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COMMENT

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INTRODUCTION

> *[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.*
> —Chief Justice John Marshall, *Marbury v. Madison*[1]

* J.D. & M.A. (Philosophy) Candidate, Stanford University 2010. For comments on earlier versions of this paper (and countless others) I thank Jacek Pruski. For inspiring this paper, and the next generation of civil rights litigators and academics, I thank Professor Pamela Karlan. Deepest thanks to Norman Spaulding for providing invaluable comments and support on earlier drafts of this paper and investing countless hours of mentorship and discussion into the success of this project and those yet to come. The staff of the *Stanford Law Review* provided excellent edits and support. Any remaining errors are of course all mine.

> *Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do.*
>
> —Karl N. Llewellyn, *The Bramble Bush*[2]

The Fourth Amendment protects the "*right* of the people to be secure . . . against unreasonable searches and seizures,"[3] but determining what this right means and how it should be vindicated has, to put it mildly, long been controversial.[4] In fact, because of the "wide applicability of government intrusions, ranging from countless thousands of daily intrusions at airports, traffic stops, drug testing, traditional criminal law enforcement practices, regulatory intrusions[,] . . . and many other searches and seizures, the Amendment is the most commonly implicated and litigated part of our Constitution."[5] Perhaps the most contentious element in the controversy surrounding the Fourth Amendment is determining how to enforce it—whether by the exclusionary rule, which requires unlawfully obtained evidence to be suppressed from a criminal prosecution; a civil damages remedy; an administrative sanction; or some other means.

The remedial controversy surrounding the Fourth Amendment also implicates broader questions about the relationship between a right and its remedy, evidenced by the pair of quotes above. These questions are both abstract and practical. On the abstract side, Chief Justice Marshall's "general and indisputable rule" from *Marbury* exhibits the deeply-held normative principle that when a right is declared it ought to be accompanied by an attendant remedy. Llewellyn affirms this principle by noting that the causal relationship also runs in the other direction: without a remedy, there is no right. On the practical side, Llewellyn's comment underscores that what courts *do*, as opposed to what they *say*, is the effective regulator for the scope of a given

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109 (1783) (internal quotation marks omitted)).

2. K. N. LLEWELLYN, THE BRAMBLE BUSH 83-84 (1951).

3. U.S. CONST. amend. IV (emphasis added). Throughout this paper I frame the Fourth Amendment primarily in terms of security, not privacy or property, though the security formulation certainly includes overlapping protection that resounds with the others formulation. *See generally* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008) (arguing that the Fourth Amendment protects security, which provides a textually stronger basis for Fourth Amendment claims and would result in more doctrinal coherence than a privacy-based protection).

4. *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 13 (1966) ("Few decisions of the United States Supreme Court have generated as much powerful controversy over the past few decades as those dealing with issues raised under the Fourth Amendment."); *cf.* Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring) (noting that "[t]he course of true law pertaining to searches and seizures, as enunciated [by the Supreme Court], has not—to put it mildly—run smooth").

5. THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION, at xix (2008).

right. That is, even if a court says a lot about the value of a right, the manner in which it vindicates that right is really what determines its value.

Evolving notions of property, privacy, and security, coupled with changed circumstances in the world—like the professionalization of the police force and the expansion of methods to eavesdrop and obtain data—have meant that "what the courts will do"—and what they will find constitutionally reasonable—changes too. Each era defines its version of the careful balance between order and liberty embodied in the Amendment,[6] meaning its doctrine expands and constricts over time.

Two decisions from the Supreme Court's 2008 Term indicate that "what the courts will do" has been, and may continue to be, restricted under the Roberts Court. First, in *Herring v. United States*,[7] the Court split 5-4 and refused to apply the exclusionary rule to evidence obtained in an arrest made where the officer erroneously believed—due to poor, negligent police recordkeeping—that a valid warrant justified the arrest, making the search a Fourth Amendment violation. The holding appears narrow: "when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule does not apply.[8] Yet, by finding that the costs outweighed the benefits of exclusion for "negligent," as opposed to systemic, widespread errors, the Court further weakened the primary criminal law remedy for Fourth Amendment violations. Justice Ginsburg's dissent decried the Court's new constriction with the practicality of Llewellyn. She noted, "The exclusionary rule . . . is often the only remedy *effective* to redress a Fourth Amendment violation."[9]

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6. As Landynski's seminal history puts it, the issues covered by the Fourth Amendment "bring into sharp focus the classic dilemma of order vs. liberty in the democratic state." LANDYNSKI, *supra* note 4, at 13. On one hand, some argue that construing the Fourth Amendment has "often proved heedless of the community interest in eradicating crime and has gone too far in the direction of protecting individual liberty," while on the other hand some claim that the "Court has sometimes been too accommodating to the claims of law enforcement and insufficiently vigilant in safeguarding the principles on which the Fourth Amendment is based." *Id.*; *cf.* CLANCY, *supra* note 5, at xx (casting the same tension and musing that "perhaps [the Court's] choices come down to this: is the Amendment designed primarily to protect individuals from overreaching governmental invasions or is it designed to regulate law enforcement practices?").

7. 129 S. Ct. 695 (2009).

8. *Id.* at 704.

9. *Id.* at 707 (Ginsburg, J., dissenting) (emphasis added). Interestingly, this observation has been made even by some conservative commentators. Radley Balko, a conservative journalist, sympathizes with the fact that "[c]onservatives have long despised the exclusionary rule" because it lets criminals go free, but concludes exclusion is necessary because "[t]he problem is that right now, it's really the only remedy. If police officers can make a case against someone using evidence they obtained illegally, what's to stop them from disregarding the Fourth Amendment entirely?" Radley Balko, *Eroding the Exclusionary Rule*: *Why the Supreme Court Got It Wrong in* Herring, REASON ONLINE, Jan. 28, 2009, http://www.reason.com/news/show/131311.html.

Second, in *Pearson v. Callahan*,[10] the Court unanimously invoked qualified immunity to bar a section 1983 suit against officers who searched a defendant's home in reliance on the "consent-once-removed" doctrine, finding the right not "clearly established" at the time of the violation.[11] *Pearson*'s significance, though, stems from its decision to abandon the sequencing rule of *Saucier v. Katz*, which *required* courts to address the question of whether a constitutional violation had occurred before addressing the clarity of its establishment for qualified immunity purposes.[12] Now, "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory."[13]

Notably, both of these cases purport to deal solely with Fourth Amendment *remedies*, not the right itself, but, as Llewellyn and Chief Justice Marshall demonstrated, these remedy-centered decisions implicate both sides of the right-remedy nexus.[14] To interpret the remedial relationship between *Herring* and *Pearson*, this Comment adopts Darryl Levinson's "remedial equilibration" thesis, which argues that rights and remedies are "inextricably intertwined."[15] Under this view "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape and very existence."[16] Conversely, both cases adhere to a form of "rights essentialism" by disaggregating right from remedy and assuming that any limits imposed on the scope of the remedy will not affect the underlying right. This strategy is dangerously inattentive to the consequences of alterations to the rights-remedy nexus. Thus, I argue that when viewed from the perspective of remedial equilibration, *Herring* and *Pearson* take on new significance: they diminish the meaning of the Fourth Amendment itself.

My primary aim is to demonstrate the practical and theoretical relationship between rights and remedies embodied in *Herring* and *Pearson*. This approach has doctrinal consequences, and I elaborate some of them below, but I leave the task of comprehensive doctrinal analysis to others less concerned with the

10. 129 S. Ct. 808 (2009).

11. *Id.* at 812-13.

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

13. *Pearson*, 129 S. Ct. at 818.

14. This distinguishes two other Fourth Amendment cases—coincidentally, both coming out of Arizona—in the 2008 Term where the Court considered the scope of the right itself. *See* Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633 (2009) (holding that the Fourth Amendment prohibited school officials from conducting a strip search of a student suspected of possessing and distributing a prescription drug on campus in violation of school policy, though the officials were entitled to qualified immunity); Arizona v. Gant, 129 S. Ct. 1710 (2009) (holding that a warrantless search of a car was unconstitutional where the defendant has been arrested and locked in the back seat of the patrol car).

15. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999).

16. *Id.* at 858.

specific relationship between the right and remedy at the core of this Comment. The analysis proceeds in the following manner: After briefly describing the "remedial equilibration" concept in more detail (Part I), Parts II and III consider *Herring* and *Pearson*, respectively, in light of the equilibration thesis. Part IV then considers the potential cumulative effect of these decisions. I conclude that, although *Marbury*'s right-remedy linkage has never been taken literally,[17] Fourth Amendment violations where unlawfully obtained evidence is included, but the right is not "clearly established," have no remedy. Nor are citizens assured that future officers engaging in the same conduct will be liable or face any serious consequences. Together then, these cases turn *Marbury* on its head; in some instances, rights presumptively lack an adequate legal remedy.

I. ABANDONING RIGHTS ESSENTIALISM: THE REMEDIAL EQUILIBRATION INSIGHT

In *Rights Essentialism and Remedial Equilibration*, Daryl Levinson attacks "rights essentialism," which remains prevalent in constitutional discourse. This discursive approach "assumes a process of constitutional adjudication that begins with judicial identification of a pure constitutional value," i.e., right, whose purity is "corrupted by being forced into a remedial apparatus that translates the right into an operational rule applied to the facts of the real world."[18] To rights essentialists, "[r]ights occupy an exalted sphere of principle, while remedies are consigned to the banausic sphere of policy, pragmatism and politics."[19] As such, "judicially mandated remedies are only provisionally warranted by their master-servant relationship with the rights they are designed to enforce."[20] Implicit within the rights essentialist paradigm, then, is the assumption that treating rights wholly apart from their remedies has no reciprocal effect on the underlying right.

Though rights essentialism may be adopted as a theoretical basis meant to strengthen the underlying right,[21] in case law, essentialism typically shows up in a rights-abridging form. *Herring*'s approach is typical: assume, without deciding, the constitutional rights question and begin tinkering with remedies. In the civil rights context, purporting to leave a formal right intact while

17. *See, e.g.*, John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87-88 (1999).

18. Levinson, *supra* note 15, at 858.

19. *Id.* at 857.

20. *Id.* at 858.

21. Ronald Dworkin, whose aim is undoubtedly the expansion of rights protection, has been the primary analytic force behind this approach, but has been subjected to some criticism by others, like Levinson. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY chs. 6-7 (1978); Levinson, *supra* note 15, at 926-31.

constricting the "remedial machinery" provides an "insidious" method for a court to "retrench civil rights protections."[22] As Professor Pamela Karlan notes, "[a]t best, this will dilute the value of the right, since some violations will go unremedied. At worst, it may signal potential wrongdoers that they can infringe the right with impunity."[23] Notably, both of these effects alter the right and do so through remedial abridgment, not by actually curtailing the scope of the right itself—undermining the essentialist notion that a right can be "assumed" or formally left intact when considering remedies without reciprocally affecting its meaning.

Karlan's insight shares theoretical similarity with Levinson's "remedial equilibration" view, which rejects the notion that remedies are "subordinate" and "metaphysically segregated" from the philosophical "purity of rights."[24] Instead, the equilibration perspective argues that "the only way to see the constitutional right . . . is to look at remedies."[25] Levinson identifies three trends evident when being attentive to the rights-remedy nexus: (1) remedial deterrence, where the right is shaped by the nature of the remedy that will follow if violated; (2) remedial incorporation, where a right effectively incorporates a remedy (typically through the prophylactic, preventative injunctive relief); and (3) remedial substantiation, where the value of the right is determined by remedial changes, that is, "expansion and contractions . . . [that] functionally alter[]" or "change[] the practical meaning of the right."[26]

Looking at *Herring* and *Pearson* through the remedial equilibration lens reveals that both remedial deterrence and remedial substantiation are present in each case. For the exclusionary rule, which has long been defined in terms of deterrence,[27] the remedial deterrence aspect of the decision is nothing new, but

22. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 185. Here, Karlan distinguishes "insidious" remedial abridgment as a means of constricting a right from the more direct act of reinterpreting the scope of the right itself, which did not occur in *Gant* or *Redding*, *see supra* note 14, though, as discussed, *Redding* is another excellent example of the equilibration thesis.

23. *Id.* at 185.

24. Levinson, *supra* note 15, at 870-71.

25. *Id.* at 880. Another way to conceive of the rights essentialist and remedial equilibration views is to compare Langdellian formalism to Llewellyn's realism in regards to what the "law" *is*. In the formalist paradigm, legal rules can be abstracted from broad principles, which are thereby self-executing and apolitical. The realist perspective, however, is hostile of this conception of law, because it ignores the practicalities of daily life. *Cf.* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases."). Taken a step further, the essentialist approach has analytical similarity to attempts to draw a bright-line distinction between "law" and "policy"—the former being superior, and the latter subservient to *true* law. Meanwhile, the remedial equilibration approach shares some similarity with critics of the policy-law distinction who argue that all law is inherently political. *See generally* DAVID KAIRYS, THE POLITICS OF LAW (1998).

26. Levinson, *supra* note 15, at 889, 905, 910.

27. *See infra* Part II.

what makes *Herring* significant is its potential signal of refused exclusion for any "negligent" police error. Here, remedial substantiation occurs because the Fourth Amendment will cease to protect citizens from these tort-like errors and, accordingly, expand the amount of unlawful activity police can engage in with impunity.[28]

Likewise, *Pearson* involves elements of remedial deterrence and substantiation. Qualified immunity itself acts like a deterrence-based remedial arrangement: by decreasing the *costs* of announcing new constitutional rights, the Court should more freely do so because it does not have to worry about retroactive application that might create crushing waves of litigation.[29] As a consequence, should abandoning *Saucier* result in more questions decided on the "clearly established" prong, this deterrence-based relationship is altered, and, as an act of remedial substantiation, the domain of arguably unconstitutional but tolerated police conduct increases, effectively weakening the value of the right.

The next two Parts consider more fully how these decisions walk down the rights essentialist path, which, I argue in Part IV, may make the Fourth Amendment's guarantees against executive intrusion a "dead letter" for those subject to unlawful searches and without criminal-context or civil remedies.[30]

II. *HERRING* IMPAIRED: EXCLUSIONARY RULE ESSENTIALISM

Before moving on to the Court's reasoning, I provide a brief synopsis of the facts in *Herring*, and, as relevant, the development of the Fourth Amendment's exclusionary rule more generally.

When Bennie Herring stopped by the Coffee County, Alabama Sherriff's Department to retrieve something from his impounded truck, Investigator Mark Anderson spotted him and, recognizing him from their past,[31] asked the

28. This also distinguishes *Herring* from the Court's last brush with the exclusionary rule, *Hudson v. Michigan*, 547 U.S. 586 (2006), which relied heavily on the prospect of alternative methods of enforcing a Fourth Amendment violation. In *Herring*, however, Justice Roberts makes no mention of what remedy Herring might have for the acknowledged violation.

29. *See, e.g.*, Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633 (2009) (broadening Fourth Amendment protection for school students, but doing so in a manner that prevented the school district officials from being liable for damages).

30. The specter of the Fourth Amendment becoming a "dead letter" was recognized and expressly avoided by the Court as the federal exclusionary rule developed. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.").

31. One troubling aspect of Herring's arrest is that it was the result of Anderson's personal identification of him and, despite seeing no unlawful conduct, potentially singling

warrant clerk to check for any outstanding arrest warrants. Finding none, Anderson asked the clerk to check with her Dale County counterpart, who reported that their computer database indicated there was an active warrant for Herring's arrest due to a failure to appear. When the Coffee County clerk asked for a faxed copy, however, the Dale County clerk could not find it—the warrant had been recalled some five months prior.

