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IS THE EXCLUSIONARY RULE DEAD?

CRAIG M. BRADLEY*

In three recent decisions, Hudson v. Michigan*,* Herring v. United States*, and last Term's* Davis v. United States*, the Supreme Court has indicated a desire to severely restrict the Fourth Amendment exclusionary rule. A majority of the Justices wants to limit its application to cases where the police have violated the Fourth Amendment purposely, knowingly, or recklessly, but not where they have engaged in "simple, isolated negligence" or where negligence is "attenuated" from the discovery of the evidence. They have further suggested that evidence should not be excluded where the police have behaved as reasonable policemen, using the approach from* United States v. Leon*.*

The Court's new approach, based on the culpability of the police, is subjective, yet the Court insists that it does not probe the police's mind. The new approach seems to reject negligence as the basis of exclusion, yet Leon *is a negligence-based approach. The new approach assumes that "reckless" behavior can be deterred more readily than negligent behavior, but that is not obvious.*

This Article reviews Hudson*,* Herring*, and* Davis*, as well as the court of appeals cases that have applied* Herring*. It suggests that the Supreme Court has not eliminated the exclusionary rule and argues that the rule should still be applied in cases of "substantial" as opposed to "simple isolated" negligence—that is, when negligence has substantially interfered with a suspect's privacy rights, such as through an illegal arrest or an illegal search of his car or house. It notes that none of the three cases decided by the Court involved such a substantial intrusion. It concludes, through a careful reading of the three cases, as well as examination of successful defense appeals in the courts of appeals, that the exclusionary*

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rule, though limited, is neither dead nor unacceptably constrained.

I. INTRODUCTION

In *Herring v. United States*,[1] the Supreme Court cast serious doubt on the continued existence of the exclusionary rule when it issued a narrow holding stating that exclusion is inappropriate when police misconduct is "the result of isolated negligence attenuated from the arrest."[2] The Court went on to suggest that evidence should be excluded only when it is obtained through "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[3] In *Herring*, the police relied on another county's erroneous report that an arrest warrant was in effect for the defendant, but the Court applied its new standard and refused to exclude evidence found during his subsequent arrest.[4]

In most cases, the police mistake will not be "attenuated" from the arrest or search, nor will it be reckless, deliberate, or grossly negligent. The Supreme Court has insisted, in numerous contexts, that the courts should not probe the minds of police officers in order to determine the reasonableness of police behavior.[5] *Herring* seems to establish a test based on "deliberate" or "reckless" conduct; this test has "sent courts rushing into the minds of police officers."[6] Nor is it clear what "recklessness" means. Was the Court adopting the narrow Model Penal Code standard of "consciously disregard[ing] a substantial and unjustifiable risk" of a Fourth Amendment violation,[7] which would be virtually impossible for defendants to prove? Or was it establishing some lesser standard? Further, the Court assumed that police recklessness could be deterred by exclusion but negligence could or should not be. This is not obvious. *Herring* thus raised many questions about the scope of the exclusionary rule that the Court was redefining.[8]

In *Davis v. United States*,[9] decided last Term, the Supreme Court answered one of these questions as to one type of case and made it seem

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[1] 555 U.S. 135 (2009).

[2] *Id.* at 137.

[3] *Id.* at 144.

[4] *Id.* at 144–47.

[5] *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

[6] Albert Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 485 (2009).

[7] MODEL PENAL CODE § 2.02(2)(c) (1985).

[8] *See, e.g.*, Craig Bradley, *Red* Herring *or the Death of the Exclusionary Rule*, TRIAL MAG., Apr. 2009, at 52.

[9] 131 S. Ct. 2419 (2011).

unlikely that *Herring* might be limited to its narrow holding. *Davis* held that when police followed existing circuit precedent and searched a car incident to arrest, the fact that the Supreme Court had subsequently invalidated that precedent did not justify exclusion.[10] This result seems easy since the police were not even negligent in this case. However, to what extent the exclusionary rule applies to various other kinds of scenarios remains unclear.[11] The post-*Herring* decisions of the courts of appeals suggest that the exclusionary rule is not dead but has been significantly limited by *Herring.*

This Article will examine *Herring*, its predecessor, *Hudson v. Michigan*,[12] the courts of appeals decisions interpreting them, and *Davis* in an attempt to determine the current status of the exclusionary rule. The Article proposes that "simple isolated negligence," which *Davis* claims is no basis for exclusion, should be distinguished from "substantial negligence" in which the suspect's privacy interests are seriously compromised by police negligence. In the three cases decided so far, the police negligence has either not interfered with a substantial right and been attenuated from the finding of the evidence (*Hudson*), or the arresting officers have acted entirely reasonably (*Herring* and *Davis*). Therefore we do not yet know how the Court will react to a case in which (1) there is police negligence, (2) that negligence substantially interferes with a suspect's privacy interests, as in an illegal arrest, a car search, or a warrantless search of a home, and (3) the negligence is not "attenuated" from the finding of the evidence. Thus, there is still some hope for the exclusionary rule.

II. *HERRING V. UNITED STATES* AND *HUDSON V. MICHIGAN*

Although *Herring* is considered the main case on the status of the exclusionary rule, its predecessor, *Hudson v. Michigan*,[13] fired the first shot of the current Court's attack on the rule. In *Hudson*, police executing a search warrant failed to knock and announce before entry, thus admittedly violating a requirement of Fourth Amendment law.[14] However, the Court, per Justice Scalia, held that the exclusionary rule should only apply in cases

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[10] *See id.* at 2423–24.

[11] *Id.* at 2434 (Sotomayor, J., concurring).

[12] 547 U.S. 586 (2006).

[13] *Id.* For a more detailed discussion of *Hudson*, see Albert Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741 (2008), and James Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008).

[14] *Hudson*, 547 U.S. at 588.

"where its deterrent benefits outweigh its substantial social costs."[15]

In the landmark case of *Mapp v. Ohio*, the Court declared: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[16] The *Hudson* Court wrote off *Mapp*'s holding as "expansive dicta."[17] The Court suggested that knock-and-announce violations could be dealt with by civil suits, despite the fact that the suspect's fifteen to twenty seconds of lost privacy[18] would be worth nothing in a civil suit. Thus, as a practical matter, the Fourth Amendment's knock-and-announce requirement was dead, since police could violate it without consequence.

