.*, 499 U.S. 621 (1991). In that case, Justice Scalia, writing for the majority, redefined the concept of a seizure, marking the point at when a person submits to a show of authority by the police or when the police use physical force. This contrasted to the commonly held view prior to *Hodari D.* that applicability of the Fourth Amendment was not dependent upon an individual's actions and that it did not matter if the person stopped as a result of the intimidating police action. Justice Stevens mounted a significant defense of that view, arguing, *inter alia*, that "the character of the citizen's response should not govern the constitutionality of the officer's conduct." *Id.* at 645 (Stevens, J., dissenting). Numerous states, on independent state grounds, have rejected the *Hodari D.* majority's approach based, in large part, on Stevens' dissent. *See* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 5.1.4.2.5. (2008) (collecting cases).

20. 499 U.S. at 629–48 (Stevens, J. dissenting).

another example, Breyer, in *Bond*, contrary to Scalia's majority opinion, actually opined in dissent that a police officer's squeezing of a bus passenger's luggage was *not* a search.[21] Breyer did set forth a vision of the exclusionary rule in *Hudson*, discussed *infra*, but he grounded that vision in the shifting sands of deterrence theory.

Scalia stands alone on the current Court. He has vision, force, and perseverance. It is his Court when it comes to the Fourth Amendment and it is his goal to make it irrelevant. Of course, there are alternative views, alternative voices—but not on this Court. To look for them on the Supreme Court, one must look to earlier times, some long ago.[22] They were the advocates of objective criteria to measure reasonableness, such as the warrant preference rule[23] and individualized suspicion,[24] and strong advocates of individual liberty.[25] Now, other than Stevens and Scalia, the members of the Court are disinterested. This leads me to conclude that the trend of the past few terms—of taking a couple of cases a year—will continue, absent other factors. I now turn to those other factors.

II. QUALIFIED IMMUNITY

Plaintiffs in civil damage suits against government agents have two burdens to overcome. It must be shown that the agent 1) violated the plaintiff's Fourth Amendment rights and 2) is not entitled to qualified immunity, which would bar the law suit from proceeding.[26] An agent is entitled to qualified immunity if the constitutional right violated was not clearly estab-

21. 529 U.S. 334, 339-41 (2000) (Breyer J., dissenting).

22. *See, e.g.*, Symposium, *Great Dissents in Fourth Amendment Cases*, 79 MISS. L.J. (forthcoming Fall 2009). In that symposium, five dissents are examined, including such seminal dissents as Justice Douglas' dissent in *Terry v. Ohio*, 392 U.S. 1 (1968), Justice Harlan's dissent in *United States v. White*, 401 U.S. 745 (1971), Justice Marshall's dissent in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), Justice O'Connor's dissent in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), and Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438 (1928). The authors of the articles that resulted from the symposium are: Professor Paul Butler of The George Washington University Law School, Professor Catherine Hancock of Tulane University School of Law, Professor Arnold H. Loewy of Texas Tech University School of Law, Professor Wayne A. Logan of Florida State University College of Law, and Professor Carol S. Steiker of Harvard Law School.

23. Justice Frankfurter, in series of dissents, advocated a central role for the use of a warrant and the need for objective criteria to measure reasonableness. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting); Harris v. United States, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting); Davis v. United States, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting). Frankfurter is sometimes overlooked because of his refusal to accept application of the Amendment to the states.

24. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 213 (1979) (discussing the central role of probable cause).

25. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 471–85 (1928) (Brandeis, J., dissenting); Brinegar v. United States, 338 U.S. 160, 180–82 (1949) (Jackson, J., dissenting).

26. *See, e.g.*, Saucier v. Katz, 533 U.S. 194 (2001).

lished at the time of the violation.[27] In *Saucier*,[28] the Court established that courts considering such claims must address the first question prior to determining whether the agent is entitled to qualified immunity. The Court did so to further the development of Fourth Amendment principles. The Court explained:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.[29]

Saucier was insistent that the constitutional question was a mandated "threshold question" and must be the "initial inquiry."[30] This "order of battle" had been criticized by several justices[31] and the Court had candidly admitted that it contradicted its policy of avoiding unnecessary adjudication

27. *Saucier*, 533 U.S. at 201. Put another way, police officers are entitled to qualified immunity unless it would have been clear to a reasonable police officer that his conduct was unlawful in the situation he confronted. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 563 (2004); Wilson v. Layne, 526 U.S. 603 (1999).

