Journal of Criminal Law and Criminology

Volume 106 | Issue 4 Article 1

Fall 2016

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0091-4169/16/10604-0627
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 106, No. 4

CRIMINAL LAW

EVIDENCE LAUNDERING IN A POST-*HERRING* WORLD

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The Supreme Court's decision in Herring v. United States *authorizes police to defeat the Fourth Amendment's protections through a process we call evidence laundering. Evidence laundering occurs when one police officer makes a constitutional mistake when gathering evidence and then passes that evidence along to a second officer, who develops it further and then delivers it to prosecutors for use in a criminal case. The original constitutional taint disappears in the wash.*

Courts have allowed evidence laundering in a variety of contexts, from cases involving flawed databases to cases stemming from faulty judgments and communication lapses in law enforcement teams. Courts typically zero in on individual officer behavior, or limit their review to a single incident, rather than considering the entire course of conduct. In so doing, they make visible the individualistic view of police work that is implicit in much of Fourth Amendment doctrine. This atomistic perspective, however, fails to appreciate the realities of modern policing, which depends heavily on teamwork and delegation. At the same time, the increased emphasis on police intentions and on balancing the costs and benefits of exclusion brings our courts into closer alignment with courts elsewhere in the world.

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INTRODUCTION

The exclusionary rule in the United States calls on judges to sort the dirty laundry in the government's case and to exclude from criminal trials evidence that the police obtain through constitutional violations. The U.S. Supreme Court, however, has grown skeptical—particularly during the Roberts Court era—about the exclusionary rule that it created over a century ago.[1] As a result, the Court has crafted several doctrines to limit the relief available to defendants.[2] Those limiting doctrines, taken together,

[1] *See* Davis v. United States, 131 S. Ct. 2419 (2011) (expanding good faith exception to exclusionary rule); Herring v. United States, 555 U.S. 135 (2009) (same); Hudson v. Michigan, 547 U.S. 586 (2006) (broadening attenuation exception to limit reach of exclusionary rule); Weeks v. United States, 232 U.S. 383 (1914) (establishing exclusionary rule in federal courts). The Court's opinion in *Utah v. Strieff*, 136 S. Ct. 2056 (2016), appeared after the completion of the research, writing, and principal editorial process for this article. We do not address its significance here, but view it as a continuation of the Court's long-term skepticism.

[2] Justice Brennan famously declared in his dissent to *United States v. Leon* that he was already a witness to "the Court's gradual but determined strangulation of the rule." 468 U.S. 897, 928–29 (1984) (Brennan, J., dissenting). Academic commentary on this trend in the years since *Leon* is broad and pervasive. *See, e.g.*, Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009); Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477 (2013); Sharon L. Davies & Anna B. Scanlon, Katz *in the Age of* Hudson v. Michigan*: Some Thoughts on "Suppression as a Last Resort,"* 41 U.C. DAVIS L. REV. 1035 (2008); George M. Dery, III, *Good Enough for Government Work: The Court's*

amount to more than an exception here or there and result in more than just a few extra wins for the government in close cases. The long-term doctrinal trend has transformed the expectations of courts and police officers, as well as the plausible attorney arguments that form the backdrop for plea negotiations.[3]

In this Article, we look closely at one such limiting doctrine and explain how it reflects long-term trends for criminal procedure remedies. The cases that interest us here apply the "good faith exception" to the exclusionary rule in multi-officer situations.[4] In these instances, one police officer makes a constitutional mistake when gathering evidence and then passes that evidence along to a second officer, who develops it further and then delivers it to prosecutors for use in a criminal case. When courts admit the evidence based on the good faith of the second officer, the original constitutional taint disappears; the second law enforcement agent's limited knowledge of the original violation effectively launders the evidence.[5]

We begin our assessment of evidence laundering by reviewing the Supreme Court opinion that first authorized this practice: *Herring v. United*

Dangerous Decision, *in* Herring v. United States, *to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 GEO. MASON U. C.R. L.J. 1 (2009); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2012); James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819 (2008).

[3] It has also left some courts uncertain about how to conduct suppression analysis in a "rational and predictable manner" when relying entirely on cost-benefit analysis. *See, e.g.*, United States v. Thomas, No. 08–cr–87–bbc–02, 2009 WL 151180, at *8 (W.D. Wis. Jan. 20, 2009).

[4] The "good faith exception" to the exclusionary rule sometimes applies after a trial court has made a finding of improper search or seizure by police. Under its terms, even though police officers clearly violate the requirements of the Fourth Amendment in collecting evidence, the trial court allows the government to introduce the evidence at trial (ignoring the usual exclusionary rule) because the circumstances indicate that the officers acted in "good faith." *See Leon*, 468 U.S. at 923–24.

[5] *See* United States v. Woerner, 709 F.3d 527, 533–35 (5th Cir. 2013) (affirming trial court's denial of motion to suppress evidence obtained by FBI search warrant that was based on confession illegally obtained by state police); United States v. Campbell, 603 F.3d 1218, 1229–30 (10th Cir. 2010) (affirming denial of motion to suppress when flaws in affidavit used to obtain warrant resulted from officers' negligence, not recklessness or deliberate intent to deceive); State v. Geiter, 942 N.E.2d 1161, 1165–67 (Ohio Ct. App. 2010) (affirming decision not to exclude evidence obtained from an illegal traffic stop when the officer conducting the stop "had no reason to question the reliability" of information relayed via police dispatch).

States.[6] As we describe in Part I, the *Herring* Court took three steps to extend the good faith exception, making evidence laundering possible. First, the Court stretched the good faith exception, which had previously applied only to mistakes by government agents who were not members of the law enforcement "team," to cover mistakes by other law enforcement agents.[7] Second, the Court imposed a heightened mental state requirement on proof of officer misconduct, declaring that simple negligence by a police officer, regardless of the context, would not be enough to trigger the exclusionary rule.[8] Third, the Court compartmentalized the relevant actions of each individual officer, rather than scrutinizing the behavior of the whole law enforcement team.[9]

In Part II we show more specifically how *Herring* invited evidence laundering by police and laid the groundwork for judicial approval of this practice. Using a hypothetical case, we first consider the behavior of the police actor who makes the initial mistake, along with the actions of his or her colleague who receives the tainted evidence. We then explain how *Herring*—by rhetoric and by example—teaches lower courts to turn a blind eye to evidence laundering except when two officers make egregious mistakes in the field as they pursue a suspect.

State courts and lower federal courts have walked through the doctrinal door that the *Herring* opinion left open. We consider in Part III the actual results when prosecutors ask for admission of laundered evidence under the good faith doctrine. Using the results of a Westlaw search, we show how courts across the country have ruled on evidence laundering in cases involving law enforcement databases (vehicle information, outstanding arrest warrants, and DNA) and direct communications between officers. Most often, courts focus on individual officer behavior or limit their review to a single incident rather than considering the entire course of conduct. This disturbing trend is most common in cases arising from errors in law enforcement databases.[10] In those cases, judges have difficulty identifying the person who inputted the incorrect information and tend to reflexively assert the reliability of databases, instead of examining the quality control systems of those databases.[11]

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[6] 555 U.S. 135 (2009).
[7] *Id.* at 142–44.
[8] *Id.* at 144–45.
[9] *Id.* at 145–46; *see infra* Part I.
[10] *See infra* Part III.
[11] *See infra* Part III.

Following our review of the post-*Herring* cases, we reflect on the implications of this line of jurisprudence. In Part IV, we argue that the good faith doctrine, as expanded through a broad reading of *Herring*, makes visible the individualistic view of police work that is implicit in much of Fourth Amendment doctrine. Courts rely on an economic model of the individual rational actor, which predicts how the rational police officer might respond to the incentives of exclusion.[12] Policing, however, is a social activity.[13] The atomistic perspective built into Fourth Amendment doctrine (and most especially the good faith doctrine) fails to appreciate the interactions among different police officers and organizational units.

The evidence laundering cases make clear that an effective exclusionary rule must take an organizational perspective on police work. In the world of fragmented policing[14] that we glimpse through the window of these cases, organizational theory tells us more than micro-economic theory. In particular, those who design and control the flow of information among policing organizations should, like the officers who react to information in a particular case, come under constitutional scrutiny. Perhaps in recognition of this point, the *Herring* opinion did mention that "systemic negligence" could result in exclusion.[15] Yet the rigors of assembling evidence to support a single defendant's motion to exclude evidence, together with the limited reach of criminal discovery, make the claim difficult to prove.[16]

One consequence of the Court's focus on the conduct of individual officers is to make jurisdictional boundaries more important. Under the emboldened post-*Herring* reading of the good faith doctrine, it becomes easier for officers from one jurisdiction to sanitize tainted evidence by passing it along to colleagues in another jurisdiction.[17] *Herring* thus seems

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[12] *See Herring*, 555 U.S. at 144 n.4 (describing the exclusion of the evidence weighed against substantial social costs).

[13] *See generally* EDWARD R. MAGUIRE, ORGANIZATIONAL STRUCTURE IN AMERICAN POLICE AGENCIES: CONTEXT, COMPLEXITY, AND CONTROL 69–112 (2003) (describing a "primitive theory" of police organizational structure).

[14] *See* Hadar Aviram et al., *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing*, 37 FORDHAM URB. L.J. 709, 726 (2010) (discussing fragmented policing and issues with accountability).

[15] 555 U.S. at 144.

[16] *Cf.* United States v. Armstrong, 517 U.S. 456 (1996) (establishing difficult showing for criminal defendant to make before obtaining discovery of government files to explore allegations of racial bias in selection of charges).

[17] *See* United States v. Davis, 690 F.3d 226, 253–57 (4th Cir. 2012); State v. Brock, 91 So. 3d 1003, 1007 (La. Ct. App. 2012).

to have reinstituted the silver platter doctrine that the Supreme Court rejected decades ago.[18] The return of the doctrine is especially concerning today because investigations increasingly occur in joint federal-state task forces or across state borders.[19]

Also in Part IV we evaluate the role of evidence laundering within the political economy of the exclusionary rule. Some observers have noted that a more flexible exclusionary remedy might give judges the political cover they need to declare more vigorous legal limits on law enforcement.[20] These predictions, however, have not proven accurate. Although the exclusionary rule transformed slowly over the years into a more flexible balancing enterprise, the substantive limits on police investigations did not appear to strengthen in response.

The final implication that we explore in Part IV is comparative. We suggest that the evidence laundering technique, like so many other changes to criminal procedure remedies in the United States, brings our courts into closer alignment with courts elsewhere in the world. While new in the U.S., the courts' emphasis on police intentions and on the context in which violations occur has long been common in other nations. As the exclusionary rule doctrine in the U.S. converges with its counterparts in other parts of the world, comparative work can provide us with useful insights as we attempt to anticipate future doctrinal developments and to measure the effects of the exclusionary rule.[21]

I. THE GOOD FAITH EXCEPTION, THEN AND NOW

The original pronouncement of a good faith exception to the

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[18] The silver platter doctrine would allow law enforcement agents in one jurisdiction to obtain evidence illegally and then present it on a "silver platter" to prosecutors in another jurisdiction for use in those courts, even if the original police action violated the applicable law in the jurisdiction where the case was filed. *See* Elkins v. United States, 364 U.S. 206, 208 n.2 (1960).

[19] *See* David Gray et al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 38–39 (2012); Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293, 324–27 (2013).

[20] *See, e.g.*, Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112–13 (2003); Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 567, 585–95 (2013); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 793 (2006) ("The government pays for criminal procedure rules in the coin of forgone arrests and convictions.").

[21] *Cf.* Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 354–55 (2013).

exclusionary rule in *United States v. Leon*[22] carried within it the seeds for growth in many different directions. Even so, the degree to which the Court has strayed from the original, warrant-based context of good faith in just twenty-five years is remarkable.[23]

A. GOOD FAITH THEN

Leon involved a police officer who relied on the judgment of a magistrate who issued a search warrant that was subsequently invalidated.[24] After finding fault with the magistrate's assessment of probable cause, the Supreme Court considered whether the evidence obtained as a result of the unconstitutional search should be suppressed.[25] In focusing on remedy rather than on violation, the Court asked if it was reasonable for the officer to rely on the magistrate's judgment.[26] Justice White gave this answer: "We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[27]

The *Leon* majority stressed the role of the *judicial officer* in producing the constitutional error.[28] So long as officers rely on "neutral and detached" judges for guidance on how to develop their evidence, a cost-benefit calculation supports the government's use of the evidence at trial, the Court declared.[29] That basic line of reasoning held firm in *Illinois v. Krull*[30] and *Arizona v. Evans*,[31] when officers relied on, respectively, a statute that was

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[22] 468 U.S. 897, 924 (1984).

[23] Justice Brennan in his *Leon* dissent predicted this unraveling, as he lamented the day the Court would use good faith to validate "situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances." *Id.* at 959 (Brennan, J., dissenting). As we describe below, this prediction has already come true in courts that have taken the broadest reading of *Herring*. *See, e.g.*, United States v. Massi, 761 F.3d 512 (5th Cir. 2014).

[24] *Leon*, 468 U.S. at 900.