Further, the Court noted that evidence found after a knock-and-announce violation is not a result of that violation. Instead, the police would have found the evidence anyway in the subsequent search; thus the Court likened this case to the doctrines of inevitable discovery and independent source that allow the admission of evidence despite a violation.[19] In other words, according to the Court, the finding of the evidence was "attenuated" from the violation.[20] The Court was not willing to recognize that suspects can use that time to flush evidence down the toilet or throw it into a fire.

The exact scope of *Hudson* was rendered unclear by the concurring opinion of Justice Kennedy, who lent his crucial fifth vote to pertinent parts of the majority opinion. But Justice Kennedy then declared that "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."[21] It is hard to imagine another Fourth Amendment violation whose consequences are as minor as the fifteen to twenty seconds of privacy lost when police fail to knock and announce during execution of a search warrant. So it is fair to deem *Hudson* a unique case, important only for what it says in dictum about the exclusionary rule, not for its holding.

Three years later, it was necessary for the Court to decide *Herring* to try to solidify its new conception of the exclusionary rule, and to get a

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[15] *Id.* at 591 (internal quotation marks omitted).

[16] 367 U.S. 643, 655 (1961).

[17] *Hudson*, 547 U.S. at 591.

[18] This was the Court's estimate in *United States v. Banks*, 540 U.S. 31, 40–41 (2003).

[19] *Hudson*, 547 U.S. at 592–93.

[20] *Id.*

[21] *Id.* at 603 (Kennedy, J., concurring in part and concurring in the judgment). However, Justice Kennedy had joined that part of the opinion that limited the operation of the exclusionary rule.

majority to join the opinion without reservation. In *Herring*, police in one county relied on another county's report of an outstanding arrest warrant for Herring. They arrested him, searched him incident to arrest, and found a gun and drugs, which were the basis of the federal charges against him. Shortly after the search, they discovered that the other county had made a mistake and that there was no warrant outstanding for Herring. Nevertheless, he was prosecuted. The trial judge refused to exclude the evidence, and the Eleventh Circuit Court of Appeals affirmed.[22]

In agreeing that the evidence found should not have been suppressed, the Court, per the Chief Justice, reiterated *Hudson*'s unfounded statement that "exclusion 'has always been our last resort, not our first impulse.'"[23] But this time it set forth a test for determining when evidence should not be suppressed. As noted earlier, the Court held narrowly that "[h]ere the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence."[24]

On the other hand, the Court suggested that the exclusionary rule should only be employed "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[25] The Court went on:

> We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. In *Leon*, we held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." The same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.[26]

As Professor Albert Alschuler and I both pointed out,[27] this case could be read narrowly as holding that here, where the arresting officers and their chain of command were in no way at fault, and where the error in the other county was thus "attenuated" from the arrest, it made no sense to apply the exclusionary rule because there was no culpable behavior by police to deter. This reading, and the fact that Justice Kennedy joined this opinion, is consistent with his statement in *Hudson* that he was not endorsing a wholesale remodeling of the exclusionary rule. A number of commentators, including Professors Wayne LaFave and Orin Kerr, also

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[22] Herring v. United States, 555 U.S. 135, 138–39 (2009).

[23] *Id.* at 140 (quoting *Hudson*, 547 U.S. at 591).

[24] *Id.* at 137.

[25] *Id.* at 144.

[26] *Id.* at 146 (citations omitted).

[27] Alschuler, *supra* note 6; Bradley, *supra* note 8.

suggested that given the narrowness of the "holding" language, *Herring* itself was but a small extension of *Arizona v. Evans*,[28] which had previously held that evidence would not be excluded when police rely on a mistake in the court system's database.[29] The error was that of someone other than the arresting officers. But the commentators recognized that *Herring* boded ill for the future of the rule.[30]

Herring could also be read broadly as definitely establishing the new exclusionary formula discussed above, what Alschuler deems the "big blast" view of *Herring*: that the defendant would have to prove recklessness, or gross or systemic negligence, in each case in order to get the evidence suppressed, whether the seizure was "attenuated" from the violation or not.[31] Alschuler asked why, if the big blast view is correct, the Court bothered to use the "attenuated" qualifier at all.[32] It would have been clearer to say that negligence does not lead to exclusion in the holding.

Besides the lack of clarity as to whether *Herring* gutted the exclusionary rule, the critical issue of what level of culpability by the police leads to exclusion remains obscure. The Court sets forth its "deliberate or reckless" standard and then insists that this is an "objective" standard, even though it plainly calls for an examination of the culpability of the police and thus is subjective.[33] Then the Court set forth the "objectively reasonable" standard of *Leon* as if it were the same thing. But the *Leon* test is very different. It is, by definition, an objective standard that hinges on whether "a reasonably well trained officer would have known that the search was illegal."[34] This is a *negligence* standard—if police are negligent, evidence

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[28] Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1086 (2011); 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, 777–78 (2009). Professor Clancy also recognizes that *Herring* is unclear as to both the objective/subjective issue, as well as the broadness of the holding. Thomas Clancy, *The Irrelevance of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 203–04.

[29] Arizona v. Evans, 514 U.S. 1 (1995).

[30] LaFave, for instance, deemed *Herring* a "scary" decision because the Court's analysis "far outruns the holding" and the case "seem[s] to set the table for a more ominous holding on some future occasion." LaFave, *supra* note 28, at 770.

[31] *See* Alschuler, *supra* note 6, at 472.

[32] *Id.* at 475.

[33] As Alschuler points out, "[e]ven if there can be such a thing as 'objective good faith,' there is no such thing as 'objectively deliberate wrongdoing.'" Alschuler, *supra* note 6, at 485. Moreover, "the word reckless . . . is ambiguous" as to whether it is objective or subjective. *Id.* at 486 (analyzing Supreme Court cases).

[34] Herring v. United States, 555 U.S. 135, 145 (2009) (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)).

must be excluded.[35]

In addition to the issue of what level of police culpability gives rise to exclusion, *Herring* left numerous other questions unresolved. Most obviously, what happens if (as in most cases) the police are negligent in a way that is not attenuated from the seizure? This issue now seems settled in the government's favor by dictum in *Davis*,[36] though, as I will discuss, there may be different types of negligence. Next, what happens if police follow precedent that is later overruled? This is the issue resolved in *Davis*. Third, what happens where there is no clear precedent, but the courts conclude that the police judgment was wrong in determining the correct legal course of action?[37] Fourth, what happens when the police reach an erroneous conclusion based on the facts, so that they mistakenly believe they have probable cause to search a car or they have exigent circumstances to search a house without a warrant? Fifth, what happens when the police exceed the scope of their authority, such as by holding someone too long in a "stop"[38] or searching beyond the limits of the search warrant?[39] Sixth, what happens when the police assume that a person's consent is "voluntary" or that the consenter had authority and then the court concludes otherwise?[40] These issues will be discussed later in this Article.