28. *Saucier*, 533 U.S. 194.

29. *Id.* at 201.

30. *Id.*

31. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring and dissenting) (collecting authorities); Wilkie v. Robbins, 127 S. Ct. 2588, 2617 (2007) (Ginsburg, J., concurring) (advocating skipping to the second inquiry in appropriate cases); Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring) ("I am concerned that the current [*Saucier*] rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense. . . ."); Bunting v. Mellen, 541 U.S. 1019, 1019 (2004) ("The 'perceived procedural tangle' described by Justice SCALIA's dissent . . . is a byproduct of an unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity."); *id.* at 1025 (Scalia, J., dissenting) ("We should either make clear that constitutional determinations are *not* insulated from our review . . . or else drop any pretense at requiring the ordering in every case.").

Justice Breyer had asserted that the rule in *Saucier* was problematic for four independent reasons:

> Sometimes (*e.g.*, where a defendant is clearly entitled to qualified immunity) *Saucier*'s fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (*e.g.*, where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."

Scott v. Harris, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring) (quoting Spector Motor Servs., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)).

of constitutional issues.[32] Nonetheless, the Court had recently reasserted that it was needed to clearly establish rights for future cases.[33]

In *Pearson v. Callahan*, the Court overruled *Saucier* and now permits courts the discretion to skip the preliminary step of establishing whether the Fourth Amendment has been violated.[34] My purpose here is not to argue the merits of such an overruling;[35] instead, the focus is on the consequences of the Court's unanimous holding. It takes little insight to observe that the overruling of *Saucier* will result in fewer courts developing Fourth Amendment principles and fewer cases presenting such issues for review. Avoiding the constitutional issue is, after all, the purpose of giving lower courts the discretion to dispose of the case on qualified immunity grounds.[36] What will also result is an increased muddling of Fourth Amendment and qualified immunity analysis. The Court has stated that, in analyzing qualified immunity claims, "[t]he question is what the officer reasonably understood his powers and responsibilities to be, when he acted,

32. *Id.* at 1774.

33. *Id. See also* Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."); County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.").

34. The Court stated: "The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S. Ct. 808, 821 (2009).

35. In *Pearson v. Callahan* the court rejected stare decisis considerations in light of the experience that lower courts had with the *Saucier* rule and criticisms of that rule from a variety of sources, including from members of the Court. *Id.* at 818. Nonetheless, the *Pearson* Court recognized that a decision on the merits "is often beneficial." *Id.* Those situations included when little would be gained in terms of conservation of resources in just addressing the clearly established prong and when a discussion of the facts makes it apparent that there was no constitutional violation. *Id.* However, the Court stated that "the rigid Saucier procedure comes with a price," including the expenditure of scarce judicial resources and wasting of the parties' time. *Id.* It noted that addressing the cases addressing the constitutional question "often fail to make a meaningful contribution" to the development of Fourth Amendment principles for a variety of reasons. *Id.* at 819. Saucier also made it difficult for the prevailing party, who has won on the qualified immunity issue, to gain review of an adversely decided constitutional issue. The Court concluded its decision by finding that the government's agents were entitled to qualified immunity and did not address the substantive Fourth Amendment claim. *Id.* at 822.

36. The standard for qualified immunity is equivalent to the good faith exception to the exclusionary rule. Groh v. Ramirez, 540 U.S. 551, 565 n.8 (2004). In *United States v. Leon*, 468 U.S. 897 (1984), the Court established that evidence seized pursuant to a judicial warrant should not be suppressed unless the warrant or the affidavit on which it was based was so clearly defective that the officers who executed the warrant could not reasonably have relied upon it. *Id.* at 922-23. The Court explained that lower courts had "considerable discretion" either to "guide future action by law enforcement officers and magistrates" by deciding the substantive Fourth Amendment question "before turning to the good-faith issue" or to "reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith." *Id.* at 924-25. In light of that discretion, many courts opt to dispose of cases on the basis of good faith, without first considering whether there was a Fourth Amendment violation. *See, e.g.*, United States v. Proell, 485 F.3d 427, 430 (8th Cir. 2007).

under clearly established standards."[37] Those standards will not be further clarified if courts address only the second question.[38]

Indeed, *Pearson* itself illustrates this point. The case involved an undercover drug buy in a house by an informant.[39] After entering the home and confirming that the seller had the drugs, the purported buyer signaled the police, who then entered the house without a warrant.[40] The alleged seller, after obtaining suppression of the evidence in the criminal case against him, sued the police.[41] In defense to that suit, a claim was made that the "consent-once-removed" doctrine, which has been recognized by some courts, permitted the warrantless intrusion.[42] The Supreme Court did not address the merits of that doctrine, skipping directly to the qualified immunity aspect of the case and finding that the officers were entitled to qualified immunity because the illegality of their actions had not been clearly established.[43] The result of *Pearson* may become typical: we are left with uncertainty as to the status of a controversial legal principle that has divided lower courts.

