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Constitutional Culpability: Questioning the New Exclusionary Rules

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CONSTITUTIONAL CULPABILITY: QUESTIONING THE NEW EXCLUSIONARY RULES

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Abstract

This Article addresses the questions left unanswered by the Supreme Court's recent exclusionary rule cases. The *Hudson-Herring-Davis* trilogy presents a new and largely unexamined doctrinal landscape for Fourth Amendment suppression hearings. Courts, litigators, and scholars are only now assessing what has changed on the ground in trial practice. Once an automatic remedy for any constitutional violation, the exclusionary rule now necessitates a separate and more searching analysis. Rights and remedies have been decoupled, such that a clear Fourth Amendment constitutional violation may not lead to the exclusion of evidence. Instead, it now leads to an examination of the conduct of the law enforcement officer—conduct that if not sufficiently "culpable" does not require exclusion. This Article analyzes the doctrinal moves of a Supreme Court focused on constitutional culpability and raises questions about the evolving doctrine's implication for trial practice. The Article then suggests several responses for lawyers and courts approaching this new reality.

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> [I]f the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule.[1]

INTRODUCTION

The Supreme Court has recently directed a sustained legal assault against the exclusionary rule.[2] First, in *Hudson v. Michigan*,[3] the Court

1. Davis v. United States, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting).
2. *See id.* at 2423–24 (holding that the exclusionary rule does not apply when searches

declared that the exclusionary rule never applies to Fourth Amendment knock-and-announce violations.[4] Then, in *United States v. Herring*[5] and *Davis v. United States*,[6] the Court delivered more internally damaging doctrinal blows, developing a new theory of exclusion based on considerations of culpability.[7] The exclusionary rule—once an automatic remedy for constitutional violations—now requires a separate and more searching analysis.[8] Rights and remedies have been decoupled such that a clear Fourth Amendment violation may not lead to the exclusion of evidence.[9] Instead, a clear Fourth Amendment violation now leads to an examination of the conduct of the law enforcement officer—conduct that does not require exclusion if it is not sufficiently "culpable."[10] As the Supreme Court reasoned in *Herring*:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is

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are conducted in objectively reasonable reliance on binding precedent); Herring v. United States, 129 S. Ct. 695, 698 (2009) (noting that suppression is not an automatic consequence of a Fourth Amendment violation); Hudson v. Michigan, 547 U.S. 586, 591 (2006) (declaring that the suppression of evidence "has always been our last resort, not our first impulse" and that the Court has long since rejected the broad application of the exclusionary rule).

3. *Hudson*, 547 U.S. at 599.

4. *See id*. at 592, 599.

5. *See Herring*, 129 S. Ct. at 700–02 (discussing the underlying principles of the Court's precedent that serve to constrain the application of the exclusionary rule).

6. *See Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting) (warning that the majority's approach threatens to erode the exclusionary rule).

7. David A. Moran, *Hanging on by a Thread: The Exclusionary Rule (Or What's Left of It) Lives for Another Day*, 9 OHIO ST. J. CRIM. L. 363, 380 (2011) ("To use a trite metaphor, the exclusionary rule is on life support. *Davis* confirms that the Court will not overrule *Mapp* anytime soon, but it also confirms that a solid majority of the justices have devised a strategy that eliminates any need to formally abolish the exclusionary rule."); *see also* Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 3 (2012) ("The post-*Herring* decisions of the courts of appeals suggest that the exclusionary rule is not dead but has been significantly limited by *Herring*.").

8. *Compare* Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."), *with Herring*, 129 S. Ct. at 704 ("Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system . . . .").

9. Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 463 (2011) ("Although the result in *Herring v. United States* surprised no one, the sweep of the Supreme Court's opinion was breathtaking. . . . If accepted at face value . . . this and other declarations in the Court's opinion would mark a revolution in Fourth Amendment jurisprudence. Together with the Court's restriction of civil actions, they would leave most violations of the Fourth Amendment without a remedy.").

10. *Herring*, 129 S. Ct. at 701 (citing United States v. Leon, 468 U.S. 897, 911 (1984)).

> 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.[11]

Under this reasoning, in any suppression hearing a court must now examine the objective culpability of actors involved to determine the magnitude of the constitutional wrong.[12] In other words, courts must now address the constitutional blame of the wrongful government actors before they exclude evidence recovered by those actors.

This is new territory for lawyers and courts accustomed to an automatic linkage between constitutional wrongs and constitutional remedies.[13] Does this new focus on deliberateness mean that the particular officer's knowledge, intent, training, oversight, or past constitutional errors are now relevant to suppression?[14] How can litigants prove or defend against systemic errors without extensive discovery, expert witnesses, and mini-hearings on training and best practices?[15] Does this mean that the police officer and police department must defend or deny their personal and professional intent to violate a constitutional right in each suppression hearing?[16] These questions open up unexplored territory for judges seeking to understand the Supreme Court's new standard for exclusion and require lawyers to make new tactical choices in suppression hearings.

This Article is written in the aftermath of what legal scholars have recognized as a significantly disfigured exclusionary remedy.[17] The *Hudson-Herring-Davis* trilogy presents a new and largely unexamined doctrinal landscape for Fourth Amendment suppression hearings.[18]

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11. *Id.* at 702.

12. *Id.* at 701.

13. *See* Arizona v. Evans, 514 U.S. 1, 13 (1995) (describing how the identification of a Fourth Amendment violation is no longer synonymous with the application of the exclusionary rule); *cf.* Illinois v. Gates, 462 U.S. 213, 254 (1983) ("The exclusionary rule is a remedy adopted by this Court to effectuate the Fourth Amendment right of citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .' Although early opinions suggested that the Constitution required exclusion of all illegally obtained evidence, the exclusionary rule 'has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.'" (quoting Stone v. Powell, 428 U.S. 465, 482, 486 (1976))).

14. *See infra* Subsections III.B.2–4.

15. *See infra* Subsections III.B.6–7.

16. *See infra* Subsections III.B.2–3.

17. *See, e.g.*, Bradley, *supra* note 7, at 2; Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 787 (2009); Jennifer E. Laurin, *Trawling For* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 727 (2011).

18. *See infra* Part II.

Courts, litigators, and scholars are only now assessing what has changed on the ground in trial practice.[19] The next few years may well determine whether the exclusionary rule, as understood since *Mapp v. Ohio*, still exists, or whether it has been replaced by a much more narrow and restrictive rule.[20] The contested lines for the exclusionary rule's future have been drawn, but neither side has yet finalized the shape of the remedy—a picture that will be developed only through lower court litigation.

This Article approaches the Roberts Court's exclusionary rule reasoning on its own terms. It analyzes the doctrinal moves of a Supreme Court focused on culpability and raises questions about the evolving doctrine's implication for trial practice. The Article then suggests several responses for lawyers and courts approaching this new reality. It argues that the Supreme Court failed to consider the practical consequences of its holdings, and this failure now opens new avenues for defense counsel to exploit an otherwise significant limitation of the exclusionary doctrine. In addition, the most recent exclusionary rule cases create new concerns for prosecutors who seek to rely on evidence tainted by constitutional error.

This Article arises as part of a larger move toward "grounded scholarship," a developing movement to make legal scholarship more relevant and useful for courts and practitioners.[21] In response to growing criticism that the divide between the legal academy and legal practice has widened, this work seeks to translate constitutional theory into practical considerations useful for lawyers and courts.[22] While much

19. *See supra* note 17.

20. Mapp v. Ohio, 367 U.S. 643, 660 (1961); LaFave, *supra* note 17, at 787.

21. *See 2013 AALS Midyear Meeting*, ASS'N. AM. L. SCH. 1, 7 (last visited Mar. 28, 2014), http://aals.org/midyear2013/AALS_Midyear_2013.pdf (discussing a panel highlighting "The Competitive Advantage of Grounded Scholarship" to help bridge the gap between the work of scholars and practitioners).

22. Chief Justice John Roberts spoke about the disconnect between the legal profession and the legal academy in a speech to the Fourth Circuit Judicial Conference in June 2011, stating: "Pick up a copy of any law review that you see, . . . and the first article is likely to be . . . the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." Brent Newton, *Scholar's Highlight: Law Review Articles in the Eyes of the Justices*, SCOTUSBLOG (Apr. 30, 2012, 12:15 PM), http://www.scotusblog.com/2012/04/scholar%E2%80%99s-highlight-law-review-articles-in-the-eyes-of-the-justices; *see, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992); Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 399–400 (2012); Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 113–20 (2010).

legal scholarship is useful, relevant, and necessary for practice,[23] the shift is in the intentionality of translating legal theory into practical trial strategies.

Part I of this Article examines the recent exclusionary rule decisions of the Supreme Court under Chief Justice John Roberts. Beginning with Justice Antonin Scalia's broadside against the exclusionary rule in *Hudson*, and continuing with more restrained attacks in *Herring* and *Davis*, the Supreme Court has redefined the purpose and practice of exclusion.[24] The Court has both decoupled the right from the remedy and altered the underlying logic of the rule.

Part II questions the doctrinal consequences of this redefined exclusionary rule. The new culpability-focused standard of exclusion shifts the analysis to the investigating officer or police department.[25] Deliberate, reckless, or grossly negligent wrongdoing by that officer or the police department will lead to suppression.[26] Merely negligent constitutional wrongdoing, however, is no longer sufficient to exclude evidence.[27] This determination of "constitutional culpability" will apply to hundreds of thousands of police arrests and prosecutions every year. In each suppression hearing, the court must now make a culpability determination, which considers the actions, knowledge, training, and intent of the participating officers.[28] Part II also addresses the Court's language and logic as well as its adoption of legal terminology from unrelated criminal and civil contexts. Criminal law regularly refers to culpability with the same language the Supreme Court chose in *Davis* and *Herring*. *Deliberate*, *reckless*, and *grossly negligent* (meaning criminally negligent) are well-established legal concepts.[29] Similarly,

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23. *See generally* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 66–67 (2006) (discussing benefits of legal theory in relation to legal practice); Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995, 1016–17 (2012) (finding that the Court uses legal scholarship "rather a lot" despite claims by judges that legal scholarship is irrelevant to the bench); David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1359–64 (2011) (noting that empirical data gathered over fifty-nine years suggest an upward trend in federal circuit court opinions citing legal scholarship, contradicting claims that there has been a decline in the use of legal scholarship by courts).

24. *See infra* Part I.

25. *See infra* Part II.

26. Herring v. United States, 555 U.S. 135, 144 (2009).

27. *See* Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011).

28. Part III describes what this hearing might look like.

29. *See, e.g.*, Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 955, 956–59 (2000) (discussing the *mens rea* term "recklessness" and the different interpretations of the word in the criminal law culpability hierarchy); *see also infra* Section II.B (discussing the term in both the civil and criminal law context).

civil law also differentiates between deliberate, reckless, and grossly negligent behavior for tort liability.[30] Adapting these existing culpability standards to the exclusionary rule may provide helpful guidance to courts addressing the issue. However, it will also alter the existing practice for exclusionary rule litigation, opening up new, previously forbidden avenues of inquiry in exclusionary rule determinations.

Part III examines the practical, future application of the Supreme Court's recent doctrinal shift. It begins by looking at the tactical choices defense counsel and prosecutors face when required to apply the Supreme Court's recent rulings. From one perspective, much of the Court's expansive language that limits exclusion is dicta, unnecessary to the holdings of the Court's decisions. Defense lawyers can attempt to avoid the consequences of the Court's reasoning by arguing for a limited interpretation of the cases. From another perspective, however, the landscape has dramatically changed. Defense lawyers have new avenues for cross-examination, expert testimony, legal argument, and remedies based on the unintended consequences of the Supreme Court's decisions. Prosecutors, in turn, must defend against expanded discovery requests and arguments that address individual and department-wide culpability. These new avenues will place additional burdens on trial courts, essentially adding a second level of analysis to the typical suppression hearing.

The Conclusion predicts how courts will adapt to this new exclusionary rule reality. While the Supreme Court did not appear to consider the new exclusionary rule's effect at the trial level, this Article concludes that it will have a significant impact.

I. THE ROBERTS COURT'S EXCLUSIONARY RULE DOCTRINE

A new lawyer considering the exclusionary rule for the first time would read the recent majority opinions of the Supreme Court as holding two things: First, the exclusionary rule's "sole purpose . . . is to deter future Fourth Amendment violations."[31] Second, the deterrent benefit of exclusion turns on the culpability of the officers or department, and only when police exhibit "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights" does the deterrent value outweigh the costs.[32]

30. *See, e.g.*, Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 483 (1992) (defining gross negligence and explaining how the term is sometimes used interchangeably with recklessness in tort law); *see also infra* Section II.B (discussing the term's varying levels of civil law culpability).

31. *Davis*, 131 S. Ct. at 2426; *accord* Herring v. United States, 129 S. Ct. 695, 700 (2009).

32. *Davis*, 131 S. Ct. at 2427 (internal quotation marks omitted); *accord Herring*, 129 S. Ct. at 702.

Unencumbered by history or the doctrinal currents swirling around that language, the sweeping assertions of purpose and justification for the rule appear forceful, if not exactly clear.[33] Yet, as is the case with most constitutional tensions, the language requires some unpacking. This Part describes the century-long trajectory of the exclusionary rule doctrine with a focus on the Court's decisions under Chief Justice John Roberts.

A. *A Brief History of the Modern Exclusionary Rule*

In its modern form, the exclusionary rule was first applied to federal Fourth Amendment violations in the 1914 case *Weeks v. United States*.[34] In 1961, the Supreme Court applied the rule to state action through the Fourteenth Amendment in *Mapp v. Ohio*.[35] While some commentators have located exclusion as a remedy in cases from the Founding era,[36] most jurists and scholars understand the exclusionary rule to be a judicially created response to unconstitutional action.[37] For decades following *Mapp*, the Supreme Court approached the exclusionary rule as a necessary and constitutionally connected remedy for a constitutional wrong.[38] Until *Hudson v. Michigan*, Supreme Court opinions assumed with little difficulty an intrinsic link between the exclusionary rule and unconstitutional action, without any separation of rights and remedies.[39]

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33. *See generally* George M. Dery, III, *"This Bitter Pill": The Supreme Court's Distaste for the Exclusionary Rule in* Davis v. United States *Makes Evidence Suppression Impossible to Swallow*, 23 GEO. MASON U. C.R. L.J. 1, 11–13, 19–27 (2012) (discussing the *Davis* Court's extensive "attack" on the exclusionary rule as a judicially created exception, blurring the line between Fourth Amendment violations by police officers and the corresponding remedy for those charged); Derik T. Fettig, *When "Good Faith" Makes Good Sense: Applying* Leon*'s Exception to the Exclusionary Rule to the Government's Reasonable Reliance on Title III Wiretap Orders*, 49 HARV. J. ON LEGIS. 373, 375–84 (2012) (discussing the lack of clarity in the Court's application of the exclusionary rule's good faith exception in wiretap orders); Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 214–17 (2012) (discussing the imprecision of the exclusionary rule as it developed over time).

34. Weeks v. United States, 232 U.S. 383, 398 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

35. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

36. *See* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 19–20 (2009).

37. Arizona v. Evans, 514 U.S. 1, 10 (1995) ("The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.").

38. *See* United States v. Jeffers, 342 U.S. 48, 50–51 (1951); McDonald v. United States, 335 U.S. 451, 453 (1948); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); *Weeks*, 232 U.S. at 398.

39. *See* 547 U.S. 586, 613 (2006) (Breyer, J., dissenting) ("The Court has decided more than 300 Fourth Amendment cases since *Weeks*. The Court has found constitutional violations in

Conservative scholars and dissenting members of the judiciary did not allow this elevation of a particular remedy for a constitutional wrong to go unnoticed.[40] Prominent voices such as Justice Benjamin Cardozo and Judge Fred Friendly criticized the exclusionary rule. They argued that the costs of exclusion far outweighed the benefits of constitutional enforcement.[41] Government litigants worked to restrict the automatic application of the exclusionary remedy almost since its creation.[42] Judges, critical of its use, have repeatedly echoed the concern that it makes little sense that "[t]he criminal [should] go free because the constable has blundered."[43]

Most notably, a series of exceptions to the application of the exclusionary rule developed. These exceptions include now familiar doctrines such as the "inevitable discovery exception,"[44] the "good faith exception,"[45] and the attenuation exception.[46] In addition, the Supreme

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nearly a third of them. . . . But in every case involving evidence seized during an illegal search of a home (federally since *Weeks*, nationally since *Mapp*), the Court . . . has either explicitly or implicitly upheld (or required) the suppression of the evidence at trial. In not one of those cases did the Court 'questio[n], in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the State's case' in a criminal trial." (alteration in original) (citation omitted) (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978))); *supra* note 38.

40. *See* People v. Defore, 150 N.E. 585, 586–88 (N.Y. 1926); *see also* Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 930, 949 (1965) (noting that the Court's exclusion remedy is "only a remedy in aid of a right; no one would suggest that the police may engage in unbridled searches if they will dispense with use of the provable fruits").

41. In *Defore*, Justice Cardozo insisted that the court should "not subject society to the[] dangers" of letting "[t]he criminal . . . go free because the constable has blundered." 150 N.E. at 587–88; *see also* Friendly, *supra* note 40, at 953 ("[A] slight and unintentional miscalculation by the police" should not result in a "dangerous criminal [going] free.").

42. *See* Laurin, *supra* note 17, at 694 ("In 1981, Attorney General William French Smith's Task Force on Violent Crime urged that the exclusionary rule be reformed to remove from its ambit 'evidence . . . obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution,' and that this position be advanced by Department of Justice lawyers in future criminal litigation." (alteration in original) (quoting U.S. DEP'T OF JUSTICE, ATTORNEY GENERALS TASK FORCE ON VIOLENT CRIME, FINAL REPORT 55 (1981))); U.S. DEP'T OF JUSTICE, *supra*, ("We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this [good faith exception to the exclusionary] rule in appropriate court proceedings, or support federal legislation establishing this rule, or both."); *cf.* Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects in the Courtroom*, 78 MARQ. L. REV. 45, 48–49 (1994) (describing a series of cases decided by the Supreme Court after *Mapp* that precluded the application of the exclusionary rule where exclusion would not deter Fourth Amendment violations).

43. Elkins v. United States, 364 U.S. 206, 216 (1960) (quoting *Defore*, 150 N.E. at 587).

44. *See* Nix v. Williams, 467 U.S. 431, 444 (1984) (finding an exception to the exclusionary rule if the information would have been ultimately discovered by lawful means).