III. *DAVIS V. UNITED STATES*

In *Davis*,[41] police in Greenville, Alabama, conducted a routine traffic stop that eventually resulted in the arrests of the driver for driving while intoxicated and Davis, the passenger, for giving a false name to police.

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[35] At another point the Court declared that the standard was whether the police officer "had knowledge, or may properly be charged with knowledge, that the search was unconstitutional . . . ." *Id.* at 143 (quoting Illinois v. Krull, 480 U.S. 340, 348–49 (1987)). The Court also quoted Judge Friendly saying that exclusion should be limited to "flagrant or deliberate violation[s]." *Id.*

[36] *See infra* text accompanying notes 64–65.

[37] For example, in *Kyllo v. United States*, the Court held that warrantless use of a heat sensor to detect heat emissions from a house violated the Fourth Amendment and excluded evidence as a result. 533 U.S. 27 (2001).

[38] *Florida v. Royer*, 460 U.S. 491 (1983), involved such a situation, and the Court invalidated a consent to search the defendant's luggage and excluded the evidence found therein.

[39] In *Leon*, the Court assumed "that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." 468 U.S. at 918 n.19. That is, if the police behaved "unreasonably" in this regard, the evidence must be suppressed.

[40] *Illinois v. Rodriguez*, 497 U.S. 177 (1990), held that a "reasonable" belief in the consenter's authority would be enough to validate the consent. Thus an "unreasonable" belief would lead to exclusion.

[41] 131 S. Ct. 2419 (2011).

After the arrestees were handcuffed and placed in the back of patrol cars, police searched the passenger compartment of the vehicle and found a revolver inside Davis's jacket pocket. Davis was arrested and convicted of being a felon in possession of a firearm.[42]

It is undisputed that the suspicionless search of the car incident to the arrest kept with Eleventh Circuit precedent,[43] which was in turn based upon the Supreme Court's decision in *New York v. Belton*.[44] However, subsequent to Davis's arrest, *Belton* was essentially overruled by *Arizona v. Gant*.[45] *Gant* required that, before police could search a car incident to arrest when the suspects are under their control, they must have reason to believe that evidence of the crime for which the defendant was arrested will be found in the car.[46] Such "reason to believe" was not present in *Davis*.[47]

Thus, the issue was whether evidence should be excluded when police follow existing law that is subsequently overruled. A seven-to-two majority concluded that it should not.[48] *Davis* involves none of the mental states discussed in *Herring* as appropriate for evidentiary exclusion. The police did not deliberately violate Fourth Amendment law, nor were they reckless. In fact, they were *not even negligent*. They were simply following the law. Thus the issue of "attenuation" does not arise in this case. Rather, this case is resolved by reference to *Leon*: the police acted in "objectively reasonable reliance" on a case later held invalid, just as the police in *Leon* had relied on a warrant later held invalid.[49]

Davis, written by Justice Alito, reiterates that *Leon*'s "good faith" test, which most of the courts of appeal post-*Herring* have used, is appropriate:

> 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. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the 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."[50]

Thus, *Davis* declares that the exclusionary rule does not apply if *either*

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[42] *Id.* at 2425.

[43] *See* United States v. Gonzales, 71 F.3d 819, 827–32 (11th Cir. 1996).

[44] 453 U.S. 454 (1981).

[45] 129 S. Ct. 1710 (2009).

[46] *Id.* at 1719.

[47] *See Davis*, 131 S. Ct. at 2426.

[48] *Id.* at 2429.

[49] *Davis*, 131 S. Ct. at 2427.

[50] *Davis*, 131 S. Ct. at 2427–28 (emphasis added) (citations omitted).

the police behaved as reasonably well-trained officers *or* they only committed "simple, isolated negligence."[51] But these are not the same tests. The *Leon* test is objective, and the "reasonable officer" by definition is not negligent. The "simple, isolated negligence" part of the test goes beyond the holding of *Herring* and *Leon* but is again dictum, since the police in *Davis* could not reasonably be considered even negligent. Following this paragraph the Court repeatedly refers to this as the "good faith exception" drawn directly from *Leon*.[52]

Why should negligence not be sufficient? In *Herring*, the Court conceded Justice Ginsburg's claim that "liability for negligence . . . creates an incentive to act with greater care" and said it did "not suggest that the exclusion of evidence could have *no* deterrent effect."[53] Rather, it found that for *Herring*'s facts "exclusion is not worth the cost."[54] In *Davis* the Court exceeded *Herring*'s limited holding to state that "simple isolated negligence" is not enough to justify exclusion, even though it had conceded in *Herring* that negligence could be deterred.[55]

The other problem with the *Davis* formulation is the Court's belief that recklessness is more deterrable than negligence. A reckless policeman *knows* that he may be violating the defendant's Fourth Amendment rights but doesn't care. It seems that such a person is less likely to be deterred by the threat of exclusion than a simply careless policeman is, even though the Court conceded in *Herring* that such a policeman could be deterred. The reckless policeman is more culpable, but not necessarily more deterrable, contrary to the Court's stated belief: "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."[56]

But that is *not* the lesson of the *Leon* line of cases. The point of *Leon* is that if someone else, like the magistrate or the legislature has made a mistake, and the police simply act on that mistake in good faith, there is no bad police conduct to deter.[57] The police were simply doing their job. Likewise, if the police are simply following a case that is later overruled as in *Davis*, they have done nothing wrong; they have followed the law as it

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[51] *Id.* (internal quotation marks omitted).

[52] *Id.* at 2428.

[53] Herring v. United States, 555 U.S. 135, 144 n.4 (2009).

[54] *Id.*

[55] Although Justice Alito, the author of *Davis*, was clearly doing this to eliminate any sense of confusion from *Herring* as to whether negligence was sufficient for exclusion, and thus was speaking for the conservative majority, he may have slipped this one by Justices Kagan and Sotomayor, who joined the whole opinion.

[56] *Davis*, 131 S. Ct. at 2427 (quoting *Herring*, 555 U.S. at 143).

