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RESPONSE: METAPHOR AND MEANING IN *TRAWLING FOR* HERRING

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

Though she provides ample analysis for most of her many insights in *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, Professor Laurin never actually explains her article's title.[1] Curious readers may well wonder exactly what it means to "trawl" for *Herring*. Is this just a simple pun on hapless Bennie Dean Herring's name, or is there more to it? At the risk of ruining a good joke, I suggest that "trawling" is in fact a conceptually significant metaphor that helpfully illuminates the "lessons in doctrinal borrowing and convergence" heralded in Laurin's subtitle. Indeed, the trawling metaphor builds upon a second water-based metaphor—the "hydraulics" of borrowing and convergence—that together animate Laurin's bold theses about the true origins and future trajectory of contemporary exclusionary rule doctrine.

Laurin's inquiry into exclusionary rule hydraulics seeks to clarify an otherwise puzzling decision—*Herring v. United States*.[2] Although Chief Justice Roberts professed fidelity to precedent in his majority opinion, Professor Laurin maintains that Chief Justice Roberts's opinion brought innovations to exclusionary rule jurisprudence that cannot be satisfactorily justified by citation to the mainline of prior exclusionary rule case law. Specifically, Laurin argues that cases in the *Mapp-Leon* line do not warrant (1) the tying of the exclusionary rule to heightened police culpability or (2) the adoption of an exclusionary rule test expressly aimed at institutional rather

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

2. 129 S. Ct. 695 (2009).

than individual misconduct.[3] While blunt in her critique, Laurin does not charge Chief Justice Roberts with improper departure from precedent. Rather, she postulates that "much of what *Herring* appears to leave unexplained may be illuminated by recovering the influence of constitutional tort doctrine on the exclusionary rule's lineage."[4] Laurin then undertakes to recover the exclusionary rule doctrine's lost lineage precisely by trawling through the waters—to use her unexplained metaphor—of constitutional tort doctrine.

In this Response, I explore Laurin's project of recovering the exclusionary rule's lost lineage through critical reflection upon her doctrinal metaphors. I attend to both Laurin's specific exclusionary rule arguments and to how Laurin's conceptualization of hydraulics extends Professors Tebbe and Tsai's general thesis on constitutional borrowing.[5] To facilitate this analysis, I deploy my own series of *visual* metaphors in the form of opinion maps that chart the flow of relevant Supreme Court doctrine.[6] Part I provides necessary doctrinal background by mapping Laurin's account of how the "good faith exception" to the exclusionary rule borrowed from constitutional tort jurisprudence. Part II maps Laurin's major arguments regarding the origins of *Herring*'s heightened culpability requirement and systemic negligence standard in the qualified immunity and entity liability branches of constitutional tort doctrine. Part III suggests that Laurin's account could be sharpened by examining the vital role dissents have played in shaping the competing judicial schools in exclusionary rule doctrine. Here, I map an alternate account of *Herring*'s origins that emphasizes the place of dissents in competing lines of doctrinal thought. In the conclusion, I reflect briefly on how the Court's hot-off-the-presses exclusionary rule case *Davis v. United States*[7] implicates my analysis.

I. IDENTIFYING BORROWING: THE "GOOD FAITH EXCEPTION" TO THE EXCLUSIONARY RULE

Professor Laurin's recovery of the exclusionary rule's lost lineage begins with an account of the Court's adoption of the "good faith exception" to the exclusionary rule in *United States v. Leon*.[8] In *Leon*, the Court denied the suppression remedy to criminal defendants whose Fourth Amendment rights were violated by the "reasonable" execution of warrants that nonetheless lacked probable cause.[9] In his majority opinion, Justice White made a profound, but potentially puzzling, citation to the then-recently announced "objective good faith" qualified immunity standard applicable in constitutional

3. Laurin, supra note 1, at 679, 683.

4. Id. at 677.

5. See generally Nelson Tebbe & Robert L. Tsai, Constitutional Borrowing, 108 Mich. L. Rev. 459 (2010) (defining and analyzing constitutional borrowing practice).

6. I have explained the theory behind these maps in great length in an earlier work. See generally Colin Starger, Exile on Main Street: Competing Traditions and Due Process Dissent, 95 Marq. L. Rev. (forthcoming Summer 2012), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808984 (on file with the *Columbia Law Review*).

7. 131 S. Ct. 2419 (2011).

8. 468 U.S. 897 (1984); Laurin, supra note 1, at 680.

9. *Leon*, 468 U.S. at 919–21.

tort litigation.[10] The potential puzzle stems from the fact that Justice White provided virtually no justification for his resort to a legal doctrine that was outside the entire realm of criminal law and criminal procedure remedies. Yet Justice White's move becomes coherent, argues Laurin, if understood as exemplifying Tebbe and Tsai's notion of borrowing.