[25] *Id.*

[26] *Id.* at 922.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 913–14 (quoting Aguilar v. Texas, 378 U.S. 108, 111 (1964)).

[30] 480 U.S. 340, 359–60 (1987) (finding there should be no exclusion if police officer reasonably relies on a statute later declared unconstitutional).

[31] 514 U.S. 1, 14 (1995) (finding there should be no exclusion if erroneous information on which police rely resulted from clerical errors of a court employee, as opposed to a law enforcement employee).

later invalidated and an inaccurate court record that incorrectly showed an outstanding arrest warrant. The Court decided that the *Leon* good faith exception applied in both of these contexts for two reasons: (1) neither legislators nor court clerks had any incentive to promote improper searches, and (2) where officers behave appropriately, there is nothing to deter.[32]

When police officers pursue an investigation based on faulty evidence from other law enforcement officers, however, the arguments for allowing the officer to rely on that evidence become weaker. Law enforcement employees are all part of the law enforcement community, a group meant to be constrained by constitutional requirements and deterred by the exclusion of tainted evidence. For that reason, the Court in *Leon*, *Krull*, and *Evans* made much of the distinction between state actors who are "adjuncts to the law enforcement team engaged in the often-competitive enterprise of ferreting out crime"[33] and state actors who hold other, non-law enforcement roles and thus "have no stake in the outcome of particular criminal prosecutions."[34]

The *Leon* good faith doctrine also implied that exclusion was premised on officer negligence; the defense did not need to prove the officer's subjective awareness of wrongdoing in order to keep tainted evidence out of the criminal trial. While the *Leon* Court did not explicitly hold that negligence by an officer would defeat good faith, its opinion stressed that the officer's claim to good faith reliance on the behavior or judgment of others had to be "objectively" reasonable.[35] In the years since, lower courts have emphasized that negligent conduct is the antithesis of objective reasonableness,[36] thus reinforcing the view that neither intentional

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[32] *Leon*, 468 U.S. at 919; *see* Herring v. United States, 555 U.S. 135, 141–42 (2009).

[33] *Evans*, 514 U.S. at 15.

[34] *Id.*

[35] 468 U.S. at 926. This insistence on objective reasonableness is consistent with the Court's jurisprudence on probable cause. Illinois v. Gates, 462 U.S. 213, 232 (1983). Arguably the need for objective reasonableness should be even greater in the exclusion context, since that inquiry occurs only after the trial court has found a Constitutional violation occurred. That is, during the remedy phase of a suppression hearing the burden is on the government to provide reasons for the behavior of officers who have just been found to have acted illegally.

[36] *See, e.g.*, United States v. DeLeon-Reyna, 898 F.2d 486 (5th Cir. 1990), *rev'd en banc* 930 F.2d 396 (5th Cir. 1991) (per curiam) (holding that where officer fails to follow office policy when communicating license plate to dispatch and she provides the wrong information as a result, this is officer negligence, which is by definition not objective reasonableness within the meaning of *Leon*); State v. Allen, 690 N.W.2d 582 (Neb. 2005) (holding that negligence by definition is failure to do something a reasonably careful person would do under the circumstances).

wrongdoing nor conscious recklessness by an officer was necessary to secure exclusion of tainted evidence. Negligence alone would—and did—suffice.

B. GOOD FAITH NOW

The twenty-first century brought major changes to the law of good faith. We have witnessed the erosion of the dividing line between law enforcement and other state actors, the removal of simple negligence from the exclusion calculus, and the willingness of courts to focus on isolated moments of police behavior rather than the entire course of the investigation.[37] Consequently, today's Supreme Court accepts evidence gathered by law enforcement practices that were previously seen as off limits.

While *Leon*'s emphasis on the non-law enforcement status of the wrongdoer guided the Court in *Krull* and *Evans*, the distinction between law enforcement and non-law enforcement errors no longer seems salient. This change appeared seven years ago in *Herring v. United States*, when the Court held for the first time that good faith could cure even errors made by law enforcement officers.[38] Specifically, *Herring* held that the exclusionary rule does not apply when an illegal search is based on "isolated [police] negligence attenuated from the arrest."[39] In *Herring*, a police officer obtained a faulty report (created by a records clerk in the sheriff's office of another county) about an expired arrest warrant for Bennie Dean Herring.[40] The officer enforced what he believed (incorrectly) to be a valid outstanding warrant and arrested Herring; the search incident to arrest turned up methamphetamine and an illegal pistol.[41] The search was illegal because there was no probable cause for the arrest and the warrant had expired, so the evidence obtained should have been excluded from Herring's case.[42] But according to the *Herring* Court, "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some

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[37] The Court has also expanded good faith protection to officers who rely on binding circuit precedent that is later declared unconstitutional. Davis v. United States, 131 S. Ct. 2419 (2011).

[38] 555 U.S. 135, 144 (2009).

[39] *Id.* at 137. While the Court's statement specified "arrest," the holding applies to any police action. The arrest language derives from the factual circumstances of *Herring.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 138.

circumstances recurring or systemic negligence."[43] It does not apply outside that context.

Once the *Herring* opinion made it possible to salvage illegal searches that began and ended with law enforcement actors, the critical question changed. It was no longer enough for a court to ask the institutional home of the actor who made the initial error in the search. Now it became important to learn about the *distance* that separated the first (erroneously acting) police officer from any later officers. *Herring* thus tied together two different doctrinal threads, extending the reach of the "attenuation" doctrine to make it relevant to good faith analysis.[44] As a result, good faith now resembles other limitations on the exclusionary rule that rest on the causal link between the original source of the error and the proposed use of the evidence.[45]

We cannot be sure if the basis for attenuation under the *Herring* doctrine is temporal (that the arrest occurred five months after the error), spatial (that the arrest occurred in a different jurisdiction from the source of the error) or personal (that someone other than the arresting officer was responsible for the faulty record keeping).[46] Whichever the meaning, the attenuation concept suggests that when the primary investigating officer is removed in some way from the error, deterrence of future misconduct is both less likely to result and too costly to impose.[47] The most important aspect of attenuation in the *Herring* opinion, for our purposes, extends good faith protection through personal attenuation—situations where the

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[43] *Id.* at 144.

[44] *See, e.g.*, Brown v. Illinois, 422 U.S. 590, 610 (1975) (Powell, J., concurring in part); Wong Sun v. United States, 371 U.S. 471 (1963).

[45] On this basis, courts admit tainted evidence that is removed (by time and intervening event) from the original illegality, or because they believe such evidence would have been inevitably discovered through lawful police channels. *See* Nix v. Williams, 467 U.S. 431 (1984); *Wong Sun*, 371 U.S. at 491; *see also* Cloud, *supra* note 2 (discussing the interconnected natures of the doctrines).

[46] For a fuller discussion of the ambiguity of attenuation in the *Herring* opinion, see LaFave, *supra* note 2, at 771–72 (discussing six potential meanings of "attenuated").

[47] Some commentators have suggested that the attenuation qualifier in *Herring* was added only to secure a fifth vote for the majority and that it may well be dropped in the near future. Craig M. Bradley, *Red* Herring *or the Death of the Exclusionary Rule?*, 45 TRIAL 52, 53 (2009); LaFave, *supra* note 2, at 760 n.18 (citing Richard McAdams, Herring *and the Exclusionary Rule*, UNIV. OF CHI. FACULTY BLOG (Jan. 17, 2009, 00:06 AM), http://uchicagolaw.typepad.com/faculty/2009/01/herring-and-the-exclusionary-rule.html); Tom Goldstein, *The Surpassing Significance of* Herring, SCOTUSBLOG (Jan. 14, 2009, 11:32 AM), http://www.scotusblog.com/2009/01/the-surpassing-significance-of-herring (discussing how the "attenuated" issue is not looked at or taken seriously).

offending officer is not the same as the subsequent officer who receives tainted evidence.[48]

In addition to expanding the types of actors who could benefit from good faith protection and adapting the attenuation doctrine to fit the good faith context, the *Herring* opinion also made a far-reaching change to the standard for judging the culpability of police officers.[49] It jettisoned the simple negligence standard that was at the heart of the *Leon* opinion. The *Herring* opinion instead used various formulations to describe the type of police wrongdoing that would suffice to justify suppression: "flagrant" violations, "knowledge" that the search was unconstitutional, "intentional conduct that was patently unconstitutional."[50] In short, the Court held:

> [P]olice conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[51]

In the absence of this heightened mental state, the Court said,

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[48] For the remainder of our analysis, we assume attenuation in this instance was primarily personal, rather than spatial or temporal, as that seems the most likely reading of *Herring v. United States* on its facts. Justice Ginsburg in her dissent declared that the fact that the error occurred "in Dale County rather than Coffee County is inconsequential in the suppression analysis." 555 U.S. at 150 n.1 (Ginsburg, J., dissenting). This may track the Court's longstanding rejection of the silver platter doctrine. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 208–11 (1960). However, the Eleventh Circuit emphasized the spatial dimension of attenuation when it issued its opinion, commenting that exclusion would inappropriately "scuttle a case brought by officers of a different department in another county." United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007).

[49] Others have heavily criticized the Court for crafting this heightened mental state requirement in the name of deterrence. *See, e.g.*, Alschuler, *supra* note 2, at 483–84 (suggesting that Chief Justice Roberts "may have forgotten what he learned in law school" about subjective and objective standards because the Court declared the mental state of police officers relevant to a standard it described as objective); Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 203–04 (2010) (discussing a broad reading of the opinion that would "expand dramatically the inapplicability of the exclusionary rule"); LaFave, *supra* note 2, at 772–74 (focus on negligence of individual officers would cut "a wide swath through the exclusionary rule").

[50] *See Herring*, 555 U.S. at 142–44. Ironically, *Herring*'s embrace of subjectivity as the true test for constitutional violations contradicts the Court's assessment of subjectivity in cases like *Whren v. United States*; in *Whren*, the Court asserted that a focus on the officer's subjective mental state would produce unreliable and inconsistent results and would invite perjury. 517 U.S. 806, 813–14 (1996). We thank Morgan Cloud, a colleague of one of the authors, for bringing this point to our attention during his review of the manuscript of this article.

[51] *Herring*, 555 U.S. at 144.

exclusion of highly relevant evidence seems unfair to those police officers who do follow the law.[52] Moreover, the Court asserted that only officers or departments who act according to this heightened mental state could be deterred by exclusion.[53] For those reasons, the Court argued, exclusion should be limited to cases in which serious concerns about officer culpability are present.

The Court in *Herring* used conflicting language to describe whether this inquiry into the officer's culpability is subjective or purely objective.[54] At one point the Court suggested that a trial judge must determine the subjective mental state of the officer who violated the law, in an effort to determine whether that mental state triggers the exclusionary remedy: "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct . . . ."[55] Likewise, the majority asserted that, "[W]hen police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'"[56] But at another point in the opinion the Court insisted that:

> The pertinent analysis of deterrence and culpability is objective, not an "inquiry into the subjective awareness of arresting officers[.]" . . . "[O]ur good-faith inquiry is confined to the objectively ascertainable question whether a *reasonably well trained officer would have known* that the search was illegal" in light of "all of the circumstances."[57]

While the first two statements signal that officer intent matters because deliberate or reckless misconduct is the only sound basis for exclusion, this last statement renders the subjective mental state of the individual officers irrelevant.[58]

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[52] This issue of the unfairness of excluding evidence obtained by one person based on mistakes made by another person has run through the entire line of *Leon* cases. But as Justice Brennan argued in *Leon v. United States*, this conception of fairness equates deterrence with punishment of individuals, when the whole point of deterrence through exclusion is "to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally." 468 U.S. 897, 953 (1984) (Brennan, J., dissenting).

[53] *Herring*, 555 U.S. at 143–44.

[54] *See id.*

[55] *Id.* at 144.

[56] *Id.* at 147–48 (citation omitted).

[57] *Id.* at 145 (emphasis added) (quoting Reply Brief for Petitioner at 4–5, Herring v. United States, 555 U.S. 135 (2009) (No. 07-513)); *Leon*, 468 U.S. at 922 n.23 (1984).

[58] Justice Ginsburg highlighted this discrepancy in her *Herring* dissent; she accused the majority of not clearly "squar[ing] its focus on deliberate conduct with its recognition that

Whether objective or subjective, precisely which government agents must display this level of culpability? Three groups of government officials created the unjustified arrest of Bennie Dean Herring. The first was the arresting officer, Mark Anderson, who worked for the Coffee County Sheriff's Department: he noticed that Mr. Herring was present at the police station to retrieve an item from his impounded vehicle.[59] Because Mr. Herring was "no stranger to law enforcement," Deputy Anderson asked the warrants clerk in his own office to check for any outstanding arrest warrants.[60] When the Coffee County clerk found no warrants, Anderson asked her to check in nearby Dale County.[61] The clerk in Dale County (the second government agent in this scenario) did find a computer record of an outstanding arrest warrant, but—unbeknownst to her—the record was faulty because the court had "recalled" the warrant five months earlier.[62] Somehow, the routine communication between the Dale County Sheriff's Department and the court clerk for Dale County (the third agent) broke down, and an outdated record stayed in the system.[63]

The Supreme Court's opinion directed attention away from the early error, showing no particular curiosity about the agents in Dale County: "*For whatever reason*, the information about the recall of the warrant for Herring did not appear in the database."[64] The opinion noted only that "there is no evidence that errors in Dale County's system are routine or widespread."[65] The majority opinion never mentioned the fact that the state actors did not routinely audit their system for accuracy, or that Alabama showed a 13% error rate in its state databases.[66] The Court instead congratulated the Dale

application of the exclusionary rule does not require inquiry into the mental state of the police." 555 U.S. at 157 n.7 (Ginsburg, J., dissenting); *see also* United States v. De Leon-Reyna, 898 F.2d 486, 490–91 (5th Cir. 1990) (arguing that the belief that evidence should not be excluded unless the officer's conduct was dishonest or reckless "ignores the overwhelming weight of authority which stresses that the officer's belief and conduct must be objectively reasonable" and stating "[i]t [is] oxymoronic for the government to suggest that an error made through negligence is 'reasonable'").