45. *See* United States. v. Leon, 468 U.S. 897, 913 (1984) (reasoning that a court should

Court exempted from exclusionary remedies certain categories of noncriminal cases involving civil tax proceedings,[47] habeas corpus proceedings,[48] and probation or parole violation hearings.[49] While one could argue that these cases laid the groundwork for a broader limitation of the doctrine, most observers instead consider these decisions to be prudential responses, counteracting a perceived windfall for the criminal defendant.[50] It is within this doctrinal framework that the Supreme Court under Chief Justice Roberts began its challenge to the continued use of the exclusionary rule.

B. Hudson-Herring-Davis

This section discusses the *Hudson-Herring-Davis* trilogy, a series of cases that taken together sets out a new framework for the exclusionary rule doctrine.[51]

1. *Hudson v. Michigan*

Hudson v. Michigan presented the simple issue of whether a conceded knock-and-announce violation should result in the exclusion

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not suppress evidence when an officer reasonably relies on a warrant issued by a magistrate).

46. *See* Wong Sun v. United States, 371 U.S. 471, 491 (1963) (finding an exception to the exclusionary rule if the evidence obtained is so attenuated from the constitutional violation that the taint of that violation has dissipated); *see also* Brown v. Illinois, 422 U.S. 590, 604–05 (1975) (declining to overrule *Wong Sun*).

47. *See* United States v. Janis, 428 U.S. 433, 447, 454 (1976) (declining to extend the exclusionary rule to civil tax proceedings because the deterrent effect would be small).

48. *See* Stone v. Powell, 428 U.S. 465, 481–82 (1976) ("[T]he Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.").

49. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (holding that the "exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights").

50. *See, e.g.*, James J. Tomkovicz, Davis v. United States*: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 395 (2011) ("According to the Court, the exclusionary rule is designed to grant defendants an evidentiary 'windfall' for the limited purpose of deterring 'culpable' law enforcement violations of the guarantee against unreasonable searches and seizures.").

51. *See* George M. Dery, III, *Good Enough for Government Work: The Court's Dangerous Decision in* Herring v. United States*, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 GEO. MASON U. C.R. L.J. 1, 27 (2009) ("Not only did *Herring* change the focus of analysis from identity of the wrongdoer to the level of government culpability, but it also lowered the standards that apply to the wrongdoing. With the spotlight on law enforcement rather than the judiciary, the Court no longer found careless mistakes to be a problem. In fact, the Court explicitly rejected the contention that 'negligence automatically triggers suppression,' ruling instead that when 'police mistakes are the result of negligence such as described here,' any 'marginal deterrence' from exclusion simply 'does not 'pay its way.'" (footnote omitted) (quoting Herring v. United States, 129 S. Ct. 695, 704 (2009) and United States. v. Leon, 468 U.S. 897, 907–08 n.6 (1984))).

of evidence recovered.[52] The facts were equally straightforward. Police obtained a valid warrant to search Booker Hudson's house.[53] Instead of waiting the appropriate amount of time after knocking and announcing, police entered the house and recovered narcotics and a firearm.[54] Hudson claimed that the evidence should be suppressed based on a clear violation of the Fourth Amendment.[55] The Supreme Court, with Justice Scalia writing for the majority, disagreed.[56] In a 5–4 decision, the Court held that as a categorical matter, exclusion is never the appropriate remedy for a knock-and-announce violation.[57]

The facts and legal issue in *Hudson* were simple, but the Court's reasoning was more complex. Justice Scalia dramatically reversed course on decades of exclusionary rule precedent and presented a new argument against exclusion. First, Justice Scalia reasoned that there was no "but-for" causal connection between the constitutional violation and the acquisition of evidence in this case.[58] Here, the constitutional violation of failing to knock and announce was not the reason the evidence was recovered.[59] The evidence was obtained pursuant to a valid search warrant.[60] In other words, courts could sever the method of the search (which might have been a constitutional violation), from the justification for the search (which was constitutionally valid).

As a secondary argument, Justice Scalia reasoned that even if one believed there was but-for causality in the case, the harm was attenuated from the constitutional violation.[61] The Court thus crafted a new concept of attenuation—one that considers as its determining factor which interests are protected by the constitutional provision. "Attenuation also 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."[62]

In the knock-and-announce context, this meant looking at what interests the knock-and-announce doctrine protected. The Court identified three interests: "the protection of human life and limb," "the protection of property," and personal "privacy and dignity."[63] But the

52. Hudson v. Michigan, 547 U.S. 586, 588 (2006).
53. *Id*.
54. *Id*.
55. *Id.*
56. *Id.* at 594.
57. *Id.* at 587, 594.
58. *Id.* at 592.
59. *Id.*
60. *Id.* at 588.
61. *Id.* at 592–93.
62. *Id.* at 593.
63. *Id.* at 594.

Court argued that those interests were independent of, and thus not relevant to, the interests governing the seizure of evidence pursuant to a warrant.[64] The Court has not further refined this novel attenuation argument based on "constitutional interests."[65]

Finally, Justice Scalia argued that even if there was but-for causality and even if the harm was not attenuated, courts must still conduct a cost–benefit analysis before they exclude evidence.[66] Weighing the cost to the community of letting a criminal go free, the cost to the court system in terms of additional knock-and-announce cases, and the cost to police officers of adding to an already dangerous search situation, the Supreme Court had little difficulty finding the benefits of knocking and announcing to not outweigh the cost of exclusion.[67] Concluding that there was almost no deterrence value in requiring exclusion for knock-and-announce violations, Justice Scalia suggested relying on tort suits and police professionalism to replace the accountability function of the exclusionary rule.[68]

The tenor and scope of the *Hudson* opinion was so wide ranging that Justice Anthony Kennedy wrote a separate concurrence to explain that the majority had not just killed the exclusionary rule.[69]

> The Court's decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law's concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's 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.[70]

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64. *Id.* ("What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.").

65. The *Hudson* Court's new conception of attenuation was not central to the reasoning of *Herring* or *Davis*. *See* Davis v. United States, 131 S. Ct. 2419, 2428–29 (2011) (holding that "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent [that was later reversed] is not subject to the exclusionary rule" because applying the rule in that context would have no deterrent value); Herring v. United States, 555 U.S. 135, 146–47 (2009) (holding that the exclusionary rule did not apply where the defendant's arrest resulted from an officer's reasonable reliance on a police database error because the error was isolated, not systematic, so the marginal deterrent effect from applying rule would be outweighed by social costs).

66. *Hudson*, 547 U.S. at 594–99.

67. *Id.*

68. *Id.* at 596–99.

69. *Id.* at 602–03 (Kennedy, J., concurring).

70. *Id.*

As we will see, the specific context of knock-and-announce decisions did not end the dismantling of the exclusionary rule, but Justice Kennedy's concurrence has had a significant impact in moderating the Court's approach.[71]

2. *Herring v. United States*

In *Herring v. United States*, the Supreme Court considered whether a police clerical mistake that resulted in the unconstitutional arrest of the defendant warranted exclusion of the evidence found incident to that arrest.[72] The facts of *Herring* present an interesting backstory to evaluate a discussion of police culpability.

Bennie Herring, the defendant in the case, had complained to local prosecuting authorities that a particular police officer—Investigator Mark Anderson—should be investigated for the murder of a local teenager.[73] Investigator Anderson, justifiably concerned about such an accusation, went to Herring's home to discuss the matter with him.[74] On the day in question, Investigator Anderson saw Herring near the local police station and sought reason to detain him.[75] Investigator Anderson first called the local sheriff's office to inquire if there were any outstanding arrest warrants for Herring.[76] Finding none, Investigator Anderson asked the sheriff's office clerk to check surrounding jurisdictions.[77] The neighboring computer system identified that a warrant was active for Herring, and Investigator Anderson immediately arrested him.[78] During a search incident to Herring's arrest, Anderson recovered narcotics and a gun.[79] Fifteen minutes later, the clerk

71. *See* David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005–2006 CATO SUP. CT. REV. 283, 308–09 (suggesting that *Hudson* could portend the impending death of the exclusionary rule, but that Justice Kennedy's concurrence in *Hudson* has left the rest of the divided Court uncertain of how he will vote if the Court grants certiorari on another case involving the exclusionary rule); David A. Moran, *Waiting for the Other Shoe:* Hudson *and the Precarious State of* Mapp, 93 IOWA L. REV. 1725, 1734–36 (2008) (describing how the uncertainty created by Justice Kennedy's concurring opinion in *Hudson* caused the Supreme Court "to lose its appetite" for Fourth Amendment cases and start to deny certiorari petitions challenging *Mapp v. Ohio*); James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1832–33, 1848–49, 1880–81 (2008) (recommending that lower courts apply *Hudson* cautiously because Justice Kennedy's concurrence broke the tie and urged a narrow holding).

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

73. *Id.* at 705 (Ginsburg, J., dissenting).

74. Brief for Petitioner at 4 n.2, Herring v. United States, 129 S. Ct. 695 (2009) (No. 07-513).

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

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

discovered that, in fact, the warrant had been withdrawn and there was no active warrant for Herring's arrest.[80] However, by the time the error was relayed to Investigator Anderson, he had already arrested Herring and recovered the contraband.[81]

As the Eleventh Circuit Court of Appeals established, the arresting officers "were entirely innocent of any wrongdoing or carelessness."[82] Further, the court assumed that the police error of record-keeping was "a negligent failure to act, not a deliberate or tactical choice to act."[83] The court refused to exclude the evidence because the error was only an isolated incidence of negligence and excluding the evidence would have little deterrent value.[84] On that record, the Supreme Court, with Chief Justice Roberts writing for another 5–4 majority, reviewed the applicability of the exclusionary rule to police errors.[85]

Chief Justice Roberts began the opinion by reframing the Court's understanding of the exclusionary rule. He emphasized four points. First, he noted that the exclusionary rule is a "judicially created rule," not a constitutional mandate.[86] Second, he stated that exclusion should be considered the last resort for a remedy.[87] Third, he stated that exclusion is not itself an individual right.[88] And, fourth, he concluded that a finding of exclusion is only appropriate when it would deter future Fourth Amendment violations.[89] This last point then requires a court to balance the costs and benefits of exclusion.[90]

Under this interpretation, the deterrent value of the exclusionary rule turns on the "flagrancy" of police misconduct.[91] The more intentional the constitutional violation, the more likely exclusion will deter future acts.[92] The less culpable the police misconduct, however, the less effective exclusion will be in deterring future violations.[93]

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80. *Id.*

81. *Id.*

82. United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007), *aff'd*, 129 S. Ct. 695 (2009).

83. *Id.*

84. *Id*.

85. *Herring*, 129 S. Ct. at 699–704.

86. *Id.* at 699.

87. *Id.* at 700.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 701.

92. *See id.* ("The extent to which the exclusionary rule is justified by these deterrence principles *varies with the culpability* of the law enforcement conduct." (emphasis added)).

93. *See id.* at 702 ("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

This new standard based on police culpability led the Court to determine that the evidence recovered from Herring need not be suppressed.[94] The clerical error was negligent, apparently isolated, and quickly corrected.[95] While the dissenting Justices offered different frames of analysis and different cost–benefit calculations, the controlling majority (including Justice Kennedy) held that a negligent, attenuated error did not require exclusion of evidence.[96]

3. *Davis v. United States*

The most recent Supreme Court case on the exclusionary rule is *Davis v. United States*.[97] *Davis* involved the question of whether evidence obtained by officers following binding appellate precedent should be excluded, if that precedent was later declared unconstitutional.[98] In *Davis*, the officer had searched a car and recovered contraband in accordance with *New York v. Belton*, a controlling case that was later overturned by *Arizona v. Gant*.[99] The Supreme Court reasoned that the police officer's actions, although later declared unconstitutional, were at the time perfectly legal and quite reasonable.[100] Thus, there was no deterrent value in suppressing evidence recovered from a then-lawful search.[101]

Davis is notable because it wholeheartedly adopted the logic and spirit of *Herring*.[102] Justice Samuel Alito, writing for the majority stated: "The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."[103] Justice Alito then cited *United States v. Leon* and *Herring* to emphasize the new focus on police culpability:

> When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the

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recurring or systemic negligence.").

94. *Id.* at 704.

95. *Id.* at 706 (Ginsburg, J., dissenting).

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

97. Davis v. United States, 131 S. Ct. 2419 (2011).

98. *Id.* at 2423.

99. *Id.* at 2425–26; *see* Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009) (holding that "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle"); New York v. Belton, 453 U.S. 454, 460 (1981) (holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile").

100. *Davis*, 131 S. Ct. at 2434.

101. *Id.*

102. *See, e.g.*, *id.* at 2427–29 (setting forth, and eventually applying, *Herring*'s police culpability analysis).

103. *Id.* at 2426.

> deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force' . . . .[104]

Because *Davis* involved a police officer's reasonable reliance on binding appellate case law, there was no issue of culpability and no reason for exclusion.[105] As the Court reasoned, the "acknowledged absence of police culpability doom[ed] Davis'[s] claim."[106] The question is what this doctrinal shift means in practice to the litigants and judges who must apply the Supreme Court's terminology in suppression hearings.

C. *A New Exclusionary Standard: Culpability-Centered*

The exclusionary rule under the Roberts Court now turns on an analysis of the culpability of the law enforcement agent or agency as a way of evaluating the deterrent value of exclusion. It is purportedly an objective test, as the Court has created the term "objectively culpable" to denote an analysis of objective wrongdoing that is based on an officer's particular knowledge and experience, but not the officer's purely subjective intent.[107]

The focus on levels of culpability as the determining factor for exclusion rests on the Court's belief that misconduct is deterrable only when the misconduct is committed in a deliberate, reckless, grossly negligent, or recurring manner.[108] Thus, these are the only types of conduct that require the extreme remedy of exclusion.[109] In other words, the exclusionary rule will not deter misconduct that is merely negligent or committed in good faith because the wrongdoer does not realize he has committed a wrong.

While questions about the scope and meaning of culpability remain to be explored, the Court reaffirmed that the exclusionary remedy is

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104. *Id.* at 2427–28 (citations omitted) (quoting Herring v. United States, 129 S. Ct. 695, 698, 702 (2009) and United States v. Leon, 468 U.S. 897, 909, 919 (1984)).

105. *See Davis*, 131 S. Ct. at 2423–24.

106. *Id.* at 2428.

107. *See Herring*, 129 S. Ct. at 702–03. *But see* Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 776 (2010) ("[T]he very notion of culpability seems to be a subjective one, and in fact the Court drew a distinction in *Herring* between a 'negligen[t] or innocent mistake' and one that is 'deliberate' or 'knowing[],' a distinction phrased explicitly in subjective terms." (second and third alterations in original) (internal quotation marks omitted)).

108. *Herring*, 129 S. Ct. at 702.

109. *Id.*

inappropriate in several recurring circumstances in which a police officer relies in good faith on information from other sources. Thus, it is clear that a good-faith error in a warrant duly signed by a magistrate judge will not require exclusion.[110] Similarly, a judicial clerk error or police administrative error does not require exclusion.[111] Finally, good faith reliance on legislative decisions or current law does not require exclusion.[112]

While these issues are settled by precedent, courts will likely have to determine whether the exclusionary rule applies when an individual officer makes a mistake based simply on his or her own misjudgment. In that situation, courts will likely find there was a constitutional violation. Under the traditional rules, this constitutional violation would trigger suppression. Under the new exclusionary rules, this violation will only trigger a second-step inquiry into the objective culpability of the police officer or police department. It is this new reality that litigants must consider as they face a culpability-centered exclusionary rule.

II. QUESTIONS ABOUT A CULPABILITY-CENTERED EXCLUSIONARY RULE

Several questions about language immediately arise from the Supreme Court's new culpability-centered standard. First, what did the Court mean by the term objectively culpable and what factors can be considered by courts or established by litigants trying to argue this standard?[113] Second, how should courts define "deliberate," "reckless," "grossly negligent," and "recurring negligence"? These terms have a recognized meaning in civil law contexts such as constitutional tort cases, but it is unclear whether the Supreme Court meant to import these definitions to the exclusionary rule context.[114] Criminal law scholars have also used these terms to distinguish levels of criminal culpability, but it is also unclear whether the Supreme Court meant to adopt those

110. *Leon*, 468 U.S. at 917, 926 (holding the exclusionary rule should not apply when officers reasonably rely on a subsequently invalidated search warrant issued by a detached and neutral magistrate).

111. Arizona v. Evans, 514 U.S. 1, 14–16 (1995) (holding that "[a]pplication of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees" (citing *Leon*, 468 U.S. at 916–22)); *Herring*, 129 S. Ct. at 703 (holding that the exclusionary rule does not apply when the officers rely on an error in a police-operated warrant record system).

112. Illinois v. Krull, 480 U.S. 340, 355–57 (1987) (holding that the exclusionary rule is inapplicable when an officer reasonably relies on a statute subsequently deemed unconstitutional); *see also* Davis v. United States, 131 S. Ct. 2419, 2428 (2011) (noting that the Court in *Krull* "extended the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes").

113. *See infra* Section II.A.

114. *See infra* Section II.B.

criminal law definitions.[115] In a few instances, the Roberts Court substituted "flagrant" for the term "deliberate" when it made analogies to the history of flagrant constitutional abuses in *Weeks*, *Mapp*, and *Silverthorne*.[116] But the Court has offered no clarifying analogies concerning a recklessness standard or gross negligence standard.[117] Finally, in *Hudson*, the Court redefined the concept of attenuation to involve a consideration of the interests behind the constitutional right at issue—a previously unnecessary consideration.[118]

The Court also remained silent about what information trial courts should examine to make these culpability-based determinations. In the civil context, recklessness and negligence presuppose an established standard of care that a particular action can be measured against.[119] In the criminal context, gross negligence is regularly equated with criminal negligence.[120] Further, recurrent negligence requires an understanding of systemic benchmarks against which to compare the particular conduct. While it is clear that the *Hudson-Herring-Davis* trilogy involves a new paradigm, it is not clear how to implement the Supreme Court's new standard.[121] The Court provides no framework from which to judge these familiar terms or standards, which leaves it to trial courts and litigants to choose the appropriate standard. This section questions the Supreme Court's choice of language in creating a culpability-based exclusionary rule analysis.