Figure 1 below distills Laurin's account of *Leon*'s borrowing into an opinion map.[11] Each plotted point (triangle or circle) represents a Supreme Court opinion—the case name appears above the opinion and the opinion author appears below. Triangles represent exclusionary rule opinions, and circles represent qualified immunity decisions. The map's X-axis shows the year the opinion was issued while the Y-axis supplies the number of votes cast in support of the opinion—opinions above the dashed line are thus majority opinions while opinions below that line are dissents. Solid arrows joining opinions indicate that the latter opinion directly cited the earlier one. The map therefore shows that, in 1984, Justice White's opinion for the Court in *Leon* commanded six votes and directly cited to three other opinions—Justice

10. See id. at 922–23 & n.23 ("[T]he officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable." (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982))).

11. Figure 1 distills the account from Part II.A–B of *Trawling*. See Laurin, supra note 1, at 689–99 (exploring circumstances that prompted and sustained impact of *Leon*'s borrowing). In chronological order, the data points on the map are:

(1) Wolf v. Colorado, 338 U.S. 25 (1949), overruled by Mapp v. Ohio, 367 U.S. 643 (1961). *Wolf* was a 6-3 decision. Justice Frankfurter delivered the opinion of the Court. Justice Black concurred. Justice Douglas dissented. Justice Murphy, with whom Justice Rutledge joined, dissented. Justice Rutledge, with whom Justice Murphy joined, also wrote a separate dissent.

(2) Monroe v. Pape, 365 U.S. 167 (1961). *Monroe* was an 8-1 decision. Justice Douglas delivered the opinion of the Court. Justice Harlan, with whom Justice Stewart joined, concurred. Justice Frankfurter dissented.

(3) *Mapp*, 367 U.S. 643. *Mapp* was a 6-3 decision. Justice Clark delivered the opinion of the Court. Justice Black concurred. Justice Douglas wrote a second concurrence. Justice Stewart concurred with the judgment and wrote a memorandum opinion. (Since Justice Stewart's memorandum opinion explicitly agreed with Justice Harlan's dissent, I do not count it as a vote for Justice Clark's majority opinion). Justice Harlan, with whom Justices Frankfurter and Whittaker joined, dissented.

(4) Pierson v. Ray, 386 U.S. 547 (1967). *Pierson* was an 8-1 decision. Chief Justice Warren delivered the opinion of the Court. Justice Douglas dissented.

(5) Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). *Bivens* was a 6-3 decision. Justice Brennan delivered the opinion of the Court. Justice Harlan concurred with the judgment only. Chief Justice Burger dissented. Justice Black dissented separately. Justice Blackmun wrote a third dissent.

(6) United States v. Calandra, 414 U.S. 338 (1974). *Calandra* was a 6-3 decision. Justice Powell delivered the opinion of the Court. Justice Brennan, with whom Justices Douglas and Marshall joined, dissented.

(7) Stone v. Powell, 428 U.S. 465 (1976). *Stone* was a 6-3 decision. Justice Powell delivered the opinion of the Court. Justice Brennan, with whom Justice Marshall joined, dissented. Justice White dissented separately.

(8) Harlow v. Fitzgerald, 457 U.S. 800 (1982). *Harlow* was an 8-1 decision. Justice Powell delivered the opinion of the Court. Chief Justice Burger dissented.

(9) *Leon*, 468 U.S. 897. *Leon* was a 6-3 decision. Justice White delivered the opinion of the Court. Justice Brennan, with whom Justice Marshall joined, dissented. Justice Stevens filed a separate dissent.

Powell's majority opinion in *United States v. Calandra*, Justice White's own dissent in *Stone v. Powell*, and Justice Powell's majority opinion from the qualified immunity case *Harlow v. Fitzgerald*.