[59] *Herring*, 555 U.S. at 137.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 138

[63] *Id.*

[64] *Id.* (emphasis added).

[65] *Id.* at 147. In making this claim, the Court ignored evidence from amici documenting that law enforcement databases are "insufficiently monitored and often out of date." *Id.* at 155 (Ginsburg, J., dissenting).

[66] *Id.* at 154 ("Is it not altogether obvious that the Department could take further precautions to ensure the integrity of its database?"); *see also* Transcript of Oral Argument at

County clerk for informing Coffee County about the error "immediately" after she learned about the problem.[67] This notification was of course too late for Mr. Herring, as he had already been arrested and searched.

The opinion also spent little time asking about Coffee County and the reasonableness of Deputy Anderson's reliance on the information from Dale County. Where "systemic errors" affect the databases of a law enforcement agency, "it might be reckless for officers to rely on" that system, the Court said.[68] But in the absence of evidence that such errors are systematic, an officer's reliance is well-placed and thus protected by good faith. The Court assessed the facts here as follows: "The Coffee County officers did nothing improper" and the clerk showed professionalism by requesting a faxed confirmation of the warrant, which is what led to the discovery of the error.[69]

By conducting this shallow inquiry[70] into the source of the error (and thereby neglecting the likelihood of other errors by these departments), the *Herring* Court betrayed the original goal of the good faith exception.[71] *Leon* emphasized that because the goal of the exception is to deter police misconduct, the conduct of *all* of the police officers involved should come

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26, Herring v. United States, 555 U.S. 135 (2009) (No. 07-513) (noting the 13% error rate in Alabama). It is beyond the scope of this article for us to suggest the appropriate level of confidence courts should have in databases; we merely want to draw attention to the *Herring* Court's strong assumption of reliability in the face of contradictory evidence.

[67] *Herring*, 555 U.S. at 138.

[68] *Id.* at 146.

[69] *Id.* at 140, 146.

[70] Here we assume the extent of the Court's inquiry is reflected in its opinion. Any deeper reflections, to the extent they exist, remain hidden from view—both to scholars and to future courts considering these questions.

Encouraging shallowness in police inquiry is also problematic in the apparent authority line of cases, in which the Court has held that officers can reasonably rely on the bare information they are provided when assessing whether a potential consenter has authority over a private area. Illinois v. Rodriguez, 497 U.S. 177 (1990). Officers can make the claim of reasonable reliance based on "facts available . . . at the moment," even if conducting further investigation would not be burdensome. *Id.* While they need to judge assertions of authority against known circumstantial evidence that such authority does not exist, there is no due diligence requirement to encourage them to find circumstantial evidence that either confirms or contradicts the claim of authority.

[71] *See Herring*, 555 U.S. at 140–41 ("*Leon* admonished that we must consider the actions of all the police officers involved."). The broad approach to police liability that the Court approved in *Leon* is premised on, and reinforced by, the collective knowledge doctrine articulated by the Supreme Court in *United States v. Hensley* and *Whiteley v. Warden*. 469 U.S. 221 (1985); 401 U.S. 560 (1971).

under scrutiny.[72] The *Leon* Court cautioned that a more cursory approach would permit officers to use their deliberately ignorant colleagues to do what they themselves cannot do.[73] Hence, the reasonable basis for police action that is required by *Leon* "refers to the knowledge and information possessed by the law enforcement community as a whole" because to define it otherwise "would affirmatively encourage . . . careless, perhaps deliberately neglectful [behaviors]."[74]

But after *Herring*, lower courts might be inclined to eschew the law enforcement team approach, scrutinizing only the behavior of the officer who triggered the prosecution. In other words, they might put more stock in the outcome that *Herring* endorsed, rather than heed the opinion's mention of *Leon*, and its proposal that systemic negligence should defeat good faith. As long as a trial judge finds that the last officer in the chain "did nothing improper,"[75] he or she might be content to remain in the dark about how the error happened. This approach, as Fourth Amendment scholar Wayne LaFave argues, would effectively nullify the collective knowledge doctrine.[76] Others have said "the Court's 'reasonable mistake' exception to the exclusionary rule will tend to put a premium on police ignorance of the law."[77]

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[72] *Herring*, 555 U.S. at 140 (quoting United States v. Leon, 468 U.S. 897, 923 n.24 (1984) ("It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.")).

[73] *Leon*, 468 U.S. at 923 n.24.

[74] Albo v. State, 477 So. 2d 1071, 1074, 1076 (Fla. Dist. Ct. App. 1985); *see* People v. Turnage, 642 N.E.2d 1235, 1240 (Ill. 1994) (refusing to "allow the police to effectively thwart the constitutional protections provided by the warrant process" by limiting attention only to the officer who executed a defective warrant).

[75] *Herring*, 555 U.S. at 140.

[76] *See* LaFave, *supra* note 2, at 773 (discussing the difficulty of fitting all *Whiteley* unconscionable decisions into a *Herring* framework). *Arizona v. Evans* made clear that because *Whiteley v. Warden* was decided at a time when error was equivalent to exclusion, its precedential value on the issue of exclusion was "dubious," but the collective knowledge doctrine was not eliminated. 514 U.S. 1, 13 (1995) (citing Whiteley v. Warden, 401 U.S. 560 (1971)).

[77] *Leon*, 468 U.S. at 955 (Brennan, J., dissenting). Justice Brennan went on to predict that:

> [Police departments, a]rmed with the assurance provided by today's decisions that evidence will always be admissible whenever an officer has "reasonably" relied upon a warrant, . . . will be encouraged to train officers that if a warrant has simply been signed, it is reasonable, without more, to rely on it. Since in close cases there will no longer be any incentive to err on the side of constitutional behavior, police would have every reason to adopt a "let's-wait-until-it's-decided" approach in situations in which there is a question about a warrant's validity or the basis for its

In sum, following *Herring*, an attenuated police mistake occurs when the misbehaving officer hands off his file to a second officer.[78] That second officer can then use the evidence based on a claim of reasonable reliance if he does not know of the first officer's mistake.[79] As long as the court is convinced the error was the result of simple negligence only, personal attenuation allows the second officer to do what the first officer cannot. We call this process "evidence laundering."[80]

II. EVIDENCE LAUNDERING BY DESIGN: A STEP-BY-STEP GUIDE TO ATTENUATED POLICE MISCONDUCT

The evidence laundering scenario involves two officers, from the same or different departments, who share information in the wake of misconduct by one of them. The second officer gathers evidence based on the tainted information provided by the misbehaving officer, and uses that new information to initiate a criminal case against the accused. This Part describes how *Herring* makes it possible in this hypothetical scenario for the second officer to launder the mistakes or wrongdoing of the first officer.

The attenuated misconduct story begins with a law enforcement team member,[81] we will call him "Officer Mutt," who makes a mistake. For

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issuance.

Id.

[78] Some lower courts have extended *Herring* to the one-officer situation, where the same officer who makes the mistake conducts the arrest or search that leads to the challenged evidence. *See, e.g.*, United States v. Massi, 761 F.3d 512, 529–32 (5th Cir. 2014) (finding a good faith mistake where an officer reasonably relied on his own erroneously obtained information); *see infra* Part III.

[79] Of course, if the facts also suggest temporal or spatial dimensions to attenuation, that improves the government's position on the likelihood and value of deterrence. The temporal concerns were salient even in the pre-*Herring* days. *See, e.g.*, State v. Stringer, 372 S.E.2d 426, 428 (Ga. 1988) (explaining that the bench warrant should have been withdrawn twenty-one months earlier); *Albo*, 477 So. 2d at 1075 (finding a failure to update police computers for several months); Carter v. State, 305 A.2d 856, 858 (Md. Ct. Spec. App. 1973) (discussing that the stolen vehicle report was not rescinded for three months after car was recovered); *cf.* Childress v. United States, 381 A.2d 614, 617–18 (D.C. Cir. 1977) (tolerating some "administrative delay" in failure to remove satisfied warrants from urban police database).

[80] *See* State v. Hicks, 707 P.2d 331, 333 (Ariz. Ct. App. 1985) ("[p]olice officers cannot launder their prior unconstitutional behavior by presenting the fruits of it to a magistrate"), *aff'd on other grounds sub nom.* Arizona v. Hicks, 480 U.S. 321 (1987).

[81] Sometimes the errant team member is not a uniformed officer. *See, e.g.*, United States v. Humbert, 336 F. App'x 132, 135–36 (3d Cir. 2009) (explaining that even if the defendant's DNA sample that was obtained by authorities upon his release from prison was in violation of state law, there was no Fourth Amendment violation when police used a

example, he arrests a suspect without probable cause, he wrongly enters (or fails to delete) the suspect's information in a police-maintained database, or he executes a stale search warrant at the suspect's house. "Officer Jeff" then enters the scene and has the chance to rehabilitate the case. Rehabilitation is possible under *Herring* because Mutt and Jeff communicate in a way that allows Jeff to deny that he knew or should have known of Mutt's mistake.[82]

How does this opportunity for rehabilitation occur? Officer Jeff learns *the substance* of what Officer Mutt knows about the accused but remains in the dark about the methods that Officer Mutt used to acquire this information; in other words, no one directly mentions Officer Mutt's mistake, if they are even aware of it. Officer Jeff uses the information to apply for a new warrant or otherwise to justify further contact with the accused. Armed with a warrant or probable cause, Officer Jeff searches the suspect's property (or arrests him, or interrogates him) and learns new information helpful to the prosecution.

When the government files charges, the accused moves to suppress the evidence that Officer Jeff gathered, claiming this evidence is all fruit of the poisonous tree—Officer Mutt's error. The prosecution admits the original error but argues that Officer Jeff's evidence should not properly be considered fruit of the poisonous tree. Due to the deniability built into the

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match derived from it to get a new warrant for a new sample); People v. Robinson, 224 P.3d 55, 68–71 (Cal. 2010) (showing defendant's blood sample taken by jail personnel in violation of state statute was later used to match defendant to a new crime). Some cases stem from factual mistakes made by the police dispatcher, who provides incorrect information to an officer on patrol about a defendant's driver's license or warrant status. *See, e.g.*, United States v. Groves, 559 F.3d 637, 642 (7th Cir. 2009) (finding no probable cause to arrest when an officer is told by dispatcher there is a warrant for the defendant, but it is just a "watch out" bulletin which provides, at most, reasonable suspicion); State v. Handy, 18 A.3d 179, 180 (N.J. 2011); State v. Brock, 91 So. 3d 1003, 1007 (La. Ct. App. 2012). In other settings, the factual mistake is contained in a police-maintained computer database about stolen cars or active warrants, on which the patrolman relies when stopping or arresting the defendant. In these cases, it is usually unclear which employee made the erroneous input. *See, e.g.*, United States v. Altman, No. 09-CR-20010, 2009 WL 4065047, at *1 & n.1, *3–*4 (C.D. Ill. 2009) (noting warrant was for wrong person; dispatcher who provided incorrect information worked for a joint city and county communication center); United States v. Esquivel-Rios, 39 F. Supp. 3d 1175, 1188–89 (D. Kan. 2014); McCain v. State, 4 A.3d 53, 64–65 (Md. Ct. Spec. App. 2010); State v. Geiter, 942 N.E.2d 1161, 1166–67 (Ohio Ct. App. 2010).

[82] This is the sort of "'working arrangement[]' that would allow circumvention of Fourth Amendment protections" about which the Court was warned by amici in *Herring*. *See* Brief for National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 28, Herring v. United States, 555 U.S. 135 (2009) (No. 07-513) (quoting Mapp v. Ohio, 367 U.S. 643, 658 (1961)).

communication between the officers, Officer Jeff did not know of Officer Mutt's mistake, and thus his good faith behavior insulates the evidence from the earlier error. In short, the reasonable, good faith reliance of Officer Jeff on his fellow officer (or on the allegedly reliable police database) breaks the chain.

The *Herring* opinion calls for some inquiry into the reasonableness of Officer Jeff's reliance on the information he received. Did Officer Jeff actually know, or should he have known, of Officer Mutt's misconduct? Recall that *Herring* regards mere negligence as insufficient to trigger exclusion; instead, systemic negligence, gross negligence, recklessness, or deliberate intent is required to make exclusion pay its way. Presumably, more serious errors by Officer Mutt should be harder to launder, because they would be harder to hide. In other words, the more serious the error committed by Officer Mutt, the more likely it is Officer Jeff knew about or had reason to know about it.

