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MESSERSCHMIDT AND CONVERGENCE IN ACTION: A REPLY TO COMMENTS ON *TRAWLING FOR* HERRING

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INTRODUCTION

Among time-honored legal fictions, the existence of living, breathing readers of published law review articles is one clung to by even the most ardent realists in our legal academic profession. Like a burning bush, evidence to ratify this faith in readership is rare and met with wonderment and gratitude. But it is a special gift indeed when one's work obtains not only an audience, but careful, sustained, critical reflection from readers whose intellectual output serves as inspiration for your own. With the *Columbia Law Review Sidebar*'s recently published responses to my Essay, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence* ("*Trawling*"),[1] I am the recipient of just such a gift from Professors Robert Tsai and Nelson Tebbe, Colin Starger, and John Greabe.

All three responses offer original insights (too numerous to fully detail here) that generously deepen both the descriptive and normative aims of *Trawling*. Through analysis and illuminating "opinion maps," Professor Starger brings to the fore dissenting opinions from the Court's exclusionary rule jurisprudence and quite literally illuminates their contribution to the dynamics of borrowing and convergence to which *Trawling* ascribes the (shared) contours of contemporary exclusionary rule and qualified immunity doctrine.[2] Professors Tsai and Tebbe add to the considerable influence their work has already exerted on my own, by highlighting the importance of fit, transparency, and related rule of law values for *Trawling*'s expressed concerns about the pathologies of borrowing, and by helpfully interrogating the nature and conceptual contribution of *Trawling*'s notion of convergence.[3]

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1. Jennifer E. Laurin, Trawling for *Herring*: Lessons in Doctrinal Borrowing and Convergence, 111 Colum. L. Rev. 670 (2011).

2. Colin Starger, Response: Metaphor and Meaning in *Trawling for* Herring, 111 Colum. L. Rev. Sidebar 109, 110–19 (2011).

3. Robert L. Tsai & Nelson Tebbe, Notes on Borrowing and Convergence, 111 Colum. L. Rev. Sidebar 140, 142–47 (2011) [hereinafter Tsai & Tebbe, Response]; see generally

Professor Greabe elaborates on the trend of overall diminishment of constitutional remedies that *Trawling* identifies and critiques, focusing on the flip side of the Essay's descriptive account to assess the impact of borrowing and convergence on constitutional tort doctrine.[4] But he is also critical of the contention in *Trawling* that recovering a history of doctrinal borrowing and convergence reveals qualified immunity doctrine as a source of the more limited, culpability-based exclusionary rule announced in *Herring v. United States*.[5] Indeed, he worries not only that my analysis is inaccurate, but that my analytical errors could "enable a doctrinal distortion of precisely the type [*Trawling*] cautions against."[6]

This brief Reply reflects on and refines *Trawling*'s argument in light of my colleagues' responses and in the wake of the Court's recent decision in *Messerschmidt v. Millender*.[7] As the first case since *Herring* to give sustained consideration to the substance of qualified immunity's protection from suit for officials who make "reasonable" constitutional missteps, *Messerschmidt* presents an obvious opportunity to test some of *Trawling*'s assertions about the trajectory of doctrinal convergence between the exclusionary rule and qualified immunity doctrine. In the brief space available here, I make a preliminary case that *Messerschmidt* strongly exemplifies a continuing trend of convergence between exclusionary rule and constitutional tort doctrine, and that in doing so it exhibits some of the most negative pathologies that *Trawling* identified. Examining *Messerschmidt* through *Trawling*'s lens has the valuable subsidiary benefit of clarifying the conceptual contribution made by *Trawling*'s notion of "convergence"—a point as to which Professors Tsai and Tebbe expressed some skepticism, and Professor Starger offered helpful refinement of his own.

However, before pressing *Trawling*'s lens back into service, it is well to contend with the flaws that my interlocutors suggest it might bear. Part I recapitulates the central thesis of *Trawling* and provides a focused response to Professor Greabe's criticisms. Part II will turn to *Messerschmidt*. Some brief thoughts on an agenda for future related work conclude the Reply.

Nelson Tebbe & Robert L. Tsai, Constitutional Borrowing, 108 Mich. L. Rev. 459 (2009).

4. John M. Greabe, Objecting at the Altar: Why the *Herring* Good Faith Principle and the *Harlow* Qualified Immunity Doctrine Should Not Be Married, 112 Colum. L. Rev. Sidebar 1, 11–15 (2012).

5. 555 U.S. 135 (2009).

6. Greabe, supra note 4, at 1.

7. 132 S. Ct. 1235 (2012).