A. *Definitional Questions: Objectively Culpable*

In *Herring*, the majority coined the term objectively culpable, which, while taking into account the officer's particular knowledge and experience, is to be evaluated against the "reasonable officer

115. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 705 (1983).

116. *Herring*, 129 S. Ct. at 702 (citing Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)).

117. *See Herring*, 129 S. Ct. at 702–03. The Court suggested that police conduct that is "deliberate, reckless, or grossly neglient" is "sufficiently culpable" to trigger the exclusionary rule, yet the Court did not define those terms separately. *Id.*

118. Hudson v. Michigan, 547 U.S. 586, 593 (2006).

119. *See* Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 68 (2007) ("While 'the term recklessness is not self-defining,' the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" (quoting Farmer v. Brennan, 511 U.S. 825, 836 (1994))); RESTATEMENT (SECOND) OF TORTS § 289, cmt. i (1965) ("The standard to which the actor must conform is that of the reasonably careful person under like circumstances . . . .").

120. *See* BLACK'S LAW DICTIONARY 1134 (9th ed. 2009) (defining "criminal negligence" as "[g]ross negligence so extreme that it is punishable as a crime").

121. *See* Moran, *supra* note 7, at 378 ("Since the discussion of officer culpability in *Herring* and *Davis* was dicta, we do not really know what 'gross negligence' means.").

standard"—namely "whether a reasonably well trained officer would have known that the search was illegal."[122] The Court expressly rejected a "subjective intent" standard,[123] but as Justice Ruth Bader Ginsburg pointed out in dissent: "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."[124] In addition, it is not clear how one is to measure the particular officer's actions against the reasonable officer standard without such an individualized inquiry into the officer's mental state.[125]

Before *Herring*, the Supreme Court had never used the term objectively culpable to determine the extent of exclusion, and, in fact, had never used the term in any prior case for any reason.[126] The meaning of "objectively culpable" is inherently puzzling. Culpability is a familiar term in criminal law.[127] Most criminal laws are predicated on levels of wrongdoing, such that crimes and their punishment vary according to the individual blameworthiness of the offender.[128]

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122. Herring v. United States, 129 S. Ct. 695, 703 (2009) (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)) (internal quotation marks omitted).

123. *See* Alschuler, *supra* note 9, at 485 ("Despite the Court's declaration that its standard was objective, its opinion repeatedly used the term 'good faith.' The Court, however, accompanied its use of this apparently subjective term with an odd and oxymoronic modifier; it spoke of 'objective good faith.' Proof that a particular officer had acted in bad faith appeared to be irrelevant. The test was simply whether a reasonably well trained officer would have known that his search was unlawful."); Laurin, *supra* note 17, at 727 ("On its face, the Court's insistence that the standard it articulates be applied objectively seems nonsensical: Even if the lowest grade of culpability to trigger exclusion, gross negligence, could be assessed solely by reference to objective factors, proof of reckless or deliberate conduct typically requires a subjective inquiry." (footnote omitted)).

124. *Herring*, 129 S. Ct. at 710 n.7 (Ginsburg, J., dissenting).

125. *See* Alschuler, *supra* note 9, at 483 ("Chief Justice Roberts's opinion in *Herring* sent objective and subjective pronouncements flying in all directions. Although the Supreme Court proclaimed unambiguously that its standard was objective, it also unambiguously invited courts to examine the mental states of police officers."); Dery, *supra* note 33, at 26 ("The entire point of assessing a deliberate falsehood is to look inside an individual's mind to see not only what he or she knew but also what he or she meant to make others believe. Such an inquiry outstrips the straightforward assessment of what a reasonable person would do in a particular situation. It leads to questions of intent and motivation of a particular person—an inquiry explicitly rejected by the Court in *Whren*.").

126. *See Herring*, 129 S. Ct. at 703. Chief Justice Roberts's use of the phrase is the only time these words have appeared in a Supreme Court case, prior or even since. The Court in *Davis* chose not to use the standard, so there is still no indication as to what the phrase means beyond how Chief Justice Roberts used it.

127. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 213–90 (8th ed. 2007); CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW 164–65 (15th ed. 1993) ("Reducing it to its simplest terms, a crime consists in the concurrence of prohibited conduct and culpable mental state.").

128. Enmund v. Florida, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree

Intuitively, it makes sense to consider the individual's blameworthiness in determining whether a criminal sanction should be imposed. An act of homicide can be manslaughter or first-degree murder based on the subjective intent of the offender.[129] Similarly, the act of taking property of another may be considered a theft (or no crime at all) depending upon the subjective intent of the actor.[130] The objective act in each remains unchanged, but the societal condemnation changes based on the mental state of the actor.

Civil standards, of course, purport to make this reasonable person-like comparison, but "civil liability," not "culpability," is the preferred term.[131] The Supreme Court has never used the term "civil culpability" because it begins to blur the already well-established lines for criminal blameworthiness and civil fault.[132] While the Court may have intended to import the idea of civil tort liability from qualified immunity cases, the Court did not do so explicitly.[133]

No doubt because of this linguistic confusion, Justice Alito, in adopting the spirit of *Herring*, altered the definition in *Davis*. Justice Alito reframed the test by stating that when "police act with an objectively 'reasonable good faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'"[134] But, how would we know if an officer acted with the

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of [his] criminal culpability' . . . ." (alteration in original) (citation omitted)).

129. For example, the difference in homicide degrees is based on the subjective intent of the actor. *Compare* N.H. REV. STAT. ANN. § 630:1–a (West, Westlaw through ch. 270 of 2013 Reg. Sess.), *with id.* § 630:2. First degree murder requires that the person purposefully cause the death of another whereas manslaughter can be accomplished by recklessness. The difference in punishment is different, in that for first degree murder a person will receive a life sentence with no chance of parole. *See, e.g.*, *id.* § 630:1–a.

130. If one takes a wallet from a table with the specific intent to permanently deprive the owner of their property, it is a crime. If one takes a wallet with the intent of returning it to the lawful owner, it is not a crime. The objective fact of taking the wallet is unchanged. What matters is the subjective reason for taking it.

131. *See In re* Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) (distinguishing between criminal culpability and civil liability).

132. The term "civil culpability" has never been used in any Supreme Court case. *Cf.* Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 419 (2002) (discussing the distinction between civil liability and criminal culpability or blameworthiness).

133. *See* Laurin, *supra* note 17, at 672; *see also* Colin Starger, *Response: Metaphor and Meaning in Trawling for* Herring, 111 COLUM. L. REV. SIDEBAR 109, 109–110 (2011); Robert L. Tsai & Nelson Tebbe, *Notes on Borrowing and Convergence*, 111 COLUM. L. REV. SIDEBAR 140, 142–43 (2011).

134. Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011) (citations omitted) (quoting United States v. Leon, 468 U.S. 897, 908 n.6, 909, 919 (1984) and Herring v. United States, 129 S. Ct. 695, 697 (2009)). The source for this new test is *Herring* and *Leon*, both cases that have nothing to do with the particular officer's individual culpability. This test also runs against prior precedent that did not excuse good-faith errors from constitutional condemnation. Terry v. Ohio,

reasonable good faith belief that his or her conduct was constitutional?[135] The question appears to require considering the officer's knowledge of the law, his intent in applying the law, and the officer's conduct compared to other reasonable officers who might apply the same law.[136] While perhaps appropriate in a civil rights case against a police officer, this additional inquiry could now become part of everyday suppression hearings.[137] Justice Alito's explanation that "[r]esponsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules"[138] only reinforces the idea that inquiry into individual and institutional training and rules may soon be required.[139]

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392 U.S. 1, 22 (1968) ("And simple 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964))).

135. *See, e.g.*, State v. Smith, 807 A.2d 500, 516 (Conn. App. Ct. 2002) ("[A]ny 'objective' test implies the existence of a standard of conduct, and, where the standard is not defined by the generic—a reasonable person—but rather by the specific—a reasonable officer—it is more likely that [Federal Rule of Evidence] 702's line between common and specialized knowledge has been crossed." (alteration in original)). For example, in an excessive force case, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397 (1989).

136. *See Herring*, 129 S. Ct. at 703. This is not a mere adoption of the *Leon* "good faith" test because there is no separate entity (a judicial officer) on which to rely. Instead, Justice Alito seemed to combine the *Herring* "objective culpability" language with *Leon* to apply to police officers. This is a wholly new construction of good faith and one that leaves many questions unanswered.

137. As Part III discusses, this new step raises a series of questions about how to define culpability.

138. *Davis*, 131 S. Ct. at 2429 (quoting Hudson v. Michigan, 547 U.S. 586, 599 (2006)).

139. Part of the difficulty in applying the standard can be attributed to the Supreme Court's manipulation of the idea of deterrence. Specifically, the Supreme Court made an unacknowledged shift from an exclusionary rule focused on general deterrence to an exclusionary rule also focused on specific deterrence. *See* Eugene Milhizer, *The Exclusionary Rule Lottery Revisited*, 59 CATH. U. L. REV. 747, 751 (2010). In both *Herring* and *Davis*, the Court looked to the actions of the particular law enforcement agents and asked whether exclusion would have an effect on their individual actions in the future. *Davis*, 131 S. Ct. at 2427 ("The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue." (alteration in original) (quoting *Herring*, 129 S. Ct. at 701)). This had not been the approach in earlier cases in which the courts eschewed a case-by-case approach to look at broad general deterrence principles. *See* Elkins v. United States, 364 U.S. 206, 217 (1960) (reasoning that the "purpose [of the exclusionary rule] is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

B. *Definitional Questions:* Mens Rea *Terminology*

A related series of questions emerge if we take the new terms of culpability seriously. In both *Herring* and *Davis*, the Supreme Court relied on the language of deliberate, reckless, grossly negligent, and recurring or systemic negligence without providing definitions.[140] As Professor Jennifer Laurin and others demonstrate, these terms find their roots in civil tort liability and qualified immunity cases involving unconstitutional actions of police officers.[141] The "constitutional borrowing" of that legal terminology and application to the exclusionary rule has profound implications.[142] As Professor Laurin argues, the Supreme Court has adopted a language and framework modeled on constitutional tort principles without acknowledging that it is doing so.[143]

While these terms have a logical connection to civil tort liability, they also have meaning in criminal law. As an initial matter, courts will be faced with whether to judge these terms of culpability under a civil or criminal standard. Courts will likely follow the civil model, but an exploration of the different standards offers new insights about how courts may parse a complicated and inconsistently defined set of terms.

1. Deliberate

Deliberate is a familiar term in civil law. Frequently used to describe intentional acts,[144] or to modify a conscious failure to meet a duty (as in "deliberate indifference"),[145] it is a common modifier for willful acts.[146]

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140. *Davis*, 131 S. Ct. at 2472–28 (quoting *Herring*, 129 S. Ct. at 702). In *Davis*, Justice Alito used the term "isolated negligence" as a definition of an action that did not require an exclusion sanction. *Id.* at 2438.

141. *See* Laurin, *supra* note 17, at 727; Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 749–50 (2011) ("*Herring*'s version of the good faith exception threatens to import the 'clearly established law' requirement from habeas and qualified immunity cases into criminal cases.").

142. *See* Laurin, *supra* note 17, at 739–42. *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010) (providing a thorough discussion of constitutional borrowing).

143. Laurin, *supra* note 17, at 727 ("*Herring*'s elevation of culpability as the 'critical' feature of the Court's exclusionary rule inquiry squarely aligns the suppression remedy with the fault-based framework of constitutional torts—in contrast to the norm in criminal procedure remedies.").

144. BLACK'S LAW DICTIONARY 492 (9th ed. 2009) (defining "deliberate" as "[i]ntentional; premeditated; fully considered").

145. *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989) (addressing municipal liability under a failure-to-train theory and concluding that inadequate police training may only serve as the basis for § 1983 liability if the failure to train rises to the level of *deliberate indifference* to the rights of individuals).

146. As one example, in Ohio, deliberate is used as a nonmodifying prefix to intent, resulting in the seemingly redundant term of deliberate intent. *See* OHIO REV. CODE ANN.

Intentional torts reference deliberate actions.[147] Intentional violations of constitutional rights rest on deliberate conduct.[148] Other times, the term deliberate serves to establish fault for other types of constitutional wrongdoing.[149] While varying in the contexts in which it arises, deliberateness generally establishes a willful, intentional act.[150]

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§ 2745.01 (West, Westlaw through 2013 File 59 of 130th Gen. Assemb.). When the Supreme Court of Ohio applied this paradigm to employment tort law, it held that a statutorily required finding of deliberate intent was met if a plaintiff could show the defendant acted with, "'specific intent' to cause an injury to another." Houdek v. ThyssenKrupp Materials N.A., Inc., 983 N.E.2d 1253, 1258 (Ohio 2012). In contrast, the New Jersey Superior Court has used deliberate as a meaningful adjective to describe the gravamen (in this case, the falsification of medical records) of a medical malpractice tort. The court held that "a *deliberate* falsification by a physician of his patient's medical record, particularly when the reason therefor [sic] is to protect his own interests . . . must be regarded as gross malpractice." *In re* Suspension or Revocation of the License of Jascalevich, 442 A.2d 635, 645 (N.J. Super. Ct. App. Div. 1982) (emphasis added). In contrast with the previous example, the New Jersey court's use of deliberate appears to distinguish tortious deliberate falsification from (possibly) benign inadvertent falsification.

147. Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77, 93 n.94 (2003) ("Intentional torts are injuries committed with the purpose to bring about a desired result or a substantial certainty that a desired consequence will occur: 'One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not [privileged].' Battery, assault, false imprisonment, intentional infliction of emotional distress, conversion, trespass to land, and trespass to chattels are examples of intentional torts." (alteration in original) (citation omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 870 (1979)).

148. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) (noting that culpability evincing an intent to injure would "most probably support a substantive due process claim"); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that the Eighth Amendment is violated by "deliberate indifference to serious medical needs of prisoners"); Sanders v. English, 950 F.2d 1152, 1154, 1162, 1164 (5th Cir. 1992) (reversing summary judgment because a reasonable jury could find that a police officer may be liable under § 1983 after he deliberately ignored exonerating information that indicated he had arrested the wrong person); Whitley v. Seibel, 613 F.2d 682, 686 (7th Cir. 1980) (concluding that while negligent acts in an investigation do not violate due process, intentional acts may).

149. *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988) (holding that to make a successful due process violation claim against the state, a defendant must show that the state acted in bad faith by failing to preserve evidence); United States v. Henry, 447 U.S. 264, 274–75 (1980) ("This is not a case where, in Justice Cardozo's words, 'the constable . . . blundered,' . . . rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel." (citations omitted)); Brewer v. Williams, 430 U.S. 387, 414 n.2 (1977) (Stevens, J., concurring) ("Here, we have a Sixth Amendment case and also one in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement."); Massiah v. United States, 377 U.S. 201, 206 (1964) ("We hold that the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.").

150. *See, e.g.*, OKLA. STAT. ANN. tit. 85, § 302 (West, Westlaw through 1st Reg. Sess. of 54th Legis. 2013) (stating that an intentional tort "exist[s] only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury"); Nabozny v.

Deliberate action in a criminal law framework can best be equated with intentional, including purposeful and knowing, actions.[151] In some criminal contexts, deliberate is more considered than intentional, as deliberate involves a weighing of choices and a decision.[152] State criminal statutes emphasize the willful, intentional nature of the wrongdoing.[153] The Model Penal Code term "purposely" similarly speaks to conscious intention[154] or knowing action.[155] While the language of state statutes differs, the general view is that a conviction based on deliberate actions requires proof of a subjective intent to commit the wrongful act.

In terms of applying the deliberate standard to the exclusionary rule, a deliberate violation of a constitutional right would require purposeful, considered action to violate the Constitution.[156] For example, a law

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Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975) ("[A] player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player . . . .").

151. *See, e.g.*, Deibler v. State, 776 A.2d 657, 662 (Md. 2001) (noting that "[t]he term willfully in criminal statutes has been said . . . to characterize an act done with deliberate intention for which there is no reasonable excuse" (alteration in original) (quoting Ewell v. State, 114 A.2d 66, 72 (Md. 1955)) (internal quotation marks omitted)).

152. *See, e.g.*, ROY MORELAND, THE LAW OF HOMICIDE 208 (1952) ("[A] 'deliberate' killing is a more opprobrious offense than an 'intentional' one since it is a weighed act."); 12 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 392 (Jeffrey Lehman & Shirelle Phelps eds., 2d ed. 2005) ("When used to describe a crime, deliberate denotes that the perpetrator has weighed the motives for the conduct against its consequences and the criminal character of the conduct before deciding to act in such a manner. A deliberate person does not act rashly or suddenly but with a preconceived intention. Deliberate is synonymous with premeditated.").

153. Many statutes include the language premeditated and deliberate as a requirement for first degree murder. *See, e.g.*, TENN. CODE ANN. § 39–13–202(a)(1) (2013) (providing that "[a] premeditated and intentional killing of another" constitutes first degree murder).

154. MODEL PENAL CODE § 2.02(2)(a) (1962) ("A person acts *purposely* with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist." (emphasis added)).

155. *Id.* § 2.02(2)(b) ("A person acts *knowingly* with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." (emphasis added)).

156. Examples of deliberate violations of constitutional rights exist in Supreme Court case law. *See* Connick v. Thompson, 131 S. Ct. 1350, 1360 (2011) ("[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action . . . . to violate citizens' constitutional rights . . . ." (alteration in original) (quoting Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997))) (internal quotation marks omitted); *id.* ("Policymakers' 'continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability.'" (quoting *Brown*, 520 U.S. at 407)); Missouri v.

enforcement officer would have to know the existing Fourth Amendment standard and then intentionally or purposely violate it. In the *Terry* stop context, the officer would need to know that he needed reasonable suspicion to stop a suspect, to know that he did not have reasonable suspicion, and to make the stop anyway.[157]

Under both a civil and criminal deliberate standard, the analysis would largely be the same. Arguably, a police officer might intentionally (civil standard) stop someone without reasonable suspicion and without deliberating about it (criminal standard), but the willful nature of the act likely will be sufficient to justify exclusion under either standard.[158] Both might fall into the category of flagrant conduct, which Chief Justice Roberts considered to provide the clearest justification for exclusion.[159] Importantly, as Part III discusses, the officer's intent would be fair game for cross-examination and argument under both the civil and criminal standards.