Proving that Officer Jeff had actual knowledge of the prior misconduct may be difficult for a defendant.[83] Evidence of malicious or reckless intent is often hard to come by, especially when officers are testifying under oath. But in this setting proof of willful blindness[84] is a real possibility.[85] A trial court should ask a series of questions in this regard: Did Officer Jeff ignore clues about misconduct? Did Officer Jeff purposely refrain from asking Officer Mutt important questions that, if answered truthfully, would have revealed the misconduct? Was Officer Mutt's misconduct so flagrant that any reasonable officer in Officer Jeff's position must have known of it? Affirmative answers to any or all of these inquiries suggest proof of willful blindness.

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[83] *See* Herring v. United States, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting) ("How is an impecunious defendant to make the required showing?").

[84] In other criminal law settings, willful blindness is morally and factually equated with knowledge of the misconduct, or at the very least with recklessness. *See, e.g.*, Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068–69 (2011) ("The doctrine of willful blindness is well established in criminal law. . . . [C]ourts applying the doctrine [hold] that defendants cannot escape the reach of . . . statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances."); MODEL PENAL CODE § 2.02(7) ("[K]nowledge is established if a person is aware of a high probability of its existence[.]"). A similar analysis applies in the context of money laundering. *See* United States v. Nicholson, 176 F. App'x 386 (4th Cir. 2006); United States v. Wert-Ruiz, 228 F.3d 250 (3d Cir. 2000).

[85] *See* People v. Jennings, 430 N.E.2d 1282, 1285 (N.Y. 1981) (rejecting the "white heart and empty head standard" that might otherwise sanitize police reliance on mistake made by fellow officers) (citing James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE 218 (2d ed. 1980)).

In the absence of malicious intent, the defense may still be able to establish gross negligence or systemic negligence. The credibility of Officer Jeff's claim to reasonable reliance depends in part on the professional reputation of Officer Mutt—for obedience, caution, sloppiness, intentional flouting of rules, or something in between. It is more believable that Officer Jeff could remain ignorant about a first-time error of Officer Mutt than about a continuation of Mutt's persistent carelessness or regular misconduct.[86] Moreover, this inquiry might extend beyond individual reputations. If the officers hail from distinct departments, Officer Jeff may be on notice if Officer Mutt's *department* has a reputation for misconduct or carelessness.

While the *Herring* opinion recognized the abstract possibility of denying good faith based on systemic negligence, the Court's factual analysis creates proof problems for defendants who want to make this argument. The *Herring* Court failed to conduct a searching inquiry into the warrants system maintained by Dale County or by Alabama generally, choosing instead to gauge good faith based on a shallow assessment of the Coffee County employees and some platitudes about the Dale County warrant clerk. In so doing, the Court signaled that its interest in ferreting out systemic negligence was something less than genuine.[87] Even if courts were more willing to consider claims of systemic negligence, defendants in most jurisdictions are likely to face serious legal and practical difficulties in obtaining evidence to mount such claims.[88]

In sum, if the trial court finds that Officer Jeff was at most negligent in his decision to rely on the information provided by Officer Mutt, and if it fails to identify hard evidence of significant or recurring misconduct by Officer Mutt, *Herring* instructs the court to admit the evidence. The original violation is thus washed away through reasonable reliance on a fellow officer. To borrow a phrase crafted by the California Supreme Court in the years before *Herring*, this type of good faith causes an otherwise defunct

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[86] The *Herring* majority itself recognized this tendency, as it suggested that officers would be reckless for trusting others known for systemic negligence. 555 U.S. at 146.

[87] Examples of lower courts following the Supreme Court's analytical techniques appear in Part III.

[88] *See* United States v. Armstrong, 517 U.S. 456 (1996) (setting high standard for defense to obtain discovery of potential equal protection violations based on race in prosecutorial filing decisions in crack cocaine cases). *See generally* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (discussing confidentiality of police personnel files in many jurisdictions).

case to be "magically resuscitate[d] . . . phoenix-like,"[89] through the reliance of one officer upon another officer's silence about his misconduct. *Herring* thus rewards a predictable and limited form of communication among police officers and agencies.[90]

III. EVIDENCE OF EVIDENCE LAUNDERING: POST-*HERRING* CASES ADJUDICATING TWO-STEP POLICE MISCONDUCT

Herring has now been the law in the United States for seven years. What have been its effects? How have state courts and lower federal courts responded to the incentives that *Herring* created for officers to launder their mistakes through the attenuation process? When defendants challenge this two-step handoff, how have the courts responded? How deeply do they dig into law enforcement practices to determine the sources of error?

The Mutt and Jeff hypothetical we presented in the previous Part offered a stark example of how courts might inspire evidence laundering if they follow the acquiescent approach to fault and attenuation suggested by *Herring*. In our review of the case law in this Part, we identify courts that have permitted boldly problematic handoffs of the sort contemplated by the hypothetical. But even in the less obviously problematic cases, acquiescent reasoning or insufficient fact-finding by courts suggests a tolerance for evidence laundering that not only is troubling on its face but might also inspire evasive tactics by law enforcement in the future.[91]

To get an early read on the impact of *Herring*, in 2014 we searched

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[89] People v. Ramirez, 668 P.2d 761, 764 (Cal. 1983). California now follows *Herring*, pursuant to a state constitutional amendment that requires state law exclusionary rules to directly track federal rules. Proposition 8, CAL. CONST. article I, § 28(a).

[90] *See, e.g.*, State v. Peterson, 830 P.2d 854, 861 (Ariz. Ct. App. 1991) (refusing to allow police to "exploit[]" errors made by their colleagues); State v. Snee, 743 So. 2d 270, 275–76 (La. Ct. App. 1999) (rewarding a police officer for relying on misconduct of another officer defeats the intention of the Fourth Amendment and the exclusionary rule). *See also* United States v. Noster, 590 F.3d 624, 636 (9th Cir. 2009) (Shadur, J., dissenting) ("[T]he majority seeks to transmute base metal into gold[.]"); People v. Joseph, 470 N.E.2d 1303, 1306 (Ill. App. Ct. 1984) (refusing to allow law enforcement authorities to "rely on an error of their own making").

[91] The ability of a Supreme Court case to create perverse incentives for police is well known. For example, until the Court put an end to the two-step custodial interrogation, where *Miranda* warnings bifurcate an interrogation instead of preceding it, many police officers took the cues provided by *Oregon v. Elstad* and gave *Miranda* to custodial suspects only after they had already confessed. 470 U.S. 298 (1985); *see* Missouri v. Seibert, 542 U.S. 600 (2004); *see also* Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 MICH. L. REV. 1121 (2001) (demonstrating how the Court's various exceptions to *Miranda* have led to police training each other how to question outside *Miranda*).

Westlaw databases for federal and state cases that applied *Herring* in the handoff scenario.[92] We conducted two related inquiries: (1) a search for federal and state cases from 2009–2014 that cite and discuss the Supreme Court's decision in *Herring* and particularly mention headnote 8 (the headnote describing the Court's factual analysis of the handoff procedure); and (2) a digest search for all federal and state cases from 2009–2014 invoking the key number that describes good faith in this setting.[93] Our search turned up twenty-one federal and state cases examining the kind of attenuated police behavior that was at issue in *Herring*. Table 1 summarizes those cases.

Table 1

Evidence Laundering Scenarios in State Courts and Lower Federal Courts from 2009-2014

Case Name	**Good Faith?**	**Jurisdictions**	**Source of Error**
Shotts v. State, 925 N.E.2d 719 (Ind. 2010)	Yes	Two states	Arrest Warrant database
State v. Johnson, 6 So. 3d 195 (La. Ct. App. 2009)	Yes	One police department	Arrest Warrant database
State v. Brock, 91 So. 3d 1003 (La. Ct. App. 2012)	Yes	Two parishes	Arrest Warrant database
United States v. Echevarria-Rios, 746 F.3d 39 (1st Cir. 2014)	Yes	One police department	Arrest Warrant database
United States v. Smith, 354 F. App'x 99 (5th Cir. 2009) (per curiam)	Yes	Two parishes in same state	Arrest Warrant database
United States v. Altman, No. 09–CR–20010, 2009 WL 4065047 (C.D. Ill. Nov. 20, 2009)	Yes	One police department	Arrest Warrant database

[92] An early post-*Herring* work adopting a similar approach found six cases addressing the attenuation issue that forms the core of our study. *See generally* Claire Angelique Nolasco et al., *What* Herring *Hath Wrought: An Analysis of Post-*Herring *Cases in the Federal Courts*, 38 AM. J. CRIM. L. 221, 232–53 (2011) (collecting and analyzing cases that cite and discuss *Herring* from January 2009–March 2010).

[93] The key number is 110k392.38.

Case Name	**Good Faith?**	**Jurisdictions**	**Source of Error**
Domino v. Crowley City Police Dep't, 65 So. 3d 289 (La. Ct. App. 2011)	Yes	One police department	Arrest Warrant database
Bellamy v. Commonwealth, 724 S.E.2d 232 (Va. Ct. App. 2012)	Yes	One police department	Arrest Warrant database
United States v. Groves, 559 F.3d 637 (7th Cir. 2009)	Yes	One police department	Arrest Warrant database
People v. Robinson, 224 P.3d 55 (Cal. 2010)	Yes	State corrections, sheriff	DNA database
United States v. Humbert, 336 F. App'x 132 (3d Cir. 2009)	Yes	State corrections, FBI	DNA database
United States v. Davis, 690 F.3d 226 (4th Cir. 2012)	Yes	Two counties in same state	DNA database
United States v. Esquivel-Rios, 39 F. Supp. 3d 1175 (D. Kan. 2014)	Yes	State highway patrol in one state, motor vehicle records in another state	Car registration database
State v. Geiter, 942 N.E.2d 1161 (Ohio Ct. App. 2010)	Yes	One police department	Stolen vehicle database
McCain v. State, 4 A.3d 53 (Md. Ct. Spec. App. 2010)	Yes	State motor vehicle records, city police	Car registration database
United States v. Campbell, 603 F.3d 1218 (10th Cir. 2010)	Yes	One police department	Search warrant
United States v. Woerner, 709 F.3d 527 (5th Cir. 2013)	Yes	FBI and city police	Search warrant
State v. Handy, 18 A.3d 179 (N.J. 2011)	No	One police department	Dispatcher mistake

Case Name	**Good Faith?**	**Jurisdictions**	**Source of Error**
United States v. Martinez, 696 F. Supp. 2d 1216 (D.N.M. 2010)	No	One sheriff's office	Home entry
People v. Arnold, 914 N.E.2d 1143 (Ill. App. Ct. 2009)	No	One sheriff's office	Arrest warrant database

Of the twenty-one cases, we found seventeen cases in which courts invoked the *Herring* formula to admit evidence even though it was laundered through the two-step handoff process. There were four cases in which courts found deliberate misconduct, recklessness, or gross negligence sufficient to sustain exclusion.[94] Given the vagaries of the search process, we are confident this does not represent the entire field of post-*Herring* cases in the two-step handoff scenario, but it may well embody a fair cross-section of court activity[95] on this issue in the first five years after the *Herring* opinion was issued.[96] At the very least, we can look to these cases

[94] There was one additional case that found misconduct in the two-step handoff scenario but did not cite *Herring*; it relied exclusively on state law and other Supreme Court precedents to conclude that good faith was inapplicable. *See* State v. Bromm, 819 N.W.2d 231 (Neb. Ct. App. 2012) (noting the officer received erroneous license plate and vehicle registration from dispatcher and used that information to stop and search a car; mistake should be attributed to law enforcement team; deterrence is needed in this circumstance to make team members more careful). Another case identified misconduct by federal DEA agents in failing to supervise the execution of a warrant but since they all knew of the misconduct, good faith was unavailable. United States v. Pineda-Buenaventura, 622 F.3d 761, 776 n.5 (7th Cir. 2010).

[95] Of course, this group of cases does not account for the full impact of *Herring* because it only tracks written court decisions. It does not include instances in which motions were filed but then withdrawn pursuant to a plea agreement; it also does not account for defendants who were deterred from filing a motion because they assumed that they could not prove deliberate or reckless or grossly negligent conduct by the officer.

[96] There are many other cases in which courts have cited and discussed *Herring* for its dicta that the exclusionary rule from this point forward must always pay its way. Hence, some courts cite *Herring* for the proposition that *only deliberate, reckless, or grossly negligent mistakes of any sort* should lead to exclusion. *See, e.g.*, United States v. Ponce, 734 F.3d 1225, 1227–29 (10th Cir. 2013) (finding good faith where officer reasonably believed his canine alert provided sufficient justification for search); United States v. Koch, 625 F.3d 470, 477–78 (8th Cir. 2010) (finding good faith where officers opened flash drive and discovered pornography); United States v. Alabi, 943 F. Supp. 2d 1201, 1262, 1290 (D.N.M. 2013) (finding good faith where officers obtained credit card information without a warrant). These applications far exceed the boundaries of the "isolated negligence attenuated" from the original error factual setting of *Herring*. Herring v. United States, 555 U.S. 135, 137

to generate examples of how courts handle this issue in recurring factual settings.