I. A MARRIAGE I DID NOT OFFICIATE: RESPONDING TO GREABE'S OBJECTIONS AT THE ALTAR

The central thesis of *Trawling* is that the culpability-based exclusionary rule regime described in *Herring v. United States*—according the remedy only for "deliberate, reckless, or grossly negligent conduct," "objective[ly]" assessed[8]—was not an incoherent standard of the majority's invention (as several Fourth Amendment scholars had argued).[9] Rather, it could claim as its source the limitation placed on civil constitutional remedies by the doctrine of qualified immunity, which insulates from suit any government official who does not violate clearly established rights of which a reasonable official would know.[10]

Trawling contended that this was so notwithstanding that the Court has never said as much and, in fact, has suggested to the contrary. In *United States v. Leon*, the Court fashioned the good faith exception to the exclusionary rule by expressly "borrowing" the test for qualified immunity announced in *Harlow v. Fitzgerald*, asking whether an official's "conduct . . . violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known."[11] The *Harlow* standard formally sounds not in *Herring*'s baseline of "gross negligence" but rather, as many commentators have suggested, in simple (or, as *Trawling* put it, "bare") negligence.[12] But *Trawling* argued that while continuing to invoke the formal dictates of *Harlow*, the Court's qualified immunity jurisprudence is difficult to square with a negligence standard in either an evidentiary sense (undertaking a purely "objective" inquiry) or a substantive sense (finding the standard met where conduct simply falls short of what the reasonable person would do). Thus, *Anderson v. Creighton* (and subsequent cases) problematized the objective evidentiary inquiry enshrined in *Harlow* by holding that "knowledge" possessed by a defendant officer will be relevant to assessing the "reasonableness" of his or her actions.[13] And in *Malley v. Briggs*, the Court seemed to adjust the baseline for evaluating "reasonable" conduct from the perspective of a "reasonably well-trained" official to that of a "plainly incompetent" or malfeasant official—a move suggesting that only a *substantial* departure from reasonable conduct will remove the shield of immunity.[14]

Meanwhile, *Trawling* argued, the Court deepened and broadened its

8. Herring v. United States, 555 U.S. at 144–45.

9. Laurin, supra note 1, at 671 & n.4 (describing academic response).

10. Id. at 679–83, 725, 727–28.

11. United States v. Leon, 468 U.S. 897, 922–23 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

12. Laurin, supra note 1, at 725–29.

13. 483 U.S. 635 (1987); see also Groh v. Ramirez, 540 U.S. 551, 564 & n.7 (2004) (examining applicable training and policies governing defendant as relevant to "reasonableness"); Wilson v. Layne, 526 U.S. 603, 617 & n.4 (1999) (same).

14. 475 U.S. 335 (1986).

borrowing from an evolving qualified immunity doctrine for purposes of exclusionary rule jurisprudence through a dynamic of "convergence" that I characterized as "hydraulic." Critically, this occurred both through explicit, formal doctrinal symmetry—first stating in *Malley* that the qualified immunity and good faith exception standards were "the same"[15]—and through implicit, functional alignment—seeming to draw on municipal constitutional liability doctrine in developing a view of what counts as "systemic" error for exclusionary rule purposes.[16] As a result, constitutional tort could be understood as influencing the contours of the criminal suppression remedy even when, as in *Herring*, the Court did not expressly invoke such precedents. The relationship might, as Professor Starger helpfully suggests, be understood as one of "hermeneutic influence": "implicit connections" among opinions that are revealed through "interpretation of doctrinal context."[17]

Professor Greabe's core criticism is that the analysis in *Trawling* does not substantiate the foundational premise of doctrinal symmetry between the *Herring* "gross negligence" standard and qualified immunity doctrine.[18] Greabe adheres to the "bare negligence" view that I describe above and in *Trawling*,[19] contending that the qualified immunity case law is more properly read as embodying a test of simple "'negligence with respect to illegality.'"[20] It is important to emphasize that while I disagree with Professor Greabe's characterization of *Trawling* as overreading the Court's post-*Harlow* decisions,[21] I concede that the "bare negligence" view is entirely plausible. *Trawling* should not be read as contending that language like *Malley*'s invocation of the "plainly incompetent" officer clearly announced a qualified immunity inquiry rooted in "gross negligence." Rather, such language lurked as a plausible hook for conceiving of qualified immunity as an inquiry, like the post-*Herring* exclusionary rule, rooted in a search for "culpability."[22] Obviously, this is an attractive reading for those Justices unfavorably disposed toward civil constitutional remedies, a group that tends to take a similarly dim view of the exclusionary rule. *Trawling* revealed how borrowing and convergence can make such quick work of restricting both remedial avenues. Indeed, as the next Part details, I view the Court's most recent, post-*Herring* qualified immunity decisions as deploying *Malley* to precisely such an end.

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15. Id. at 344.

16. Laurin, supra note 1, at 710–15.

17. Starger, supra note 2, at 113.

18. Greabe, supra note 4, at 9 ("I do not see how Laurin's conclusion follows from the evidence she cites.").

19. Laurin, supra note 1, at 726 n.283.

20. Greabe, supra note 4, at 5 (quoting John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 89 (1999)).

21. Id. at 9–10.

22. Professor Starger's opinion maps helpfully reveal how dormant judicial glosses are revived and pressed into service, both explicitly and implicitly, later in a line of doctrinal development. Starger, supra note 2, at 114.