In the interim ten to fifteen minutes, however, Anderson arrested his target, Herring, and in a search incident to arrest found methamphetamine and a gun in his truck (which was unlawful as a consequence of a prior felony conviction). The search, therefore, was made without probable cause or pursuant to a valid warrant—a violation of the Fourth Amendment. Thus, the Court narrowed the issue and noted that "[t]he parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a *later* prosecution."[32] Put differently, the parties agreed that there was at least *some* rights violation; the only question for the Court was what remedy, if any, should be available.[33]

More generally, the Fourth Amendment's exclusionary rule has been the Court's primary remedy in the criminal context for Fourth Amendment violations, but was not initially conceived as a mere "remedy" or "policy" matter subject to deterrence-based balancing. In fact, *Weeks v. United States* and other early exclusionary rule cases come near to treating exclusion in a "remedial incorporation" sense, where the remedy almost defines the right itself.[34] But, since the Court disaggregated suppression from the constitutional right, it has subsequently construed the exclusionary rule in terms of deterrence, not constitutional necessity.[35] As *Stone v. Powell*, which limited the

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him out in retaliation for their prior conflicts. Specifically, "Herring had told the district attorney, among others, of his suspicion that Anderson had been involved in the killing of a local teenager, and Anderson had pursued Herring to get him to drop the accusations." Herring v. United States, 129 S. Ct. 695, 705 (2009) (Ginsburg, J., dissenting).

32. *Id.* at 698 (majority opinion) (emphasis added).

33. *See id.* (acknowledging the parties' agreement that the "arrest [wa]s . . . a violation of the Fourth Amendment," making the issue whether the exclusionary rule should be applied).

34. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.) (explaining that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all").

35. The first Supreme Court decision to disaggregate the exclusionary rule as a remedy apart from an entitlement related to the Fourth Amendment directly was *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), where Justice Frankfurter held that state officials were required to follow the Fourth Amendment, but that exclusion was not mandatory for these officials. This of course changed in *Mapp v. Ohio*, which extended the federal rule to state actors. 367 U.S. 643 (1961). As far as the deterrence-based rationale goes, this interpretive strain really took hold in *United States v. Calandra*, 414 U.S. 338 (1973).

exclusionary rule in the habeas context, reasoned:

> The primary justification for the exclusionary rule then is deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any *reparation comes too late*. . . . Instead, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.[36]

Herring appears to uncontroversially affirm the logic and deterrence-based reasoning of *Stone*, but from a remedial equilibration standpoint, we should also observe that the absence of a remedy for Bennie Herring means that, for him, the Fourth Amendment's guarantees mean nothing. Put in Levinson's terms, increasing instances where exclusion, conceived as a "judicially created remedy," does not apply (as the Court has done consistently)[37] reduces the deterrent function of the rule, and, crucially, diminishes the value of the *right* itself (remedial substantiation).

The Court's rationale comes in two big steps, which I consider next.

A. *Passage of Time*

The Chief Justice starts by using the temporal and spatial attenuation between the bookkeeping error and the unlawful search as a mechanism for both (a) minimizing the rights violation and (b) subsequently separating the violation from the remedy applied during the criminal prosecution. There are three temporally significant moments: (T1) the Dale County Clerk's error in relying upon the faulty computer database, (T2) the unlawful arrest, and (T3) the use of the unlawfully obtained evidence in the criminal prosecution.

Finding that the Dale Country recordkeeping error was an act of "isolated negligence attenuated from the arrest,"[38] the court sees T1 as the relevant point for considering whether suppression is warranted. But the attenuation between T1 and T2, of course, does not make the arrest any more constitutional. Instead, this attenuation might make it more problematic. In situations where officers are required to make split-second decisions in a volatile or dangerous situation, or are worried about the spoliation of specific evidence, "reasonableness" may justify a greater degree of error. This is the basis for the "exigent

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36. 428 U.S. 465, 486 (1976) (internal quotation marks and citations omitted) (emphasis added); *see also* United States v. Leon, 468 U.S. 897, 909 (1984) (creating the "good faith" exception to exclusion because it should apply only where it "'result[s] in appreciable deterrence'" (quoting United States v. Janis, 428 U.S. 433, 454 (1976))).

37. As Carol S. Steiker has argued, these "inclusionary rules" have long been expanding, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996), and have disturbing implications for the value of the Fourth Amendment.

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

circumstances" exception to a warrant requirement, and it generally makes sense.[39] When, however, as in *Herring*, the arrest is not a response to an immediate danger (or probable cause to believe that one exists), and no "exigent circumstances" are present, the scope of "reasonable" police conduct should be narrower, not broader.[40]

The relationship between T2 and T3, to the Court at least, also has remedial significance. The Court draws a sharp distinction between the unlawful search itself and the subsequent use of that information to effect a conviction. So if exclusion of evidence is meant to remedy the unlawful search, as *Stone* put it, the "reparation comes too late." But from the remedial equilibration perspective, this disaggregation of rights violation from the remedy may be more troubling than the first. If we broaden the scope of the Fourth Amendment violation by acknowledging the entire set of consequences flowing from an initial search, the Fourth Amendment violation, I posit, actually *continues* throughout the prosecution. The use of unlawfully obtained evidence *during* the criminal prosecution further disrupts the security that the Fourth Amendment was meant to protect.

If, for example, I were to break into current Republican Party Chairman Michael Steele's house and take his diary or private journal (an unlawful search), and then subsequently broadcast the information on MSNBC, the *harm* would not stop with the trespass and theft, but would continue through the subsequent dissemination that was made possible only through the antecedent lawless act. In fact, the continued intrusion that results from the subsequent dissemination is likely greater than the mere trespass. Embarrassing facts or confessions, should there be any, become harmful only when disclosed. This subsequent use also likely motivates the theft of private information in the first place. While I might find the journal personally riveting, I took it to make the information public and, presumably, to reap the benefits of this public disclosure. The same is true when officers unlawfully arrest or search individuals, and subsequently use the unlawfully obtained evidence in a public forum (the courtroom); the constitutional injury continues during the criminal prosecution, and (typically) explains why the officers sought the information (or property) in the first place.[41]

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39. *See generally* CLANCY, *supra* note 5, § 10.6 (describing exigent circumstances exception to the warrant requirement).

40. The Court has made similar distinctions when addressing excessive use of force claims, finding that level of force unconstitutional when individuals are fleeing on foot, but justified where officers have to make split-second decisions in the face of an ongoing pursuit that creates a public safety threat. *See* Tennessee v. Garner, 471 U.S. 1, 3 (1985) (laying out the contours of the doctrine regarding deadly force); *see also* Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam) (deadly force not excessive where officer is chasing defendant who gets into automobile after altercation and begins driving away).

41. In my example, MSNBC would likely have a First Amendment right to broadcast anything I told them about from reading the journals, *see* Bartnicki v. Vopper, 532 U.S. 514

Broadening the scope of the Fourth Amendment violation to include T3 does not mean that suppression is *required* in every instance, or that no "fruit of the poison tree" can ever be used. That would be a strong form of remedial incorporation. What is important, though, is that construing the Fourth Amendment's remedial machinery in the narrow form seen in *Stone* and *Herring* has implications for the right itself and is thereby relevant to how we, and the Court, might think about the right.

The Steele example also tracks the difference between *past* and *ongoing* violations. In the former, a court's remedial goal is merely the rectification of a prior harm, while the latter addresses a "continuing state of affairs."[42] In distinguishing prior and continuing injustice, though in a different context, Jeremy Waldron provides another illustration of this distinction. Suppose a court is confronted with a car thief and acts to rectify the harm. Waldron explains that "[t]aking the car away from the thief and returning it to me, the rightful owner, is not a way of compensating me for an injustice that took place in the past; it is a way of remitting an injustice that is ongoing in the present."[43] As before, the continued use of unlawfully obtained property is part of the violation. The exclusionary rule works in roughly the same manner: a piece of property was wrongfully obtained by government intrusion and suppression eliminates the intruder's ability to continue to use the unlawfully seized property. Maintaining that ex post usage has no relationship to the initial unlawful seizure misses the distinction between ongoing and past violations by refusing to consider what this remedial limitation means for the Fourth Amendment itself.