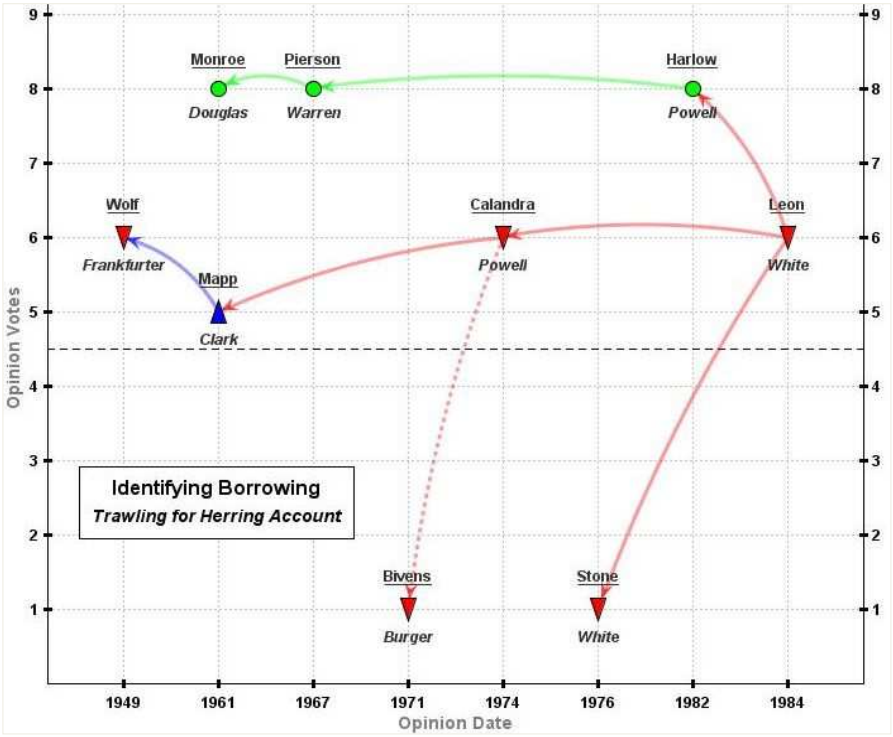

Figure 1

Figure 1 helpfully illustrates the water metaphor implied by trawling and hydraulics. By this trope, Laurin invites us to conceive of doctrine as a river that has its source in different tributaries. In the quest to capture *Herring*'s meaning, we must not cast our nets exclusively in the primary tributary of red exclusionary rule line cases. The green waters of qualified immunity also contribute to the flow of exclusionary rule doctrine. This basic work accomplished by the trawling metaphor is thus fairly simple to draw out. Figures 2 and 3 chart more complex concepts and depict the hydraulics of borrowing and convergence.

Before moving on from Figure 1, however, two map features require brief explanation. First, Justice Clark's seminal *Mapp v. Ohio* opinion is represented as a blue triangle pointing upwards because it expanded the exclusionary rule remedy. By contrast, all the red triangles pointing downwards represent restrictions on the remedy. So *Wolf v. Colorado* restricted the exclusionary rule by holding that state courts did not need to suppress evidence obtained through unreasonable search or seizure, but *Mapp* expanded the exclusionary rule by

overruling *Wolf*.[12] Second, the arrow from *Calandra* to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* is dotted rather than solid because Justice Powell's opinion did not formally cite to Chief Justice Burger's dissent. Despite this absence of direct citation (represented on the map by solid arrows), Laurin connects the two opinions in her account because the *Calandra* Court implicitly adopted the premise of Chief Justice Burger's *Bivens* salvo.[13] I call such implicit connections between opinions "hermeneutic" because hermeneutic connections require interpretation of doctrinal context in addition to literal reading of opinion text. As I shall argue, dissents have played an important hermeneutic role in articulating competing visions of exclusionary rule doctrine.

II. *TRAWLING FOR* HERRING: HEIGHTENED CULPABILITY AND SYSTEMIC NEGLIGENCE

Returning now to the exclusionary rule's lost lineage, Figures 2 and 3 depict *Trawling*'s major theses regarding the origins of Chief Justice Roberts's two most controversial moves in *Herring*. Figure 2 maps the main tributaries to *Herring*'s new culpability test.[14] Figure 3 charts the opinions upstream from Chief Justice Roberts's turn to a systemic negligence standard.[15] In both maps,

12. *Mapp*, 367 U.S. at 654–55 (overruling *Wolf*, 338 U.S. 25).

13. Laurin, supra note 1, at 693.

14. Figure 2 distills the argument from Part III.A of *Trawling*. Id. at 725–32 (arguing application of objective reasonableness standard "has forayed into increasingly culpability-focused terrain that has challenged conventional distinctions between objective and subjective legal inquiries"). In chronological order, the data points on the map are:

(1) *Pierson*, 386 U.S. 547. For *Pierson*'s vote breakdown, see supra note 11.

(2) *Harlow*, 457 U.S. 800. For *Harlow*'s vote breakdown, see supra note 11.

(3) *Leon*, 468 U.S. 897. For *Leon*'s vote breakdown, see supra note 11.

(4) Malley v. Briggs, 475 U.S. 335 (1986). *Malley* was a 7-2 decision. Justice White delivered the opinion of the Court. Justice Powell, with whom Justice Rehnquist joined, concurred in part and dissented in part.

(5) Illinois v. Krull, 480 U.S. 340 (1987). *Krull* was a 5-4 decision. Justice Blackmun delivered the opinion of the Court. Justice O'Connor, with whom Justices Brennan, Marshall, and Stevens joined, filed a dissenting opinion. Justice Marshall filed a separate dissenting opinion.

(6) Anderson v. Creighton, 483 U.S. 635 (1987). *Anderson* was a 6-3 decision. Justice Scalia delivered the opinion of the Court. Justice Stevens, with whom Justices Brennan and Marshall joined, filed a dissenting opinion.

(7) Arizona v. Evans, 514 U.S. 1 (1995). *Evans* was a 7-2 decision. Chief Justice Rehnquist wrote the majority opinion. Justice O'Connor, with whom Justices Souter and Breyer joined, filed a concurring opinion. Justice Ginsburg, with whom Justice Stevens joined, filed a dissenting opinion. Justice Stevens also wrote a separate solo dissent.