[57] United States v. Leon, 468 U.S. 897, 920–21 (1984).

existed at the time they acted. That does not suggest that, when the police are guilty of culpable conduct, they are more deterrable the more culpable that conduct becomes.

These terms of culpability are insufficient to capture a range of police behavior, some of which should lead to exclusion and some not. Suppose that police fail to, or inadequately, fill in the "things to be searched for" box on a search warrant, but never use that error to unacceptably expand the scope of the search. This is clearly negligence, but minor and inconsequential and should not lead to exclusion.[58] On the other hand, if police, lacking probable cause to arrest someone, negligently conclude that they have it, they are not acting as "reasonably well-trained" police officers; their error is not attenuated from the subsequent search, and any evidence found should be excluded.[59] The defendant's rights have been violated in a much more significant fashion than in the "particularity" mistake or the knock-and-announce violation in *Hudson*. Thus, it is possible that the Court's reference to "simple, isolated negligence" only includes minor mistakes that don't affect suspects very much. This factor should be the key!

Police culpability, which, according to the Court, is the main issue,[60] should vary according to the impact of police negligence on the suspect. It is obviously less culpable to mistakenly fill in a box on a search warrant without disadvantaging the suspect than it is to negligently conclude that a suspect is subject to arrest, search him, book him, and leave him in jail until he is arraigned the next day when, perhaps, his attorney can straighten things out. Likewise, a negligent assessment that exigent circumstances are present so that the police can dispense with a search warrant in searching someone's house is more culpable than failing to knock and announce when executing a search warrant.[61] If we're going to assess police culpability on a case-by-case basis, as *Herring* requires, we should at least take into account the extent of the intrusion on privacy that negligent police behavior causes.

That culpability depends in part on the impact on the victim is a commonplace in criminal law. Murderers are punished much more severely than attempted murderers, even though they commit the same act with the

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[58] *See infra* text accompanying notes 99–114 (discussing Groh v. Ramirez, 540 U.S. 551 (2004)).

[59] For further discussion of this issue, see *infra* Part IV and text accompanying notes 85–100.

[60] *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 [police]." (internal quotation marks omitted) (quoting Herring v. United States, 555 U.S. 135, 143 (2009))).

[61] *See* Hudson v. Michigan, 547 U.S. 586 (2006).

same mens rea.[62] Likewise manslaughter is punished more severely than reckless endangerment, as is theft of a purse when the amount inside happens to exceed the statutory limit for grand larceny.

Lest the Court has forgotten, the Fourth Amendment itself forbids "unreasonable searches and seizures." In my view the Fourth Amendment and the exclusionary rule should be co-extensive. If a search is "unreasonable" (i.e., negligent), then it violates the Fourth Amendment and the evidence should be excluded. If it violates some Fourth Amendment-based rule that the Court has developed over the years, such as the knock-and-announce requirement, but is not unreasonable, then the evidence should not be excluded.[63] Likewise, non-negligent reliance on contemporaneously valid case law should not lead to exclusion. I do not object to a "simple isolated negligence" exception if it is meant to refer to minor breaches that do not substantially interfere with a suspect's rights, as opposed to illegal arrests with all their consequences or searches of houses incorrectly based on exigent circumstances.

The *Davis* Court's discussion of whether or not "negligence" is enough to invoke the exclusionary rule is therefore dictum, as it was in *Herring*. As suggested above, it may be that the "simple isolated negligence" mentioned in *Davis*—a case in which there was no negligence at all—was not meant to apply to cases of what we might call "substantial negligence," where police negligently interfere significantly with a suspect's rights. Or at least Justice Kennedy, consistent with his concurring opinion in *Hudson*, may feel this way.

Justice Sotomayor concurred in the judgment in *Davis*, pointing out that "[t]his case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled."[64] Nor does it necessarily resolve the other scenarios, mentioned above, that *Herring* left unsettled.

However, as Justice Breyer pointed out in dissent:

> [A]n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding," where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if 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

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[62] *Compare* MODEL PENAL CODE § 210.2 (1985) (murder is a first-degree felony), *with* § 5.05 (attempted murder is a second-degree crime).

[63] This argument is set forth in detail in Craig Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, LAW & CONTEMP. PROBS., Summer 2010, at 211.

[64] *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring).

> 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.[65]

Hudson, *Herring*, and now *Davis* suggest that Justice Breyer may be right as to the situations he discusses. *Hudson* involved police misbehavior that was at least negligent, and possibly reckless or systemic, in that it blatantly violated Supreme Court precedent. But the Court in that case refused to exclude the evidence because the Fourth Amendment right at issue was too minor and the violation was too "attenuated" from the finding of the evidence, which would have been found anyway without the police violation. By contrast, in *Herring* and *Davis*, the conduct of the arresting police was blameless.

There is still a large category of cases where the police conduct is clearly wrong, but does not amount to "substantial negligence" as I have defined it. Thus, searches that the officer reasonably believes are legal but that fall "just outside the Fourth Amendment's bounds" or follow "suggestive rather than 'binding' precedent" are not really negligent acts that a "reasonably well-trained officer" would not undertake. In my view, these should not lead to exclusion. But searches involving a clear miscalculation of probable cause, exigent circumstances, or consent, while perhaps not reckless, are not the sort of searches that a well-trained officer undertakes. Those searches should lead to exclusion if they substantially intrude on the suspect's privacy interests. Or the Court could just declare such searches "reckless," a term they have not yet defined.[66] We should not try to force courts to distinguish between reckless and negligent police behavior in making the exclusionary decision. Negligence (or recklessness) plus significant intrusion on the suspect's privacy rights is enough to justify suppression.

A. RETROACTIVITY

There are two other issues considered in *Davis*, though unrelated to the theme of this Article, that should be discussed. The reader who is not interested in these points could skip this discussion without losing the flow of the Article.

The first is retroactivity. While *Davis* was pending on appeal, the Court decided *Gant* and upended *Belton*. The petitioner and dissent argued

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[65] *Id.* at 2439 (Breyer, J., dissenting).