Turning first to the cases that applied *Herring* to validate the handoff, the opinions most frequently contain facts that mirror the facts of *Herring* itself: a police officer executes an arrest warrant found in a law enforcement database that later turns out to be invalid or recalled.[97] Nine of the seventeen opinions invoked the good faith exception in this warrant database scenario.[98] For example, in *Bellamy v. Commonwealth*, during the course of a domestic violence investigation the officer asked dispatch to run a warrant check on the participants.[99] When the dispatcher found an outstanding warrant for Bellamy, the officer took him into custody, performed a search incident to arrest, and found a bullet and marijuana in his pocket.[100] The officer later learned that the warrant reported by the police dispatcher had previously been served.[101] Citing *Herring* but offering little analysis of the facts, the Virginia Court of Appeals asserted that the officer was objectively reasonable in relying on the dispatcher's report and declared that the dispatcher's error was not the result of "systemic error or

(2009). That said, some courts that have applied *Herring* broadly have found deliberate or reckless misconduct that is worthy of suppression. *See, e.g.*, United States v. Ganias, 755 F.3d 125, 136–37 (2d Cir. 2014) (finding no good faith where government agents exploited warrant and retained defendant's property for more than two years); United States v. Stokes, 733 F.3d 438, 443–44 (2d Cir. 2013) (finding officer's deliberate entry into the defendant's hotel room without a warrant or consent justified exclusion); United States v. Williams, 731 F.3d 678, 689–90 (7th Cir. 2013) (finding officer's frisk of defendant in the absence of reasonable suspicion to be deliberate and culpable to an extent that warrants suppression); United States v. Taylor, 963 F. Supp. 2d 595, 601–05 (S.D. W. Va. 2013) (finding the police department's policy of permeation during traffic stops to be a deliberate violation of the Fourth Amendment).

[97] *See, e.g.*, United States v. Echevarria-Rios, 746 F.3d 39 (1st Cir. 2014) (arrest warrant later declared invalid because summons never served); United States v. Smith, 354 F. App'x 99 (5th Cir. 2009); United States v. Altman, No. 09–CR–20010, 2009 WL 4065047 (C.D. Ill. Nov. 20, 2009); Shotts v. State, 925 N.E.2d 719 (Ind. 2010); State v. Brock, 91 So. 3d 1003 (La. Ct. App. 2012); Domino v. Crowley City Police Dep't, 65 So. 3d 289 (La. Ct. App. 2011); State v. Johnson, 6 So. 3d 195 (La. Ct. App. 2009); Bellamy v. Commonwealth, 724 S.E.2d 232 (Va. Ct. App. 2012); *see also* United States v. Groves, 559 F.3d 637 (7th Cir. 2009) (officer is told by dispatcher there is a warrant for the defendant, but it's just a "watch out" bulletin, which provides at most reasonable suspicion, not probable cause to arrest; court finds good faith).

[98] *Echevarria-Rios*, 746 F.3d at 41; *Smith*, 354 F. App'x at 102; *Altman*, 2009 WL 4065047, at *4; *Brock*, 91 So. 3d at 1006–07; *Domino*, 65 So. 3d at 292–93.

[99] 24 S.E.2d at 233.

[100] *Id.*

[101] *Id.* at 234.

reckless disregard of constitutional requirements."[102] Hence, the court concluded, "application of the exclusionary rule to deter police misconduct [in this case] 'does not pay its way.'"[103]

Courts have also refused to suppress where officers relied on erroneous stolen vehicle reports[104] or erroneous car registration information[105] acquired from their department (or more general law enforcement) databases. In these three cases, the courts declared—usually in a cursory fashion—that officers are entitled to trust these resources in the absence of known recurring error. For example, in *State v. Geiter*, the Ohio Appellate Court asserted, without documenting any facts about system reliability, that the arresting officer "had no reason to question the reliability of the local system's information."[106] Even when the facts should lead a reasonable person to question reliability, courts seem reluctant. Consider *McCain v. State*, where the arresting officer testified that he had encountered inaccurate information in the database "once out of the month, maybe."[107] The Maryland Court of Appeals, failing to even consider whether other officers in the department had similar experiences with the database, concluded that problems were not sufficiently frequent to make the database unreliable.[108]

Courts have conducted a more searching inquiry into the source of the error in cases that involve the past illegal procurement of a blood or DNA sample, which was then used by a different officer to match the defendant

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[102] *Id.* at 236 (internal citation omitted).

[103] *Id.* (quoting Herring v. United States, 555 U.S. 135, 147–48 (2009)).

[104] *See, e.g.*, State v. Geiter, 942 N.E.2d 1161 (Ohio Ct. App. 2010).

[105] *See, e.g.*, United States v. Esquivel-Rios, 39 F. Supp. 3d 1175, 1183 (D. Kan. 2014); McCain v. State, 4 A.3d 53, 56 (Md. Ct. Spec. App. 2010).

[106] *Geiter*, 942 N.E.2d at 1167.

[107] 4 A.3d at 65.

[108] *Id.* at 64–65. The court said this was "an occasional discrepancy" and agreed with the trial court that "[t]here's nothing in [the] record that indicates that these officers knew that there were *frequent* occurrences of MVA mistakes." *Id.* at 65 (emphasis added). Having defined "systemic" error as requiring "frequent" error, the court concluded that even monthly errors were not enough to impose exclusion. *See id.*

The courts' tolerance for error and ambiguity in this context mirrors its emphasis on reasonableness rather than accuracy in the Fourth Amendment violation context: officers don't need to be factually correct, just reasonable, in their assessment of the facts suggesting authority to consent to search, for example. Illinois v. Rodriguez, 497 U.S. 177, 184–86 (1990). Likewise, probable cause does not require factual correctness to justify the police intrusion that follows; reasonableness suffices. *Id.* (citing Illinois v. Gates, 462 U.S. 213, 232 (1983) and Brinegar v. United States, 338 U.S. 160, 176 (1949)).

to another crime.[109] In the three cases that involved this scenario, courts looked to the cause of the original error, asking if there was deliberate, reckless, or grossly negligent error in taking the sample or in entering the information in the law enforcement database.[110] They also watched for any signs that the second officer was deliberate, reckless, or grossly negligent in relying on the sample or the database report in the new investigation of the defendant.[111] These discussions about database and user reliability were far more extensive than the cursory reviews of the warrant and auto databases, often containing pages of detail.[112] Yet despite the serious attention that courts directed to the systematic nature of the original error in the DNA database cases, they still invoked the good faith exception; all three were wins for the government.[113] To be fair, the crimes solved by the second officers using DNA were serious,[114] which likely factored into the courts' calculus.[115] Additionally, given the fairly new deployment of rules governing the taking and maintenance of DNA samples,[116] the courts may have felt constrained to conclude that the errors amounted to understandable mistakes. In sum, in the DNA database context, while courts appear to conduct a more probing analysis than they offer in the warrant or auto database context, they still hold that these systems are reasonably sufficient.

Moving beyond our assessment of the types of cases we found, we have a few observations about the analytical theme of attenuation that emerges in these cases. As one might predict, the degree of attenuation increases when we add the spatial dimension to the personal, triggering an inquiry that involves actors from multiple jurisdictions or agencies. There

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[109] *See, e.g.*, United States v. Davis, 690 F.3d 226, 239 n.21 (4th Cir. 2012); United States v. Humbert, 336 F. App'x 132, 135–37 (3d Cir. 2009); People v. Robinson, 224 P.3d 55, 60–61 (Cal. 2010); *see supra* Table 1.

[110] *See Davis*, 690 F.3d at 239 n.21; *Humbert*, 336 F. App'x at 136; *Robinson*, 224 P.3d at 69, 71.

[111] *See, e.g.*, *Robinson*, 224 P.3d at 69.

[112] *See, e.g.*, *id.* at 69–71.

[113] *Davis*, 690 F.3d at 239 n.21, 253; *Humbert*, 336 F. App'x at 136; *Robinson*, 224 P.3d at 60–61.

[114] *Humbert*, 336 F. App'x at 133 (armed bank robbery and carjacking); *Robinson*, 224 P.3d at 61 (rape).

[115] *See, e.g.*, *Davis*, 690 F.3d at 256 ("The price to society of application of the exclusionary rule here, especially since the DNA evidence against Davis was compelling, would be to allow a person convicted of a deliberate murder to go free.").

[116] *See, e.g.*, *Robinson*, 224 P.3d at 63–64, 68–70.

were nine such cases in our dataset,[117] and all nine resulted in findings of good faith. The attenuation claim was particularly strong where the behavior crossed state lines. Consider the Indiana Supreme Court's opinion in *Shotts v. State*.[118] Indiana officers arrested David Shotts based on an arrest warrant from Alabama, eventually leading to a criminal prosecution in Indiana.[119] When the warrant's status under Alabama law was called into question, Shotts filed a motion to suppress the evidence acquired by the Indiana police.[120] The Indiana Supreme Court found that the officers did all they could to verify the warrant and could not have known of the Alabama state law problem.[121] Moreover, the court doubted that exclusion would hold its typical deterrent power when two jurisdictions are involved: "[e]xclusion by an Indiana court in a proceeding under Indiana law would not deter the Alabama officer who applied for the [defective] Alabama warrant."[122] *Shotts* (and the other eight opinions) thus suggest that exclusion is particularly inappropriate when multiple officers from multiple jurisdictions are involved in the defendant's case.

The most egregious case of evidence laundering we found, *United States v. Woerner*, involved cross-jurisdictional conduct between state and federal agents in Texas.[123] Mark Woerner was subject to "investigations that were parallel[]" by state and federal authorities for possession of child pornography.[124] The state officers executed what they knew was a stale search warrant at Woerner's home; based on what they found, they arrested Woerner.[125] While the defendant was in state custody following this arrest,

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[117] This total includes arrest warrant database cases, auto database cases, DNA database cases, and individual officer conduct cases.

[118] *See* 925 N.E.2d 719 (Ind. 2010). The crossing of jurisdictional lines also arose in *State v. Brock*, where the warrant was issued in Shreveport, Louisiana, but executed by officers in Caddo Parish, Louisiana. 91 So. 3d 1003, 1004 (La. Ct. App. 2012). The differing jurisdiction did not seem to factor explicitly into the court's analysis of good faith, though, as the court simply declared that the Caddo Parish officers were not acting with reckless disregard for constitutional requirements or with gross negligence by relying on the warrant. *Id.* at 1007.

[119] *Shotts*, 925 N.E.2d at 721.

[120] *Id.* at 722.

[121] *Id.* at 726.

[122] *Id.*

[123] 709 F.3d 527 (5th Cir. 2013).

[124] *Id.* at 535.

[125] *Id.* at 531 ("[The Officer,] believing the warrant to be expired, . . . executed the expired search warrant and seized computers, cameras, VHS tapes, photographs, and electronic storage media.").

federal agents came to the police station to talk to him.[126] What they learned from that interview they used to get a new search warrant for Woerner's computer, and the evidence seized from the computer search provided the basis of the federal prosecution of Woerner.[127] Although there was some evidence in the record that the federal agents were aware of the state officers' misconduct at the time of the interview,[128] the Fifth Circuit held that the federal agents were "at most" negligent in interrogating Woerner while he was in state custody and in using those statements in its warrant application; therefore, suppression was not warranted.[129] Notably, the court did not evaluate the flagrancy of the state officers' misconduct.

One might be tempted to view *Woerne*r as just an anomaly, a Fifth Circuit mistake that will likely be confined to its unusual facts. But that would be an unwise assumption. Just one year after the *Woerner* opinion was issued the Fifth Circuit decided *United States v. Massi*, in which it allowed an officer to launder *his own evidence*.[130] In *Massi*, one officer performed all of the relevant actions: illegally arresting the defendant, seeking a search warrant based on observations made during that illegal arrest, and executing the search warrant to obtain tangible evidence.[131] The Fifth Circuit opined that good faith does not require there to be a distinction between the officers who commit the error and the officers who ultimately obtain the challenged evidence, thus overlooking the personal attenuation framework that seemed important to the Supreme Court in *Herring*.[132]

Rather than citing and discussing *Herring*, the Fifth Circuit explained that its conclusion flowed from *Woerner*'s holding.[133] The court said "*Woerner* signals an openness to applying the good faith exception where an earlier-in-time constitutional violation exists alongside a search warrant

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[126] *Id.* at 531–32.

[127] *Id.* at 532–33.

[128] The federal agent asked the state agent how long Woerner could be held before he had to be let go. Brief of Defendant-Appellant at 20, United States v. Woerner, 709 F.3d 527 (5th Cir. 2013) (No. 11-41380), 2012 WL 7993302. Such a question signals that the federal agent was aware of potential problems with the arrest; his interrogation thus amounted to exploitation of the illegality.

[129] *Woerner*, 709 F.3d at 535. The appellate court cited the conclusion of the district court with approval here: "the police misconduct leading to the inclusion of Woerner's statements . . . [in the] warrant application was at most the result of negligence of one or more law enforcement officers." *Id.*

[130] 761 F.3d 512, 528 (5th Cir. 2014).