(8) Herring v. United States, 129 S. Ct. 695 (2009). *Herring* was a 5-4 decision. Chief Justice Roberts delivered the opinion of the Court. Justice Ginsburg, with whom Justices Stevens, Souter, and Breyer joined, dissented. Justice Breyer, with whom Justice Souter joined, also wrote a separate dissent.

15. Figure 3 distills the argument from Part III.B of *Trawling*. See Laurin, supra note 1, at 732–39 (querying "[w]hat quantam of error will qualify as 'systemic' for purposes of invoking the exclusionary rule"). In chronological order, the data points on the map are:

(1) *Monroe*, 365 U.S. 167. For *Monroe*'s vote breakdown, see supra note 11.

(2) Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). *Monell* was a 7-2 decision. Justice Brennan delivered the opinion of the Court. Justice Stevens concurred in part. Justice

the familiar red and green currents can be seen to *converge* and move together. This convergence occurs after the initial borrowing in *Leon* and involves repeated borrowing back and forth between previously independent doctrines.

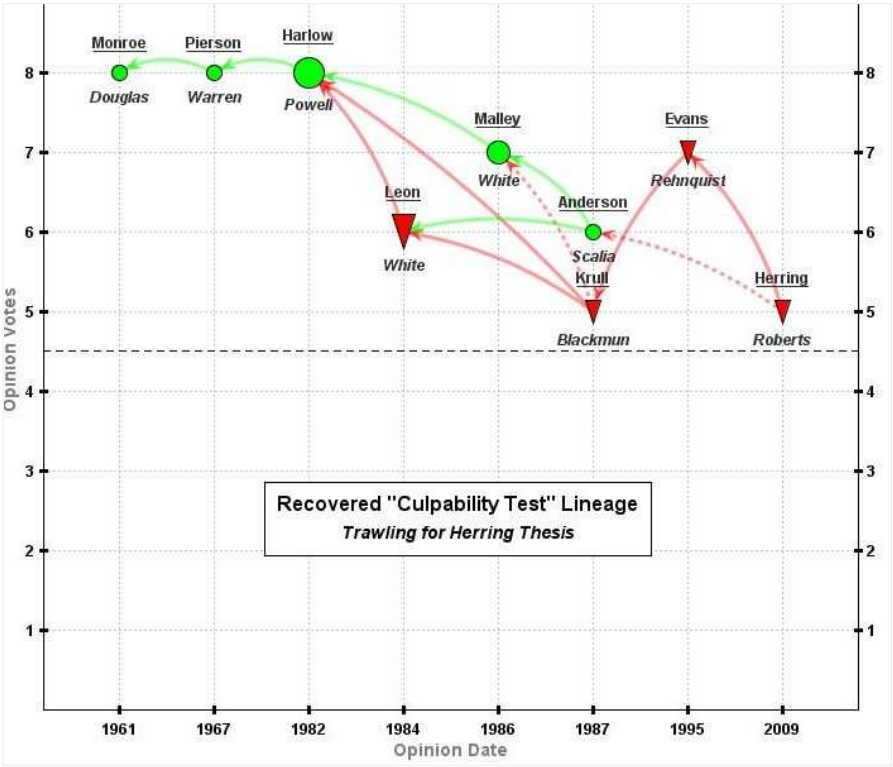

Figure 2

Figure 2 shows how *Malley v. Briggs* and *Anderson v. Creighton*, both qualified immunity cases, directly borrowed back from *Leon.* Laurin argues

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Rehnquist, with whom Chief Justice Burger joined, dissented.

(3) *Leon*, 468 U.S. 897. For *Leon*'s vote breakdown, see supra note 11.

(4) *Krull*, 480 U.S. 340. For *Krull*'s vote breakdown, see supra note 14.

(5) City of Canton v. Harris, 489 U.S. 378 (1989). *City of Canton* was a 6-3 decision. Justice White delivered the opinion of the Court. Justice Brennan filed a concurring opinion. Justice O'Connor, with whom Justices Kennedy and Scalia joined, filed an opinion concurring in part and dissenting in part.

(6) *Evans*, 514 U.S. at 1. For *Evans*'s vote breakdown, see supra note 14.

(7) Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997). *Brown* was a 5-4 decision. Justice O'Connor delivered the opinion of the Court. Justice Souter, with whom Justice Stevens and Breyer joined, dissented. Justice Breyer, with whom Justices Stevens and Ginsburg joined, dissented.

(8) Hudson v. Michigan, 547 U.S. 586 (2006). *Hudson* was a 5-4 decision. Justice Scalia delivered the opinion of the Court. Justice Kennedy filed an opinion concurring in part and concurring with the judgment. Justice Breyer, with whom Justices Stevens, Souter, and Ginsburg joined, dissented.