Professor Greabe also lodges a more conceptual critique that merits response. Greabe posits that the qualified immunity test is, properly applied, "binary": What law is "clearly established," and did the defendant official comply with it? He argues that my account wrongly introduces a "trinary" framework: What law is "clearly established," and did the defendant official comply with it, *and* did non-compliance cross "a second line demarking the boundary between a negligent and reckless state of mind with respect to illegality"?[23] Interestingly, the contrast Greabe draws maps somewhat onto lower courts' ongoing debate over whether the qualified immunity inquiry is a two- or three-part test—whether *in addition* to determining whether an official's conduct transgressed clearly established law, a court must *also* ask whether any such transgression was nevertheless reasonable.[24]

I tend to think that among those courts, and as between Professor Greabe and me, the conceptual distinction obfuscates rather than clarifies the substantive disagreement. The bottom line is that a court assessing a defendant's claim to qualified immunity must decide *how much* of a departure from the Constitution's dictates will be tolerated—how much "breathing room" will be given, to use a recent trope.[25] A "trinary" inquiry accomplishes this by allowing instances where it is deemed "reasonable" to violate a "clearly established" right. But a "binary" inquiry could (and I contend often does) reach the same result by finding a right "clearly established" only if it has been expressed with such a degree of particularity that "'it can be said that the [official] had knowledge, or may properly be charged with knowledge, that'" her conduct was unconstitutional.[26] Immunity would shield an official even under that "binary" inquiry unless the defendant's derogation of duty was fairly substantial—"gross," even. The relevant point for *Trawling*'s thesis is simply that, however the "breathing room" question is asked, the Court has suggested, since *Harlow*, that it will be answered in a way that gives "ample" space to err[27] and that immunity will be lost only when conduct falls some distance from that lowest point on the culpability spectrum that negligence is thought to occupy.

Describing that trigger point with precision is more difficult—and in part for this reason, *Trawling* does not actually attempt this task. Yet Professor Greabe takes great issue with the Essay's suggestion that the qualified immunity standard *at times* approaches something more like criminal recklessness—a *conscious* disregard for the risk of illegality.[28] To

23. Greabe, supra note 4, at 7.

24. See, e.g., Taravella v. Town of Wolcott, 599 F.3d 129, 136–40 & nn.2–4 (2d Cir. 2010) (Straub, J., dissenting) (describing discrepancy within Second Circuit's case law and across other circuits and noting potential implications of two- versus three-step inquiry).

25. Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2085 (2011).

26. Herring v. United States, 555 U.S. 135, 143 (2009) (quoting Illinois v. Krull, 480 U.S. 340, 348–49 (1987)); see also Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("[I]n the light of pre-existing law the unlawfulness must be apparent.").

27. Malley v. Briggs, 475 U.S. 335, 341 (1986).

28. Greabe, supra note 4, at 6; Laurin, supra note 1, at 726 & n.283.

be sure, I agree with Professor Greabe that such a standard is in tension with the Court's frequent reaffirmation of *Harlow*'s admonition that the qualified immunity inquiry is "objective."[29] But *Trawling*'s aim was not to establish that something like criminal recklessness was in fact the definitive standard for piercing qualified immunity. Rather, it was simply to demonstrate that qualified immunity doctrine occasionally seems to search for something much more like "bad faith" than what the *Harlow* test suggests, and that the Court has struggled to adhere to a test that is formally "objective" but still aims to assess "culpability." The point was both to answer commentators after *Herring* who doubted both the coherence of and the precedent for such an unstable conception,[30] and to offer another instance of this idiosyncratic understanding of objective and subjective inquiries as a plausible *source* for *Herring*'s approach.

While I am inclined simply to "agree to disagree" with much of Professor Greabe's carefully considered Response, I more strongly protest his suggestion that *Trawling* itself threatens more harm than good. Greabe "fear[s] that judges hostile to regulation through the constitutional tort regime might seize on [my] depiction to support an expansion of the doctrine and a concomitant contraction of constitutional tort liability" and that my "mischaracterization of the scope of the doctrine [will] become a tool of lawmaking."[31] Given that Professor Greabe concedes that my description of the trajectory of the doctrine is not "without support," I take his point to be that if I agree that the state of affairs that I describe is grim, I should urge courts to "get it right" rather than offering novel ideas about how to "get it wrong."

This critique implicitly poses a provocative query about the ethics of legal scholarship: What responsibilities do we as "expert" observers and commentators on the law have for the real world use to which our claims will be put? Sketching anything like a comprehensive response to this important and under-theorized question is a task far beyond the scope of this Reply.[32] For present purposes, I offer the provisional answer—

29. Laurin, supra note 1, at 694–99.

30. See, e.g., Albert W. Alschuler, *Herring v. United States*: A Minnow or a Shark?, 7 Ohio St. J. Crim. L. 463, 487–88 (2009) (characterizing *Herring* Court as vacillating between objective and subjective inquiries in describing objective assessment of culpability); Thomas K. Clancy, The Irrelevancy of the Fourth Amendment in the Roberts Court, 85 Chi.-Kent L. Rev. 191, 206 n.81 (2010) (describing objective culpability assessment as "confusing twist" in light of opinion's "references to apparently subjective states of mind"); Kit Kinports, Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion, 12 U. Pa. J. Const. L. 751, 776 (2010) (characterizing *Herring* Court's description of objective culpability standard as "somewhat mysterious[]" and asserting that "the very notion of culpability seems to be a subjective one").