[131] *Id.* at 517–19.

[132] *Id.* at 528.

[133] *Id.* at 525–26.

that was sought and executed in good faith."[134] The court cited cases from the Sixth, Second, and Eighth Circuits in support of its assertion that the good faith exception can sometimes "overcome a taint from prior unconstitutional conduct,"[135] even when the same officer is involved from start to finish. In that circumstance, the invocation of the good faith exception should depend on that officer's "awareness . . . that [his] conduct violated constitutional rights."[136] By casting the officer's *awareness* of his own errors as the trigger for exclusion, the *Massi* court elevated the officer culpability standard set forth in *Herring* and abandoned the possibility of exclusion based on even gross or systemic negligence.[137] In light of the Fifth Circuit's sweeping decisions in *Woerner* and *Massi*, we have little reason to be optimistic about future courts' willingness to reject or constrain evidence laundering.

In contrast to the cases that validated the handoff procedure—often based on a superficial assessment of the conduct at issue—courts that have chosen suppression as the appropriate remedy have articulated a more robust understanding of the problematic behavior; they have emphasized the need for deterrence of misconduct wherever it occurs in the law enforcement team. For example, in *People v. Morgan*,[138] the Illinois Court of Appeals found that an officer who relied on a three-day-old warrant list without attempting to verify the defendant's status was "willfully blind to the facts" and thus reckless, rather than simply negligent.[139] In *State v.*

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[134] *Id.* at 526.

[135] *Id.* at 527 (citing United States v. McClain, 444 F.3d 556, 564–66 (6th Cir. 2005); United States v. Fletcher, 91 F.3d 48, 51–52 (8th Cir. 1996); United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985)). It did note that the Ninth and Eleventh Circuits refuse to apply the good faith exception to instances where a search warrant is issued on the basis of unconstitutionally obtained evidence. *Massi*, 761 F.3d at 527 (citing United States v. McGough, 412 F3d 1232, 1239–40 (11th Cir. 2005); United States v. Vasey, 834 F.2d 782, 789–90 (9th Cir. 1987)).

[136] *Id.* at 528. The court found the officer in question had reason to believe his behavior was constitutionally acceptable and concluded that exclusion "would not serve the interest of deterring future constitutional violations." *Id.* at 532.

[137] Notably, the *Massi* opinion does not cite to *Herring* at all; *Woerner* is its main precedent. *Massi*, 761 F.3d at 525–37 (citing United States v. Woerner, 709 F.3d 527 (5th Cir. 2013) 30 times throughout the opinion).

[138] 901 N.E.2d 1049, 1061 (Ill. App. Ct. 2009) (noting the correct warrant list would have not included the defendant's name and the case was not really about attenuation; it was simple error by the arresting officer); *accord* People v. Arnold, 914 N.E.2d 1143, 1155 (Ill. App. Ct. 2009) (an officer's failure to confirm the warrant status before handcuffing the defendant was called "reckless disregard" by the court).

[139] *Id.* at 1062.

Handy, the New Jersey Supreme Court scolded a dispatcher who failed to alert a police officer to discrepancies between the defendant's name and birthdate and the information she was reporting from the warrant database.[140] Calling the dispatcher a "co-operative" in the defendant's arrest, the court declared that exclusion was necessary to deter such "slipshod" behavior by law enforcement.[141] Any other result, the court said, would mean that "police operatives . . . are free to act heedlessly and unreasonably, so long as the last man in the chain does not do so."[142]

Similarly, one federal trial court explicitly refused to allow evidence laundering through the acquisition of a new warrant or interrogation that was causally linked to unconstitutional behavior by other officers, even in the absence of evidence that the second officers acted unreasonably.[143] In *United States v. Martinez*, the court denied the use of the good faith exception where "officers learn information during an unconstitutional search and give that information to another officer for incorporation into the warrant affidavit."[144] The court further held that "[the good faith exception] should not apply where an officer uses illegally obtained information during questioning of the defendant to obtain a confession and then includes that confession in the warrant affidavit."[145]

To sum up: overall, the government's chances of winning a handoff case seem especially strong in the database context. When the original error involves the faulty assembly or maintenance of an arrest warrant database, DNA database, vehicle registration database, or some comparable collection of information for law enforcement purposes, the good faith exception almost always carries the day; fifteen of the seventeen database error cases we examined resulted in a government win. This trend is perhaps not surprising, given the often anonymous nature of database inputs. It is hard to identify who is responsible for entry of (or failure to remove) erroneous information, let alone that person's motives. The timing

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[140] 18 A.3d 179, 184 (N.J. 2011).

[141] *Id.* at 187. For this reason, the *Handy* court said its facts did not fall within the "niche" carved out by *Herring*, which addressed only clerical and database errors. *Id.* at 187.

[142] *Id.* at 188.

[143] United States v. Martinez, 696 F. Supp. 2d 1216 (D.N.M. 2010).

[144] *Id.* at 1262. This position is consistent with pre-*Herring* jurisprudence in the Ninth and Eleventh Circuits, where a search warrant issued on the basis of unconstitutionally obtained evidence cannot be saved by good faith. *See, e.g.*, United States v. McGough, 412 F.3d 1232, 1239–40 (11th Cir. 2005); United States v. Vasey, 834 F.2d 782, 789 (9th Cir. 1987) ("[W]e conclude that the magistrate's consideration of the evidence *does not sanitize the taint* of the illegal warrantless search." (emphasis added)).

[145] *Martinez*, 696 F. Supp. 2d at 1262–63.

of the error also helps the government: the commission of the error might be months or years removed from its effect in the defendant's case. Generally speaking, when the nameless, faceless source of the error cannot be interrogated, it is the defendant who loses. Anonymity dilutes the burden of proof the prosecution is supposed to bear in the suppression hearing to justify why illegally obtained evidence should be admitted despite the constitutional error.[146]

Identity issues aside, these opinions display an extraordinary confidence in the reliability of databases generally, a confidence that does not seem to be warranted. The Electronic Privacy Information Center wrote in its amicus brief that accompanied *Herring*'s certiorari petition that "government and commercial databases are filled with errors, according to the federal government's own reports."[147] Moreover, because these database systems are exempt from "important privacy and accuracy requirements" contained in federal laws,[148] the true scope of the error rate may be difficult to calculate. For example, despite known problems in the National Crime Information Center database, which receives information from state criminal history repositories as well as from federal authorities, audits at the federal and local level are "infrequent," often occurring less than once every five years.[149] For this reason, the Bureau of Justice Statistics has lamented that "inadequacies in the accuracy and completeness of criminal history records [are] *the single most serious deficiency* affecting the Nation's criminal history record information systems."[150] Given the

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[146] *See* Nix v. Williams, 467 U.S. 431, 440–46 (1984) (insisting, in the context of the inevitable discovery exception, that the government must establish by preponderance of the evidence that an exclusionary rule exception applies). This burden is particularly important when the defendant's access to technology or information is less than the government's access to this data, as Justice Brennan explained in his dissent in *Florida v. Riley*. 488 U.S. 445, 465 (1989) (Brennan, J., dissenting) (arguing that where the "State has greater access to information concerning" a technology or practice at issue, it ought to bear the burden of proof in a suppression hearing about whether use of that technology or practice violates the Constitution).

[147] Brief for Electronic Privacy Information Center (EPIC) as Amicus Curiae Supporting Petitioner at 6, Herring v. United States, 555 U.S. 135 (2009) (No. 07-513), 2008 WL 2095709. According to its amicus brief, "the Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values." *Id.* at 1.

[148] *Id.* at 6.

[149] *Id.* at 14–15 (citing BUREAU OF JUSTICE STATISTICS, IMPROVING ACCESS TO AND INTEGRITY OF CRIMINAL HISTORY RECORDS, NCJ 200581 (2005)).

[150] *Id.* at 14 (internal citation omitted).

publicly available nature of these reports, courts that reflexively call databases reliable seem to be shirking their responsibilities to dig deeper when faced with a prosecution claim of good faith.

In contrast to their handling of errors that arise in the detached, bureaucratized database context, courts treat errors that arise in direct communication settings more cautiously. That is, when both the original error and the later uses of the evidence are the work of field agents who are in contact with each other, making customized decisions about warrants and probable cause in a single case, the government's win rate is considerably lower; only two out of four personal contact cases we analyzed resulted in government wins. Where an individual officer makes an error with regard to a suspect and another officer relies on that error in a case involving the same suspect, it is easier for the court to follow the trail of decision-making or neglect and to place blame at the foot of the wrongdoer. While the error-producing officer, once identified, is not always labeled grossly negligent, reckless, or deliberate in his misconduct, at least some courts have expressed willingness to reach that conclusion when the errors committed are obvious constitutional violations.

This pattern of twenty-one case outcomes we found indicates that, despite the Supreme Court's *acknowledgement* of systemic negligence as an exception to good faith, the good faith doctrine under *Herring* is designed to be applied in an atomistic fashion. It seems limited to identifying and deterring individual officer misconduct and incapable of detecting or deterring fundamentally flawed information systems or interactions among law enforcement agencies.

IV. EVALUATING EVIDENCE LAUNDERING

What do the opinions applying the good faith exception in handoff situations suggest about the trajectory of the exclusionary rule after *Herring*? In this Part, we consider the domestic implications of these decisions in an era of fragmented law enforcement authority. In the Part that follows, we examine the *Herring* line of cases from a comparative perspective.

A. POST-*HERRING* CASE LAW AND THE REALITIES OF MODERN POLICING

The first key takeaway from our review of *Herring* and of the decisions that followed is the importance of evaluating law enforcement conduct from an organizational perspective. *Herring* may make sense if we focus on the individual officer who reasonably relied on the actions or representations of a fellow officer. But in an environment where police

action is increasingly the product of coordination among multiple officers and agencies, the case has some troubling effects. By permitting the laundering of tainted evidence through the handoff technique we described earlier, the doctrine encourages a lack of communication and a culture of ignorance among officers about the evidence collection practices of their colleagues.[151] This not only undermines the efficacy of exclusion, but also impairs valuable law enforcement efforts.[152]

Multi-jurisdictional cases pose a particularly significant risk of evidence laundering. Lines of communication between authorities from different jurisdictions are typically less developed, and ignorance about the evidence-gathering practices of colleagues in other departments is more common.[153] Courts are also more apt to tolerate evidence laundering in such cases, under the reasoning that officers from foreign jurisdictions would not be deterred from exclusion in the forum court.[154] This reasoning pre-dates *Herring* in some state court decisions, but *Herring*'s broader view of attenuation strengthened this view.[155] *Herring* effectively breathed new life into the silver platter doctrine that the Supreme Court rejected years ago.[156]

Officers in one jurisdiction now have an incentive to pass along tainted evidence to officers in another jurisdiction, without revealing problems in the evidence collection process, because the good faith doctrine will insulate their handoff.[157] State and federal law enforcement often interact

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[151] While *Herring* permits exclusion in cases where courts find "systemic negligence," such claims would be very difficult to document and prove, for reasons mentioned in notes 15-16 and accompanying text.

[152] United States v. Leon, 468 U.S. 897, 956–57 (1984) (Brennan, J., dissenting) (observing that "[i]nevitably, the care and attention devoted" to communication will "dwindle" if the courts fail to regard communication as important, and police officers will provide each other "only the bare minimum of information" in order to retain the cloak of deniability).

[153] *See, e.g.*, GERARD R. MURPHY & CHUCK WEXLER, POLICE EXEC. RESEARCH FORUM, MANAGING A MULTIJURISDICTIONAL CASE: IDENTIFYING THE LESSONS LEARNED FROM THE SNIPER INVESTIGATION 35–36 (2004); Aviram et al., *supra* note 14, at 717–18.

[154] United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007); Shotts v. State, 925 N.E.2d 719, 724 (Ind. 2010).

[155] *Cf.* Jenia I. Turner, *Interstate Conflict and Cooperation in Criminal Cases: An American Perspective*, 4 EUR. CRIM. L. REV. 114, 130–35 (2014) (providing an overview of different approaches to the admissibility of evidence in multi-jurisdictional cases).

[156] *See* Elkins v. United States, 364 U.S. 206, 208–09 (1960). As early as the 1920s, the Supreme Court began scrutinizing cooperation between federal and state authorities in gathering evidence and excluded evidence where an unlawful search or seizure was the product of joint action between the two. Logan, *supra* note 19, at 295–96.