(9) *Herring*, 129 S. Ct. at 695. For *Herring*'s vote breakdown, see supra note 14.

that this borrowing back helped justify a progressive ratcheting-up of the showing actually required to deem official conduct "unreasonable" under *Harlow*'s "objective reasonableness" standard.[16] In turn, *Herring* effectively brought the exclusionary rule "formally into line with the contours of the qualified immunity doctrine as it has been applied since *Malley* and *Anderson*."[17] Since "*Herring* did not acknowledge any debt to qualified immunity doctrine in setting its gross negligence baseline,"[18] the arrow from *Herring* back to *Anderson* is dotted, signifying a hermeneutic connection. Similarly, *Illinois v. Krull* also connects to *Malley* hermeneutically.[19]

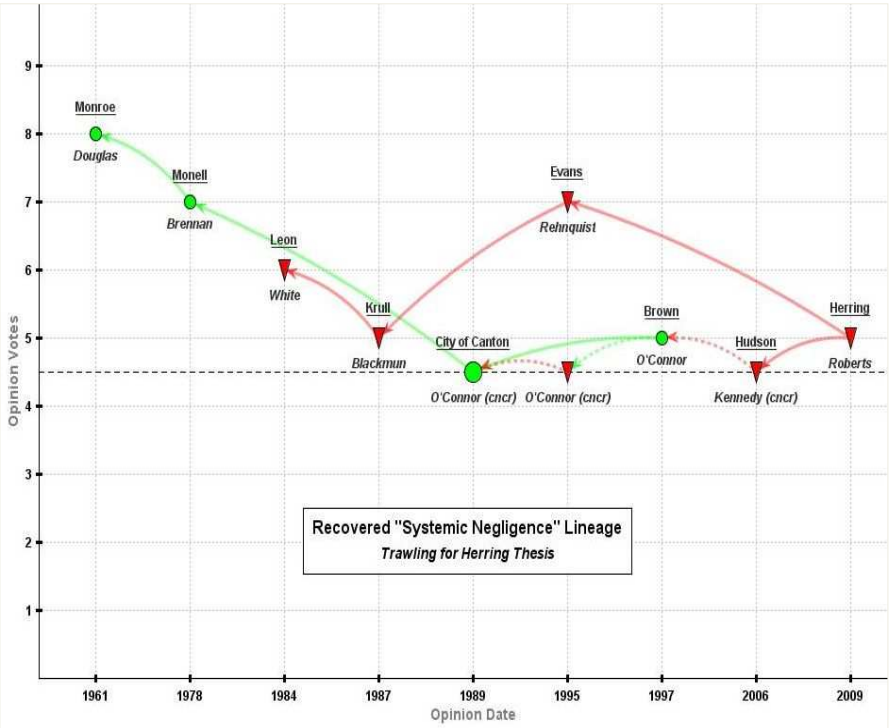

Figure 3

Figure 3 depicts a similar interplay between *Monell*-line constitutional tort cases and the exclusionary rule mainline. Laurin argues that *Herring*'s ruling that suppression only remedies constitutional harm attributable to system-level failure is "resonant with the Court's post-*Monell* approach to entity-based liability under § 1983."[20] This resonance is signaled by *Herring*'s direct

16. Laurin, supra note 1, at 725–26.
17. Id. at 726.
18. Id. at 727.
19. See id. at 710–11 (noting *Krull* "implicitly reiterated" *Malley*'s objective reasonableness standard).
20. Id. at 732.

citation to the concurrences of Justice Kennedy in *Hudson v. Michigan* and Justice O'Connor in *Arizona v. Evans*.[21] However, the real resonance of those mainstream exclusionary rule opinions turns on their implicit connections to Justice O'Connor's insistence on patterns of constitutional violations to establish torts in the *Monell*-branch cases *Board of County Commissioners v. Brown* and *City of Canton v. Harris*.[22]

Beyond identifying specific instances of doctrinal convergence, Laurin seeks to understand the more general phenomenon. At this higher level of abstraction, convergence builds upon Tebbe and Tsai's borrowing analysis and can usefully serve scholars exploring realms other than the jurisprudence of the Fourth Amendment or constitutional torts. Though Laurin sees convergence as "distinct in its operation and effect from the initial act of borrowing,"[23] she stresses how the dynamics are inherently intertwined: "Borrowing sets the stage for convergence by supplying advocates and judges with additional strategic motivation (beyond what first prompted borrowing), jurisprudential warrant, and habits of mind that drive further exploration of ties between the source and target doctrines."[24] It is precisely this back-and-forth relationship between borrowing and convergence that Laurin calls hydraulic. This striking and compelling metaphor works on different levels.

Hydraulics evokes an extremely complex mathematics of cause and effect. Where rivers meet, swirling eddies do not begin or end clearly. Riverbed topography and other environmental contexts complicate efforts to accurately quantify the influence of one current over another. Yet despite difficulties in precisely capturing flow mechanics, one conclusion is clear—the combined hydraulic energy of two rivers moving together is greater than one moving alone. And so it is with convergence hydraulics. Making "claims of cause and effect must . . . be qualified" because "many factors will be at play in the Court's decision to adopt a particular line of reasoning in any given case."[25] Background traditions and principles "muddle attempts to casually attribute doctrinal change to borrowing or convergence per se."[26] Yet the back-and-forth borrowing undeniably creates energy that powers further doctrinal change.