Seibert, 542 U.S. 600, 620 (2004) (Kennedy, J., concurring) ("The police used a two-step questioning technique based on a deliberate violation of *Miranda*."); Farmer v. Brennan, 511 U.S. 825, 842 (1994) (explaining that a prison official acts with "deliberate indifference" sufficient to sustain an Eighth Amendment claim if "the official acted or failed to act despite his knowledge of a substantial risk of serious harm"); United States v. Henry, 447 U.S. 264, 270 (1980) ("The question here is whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements . . . within the meaning of *Massiah*."); Franks v. Delaware, 438 U.S. 154, 171 (1978) ("[T]he Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate."); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that the government violated the Sixth Amendment by using at trial incriminating statements that were deliberately elicited from the petitioner in the absence of counsel).

157. Or, in the interrogation context, an officer would have to interrogate an individual without *Miranda* warnings despite the officer's knowing that *Miranda* warnings are required for custodial interrogation, and create a statement actually used against the defendant at trial. Of course, the constitutional violation would only occur if the government were trying to introduce the statement at trial. United States v. Patane, 542 U.S. 630, 641 (2004) ("[P]olice do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.").

158. One potential wrinkle to adopting the criminal law definition is whether the accompanying defenses should come along with it. For example, in criminal law a reasonable and even unreasonable mistake of fact or law would negate the *mens rea* normally associated with specific intent crimes. As such, unless the officer admitted to the unconstitutional intent, there would be no real way to exclude evidence based on a deliberate violation. Any mistake would negative the intent, and thus, under an analogous criminal law framework, exonerate the officer from wrongdoing.

159. *See* Herring v. United States, 129 S. Ct. 695, 701–02 (2009) (describing the flagrant nature of early exclusionary rule abuses).

2. Reckless

Recklessness in the civil law context is understood as an action that consciously ignores a potential harm.[160] Courts define recklessness as acting with a conscious and unjustified awareness of the risks.[161] This involves both objective considerations (e.g., the unreasonableness of the risk) and subjective considerations (e.g., the individual actor's awareness or knowledge of the risks).[162] As the *Restatement of Torts* summarizes:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[163]

160. One must act with a conscious appreciation for the potential harm his or her action may cause, or reasonably should have appreciated the potential harm. RESTATEMENT (SECOND) OF TORTS § 500 (1965); *see, e.g.*, Hickingbotham v. Burke, 662 A.2d 297, 301 (N.H. 1995) ("A social host's service of alcohol would be reckless if the host 'consciously disregard[ed] a substantial and unjustifiable risk' of a high degree of danger. The risk that the host disregards must be 'of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to [the actor], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.'" (alteration in original) (citation omitted) (quoting BLACK'S LAW DICTIONARY 1270 (6th ed. 1990))). Note that the *mens rea* requirement of recklessness should not be confused with an intentional tort: a reckless actor does not intend to cause the resultant harm, he or she only intends to engage in the high-risk action and is cognizant of its potential harmful outcome. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 199 (11th ed. 2005).

161. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 68 (2007) ("While 'the term recklessness is not self-defining,' the common law has generally understood it in the sphere of civil liability as conduct violating an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" (quoting Farmer v. Brennan, 511 U.S. 825, 836 (1994))). Indiana case law defines recklessly as acting with a "plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct." Kimball v. State, 474 N.E.2d 982, 985 (Ind. 1985).

162. Harry F. Tepker, Jr., *The Arbitrary Path of Due Process*, 53 OKLA. L. REV. 197, 219 n.145 (2000) ("Judicial definitions of 'reckless conduct' seem to follow similar, though not identical, patterns of assessing both objective factors—such as the degree or unreasonableness of risk—and subjective factors—such as awareness, knowledge, and intent.").

163. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

Again, while the recklessness standard varies from jurisdiction to jurisdiction (and cause to cause), it generally includes awareness of and a rejection of ordinary duties to avoid risk.[164]

Recklessness has also been well studied by criminal law scholars and judges.[165] State statutes define recklessness as acting with the awareness of a substantial and unjustifiable risk that involves a gross deviation from what a reasonable person would do in the actor's situation.[166] The Model Penal Code also tracks this language.[167] A key point is awareness of the type of risk (substantial and unjustified) and the choice to act in a

164. *See, e.g.*, OHIO REV. CODE ANN. § 2901.22(C) (LexisNexis 2013) (providing that recklessness is defined as "heedless indifference to the consequences, [by] perversely disregard[ing] a known risk that [one's] conduct is likely to cause a certain result or is likely to be of a certain nature"); Dronsejko v. Thornton, 632 F.3d 658, 665 (10th Cir. 2011) (explaining that "[r]ecklessness is defined as conduct that is an extreme departure from the standards of ordinary care'" (quoting City of Phila. v. Fleming Cos., 264 F.3d 1245, 1258 (10th Cir. 2001)) (internal quotation marks omitted)); Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977) ("[A] highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." (citation omitted)); *see also* BLACK'S LAW DICTIONARY 1271 (6th ed. 1990) ("recklessness" is defined as "[t]he state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing such consequences, persists in spite of such knowledge").

165. *See, e.g.*, Dressler, *supra* note 29, at 959 ("In my view, what should justify a judgment of criminal recklessness is that the actor is aware that she is taking an unjustifiable risk or, at the very least, is aware that there is a significant likelihood that her intended conduct is unjustifiable. . . .").

166. *See, e.g.*, Powell v. State, 49 A.3d 1090, 1103 (Del. 2012) ("Awareness of, and conscious disregard for, a substantial, unjustifiable risk will suffice to constitute recklessness."); State v. Sewell, 603 A.2d 21, 28 (N.J. 1992) (citing 2 THE NEW JERSEY PENAL CODE: FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION, commentary to § 2C:2-2, at 41–42 (1971)) (noting that recklessness resembles knowledge in that both involve a state of awareness: the awareness in knowledge being 'certainty' of a result; that of 'recklessness' involving the conscious disregard of a 'substantial and unjustifiable risk' that a result will occur); State v. Ramsey, 1 A.3d 796, 800 n.5 (N.J. Super. Ct. App. Div. 2010) ("Reckless culpability is a lesser culpability to purposeful or knowing conduct." (citing N.J. STAT. ANN. § 2C:2–2(b)(1)–(3) (West 2013)); State v. Murphy, 447 A.2d 219, 221 (N.J. Super. Ct. Law Div. 1982).

167. MODEL PENAL CODE § 2.02(2)(c) (1962) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."); *see also* Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 229–30 (1997) (discussing the Model Penal Code's redefinition of culpable mental states and influence on criminal law in more than half of all states).

way unlike a reasonable person (deviating from a reasonable standard of conduct). Another key point is that awareness of a risk must be considered in relation to the reasons for the risk. Thus, if there is a justified reason for the risk, the act may not, in fact, be reckless.[168]

Civil recklessness and criminal recklessness involve different standards. As the Supreme Court explained, "Unlike civil recklessness, criminal recklessness . . . requires subjective knowledge on the part of the offender."[169] Thus, civil recklessness involves "conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known."[170] Criminal recklessness builds on this objective "should have been aware" standard and requires actual, subjective awareness.[171] Thus, choosing a criminal reckless definition would raise the bar on exclusion. It would also signal a shift away from the objective standards the Court seems to favor in the qualified immunity context.[172]

In terms of applying this civil recklessness standard to the wrongful action of a police officer for purposes of exclusion, a court would have to first determine the objective standard of what a reasonable police officer would do.[173] Then, a court would have to determine if the

168. According to Professor Joshua Dressler, the awareness of the risk is judged in comparison to the reasons for taking the risk. *See* JOSHUA DRESSLER ET AL., CASES AND MATERIALS ON CRIMINAL LAW 154 (3d ed. 2003) ("The risk of which the actor is aware must of course be substantial in order for the recklessness judgment to be made. The risk must also be unjustifiable. Even substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose . . . .").

169. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 68 n.18 (2007).

170. *Id*. at 68 (quoting Farmer v. Brennan, 511 U.S. 825, 836 (1994)) (internal quotation marks omitted).

171. *Farmer*, 511 U.S. at 836–37 (clarifying that criminal law permits a finding of recklessness only when the defendant possesses an actual, subjective awareness of the risk of harm).

172. In general, constitutional tort liability and its companion doctrine, qualified immunity, turn on objective considerations. *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Supreme Court has been clear that any subjective intent of the officer's conduct is not relevant even if questions of the officer's knowledge and experience are relevant. *See id.* at 815–18 (concluding that the Court will not consider evidence of subjective intent in cases where government officials rely on qualified immunity as an affirmative defense and that the Court will only consider whether an official's conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known").

173. *See* United States v. Leon, 468 U.S. 897, 919–20 (1984) ("[W]here the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a *reasonable officer would and should act in similar circumstances*." (alteration in original) (emphasis added) (quoting Stone v. Powell, 428 U.S. 465, 539–40 (1976) (White, J., dissenting)) (internal quotation marks omitted)); *see, e.g.*, Kladis v. Brezek, 823 F.2d 1014, 1019 (7th Cir. 1987) (using the reasonable officer standard to determine if a police officer used excessive force); Patrick v. Moorman, 855 F. Supp. 2d 392, 402 n.9 (E.D. Pa. 2012) (explaining

officer's actions unjustifiably risked harm that he or she should have known could occur.[174]

For the criminal recklessness standard to apply, a police officer would have to be aware of a suspect's constitutional rights and to act in a way that substantially and unjustifiably risked violating those rights. In the *Terry* context, the officer, knowing that he needed reasonable suspicion, would nevertheless act without reasonable suspicion and in a way that substantially and unjustifiably risked violating the Fourth Amendment. However, since this risk must be judged in comparison to the reasons for taking the risk, the officer might be able to minimize the unjustified nature of his or her actions by pointing to the importance of stopping potential criminal activity.[175] This balancing might offer courts real flexibility in avoiding a finding of recklessness.

Under either a civil or criminal standard, the questions for suppression hearings are new and expansive. In suppression hearings courts have purposely avoided inquiries into objective standards of care, awareness of those standards, and deviations from them.[176] All of this

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how a reasonable officer would determine if a suspect posed a threat to those around him); White v. State, 19 A.3d 369, 372 (Md. 2011) (discussing the reasonable police officer standard as explained by an expert witness). In excessive force cases, the reasonableness of force must be judged from the perspective of a reasonable officer on the scene. Graham v. Connor, 490 U.S. 386, 396 (1989).

174. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965). The "objective" comparison might not open questions into the particular officer's awareness of the constitutional rights or justification for acting. In suppression hearings, however, establishing a reasonable officer standard will burden the court because the court will have to establish the reasonable officer benchmark and then compare the particular officer's awareness and actions to that benchmark standard.

175. *See* Hannah B. Schieber, Comment, *Utter Confusion: Why "Utter Disregard for Human Life" Should Be Replaced with an Objective Analysis of the Defendant's Activity*, 2011 WIS. L. REV. 691, 698 ("Scholars often conceptualize criminal recklessness as requiring two states of mind: the 'belief-state,' referring to the defendant's awareness of the risk, and the 'desire-state,' referring to the defendant's reasons for taking the risk. The desire-state does not indicate a desire to cause harm, but instead either an insufficient aversion to harm or a readiness to create a risk of harm. Determinations of recklessness become what Professor Joshua Dressler refers to as a 'criminal law version of the Learned Hand formula.' The fact finder considers the level of risk of harm the defendant created in light of the likelihood of that harm occurring, then weighs that against the defendant's apparent reasons for engaging in the behavior. If a defendant knew that his actions created a significant risk but had legitimate reasons for creating those risks (such as speeding down a highway to rush someone to the hospital), a jury may not find his actions to be criminally reckless." (footnotes omitted)).

176. Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 80–81 (2007) ("In *Whren v. United States*, however, the Court unanimously rejected the defendants' proposed 'reasonable police officer' standard—i.e., that 'the Fourth Amendment test for traffic stops should be . . . whether a police officer, acting reasonably, would have made the stop for the reason given'—and held instead that a traffic stop is reasonable for constitutional purposes so long as it was based on probable cause. In so doing, the Court spoke disparagingly about the whole notion of objective standards, referring to them as 'exercise[s]' in

may change as courts wrestle with the difficult culpability terms that they may now be required to apply to any suppression determination.

3. Gross Negligence/Criminal Negligence

The most interesting, most difficult, and most far-reaching standard of culpability mentioned by the Supreme Court is gross negligence. As a general matter, most constitutional violations would be better characterized as negligent (gross or ordinary) rather than deliberate or reckless, and thus understanding the floor set by this standard is important.[177]

Ordinary civil negligence is differentiated from civil gross negligence by the magnitude of the deviation from a reasonable standard of care.[178] In a civil case, one must claim a failure to live up to the standard of reasonable care.[179] While ordinary negligence has different definitions, in general, it involves a failure to exercise reasonable care.[180] Civil gross negligence, by contrast, involves a gross deviation from the standard of reasonable care.[181] "Gross negligence has been recognized by the United States Supreme Court as 'meaning a

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'virtual subjectivity' that call for 'speculati[on] about the hypothetical reaction of a hypothetical constable.'" (alterations in original) (quoting Whren v. United States, 517 U.S. 806, 810 (1996)).

177. *See, e.g.*, Doggett v. United States, 505 U.S. 647, 657–58 (1992) (finding government negligence as a justification to dismiss an indictment on speedy trial grounds); Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct . . . .").

178. *See, e.g.*, Altman v. Aronson, 121 N.E. 505, 506 (Mass. 1919) ("Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence."); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981) (noting the distinction in severity between ordinary negligence and gross negligence).

179. BLACK'S LAW DICTIONARY 1133 (9th ed. 2009) (defining negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm").

180. For example, Delaware tort law defines negligence as "the want of due care or want of such care as a reasonably prudent and careful person would exercise under similar circumstances." Orsini v. K-Mart Corp., No. 95C-07-146-WTQ, 1997 WL 528034, at *3 (Del. Super. Ct. 1997) (citing Kane v. Reed, 101 A.2d 800, 801 (Del. Super. Ct. 1954)); *see also cf.* Lee v. Javitch, Block & Rathbone LLP, 601 F.3d 654, 659 (6th Cir. 2010) ("Ohio tort law defines negligence as the failure to conduct oneself as would 'a reasonably prudent man in like circumstances;' and excludes from the definition of negligence 'failing to take extraordinary measures which hindsight demonstrates would have been helpful.'" (quoting Bender v. First Church of Nazarene, 571 N.E.2d 475, 477 (1989))).

181. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 212 (W. Page Keeton ed., 5th ed. 1984) (explaining gross negligence "as failure to exercise even that care which a careless person would use" and noting that several courts "have construed gross negligence as requiring willful, wanton, or reckless misconduct . . . . But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind." (footnotes omitted)).

greater want of care than is implied by the term ordinary negligence.'"[182] As one court described, gross negligence is defined as "fail[ing] to observe even slight care" and "carelessness or recklessness to a degree that shows utter indifference to the consequences that may result."[183]

Similarly, criminal negligence involves failing to perceive as substantial and unjustifiable that risk will result from one's actions.[184] A California court's description in a homicide case of criminal negligence serves as a colorful example:

> [T]here must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to the consequences.[185]

The Model Penal Code offers a more restrained and influential definition that emphasizes that the individual should be aware of the substantial and unjustifiable risk, and that a failure to see this risk

182. Blaine LeCesne, *Crude Decisions: Re-examining Degrees of Negligence in the Context of the BP Oil Spill*, 2012 MICH. ST. L. REV. 103, 129 (quoting Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 495 (1875)) (internal quotation marks omitted).

183. Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc., 767 P.2d 125, 129 (Utah Ct. App. 1988) (citations omitted) (quoting Atkins Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330, 335 (Utah 1985)).

184. *See, e.g.*, N.Y. PENAL LAW § 15.05(4) (McKinney 2013) ("A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."); OR. REV. STAT. § 161.085(10) (2011) (defining criminal negligence as when "a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation").

185. People v. Penny, 285 P.2d 926, 937 (Cal. 1955) (quoting 26 AM. JUR. *Homicide* § 210 (1940). The California jury instructions further explain "[c]riminal negligence involves more than ordinary carelessness, inattention or mistake in judgment. A person acts with criminal negligence when: 1. He or she acts in a reckless way that is a gross departure from the way an ordinarily careful person would act in the same situation; 2. The person's acts amount to disregard for human life or indifference to the consequences of his or her acts; [and] 3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others." JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS no. 821, at 538 (2013).

involves a gross deviation from the standard of care of a reasonable person.[186] Other states have similar language.[187] Criminal negligence, like civil negligence, is also an objective standard.[188] As Professor Joshua Dressler states, "'[N]egligence' constitutes *objective* fault, i.e., an actor is not blamed for a wrongful state of mind, but instead is punished for his failure to live up to the standards of the fictional 'reasonable person.'"[189] The difference between civil gross negligence and criminal gross negligence (otherwise known as criminal negligence) is complicated by the fact that no universal definition of civil gross negligence exists.[190]

186. MODEL PENAL CODE § 2.02(d) (1962) ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

187. *See, e.g.*, ALASKA STAT. § 11.81.900(a)(4) (2013) ("[A] person acts with 'criminal negligence' with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."); LA. REV. STAT. ANN. § 14:12 (2013) ("Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."); OR. REV. STAT. § 161.085(10) (2011) ("'Criminal negligence' or 'criminally negligent,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."); 18 PA. CONS. STAT. ANN. § 302(b)(4) (West 2013) ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

188. John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111, 123 n.73 (1996) ("The Model Penal Code terminology, for example, defines negligence in objective terms, as contrasted with recklessness where subjective awareness is required.").

189. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10:04(D)(2), at 131 (5th ed. 2009).

190. LeCesne, *supra* note 182, at 129 ("Presently, and notwithstanding its ubiquitous statutory usage, there is no generally accepted meaning of 'gross negligence.'"); *see also id.* ("One court even dubbed the task of assigning this higher level of culpability as akin to entering a legal 'twilight zone which exists somewhere between ordinary negligence and intentional injury.'" (quoting Pleasant v. Johnson, 325 S.E.2d 244, 247 (N.C. 1985))); *id*. ("One of the most widely accepted modern expressions of gross negligence suggests that it consists of two

Applying a gross negligence standard in the exclusionary rule setting presents several problems. First, courts must agree on a definition. Second, a court would have to ask whether the officer's actions involved a substantial and unjustified risk of violating constitutional rights. Third, the culpability determination would have to inquire into whether the officer's failure to perceive the risk justifies condemnation. This inquiry would necessarily consider the surrounding circumstances of why the officer failed to perceive the risk of harm to constitutional rights. Thus, in the gross negligence area, courts would have to focus more on why the officer failed to perceive the risk of unconstitutional action rather than on the officer's subjective thinking.