Pearson's new battle order—and the result in *Pearson*—is likely to make the avoidance of difficult Fourth Amendment questions the norm in cases where a defense of qualified immunity is available.[44] Hence, many

37. Saucier v. Katz, 533 U.S. 194, 208 (2001).

38. The Court in Lewis observed:

> [I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.

523 U.S. 833, 841 n.5 (1998).

39. 129 S. Ct. at 813–14.

40. *Id.*

41. *Id.*

42. A panel of the Tenth Circuit in *Pearson* confronted the meaning, viability, and scope of that doctrine. The panel majority stated that "[t]he 'consent-once-removed' doctrine applies when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance." Callahan v. Millard County, 494 F.3d 891, 895–896 (10th Cir. 2007). The Supreme Court summarized the lower court's views, stating "[t]he majority took no issue with application of the doctrine when the initial consent was granted to an undercover law enforcement officer, but the majority disagreed with decisions that 'broade[n] this doctrine to grant informants the same capabilities as undercover officers.'" *Pearson*, 129 S. Ct. at 814.

43. *Id.* at 822–23.

44. *Pearson* observed that there remain classes of cases where the constitutional issue would be addressed: "Most of the constitutional issues that are presented in § 1983 damages actions and Bivens cases also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages." *Id.* at 822. Despite that ready assurance, these situations may not offer significant opportunities for development of Fourth Amendment principles. If the exclusionary rule is overruled or substantially restricted, see discussion *infra*, there will be little development in criminal cases. Injunctive relief is a rare claim in Fourth Amendment litigation, at least in the Supreme

civil cases will no longer be decided by the lower courts on the merits of the Fourth Amendment claims and, therefore, there will be fewer cases worthy of review by the Supreme Court. The end result is that the Court will not take as many cases for review because it can always be said: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was not clearly established.

III. THE EXCLUSIONARY RULE

The chief enforcement mechanism to insure compliance with the Fourth Amendment is the exclusionary rule, which prohibits the introduction of illegally obtained evidence in the government's case-in-chief.[45] Although the rule was for some time considered constitutionally mandated, the Court now believes that the exclusionary sanction is a judicially created remedy designed to deter future police misconduct.[46] It is not "'a personal constitutional' right of the party aggrieved'" and it "is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'"[47]

An overriding consideration in contemporary exclusionary rule cases is the Court's use of a cost-benefit test. On the benefit side of the scale is

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Court. *See, e.g.*, Illinois v. Krull, 480 U.S. 340, 354 (1987) ("[A] person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation."); Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (holding that businessman was entitled to declaratory judgment that statute that authorized warrantless inspections violated the Fourth Amendment and injunction enjoining enforcement to that extent). That leaves claims against municipalities as one of the few avenues to develop search and seizure principles. Yet, *Pearson* itself put the viability of that avenue in question:

> We also do not think that relaxation of *Saucier's* mandate is likely to result in a proliferation of damages claims against local governments. It is hard to see how the Saucier procedure could have a significant effect on a civil rights plaintiff's decision whether to seek damages only from a municipal employee or also from the municipality. Whether the Saucier procedure is mandatory or discretionary, the plaintiff will presumably take into account the possibility that the individual defendant will be held to have qualified immunity, and presumably the plaintiff will seek damages from the municipality as well as the individual employee if the benefits of doing so (any increase in the likelihood of recovery or collection of damages) outweigh the litigation costs.

129 S. Ct. at 822 (citation omitted). The purpose of § 1983 actions is to deter the individual officers from committing constitutional violations and, hence, the governmental agency is not liable on a theory of respondeat superior. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). However, local governing bodies are subject to suit for constitutional torts resulting from implementation of local ordinances, regulations, policies, or customary practices. *Id.* at 694; *see also* Hudson v Michigan, 547 U.S. 586, 599 (2006) ("Failure to teach and enforce constitutional requirements exposes municipalities to financial liability.").

45. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 12–13 (1968).

46. United States v. Leon, 468 U.S. 897, 906 (1984).

47. *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974); *id.* (quoting Stone v. Powell, 428 U.S. 465, 540 (1976).

only deterrence of police misconduct, despite decades of Supreme Court declarations that that purpose has never been empirically proven and despite much skepticism about whether the rule does in fact deter.[48] On the other side, according to the Court, is the high cost upon the ability of courts to ascertain the truth in criminal cases[49] and permitting "some guilty defendants [to] go free or receive reduced sentences as a result of favorable plea bargains."[50] Thus, the Court in recent decades has restricted application of the exclusionary rule to instances where its "remedial objectives are thought most efficaciously served."[51] Where the rule does not result in appreciable deterrence of future police misconduct, the Court has viewed its use as unwarranted.[52]

The debate over application of the exclusionary rule often has been accompanied by references to the efficacy of alternative remedies, with a chief alternative being civil suits for damages.[53] Other considerations include administrative sanctions against police officers and training programs

48. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 492 (1976) ("Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system."). Indeed, the Court has sometimes stated that it would reconsider its refusal to extend the rule to some situations if "future empirical evidence" undermined the assumptions upon which the decision was based. *Krull*, 480 U.S. at 352 n.8; *see also* Arizona v. Evans, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) ("The debate over the efficacy of an exclusionary rule reveals that deterrence is an empirical question, not a logical one."). *Cf. Leon*, 468 U.S. at 928 (Blackmun, J., concurring) ("[A]ny empirical judgment about the effect of the exclusionary rule in a particular class of cases is necessarily a provisional one."); *id.* at 942–43 (Brennan, J., dissenting) ("Although the Court's language . . . suggests that some specific empirical basis may support its analyses, the reality is that the Court's opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data. . . . By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics.").

49. *Hudson*, 547 U.S. 586 (2006); United States v. Payner, 447 U.S. 727, 734 (1980).

50. *Leon*, 468 U.S. 897, 907 (1984).

51. *Id.* at 908 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

52. *Evans*, 514 U.S. 1 (1995); United States v. Janis, 428 U.S. 433, 454 (1976).

53. Akhil Reed Amar, in his article, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994), re-ignited much of the debate with his claims that the exclusionary rule should be abolished as having no legitimate basis and that a "traditional civil-enforcement model" that includes entity liability, no immunity defenses, punitive damages, class actions, attorneys fees, and injunctive relief, should be substituted. Numerous scholars disagree with his views, including his historical analysis and the roles of exclusion and civil actions. *See, e.g.*, Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1771 (1996); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law*, 74 N.C. L. REV. 1559 (1996); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). For other scholarly comment in favor of eliminating the rule, see, for example, Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603 (2007); *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363.

to increase compliance with Fourth Amendment requirements. Traditionally, there has been much skepticism about such alternatives—at least in the criminal trial context.[54] Recently, however, a majority of the Court in *Hudson v. Michigan*[55] pointed to the availability of such alternatives and higher levels of police professionalism and training in the context of creating a *per se* exception to the exclusionary rule for knock and announce violations. Justice Scalia, writing for the *Hudson* majority, engaged in an extended treatment of various developments that he believed called into question the viability of the exclusionary rule, including the availability of civil remedies, the "increasing professionalism of police forces, including a new emphasis on internal police discipline," and "the increasing use of various forms of citizen review" to "enhance police accountability."[56]

At its most fundamental level, *Hudson* called into question the future of the exclusionary rule: "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."[57] Remove a few words from this quotation and the rationale for abolition of the rule is clear: "We cannot assume that exclusion . . . is necessary deterrence simply because we found that it was necessary deterrence . . . 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."[58] Abolition is Scalia's clear aim; he has planted the seeds in *Hudson* and needs one more vote to reap the harvest.

Justice Breyer's dissent in *Hudson* challenged much of the majority's reasoning—but did so by defending the rule as necessary deterrence,[59] a position that has little empirical support[60] and leaves the rule without a

54. *See, e.g.*, Irvine v. California, 347 U.S. 128 (1954); People v. Cahan, 282 P.2d 905, 913 (Cal. 1955); *see also* WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.2 (4th ed. 2004) (discussing inadequacy of other remedies); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 18 (2001) ("There is general agreement on the ineffectiveness of tort actions under current law. The reasons most commonly cited are inadequate damages, immunity defenses, individual liability, juror prejudice, and lack of representation."). Indeed, even Chief Justice Burger, a consistent critic of the exclusionary rule, recognized the significant limitations that civil remedies offered and called on Congress to create "an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated." *See* Bivens v. Six Unknown Named agents of the Federal Bureau of Narcotics, 403 U.S. 388, 421–23 (1971) (Burger, C.J., dissenting).