Of course, the hydraulic metaphor has limits. Doctrinal confluence may be like the confluence of rivers, but the presence of human actors distinguishes legal hydraulics from its watery analog in critical ways. For instance, the convergence dynamic is curiously self-generative; it "create[s] . . . [a] tactical impetus to pursue further analogizing between the two doctrinal fields" and then "begets opportunities for its own enlargement."[27] Water, by contrast, cannot power itself or fuel perpetual motion. More pertinent for my purposes,

21. Id. at 713–14.

22. Id. at 714 (noting Justice Kennedy's *Hudson* concurrence "tracked . . . closely the formulation for municipal liability that Justice O'Connor first articulated in the *City of Canton* concurrence that he had joined, and that the Court adopted in *Brown*").

23. Id. at 674.

24. Id.

25. Id. at 721.

26. Id. at 722.

27. Id. at 723.

legal convergence is also deeply hermeneutic; it unfolds as legal actors "read around" in the intersecting domains, build their knowledge, and sharpen their capacity for different modes of reasoning.[28] Quite obviously, real rivers flow independent of written discourse, argument, or interpretation.

These limitations of water metaphors do not render them less useful. As Paul Ricoeur observes, "[w]ith metaphor, the innovation lies in the producing of a new semantic pertinence by means of an impertinent attribution."[29] As I see it, Laurin's impertinence is both innovative and infectious as it relentlessly invites further cheekiness. In this spirit, then, I shall conclude by exploring how Laurin's dredging of exclusionary rule doctrine might be deepened by trawling for *Herring* in the waters of dissent.

III. DISSENT AND COMPETING EXCLUSIONARY RULE SCHOOLS

Attending to dissents helps explain Chief Justice Roberts's moves in *Herring* by foregrounding the centrality of competing schools of thought to the development of exclusionary rule doctrine. Certainly, Laurin alludes to such competing schools when she cites Justice Ginsburg's *Herring* dissent as advocating a "more majestic conception" of the exclusionary rule.[30] The majestic-conception school rejects deterrence as the sole justification for the exclusionary rule's constitutional necessity. Instead, this school understands the exclusionary rule as a "'constraint on the power of the sovereign, not merely on some of its agents.'"[31] Per Justice Ginsburg, a major flaw in Chief Justice Roberts's refusal to require suppression in Herring's case was that it ensnared the judiciary in the "'taint of partnership in official lawlessness'" and allowed the government to "'profit from its lawless behavior.'"[32]

In his *Herring* majority opinion, Chief Justice Roberts quickly dismissed Justice Ginsburg and her allegiance to the majestic-conception school: "Majestic or not, our cases reject this conception . . . and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis."[33] However, Chief Justice Roberts's attack on Justice Ginsburg's reliance on previous dissents seems unwarranted given the influence of dissents in advancing the teachings of his own exclusionary-rule-as-deterrence school of doctrine. As discussed above, Chief Justice Burger's dissent in *Bivens* and Justice White's dissent in *Stone* served as tributaries to the current that led to the adoption of the good faith exception in *Leon*. Chief Justice Roberts apparently forgot that the deterrence school has not always commanded a Court majority.

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28. Id.

29. 1 Paul Ricoeur, Time and Narrative, at ix (Kathleen McLaughlin & David Pellauer trans., 1990).