That said, there is certainly a big difference between a car and, for example, illegal drugs, to which the individual was never entitled. This issue raises a different set controversies related to exclusion, and I avoid this debate. Instead, the example is meant to illustrate only that in most cases of unlawful seizures the violation does not end merely when the object is taken, but continues so long as it is used by the intruder. The matter is one of perspective. In *Herring*, because the Court sees the remedial question as a purely historical matter, T3 is irrelevant, while, if we perceive the violation as ongoing, T3 emerges as a significant aspect when considering how to vindicate the Fourth Amendment.

(2001). In the Fourth Amendment context, however, when state actors violate the law initially, subsequent use is not cured by transferring the unlawfully obtained evidence to another official. This is why the Court did away with the "silver platter" doctrine that permitted state officials to unlawfully obtain evidence and give it to federal officials for a federal prosecution. *See* Elkins v. United States, 364 U.S. 206 (1960). Most important for present purposes, though, is to examine the nature of the injury involved and see that harm does not end when the journal is taken, but continues and is exacerbated by subsequent use.

42. Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 14 (1992).

43. *Id.*

Again, these criticisms of Justice Roberts's reliance upon temporal "attenuation"—between (1) the bookkeeping error and the unlawful search and (2) the unlawful search and the use of the unlawfully obtained property in the process of the criminal prosecution—do not mean that exclusion is *required* to remedy an unlawful act. Rather, I have attempted to show that limiting the exclusionary rule for these two reasons means something for the right. In the first instance, it emasculates the significance of the right by loosening the standard required of officials in a manner inconsistent with the rationale behind the exigent circumstances doctrine. In the second instance, the exclusionary rule is considered unnecessary because the Court presumes the constitutional violation ends with the search and does not continue into the subsequent prosecution.[44] Seeing the relationship in this fashion means "the causal arrow runs from the remedy to the warrant component of the Fourth Amendment right, not the other way around."[45]

B. *"Negligence" as a Trigger*

The second, and perhaps more significant, essentialist step comes when the Court seems to raise the trigger for exclusion.[46] The Chief Justice relies on the "crucial" fact that the police error was "negligent, but . . . not . . . reckless or deliberate."[47] To the majority, then, "when police mistakes are a result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule is inapplicable.[48]

One could easily say that the negligence-based dispute is really just about how the majority, contrary to the dissenters, calculates the balance of costs and benefits of exclusion in this particular instance: quintessential deterrence-based remedial reasoning. We might also argue about whether the Court underestimates the value of exclusion, or overestimates the costs of suppressing evidence for police enforcement. This debate, while relevant and interesting, is different from my concern here.

Significant for my purposes is the fact that the Court operates on the

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44. The Court has addressed a variant of this argument before and, in rights essentialist fashion, rejected it. *See* United States v. Calandra, 414 U.S. 338, 354 (1974) (concluding that grand jury questions based on exposure to unlawfully obtained evidence "work no new Fourth Amendment wrong. Whether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question, not of rights, but of remedies").

45. Levinson, *supra* note 15, at 896.

46. The potential significance of *Herring* and the implications of a negligence standard were quickly noticed. *See, e.g.*, Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1; Balko, *supra* note 9; Tom Goldstein, *The Surpassing Significance of* Herring, SCOTUSBLOG, Jan. 14, 2009, http://www.scotusblog.com/wp/the-surpassing-significance-of-herring/#more-8528.

47. Herring v. United States, 129 S. Ct. 695, 700 (2009).

48. *Id.* at 704.

presumption that right and remedy are hermetically sealed. That move permits it to proceed unworried about consequences of ratcheting up the exclusionary trigger. In terms of remedial deterrence, this decision reduces police officers' incentives to refrain from (or at least exercise due care to avoid) violating the Fourth Amendment. While one can only hypothesize precisely *how* this change will affect the right, it likely means at least three things: (1) criminal defendants can expect to have more unlawfully obtained evidence used against them in the criminal prosecution; (2) more individuals will be convicted and/or receive longer sentences (e.g., drug convictions often rely on quantities obtained, and exclusion would prevent sentence enhancements);[49] and (3) more individuals will be subject to unlawful searches that turn up nothing, reducing the substantive value of the Fourth Amendment right applied to these individuals. In short, *Herring* simultaneously increases the likelihood of official lawlessness while reducing the sanction for doing so. This is quintessential remedial substantiation: "limitations on the consequences of violating [the Fourth Amendment] . . . change[] the practical meaning of the right."[50]

The third consequence is perhaps the most troubling. As Justice Ginsburg notes, "the most serious impact of the Court's holding will be on innocent persons wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base."[51] Suppose, for instance, that an individual is completely innocent and law-abiding but is wiretapped or otherwise searched negligently. *Herring* waters down the rights for this class of individuals by reducing the costs of these unconstitutional incursions, thereby increasing their likelihood. This, perhaps, explains Justice Ginsburg's remark that the "exclusionary rule is a 'remedy necessary to ensure that' the Fourth Amendment's prohibitions 'are observed in fact.'"[52] Effectuating the enumerated protections of the Fourth Amendment requires some sufficient consequence to deter overreaching police conduct, and in a manner different from ex post civil liability, as Justice Stewart has explained, the exclusionary rule "compel[s] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[53]

So, though exclusion is not a "*necessary* consequence of a Fourth Amendment violation,"[54] (indeed, it cannot be; many unlawful searchers may

49. *See, e.g.*, 21 U.S.C. § 841(b) (2006) (providing escalating penalties related to drug quantity).

50. Levinson, *supra* note 15, at 910.

51. *Herring*, 129 S. Ct. at 705 (Ginsburg, J., dissenting) (internal quotation marks and citations omitted).

52. *Id.* at 707 (quoting Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond*: *The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983)).

53. Elkins v. United States, 364 U.S. 206, 217 (1960).

54. *Herring*, 129 S. Ct. at 700 (emphasis added).

turn up no excludible evidence) limiting the exclusionary remedy *does* impact the rights protection afforded by the Amendment. But, if exclusion is not required, what is a necessary consequence of a Fourth Amendment violation? Unsurprisingly, given his essentialist approach, Justice Roberts demonstrates little regard for this question, and leaves us to speculate how we should think about the other primary form of remedies for Fourth Amendment violations—civil damages, a matter left for *Pearson*.

III. STRENGTHENING QUALIFIED IMMUNITY: *PEARSON V. CALLAHAN*

A. *Farewell* Saucier

Like *Herring*, the Court's remedial analysis in *Pearson* deserves attention with respect to its meaning for Fourth Amendment rights. The facts are relatively simple. Afton Callahan sold methamphetamine to an informant working to clear his own pending charges, who Callahan had voluntarily permitted to enter his trailer home. Then, on the informant's signal, officers who were part of the Central Utah Narcotics Task Force entered Callahan's home, arrested him, and conducted a warrantless search of his trailer. The evidence obtained was used to secure his conviction, and the state argued that "exigent circumstances" justified the warrantless search. On appeal, however, the state conceded exigent circumstances were not present, but argued that the inevitable discovery doctrine justified the use of the evidence. The Utah Court of Appeals disagreed and vacated Callahan's conviction, leading him to file a section 1983 suit for civil damages alleging a Fourth Amendment violation.

The district court granted summary judgment for the officers on qualified immunity grounds, but also addressed the Fourth Amendment question directly. Noting that Callahan's claim implicated the "consent once removed" doctrine, "which permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view,"[55] the district court assumed that in light of *Georgia v. Randolph*[56] the Supreme Court would deem this search unconstitutional. Interpreting *Randolph* in a similar, though not identical, fashion, the Tenth Circuit held the search unconstitutional, but, controversially, also ruled that the right was clearly established at the time of the offense, affording the officers no qualified immunity.[57]

In *Pearson*, however, the Supreme Court unanimously reversed the Tenth

55. Pearson v. Callahan, 129 S. Ct. 808, 814 (2009).

56. 547 U.S. 103 (2006). *Randolph* dealt with the related question of third-party consent but, notably, did not actually explicitly address the "consent-once-removed" doctrine.