[66] *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 276 (1971) ("The mental element of 'knowing or reckless disregard' required under the *New York Times* test, for example, is not always easy of ascertainment. 'Inevitably its outer limits will be marked out through case-by-case adjudication . . . .'" (quoting St. Amant v. Thompson, 390 U.S. 727, 730–31 (1968))).

that *Gant* should apply in *Davis*, according to established retroactivity precedent, *Griffith v. Kentucky*.[67] The Court conceded that *Gant* applies here and that therefore the police violated the defendant's Fourth Amendment rights.[68] But "[r]etroactive application does not, however, determine what 'appropriate remedy' (if any) the defendant should obtain."[69] In *Davis*, the Court denied exclusionary relief. To one not steeped in the mysteries of retroactivity doctrine, this sounds reasonable.

B. STUNTING THE DEVELOPMENT OF FOURTH AMENDMENT LAW

The other issue is whether the difficulty of obtaining a remedy for Fourth Amendment violations will "stunt the development of Fourth Amendment law," as the petitioner argued.[70] On this view, "[w]ith no possibility of suppression, criminal defendants will have no incentive . . . to request that courts overrule precedent."[71] Professors Alschuler and Kerr have also expressed concerns about this issue.[72]

The Court begins by disingenuously asserting that "this argument applies to an exceedingly small set of cases. Decisions overruling this Court's Fourth Amendment precedents are rare,"[73] this not having happened since 1967 when *Chimel v. California*[74] overruled *United States v. Rabinowitz*[75] and *Harris v. United States*.[76] While this may be technically true, it overlooks *Gant*, which Justice Alito himself described as overruling *Belton v. New York*,[77] and *Herring*, which effectively overruled a key part of *Mapp v. Ohio*[78] by deeming its holding "expansive dicta." Nevertheless, the majority correctly notes that "as a practical matter, defense counsel in many cases will test this Court's Fourth Amendment precedents in the same way that *Belton* was tested in *Gant*—by arguing that the precedent is distinguishable."[79]

Also, if a court of appeals has binding precedent on which police rely,

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[67] 479 U.S. 314 (1987).

[68] *Davis*, 131 S. Ct. at 2431.

[69] *Id.*

[70] *Id.* at 2432.

[71] *Id.*

[72] Alschuler, *supra* note 6, at 489–90; Kerr, *supra* note 28, at 1092.

[73] *Davis*, 131 S. Ct. at 2433.

[74] 395 U.S. 752 (1969).

[75] 339 U.S. 56 (1950).

[76] 331 U.S. 145 (1947).

[77] 453 U.S. 454 (1981). It's true that in *Gant* the Court didn't overrule *Belton*, but just confined it to its narrow facts. However, Justice Alito repeats his characterization of *Gant* as overruling *Belton* in *Davis*. *Davis*, 131 S. Ct. at 2425.

[78] 367 U.S. 643 (1961).

[79] *Davis*, 131 S. Ct. at 2433.

the Supreme Court can take a case from another circuit, or state, that disagrees.[80] Finally, as will be discussed, the courts of appeals are not shy about declaring that certain police practices violate the Fourth Amendment, even if they then refuse to exclude the evidence under *Herring*. Consequently, in the *next* case, the police will not be able to claim that they acted in good faith because circuit precedent is now clearly against them.

Suppose the Supreme Court has decided that it wants to overrule *Chimel v. California*[81] in light of *Arizona v. Gant*, as the *Gant* dissenters predicted they might.[82] That is, instead of allowing suspicionless searches incident to arrest of the area within the immediate control of an arrestee in a dwelling, a majority of the Court would like to impose the *Gant* requirement of "reason to believe" that evidence of the crime of arrest will be found. However, based on *Davis*, no court of appeals will suppress evidence because the police relied on the then-existing precedent of *Chimel*.

But this would not stop a court of appeals, after reading *Gant*, from concluding that the suspicionless search of a house was unconstitutional under the Supreme Court's new view of searches incident to arrest.[83] Thus the validity of a suspicionless search incident to an arrest would be presented to the Supreme Court. Or, even if the lower courts did not feel it right to depart from *Chimel*, the Supreme Court itself could do so while refusing to suppress the evidence in this case, as the Court suggests in *Davis*.[84]

IV. THE COURTS OF APPEALS CASES

Meanwhile, the courts of appeals, while in disagreement on a number of post-*Herring* issues, were, unlike the commentators, untroubled by what the appropriate test was after *Herring*.[85] They uniformly ignored the "attenuated" language of *Herring*[86] and instead treated that case as simply extending *Leon*'s "good faith exception" to non-warrant cases.[87] In large part, no doubt, this treatment occurred because no case presented to the courts of appeals seemed to present an "attenuation" issue. As noted, this

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[80] *Id.*

[81] 395 U.S. 792 (1969).

[82] Arizona v. Gant, 129 S. Ct. 1710, 1731 (2010) (Alito, J., dissenting) ("If we are going to reexamine *Belton*, we should also reexamine . . . *Chimel* . . . .").

[83] As did the Third Circuit in *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010) (involving the suspicionless search of a gym bag incident to arrest).

[84] *Davis*, 131 S. Ct. at 2433.

[85] This is based on a study of all cases in the courts of appeals citing *Herring*.

[86] The courts ignored it in the sense of not basing their decisions on "attenuation."

[87] *See, e.g.*, United States v. Koch, 625 F.3d 470, 477–78 (8th Cir. 2010); United States v. Song Ja Cha, 597 F.3d 995, 1004 (9th Cir. 2010).

Leon-based approach was invited by the Court in *Herring* and subsequently endorsed in *Davis*.[88] Most importantly, the courts of appeals did not conclude that the exclusionary rule was effectively dead, yet. Instead, a number of courts held that evidence must still be suppressed following *Herring*.

The most common post-*Herring* cases in the courts of appeals did not really involve a *Herring* issue at all. Rather, they involved police utilizing a defective search warrant and the courts uniformly ruling that under *Leon*, as well as *Herring*, the evidence should not be suppressed because the police acted in good faith when relying on the warrant.[89]

It should be noted, however, that just because a case involves a warrant does not necessarily exempt all evidence from exclusion. *Leon* set forth at least five situations in which evidence would be excluded despite the existence of a warrant. The Third Circuit summarized four situations: (1) where the magistrate relied on an affidavit that was deliberately or recklessly false, (2) where the magistrate was not neutral and detached, (3) where the affidavit was so lacking in indicia of probable cause that no reasonable officer could rely on it, and (4) when the warrant failed on its face to list the things to be seized or the person or the place to be searched.[90] To this a fifth situation should be added: when the police unreasonably exceeded the scope of the warrant—another negligence standard.[91]

Despite the existence of a warrant, a defendant recently won an exclusion victory in a court of appeals in *United States v. Song Ja Cha*.[92] In this case, Guam police responding to a complaint heard a separate claim that women were being prostituted against their will in a karaoke bar. They went to the bar and attached residence and found women who made this claim. The police inspected the bar and the house and obtained undisputed probable cause to believe that these allegations were true.[93] They then seized the house and bar, excluded all occupants, and pursued a search warrant. However, they were "nonchalant"[94] in this pursuit and didn't

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[88] *Davis*, 131 S. Ct. at 2428.