55. 547 U.S. 586 (2006).

56. *Id.* at 598–99

57. *Id.* at 597.

58. *Id.* at 597.

59. *Id.* at 608–09.

60. *See* THOMAS K. CLANCY, *supra* note 20, at 622–24 (2008) (discussing the evolution of exclu-

constitutional grounding. Such grounding cannot indefinitely support the rule's continued existence. Breyer also saw no reason to believe that the remedies that the Court found inadequate in *Mapp v. Ohio*[61] would adequately deter unconstitutional police behavior for knock and announce violations. He noted that, while the number of "cases reporting knock-and-announce violations are legion," the majority failed to cite a single reported case in which a plaintiff had collected more than nominal damages.[62] Breyer maintained that civil "actions are 'expensive, time-consuming, not readily available, and rarely successful.'"[63] He viewed "the need for deterrence—the critical factor driving this Court's Fourth Amendment cases for close to a century," as requiring exclusion in *Hudson*.[64] Breyer asserted:

> There may be instances in the law where text or history or tradition leaves room for a judicial decision that rests upon little more than an unvarnished judicial instinct. But this is not one of them. Rather, our Fourth Amendment traditions place high value upon protecting privacy in the home. They emphasize the need to assure that its constitutional protections are effective, lest the Amendment "sound the word of promise to the ear but break it to the hope." They include an exclusionary principle, which since *Weeks* has formed the centerpiece of the criminal law's effort to ensure the practical reality of those promises. That is why the Court should assure itself that any departure from that principle is firmly grounded in logic, in history, in precedent, and in empirical fact. It has not done so.[65]

Perhaps Breyer's dissent is noble—or perhaps mere noble sentiment. Arguably, there appear in his *Hudson* dissent hints of a broader justification for the rule, that is, that the rule is constitutionally mandated. But Breyer fails to make that argument. Absent such a ground, Breyer's discussion is little more than wishful thinking and he, like the majority, continued the evidence-free debate over the efficacy of deterrence.

This brings us to *Herring v. United States*.[66] That case can be read narrowly or broadly. The broader reading signals a dramatic restriction in the application of the exclusionary rule. *Herring*, in the short run, will generate a significant amount of litigation as to which reading is correct and will require the Court to address its implications. If the broad language

sionary rule doctrine and citing cases and other authority discussing the lack of empirical evidence supporting deterrence as a justification).

61. 367 U.S. 643 (1961).

62. 547 U.S. at 610.

63. *Id.* (quoting Potter Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 COLUM. L. REV. 1365, 1388 (1983)).

64. *Id.*

65. *Id.* at 629-630.

66. 129 S. Ct. 695 (2009).

employed in *Herring* prevails, it will fundamentally change the litigation of motions to suppress in criminal cases. That is, a central question will be whether the officer had a culpable mental state; if not, the rule will not apply. If that mode of analysis prevails, it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule.

Narrowly, the issue in *Herring* was whether the good faith doctrine should be applied when police officers in one jurisdiction checked with employees of the sheriff's office in another jurisdiction and were told that there was an outstanding warrant for Herring, who was then arrested.[67] Contraband was discovered during the search incident to Herring's arrest.[68] The report was in error, and the warrant should have been removed from the records, but the report was not a result of the negligence of personnel in the reporting jurisdiction's sheriff's office.[69]

Writing for a majority of five, Chief Justice Roberts stated that the exclusionary rule did not apply. A narrow reading of *Herring* can be drawn from the following statement by the majority of its holding: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."[70] Words of limitation jump out from these sentences: "isolated negligence;" attenuation.[71] Hence, some may see *Herring* as a narrow expansion of good faith that has little application.[72]

In contrast, the rest of the majority opinion is very broadly written and represents a significant recasting of modern exclusionary rule theory. Instead of viewing the issue as part of a good faith exception to the exclu-

67. *Id.* at 698–99.

68. *Id.*

69. *Id.*

70. *Id.* at 698.

71. Consistent with a narrow view, Roberts later asserted: "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." *Id.* at 702.