As a final point, one might ask how to evaluate Justice Alito's conception of "isolated negligence."[191] Why should an isolated mistake not deserve some sanction? Again, there may be a difference in interpretation between isolated civil negligence and isolated criminal negligence, as it affects the level of culpability,[192] but in reality both isolated civil and criminal negligence are subject to legal liability. A good faith failure to meet the standard of care is still a failure to meet the standard of care. A negligent crime is still a crime. Interestingly, in early decisions the Court appeared to recognize that mere negligence could trigger the exclusionary rule.[193]

While legal commentators generally understand that the Court appeared to borrow the civil tort standards (as opposed to criminal *mens rea* standards) to guide the new exclusionary rule,[194] the Court did not

components: (1) the view from the objective standpoint of the actor and (2) the actual, subjective awareness of the risk involved and indifference to the welfare of others."); *see also, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (West 2003) ("Gross negligence means an act or omission . . . [that] when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others . . . of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.").

191. Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011).

192. *See supra* Subsection II.A.3. The Court also muddied the idea of the good faith exception. *See* United States v. Leon, 468 U.S. 897, 962 (1984) (Stevens, J., concurring in part and dissenting in part); *see also* Dery, *supra* note 33, at 19–26 (arguing that *Davis*'s narrow focus on police culpability could cause the good faith exception to swallow the exclusionary rule). For cases in which the police relied in good faith on their own police error, see *Herring v. United States*, 129 S. Ct. 695, 702–03 (2009); *Davis*, 131 S. Ct. at 2428 ("Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" (alteration in original) (quoting *Herring*, 129 S. Ct. at 702)).

193. Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.").

194. *See, e.g.*, Laurin, *supra* note 17, at 671–73.

do so explicitly, and trial courts will be left to interpret these terms with conflicting meanings. Though lower courts might vary in their terminology and analytical framework, they will all have to incorporate this culpability question into their suppression hearings. This is new and uncharted territory and is the subject of Part III.

C. *Definitional Questions: Attenuation*

In *Hudson*, the Supreme Court gave new meaning to another legal concept—attenuation. By doing so, the Court detached the concept of attenuation from its origins in *Brown v. Illinois* and *Wong Sun v. United States*.[195] Prior to *Hudson*, certain constitutional violations did not result in automatic exclusion if the constitutional wrong was attenuated from the taint of the violation.[196] For example, in *Brown*, the Court considered several factors that might lead to attenuation.[197] Considerations such as the temporal proximity between the illegal act and acquisition of evidence, any intervening acts, and the purpose and flagrancy of the official misconduct all could factor into an attenuation analysis.[198] The key question was "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[199] If there was sufficient attenuation, then the evidence did not need to be suppressed.[200]

The attenuation doctrine in *Hudson* recalibrated this understanding. Justice Scalia reasoned that exclusion must serve the interests protected by the knock-and-announce rule.[201] Decoupling the remedy from the right and now requiring an inquiry into the purpose of the constitutional protection adds new complexity to any exclusionary analysis.[202] Taking

195. Hudson v. Michigan, 547 U.S. 586, 592 (2006); Brown v. Illinois, 422 U.S. 590, 600–05 (1975); Wong Sun v. United States, 371 U.S. 471, 491 (1963).

196. Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1218 (2012) ("During the 1960s and 1970s, attenuation analysis probed the strength of the connection between the police illegality and the evidence the prosecutor wished to introduce by examining the circumstances under which the evidence came into the hands of the police." (internal quotation marks omitted)).

197. *Brown*, 422 U.S. at 603–04.

198. *Id.*

199. *Id.* at 599 (quoting *Wong Sun*, 371 U.S. at 487–88 (1963)) (internal quotation marks omitted).

200. *See id.* at 598–600.

201. Hudson v. Michigan, 547 U.S. 586, 593–94 (2006) (noting that "[a]ttenuation also 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").

202. Sharon L. Davies & Anna B. Scanlon, *Katz in the Age of* Hudson v. Michigan*: Some Thoughts on "Suppression as a Last Resort,"* 41 U.C. DAVIS L. REV. 1035, 1060 (2008) ("Prior to *Hudson*, the attenuation doctrine had always probed the strength of the connection between

Justice Scalia's terminology as written, courts must now examine the interests of the constitutional protections underlying constitutional rights.[203]

As but one example, in a typical Fourth Amendment stop and frisk, what are the interests being protected by the constitutional limits placed on a police officer's seizing an individual? Dignity?[204] Privacy?[205] Security?[206] The right to be left alone?[207] How are those interests

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the police illegality and the evidence the prosecutor wished to introduce by examining the circumstances under which the evidence came into the hands of the police. Thus, under the attenuation doctrine, the Court has sometimes found suppression unnecessary where the causal chain between a wrongful police act and the discovery of evidence had effectively been severed by some significant intervening event, or the police illegality was so far removed from the evidence it ultimately obtained, such as to question the deterrent value achieved by the suppression of the evidence. The inquiry was into whether the evidence in question had 'been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" (quoting *Hudson*, 547 U.S. at 592)); *see also* Tomkovicz, *supra* note 71, at 1862–71 (discussing *Hudson*'s novel and potentially broad application of the existing attenuation precedent).

203. *Hudson*, 547 U.S. at 593–94; *see* Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1761–64 (2008) (discussing which interests the knock-and-announce requirement serves as examined in *Hudson*); George M. Dery, III, *A False Mirror:* Hudson v. Michigan's *Distortion of the Exclusionary Rule in Knock-and-Announce Litigation*, 76 UMKC L. REV. 67, 89 (2007) (discussing constitutional interests in relation to attenuation and the need for a relationship between the penalty of exclusion and a violation of the knock-and-announce rule).

204. *See, e.g.*, United States v. Griffin, 730 F.3d 1252, 1256 (11th Cir. 2013) (en banc) (noting that the abusive stop-and-frisk tactic risked eroding individual liberty and dignity); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 660–61 (noting that while underdeveloped in case law and scholarship, the concept of dignity "has always existed around the periphery of constitutional search-and-seizure jurisprudence"); Laurent Sacharoff, *The Relational Nature of Privacy*, 16 LEWIS & CLARK L. REV. 1249, 1276–77 (2012) ("The history of the Fourth Amendment amply supports the notion that it protects against the humiliation and loss of dignity wrought by unreasonable government searches and seizures.").

205. *See, e.g.*, United States v. Coates, 495 F.2d 160, 163 (D.C. Cir. 1974) (noting stop and frisks are constitutional as long as they are reasonable based on a balancing test between government interests and an individual's interest in privacy); Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 120–26 (2002) (discussing "privacy" in the context of Fourth Amendment search jurisprudence); Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 129, 152 (2002) ("Privacy is, however, more a matter of affect than cognition. Privacy is a set of metaphorical boundaries that enables each of us to safeguard a sense of self. Privacy enables us to decide which aspects of ourselves to reveal and to whom. That control matters deeply, because overly selective exposure of ourselves to others will lead to their misjudging our nature.").

206. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968) (noting that in the context of stop and frisks, the question "is whether in all the circumstances of this on-the-street encounter, [the petitioner's] right to personal *security* was violated by an unreasonable search and seizure" (emphasis added)); *see also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 351–66 (1998) (discussing the

balanced with stopping crime? Solving crime? Ensuring social order? A brief review of the scholarly literature on police–citizen Fourth Amendment encounters illustrates the problems with judging the interests protected by the Fourth Amendment.[208]

The exclusionary remedy, of course, applies not just to police–citizen street encounters but to all types of Fourth, Fifth, and Sixth Amendment violations, as well as various due process issues.[209] To determine if exclusion would serve the purposes of the constitutional right, the purpose behind each right would have to be evaluated, debated, and decided. As Part III discusses, this language leaves many difficult questions for lawyers litigating these issues.

D. *Application Questions: Constitutional Culpability*

Two significant questions remain about how to apply the Supreme Court's new exclusionary rule. The first concerns the future *Herring–Davis* question: whether the Supreme Court will be willing to extend its new exclusionary reasoning to nonculpable police officers who make an error of constitutional magnitude.[210] The simplest and most common

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Framers' understanding of security in relation to the Fourth Amendment and its modern day conception). *But see* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008) ("The Fourth Amendment does not guarantee a right of privacy. It guarantees—if its actual words mean anything—a right of *security*.").

207. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The drafters of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.").

208. Scholars argue that a host of values, such as dignity, respect, trust, security, power, and social control, are the true purpose of the Fourth Amendment. *See, e.g.*, Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1326 (2002) ("The Fourth Amendment protects power not privacy."); Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 30 T. JEFFERSON L. REV. 1, 2 (2007) ("The eternal right, beyond technology and corrupt government, corporation, or individual, is *dignity*."); Scott E. Sundby, "*Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1775 (1994) ("Developments such as growing government regulation, and expanding technological capacity, however, have robbed the 'right to be let alone' of much of its power to control the legal discourse concerning the Fourth Amendment."); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 23 (2003) ("The Fourth Amendment protects core interests essential to human flourishing, interests in privacy, property, and freedom of movement.").

209. *See* William A. Davis, *The Impeachment Amendment Exception to the Sixth Amendment Exclusionary Rule*, 87 COLUM. L. REV. 176, 180–83 (1987) (discussing the exclusionary rule's permeation throughout Fourth, Fifth, and Sixth Amendment as well as *Miranda* jurisprudence).

210. To be clear, this is the next logical step from *Herring*. Instead of a police employee, the police officer himself or herself makes the mistake. Thus, there is no separation from wrongdoing and no good faith reliance on another entity.

example would be if a police officer erroneously believes he has reasonable suspicion to seize or probable cause to search. There is a constitutional wrong, and the question would be whether the remedy of exclusion is available for this (intentional, reckless, grossly negligent, or negligent) mistake. Extending the *Herring–Davis* logic, the lack of culpability could mean that there would be no automatic exclusion.[211] The result potentially would necessitate a two-tiered suppression hearing in which courts are called upon to judge both the constitutional violation and the appropriate exclusionary remedy.[212]

How this two-tiered suppression hearing would work is not yet known. As the next Part discusses, the questions that need to be answered to determine culpability and exclusion are not the same as those needed to determine whether a constitutional violation existed in the first instance.[213] To evaluate culpability, should a court hold a separate hearing or allow cross-examination and evidence during the actual suppression hearing? Can the two steps happen simultaneously? What rules of evidence, discovery, or expert testimony should govern? These are questions courts will have to address before hearing evidence on even the most basic suppression hearing.

The second question is the "*Hudson* question," which asks whether Justice Scalia meant what he said—that the constitutional wrong must not be attenuated from the underlying constitutional interests.[214] While such a distinction perhaps makes sense in the knock-and-announce context, it is much more difficult to determine the underlying constitutional interests in a stop-and-frisk case or for a search without probable cause. Or, under the Fifth Amendment, is the purpose of *Miranda* education, notice, fairness, protection, coercion, autonomy, or something else?[215] While this language has dropped out of the analysis in the post-*Hudson*, *Herring*, and *Davis* cases, it remains a potential argument to further complicate the application of the exclusionary rule.

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211. *See* Herring v. United States, 129 S. Ct. 695, 702 (2009); Davis v. United States, 131 S. Ct. 2419, 2428 (2011).

212. Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 231 (2010) ("Now the Court is proposing to engage in a two-part inquiry in every case, considering first whether there was a breach and second whether the level of police culpability was reckless or systematic.").

213. *See infra* Part III. The constitutional violation can be determined without delving into the officer's intent or an objective culpability determination. In fact, *Whren* holds that the subjective intent of the officer is irrelevant to determine the constitutional violation. *See infra* notes 269–70 and accompanying text.

214. *See* Hudson v. Michigan, 547 U.S. 586, 592–93 (2006).

215. *See* Sharon L. Davies, *Some Reflections on the Implications of* Hudson v. Michigan *for the Law of Confessions*, 39 TEX. TECH L. REV. 1207, 1233–34 (2007) (discussing how *Hudson* may have opened the door for "*Miranda*-defective statements" to avoid automatic suppression).

As the next Part discusses, the Roberts Court's new standard opens up novel arguments for litigants and challenges for courts. Several unexamined and perhaps unintended effects will result as the language and logic of the opinions are litigated.

III. NEW STANDARDS FOR EXCLUSION: NEW LITIGATION QUESTIONS

Because of the uncertain doctrinal framework, this new standard for exclusion presents emerging challenges for lawyers. The goal of this Part is to translate legal theory into practical considerations useful to those litigating Fourth Amendment issues.

This Part focuses on the future *Herring–Davis* question not yet answered by the Supreme Court.[216] The open question is what happens if the police officers themselves make a constitutional mistake.[217] Can a court deny the exclusionary remedy because the mistake was isolated, negligent, in good faith, or not "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence"?[218] The answer will determine whether the exclusionary rule has any life left.

A. *Strategic Denial: Concerning Dicta in* Herring *and* Davis

For defense lawyers facing the new exclusionary rule, the first option is to ignore *Herring* and *Davis*. The tactic of strategic denial exists because the Court's language, although forceful, was unnecessary to the holdings in *Herring* and *Davis*. Thus, the first question is whether to accept the Court's new standard as dicta.[219]

Lawyers who choose the "denial approach" will argue for the narrowest interpretation of the Court's holdings and reject outright the strong language limiting the exclusionary remedy.[220] As a matter of blackletter law, the denial approach is supportable.[221] Dicta, which is

216. The concern is not on cases with facts similar to *Herring* or *Davis*, which involved bureaucratic negligence or reliance on appellate holdings, as precedent now controls those cases.

217. *See* Marceau, *supra* note 142, at 742–54 (discussing mistake of law and mistake of fact by police officers after *Herring*).

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

219. BLACK'S LAW DICTIONARY 519 (9th ed. 2009) (defining "dictum" as "[a] statement of opinion or belief considered authoritative because of the dignity of the person making it").

220. Moran, *supra* note 7, at 376 ("Chief Justice Roberts used his *Herring* majority opinion in an attempt to engraft a brand new, officer-culpability requirement onto the exclusionary rule. Only deliberate, reckless, or grossly negligent conduct by individual officers would require exclusion; mere ordinary negligence would not. Never mind that this discussion was dicta since the line between ordinary negligence and gross negligence was not at issue in *Herring*, and never mind that the opinion made no serious effort to explain the difference in the context of a typical Fourth Amendment violation." (footnote omitted)).

221. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953,

language not essential to deciding the case and controversy before the court, is not binding.[222] Further, the dissenting justices in *Herring* and *Davis* avoided characterizing the majority's reasoning as a holding.[223] Thus, applied to the future *Herring–Davis* question about whether an officer's own constitutional violation requires suppression, the cases offer no prescribed answer.

First, in *Herring* there was no reason to address the level of culpability of the arresting officers because all parties agreed that the officers had acted reasonably.[224] The controlling issue was not whether a police clerk acted negligently, but whether the police officers acted reasonably in relying on the report of an arrest warrant.[225] The arresting officers made no error (negligent, reckless, grossly negligent, or otherwise) because they were following the information provided by the clerk.[226] While the Court's statement of a new standard about when the exclusionary remedy should apply was forcefully presented,[227] the Court had no reason to apply the new standard to the facts.[228]

The facts of *Davis* provide an even less appropriate situation to evaluate culpability, because all parties agreed that the officers were not only reasonable, but actually followed the established law.[229] There was simply no need to inquire into the level of negligence as opposed to recklessness or any other level of culpability. Yet, Justice Alito

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1056–58 (2005) (discussing the distinction between a holding and dicta); Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 165–69 (2011) (discussing that dicta is traditionally not binding in the same manner as a holding).

222. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." (quoting Cohens v. Virgina, 19 U.S. (6 Wheat.) 264, 399–400 (1821))).

223. Moran, *supra* note 7, at 365 ("To put it simply, the language in *Herring* limiting the exclusionary rule to violations committed by grossly negligent (or worse) police officers looks like dicta. The four justices in dissent in *Herring* were careful not to refer to the culpability language in the majority opinion as a holding.").

224. *Id.* at 376.

225. *See* Herring v. United States, 129 S. Ct. 695, 701–02 (2009).

226. *Id.* at 695, 699 (citing the Eleventh Circuit's finding that "the arresting officers in Coffee County 'were entirely innocent of any wrongdoing or carelessness'" (quoting United States v. Herring, 492 F.3d 1212, 1218 (2007))).

227. *Id.* at 701–03 (discussing the culpability standard for police officers under the exclusionary rule).

228. The case would have been more difficult if the arresting officer knew that the record system had not been updated and was not sure that there was a real warrant but wanted to arrest Herring anyway. In this circumstance, the court's exploration into culpability would make a lot more sense.

229. Davis v. United States, 131 S. Ct. 2419, 2428 (2011) ("[A]ll agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.").

borrowed the reasoning of *Herring* and its newly developed standard without any real need for application.[230]

That the Supreme Court has expressed a forceful idea about the limits of the exclusionary rule does not mean that trial courts are listening. The writing may be on the wall, but it has to be read (and accepted) for it to mean anything. Thus, one avenue open for litigators is to distinguish the existing precedent and to argue that the controlling weight of *Herring* and *Davis* is limited to the facts presented. Until the Supreme Court decides a case about the constitutional error of an officer making a misjudgment of a constitutional magnitude, the denial approach is still available for argument.

B. *Acceptance: New Avenues for Litigation*

The new culpability-focused standard raises new considerations and concerns for courts at the trial level. These issues were not present under the traditional exclusionary rule regime, which did not focus on "constitutional blame." In fact, it seems likely that the Supreme Court failed to consider the practical, trial-level consequences of its reasoning.[231] Trial courts facing these questions and litigators making tactical choices must now rethink how the exclusionary rule operates. This section addresses ten possible consequences that result from the *Hudson-Herring-Davis* trilogy.

1. The Problem of Litigating Police Culpability

To frame the analysis, it is helpful to consider a typical scenario that raises a stark *Herring–Davis* question.[232] Take as an example a few fact patterns that have emerged from the routine stop-and-frisk practices in New York City.[233] The New York Police Department (NYPD) has made over a half-million documented *Terry* stops a year.[234] Many of those

230. *Id.* at 2427–28.

231. *See id.* at 2439 (Breyer, J., dissenting).