[89] *E.g.*, United States v. Campbell, 603 F.3d 1218, 1225–26 (10th Cir. 2010); United States v. Tracey, 597 F.3d 140, 150–54 (3d Cir. 2010).

[90] *Tracey*, 597 F.3d at 151. It could be argued that a magistrate's abandonment of his judicial role is not a mistake for which the police should be held responsible, but *Leon* declared that "in such circumstances, no reasonably well trained officer should rely on the warrant." United States v. Leon, 468 U.S. 897, 923 (1984).

[91] *See Leon*, 468 U.S. at 918 n.19 ("Our discussion . . . assumes . . . that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant.").

[92] *Song Ja Cha*, 597 F.3d at 1004–07.

[93] *Id.* at 997–99. This inspection was not challenged as an invalid search.

[94] *Id.* at 1006.

return with the warrant until 26.5 hours later, having kept everyone out of the house in the interim, despite the owner's need to get his medicine for diabetes.[95] The Ninth Circuit deemed this conduct "deliberate, culpable, and systemic"[96] and affirmed the suppression of evidence seized, consistent with *Herring*.[97]

Another issue, which had created a conflict in the circuits, was whether, when the police conduct a search incident to arrest of an automobile consistently with *Belton v. New York*, the evidence should be suppressed because of the Supreme Court's subsequent decision in *Arizona v. Gant*.[98] *Gant* held that suspicionless searches of automobiles incident to arrest were generally no longer allowed, contrary to *Belton*. *Davis* resolved this conflict by holding that pre-*Gant* searches conducted by police under the authority of *Belton* should not result in evidentiary suppression.

Another conflict over the exclusion issue that I suspect is the next one that will be resolved by the Supreme Court is this: Should evidence be excluded if the police fail to meet the particularity requirement in a search warrant? *Groh v. Ramirez*[99] seemed to make it clear that the *Leon* good faith exception would not apply in a case where the police neglected to fill in the portion of the search warrant in which they were to specify the items to be seized[100] or failed to refer to the attached affidavit in this respect. Although *Groh* was a civil case, it made it clear that the *Leon* "good faith exception" was the same when the issue was qualified immunity rather than exclusion.[101] *Groh* held that "no reasonable officer" could execute such a fatally defective warrant,[102] despite the fact that the officers did not expand the search beyond what they would have sought had the "description" section been filled in properly.[103]

In *United States v. Lazar*,[104] the Sixth Circuit dealt with a case in which police seized the records of various hospital patients, some of whose names were not mentioned in the warrant. The court held that *Groh v.*

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[95] *Id.* at 998–99.

[96] *Id.* at 1004. I'm not sure why the Ninth Circuit termed this "systemic."

[97] *Id.* at 1007.

[98] 129 S. Ct. 1710 (2009). *Compare* United States v. Buford, 632 F.3d 264, 270–77 (6th Cir. 2011) (holding that the evidence should not be suppressed under *Herring* and noting that three other circuits had resolved the case the same way), *with* United States v. Gonzalez, 578 F.3d, 1130, 1131–32 (9th Cir. 2009) (suppressing the evidence).

[99] 540 U.S. 551 (2004).

[100] *Id.* at 554. Actually the warrant merely repeated the description of the house in this section.

[101] *Id.* at 565 n.8.

[102] *Id*. at 564.

[103] *Id.* at 561.

[104] 604 F.3d 230 (6th Cir. 2010).

Ramirez governed, rather than the "less on point" case of *Herring*.[105] "*Herring* does not purport to alter that aspect of the exclusionary rule which applies to warrants that are facially deficient warrants *ab initio*."[106] Consequently, the evidence regarding those patients must be excluded. Note that this case, in which the police searched the records of people not named in the warrant, could be termed "substantial negligence" under my earlier analysis and hence lead to exclusion even under *Davis*. The situation differs from *Groh*, where the agents did not exceed the bounds of the allowed search because of their mistake.

In *United States v. Rosa*,[107] the Second Circuit dealt with a warrant for computers in a child porn case that did not specify the crime for which the police were searching. Thus, on its face, the warrant would allow a search of tax records or other unrelated information.[108] However, the police did not search further than for child pornography.[109] The court held that this warrant violated the Fourth Amendment, but that, under *Herring*, the evidence should not be suppressed. It found that this was isolated negligence and that this warrant did not suffer from the "glaring deficiencies" of the warrant in *Groh*.[110]

Similarly, in *United States v. Otero*,[111] the Tenth Circuit dealt with a warrant to search a postal employee's computer for evidence of postal crimes. The warrant did not specify the crimes for which evidence was sought and was thus overbroad.[112] However, the court (without discussing *Groh*) declined to suppress the evidence under *Herring* on the ground that the authorities had in fact limited the search to the suspected crimes and believed that the warrant was so limited.[113] Thus, they lacked "knowledge . . . that the search was unconstitutional" under *Herring*.[114] According to my analysis, the police were clearly negligent, but since they did not take advantage of their mistake, the negligence was not substantial. However, had they exceeded the scope of their probable cause and searched for evidence of crimes for which they lacked probable cause, I would conclude that this was not "simple isolated negligence" but "substantial negligence"

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[105] *Id.* at 236.
[106] *Id.* at 237–38.
[107] 626 F.3d 56 (2d Cir. 2010).
[108] *Id.* at 61–62.
[109] *Id.* at 66.
[110] *Id.*
[111] 563 F.3d 1127 (10th Cir. 2009).
[112] *Id.* at 1132.
[113] *Id.* at 1134, 1136.
[114] *Id.* at 1134 (quoting Illinois v. Krull, 480 U.S. 340, 348–49 (1987)). *Cf.* United States v. Tracey, 597 F.3d 140 (3d Cir. 2010); United States v. Allen, 625 F.3d 830 (5th Cir. 2010).

and suppress any additional evidence found (but not evidence of the postal crimes).