30. Laurin, supra note 1, at 739 (citing Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting)).

31. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

32. Id. (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

33. Id. at 700 n.2 (majority opinion) (internal citation omitted).

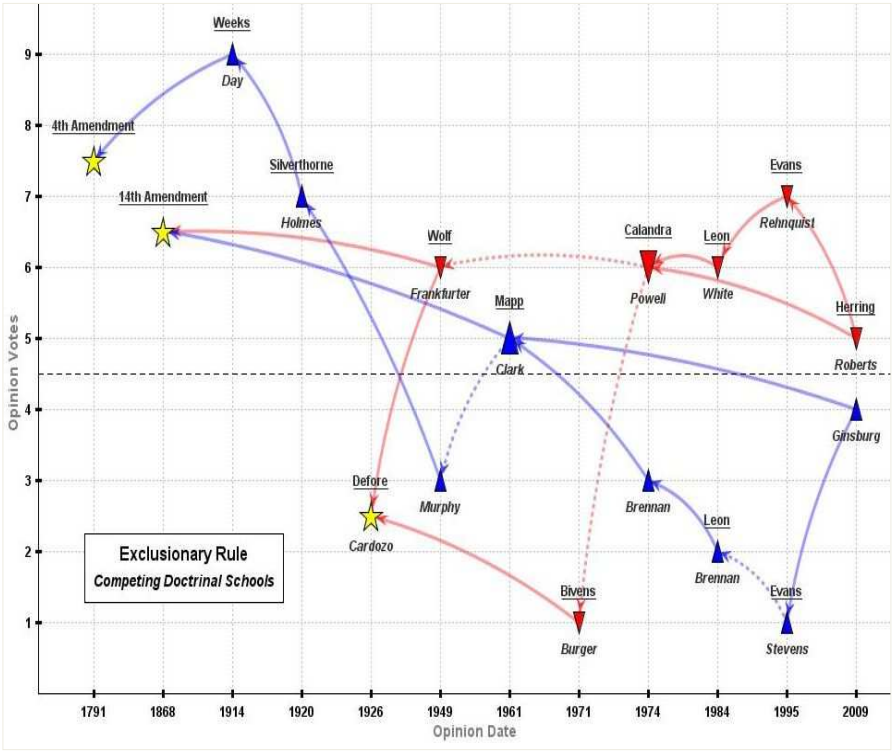

Figure 4

Figure 4 presents my own recovery of lineages animating Justice Ginsburg's philosophical debate with Chief Justice Roberts in *Herring*.[34] Red

34. In chronological order, the data points in Figure 4 are:
(1) Weeks v. United States, 232 U.S. 383 (1914). *Weeks* was a 9-0 decision. Justice Day delivered the unanimous opinion of the Court.
(2) Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *Silverthorne* was a 7-2 decision. Justice Holmes delivered the opinion of the Court. Chief Justice White and Justice Pitney dissented without opinion.
(3) People v. Defore, 140 N.E. 585 (N.Y. 1926). Judge Cardozo delivered the unanimous opinion of the Court of Appeals of New York. Of course, *Defore* is not a Supreme Court opinion, so the Y-axis position has no significance.
(4) Wolf v. Colorado, 338 U.S. 25 (1949), overruled by Mapp v. Ohio, 367 U.S. 643 (1961). For *Wolf*'s vote breakdown, see supra note 11.
(5) *Mapp*, 367 U.S. 643. For *Mapp*'s vote breakdown, see supra note 11.
(6) Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). For *Bivens*'s vote breakdown, see supra note 11.
(7) United States v. Calandra, 414 U.S. 338 (1974). For *Calandra*'s vote breakdown, see supra note 11.
(8) United States v. Leon, 468 U.S. 897 (1984). For *Leon*'s vote breakdown, see supra note 11.
(9) Arizona v. Evans, 514 U.S. 1 (1995). For *Evans*'s vote breakdown, see supra note 14.

arrows connect opinions in the school advocating for an exclusively deterrence-based theory of the exclusionary rule while blue arrows connect opinions in the majestic-conception school. As I see it, the deterrence school did not wrest a majority until Justice Frankfurter's *Wolf* opinion in 1949. In holding that state courts did not need to suppress evidence obtained through unreasonable search or seizure, *Wolf* owed more to Judge Cardozo's legendary *People v. Defore* opinion penned for the New York Court of Appeals than to earlier Supreme Court opinions like *Silverthorne Lumber Co. v. United States*, which automatically imposed exclusion to avoid, in Justice Holmes's words, "reduc[ing] the Fourth Amendment to a form of words."[35] Of course, *Mapp* overruled *Wolf* in 1961 and the deterrence school did not return to majority rule until 1974's *Calandra*.

Chief Justice Roberts's heavy reliance on *Calandra* and its downstream progeny should thus be viewed as hermeneutically connecting *Herring* to Justice Frankfurter's overruled *Wolf* opinion and to Chief Justice Burger's *Bivens* dissent. The uniting philosophy behind the opinions of Chief Justices Roberts and Burger and Justice Frankfurter is found in *Defore*, which jurists in this school inevitably cite.[36] The most famous line from *Defore* perfectly defines the exclusionary rule outcome adherents to this school seek to avoid: "The criminal is to go free because the constable has blundered."[37] The aphorism goes a long way towards explaining Chief Justice Roberts's culpability test and systemic negligence standard in *Herring*—suppression should not result from mere "blundering" of an individual "constable." The repeated borrowing from Judge Cardozo shows his influence over the current mainstream view of the exclusionary rule.

CONCLUSION

On June 16, 2011, the Court handed down *Davis v. United States*, in which six Justices joined the majority in holding that the exclusionary rule does not apply to searches conducted in "objectively reasonable reliance on binding appellate precedent" that is later overruled.[38] In his opinion for the Court, Justice Alito strongly affirmed the viability of both *Herring*'s heightened culpability test and its systemic negligence standard.[39] In dissent, Justice Breyer tried in vain to characterize as "broad dicta" *Herring*'s heightened culpability language and predicted that the Court's new "'good faith' exception will swallow the exclusionary rule."[40] Of course, Professor Laurin perfectly predicted this result, and it further vindicates her convergence

(10) *Herring*, 129 S. Ct. 695. For *Herring*'s vote breakdown, see supra note 14.