57. *See* Callahan v. Millard County, 494 F.3d 891, 898-99 (10th Cir. 2007).

Circuit on the qualified immunity issue, and did so without addressing the underlying rights question or the contours of the consent once-removed doctrine. In so doing, the Court reworked the structure of the qualified immunity inquiry under section 1983 and overturned part of *Saucier v. Katz*.[58] Under *Saucier*, courts were *required* to address the constitutional violation before asking whether the right was "clearly established" to determine whether the officers would be liable. After *Pearson*, this sequence, while "often appropriate . . . should no longer be regarded as mandatory."[59]

Situated within the continued evolution of the meaning of the Fourth Amendment and its remedies, *Pearson*'s abandonment of *Saucier* sequencing goes a step further than the Rehnquist-era balance of individual and collective interests embodied in its qualified immunity doctrine.[60] Qualified immunity makes it easier for courts to expound new constitutional rules, because each time they do, they need not fear that the courthouse doors will be flung open by plaintiffs attempting vindication of this (newly pronounced) right. This remedial device generally permits relatively cost-free rights expansion, though only prospectively. Like *Teague*'s non-retroactivity principle,[61] which generally means applying new rules to pending cases on direct review only, qualified immunity "facilitates—and may be a prerequisite for—the creation of new rights by reducing the cost of inventing them."[62] *Pearson*, however, alters

58. 533 U.S. 194 (2001).

59. *Pearson*, 129 S. Ct. at 818.

60. In many ways *Saucier* was the result of Chief Justice Rehnquist's view of the qualified immunity compromise: judges should address the constitutional issue but need not worry about imposing liability on unwitting officers who have acted in good faith but nonetheless violated the Constitution (another form of remedial deterrence). *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.").

61. Teague v. Lane, 489 U.S. 288 (1989).

62. *Levinson*, *supra* note 15, at 889; *see also id.* at 890 (arguing that the Court would have never created *Miranda* warnings "if the warning requirement had applied retroactively so that every prisoner had to be released from custody on post-conviction review"). Reducing the cost of expanding rights for disfavored groups, like criminal defendants, is also important for the courts as an institution in two respects. First, disfavored groups lack the protection of the political process and rely on the courts as a bulwark against state overreaching. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). Second, reducing the costs of expounding rights helps limit congressional intervention through controlling Supreme Court appellate jurisdiction. After *Miranda*, for example, Congress expressed its disapproval by attempting to strip the jurisdiction of federal courts to consider these claims, which the Court struck down. *See* United States v. Dickerson, 530 U.S. 428 (2000); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.1, at 174-75 (5th ed. 2007). Congress, then, understands that a "change in the substantive law," that is, to the right, might be made by limiting the availability of a remedy through "a procedural device." CHEMERINSKY, *supra*, at 177. *See generally* Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981). On a related note, even before *Teague* the Court proceeded in the no-retroactivity

this balance by allowing (though not requiring) courts to hop-scotch the rights issue and address a dispositive (and presumably unrelated) question about the remedy. Despite the low-cost understanding of qualified immunity and constitutional remedies advanced by Chief Justice Rehnquist and evident in *Saucier* and *Teague*, in *Pearson* the Court held that expounding the right first can, in fact, be a quite pricey endeavor.[63] To address the potential remedial consequences of *Pearson* I next consider the "costs" that motivated the Court to overturn *Saucier*.

B. Saucier*'s Price*

Pearson acknowledges that addressing the constitutional question first "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[64] However, the opinion then quickly jumps into essentialist policy mode by noting eight (depending on how you count them) "price[s]" of always addressing the rights question.

The first two costs involve resources: that of the judiciary and the parties litigating, respectively. Of the former, when it is "plain that a constitutional

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compromise for the exclusionary rule. *See* Linkletter v. Walker, 381 U.S. 618 (1965) (holding that the exclusionary rule need not operate retrospectively upon cases decided prior to *Mapp*); *see also* LANDYNSKI, *supra* note 4, at 172 (suggesting additional strategic reasons why the Court waited four years after *Mapp* to decide the retroactivity issue).

63. As an aside, to the extent that *Saucier*, authored by Justice Kennedy, was the product of the Rehnquist era, and *Pearson*, joined by Justice Kennedy, is representative of the Roberts-era direction of the Court, one wonders what *Pearson* signals. It might be as simple as error correction (hence the unanimity), but the broad sweeping tone of Justice Alito's opinion and some of the language might provide the Court with authority for further remedial abridgment. In particular, when determining whether a right is "clearly established," the Court, relying on Justice Rehnquist's language in *Wilson*, notes that the officers were "entitled to rely" on out-of-circuit precedent though their circuit had not yet ruled on consent-once-removed entries into a residence. *See Pearson*, 129 S. Ct. at 823; *id.* (citing *Wilson*, 526 U.S. at 618) ("In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that '[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.'"). Though *Pearson* and *Wilson* involved decisions below that *created* a circuit split, the logical implication of the Court's language goes beyond this situation: where a circuit split exists, officers should not be subject to money damages merely because they are on the "losing side" of a controversy. While the Court certainly does not go this far, one wonders whether there are seeds for this controversy sown here. The Court's reluctance to impose damages in the absence of fair warning, while understandable, is ironic given its well-established rule that the existence of a circuit split on the interpretation of a criminal statute is not ambiguous enough to trigger the rule of lenity, meaning potentially lawful actors who have been prosecuted are not similarly spared from picking the "losing side" of a controversy. *See* Moskal v. United States, 498 U.S. 103, 108 (1990).

64. 129 S. Ct. at 818.

right is not clearly established but far from obvious whether in fact there is such a right," addressing the rights violation is an "essentially academic exercise."[65] This statement is an implicit repudiation of the rights-essentialist paradigm. By deeming the promulgation of a novel or emerging right "academic," the Court essentially says the costs of considering the remedy outweigh the right itself. This, from the remedial equilibration perspective, makes sense: when faced with costly right promulgation Courts tend to (1) restrict the underlying right (here, by emasculating it as "academic" and ignoring it altogether) or (2) restrict the remedy available for the right (as it did when curtailing the remedies available for *Brown v. Board of Education* violations[66]). Notably, again, the remedial concern essentially drives the limits placed upon the way the court conceives of the attendant right. Likewise, the resource-reduction worry holds true for private parties that will also incur costs for litigating the existence of a constitutional right in addition to the clarity of its establishment.

Third, *Saucier* is too "pricey" where considering the right fails to make a "meaningful contribution" to the development of constitutional precedent.[67] Fourth Amendment cases typically fail to perform the "law elaboration" function—incorporated in the *Teague*-like compromise of the qualified immunity doctrine—because "the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts."[68] As the Court noted in *Brosseau*, this area is one in which "the result depends very much on the facts of each case."[69] Fourth Amendment fact-dependency results, in part, because of the Amendment's mushy text—"probable cause," "*unreasonable* searches and seizures" —and necessarily implies that some mistakes or acts of overreaching (the reasonable ones) will be permitted.[70]

But, when combined with a strong qualified immunity doctrine resting on the "clearly established" prong, many objectively unreasonable searches will also fail to entitle a plaintiff to any relief—immunizing these unlawful acts. Consider, for example, *Wilson v. Layne*: all nine Justices agreed that having media ride-alongs that permit video and photographic intrusions into arrestees' homes was a Fourth Amendment violation, but despite this unanimity, eight of nine Justices agreed that the officers should be immune from suit because the

65. *Id.*

66. 347 U.S. 483 (1954); *see* Milliken v. Bradley, 418 U.S. 717 (1974) (preventing inter-school district remedies for *Brown*); Levinson, *supra* note 15, at 874-78 (discussing school desegregation and remedial equilibration).

67. *Pearson*, 129 S. Ct. at 819.

68. *Id.* (quoting Buchanan v. Maine, 469 F.3d 158, 168 (1st Cir. 2006) (internal quotation marks omitted)).

69. Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (per curiam).