Despite *Groh*'s lack of sympathy when the police limited their search to what it would have been had the warrant been specific, I think this limit will be the deciding factor in these cases. When the police make, but do not take advantage of, these kinds of clerical errors, they are obviously acting negligently, not recklessly or knowledgeably, as to Fourth Amendment rights. This is "simple isolated negligence." If the Supreme Court takes up this issue, it will either overrule *Groh* outright, or limit it to the kind of glaring deficiency present in that case. Since Justice Alito has replaced Justice O'Connor, the author of the five-to-four decision in *Groh*, *Groh* is a dead *Herring*.

Another case involving a search warrant in which the defendant prevailed is *United States v. Brown*.[115] In *Brown*, the FBI was investigating a masked bank robbery. Having found the mask, the FBI was seeking a search warrant to test Brown's DNA to compare it to DNA on the mask. In preparing the affidavit for the search warrant, an agent not directly involved in the investigation made a false declaration that tied the defendant directly to the bank robbery and was critical to probable cause. The district court found that this statement was made with "reckless disregard for the truth,"[116] despite the fact that the affiant believed the statement.[117] Accordingly, the evidence was suppressed. But this action would likely not be "reckless" under the narrow Model Penal Code definition, since the agent was apparently not "consciously disregard[ing] a substantial . . . risk"[118] that he was violating the suspect's Fourth Amendment rights. But this was at least "substantial negligence." This is the sort of case where even after *Davis*, evidence should be suppressed.

A final post-*Herring* case deserves discussion, though it is from the New Jersey Supreme Court rather than a federal court of appeals. In *State v. Handy*,[119] police stopped a man for bicycling on the sidewalk in violation of a city ordinance. The officer did a warrant check with the police dispatcher, submitting the man's name, "Germaine" Handy, which he spelled out, address in Millville, New Jersey, and date of birth. The dispatcher confirmed that there was an arrest warrant outstanding for Handy, and pursuant to this information Handy was arrested and cocaine was found.[120]

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[115] 631 F.3d 638 (3d Cir. 2011).

[116] *Id*. at 641, 648–49.

[117] *Id.* at 649–50.

[118] MODEL PENAL CODE § 2.02(2)(c) (1985).

[119] 18 A.3d 179 (N.J. 2011).

[120] *Id.* at 180–81.

It turned out that the information that the dispatcher had in hand showed a ten-year-old arrest warrant for a man named "Jermaine" Handy with a different date of birth and an address in Los Angeles. When the arresting officer found this out at the station, he only arrested Handy for the cocaine found in the search, not the crime named in the supposed arrest warrant. The dispatcher was aware of these discrepancies, but failed to call them to the arresting officer's attention.[121]

The Court found that *Herring* was inapplicable because the police dispatcher was not "attenuated" from the arrest "but was literally a co-operative in its effectuation" and that her conduct was "objectively unreasonable."[122] Accordingly, this kind of behavior could be deterred by exclusion and that was the appropriate remedy.[123] The police behavior also led to a substantial incursion into a suspect's rights. In fact, even if this had been a dispatcher from another county, as in *Herring*, the dispatcher's culpability should have rendered "attenuation" irrelevant.

Several observations can be made about the post-*Herring* cases. The first, unrelated to the subject of this Article, is how many involve search warrants. This is encouraging, suggesting that police are regularly getting them. However, *Herring* has now removed the incentive—more lenient treatment of the exclusionary issue—for police to get warrants. This removal may cause warrant use to decline.

Second is the application of *Leon*'s "reasonably well-trained officer" standard, which is, as noted, a negligence standard. The standard may be altered slightly now that *Davis* has rejected "simple isolated negligence" as a basis for exclusion. Still, the courts are not suggesting that there is any burden of proof on the defendant on this issue. If the police make a mistake, the courts simply ask, "is this the sort of mistake that a reasonably well-trained officer would make?" This inquiry has led to exclusion in a number of the cases discussed. Thus the exclusionary rule is not dead.

Third, most cases decide the Fourth Amendment issue first, and then decide the *Herring* issue. This means that in the *next* case, at least as to mistakes of law, when the police have lost before on the Fourth Amendment issue, they cannot claim "good faith" if they commit the same mistake again.

V. OTHER ISSUES LEFT OPEN BY *HERRING* AND *DAVIS*

Justice Sotomayor argues that the following issue is still unsettled after

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[121] *Id.* at 182.

[122] *Id.* at 187.

[123] *Id*. The court recognized that it could refuse to follow *Herring* under the state constitution, but declined to consider this issue. *Id.* at 186.

Davis:[124] What if the police are acting in a new area that is not governed by existing law? It will be difficult to find that the police were acting negligently in such a situation, as Justice Breyer suggests.[125]

In *Kyllo v. United States*, the police beamed a "thermal imager" at a house to determine if it was emitting unusual amounts of heat, and upon finding that it was, used this information to get a search warrant based on probable cause of indoor marijuana growing.[126] The Supreme Court held five to four that use of the thermal imager was an unreasonable intrusion into the home.[127] If this case were arising for the first time today, presumably a district court could conclude that this did indeed violate the Fourth Amendment, but that, under *Herring*, the police mistake did not warrant exclusion, as the police were not reckless or even negligent in their application of existing law, which was unclear as to this issue. Contrary to Justice Sotomayor's view, whether or not a police officer's conduct can be characterized as culpable *is* dispositive.[128] Whether or not this was a substantial intrusion into the suspect's privacy is irrelevant to the question of exclusion, because there was no police negligence in the first place.

But since the Supreme Court has actually held that this police practice is not allowed, in the next case the police can no longer claim that they were acting in good faith, and the evidence must be excluded. Thus, there can be no warrantless, good-faith use of thermal imagers after *Kyllo* or in any case where circuit precedent is established.

What about mistakes by the police in assessing facts? Suppose the police search a car with what they believe is probable cause, but the trial court concludes that they lacked it. This is a particularly troubling case. It's one thing to rely on a magistrate's judgment that there is probable cause supporting a search warrant, as in *Leon*. At least a judicial officer has intervened in the case. But here, the police are simply relying on their own judgment and seriously interfering with the suspect's rights. It is possible that the Court would reassert its "attenuation" analysis from *Herring* in this situation and hold that such a non-attenuated violation of the Fourth Amendment requires exclusion. Or it could call this "substantial negligence," as opposed to the "simple isolated negligence" rejected as a

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[124] Davis v. United States, 131 S. Ct. 2419, 2436 (2011) (Sotomayor, J., concurring).