[157] As discussed earlier, *Herring* encourages courts to conduct little to no review of the

with each other in joint task forces,[158] and interstate cooperation in the gathering of evidence is on the rise.[159] Courts' toleration of "dirty silver platters" therefore has a much greater practical significance today than it did in the 1940s, when the Supreme Court initially accepted the doctrine.[160]

The effects of *Herring* extend beyond reviving the silver platter doctrine, however. Courts have also permitted evidence laundering when it concerns different officers within the same jurisdiction and, indeed, even within the same department. A number of two-step handoff decisions focus exclusively on the effect that exclusion would have on the second officer, who may have acted reasonably in gathering evidence he did not know was tainted by earlier misconduct.[161] In focusing their attention so narrowly, courts overlook the culpability of the first officer. Judges appear to be assuming that, when it comes to the first officer, the broader educational effect of exclusion is too attenuated to be worth the costs of losing probative evidence and weakening the enforcement of criminal law.[162]

This cost-benefit analysis, focusing on the deterrence of individual officers, runs contrary to a long-established line of cases, including *Leon* itself, that insist the deterrence conversation is supposed to be about law enforcement as a whole—not the particular officer who made the arrest.[163]

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actions of the first officer. *See supra* notes 97–108, 123–137 and accompanying text. So even when the first officer intentionally hides her misconduct, this behavior is likely to escape scrutiny. This is especially true for cases occurring in two separate jurisdictions. *See supra* notes 117-137 and accompanying text.

[158] Logan, *supra* note 19, at 321–22; Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1201–08 (1995); Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, 21 CRIM. JUST. 16, 17–21 (2006).

[159] *See* JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 169–70 (2002) (discussing "sharing system[s]" between regional and federal programs); Logan, *supra* note 19, at 297, 321–22.

[160] *See* Lustig v. United States, 338 U.S. 74, 78–79 (1949); Logan, *supra* note 19, at 295–96. On the meaning of the silver platter doctrine, see *supra* note 18.

[161] *E.g.*, United States v. Massi, 761 F.3d 512, 525 (5th Cir. 2014); United States v. Echevarria-Rios, 746 F.3d 39, 41 (1st Cir. 2014); United States v. Altman, No. 09–CR–20010, 2009 WL 4065047 (C.D. Ill. Nov. 20, 2009); Bellamy v. Commonwealth, 724 S.E.2d 232, 235 (Va. Ct. App. 2012); Domino v. Crowley City Police Dep't, 65 So. 3d 289, 292–93 (La. Ct. App. 2011); State v. Johnson, 6 So. 3d 195, 196 (La. Ct. App. 2009).

[162] *See, e.g.*, *Bellamy*, 724 S.E.2d at 235; McCain v. State, 4 A.3d 53, 60–61 (Md. Ct. Spec. App. 2010). As discussed earlier, in notes 109–116 and accompanying text, courts have scrutinized the initial source of the error more closely in cases involving DNA databases. Yet even in those cases, the courts ultimately applied the good faith exception and declined to exclude the evidence.

[163] It also runs counter to collective responsibility doctrines that govern policing in other

It also ignores the realities of modern policing, in which responsibility for law enforcement within the same jurisdiction is frequently dispersed through several agencies.[164] In this environment, a focus on attenuation and individual culpability fails—systemically and predictably—to ensure proper accountability for law enforcement actions. More broadly, it discourages police agencies from coordinating efforts and sharing information more effectively. [165]

B. WEAKER REMEDY, STRONGER RIGHTS?

Could there be a silver lining to this paring down of the exclusionary rule after *Herring*? One might argue that the tighter restrictions on the exclusionary rule could help ensure the rule's future survival. The rule remains highly controversial and calls for its abolition persist.[166] If courts restrict the use of exclusion to cases of egregious police misconduct, this may make the exclusionary rule more palatable.

At the same time, even as the U.S. Supreme Court has reined in the exclusionary rule, it has sharpened its rhetorical assault on the rule over the last decade.[167] One could argue that each new cutback has made the rule's future seem more precarious and its elimination more likely. Despite Justice

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contexts, such as the inability of any police officer to interrogate a suspect who has invoked his right to counsel. Under the *Edwards* line of cases, all officers—not just those who are aware of the invocation—are prohibited from contacting the custodial suspect following a right to counsel invocation, unless the suspect reinitiates contact himself. *See* Arizona v. Roberson, 486 U.S. 675, 687–88 (1988); Edwards v. Arizona, 451 U.S. 477, 485–87 (1981). Indeed, in *Roberson*, Justice Stevens asserted that no significance could be attached to the fact that different officers were involved at different stages. 486 U.S. at 685.

[164] Aviram et al., *supra* note 14, at 722 (discussing the statistics on cooperation among agencies).

[165] *Id.* at 730.

[166] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799–800 (1994); H. Mitchell Caldwell, *Fixing the Constable's Blunder: Can* One *Trial Judge in* One *County in* One *State Nudge a Nation Beyond the Exclusionary Rule?*, 2006 BYU L. REV. 1, 30–69; Daniel E. Lungren, *Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL'Y 695, 697–701 (1996); Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755 (2008); Todd E. Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URB. L.J. 837, 837–38 (2010); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 364–66.

[167] Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011); Herring v. United States, 555 U.S. 135, 140–47 (2009); Hudson v. Michigan, 547 U.S. 586, 590–99 (2006); James J. Tomkovicz, Davis v. United States*: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 382 (2011); *see also* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 302–47 (2012).

Kennedy's assurance that these cutbacks are merely refinements and the exclusionary rule is here to stay,[168] there is reason to doubt its staying power.[169]

If the exclusionary rule does remain, albeit in a feeble version of its original form, one positive effect of a more limited remedy might be that we see better search and seizure jurisprudence. If courts are not so concerned that finding a violation will lead to exclusion and, in most cases, a dismissal of the case, they may expand the interpretation of the underlying Fourth Amendment rights.[170] Scholars have argued that the bluntness of the exclusionary rule has caused courts to restrict constitutional rights.[171] While this may be the case, it is not clear that the converse is also true—that contracting the exclusionary remedy would lead courts to interpret rights more generously.[172] Limitations on the exclusionary rule seem to be happening at the same time as jurisprudence cutting back on the scope of the rights themselves, with a few recent exceptions.[173] This suggests that a decades-long habit of interpreting Fourth Amendment rights

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[168] *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

[169] *See, e.g.*, MACLIN, *supra* note 167, at 346–47.

[170] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89–91 (1999); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

[171] *See, e.g.*, Amar, *supra* note 166, at 799; Calabresi, *supra* note 20, at 112–13; Slobogin, *supra* note 166, at 401–03; *see also* Stuntz, *supra* note 20, at 793 ("The government pays for criminal procedure rules in the coin of forgone arrests and convictions.").

[172] One Canadian scholar has suggested that the Canadian Supreme Court's broader interpretation of privacy in search and seizure cases is the result at least in part of the more flexible Canadian exclusionary rule. James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 81–84 (1999). While this is a plausible interpretation, it is also possible that differences in the texts of the Canadian Charter and of the U.S. Constitution, the interpretive methods of the two Supreme Courts, and the ideology of the Justices have played a role.

[173] For recent cases that have contracted Fourth Amendment rights, *see, e.g.*, Maryland v. King, 133 S. Ct. 1958, 1980 (2013); Kentucky v. King, 131 S. Ct. 1849, 1856–64 (2011); Scott v. Harris, 550 U.S. 372, 381–86 (2007); Brigham City v. Stuart, 547 U.S. 398, 403–07 (2006); Illinois v. Caballes, 543 U.S. 405, 408–10 (2005); United States v. Drayton, 536 U.S. 194, 207–08 (2002); Atwater v. City of Lago Vista, 532 U.S. 318, 327–55 (2001). *Contra* Riley v. California, 134 S. Ct. 2473, 2494–95 (2014); Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013); United States v. Jones, 132 S. Ct. 945, 951–54 (2012); Arizona v. Gant, 556 U.S. 332, 351 (2009). The effects of these exceptions will be limited in the near future, however, since police officers who relied on circuit precedent that was binding before these exceptions came into being will also be protected by good faith. *See* Davis v. United States, 131 S. Ct. 2419, 2434 (2011).

narrowly may be too ingrained and difficult to reverse, even if the remedy becomes more flexible.

Compounding this problem, defendants may be discouraged from bringing complaints as the odds of exclusion decline. As the petitioner in *Davis v. United States* argued, criminal defendants have no incentive to litigate the scope of constitutional rights if they are not likely to obtain some personal benefit from the litigation.[174] If defendants increasingly forgo challenging police misconduct, this would not only hinder the development of Fourth Amendment law, but also deprive the public of the educational and expressive benefits of suppression hearings. These benefits include teaching police officers about rules on search and seizure and expressing society's strong commitment to enforcing those rules.[175]

A softer, less predictable exclusionary rule may stunt the development of Fourth Amendment doctrine in another way as well. When the decision on exclusion is dispositive, courts may decide the remedial question first and fail to properly analyze the legality of the underlying conduct.[176] The

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[174] Transcript of Oral Argument at 6–7, Davis v. United States, 131 S. Ct. 2419 (2011) (No. 09-11328), 2011 WL 972573; Alschuler, *supra* note 2, at 464–65, 495–99. *But cf.* Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 50 (1994) (citing to 1971 GAO study, which found that 80–90% of suppression motions were unsuccessful, suggesting that a number of defendants were willing to file unmeritorious motions given the low costs of doing so compared to the great benefit if exclusion is granted); Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1728, App. B at 1743–45 (2005) (reporting results of 2005 survey showing that suppression motions had an 11.6% success rate).

[175] *See, e.g.*, Scott E. Sundby, Mapp v. Ohio*'s Unsung Hero: The Suppression Hearing as Morality Play*, 85 CHI.-KENT L. REV. 255 (2010).

[176] United States v. Leon, 468 U.S. 897, 922–25 (1984) (suggesting that "courts could reject suppression motions . . . by turning immediately to a consideration of the officers' good faith"). Some courts are already doing that. *See, e.g.*, United States v. Smith, 354 F. App'x 99, 102 (5th Cir. 2009) (deciding only the good faith question and not determining whether the warrant was valid); United States v. Alabi, 943 F. Supp. 2d 1201, 1295–96 (D.N.M. 2013) (finding good faith where officers obtained credit card information without a warrant, without deciding whether warrant was necessary). Courts have long been allowed to do this in the qualified immunity context when section 1983 actions are filed. *See* Pearson v. Callahan, 555 U.S. 223, 231–32, 236 (2009). This has caused some commentators to assert that the development of the doctrine on constitutional violations has suffered. *E.g.*, Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149–50 (2009); Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 401, 409–11 (2009); *cf.* Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP.

more frequently this happens, the less we are likely to see development in Fourth Amendment law. While it is possible that doctrine will still evolve in the context of civil cases, it remains true that "most Fourth Amendment law is made in criminal proceedings."[177] Given the marginal contribution of civil actions to doctrinal growth, we believe the exclusionary rule remains an important tool for regulating police conduct.[178]

C. A COMPARATIVE ASSESSMENT OF *HERRING* AND ITS PROGENY

The recent exclusionary rule trends are also significant from a comparative perspective. Our Supreme Court has long defined American criminal procedure in opposition to foreign systems, particularly inquisitorial systems.[179] To some degree, this resistance to foreign approaches has been grounded in a belief that they are "worse at uncovering the truth, worse at protecting individual rights, or worse at preventing abuses of government authority."[180] Moreover, some justices have shown a particular distaste for considering foreign or international law when answering questions about American constitutional rules—not because foreign laws are perceived as worse at protecting individual rights, but rather because of a belief that our constitutional text is unique and should not be guided by foreign legal values and authorities.[181] Yet with decisions such as *Herring*,[182] the Supreme Court has brought our exclusionary rule

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L. REV. 667, 670 (2009) (finding that deciding the merits first leads to the "articulation of more constitutional law, but not the expansion of constitutional rights").

[177] Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 428 (2012).

[178] David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 578–80 (2008). For a proposal on how civil actions can be made more effective (e.g., by imposing individual liability for bad faith police conduct), see Slobogin, *supra* note 21, at 349.

[179] David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1639–41 (2009) (noting Court's distrust of inquisitorial or civil-law systems, but also the Court's misunderstanding of key features of modern inquisitorial systems).

[180] *Id.* at 1641.

[181] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 624–28 (2005) (Scalia, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 324–25 (2002) (Rehnquist, C.J., dissenting). *But see* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (pointing to the legality principle in a number of European jurisdictions as an "admirable" limit on plea bargaining).

[182] As discussed in the Introduction, *Herring* is one of several recent Supreme Court cases that significantly cut back on the exclusionary rule. *See also* Davis v. United States, 131 S. Ct. 2419 (2011); Hudson v. Michigan, 547 U.S. 583 (2006). *Hudson*'s claim that "[s]uppression of evidence . . . has *always* been our last resort, not our first impulse," 547 U.S. at 591 (emphasis added), is historically inaccurate. Davies & Scanlon, *supra* note 2, at 1058–59. But if suppression is now our last resort, we are in line with the approach taken by

much closer to its counterparts in foreign systems, both common-law/adversarial and civil-law/inquisitorial.[183] In the pages that follow, we identify these areas of convergence and then discuss their implications.

D. INTERNATIONAL CONVERGENCE IN THE EXCLUSIONARY REMEDY

A broad range of common-law and civil-law jurisdictions today rely on a balancing approach to determine whether to exclude unlawfully obtained evidence.[184] They weigh the effect of factors such as the seriousness of the misconduct, the gravity of the offense, and the importance of the rights violated. American case law on the exclusionary rule increasingly resembles these approaches in three important ways. First, the cost-benefit analysis urged by cases such as *Herring* is similar in its broad outline to the totality-of-circumstances approach used by other systems. Second, here and abroad, exclusion is increasingly reserved for reckless, intentional, or systematic breaches of the law. Third, exclusion of indirect evidence is disfavored more often in U.S. courts after *Herring*, just as it is in many other common-law and civil-law systems.