232. The generic version of this problem would involve, for example, a police officer who observes activity that causes him to investigate a suspect. Based on nothing more than a hunch, he stops a man. Based on the man's reaction, the officer searches the man. Incident to the search, contraband is recovered. At the suppression hearing, the judge finds that the stop was without reasonable suspicion and the search without probable cause.

233. *See, e.g.*, Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High Crime Areas*,*"* 63 HASTINGS L.J. 179, 214–15 (2011) (describing stop-and-frisk practices in New York City).

234. *See* Terry v. Ohio, 392 U.S. 1, 20, 30–31 (1968) (holding that stop-and-frisk searches are appropriate when the police officer acts reasonably); Russ Buettner & William Glaberson, *Courts Putting Stop-and-Frisk Policy on Trial*, N.Y. TIMES (July 10, 2012), http://www.nytimes.com/2012/07/11/nyregion/courts-putting-stop-and-frisk-policy-on-trial.html; Editorial, *Lingering Questions About Stop and Frisk*, N.Y. TIMES (Feb. 18, 2010), http://www.nytimes.

stops were made without reasonable suspicion and were thus unconstitutional under the Fourth Amendment.[235] Many of those stops also involved un-*Mirandized* custodial interrogations.[236] Two real-life examples, documented in testimony and evaluated by federal judge Shira Scheindlin overseeing the lawsuits, provides context for this analysis.[237] While these stories arose in a civil context in which the parties sought preliminary injunctions, these events could easily arise in suppression hearings involving Fourth and Fifth Amendment issues. Because of the extensive testimony concerning the officers' justifications for the stops and the judge's credibility findings, the stories have sufficient detail to permit analysis of whether exclusion would be required under the new standard.

a. Charles Bradley's Stop

Charles Bradley was a fifty-one-year-old security guard and a resident of the Bronx.[238] He went to visit his fiancée at her apartment. A resident who knew him and his relationship with his fiancée let him into the apartment building.[239] The fiancée, who was deaf in one ear, did not open the apartment door, and so Mr. Bradley went back outside. While he was standing on the sidewalk outside the apartment building, an unmarked police van arrived. One of the police officers gestured for Bradley to come over. Police then questioned Bradley about possible

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com/2010/02/19/opinion/19fri3.html; Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/2010/07/12/nyregion/12frisk.html; *cf.* Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES (Sept. 25, 2012), http://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html; *see also New Yorkers Speak Out on Stop, Question and Frisk Policy*, N.Y. TIMES (August 20, 2012), http://www.nytimes.com/interactive/2012/08/21/nyregion/stop-and-frisk-voices.html (polling 1,000 people on their opinion of stop and frisk in New York City).

235. *See infra* notes 248–249, 262 and accompanying text; *see also* Floyd v. City of N.Y., 959 F. Supp. 2d 668 (S.D. N.Y. 2013) (judging the constitutionality of the NYPD stop-and-frisk practices).

236. *See infra* note 265 and accompanying text. Many of the stops involved police questioning after an unconstitutional seizure. Again, the *Miranda* violation only occurs if the statements are used in trial. *See infra* note 265–66 and accompanying text.

237. See Ligon v. City of N.Y., 925 F. Supp. 2d 478, 483–84 (S.D.N.Y. 2013) (lawsuit challenging the "Trespass Affidavit Program," which involved police stops outside private apartment buildings on the suspicion of trespass); see also Davis v. New York, 902 F. Supp. 2d 405, 408 (S.D.N.Y. 2012) (suit against the New York Public Housing Authority challenging the policies and practices that the police department and the housing authority used to enforce prohibitions against trespassing on public housing property); Floyd v. City of N.Y., 813 F. Supp. 2d 417, 421 (S.D.N.Y. 2011) (lawsuit challenging New York City police's "policy, practice, and/or custom of unconstitutional stops and frisks . . . on the basis of race and/or national origin").

238. *Ligon*, 925 F. Supp. 2d at 497.

239. *Id.*

criminal activities and contraband.[240] He denied knowing anything, but the police searched him and arrested him for trespassing.[241] Bradley was taken to the police station in the van, questioned again about unrelated criminal activity, strip-searched, booked for trespass, detained, and then released.[242] Bradley insisted he had done nothing wrong. The prosecutors' office dismissed the charges after Bradley's lawyer provided an affidavit from the fiancée.[243]

In contrast to Bradley's version of events, Officer Santiago, the arresting officer, testified that the apartment at issue was a high-crime, high-drug area with many reported robberies and shootings.[244] He testified that he observed Bradley at the end of the hallway inside the building "suspiciously walking back and forth for two or three minutes and disappearing."[245] The trial judge discredited this testimony because Officer Santiago would have had to make these alleged observations from a vantage point with an obstructed line-of-sight of Bradley.[246] Officer Santiago testified that he inquired about Bradley's reason for being at the building, and arrested him for criminal trespass because he was unsatisfied with Bradley's answers. Officer Santiago denied the custodial questioning and strip search.[247]

The trial judge credited Bradley's version of events and found Officer Santiago's testimony to be contradicted by other evidence, including several factual inconsistencies and false statements.[248] The trial judge determined that there was no reasonable suspicion for the stop.[249]

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240. *Id.* at 497–98.

241. *Id*. These types of trespassing arrests were the center of the "Clean Halls" lawsuit at issue in the *Ligon* litigation. *Id.* at 484.

242. *Id.* at 498.

243. *Id.*

244. *Id.*

245. *Id.* at 498–99.

246. *Id.* at 499. Officer Santiago would have made these observations from the police van, which was parked across the street almost thirty feet from the front door. *Id.* Further, his view would have been obstructed by the door, the entryway, and a hallway. *Id.*

247. *Id.* at 498–99.

248. *Id.* at 499 ("The paperwork Officer Santiago completed with regard to Bradley's stop and arrest contained numerous, self-serving errors. In direct contradiction to his testimony at the hearing, Officer Santiago made the following statements on the arrest fact sheet: *first*, that he observed Bradley in the building for seven minutes; *second*, that he stopped Bradley inside the building; *third*, that he went to the apartment Bradley said he was visiting; and *fourth*, that the apartment was occupied. By all accounts, each of these statements was false. Officer Santiago's credibility was further called into question by the fact that in 2002 or 2003 he lied within the scope of his police work by creating two improper summonses to help a friend." (footnotes omitted)).

249. *Id.*

b. Abdullah Turner's Stop

Abdullah Turner was a twenty-four-year-old man who visited a close friend in the Bronx.[250] On the way to an engagement party, Mr. Turner and his friend stopped by another friend's house to return a sweater.[251] Turner remained outside the apartment talking on the phone while the friend went into the apartment to return the sweater.[252] As he walked outside, a police officer snatched Turner's phone from his ear and asked him to provide identification and to explain what he was doing in the area. Turner was seized and questioned about criminal wrongdoing.[253] Despite providing identification and explaining his reason for waiting outside, Turner had his phone taken, and was arrested for criminal trespass.[254] He was booked and spent the night in a holding cell.[255]

Defending his actions, Officer Ramdeen, the arresting officer, testified that he saw Turner pacing aimlessly in the lobby for several minutes.[256] When Turner exited the apartment building, Officer Ramdeen inquired about his purpose and Turner allegedly stated his friend was in the building trying to buy marijuana.[257] The officer then arrested him for trespassing because he had no legitimate purpose in the building.[258]

The trial judge credited Turner's testimony.[259] The judge found that "Turner's responses to the officers' questions were reasonable and unsuspicious."[260] The judge discredited the confession and found no grounds for suspicion or for the stop.[261]

c. The Problem Reconsidered

In the above examples, the judge disbelieved the police officers' testimony and found no reasonable suspicion for the stops.[262] Had these cases arisen in a suppression hearing, the judge would likely have found the police officers' actions unreasonable and thus unconstitutional under the Fourth Amendment.[263] Under the old exclusionary rule, any

250. *Id.* at 499–500.
251. *Id.* at 500.
252. *Id.*
253. *Id.*
254. *Id*. at 501.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 502.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 499, 502.
263. Hudson v. Michigan, 547 U.S. 586, 608–09 (2006) (Breyer, J., dissenting) ("In *Weeks*, *Silverthorne*, and *Mapp*, the Court based its holdings requiring suppression of unlawfully

recovered contraband would be subject to exclusion.[264] In addition, both individuals were subjected to un-*Mirandized* custodial interrogations that potentially violated the Fifth Amendment.[265] Again, under the old exclusionary rule, if the defendant made statements during unconstitutional interrogation and the government tried to use such statements during its case-in-chief at trial, then the court would exclude these statements.

Under the new culpability-centered rule, however, exclusion is not automatic.[266] Now, a court must consider whether exclusion will deter future constitutional violations, and if so, whether the action of that particular officer was deliberate, reckless, or grossly negligent, or involved recurring or systemic negligence.[267] As the next few subsections discuss, these new questions involve consideration of the particular police officer's intent, knowledge, and experience, and the larger issues of a police department's institutional practices—factors that courts did not have to consider under the old exclusionary rule. This, in turn, opens up questions about the need to obtain that information through discovery, pretrial disclosure, and cross-examination. The following nine subsections address the new litigation considerations arising from this new exclusionary rule framework.

2. Litigating Culpability

Under the traditional exclusionary rule, there existed no opportunity or need to assess an officer's blameworthiness in violating constitutional rights.[268] The Supreme Court stated in *Whren v. United States* that the subjective beliefs of the arresting officer are irrelevant for

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obtained evidence upon the recognition that admission of that evidence would seriously undermine the Fourth Amendment's promise. All three cases recognized that failure to apply the exclusionary rule would make that promise a hollow one . . . .").

264. United States. v. Jeffers, 342 U.S. 48, 54 (1951).

265. Miranda v. Arizona, 384 U.S. 436, 463–65 (1966). Again, the violation would occur only if the statement was used against the defendant in the government's case-in-chief at trial. United States v. Patane, 542 U.S. 630, 641 (2004).

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

267. *See id.* at 701–02; United States v. Voustianiouk, 685 F.3d 206, 215–16 (2d Cir. 2012) (holding that in failing to obtain a new warrant to search the second-floor apartment, law enforcement was "sufficiently deliberate" in its actions to meet the *Herring* standard); Virgin Islands v. John, 654 F.3d 412, 417–18 (3d Cir. 2011) (holding that an improvidently issued warrant where no probable cause for a search existed constituted sufficient "deliberate, reckless or grossly negligent" actions to establish *Herring* and *Davis* culpability and activate the exclusionary rule).

268. *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." (citing Whren v. United States, 517 U.S. 806, 812–13 (1996))).

Fourth Amendment purposes.[269] To determine the constitutional violation, courts were to follow an objective standard, and since the exclusionary remedy was linked to the violation, it too was controlled by an objective standard.[270] Whether evil or inadvertent, the constitutional wrong and constitutional remedy turned on reasonableness, not blameworthiness.[271]

Under a new culpability-centered standard, the objective nature of the analysis is not so clear-cut. To determine whether the officers in our two scenarios acted deliberately, recklessly, or whether the officers' actions were part of a recurring systemic problem, the officers' decision making becomes relevant.[272] In simple terms, how do we know if Officer Santiago's or Officer Ramdeen's actions were blameworthy without analyzing either the officers' knowledge of constitutional rules or their particular experience, including past violations of constitutional rights?[273] If an officer regularly decided to ignore the reasonable suspicion standard, this might result in a different outcome than if the officer merely misunderstood the doctrine in practice.[274] Similarly,

269. 517 U.S. 806, 813 (1996) ("[T]he constitutional reasonableness of [a] traffic stop[] [does not] depend[] on the actual motivations of the individual officers involved."). In fact, a reasonable police officer standard was rejected in *Whren*. The Supreme Court criticized subjective tests, complaining that they were "exercise[s]" in "virtual subjectivity" that call for "speculati[on] about the hypothetical reaction of a hypothetical constable." *Id.* at 814–15 ("[I]t seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation.").

270. *See* United States v. Jeffers, 342 U.S. 48, 51 (1951); *cf.* McDonald v. United States, 335 U.S. 451, 456 (1948) (holding that the Fourth Amendment cannot be violated in "the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative"); Silverthorne Lumber Co., Inc. v. United States, 251 U.S. 385, 392 (1920) (holding that although knowledge gained by the government's own wrong cannot be used before a court, knowledge gained from independent sources may be brought before a court like any other); Weeks v. United States, 232 U.S. 383, 398 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

271. *See Devenpeck*, 543 U.S. at 153 (holding that the arresting officer's state of mind is irrelevant).

272. *Herring*, 129 S. Ct. 695, 702–03.

273. The difficulty of determining deliberateness is evident in some of the Court's earliest cases. For example, in *Brewer v. Williams* the majority had little difficulty stating that police deliberately elicited an incriminating statement in violation of the Sixth Amendment. *See* 430 U.S. 387, 399 (1977) ("There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him."). Yet the dissenting Justices argued that "[t]he police did nothing 'wrong,' let alone anything 'unconstitutional.'" *See id.* at 438 (White, J., dissenting).

274. Oregon v. Elstad, 470 U.S. 298, 342 (1985) (Brennan, J., dissenting) ("Courts have frequently taken the 'purpose and flagrancy of the official misconduct' into account in considering whether the taint of illegal action was sufficiently dissipated to render a confession admissible. In part, this inquiry has reflected conviction that particularly egregious misconduct

different outcomes might result between a case involving an officer who previously had evidence suppressed under similar circumstances and one involving an officer who had never been in that situation. Further, how do we know about recurring or systemic negligence without investigating past actions of the officers?

Applying the *mens rea* terminology supplied by the Court in *Herring* and *Davis*, the first question is whether the officers deliberately stopped the individuals without reasonable suspicion. Presumably, there would not be any testimony that the actions were deliberate violations of the Constitution. But, can a judge who discredits an officer's statements infer a deliberate violation based on untruthfulness? What if the officer testifies to an honest but mistaken understanding of trespass law? Is this reckless or grossly negligent? How does the pattern and practice of the other stops factor into a court's analysis?

These questions arise from the doctrinal uncertainty, which may in fact be useful for trial lawyers (especially defense counsel) to explore. Specifically, as will be discussed, new areas of cross-examination and argument are now open to determine the particular officer's knowledge and experience. Similarly, the police department's training on constitutional standards (in general) and the police officer's training (in particular) now become subject to investigation. Each of these questions is addressed in turn.

3. Litigating Knowledge

As Justice Roberts recognized in *Herring*, an officer's particular knowledge of the law is relevant to the good-faith inquiry.[275] To determine culpability, courts must first determine what a reasonable law enforcement officer knows about the Constitution (e.g., the Fourth Amendment's requirement of reasonable suspicion), then determine what this particular officer knows, and, finally, compare the objective actions of the officer against these two benchmarks of officer

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must be deterred through particularly stern action." (citation omitted) (citing Brown v. Illinois, 422 U.S. 590, 604 (1975))); Kinports, *supra* note 107, at 775 ("Using the culpability rubric, an officer who proceeds to frisk a suspect without any belief that the suspect is armed is clearly acting with a culpability greater than negligence. The limitations of *Terry* are well known, and a police officer who conducts a frisk to uncover evidence or out of habit—and with no fear for her safety—cannot be considered merely negligent." (footnotes omitted)).

275. *Herring*, 129 S. Ct. 695 at 703 ("We have already held that 'our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.' These circumstances frequently 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." (citation omitted) (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984))).

knowledge.[276] These additional steps were all unnecessary under the old exclusionary rule regime.[277]

Going back to the two examples that begin this Part, a police officer stops a suspect based on an erroneous hunch (or no hunch) and then conducts a search. First, courts must now inquire about what a reasonable law enforcement officer knows about the Fourth Amendment.[278] One might assume as a default that a reasonable police officer would know of current Fourth Amendment developments through professional training and experience.[279] A responsible law enforcement officer should know that an unsubstantiated hunch is insufficient justification for a stop and that an officer needs probable cause for a full search.[280] Similarly, one might assume that a reasonable police officer would know that custodial interrogation requires *Miranda* warnings or the resulting statements will be inadmissible.[281]

The second step would be an inquiry into what this particular police officer knows about the Fourth Amendment (as compared to the reasonable police officer).[282] This inquiry will require the police officer to demonstrate some familiarity with basic search and seizure law.[283] Unless we expect police officers to be legally trained, however, any

276. *Id.* at 701–03.

277. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996).

278. Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1529 n.226 (2009) ("In the law-enforcement context, courts assess reasonable suspicion and probable cause based on a 'reasonable officer' standard. Such a standard considers the training and experience of the officer in determining whether there was sufficient indication that 'criminal activity may be afoot.'" (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968))); s*ee also* United States v. Salazar, 609 F.3d 1059, 1065 (10th Cir. 2010) ("In other Fourth Amendment applications of the reasonable officer standard, we have characterized that reasonable officer as 'prudent, cautious and trained.'" (quoting United States v. Santana-Garcia, 264 F.3d 1188, 1192 (10th Cir. 2001))).

279. *See* United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000) ("[T]here is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law. To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey."); United States v. Hale, 784 F.2d 1465, 1470 (9th Cir. 1986) (noting that it is not unreasonable to require law enforcement officers to know well-established current laws); Doctor v. State, 596 So. 2d 442, 447 (Fla. 1992) ("Law enforcement officers are charged with knowledge of the law."); *see also* Marceau, *supra* note 141, 743 n.277 (2011) (discussing the *Lopez-Soto* holding).

280. Terry v. Ohio, 392 U.S. 1, 21–22 (1968); *see also* Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000) ("The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity." (quoting *Terry*, 392 U.S. at 27)).

281. *See* Miranda v. Arizona, 384 U.S. 436, 464–65 (1966).

282. *See* Herring v. United States, 129 S. Ct. 695, 703 (2009).

283. *Cf.* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 896 (1991) (recognizing that police officers receive some Fourth Amendment training at the time they join the force, as well as further training through on-the-job experience).

further inquiry may be slightly unfair to officers because they would now be required to provide a legal justification for their stop and interrogation tactics, not just recite the facts of the stop.[284] While difficult, this step may now be necessary. To prove a deliberate violation, one must first establish that the officer knew the law and intentionally violated it. To prove a reckless violation, one must establish the officer's awareness of the risk of violating the Constitution, which again requires some analysis of the officer's knowledge of the Constitution.[285]

The third step would be to compare the reasonable officer standard to the particular officer in question and decide how this knowledge should affect the overall culpability analysis.[286] This last step offers another level of complexity. A knowledgeable officer may be more culpable than an innocently ignorant officer. A willfully ignorant officer may be more reckless than an innocently ignorant officer. A truly ignorant officer may be, in fact, reckless in that lack of knowledge.