31. Greabe, supra note 4, at 3, 5.

32. Somewhat surprisingly, this appears still to be a fertile area for new scholarship. For a recent essay exploring somewhat related concerns, see Richard H. Fallon, Jr., Scholars' Briefs and the Vocation of a Law Professor (unpublished manuscript), available at

consistent, I believe, with Professor Greabe's thrust—that we as scholars bear significant responsibility in this regard.

But I would resist any suggestion that this responsibility counsels against "calling out" fomenting, veiled, and negative trends in legal doctrine. *Trawling* sought to reveal a doctrinal dynamic that was occluded—indeed, unremarked on by influential scholars in relevant fields.[33] As Professors Tsai and Tebbe note, an important lesson of *Trawling* is that a lack of transparency[34]—or worse, a kind of doctrinal doublespeak—can augment or even independently generate harms that might flow from borrowing and convergence. The Essay was offered in part as an antidote to those pathologies, a cautionary tale for courts, a guidebook for litigants and advocates who should attend to these trends earlier rather than later. Professor Greabe and I agree that *if* the identified dynamic is at work, it threatens both conceptual and practical harm in the realm of constitutional law and criminal justice.[35] To identify the trend, to do so in a manner that is consistent with norms of scholarly integrity (including engaging potential weaknesses in the argument), *and* to do so in a cautionary rather than agnostic tone—these actions I take to be consistent with an academic's ethical relationship to the real world of lawmaking. That said, there can be negative consequences to generating this sort of jurisprudential sunshine, and Professor Greabe's call for reflection on that fallout is entirely well-taken.

II. CONVERGING ON *MESSERSCHMIDT*

On February 22, 2012, the Supreme Court decided *Messerschmidt v. Millender*, reversing the Ninth Circuit and granting qualified immunity to defendant police officers sued under 42 U.S.C. § 1983 in connection with a home search authorized by an allegedly unconstitutionally broad warrant.[36] A summary, contextualized by *Trawling*'s account of borrowing and convergence, begins the discussion, followed by an assessment of the case's significance for *Trawling*'s thesis—and vice versa.

A. *A Summary*

At five o'clock in the morning on November 6, 2003, a Los Angeles County SWAT team forced open the door of 73-year-old August Millender's home, and searched it in connection with the investigation of

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http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_070012.pdf (on file with the *Columbia Law Review*) (last visited April 8, 2012).

33. Laurin, supra note 1, at 671.

34. Tsai & Tebbe, Response, supra note 3, at 142; Laurin, supra note 1, at 719–21.

35. Greabe, supra note 4, at 11–12. Indeed, I view *Trawling* as closely related to prior work in which I explored and suggested reforms to address some of the structural concerns that Professor Greabe rightly raises in light of the bidirectional nature of borrowing and convergence. Jennifer E. Laurin, Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure, 110 Colum. L. Rev. 1002, 1058–72 (2010).

36. 132 S. Ct. 1235, 1241 (2012).

Jerry Ray Bowen, Millender's foster son, for assaulting and threatening to kill his girlfriend.[37]

Investigator Messerschmidt of the L.A. County Sheriff's Department had sought the warrant after uncovering, among other facts, that Bowen (whom public records listed as residing at Millender's home) had brandished a sawed-off shotgun during the crime, that he was a member of the Crips street gang, and that in the course of the assault he had shouted, "I told you not to call the cops on me." All of this information was contained in two affidavits accompanying the warrant, which aimed to search for and seize, in relevant part, "[a]ll . . . firearms capable of firing ammunition," any items showing "membership or affiliation with any" street gang including but not limited to the Mona Park Crips, and "[a]ny photographs . . . depicting persons, vehicles, or locations, which may appear relevant to gang membership . . . or which may depict evidence of criminal activity."[38] Ultimately, the search turned up nothing of value to the case against Bowen[39]—though police did seize Millender's personal shotgun, as well as .45 caliber ammunition and a California Social Services letter addressed to Bowen.[40]

Millender and others in her household sued, alleging there was not probable cause to believe that the scope of items for which the warrant authorized search would be found and would aid in the prosecution of Bowen for the assault.[41] The district court and a split en banc Ninth Circuit agreed. But in an opinion for five Justices authored by the Chief Justice (also the author of *Herring*), the Supreme Court reversed and held that whatever the warrant's constitutional deficiencies, the police officers who obtained it were immune from suit, as their actions were "not plainly incompetent."[42]

The majority and two concurring Justices fairly easily rejected the notion that liability could be premised on the search for "[a]ll . . . firearms," concluding that a combination of "Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police," in addition to a provision of California law expressly authorizing the issuance of search warrants for items possessed with intent to use them in a future offense, meant that "a reasonable officer could conclude that there would be additional illegal guns among

37. Millender v. County of Los Angeles, 620 F.3d 1016, 1022 (9th Cir. 2010) (en banc).

38. *Messerschmidt*, 132 S. Ct. at 1242.