70. On this score, Chief Justice Roberts rightly notes that "[t]he very phrase 'probable cause' confirms that the Fourth Amendment does not demand all possible precision." Herring v. United States, 129 S. Ct. 695, 699 (2009).

violation had not been "clearly established."[71] The same type of phenomenon, though less stark than *Wilson*, occurred in *Redding*. There, while eight Justices agreed that the strip search of a middle school student was a constitutional violation, the majority fractured on the issue of qualified immunity—with Justices Stevens and Ginsburg dissenting on the grounds that the unreasonableness of the search was clearly established.

Instead, fact dependency may be all the more reason for addressing the rights-violation question under the Fourth Amendment. If the right to be secure against unreasonable searches is to retain (or, depending on your perspective, "obtain") its vitality, some recovery for Fourth Amendment violations must be afforded. The practice of continued avoidance on Fourth Amendment questions means, in *Herring*-esque fashion, that mistakes will not only go unremedied but instead incentivized. Refusing to consider a constitutional violation unless it is clearly established rewrites the Fourth Amendment: "The right to be free of unreasonable searches and seizures *only if* such conduct is clearly established at the time of the violation." This amounts to a substantive limitation on the Fourth Amendment right—instead of using objective reasonableness as a guide, officers need only worry about what has been clearly established.

Further, should courts adopt a practice of refusing to address whether emerging practices violate the Fourth Amendment (note that *Pearson* does not require this, but would permit it), rights claims may essentially stagnate. If previously recognized, a particular act or practice will amount to a rights violation. If not, despite being objectively unreasonable, nothing *requires* a court to deem this practice unconstitutional.[72] On the flipside, one might worry that *Pearson*'s introduction of increased flexibility would change the underlying Fourth Amendment doctrine in the opposite direction because the majority of suits addressing rights development will be decided by so-called "activist" judges who reach out to expand constitutional protections, which would presumably skew the doctrine as a whole to the left (except, perhaps, in

71. 526 U.S. 603 (1999).

72. One possible, practical counterargument to this point is that judges, sworn to uphold the Constitution, will not turn a blind eye to violations and will typically continue to follow *Saucier*. While this is certainly true, the realities of swelling caseloads and reasons laid out in *Pearson* demonstrate the strong incentive to rule on the "clearly established" prong whenever the opportunity arises. The introduction of discretion into qualified immunity sequencing might raise another potential (depending on your theory of judicial interpretation) problem: so-called 'activist' judges go out of their way to reach (and presumably expand) the Fourth Amendment question, while a majority of judges do not. As the argument goes, this might potentially "skew" finding of constitutional violations in an ideological fashion. This possibility is supported by the fact that, despite being broadly labeled "generalists," Court of Appeals judges often do "specialize" in areas of their concern. *See generally* Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519 (2008).

the area of the Second Amendment, which would tend right).[73] Either way, *Pearson* could have a significant impact on Fourth Amendment doctrine.

Given these concerns about the appropriate role of judicial review over Fourth Amendment claims, the fact that Fourth Amendment violations are so fact-intensive suggests that judges should be especially circumspect in determining whether a particular situation would be deemed "objectively unreasonable" through the eyes of the jury that would ultimately be asked to answer this question.[74] That is, fact sensitivity makes it even more dangerous to deem a right clearly or unclearly established: the jury might view the situation differently than a judge ruling on a 12(b)(6) or summary judgment motion.[75]

Fourth, *Pearson* tells us that addressing the right first will be of "scant value when it appears that the question will soon be decided by a higher court."[76] If, for instance, the Supreme Court has granted certiorari on a case involving a clear circuit split, then another Court of Appeals would waste resources by addressing the constitutional right question. This presumes, of course, that the Supreme Court will, in fact, address the question. In *Pearson*, however, the Court refuses to address the Fourth Amendment right at issue in the case—the "consent-once-removed" doctrine—or determine, at a minimum, whether the Tenth Circuit was correct in assuming that *Randolph* required its holding. Instead, as it admonishes lower courts to do, the Court addresses the "clearly established" prong (acknowledging that the decision below created a conflict, but refusing to resolve it). To be of value, the higher court must actually rule on the right,[77] and, at any rate, for lower courts, pending potential binding authority suggests that they should hold a case, rather than rule one way or the other; this would also reduce the chance of error and conserve resources.

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73. Related to this possibility, at least at the appellate level, is the fact that Federal Court of Appeals judges, of varied political valiances, often specialize in areas of their primary concern. *See id.*

74. *See Brosseau*, 543 U.S. at 202 (Stevens, J., dissenting) (arguing that the qualified immunity inquiry should have been "answered by a jury").

75. A good example of this problem is another Fourth Amendment case, *Scott v. Harris*, 550 U.S. 372 (2007), where the Court relied on a videotape to justify its position about what a reasonable, hypothetical, jury would have decided. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (accepting the Court's invitation to "see for yourself" whether the police officers' conduct, which rendered a teenager permanently paralyzed, violated the Fourth Amendment and finding that although many jurors might have reached the same conclusion as the Court, their reasons for doing so and perception of the situation were quite different); *cf.* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (setting out the thesis that *Perils* applies).

76. Pearson v. Callahan, 129 S. Ct. 808, 819 (2009).

77. Frequently the Supreme Court does not, as in *Pearson* and *Herring*, actually decide the constitutional question either. *See, e.g.*, *Brosseau*, 543 U.S. at 198 ("We express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself.").

Fifth is the concern that addressing the constitutional question might rest on ambiguous state law, but this seems readily distinguishable (as several courts have already recognized[78]), and, at any rate, resolved by the adequate and independent state ground doctrine.

The sixth price relates again to fact-specificity issues in Fourth Amendment cases. If qualified immunity is asserted at the pleading stage, the propensity for bad decision making increases because the "factual basis for the plaintiff's claim or claims may be hard to identify," which makes the two-step inquiry "uncomfortable."[79] But, as before, this cuts in favor of curtailing qualified immunity, not expanding it. Instead, a judge should have a clear picture of exactly what right was or was not established; encouraging resolution of the qualified immunity question in the face of factual uncertainty promotes judicial speculation and *raises* the potential for hindsight bias (the Court's seventh concern), rather than reducing it.

Seventh, *Saucier*'s rigid sequencing rule created the problem of hindsight bias. Judges who have decided that a right was not clearly established at the time of the violation might be less likely to find a violation in the first place, which means that forcing them to address the question could create bad law. That is, knowing that the plaintiff *cannot* recover makes it harder to say that her rights have, in fact, been violated.

The problem of hindsight bias is interesting because the Court indirectly acknowledges the remedial substantiation at work here by noting that the structure of the remedial inquiry for qualified immunity directly affects whether the right itself constricts or expands in a particular case. So, given this concern, what we would want is some type of method for reducing the likelihood that a judge's first review of a search comes before the assertion of qualified immunity. In the criminal context, the problem of ex post judicial bias is tempered by the warrant requirement. Requiring that officers provide ex ante reasons for their search limits the probability that judges viewing an otherwise unreasonable search ex post may be implicitly biased by the fact that the officers actually found contraband.[80] On the civil side, however, there is no counterpart, and the Court must rely on ex post adjudication to get its first look at a challenged search. This does mean a problem of hindsight bias exists, but the Court's response is essentially avoidance of the issue and, once again, a

78. *See Pearson*, 129 S. Ct. at 819 (citing courts that "have identified an 'exception' to the *Saucier* rule for cases in which resolution of the constitutional question requires clarification of an ambiguous state statute").

79. *Id.* (internal quotation marks and citations omitted). I include here the Court's worry that courts might be faced with "woefully inadequate" briefing on the constitutional question, *id.* at 820, because it gets to the same point: it remains unclear exactly *what* the asserted rights violation *is*.