35. *Silverthorne*, 251 U.S. at 392.

36. See *Herring*, 129 S. Ct. at 704 (quoting *Defore*, 150 N.E. at 587); *Bivens*, 403 U.S. at 413 (Burger, C.J., dissenting) (quoting *Defore*, 150 N.E. at 587); *Wolf*, 338 U.S. at 31 (citing the "[w]eighty testimony" of Cardozo's *Defore* opinion).

37. *Defore*, 150 N.E. at 587.

38. 131 S. Ct. 2419, 2423–24 (2011). *Davis* was a 7-2 decision. Justice Alito delivered the opinion of the Court. Justice Sotomayor concurred in judgment only. Justice Breyer, with whom Justice Ginsburg joined, dissented.

39. Id. at 2427–28.

40. Id. at 2439 (Breyer, J., dissenting).

and borrowing analysis.[41]

In terms of the competing schools of thought, majority and dissent also invoked authority entirely consistent with the Figure 4 opinion map. With refreshing candor, Justice Alito admitted in *Davis* that the exclusively deterrence-based view of the exclusionary rule did not command a majority as late as 1971 and that the current focus on the "flagrancy of the police misconduct" in fact derives from "a line of cases" beginning with *Leon*.[42] Nodding to his school's tradition, Justice Alito once again closed by citing Judge Cardozo's "constable has blundered" line from *Defore*, this time quipping that a criminal should not go free "because the constable has scrupulously adhered to governing law."[43] For his part, Justice Breyer continued the majestic-conception habit of citing previous dissents that treat the exclusionary rule as "'an essential auxiliary'" to the Fourth Amendment.[44] Perhaps most striking in this regard is Justice Breyer's direct invocation of Justice Murphy's classic line from his *Wolf* dissent: "In many circumstances, 'there is but one alternative to the rule of exclusion. That is no sanction at all.'"[45] Here, Justice Breyer reveals a deep appreciation for the origins of the exclusionary rule tradition he carries on.

Though it may seem like ancient history, *Wolf* remains relevant to any complete understanding of contemporary exclusionary rule debates. Justice Frankfurter's *Wolf* opinion marked the first time since the exclusionary rule's debut in *Weeks v. United States* that a majority endorsed cleaving the suppression remedy from the Fourth Amendment right. Anticipating future exclusionary rule majorities, Frankfurter explicitly justified this cleaving of remedy from right on the existence of alternate civil remedies to deter police abuse.[46] In his prescient *Wolf* dissent, Justice Murphy argued that the deterrence value of alternate remedies was "illusory" because such remedies required difficult-to-make showings of malice.[47] Partially anticipating Laurin's critique, Justice Murphy also urged that the exclusionary remedy be viewed in the light of its essential relationship to background constitutional meaning.[48]

While neither Chief Justice Roberts nor Justice Ginsburg cited to the *Wolf* debate in their clashing *Herring* opinions, this absence does not mean those

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41. See Laurin, supra note 1, at 730 ("This Essay's convergence thesis suggests that the Court would be likely to extend the logic of *Herring* to preclude application of the exclusionary rule in instances of *Gant* violations and similar 'mistake of law' scenarios.").

42. *Davis*, 131 S. Ct. at 2427 (citing United States v. Leon, 468 U.S. 897, 911 (1984) and Whiteley v. Warden, 401 U.S. 560, 568–69 (1971), a case that did not advance a deterrence-based view of the exclusionary rule).

43. Id. at 2434 (citing People v. Defore, 150 N.E. 585, 587 (N.Y. 1926)).

44. Id. at 2440 (Breyer, J., dissenting) (quoting Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting)).

45. Id. at 2440 (quoting Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting)).

46. See *Wolf*, 338 U.S. at 30 & n.1 (observing that "jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection" and collecting case law and statutes providing civil remedies).

47. Id. at 42–43 (Murphy, J., dissenting).

48. See id. at 44 ("Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.").

opinions failed to contribute to the current flow of exclusionary rule doctrine. Indeed, Justice Breyer's citation in *Davis* to Justice Murphy's *Wolf* dissent proves as much. As this Response has emphasized, Supreme Court Justices do not always reveal the full lineages informing their opinions. Justice Alito's failure in *Davis* to cite to the *Wolf* majority does not mean Justice Frankfurter's opinion exercised no sway over the currently dominant school. As Laurin's trawling analysis shows, the absence of citation to constitutional tort cases in exclusionary rule decisions does not mean that the former opinions have not hermeneutically influenced the latter. Clearly, borrowing and convergence shaped exclusionary rule and constitutional tort doctrines beyond what formal invocations of authority would indicate. Building on this insight, I have argued that dissents also exert influence hermeneutically by articulating the teachings of competing doctrinal schools. Following Laurin's cue, I therefore suggest that "reading around" dissents is a productive way for scholars to comprehend the hydraulics of exclusionary rule doctrine.

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