39. Hence, no indication appears in the record that Bowen ever contested the constitutionality of the search in criminal proceedings.

40. *Messerschmidt*, 132 S. Ct. at 1243.

41. See Groh v. Ramirez, 540 U.S. 551 (2004) (holding that affidavit supporting issuance of warrant must support probable cause finding); Illinois v. Gates, 462 U.S. 213, 238 (stating that probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place").

42. *Messerschmidt*, 132 S. Ct. at 1250.

others that Bowen owned."[43] Considerably greater effort, however, was required to defend the conclusion that a reasonable officer could have thought that probable cause supported a general search for any items related to gang membership or "criminal activity." Three points emerge as particularly relevant in the context of *Trawling*'s analysis.

First, the Court had to contend with Messerschmidt's admissions in the civil litigation that, based on his knowledge of the case and experience as a gang investigator, he had "no reason to believe" that Bowen's assault of his girlfriend was gang-related—evidence suggesting (at least for purposes of summary judgment) that Messerschmidt actually knew that probable cause did not support the search for gang-related items.[44] In the majority's view, while *Anderson v. Creighton* held that "information" known to an official must be considered in evaluating qualified immunity, Messerschmidt's "conclusion[s]" were not part of this calculus. Rather, the latter constituted "'subjective beliefs,'" probing of which flew in the face of the Court's oft-repeated command that the qualified immunity inquiry is an "objective" one.[45] But in any event, the majority opined, Messerschmidt's conclusion would not render him liable for procuring a warrant to search for gang-related items, since even if such items could not establish that Bowen committed the assault, they could "impeach[]" Bowen at trial. The majority cited no authority for this final proposition—understandably so, as it appears to be entirely novel.[46]

Second, and seemingly in tension with the above-described reasoning, the Court *did* view as relevant that Messerschmidt had submitted his warrant application for review by superior officers and an assistant district attorney, and subsequently to the issuing magistrate.[47] This was so despite the Court's holding in *Malley v. Briggs* that police have an independent duty to ascertain the existence of probable cause for a warrant and are not ipso facto immune from suit by virtue of a magistrate's review. Nevertheless, for unspecified reasons, the majority chided the Court of Appeals for failing to consider third party review of the warrant as "pertinent [to] . . . whether [defendants] could have held a reasonable belief that the warrant was supported by probable cause."[48]

Third, in support of its conclusion that Messerschmidt's conduct was,

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43. Id. at 1246–47; id. at 1251 (Breyer, J., concurring); id. at 1251 (Kagan, J., concurring in part and dissenting in part).

44. Id. at 1254 (Sotomayor, J., dissenting) (quoting appendix).

45. Id. at 1248 n.6 (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987), and quoting United States v. Leon, 468 U.S. 897, 922, n.23 (1984)).

46. Id. at 1248; id. at 1252 (Kagan, J., concurring in part and dissenting in part); id. at 1256 (Sotomayor, J., dissenting); see also Orin Kerr, Probable cause of what? A comment on *Messerschmidt v. Millender*, SCOTUSblog (Feb. 23, 2012, 9:45 AM), http://www.scotusblog.com/2012/02/probable-cause-of-what-a-comment-on-messerschmidt-v-millender/ (discussing impeachment theory as "intriguing suggestion" never before seen by leading Fourth Amendment commentator).

47. *Messerschmidt*, 132 S. Ct. at 1249–50; id. at 1252 (Kagan, J., dissenting); id. at 1260 (Sotomayor, J., dissenting).

48. Id. at 1250.

even if illegal, nonetheless "reasonable," the Court relied most heavily *not* on the qualified immunity chestnut, *Harlow v. Fitzgerald*, but rather on *Malley v. Briggs* and the exclusionary rule decision in *United States v. Leon*.[49] Indeed, the Court explicitly noted (in passing) the doctrinal symmetry between exclusionary rule and qualified immunity jurisprudence, noting that the "same standard" of objective reasonableness governs the two contexts.[50] Notably, however, neither *Herring,* nor its successor case of *United States v. Davis*, nor the "gross negligence" standard articulated in those decisions, is cited. The absence is conspicuous, given that the merits and amici briefs relied explicitly and extensively on the Court's recent exclusionary rule jurisprudence: Messerschmidt, the United States, and others argued that *Herring*'s "gross negligence" test provided the relevant standard for assessing qualified immunity in the case; indeed, Messerschmidt urged the Court to expressly reformulate the qualified immunity test in light of the shift in exclusionary rule jurisprudence.[51]

B. *Assessing* Messerschmidt*, Assessing Convergence*

In responding to *Trawling*, Professors Tsai and Tebbe expressed some doubt about the explanatory power of "convergence" in explaining the interplay between exclusionary rule and qualified immunity jurisprudence. They question whether, rather than these two doctrinal streams "'merg[ing] into one'" as the metaphor suggests, a more accurate account is simply that "key ideas migrated over into exclusionary rule jurisprudence, where they became more or less independent of the source domain."[52] If so, Tsai and Tebbe suggest that the upshot is "less dire" than the magnified diminishment of constitutional remedies that I rue in *Trawling*, since "developments in one area of law" will not influence the other in lockstep.[53] Their invitation to refine my account of "convergence" is welcome, as is the caution against causal and predictive over-claiming. Unfortunately, however, *Messerschmidt* undermines Tsai and Tebbe's more optimistic hypothesis and exemplifies how convergence of

49. *Harlow* is cited only twice and utterly peripherally. Id. at 1245, 1248 n.6 (citing *Harlow* once to attribute quotation, and once in footnote as "see also" citation following *Leon*).