80. *See* Levinson, *supra* note 15, at 895-96 ("We might think of warrants as effectively raising the probable cause standard by eliminating judicial bias that would color ex post adjudication of the reasonableness of searches that turned up incriminating evidence.").

tendency toward doctrinal stagnation in the face of ongoing violations. Those asserting rights that were previously recognized will have remedies, but those asserting new claims might be left with nothing. Thus, given the way technology and ongoing struggles with terrorism pose new threats to Fourth Amendment guarantees, stagnation could also have the consequence of making the Fourth Amendment less effective as a bulwark against state overreaching because the range of its coverage will be limited to areas acknowledged in the past.

When courts do announce a constitutional right, however, the Court's eighth concern kicks in: it may be difficult for "affected parties" (i.e., state actors, typically police officers) to obtain appellate review of a decision that may "have a serious prospective effect on their operations" because announcing a rights violation that is not clearly established will make these officers a "winning party" typically unable to appeal the first constitutional right question, making it potentially unreviewable. This problem, however, is not, as the Court concedes, necessarily the consequence of *Saucier*, but a procedural "tangle" arising from the Court's unwillingness to entertain an appeal on an issue on which the party prevailed.[81] Yet there are alternative procedural means of getting around this procedural hurdle. For instance, each qualified immunity step could be seen as its own appealable determination (which comports with qualified immunity's status as an exception to the prohibition on interlocutory appeals).[82]

Ninth, *Saucier*'s "two-step protocol departs from the general rule of constitutional avoidance."[83] The strength of the avoidance canon, however, seems particularly weak in constitutional litigation. That is, section 1983 creates an entire class of cases where the constitutional question is the very reason for the suit. Avoidance is relevant where there's a statutory claim (e.g., the Immigration and Nationality Act,[84] a child pornography law,[85] or a jurisdiction-stripping provision[86]) that *may* give rise to a constitutional issue but need not. By contrast, where a plaintiff alleges that her constitutional rights have been violated, the response "we generally avoid constitutional questions" misses the point.

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81. *Pearson*, 129 S. Ct. at 820 n.2.

82. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

83. *Pearson*, 129 S. Ct. at 821.

84. *See* Kent v. Dulles, 357 U.S. 116 (1958) (avoiding the constitutional question by limiting the scope of the statute).

85. *See* United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (abandoning the most natural reading of the statute to avoid potential First Amendment problem).

86. *See* INS v. St. Cyr, 533 U.S. 289 (2001) (avoiding Suspension Clause issue by permitting habeas petitions by immigrants despite congressional limitations in deportation cases under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(a)(1)).

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Pearson's reach should not be overstated. While there is much in terms of remedial equilibration and the relationship between rights and remedies to be made out of the Court's analysis and its decision to abandon the eight-year *Saucier* experiment, the sky is not falling, and the switch from a mandatory rule to a discretionary choice does not *necessarily* mean remedial stagnation. In fact, the Court's first real opportunity to skip a rights question came and passed in *Redding*. We are thereby reminded of the Court's admonishment that "[a]ny misgivings" concerning the abandonment of *Saucier*'s mandate "are unwarranted" because lower courts are not prevented from following the procedure but merely "have the discretion to decide whether that procedure is worthwhile in particular cases."[87]

Yet, given the eight "costs" of *Saucier* discussed above, we have strong reason to believe that in the mine run of cases—unlike the Court's first chance in *Redding*—the clearly established inquiry will dominate courts' considerations of qualified immunity motions. *Pearson* counsels, however, that this implication should not be disconcerting because the "development of constitutional law" is not "entirely dependent on cases in which the defendant may seek qualified immunity."[88] Of course constitutional law is not *entirely* dependent on section 1983 suits against officers, but the reach of the other outlets the Court points to—criminal cases, actions against municipalities, and suits for injunctive relief—have also been limited. First, the exclusionary remedy for Fourth Amendment violations has been long been weakened by exceptions and, following *Herring*, may now be sharply curtailed where police have acted negligently. Second, while municipalities might not have qualified immunity,[89] a plaintiff must demonstrate that the violation is pursuant to a policy, practice, or custom of the city and no respondeat superior liability will lie.[90] Finally, obtaining injunctive relief, or performing structural reform more generally, has been sharply curtailed by *Lyons v. City of Los Angeles*,[91] and in

87. *Pearson*, 129 S. Ct. at 821.

88. *Id.* at 821-22.

89. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

90. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). Indeed, this development also demonstrates the equilibration of rights and remedies. Where qualified immunity lowers the cost of expanding rights violations and, more generally, recovery for individual actions (remedial deterrence), extending liability to municipalities but simultaneously raising the threshold for triggering liability essentially serves the same function. One interesting permutation of this process is in cases where the alleged constitutional violation was a failure to adequately train officials. Here again, the court curtails the remedy (demanding deliberate indifference and an exceedingly tight causal nexus) to prevent liability from resting upon municipalities. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378 (1989).

91. 461 U.S. 95 (1983). The vibrancy of *Lyons* was recently reaffirmed, albeit in a different context, in *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009).

other contexts by congressional action.[92]

IV. A POTENTIALLY PROBLEMATIC DIALECTIC: *HERRING* AND *PEARSON* COMBINED

This Part briefly addresses the relationship between *Herring* and *Pearson* as remedies to Fourth Amendment violations. I first argue that the potential for no remedy in either the civil or criminal context is a consequence made available by the combination of these cases and, next, attempt to show more broadly why this consequence is significant.

A. *No Remedy?*

When done in both the criminal and civil context, hop-scotching the rights question for a dispositive remedial question undermines the value of the Fourth Amendment as a bulwark against executive intrusions into individual privacy and security. Bennie Herring's prosecution and his potential damages suit are illustrative. Like the remedial procedure now available after *Pearson*, *Herring* moves to the subsidiary remedy point about deterrence and negligence without actually discussing the contours of the right at issue—a process that effectively mirrors what courts do when addressing the "clearly established" question alone. This move has remedial consequences. By moving to deterrence without addressing whether, in fact, Herring's rights had been violated and precisely why, the majority is able to act as if its deterrence-based inquiry has no effect on the underlying right. But, of course, it does.

Refusing to apply the exclusionary rule in *Herring* means that unlawfully obtained evidence is used to sustain his prosecution, which, as argued above, compounds Herring's (and Michael Steele's hypothetical) injury. On the *Pearson*/damages flipside, his attempt at recovery would be similarly futile. The right not to be subject to a search incident to negligent police recordkeeping (should it exist) was certainly not "clearly established" before his case, and, as the *Pearson* Court itself refused to do, there is no guarantee the court would consider whether there was a constitutional violation in the first instance. Nor could Herring make a claim out for injunctive relief. He would likely have trouble satisfying Rule 11 in his complaint alleging a systemic error (i.e., the facts, if there, are not available to him),[93] and in light of *Lyons* he

92. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996); *cf.* Levinson, *supra* note 15, at 888 (noting that the PLRA exhibits the remedial substantiation relationship by limiting the value of the Eight Amendment right by truncating equitable remedies for violations).

93. Justice Ginsburg also pointed out the implications of the systemic error inquiry on the criminal side: "How is an impecunious defendant to make the required showing? If the

would not have standing for such a suit.

The result? A Fourth Amendment violation without any remedy. If remedies, as the essentialist thesis maintains, exist wholly apart from their principled rights counterparts, the existence of unremedied constitutional violations might not (beyond the individual injustice) be troubling. Yet, the truncation of remedies also effectively dilutes the Fourth Amendment right itself. For people like Herring, such a constitutionally guaranteed right has no meaning. They receive no redress, nor have the contours of the rights violation been sufficiently developed to prevent future violations. Like the "consent-once-removed" doctrine's continued limbo despite *Pearson*, the remedial constriction of the court leaves the Fourth Amendment in a similarly uncertain status.

Further, the rights dilution made possible at the hand of its remedy also affects people who, unlike Herring, have done nothing wrong at all. Being blind to the increased incentive to violate rights by reducing the cost of violating them not only permits but effectively encourages lawlessness on behalf of state officials. That is, because *Herring* means that no negligently obtained evidence will be excluded, the Court has essentially incentivized officials, at a minimum, to *become* negligent with respect to constitutional guarantees, and, more seriously, to knowingly violate these guarantees because they face no meaningful consequence for the violation.