For defense counsel, this new focus on knowledge requires a three-fold inquiry in every suppression hearing. Counsel would inquire about general Fourth Amendment awareness of "reasonable police officers," the particular standards and training of this officer[287] and the officer's police department,[288] and then argue that the officer's conduct did not match that of a reasonable officer. In the examples discussed above, this would involve cross-examination into the particular constitutional knowledge of the arresting officers. One could imagine a line of cross-examination involving the officer's knowledge of recent Fourth

284. *See, e.g.*, Recent Case, *Fourth Amendment—Qualified Immunity—Third Circuit Holds that Police Officer's Good Faith Reliance on Legal Advice Creates a Presumption of Reasonableness.*—Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010)*, 124 HARV. L. REV. 2083, 2087–88 (2011) ("Although the doctrine of qualified immunity assumes that government officials are aware of clearly established law, there is a tension between the reasonableness of expecting that police officers 'know the basic elements of the laws they enforce' and the unfairness of requiring that they 'be as conversant in the law as lawyers and judges who have the benefit not only of formal legal training, but also the advantage of deliberate study.'" (footnotes omitted) (quoting Kelly v. Borough of Carlisle, 622 F.3d 248, 255, 258 (3d Cir. 2010))).

285. S*ee supra* Subsections II.B.1–2.

286. *See Herring*, 129 S. Ct. at 703. Complicating this analysis are credibility questions, which may be quite distinct from the knowledge issues. For example, in our two examples, the trial court disbelieved the officer's testimony. Ligon v. City of N.Y., 925 F. Supp. 2d 478, 499, 502 (S.D.N.Y. 2013). To determine whether the officer intentionally or negligently arrested the men in the absence of any truthful testimony on which to base a decision is a rather difficult situation for the court.

287. For defense counsel this line of questioning might involve asking about any additional legal training the officer received.

288. For defense counsel this line of questioning might involve asking questions about training on legal issues provided by the police department, including training at the police academy and other additional in service trainings.

Amendment precedent, the law of trespass, the factors for reasonable suspicion, and legal conclusions reached from this understanding. Presumably, in New York City, these questions would include discussion of the federal lawsuits against the police department and data challenging the stop-and-frisk policy.[289] Similarly, the legal rules of custody, interrogation, and *Miranda* protections for suspects subject to custodial interrogation might be avenues of inquiry.[290]

For prosecutors, the focus on the particular officer's knowledge may provide an opportunity to strengthen the constitutional argument at the suppression hearing. While not without risks, because the constitutional analysis and discussion is being generated by a non-lawyer, allowing the police officer to explain why he or she thought the stop was constitutional provides another argument to the court about the stop's legitimacy. Normally, officers testify to the facts while the lawyers and judge apply the facts to the law. Under the new process, the officer—through direct examination—would have the opportunity to explain his or her view of the law as it fits the facts at issue.[291] This presents a potential benefit for a prosecutor with a sophisticated police witness.

While this inquiry by both the defense and the prosecution are new steps in the process, they may not result in a different outcome. The final determination of objective culpability is with the judge, who must determine whether the officer's actions under the Fourth Amendment conform to what a reasonable officer would do.[292] In this way, the judge will determine whether the culpability warrants suppression by comparing the officer's actual action to the actions that a reasonable officer would have taken. This is a new process that may ultimately lead to the exact same result.

4. Litigating Prior Experience

The prior experience of the particular officer also now becomes an issue in determining culpability. As Justice Alito stated in *Davis*, suppression is unwarranted when police officers believe, based on an "objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence."[293]

289. *See supra* notes 234, 237 (discussing the federal lawsuits in New York City for stop-and-frisk practices).

290. These questions might include inquiries into the training on *Miranda* practices, interrogation tactics, etc.

291. In many ways this process might be objected to because it would bolster the prosecution's case. Under the new exclusionary rules, however, it would seem that this type of inquiry is now permissible. *See Herring*, 129 S. Ct. at 702.

292. *See supra* note 286 and accompanying text. The final decision or result of the court does not change, but only the inputs that go into that decision.

293. Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011) (citation omitted).

As discussed above, the first part focuses on knowledge, the latter part on the experience of the particular officer. How can a court determine if the constitutional violation was "isolated" without evaluating the other similarly situated situations? Does the inquiry now require investigation into previous similar stops?[294] Does the fact that a court has found previous stops unconstitutional become relevant?[295] What if the police officer is notorious for illegal stop and frisks?[296] Or the police unit?[297] Or the Department?[298] What if the officer is under investigation for disciplinary violations concerning stop and frisks? Under the traditional suppression regime, such questions were irrelevant.[299] Now, these questions may be critical to determining if the unconstitutional action was isolated or part of a recurring pattern.

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294. Interestingly, the data-driven nature of police work, with required documentation of all stops and contacts, may make this inquiry fairly easy. In some jurisdictions, every contact with citizens is supposed to be documented in formal reports. Thus, this database includes all of the reported stops, the justifications, and the results. This data could be used in Fourth Amendment litigation. *See, e.g.*, SARAH V. HART, U.S. DEP'T OF JUSTICE, CRIME SCENE INVESTIGATION: A REFERENCE FOR LAW ENFORCEMENT TRAINING 1 (June 2004), https://www.ncjrs.gov/pdffiles1/nij/200160.pdf ("Critical to the administration of a crime is the objective recognition, *documentation*, *collection*, preservation, and transmittal of physical evidence for analysis.").

295. Courts have found that prior police experience is relevant in justifying a stop. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 699 (1996) (recognizing that "a police officer views the facts through the lens of his police experience and expertise"); Terry v. Ohio, 392 U.S. 1, 27 (1968) (establishing that "due weight must be given . . . to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience"). Logically, a police officer's prior failure to justify a stop should also be relevant.

296. *See* Jason Cherkis, *Rough Justice*, WASH. CITY PAPER (Jan. 7, 2000), http://www.washingtoncitypaper.com/articles/18752/rough-justice (describing the tactics of four police officers who were known for frequently bending the law).

297. Scandals like the Rampart scandal in the Los Angeles Police Department provide cautionary lessons. *See* Matt Lait & Scott Glover, *Rampart Case Takes On Momentum of Its Own*, L.A. TIMES (Dec. 31, 1999), http://articles.latimes.com/print/1999/dec/31/news/mn-49335 (discussing the "Pandora's box of alleged police crimes and misconduct" of the Los Angeles Police Department's Rampart Division); Henry Weinstein, *Rampart Probe May Now Affect Over 3,000 Cases*, L.A. TIMES (Dec. 15, 1999), http://articles.latimes.com/print/1999/dec/15/news/mn-44050 (discussing the years and substantial resources needed to unravel the Rampart scandal). *See generally* Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001) (describing the tolerated aggressive policing culture, departmental structure, disciplinary system, and its handling of excessive force cases as problems that plagued the Los Angeles Police Department); *In the News: Rampart Scandal*, L.A. TIMES (last visited Feb. 7, 2014), http://articles.latimes.com/keyword/rampart-scandal (search of the L.A. Times's archive for articles on the Rampart scandal).

298. *See* Graham Rayman, *The NYPD Police Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE (May 4, 2010), http://www.villagevoice.com/2010-05-04/news/the-nypd-tapes-inside-bed-stuy-s-81st-precinct/full (describing the pressure facing officers to manufacture statistics to support the numbers-driven stop-and-frisk program).

299. *See* Whren v. United States, 517 U.S. 806, 812–13 (1996).

Certainly, an officer's prior discipline on past stops might have a bearing on the officer's level of deliberateness or recklessness.[300] In fact, in discrediting Officer Santiago, the trial court referenced a prior disciplinary report.[301] If a court finds the officer had been involved in ten prior stops without reasonable suspicion, this information should factor into evaluating the eleventh stop. If an officer had been disciplined because of prior inattention to constitutional restraints, this fact would bear on the isolated nature of the constitutional wrong. At the same time, if an officer had a long history of lawful, constitutional stops, this too would be relevant for the prosecutor to introduce to bolster the officer's record. As might be imagined, this history of prior conduct will present a real difficulty for courts in terms of time, expense, and confusion.

Presumably, courts will be quite reluctant to allow mini-hearings into the history of a particular officer's negligent actions or past experience. Yet, that is exactly the process that seems to be suggested by the Supreme Court's culpability-centered focus. Defense counsel will begin questioning officers on past acts. The questioning will in turn require courts to make decisions about the scope and extent of cross-examination. For example, in the *Ligon* litigation,[302] should prior trespass arrests be relevant? What about prior stops? What about testimony from citizens who claim to have been stopped by this particular officer?

Similarly, prosecutors will also seek to bolster the professionalism of their testifying police witnesses. While before, past experience was irrelevant to whether the officer acted within constitutional constraints, a pattern of professional action free from disciplinary concerns now may be a relevant factor in a culpability analysis. Showing a pattern of constitutional practice may counteract the defense's attempt to show a pattern of violations. The result, even when focused on the individual officer, offers a new and complex inquiry.

5. Litigating Institutional Wrongdoing

In addition to inviting an inquiry into the training and past acts of the particular officer, the Supreme Court's new standard also opens the door to questioning institutional policies and practices. This reality has existed since *Leon*, which recognized that the deterrent effect of the

300. Borrowing from the qualified immunity cases, officers are considered to violate clearly established law when they are aware of the controlling law. *See* Hope v. Pelzer, 536 U.S. 730, 738–39, 741 (2002). Here, the prior misconduct would play the role of clearly establishing the law. Prior misconduct puts the officer on notice of the possibility of violating the law in the future.

301. Ligon v. City of N.Y., 925 F. Supp. 2d 478, 499 (S.D.N.Y. 2013); *see supra* note 248.

302. *See supra* Subsections III.B.1.a–b.

exclusionary rule affects "the behavior of individual law enforcement officers *or the policies of their departments*."[303] The language "recurring or systemic negligence" can lead to even deeper inquiries into past acts or patterns of unconstitutional action.[304]

In practice, this would mean that courts might be required to evaluate an ongoing police department practice distinct from the actual police–citizen encounter in court.[305] How else might a court determine whether the constitutional violation was isolated or recurring, but to examine past practices and current policy? Though courts may be reluctant to undertake this inquiry, defense lawyers should challenge the systemic nature of the problem or they will risk losing the exclusionary remedy. For example, a defense lawyer facing an acknowledged constitutional violation and a prosecutor's argument that the particular police officer acted without objective culpability would be remiss in not trying to paint the constitutional violation as either a failure to train or a systemic failure.[306] To be clear, this would not be in the context of a constitutional tort suit, but in the ordinary Fourth Amendment suppression hearing.

As discussed, recent lawsuits in New York City concerning the NYPD stop-and-frisk practices present a good example of the potential disruption this inquiry could bring. Between 2005 and June 2008, 88% of the 775,428 individuals stopped were neither cited nor arrested.[307] In

303. United States v. Leon, 468 U.S. 897, 918 (1984) (emphasis added).

304. Laurin, *supra* note 17, at 684 (in critiquing *Herring*, "[N]o prior decision had held that evidence of departmental policies or other systemic circumstances that undermined Fourth Amendment compliance, standing alone, and in the absence of individual law enforcement misconduct, justify granting suppression"); Wayne R. LaFave, *supra* note 17, at 784 (recognizing that the Supreme Court has never before used the term "systemic negligence").

305. *Cf.* David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 102–06 (2007) (detailing racially biased police department practices); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1236–37 (detailing the difficulty in requiring a plaintiff to establish a police department policy of choking citizens in order to have an injunction granted against the department).

306. City of Canton v. Harris, 489 U.S. 378, 388–89 (1989) ("[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. . . . Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983."); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) (limiting municipal liability to unconstitutional policy or custom). *But see* Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 51 (2010) (discussing why "plaintiffs may want to hold supervisors personally responsible for the actions of their subordinates" rather than rely on a city policy to sue the municipality).

307. CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS: THE CENTER FOR CONSTITUTIONAL RIGHTS PRELIMINARY REPORT ON UF-250 DATA FROM 2005 THROUGH JUNE 2008 1, 10, 15 (Jan. 15, 2009), http://ccrjustice.org/files/Report-CCR-NYPD-

less than 2% of the frisks was a weapon recovered.[308] Based on data collected between 2004 and 2009, "877,080 stops, or 31.2% of all stops citywide, [were] unjustified or of undeterminable legality."[309] So, imagine a typical suppression hearing involving the recovery of a weapon after an unconstitutional stop and frisk. Under a culpability-centered exclusionary rule, the court would have to consider the knowledge and experience of the particular officer and then evaluate whether this unconstitutional frisk was part of a systemic pattern. Does this data support a recurring, systemic problem of stopping people without reasonable suspicion? Is it fair for the judge to take into account the actions of other officers in determining the objective culpability of this particular officer? How should courts incorporate the stated policies of the police department or government and the custom and practice that encourages these stops? What weight would this information have on determining the objective culpability of the officer or the department? None of these questions has an easy answer, yet all are potentially raised in the most basic of Fourth Amendment stops.

As another example of the difference that a culpability-centered analysis might bring, the *Ligon* lawsuit on stop-and-frisk practices revealed that a training video on the definition of a Fourth Amendment seizure incorrectly stated the law.[310] As this training video had been shown in almost every precinct and to almost every patrol officer, this systemic error in legal instruction could affect thousands of police stops.[311] Should such a systemic misinstruction to all police officers be enough to demonstrate a systemic problem warranting exclusion? While this information was introduced into evidence as part of the civil lawsuit, arguably, these facts are now admissible in suppression hearings as they provide a necessary avenue for defense counsel to show a non-isolated example of negligence.[312]

While taxing on the trial courts now responsible for litigating larger police-policy issues in suppression hearings, this new practice might have a positive impact on reforming certain areas of police practice. Civil tort principles will be litigated within suppression hearings, with the result that some practices may be deemed unconstitutional. This

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Stop-and-Frisk.pdf.

308. *Id.* at 11–12.

309. Declaration of Jeffrey Fagan at 2, Floyd v. City of N.Y., No. 08-cv-01034 (SAS) (S.D.N.Y. Nov. 7, 2011); *see also NYPD Stop and Frisk - the Numbers and the Impact*, CTR. FOR CONST. RTS., www.stopandfrisk.org (last visited Apr. 5, 2014).

310. Ligon v. City of N.Y., 925 F. Supp. 2d 478, 534–38 (S.D.N.Y. 2013) (detailing a series of errors in police training videos and materials involving the Fourth Amendment).

311. *See id*. at 534.

312. Since the Supreme Court's language in *Herring* and *Davis* focused on "non-isolated negligence," this type of systemic error will now be the focus of suppression hearings (rather than being confined to civil lawsuits). *See supra* note 306 and accompanying text.

outcome is similar to the practice of founding era Fourth Amendment tort suits, which predated the rise of the exclusionary rule.[313] Of course, from another perspective, this new focus will merely distract from the relevant issues surrounding the particular stop being litigated.

6. Expanded Discovery

To facilitate the inquiry of recurring or systemic negligence—in this case meaning prior constitutional violations—new avenues of discovery might now be open for lawyers investigating the issue.[314] The information about the New York City stops was developed from litigation by civil rights groups suing the city.[315] To determine systemic negligence, litigants will need access to a host of new information

313. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994) (discussing the Founding-era practice of civil tort suits as the primary remedy for Fourth Amendment violations).

314. *See* David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 496 n.242 (1999) (recognizing that "[p]olice personnel files including police reports of prior incidents have been held to be discoverable in cases where the defendant is accused of violence against a police officer and the defendant is asserting self-defense"); *see id.* ("Police personnel files have been held to be properly discoverable for an in camera inspection to find impeachment material in non-violent criminal cases."); Jeffrey F. Ghent, Annotation, *Accused's Right to Discovery or Inspection of Records of Prior Complaints Against, or Similar Personnel Records of, Peace Officer Involved in the Case*, 86 A.L.R.3d 1170, 1175 (1978) ("Within the cases in which a defendant, charged with an offense involving violence against a peace officer alleged by the defendant to have been the aggressor, sought discovery or inspection of the officer's personnel records, such disclosure has occasionally been totally disallowed but usually has been at least partially allowed, either in the form of in camera inspection by or in the presence of the trial judge or in the form of direct disclosure to the defendant." (footnotes omitted)).

315. *See supra* note 237 (discussing the federal lawsuits in New York City). This information will not be available in other cities, and only involves one aspect of the problem. Observing how similar discovery requests have been litigated in § 1983 lawsuits, however, provides some clues as to how this process will evolve. *See, e.g.*, Ryan v. Bd. of Police Comm'rs, 96 F.3d 1076, 1084 (8th Cir. 1996) (acknowledging the availability of discovery and the importance of meeting discovery demands in a police misconduct case); Wolfe v. Green, 257 F.R.D. 109, 113 (S.D.W. Va. 2009) (requiring police to provide requested documents); King v. Conde, 121 F.R.D. 180, 195–96 (E.D.N.Y. 1988) (allowing discovery of police records); Spell v. McDaniel, 591 F. Supp. 1090, 1115 (E.D.N.C. 1984) ("Under § 1983, the extent of supervisors' knowledge of and participation in the acts of their subordinates determines the scope of their liability and *ipso facto* the municipality's liability. The essence of plaintiff's complaint is that the supervisory defendants were grossly negligent or deliberately indifferent in failing to provide adequate training, supervision and discipline to officers on the police force . . . . To prove this allegation, the court agrees with plaintiff that it would be high [sic] relevant, indeed critical, to establish what the defendants knew regarding allegations of police brutality and when they knew it."). *See generally* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION §§ 8:1–8:15 (3d ed. 2001) (discussing discovery considerations for § 1983 lawsuits against police officers).

sources.[316] First, litigants will need data on the particular officer involved.[317] This will involve data on past stops, citizen complaints, internal police complaints, disciplinary reports, civil lawsuits, and maybe even past legal determinations.[318] Second, as a systemic matter, litigants will need data on the number of constitutional violations in the jurisdiction, which would include those formally found by the court, those informally discovered by the prosecutors, and those litigated in successful civil rights actions.[319] In addition, for courts to evaluate a reasonable officer's knowledge about constitutional rights (to determine deliberate or reckless action), they will need documentation about training programs, standards of conduct, and accountability mechanisms in the jurisdiction.[320]

As might be imagined, this additional information will be burdensome to produce for a criminal suppression hearing. In addition, it will require extensive litigation before admission. Yet under a culpability-centered standard, this inquiry appears to be permissible. Police officers are repeat players in the criminal justice system as they make hundreds of stops a year and leave a significant paper trail about these contacts.[321] Individually and collectively, this data will now be

316. *Cf.* Beck v. City of Pittsburgh, 89 F.3d 966, 973 (3d Cir. 1996) (allowing recurring pattern of excessive force claims to be presented to the jury); Vann v. City of N.Y., 72 F.3d 1040, 1049 (2d Cir. 1995) ("To prove such deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. . . . An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents." (citations omitted)).