72. Justice Kennedy, a crucial fifth vote for the majority in *Hudson* and *Herring*, might be attracted to such a view. He joined the Court's opinion in *Herring*. In *Hudson*, the majority viewed the knock-and-announce violation attenuated from the recovery of the evidence in the house. It stated: "Attenuation . . . occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." 547 U.S. 586, 593 (2006). Kennedy wrote a concurring opinion in which he stated that the Hudson "decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression. *Id.* at 603 (Kennedy, J., concurring). He added that "the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression." *Id.* The concept of attenuation in *Hudson* and in *Herring* differs markedly from the concept of attenuation that prevailed in pre-*Hudson* Supreme Court jurisprudence. See THOMAS K. CLANCY, *supra* note 20, at §§ 13.3.1.2, 13.3.6.

sionary rule, Roberts seemed to dismiss that notion; instead, he viewed *United States v. Leon*,[73] the genesis of that exception, as follows:

> When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance good faith.[74]

Roberts thereafter expansively reframed exclusionary rule analysis; he asserted that suppression "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct."[75] He later repeated: "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct."[76] He added:

> Judge Friendly wrote that "[t]he 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."[77]

Exclusion—and deterrence—appears justified after *Herring* based on culpability. It does not further that inquiry, the reasoning goes, to label the situation as a "good faith" exception to the exclusionary rule. Thus, Roberts recounted several cases of "intentional" and "flagrant" misconduct, including in *Weeks v. United States*,[78] the case that initially adopted the exclusionary rule, that would support exclusion.[79] Roberts flatly asserted:

> 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,

73. 468 U.S. 897 (1984).

74. *Herring*, 129 S. Ct. at 701. The label "good faith" is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses "expressly and exclusively on the objective reasonableness of an officer's conduct, not on his or her subjective 'good faith' (or 'bad faith')." People v. Machupa, 872 P.2d 114, 115 n.1 (Cal. 1994). *See also Leon*, 468 U.S. at 918 ("[The Court has] frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment."). However, labeling the officer's conduct as "objectively reasonable" has also been criticized as misleading. For example, Justice Stevens has taken issue with the Court's characterization of the police's conduct as being objectively reasonable, even if they have not complied with the Fourth Amendment, because "when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution." *Id.* at 975 (Stevens, J., dissenting).

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

76. *Id.* at 701.

77. *Id.* at 702 (quoting *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (footnotes omitted)).

78. 232 U.S. 383 (1914).

79. 129 S. Ct. at 702.

> reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.[80]

The Chief Justice emphasized that negligence is simply not worth the costs of exclusion.[81] He ended the majority opinion by quoting one of the more famous statements in opposition to the adoption of the exclusionary rule and added:

> [W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered."[82]

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented.[83] Justice Ginsburg certainly did not view the *Herring* decision as narrow.[84] She replied with a broad defense of the rule, which is notable for the fact that, for the first time in decades, a member of the Court has clearly suggested that the exclusionary rule may be constitutionally based.[85] She

80. *Id.* at 702. Roberts maintained that recordkeeping errors by the police are not immune from the exclusionary rule but "the conduct at issue was not so objectively culpable as to require exclusion." *Id.* at 704. He noted: "If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation." *Id.* at 703.

81. *Id.* at 702 n.4. Despite all of the Court's references to apparently subjective states of mind, Roberts added a confusing twist: all of these inquiries are objective ones. He emphasized that "the pertinent analysis of deterrence and culpability is objective, not an 'inquiry into the subjective awareness of arresting officers[.]'" *Id.* at 703. Factors in making that determination include a "particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent[.]" *Id.*

82. *Herring*, 129 S. Ct. at 704 (quoting People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

83. Justice Breyer, in a separate dissent joined by Justice Souter, applied a traditional good faith analysis and concluded that it should not apply in *Herring*. He added that negligent record keeping errors were susceptible to deterrence through application of the exclusionary rule. *Id.* at 710-711.

84. As she noted, the Court had cited a view the exclusionary rule "famously held by renowned jurists Henry J. Friendly and Benjamin Nathan Cardozo." *Id.* at 706–07. Anyone familiar with the history of the exclusionary rule debate knows that those two jurists are frequently relied on by opponents of the rule.