B. *Alternative Remedies and the Need for Constitutional Discourse*

Thus far I have made the case that the remedial consequences of *Herring* and *Pearson* combined will likely have an unfortunate effect upon the underlying Fourth Amendment right itself. In this Subpart I look beyond these practical consequences and focus on the element of Levinson's thesis which emphasizes the role of discourse in constitutional adjudication. For Levinson, constitutional remedies have no special status above other remedies, and accordingly, he rejects the notion that remedial construction in constitutional cases is "special" or somehow different than fashioning remedies in typical statutory or private law contexts. Courts should, he argues, be as free as they are in the latter context to fashion appropriate remedies for constitutional violations.[94]

Though I largely share Levinson's aim—to provide a view of judicial review that permits remedial flexibility for constitutional violations despite the counter-majoritarian difficulty—I briefly depart from his analysis. Instead, I

answer is that a defendant is entitled to discovery (and if necessary, an audit of police databases), then the Court has imposed a considerable administrative burden on courts and law enforcement." Herring v. United States, 129 S. Ct. 695, 710 (2009) (Ginsburg, J., dissenting) (internal citation omitted).

94. Levinson, *supra* note 15, at 931-40.

argue that part of the significance of *Herring* and *Pearson* derives from their uniquely constitutional nature and that, as part of the relationship between remedy, right, and injury, constitutional violations and their remedies deserve some special treatment. Specifically, I argue that because vindication of a constitutional right always serves a unique public purpose, the remedial imperative in this context is heightened. Thus, instead of limiting the remedial options for courts, I conclude (along with Levinson) that courts deciding constitutional cases should be given, and should exercise, wide latitude in fashioning appropriate remedies for these violations and tailoring them to the precise nature of the constitutional harm.[95]

To make my case, I respond to a hypothetical objection to my argument. One might argue that though federal law leaves criminal defendants/civil plaintiffs with no effective remedies, state-based, common-law remedies (e.g., trespass, battery) might suffice. And that, given that the Fourth Amendment was long enforced via civil trespass, not section 1983 or evidence suppression, the recent constriction of these remedies is of no serious concern from a constitutional standpoint. This view has antecedents in the "traditional" or "orthodox" view of state courts as primary arbiters of constitutional questions, which also puts an emphasis on limited federal court jurisdiction embodied in the Madisonian Compromise.[96]

Equating a constitutional violation with state common-law "trespass" first falters because it wrongly presupposes that *private* trespass is equivalent to the *public* constitutional violation.[97] Given that rights are meant to serve as a check, or as Nozick put it, "side constraint" on state action,[98] the injury incurred at the hands of the state, with its duty to protect rights and an exclusive claim to the legitimate use of coercive force, is qualitatively different than an injury at the hands of a private individual. This is implicit within the state-action doctrine: only the state can inflict the type of injury that the Constitution prescribes.

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95. *Cf.* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971) (describing broad remedial authority of federal courts sitting in equity to tailor remedies to constitutional violations).

96. By "orthodox" view I mean the view that the Exceptions Clause, Article III § 2, gives "Congress . . . plenary power over the appellate jurisdiction of the Supreme Court." PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 260 (6th ed. 2008). From the Exceptions Clause, the orthodox view infers that federal courts need not provide remedies for *every* constitutional violation because the state courts are bound by the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and can be relied upon to follow and enforce the substantive mandates of the Constitution. For a recent invocation of this structural view, see *Haywood v. Drown*, 129 S. Ct. 2108, 2119-23 (2009) (Thomas, J., dissenting).

97. *Cf.* Abram Chayes, *Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4-5 (1982) (distinguishing private and public litigation).

98. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 29 (1974).

More broadly, constitutional litigation serves purposes beyond remedying just the individual's rights and protects the public interest, which means the remedy serves a function that is simultaneously prospective and historical.[99] For instance, the social function of public vindication underlies the concept of the "private attorney general" employed by civil rights statutes by "providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe."[100] State trespass remedies might at one time have provided individual officers with structural incentives to refrain from acting,[101] but they have never served an explicit public interest and, following the rise of the professional police force, are now less adequate at serving it than they might have been at the founding.[102]

My claim here goes a step beyond just civil rights statutes with an explicit or implied cause of action: *any* adjudication of constitutional infringement serves this public function. That is, constitutional harms contain an irreparable, often dignitary, harm that comes from having the guarantee of living in a free and equal society violated. The imprimatur of the state on police officers' behavior (and in most instances the use of taxpayer funds to indemnify officers liable under section 1983),[103] changes the character of this injury from mere private violation to a public harm. Vindicating constitutional rights for an individual necessarily increases the value of that right for all others. Thus, it is the nature of the *injury* which underlies the need for examining the right-remedy nexus.

Of course, this is quintessential remedial substantiation: providing a strong remedy for one individual increases the value of the collective right. Describing constitutional violations as mere "trespass," however, denigrates that function by burying the right even further than *Pearson* permits by removing the discursive effect of announcing that the executive has stepped over the line. As such, even when difficult to price monetarily, like procedural due process

99. *See* Chayes, *supra* note 97, at 4-5.

100. Karlan, *supra* note 22, at 186.

101. As an historical matter, these simple state trespass remedies fail to maintain the structural incentives motivating the Fourth Amendment at its adoption, which, as Professor Lessig argues, means that remedial translation is justified. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1229 (1993).

102. *See id.* at 1231-32 (arguing that state trespass remedies no longer perform the function they once served, which provides the need for remedial translation). On the professionalization of the police force and its implications for Fourth Amendment remedies, see Carol. S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-38 (1994) (discussing changed circumstances and the implications of the expanding police force in contradistinction to the informal constable).

103. On this score, the Court has also erred by assuming that governments, with widely dispersed income sources, behave in the same way that private actors do when considering what standard of care to exercise in order to avoid tort liability. *See generally* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

violations,[104] the adjudication of a constitutional violation as such at least permits this harm to be *recognized*. Recognition, through even its symbolic value alone, serves to bolster constitutional discourse and creates a political check on overreaching.

Failure to acknowledge the importance of symbolic and discursive value of rights promulgation through essentialist right-remedy disaggregation, therefore, may derive from inadequate attention to the type of injury meant to be redressed in particular cases. In *Herring*, for example, which follows *Stone*'s line that the "reparation comes too late," the Court supposes that the entire constitutional harm accrues at the arrest phase, and fails to continue into the prosecution. Re-characterizing the broader, social harm implicated by police unlawfulness, rather than focusing on deterring arrests alone, would necessarily change the way courts balance the costs and benefits associated with suppressing evidence.

Finally, my response to reliance upon state common-law remedies was meant to demonstrate how the rights-remedy controversy must also come back to the antecedent injury addressed by the constitutional provision. Levinson rejects the view that we start at the top, with the right, and look to the bottom, the remedy, as a secondary aim. He is right to argue that the top-down, essentialist approach errs by presupposing the hermetically isolated nature of rights and remedies, and that we have much to gain by looking at constitutional remedies from the "bottom." This, however, is not the end of the story. We must take an even deeper look into the nature of constitutional injury to truly appreciate both sides of the remedial equilibration insight, as our framing of this injury influences both the nature of the right. When we do so, state common law remedies are inadequate because they ignore constitutional injury, and, instead, to maintain the role the Fourth Amendment plays as a bulwark against executive overreaching, a robust, federally mandated remedial machinery is needed.

CONCLUSION

Herring and *Pearson* represent the remedial flipsides of the Fourth Amendment coin—raising the bar in the criminal context for excluding unlawfully obtained evidence, while in the civil context, lowering the bar for dismissing damages suits without even determining whether, and to what extent, a constitutional violation occurred. Restricting this remedial structure can only serve to change, and for all practical purposes, devalue that coin. Again, Justice Marshall's prose remains timeless: "The government of the

104. *Cf.* Carey v. Piphus, 435 U.S. 247 (1978) (refusing to grant compensatory damages under section 1983 for denial of procedural due process rights without particularized evidence of a quantifiable injury).

United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[105]

105. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).