317. Interestingly, New York City and Philadelphia have been collecting that data as a result of existing settlements with plaintiffs who sued over police practices. In other jurisdictions, the rise of crime data analysis has led to new crime data collection methods and recording systems. Many major metropolitan areas have sophisticated crime-mapping systems that require the collection of information about each arrest, contact, and police activity. *See* Ferguson, *supra* note 233, at 214–15, 219–20 (discussing New York City's CompStat program for collecting empirical data on crime and crime mapping).

318. *See* G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747, 752–54 (1999) ("The specifics of proof in discipline cases often require a painstaking gathering and analysis of much detailed evidence concerning the disciplinary process over a period of several years before and after the incident in question.").

319. *See, e.g.*, Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 3 (2003) (discussing an investigation by the Civil Rights Division of the U.S. Department of Justice in response to fifteen young black men being shot and killed by the Cincinnati Police Department over a six-year period in the 1960s).

320. All of this data exists. The issue is requiring police and prosecutors to provide it at the request of defense counsel challenging a particular stop.

321. *See* Stuntz, *supra* note 283, at 896.

subject to discovery and litigation.

7. Experts: A Reasonable Police Officer Standard

Experts on police training and knowledge may also now be needed in suppression hearings.[322] In a traditional suppression hearing focused on the constitutional violation, there was no real place for an expert opinion on how a reasonable officer would have acted.[323] Judges have been and are perfectly capable of determining existing constitutional standards and whether the Constitution was violated. However, if the inquiry is now how the particular officer's actions compare to a reasonable officer's actions, then new information sources about the reasonable officer standard are required.[324]

One can easily imagine that in any suppression hearing in which a court must determine objectively culpable wrongdoing, both sides will hire experts to testify about what a reasonable police officer would do and why the other side is wrong.[325] These experts could be former police officers or current criminologists who might explain why a certain action or certain way of thinking rises to the level of culpable

322. *See* FED. R. EVID. 702 (discussing expert testimony); Geoffrey P. Alpert, Effective Use of Expert Witnesses in Police Misconduct Cases: The Changing Role of the Expert Witness (July 2002) (unpublished presentation, Association of Trial Lawyers of America), 2 Ann. 2002 ATLA-CLE 1817 ("To show a mistake or wrongdoing that is negligent or even grossly negligent, an expert can evaluate the actions of the officer and other people and determine whether the behavior did or did not comply with proper standards or practices.").

323. *See, e.g.*, United States v. Perkins, 470 F.3d 150, 155–56 (4th Cir. 2006); Young v. City of Providence *ex rel.* Napolitano, 404 F.3d 4, 22–23 (1st Cir. 2005); Alvarado v. Oakland Cnty., 809 F. Supp. 2d 680, 688–89 (E.D. Mich. 2011); Young v. City of Centreville, 523 N.E.2d 621, 628–29 (Ill. App. Ct. 1988).

324. This may result in the scope of expert testimony that is regularly seen in § 1983 cases against police officers. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: FEDERAL EVIDENCE § 6.01 (2013) ("A wide variety of experts have testified in § 1983 actions. For example, experts have described and explained law enforcement operations and correctional procedures . . . ." (footnotes omitted)); *see also* Eileen R. Kaufman, *Choosing the Insidious Path:* West Virginia University Hospitals, Inc. v. Casey *and the Importance of Experts in Civil Rights Litigation*, 19 N.Y.U. REV. L. & SOC. CHANGE 57, 61 (1991–1992) ("There is no serious dispute that experts are an essential expense when litigating civil rights cases.").

325. *See* AVERY ET AL., *supra* note 315, at § 11:15 ("The use of expert testimony regarding proper police practices is now regularly entertained by the courts. The number of retired police administrators, criminologists, and other professionals with expertise who are willing to testify in police misconduct cases is growing rapidly and these experts are available in most sections of the country."); Alpert, *supra* note 322 ("[A]n expert can rely on 'national standards' as published by membership organizations (*e.g.*, International Association of Chiefs of Police, Police Executive Research Forum), the agency's own policy, or policies in surrounding jurisdictions. Similarly, training materials from national, local, or regional outlets can be used to establish standards. Once the expert has developed the standard by which an officer should act, the expert can evaluate the officer's behavior in its proper context, come to a conclusion about the level of "negligence" or "recklessness," and determine if these actions were a proximate cause of the injury.").

action.[326] Obviously, like the practice of experts in civil contexts, both sides would likely call conflicting experts.[327] These experts might further open the door for additional discovery, similar to the role of the expert in other legal contexts. As police departments and practices are localized, there would be questions of local practices versus national practices as well as a question of how to find objective benchmarks to evaluate the rather messy reality of modern police–citizen encounters.[328] While most judges would consider such expert testimony unnecessary, it would be far more relevant under the new rule than under the traditional exclusionary rule.

8. Establishing Deterrence on the Record

The core logic underlying *Hudson*, *Herring*, and *Davis* involves the importance of deterrence.[329] If a particular act of exclusion will deter future violations, then it follows that the evidence should be excluded.[330] Usually, the deterrence rationale focuses on general deterrence, but it can also involve specific acts of deterrence.[331] In particular, the focus of specific deterrence may lead to a new line of questioning in this two-tier suppression context.

For defense counsel this might necessitate a change in tactics to establish on the record that an acknowledged constitutional wrong might deter this particular officer from such wrongdoing in the future. As an example, assume that the trial court has found a Fourth Amendment violation (first tier), and the parties are now arguing about

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326. AVERY ET AL., *supra* note 315, § 11:15 ("An expert may be called to testify about a wide variety of police practices. Whether municipalities have provided proper training to officers, whether supervisors have properly reviewed prior complaints of misconduct, and whether the policies of a department with respect to supervision and discipline are proper are probably best litigated with the use of experts."); Taylor, *supra* note 318, at 752 ("Often, a police expert, either a sympathetic local (ex) police official, or one who specializes in police misconduct cases, may be required to help interpret and evaluate the evidence, both for plaintiff's counsel, and, later, for the jury.").

327. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 34–39 (2000) (discussing the historical development of using expert witnesses to represent both sides).

328. *See generally* AVERY ET AL., *supra* note 315, § 11:15 ("The utility of expert testimony in understanding police operations is evident from the training which police officers themselves are given to prepare them for their jobs. In all responsibly managed police departments, officers are required to undergo specialized training before they are assigned to street patrol. The need for sophisticated and thorough training is well recognized.").

329. *See supra* Part I.

330. Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("By refusing to admit evidence gained as a result of [unconstitutional] conduct, the courts hope to instill," both in "particular investigating officers" *and* "in their future counterparts, a greater degree of care toward the rights of an accused.").

331. *Id.*

the level of objective culpability of the particular officer (second tier). Defense counsel asks the officer whether he would knowingly violate the Fourth Amendment. The officer responds, "No, of course not." Defense counsel then asks, "You know that the court found your actions in this case violated the Fourth Amendment." The officer says, "Yes." Then, defense counsel finishes by asking, "Knowing what the court held about your actions, would you knowingly violate the Constitution again?" Presumably, the officer would answer that he would not violate the Constitution in the future, and the defense could argue that this officer has been specifically deterred from future constitutional violations. Deterrence, normally a speculative concept, has been proven on the record.

Getting an officer to admit on cross-examination that: (a) he or she would not purposely violate the Fourth Amendment; (b) he or she understands that his or her actions did violate the Fourth Amendment; and (c) if faced with the same circumstance, he or she would not repeat the error, removes the case from the *Herring–Davis* logic of deterrence. A trial court could not simply rely on a lack of objective culpability if the principle of specific deterrence would apply in the particular case (because it could be proved that the officer would, in fact, be deterred in the future). In simple terms, if one can prove specific deterrence on the record, one can avoid a generalized culpability inquiry by the court.

9. Seeking New Remedies

The Supreme Court's decoupling of constitutional violations and the remedy of suppression does not necessarily mean that constitutional violations will go unremedied.[332] While from a defendant's perspective suppression of the evidence is usually the preferred choice, it does not exhaust the options.[333] Without exclusion, a court may be willing to consider other methods of police accountability. One potential remedy would be to inform the jury of the constitutional violation during trial.[334] The jury would be instructed that the evidence was recovered in

332. *See supra* Section I.A.

333. *Compare* Hudson v. Michigan, 547 U.S. 586, 597–98 (2006) ("Citizens and lawyers are much more willing to seek relief in the courts for police misconduct . . . . The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded."), *with id*. at 611 (Breyer, J., dissenting) ("To argue that there may be few civil suits because violations may produce nothing 'more than nominal injury' is to confirm, not to deny, the inability of civil suits to deter violations.").

334. *See, e.g*., Elizabeth N. Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1452, 1459 (2006) (proposing jury instructions for *Brady* violations, which are triggered when prosecutors fail to turn over favorable information to defense counsel); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 416, 422 (2010) (suggesting a jury instruction for a *Brady* violation as a punitive sanction); Cynthia E. Jones, *The Right Remedy for the Wrongly*

violation of the Constitution.[335] In this way, the negligence of the officer would be aired in court, but it would not result in exclusion of the evidence.

Similar instructions on missing evidence or other government errors are regularly given to juries deciding cases.[336] In most cases, the fact that a constitutional violation occurred in obtaining evidence will have no direct effect on the verdict. In some cases, however, the police officer's actions might affect credibility determinations. In others, the violation might affect the weight given to the prosecution's evidence.

The justification for this instruction is not to invite the jury to punish the officer but to provide a clear and formal consequence for governmental wrongdoing. A prosecutor will have to address an unpleasant fact that weakens the case, which itself is a deterrent.[337]

In addition, if the argument against the exclusionary rule is that it undermines the truth-seeking nature of trial, this truthful admission of a constitutional violation will serve that larger interest.[338] The Constitution has been violated. Acknowledging that fact in open court serves several process-oriented goals, including a measure of personal and community accountability for the offending officer.[339]

Convicted: Judicial Sanctions for Destruction of DNA Evidence, 77 FORDHAM L. REV. 2893, 2948 (2009) ("In addition to excluding forensic evidence, a new trial sanction could also include a strongly worded adverse inference or 'missing evidence' instruction.").

335. This could be done during jury instructions or during closing argument.

336. *See, e.g.*, One Beacon Ins. Co. v. Broad. Dev. Grp., Inc., 147 Fed. App'x 535, 540 (6th Cir. 2005) ("Under Kentucky law, a missing evidence instruction . . . is appropriate when there exists a genuine question of fact as to whether one party negligently destroyed or lost evidence relevant to an essential element of an opposing party's case."); Niehus v. Liberio, 973 F.2d 526, 529–30 (7th Cir. 1992) (allowing a missing-evidence instruction in a police misconduct lawsuit); United States v. Steve, Nos. 89-3223, 89-3224, 1990 WL 194509, at *2 (D.C. Cir. 1990) ("When the prosecutor loses or leaves behind important evidence, the trial court may find sanctions in order or a 'missing evidence' instruction warranted, *i.e.*, a charge that the jury may infer that the missing evidence would have been unfavorable to the government. Relevant considerations for the trial judge, in deciding what action to take when the government fails to preserve evidence, include 'the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial.'" (quoting United States v. Bryant, 439 F.2d 642, 648, 653 (D.C. Cir. 1971))); State v. Fulminante, 975 P.2d 75, 93 (Ariz. 1999) ("When police negligently fail to preserve potentially exculpatory evidence, an instruction . . . permits the jury to infer that the evidence would have been exculpatory.").

337. As the *Hudson* majority was concerned with finding other methods of accountability short of suppression, this truth-oriented instruction may serve the needs of both accountability and truth. *See Hudson*, 547 U.S. at 597–99.

338. *See* Taylor v. Illinois, 484 U.S. 400, 409 (1988) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

339. Recording and formalizing this admission of constitutional error will also make it easier for future litigants to prove a recurring pattern of negligence (which is now one of the considerations post *Herring*-*Davis*).

10. Litigating Attenuation

The final issue is how to address the Supreme Court's attenuation discussion in *Hudson*.[340] Justice Scalia's focus on "interest attenuation" requires an evaluation of the underlying interests protected by the violated constitutional right.[341] Lower courts have remained remarkably silent on the issue, perhaps confused as to how one would evaluate constitutional interests.[342] Scholars that attempt to address the possible ramifications generally signal alarm.[343] Yet the puzzle of litigating the issue remains.

For example, consider again a court confronted with the unconstitutional stop and questioning of the two individuals in the NYPD cases. What is the purpose of *Terry v. Ohio*, such that contraband recovered after an unconstitutional stop can be evaluated? Is it security, privacy, or dignity?[344] All of these purposes are in some measure part of the Fourth Amendment's protection on the streets.[345] But how would these interests be determined in litigation? Further, as Professor Davies has argued, depending on one's view of the interests protected by *Miranda*, many of the traditional *Miranda* protections could be circumvented by simply redefining the interests.[346] Broadly speaking, if the interests underlying a constitutional right were at issue in every suppression hearing, courts would be forced to evaluate significant constitutional theories even in ordinary suppression hearings.

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340. *See supra* Section II.C.

341. A precursor argument for attenuation can be seen in arguments like those of Chief Justice Burger in *Brewer v. Williams*, in which he argued that the purpose of the Sixth Amendment would not be furthered by suppression of evidence. 430 U.S. 387, 426 (1977) (Burger, C.J., dissenting) ("In any event, the fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial and the integrity of the factfinding process. In this case, where the evidence of how the child's body was found is of unquestioned reliability, and since the Court accepts Williams' disclosures as voluntary and uncoerced, there is no issue either of fairness or evidentiary reliability to justify suppression of truth. It appears suppression is mandated here for no other reason than the Court's general impression that it may have a beneficial effect on future police conduct; indeed, the Court fails to say even that much in defense of its holding." (footnote omitted)).

342. *See, e.g.*, United States v. Elmore, 692 F. Supp. 2d 915, 922 (E.D. Tenn. 2010) (discussing three different cases in the Sixth Circuit in which the court did not find attenuation to be a convincing reason to avoid suppression).

343. *See, e.g.*, Davies, *supra* note 215, at 1233–35; Tomkovicz, *supra* note 50, at 394–95; Tomkovicz, *supra* note 71, at 1828–30.

344. *See supra* notes 204–06 and accompanying text.

345. Terry v. Ohio, 392 U.S. 1, 8–9 (1968) ("The Fourth Amendment provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .' This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." (alteration in original) (quoting U.S. CONST. amend. IV)).

346. Davies, *supra* note 215, at 1233–35.

Litigants would be advised to argue for a conception of the constitutional right that fits their client's interest. Perhaps as part of a motion to suppress (or a responsive motion), an argument will need to be crafted establishing the constitutional interests protected. Though this step was unnecessary in traditional suppression hearings, it is now incumbent upon lawyers to create the link between the interest protected by the constitutional protection and suppression of evidence. For example, in a Fourth Amendment suppression hearing, a cross-examination should include questioning the officer about why certain constitutional restraints exist, how officers are trained on reasonable expectations of privacy, and how officers know that violation of such legal protections would warrant suppression. These arguments will likely be contested and will need to be part of the record developed by the parties. Courts will be in an even more delicate position of trying to divine the interests protected by the various constitutional protections knowing that any constitutional conclusions will be subject to appellate review.

CONCLUSION: CONCERNS FOR THE FUTURE

On the ground, constitutional changes take time to take hold. Sweeping pronouncements that redefine constitutional concepts can sometimes remain ignored in practice. The Supreme Court has taken the first steps to redefine the exclusionary rule. How litigants answer the questions in this Article will determine the next steps.

The concerns with applying the new exclusionary rules are both practical and substantive. Practically, a two-tiered suppression hearing analysis requires additional inputs to determine the level of culpability. Even if it does not change the ultimate outcome of suppression, it will change the process. This, in turn, will mean additional work for trial courts and additional strategic decisions for lawyers. Defense counsel will be wise to consider whether this new culpability focus opens new avenues for cross-examination, discovery, and expert testimony. Prosecutors will be wise to limit the scope of this discovery and to prepare their officers for an additional culpability-based cross-examination. Police departments will be required to collect more information about possible systemic problems and to develop standards for a "reasonable police officer."

Substantively, the changes will narrow the reach of the exclusionary rule. Whether good or bad from a policy perspective, it is a significant change. One can imagine that such a system may incentivize courts to find no constitutional violation in order to avoid a lengthy culpability inquiry. Alternatively, a bifurcated process could develop such that culpability litigation only occurs after a finding of constitutional wrongdoing, much like a penalty phase in a capital punishment trial.

Any prediction of the future of the exclusionary rule must be based on the past pattern of cases. As discussed, the Supreme Court has made clear that the exclusionary rule is no longer an automatic remedy. What replaces it and how to determine when it should be applied is the challenge for judges and lawyers on the ground. Lower courts have already begun addressing these questions with mixed results.[347]

While the pure *Herring–Davis* case has not yet emerged, it soon will. When it does, litigants and judges will have to start defining some of the terms offered by the Supreme Court. Creative litigants will begin pushing the boundaries of discovery and investigating deliberate and systemic problems. Perhaps this will open up new methods of police accountability involving the collection of new data about constitutional violations. Or, perhaps more likely, this change will functionally eviscerate the traditional exclusion remedy as overburdened defense lawyers and public defenders will be unable to litigate systemic issues in individual cases. Courts will also have to interpret the Supreme Court's intent in including ill-defined new culpability standards into the exclusionary rule. How far trial courts will go to litigate culpability is unclear, but the first step is to answer the questions in this Article.

347. *See* Claire Angelique et al., *What* Herring *Hath Wrought: An Analysis of Post-Herring Cases in the Federal Courts*, 38 AM. J. CRIM. L. 221, 231–33 (2011).