85. Ginsburg stated:

> Others have described "a more majestic conception" of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental "right of the people to be secure in their persons, houses, papers, and effects," the Amendment "is a constraint on the power of the sovereign, not merely on some of its agents." I share that vision of the Amendment.
>
> The exclusionary rule is "a remedy necessary to ensure that" the Fourth Amendment's prohibitions "are observed in fact." The rule's service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.
>
> Beyond doubt, a main objective of the rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." But the rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless be-

addressed what she perceived as the Court's creation of a system of exclusion based on distinctions between reckless or intentional actions on the one hand and mere negligence on the other; Ginsburg argued that the rule was also justified when the police are negligent. She believed that the mistake in *Herring* justified its application[86] and concluded:

> Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule.[87]

My purpose here is not to argue the merits of *Herring* but simply to predict that, if its broader implications are realized, Fourth Amendment litigation will change to one focused primarily on the culpability of the government agent and, often, the merits of the Fourth Amendment claim will not have to be decided. The inquiry after *Herring* might become a quest to ascertain police culpability: was there intentional misconduct; reckless misconduct; a pattern of recurring negligence; or mere negligence? "Mere negligence" would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression. For example, a police officer—instead of relying on information from other officers (as in *Herring*)—may believe that her actions are reasonable based on her own investigation, even though the actions do not comply with the Fourth Amendment.[88] Based on a broad reading of *Herring*, and consistent with *Pearson*, a court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, there would be little reason to review such a case because it can always be said: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.

CONCLUSION

As someone who has devoted much of his career to the Fourth Amendment (and one who believes in its fundamental importance to individual liberty and security), the predictions made in this article are at best discouraging. A grim view of the near future is presented by the combination of a lack of interest in the area by members of the current Court, an

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havior, thus minimizing the risk of seriously undermining popular trust in government." *Id.* at 707 (citations omitted).

86. *Id.* at 708.

87. *Id.* at 710.

88. *See, e.g.*, Moore v. State, 986 So. 2d 928, 934–35 (Miss. 2008) (collecting cases and finding that, when a police officer, under a reasonable mistake of law, believed that there is probable cause to make a traffic stop, the stop is valid, even though the vehicle did not violate the law).

expansion of reliance on qualified immunity analysis in civil cases to avoid the merits of the claim, and culpability limitations on the application of the exclusionary rule in criminal cases.

Despite this near term outlook, I am confident that a brighter day will come. It may not be a bad thing to pause to let new voices develop with new insights, to let social and technological change occur, and to later re-examine the fundamental purpose of the Amendment and its role in protecting the security of Americans. The twentieth century produced a continual rebalancing of the Fourth Amendment's promise of protecting individual liberty while seeking to permit reasonable governmental intrusions. For example, beginning at least with *Weeks v. United States* in 1914, and ending with *United States v. Calandra*[89] in 1974, the exclusionary rule was thought to be constitutionally based. As early as 1949, Justice Rutledge said it was too late to question that basis.[90] Since 1974, the Court has taken the opposing view. Although there are no prospects that the Court in the near future will change its view again, what may prove as equally false as Rutledge's observations are the ready assurances that the rule is not constitutionally mandated or broadly available.[91] Moreover, given the Court's approach to the Fourth Amendment in the past several decades and the lack of strong proponents of individual rights on the Court, it is not necessarily a bad thing if it reviews few cases.

As Thoreau once said: "I wish to make an extreme statement, if so I make an emphatic one."[92] This is to say that the title of this article is overstated: the Amendment will not be "irrelevant." It applies to such a broad range of governmental actions and is too often implicated for such a claim to be accurate. Nonetheless, in the short term, its substantial irrelevance in Supreme Court jurisprudence appears to be at hand.

89. 414 U.S. 338 (1974).

90. *See* Wolf v. Colorado, 338 U.S. 25, 48 (1949) (Rutledge, J., dissenting) ("The view that the Fourth Amendment itself forbids the introduction of evidence illegally obtained in federal prosecutions is one of long standing and firmly established. It is too late in my judgment to question it now."); *see generally* Morgan Cloud, *Rights Without Remedies: The Court That Cried "Wolf"*, 77 MISS. L.J. 467 (2007) (discussing evolution of the exclusionary rule).

91. *Cf.* United States v. Janis, 428 U.S. 433, 446 (1976) (noting that the "debate" within the Court concerning the rule has always been a warm one and "the evolution of the exclusionary rule has been marked by sharp divisions in the Court.").

92. HENRY DAVID THOREAU, WALKING 7 (WLC ed. 2009).