50. Id. at 1244–45, 1245 n.1, 1249, 1250 (citing, inter alia, *Leon* and *Malley* and offering "plain[] incompetence" as metric for when shield of immunity is lost, on four separate occasions).

51. See Brief of Petitioners at 36–38, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704); Brief for the United States as Amicus Curiae Supporting Petitioners at 21–22, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704); Brief of Texas et al. as Amici Curiae in Support of Petitioners at 6–7, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704); see also Brief for Respondents at 14, 49–50, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704); Brief of the American Civil Liberties Union as Amicus Curiae in Support of Respondents at 19–20 & nn.5 & 6, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704).

52. Tsai & Tebbe, Response, supra note 3, at 141 (quoting Laurin, supra note 1, at 674).

53. Id.

exclusionary rule and constitutional tort doctrine can, as *Trawling* feared, effect a "doubling down" on constitutional remedial restrictions.[54]

Critically, the case exemplifies the flip side of the borrowing relationship on which *Trawling* focused, as we see a contest over the content of qualified immunity jurisprudence assertedly turning on the contours of the exclusionary rule as *Herring* has drawn them. Certainly, that was the claim of Messerschmidt and amici including the United States, who repeatedly argued that *Herring*'s gross negligence test (and *not* a "bare" negligence test) was what a plaintiff aiming to pierce immunity must satisfy.[55] Moreover, proponents of the *Herring* standard tied formal symmetry to a newly deepened conception of theoretical symmetry: Just as the Court had reasoned in *Herring* that the minimal deterrence value of suppressing evidence negligently procured could not justify the "costs" of the remedy—a cost-benefit framework derived from a line of cases extending back to *United States v. Calandra*[56]—so too should imposition of civil damages for merely negligent conduct not be counseled.[57] Notably, while the Court has long invoked the "dual" goals of deterrence and compensation that animate constitutional tort doctrine,[58] it has never embraced these parties' suggestion that the former takes precedence over the latter. Further, while counsel for plaintiffs expressly contested the applicability of a "gross negligence" standard to a qualified immunity inquiry, the premise of symmetry between the good faith exception and qualified immunity was effectively conceded[59]; indeed, plaintiffs argued primarily that *Herring* was *consistent* with prior qualified immunity jurisprudence.[60] This, of course, is what the convergence account predicts—not unidirectional "migrat[ion]" "independent of the source domain"[61] but bidirectional interchangeability of standards.

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54. Laurin, supra note 1, at 741.

55. Reply Brief of Petitioners at 21–23, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704); Brief for the United States as Amicus Curiae Supporting Petitioners at 12, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704).

56. See Laurin, supra note 1, at 691–94 (discussing emergence of deterrence and cost-benefit analysis in exclusionary rule jurisprudence).

57. Brief for the United States as Amicus Curiae Supporting Petitioner at 31–32, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704); Brief of Petitioner at 26–27, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704).

58. See, e.g., Owen v. City of Independence, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.").

59. Revealing how uncontroversial this point is, counsel for Messerschmidt opened his oral argument by invoking suppression and qualified immunity cases in parallel, without qualifier, and without quibble from any Justices or opposing counsel. Transcript of Oral Argument at 3, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704) ("In *Malley v. Briggs* and *United States v. Leon*, this Court set forth a very high standard for denying qualified immunity in the civil context or suppressing evidence in the criminal context under circumstances where a police officer has procured a warrant that is subsequently determined to be invalid."); see also id. at 14, 27, 28–29 (referring repeatedly and without objection to symmetry).

60. See Brief for Respondents at 49–52, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704) (arguing secondarily that exclusionary rule doctrine should not be "slavishly" applied, and that in any event Messerschmidt did *not* commit "garden variety negligence").

61. Tsai & Tebbe, Response, supra note 3, at 141.

But what of the Court's understanding? Mysteriously, *Herring*'s "gross negligence" standard is not cited by the Court, a fact that Professor Greabe (and others) might fairly highlight as refuting the premise that convergence is at work.[62] Nevertheless, I think a close reading of *Messerschmidt* reveals "hermeneutic influence[s],"[63] and that as a functional matter the standard the Court holds plaintiffs to a showing of is at least "gross negligence" to refute an assertion of qualified immunity. The majority opinion contains several pieces of supporting evidence.