[125] *See supra* text accompanying note 65.

[126] 533 U.S. 27, 29–30 (2001).

[127] *Id.* at 40–41.

[128] *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring) (arguing that "whether an officer's conduct can be characterized as 'culpable' is not itself dispositive"). As the *Davis* majority made clear: "[T]he deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue." *Id.* at 2427 (quoting Herring v. United States, 555 U.S. 135, 143 (2009)).

basis of exclusion in *Davis*. Either way, a negligent assessment of probable cause leading to the substantial intrusion of a car search or an arrest should be the basis of exclusion.

A similar analysis would occur if the police were mistaken about a fact, such as the address that they put in a search warrant. If the factual error was found to be due to police negligence, obviously the harm to the innocent victim of the mistake would be substantial, and any evidence found in his house should be suppressed.[129]

Exceeding the scope of a warrant gives rise to similar analysis. Suppose the police have a search warrant for stolen widescreen television sets and, during its execution, look in drawers or other places where a television could not be and find drugs. This strikes me as a substantial intrusion into the suspect's privacy and, if the police are negligent, as they would usually be in exceeding the written terms of the warrant, the evidence should be excluded. Surely the Court does not want such misbehavior to go unpunished, though they could also order exclusion by deeming this behavior "reckless."

Another issue is consent searches. Suppose the police search a house based on consent, and the court later concludes that the defendant did not consent or that the consent was involuntary. Should the evidence be excluded automatically, or must the defendant still pass the *Herring* test to have the evidence excluded? Consent is somewhat different than other Fourth Amendment issues. The validity of a consent is not based on the voluntariness of this particular defendant, but rather on whether a "reasonable [innocent] person would [have felt] free to decline the officers' requests or otherwise terminate the encounter."[130]

Thus, in finding consent invalid, the court has already determined, in a sense,[131] that the police behaved unreasonably by misjudging what a "reasonable person" would do. It would not be right then to conclude that a reasonably well-trained officer would have made this mistake.[132] Similarly,

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[129] *Cf.* Maryland v. Garrison, 480 U.S. 79 (1987) (upholding the search of the wrong apartment on the ground that the mistake was reasonable because it was not obvious to the police until afterwards that there were two apartments on the third floor of the building rather than one). Obviously, if the police are not negligent in the first place, there is no exclusionary issue. In effect, the *Garrison* Court employed the "good faith" exception before it existed.

[130] United States v. Drayton, 536 U.S. 194, 202 (2002) (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991)).

[131] It's not precisely the same issue, since one involves the "reasonable person's" attitude and the other involves the "reasonable policeman's" attitude.

[132] *See* United States v. Stokely, 733 F. Supp. 2d 868, 905–06 (E.D. Tenn. 2010) (holding that consent was involuntary when made by a suspect placed in handcuffs, as was his young child, prior to the consent). *Herring* did not change this outcome because here the

if the police wrongly conclude that a particular individual has the authority to consent to a search, that wrongful conclusion has already violated the test of *Illinois v. Rodriguez*.[133] *Rodriguez* requires that "the facts available to the officer . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises."[134] Thus the police have already failed the "reasonable officer" test and shouldn't get to relitigate it again with a *Herring* argument.

In sum, although the Court in *Davis* edges even closer to effectively abolishing the exclusionary rule except in really extreme cases, it hasn't done so yet. In neither *Herring* nor *Davis* could the police behavior even be termed negligent, much less anything worse. We are still waiting for a case where the police have made a negligent mistake that substantially interferes with a suspect's constitutional rights, such as an arrest not based on probable cause or a warrantless search of a house where police evaluation of exigent circumstances is clearly wrong.

VI. CONCLUSION

I have long been a supporter of the mandatory exclusionary rule. If the police violate the suspect's rights, the evidence should be excluded without further ado. As a former prosecutor I did not find that the rule exacted a high price on law enforcement, as the Supreme Court now claims. It was rare for exclusionary claims to succeed, and when they did, the police deserved it. Thus the courts were not, as a general rule, excluding evidence based on minor, technical violations of the Fourth Amendment.

However, it was I who discovered, and brought to the Supreme Court's attention, the fact that "the automatic exclusionary rule applied in our courts is . . . 'universally rejected' by other countries."[135] Realizing that perfectly civilized countries like England, Canada, and Germany don't automatically apply the exclusionary rule to all search and seizure violations, but rather do so on a discretionary basis when the "ends of justice" demand it (or some similar language), does give one pause about the need for a mandatory rule. Therefore, I don't necessarily criticize the Court's attempt to limit the scope of the rule.

But so far, the Justices have enunciated neither a clear nor a fair

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police were trying to rely on their own mistake in concluding that the handcuffing was justified, rather than on a computer mistake as in *Herring*. *Id.*, *cited with approval in* United States v. Barclay, No. 2:10-CR-20570, 2011 WL 1595065 (E.D. Mich. Mar. 21, 2011).

[133] 497 U.S. 177 (1990).

[134] *Id.* at 188 (internal quotation marks omitted) (quoting Terry v. Ohio, 392 U.S. 1, 21–22 (1968)).

[135] Sanchez-Llamas v. Oregon, 548 U.S. 331, 344 (2006) (quoting Craig Bradley, Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399–400 (2001)).

alternative rule. They are unclear about whether their rule is an objective one based on the behavior of a hypothetical "reasonable policeman" or a subjective one based on the culpability of the officers in the case. They are unclear about just what level of culpability by the police will justify exclusion and who bears the burden of proof. And they misconceive the connection between police culpability and deterrence of future police misconduct by assuming that "punishing" reckless officers with exclusion will deter police misconduct more than punishing negligent ones will.

To the extent the Court endorses the "reasonable good faith" objective negligence approach of *Leon* and simply extends it to warrantless searches, I don't necessarily disagree with it. In short, despite the loose talk in these cases about severely limiting the exclusionary rule, I don't disagree with the outcomes in *Hudson*, *Herring*, or *Davis*. The police in *Hudson*, though negligent or worse, did not interfere substantially with the suspect's privacy rights. And the police conduct in *Herring* and *Davis* was completely reasonable.

But when the police, through negligence or recklessness, substantially interfere with a suspect's privacy rights and in the process obtain evidence to which they would not otherwise have access, that evidence should be suppressed. It is simple justice that the evidence be excluded.