First and most clearly, the Court sanctions a (potential) interpretation of probable cause that is both unprecedented and dramatically broader than ever previously articulated. If there is any conceptual space between clearly prohibited "general warrants,"[64] and the majority's suggestion that Messerschmidt might permissibly have sought authorization to search for any evidence relevant to impeach Bowen, the majority does not describe it. What passes as a reasonable misapprehension of the law seems not *just* short of, but *some distance* from, what was clearly established.[65]

Moreover, while the majority did not deploy *Herring* to describe or justify that distance, it is not at all clear that it *needed* to in order to invoke the decision's culpability-based framework through the citations that do appear. Recall that *Herring* (and, subsequently, *Davis*) attributed the "gross negligence" framework to *Leon*[66]—an exclusionary rule case repeatedly cited in *Messerschmidt*.[67] That the Court is operating with this view of *Leon* is supported by its repeated invocation of *Malley*'s image of the "plainly incompetent" officer as the touchstone for the Court's inquiry.[68]

Further substantiation for reading the *Messerschmidt* majority as implicitly applying the "gross negligence" standard is the fact that the Court had at least provisionally accepted the invitation to consider revisiting its qualified immunity jurisprudence in light of *Herring*, by granting cert on that specific question.[69] Yet the opinion is silent on its disposition of the issue. This silence is less mysterious if one reads the Court's repeated invocation of *Malley* and *Leon* in light of the analysis in

62. See Greabe, supra note 4, at 7 (calling Court's failure to cite qualified immunity doctrine in *Herring* "a great mystery" in light of *Trawling*'s analysis, and contending this silence "is telling").

63. Starger, supra note 2, at 113.

64. See, e.g., Boyd v. United States, 116 U.S. 616, 625–26 (1886) (discussing historical development of prohibition of "general warrants" traced back to British common law).

65. See supra note 27 and accompanying text.

66. Davis v. United States, 131 S. Ct. 2419, 2427 (2011); Herring v. United States, 555 U.S. 135, 143–44 (2009).

67. See supra notes 49–50 and accompanying text; see also Laurin, supra note 1, at 680–81 (suggesting some disingenuousness in this attribution).

68. See supra note 49 and accompanying text.

69. Brief of Petitioners at i, Messerschmidt v. Millender, 132 S. Ct. 1235 (2012) (No. 10-704).

Trawling. Put simply, the Court has no need to announce a new standard for its qualified immunity inquiry if, as *Trawling* suggested, it (or at least a majority of its members) already understood the standard as encompassing the "gross negligence" inquiry that *Herring* contemplates.

None of this is to suggest that the Court's apparent alignment of qualified immunity with the (newly fashioned) contours of the exclusionary rule is correct. Substantively, *Messerschmidt*'s holding incentivizes official incompetence and diminishes the Fourth Amendment's practical force.[70] That the Court accomplishes this in such veiled fashion sows confusion rather than clarity for courts, litigants, and public officials, and confounds efforts to hold the Court accountable for the legal standard it has announced.[71] But what *Trawling* suggests is that however distorting such a result might be, it is driven by the same dynamics that gave rise to *Herring*, and presaged by the outcome in that case.

Finally, two puzzles posed by *Messerschmidt* that implicate *Trawling*'s analysis are worth flagging for future interrogation. First, as noted above, the Court offers no explanation for *why* (much less to what degree) it viewed as "pertinent" the fact that Messerschmidt's warrant application was reviewed by superior officers, a prosecutor, *and* a magistrate.[72] Perhaps the majority reasoned that if other experienced law enforcement officials viewed the warrant as legal, such a conclusion is more likely to be "reasonable."[73] But the parties themselves had urged a different position. Messerschmidt, as well as the United States, offered that this fact was relevant because it provided "objective" evidence of the officer's "good faith": Had he known the application was deficient, the argument went, he would not have forthrightly shared it with superiors; that he did so reflects a kind of absence of consciousness of guilt.[74]

Justice Sotomayor's dissent effectively accuses the majority of (implicitly) embracing this latter view, and contends that, in doing so, the majority disregarded *Harlow*'s admonition against "subjective" qualified immunity inquiries.[75] Of course, the majority deployed that same

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70. See *Messerschmidt*, 132 S. Ct. at 1260 (Sotomayor, J., dissenting) (discussing perverse incentives).

71. See Tsai & Tebbe, Response, supra note 3, at 142–45 (discussing value of transparency in borrowing).

72. *Messerschmidt*, 132 S. Ct. at 1245–46.

73. This reasoning encounters the hurdle that the majority gave no consideration to what "information" those other individuals possessed, a factor that, as discussed above, *Anderson* makes relevant to the calculus. See supra note 13 and accompanying text. Almost certainly, though, these other officials would possess *different* and *less* information about the case than the lead investigator, undermining the suggestion that their conclusions are comparable proxies for an official in Messerschmidt's "position." Malley v. Briggs, 475 U.S. 335, 345 (1986).

74. Brief for Respondents at 26–30, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704); Brief of American Civil Liberties Union as Amicus Curiae in Support of Respondents at 10, 22, *Messerschmidt*, 132 S. Ct. at 26–30 (No. 10-704).

75. *Messerschmidt*, 132 S. Ct. at 1260 (Sotomayor, J., dissenting). In this regard, Justice Sotomayor's opinion may serve as the sort of repository for non-mainstream

admonition in service of its own aims, to reject the plaintiff's reliance on Messerschmidt's arguable cognizance that probable cause was lacking for (at least a portion of) his warrant.[76] *Trawling* identified this "dance" between subjective and objective standards as prevalent in the Court's qualified immunity cases, and suggested that it reflects something like *Herring*'s search for "culpability," "objective[ly]" assessed.[77] *Trawling*'s convergence thesis would further suggest that the significance attached by *Messerschmidt* to third party review of the warrant amounted to the kind of "objective" assessment of "culpability" that *Herring* described.[78] But again, the Court's silence as to the rationale or source for this aspect of its decision confounds the doctrine and creates space for opportunistic and unaccountable decisionmaking down the road.

A second puzzle is perhaps more far-reaching. While the *Messerschmidt* majority describes application of the exclusionary rule and qualified immunity as governed by the "same standard," it adds a conspicuous qualifier, *limiting* its statement to the warrant context.[79] It is a limitation that is in tension with both arenas of jurisprudence: On the criminal side, limitations on the Fourth Amendment exclusionary rule have not been cabined to the warrant context,[80] and even more broadly, on the civil side, qualified immunity doctrine has been expressly characterized (and certainly applied) as entailing an identical inquiry across officials and constitutional or statutory violations complained of.[81]

The question, then, is whether the *Messerschmidt* majority is signaling the potential for more particularized qualified immunity standards to flower. Not only might this be a more sensible turn for qualified immunity jurisprudence as a general matter,[82] but it might also serve to limit convergence and preserve a distinct (and perhaps more permissive) qualified immunity standard in other constitutional arenas that less

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jurisprudential viewpoints that Professor Starger's Response aims to highlight. See Starger, supra note 2, at 117–19.

76. Supra note 51 and accompanying text.

77. Herring v. United States, 555 U.S. 135, 145 (2009); Laurin, supra note 1, at 726–27.

78. See supra notes 47–48 and accompanying text.

79. *Messerschmidt*, 132 S. Ct. at 1245 n.1.

80. See, e.g., Davis v. United States, 131 S. Ct. 2419 (describing scope of exclusionary rule in context of warrantless search, without distinguishing among various Fourth Amendment contexts).

81. See generally John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 Yale L.J. 259 (1999) (explaining and criticizing transsubstantive nature of qualified immunity inquiry). Indeed, it is the transsubstantive nature of the qualified immunity inquiry that heightens Professor Greabe's concerns (which I share) about the breadth of implications for *Trawling*'s analysis on the realm of constitutional tort: A heightened qualified immunity inquiry in the Fourth Amendment context would, under current doctrine, apply equally to other constitutional claims. See supra note 4 and accompanying text.

82. I am sympathetic to Professor Jeffries' views on this matter. See generally Jeffries, supra note 81.

directly implicate politically freighted criminal justice concerns.[83] A more pessimistic view is that by describing convergence as cabined to the warrant context, *Messerschmidt* temporarily lowered the political stakes for heightening the qualified immunity inquiry, but, in so doing, created a opening through which the hydraulic properties of convergence are likely to push broader deployment of a heightened culpability assessment for qualified immunity. Whatever the majority's intention (a fact that may or may not be known even to those five Justices), the qualifier is sufficiently conspicuous to invite debate among litigants in future cases as to the breadth of applicability of *Messerschmidt*'s seemingly heightened qualified immunity test. Whether the *Messerschmidt* Court's hedge emerges over the longer term as permanent or provisional will serve to further test the conceptual utility of *Trawling*'s notion of convergence, as well as the descriptive accuracy of the Essay's "hydraulic" metaphor.

CONCLUSION

While the full significance of *Messerschmidt* is far from apparent at this early stage, examining the case through the lens of *Trawling*'s analysis complicates early portrayals of it as a "narrow case" of relevance primarily to "Fourth Amendment nerds."[84] In fact, it looms as a decision that could reflect a turning point for Fourth Amendment litigation, qualified immunity doctrine, and constitutional tort litigation more broadly. This becomes even clearer with the enhanced perspective provided by the deeply appreciated reflections on *Trawling* offered by Professors Starger, Tsai, Tebbe, and Greabe. I look forward to continuing to refine my inquiries in this arena of constitutional rights and remedies with the assistance of the challenges and insights that these scholars have offered, and hopefully will continue to offer, to my work.

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83. Indeed, the Court's conspicuous qualifier is itself further evidence that it viewed the standard it was applying to Messerschmidt's claim to qualified immunity as being functionally identical to the *Herring* test—and hence arguably heightened by comparison to prior formulations (per *Harlow*) of the applicable standard. Put differently, the rather sudden suggestion that this is a rule of narrow applicability is arguably attributable to the Court's cognizance that it has indeed changed the rule.

84. Kerr, supra note 46.