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other nations who embrace a sliding scale of remedies.

[183] *Cf.* Yue Ma, *The American Exclusionary Rule: Is There a Lesson to Learn from Others?*, 22 INT'L CRIM. JUST. REV. 309, 321 (2012) (suggesting that the Court's decision to "inquire into the degree of police culpability in each case and apply the exclusionary rule only in cases where there is sufficient degree of police culpability . . . brings the American exclusionary rule practice a step closer to the practice in England and Canada"); Stephen C. Thaman, *Balancing Truth Against Human Rights: A Theory of Modern Exclusionary Rules*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW: 20 IUS GENTIUM 403, 430 (Stephen C. Thaman ed., 2013) (arguing that the Supreme Court's recent emphasis on a balancing, cost-benefit analysis to exclusion is "paving the way for a possible return to the old Common Law presumption of admissibility of relevant evidence, or its inquisitorial counterpart which prioritized truth over rights").

[184] Sabine Gless, *Germany: Balancing Truth Against Protected Constitutional Interests*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 183, at 113, 119–20; Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases*, *in* RESEARCH HANDBOOK ON COMPARATIVE CRIMINAL PROCEDURE 280 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016); Jenia Iontcheva Turner, *Limits on the Search for Truth in Criminal Procedure: A Comparative View*, *in* RESEARCH HANDBOOK ON COMPARATIVE CRIMINAL PROCEDURE 35, *supra*. In countries that have recently emerged from a totalitarian regime, however, legislators and courts are more likely to adopt strict, categorical exclusionary rules as a symbol of a commitment to the rule of law. Jenia Iontcheva Turner, *The Exclusionary Rule as a Symbol of the Rule of Law*, 67 SMU L. REV. 821, 825–26 (2014); *cf.* Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. LAW 393, 399–401 (2013) (discussing the relationship between the exclusionary rule and the rule of law).

Modern exclusionary rules across a number of common-law and civil-law jurisdictions are converging towards a balancing approach. Historically, common-law courts ignored irregularities in the gathering of evidence, as long as the evidence obtained was deemed reliable.[185] Contemporary common-law courts, such as those in Canada, England, and Australia, now accept the exclusion remedy on a limited basis. These courts exclude evidence when they conclude, upon examination of the totality of circumstances, that an illegality in the evidence-gathering process would undermine the integrity of the judicial system or the fairness of the proceedings.[186]

A number of continental European countries, including Belgium, the Netherlands, and Germany, likewise rely on a case-by-case balancing approach in deciding whether to exclude evidence obtained in violation of rules pertaining to search or seizure.[187] A similar exclusionary rule applies

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[185] JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 153 (2012).

[186] S. AFR. CONST., 1996, § 35(5) (evidence obtained in violation of the Bill of Rights "must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice"); Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 24 (U.K.); *Evidence Act 1995* (Cth) s 138(3) (Austl.); Police and Criminal Evidence Act (PACE), 1984, c. 60, § 78, sch. 3 (Eng.); Evidence Act 2006, § 30(3) (N.Z.); R. v. Grant, [2009] 2 S.C.R. 353 (Can.); CrimA 5121/98 Yissacharov v. Chief Military Prosecutor 1 IsrSC 320, 421 [2006] (Isr.); H.M. Advocate v. Higgins, [2006] HCJ 5; (2006) S.C.C.R 305 (Scot.); Andrew L.-T. Choo, *England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical Evidence*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 183, at 331, 342–43, 352. Ireland applies a similar approach with respect to evidence obtained in violation of ordinary law, but uses a stricter, more categorical approach when a constitutional rule has been violated. DPP v. Kenny, [1990] 2 I.R. 110, 134 (Ir.).

[187] *See* Marie-Aude Beernaert & Philip Traest, *Belgium: From Categorical Nullities to a Judicially Created Balancing Test*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 183, at 161, 165–66 (discussing Belgium); Matthias J. Borgers & Lonneke Stevens, *The Netherlands: Statutory Balancing and a Choice of Remedies*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 183, at 183, 204–06 (discussing the Netherlands); Gless, *supra* note 184, at 113, 139 (discussing Germany); Marc Groenhuijsen, *Illegally Obtained Evidence: An Analysis of New Trends in the Criminal Justice System of the Netherlands*, *in* THE XIIITH WORLD CONGRESS OF PROCEDURAL LAW: THE BELGIAN AND DUTCH REPORTS (2008) (discussing the Netherlands); Joachim Meese, *The Use of Illegally Obtained Evidence in Belgium: A 'Status Questionis,'* 10 DIGITAL EVIDENCE & ELECTRONIC SIGNATURE L. REV. 63, 64–65 (2013) (discussing Belgium); Thomas Weigend, *Throw It All Out? Judicial Discretion in Dealing with Procedural Faults*, *in* DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT 185, 191–92 (Michele Caianiello & Jacqueline S. Hodgson eds., 2015) (noting that German courts engage in an "open-ended weighing of the interests involved"). Countries such as France and Italy, which at first glance appear to use a more categorical nullities approach, nonetheless rarely exclude evidence obtained in

in international criminal courts.[188] Judges exclude evidence under this approach to preserve the fairness of the proceedings, to promote systemic integrity, or to protect individual rights.[189] Courts weigh these aims against the competing public interests in uncovering the truth about the case and enforcing the criminal law. Disciplining the police is not an important consideration.[190]

While the foreign courts we examine differ on the factors they view as important in the balancing analysis, they consistently examine the gravity of police misconduct in deciding whether to exclude evidence. Exclusion is

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violation of search and seizure provisions because courts have developed broad exceptions to nullities. In France, courts apply a nullity in only about 25% of cases where a nullity is requested, largely because of a requirement that the nullity must have damaged the interests of the party requesting it (i.e., the defendant). Jean Pradel, *France: Procedural Nullities and Exclusion*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 183, at 145, 149 & n.20; *see also* Richard S. Frase, *France*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 201, 212–14 (Craig Bradley ed., 2d ed. 2008). In Italy, courts treat seizures separately from searches, so violations occurring during a search are rarely found to taint the subsequent seizure of the evidence. Italian courts thus regularly admit evidence obtained as a result of an unlawful search. *See, e.g.*, ANDREA RYAN, TOWARDS A SYSTEM OF EUROPEAN CRIMINAL JUSTICE: THE PROBLEM OF ADMISSIBILITY OF EVIDENCE 202–07 (2014).

[188] Rome Statute of the International Criminal Court art. 69(7), July 17, 1998, 2187 U.N.T.S. 90; Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Admission of Material from the "Bar Table," ¶ 38 (June 24, 2009), http://www.icc-cpi.int/iccdocs/doc/doc702244.pdf; Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence," ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 3, 2003), http://www.icty.org/x/cases/brdanin/tdec/en/031003.htm.

[189] *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitutional Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 24 (U.K.) ("[T]he evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."); Police and Criminal Evidence Act (PACE), 1984, c. 60, § 78(1), sch. 3 (Eng.) (adopting a fairness-oriented approach); R. v. Grant, [2009] 2 S.C.R. 353, paras 68–70 (Can.) (elaborating on the judicial integrity rationale established by Section 24(2) of the Canadian Charter); DPP v. Kenny, [1990] 2 I.R. 110, 134 (Ir.) (justifying exclusion with reference to the "unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen'"); Weigend, *supra* note 187, at 192, 196 (noting that German courts typically weigh the protection of individual rights against the search for truth in deciding whether to exclude). *See generally* Slobogin, *supra* note 184.

[190] R. v. Grant, [2009] 2 S.C.R. 353, para. 70 (Can.) (noting that the Section 24(2) of the Canadian Charter "is not aimed at punishing the police or providing compensation to the accused"); R. v. Delaney, (1989) 88 Cr. App. R. 338 (Eng.); R. v. Mason, (1988) 1 W.L.R. 139, 144 (Eng.); Weigend, *supra* note 187, at 189 (noting that German courts and scholars do not regard exclusion as a means of disciplining police); *cf.* JONATHAN DOAK & CLAIRE MCGOURLAY, CRIMINAL EVIDENCE IN CONTEXT 291 (2d ed. 2009) (noting that English courts continue to profess a reluctance to discipline police, though they do tend to exclude more often in cases of bad faith acts by police).

more likely where a violation is intentional, reckless, or part of a pattern.[191] For less serious breaches, these courts may impose less drastic remedies, such as declaratory relief or sentence discounts after conviction.[192]

For example, in England, bad faith on part of police officers may convert a minor legal breach into a "'significant and substantial' breach of the rules [that] weigh[s] heavily in favor of exclusion, but [does] not lead automatically to exclusion."[193] Conversely, good faith on the part of officers will typically weigh in favor of admitting the evidence, though certain violations may be so substantial that exclusion will follow even if the police act in good faith.[194] In Australia, the Uniform Evidence Act calls on courts to consider, among other factors, "the gravity of the impropriety or contravention, and . . . whether the impropriety or contravention was deliberate or reckless . . . ."[195] This factor is also relevant under Australian common law, which continues to govern in territories that have not yet adopted the Uniform Act.[196] Canadian case law has likewise long emphasized the relevance of the seriousness of the breach, including whether the officers acted deliberately or recklessly, or conversely, in good faith.[197]

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[191] *See, e.g.*, *Evidence Act 1995* (Cth) s 138(3) (Austl.); Evidence Act 2006, § 30(3) (N.Z.); R. v. Grant, [2009] 2 S.C.R. 353, paras 73–75 (Can.); R. v. Canale, (1990) 91 Cr. App. R. 1 (Eng.); CrimA 5121/98 Yissacharov v. Chief Military Prosecutor, 1 IsrSC 320 421 [2006] (Isr.).

[192] *See, e.g.*, R. v. Nasogaluak (2007), 229 C.C.C. (3d) 52 (Alta. C.A.); Chraidi v. Germany, 47 Eur. Ct. H.R. 2, ¶¶ 24–25 (2006); ANDREW BUTLER & PETRA BUTLER, THE NEW ZEALAND BILL OF RIGHTS ACT: A COMMENTARY 1037 § 29.6.5 (2005); Borgers & Stevens, *supra* note 187, at 190.

[193] Choo, *supra* note 186, at 342.

[194] *Id.*

[195] *Evidence Act 1995* (Cth) s 138(3) (Austl.).

[196] *Bunning v Cross* (1978) 141 CLR 54, 78–80 (Austl.) (holding that in deciding whether to exclude unlawfully obtained evidence, judges should consider the nature of the crime charged; whether the violation was deliberate, reckless, or accidental; whether the violation affected the reliability of the obtained evidence; the ease with which the authorities might have complied with the law in procuring the evidence in question; and the legislative intention with respect to the law said to be violated); Kenneth J. Arenson, *Rejection of the Fruit of the Poisonous Tree Doctrine in Australia: A Retreat from Progressivism*, 13 U. NOTRE DAME AUSTL. L. REV. 17, 20 (2011).

[197] This factor has become even more prominent with the recent revision of the exclusionary rule. *See* R. v. Grant, [2009] 2 S.C.R. 353, paras 75, 214 (Can.); Don Stuart, *Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms*, 16 SW. J. INT'L L. 313, 314, 318 (2010); *see also* David Porter & Brent Kettles, *The Significance of Police Misconduct in the Analysis of s. 8 Charter Breaches and the Exclusion of Evidence*

The focus on the flagrancy of the officer's misconduct is not limited to Anglo-American nations; it can be found throughout Europe. For example, one of the factors Belgian courts consider when balancing interests is whether the authorities violated the law deliberately.[198] German courts are also more likely to exclude evidence where officers purposefully or systematically violate the law.[199] A similar inquiry into the officer's motivation and state of mind occurs in Denmark, the Netherlands, and (with respect to indirect evidence) in Spain.[200]

In addition to limiting exclusion mostly to cases where the police deliberately violated the law, many foreign courts tend to admit evidence that was an indirect product of an unlawful search or seizure (or in U.S. parlance, "fruit of the poisonous tree").[201] When confronting cases involving evidence that is indirectly derived from an initial breach of the law, English courts focus on the influence that the initial breach has on the derivative evidence.[202] But even if judges find a causal connection between

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Under s. 24(2) in R. v. Grant, R. v. Harrison *and* R. v. Morelli, 58 CRIM. L.Q. 510 (2012).

[198] Meese, *supra* note 187, at 64–65.

[199] Weigend, *supra* note 187, at 194 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 18, 2007, 51 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN 285), 2007 (Ger.)) (upholding exclusion where the police "intentionally circumvented the protective warrant requirement"); Weigend, *supra* note 187, at 194 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 9, 2011, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2417, 2011 (Ger.)) (noting evidence would be excluded "if there has been a grave, conscious, or arbitrary violation of procedural law which infringed upon the protection of an individual's fundamental rights in a planned or systematic fashion"). Thomas Weigend has noted a trend toward exclusion in recent German decisions, "especially where important individual rights have been violated and the law enforcement officer acted without good faith." *Id.* at 195.

[200] E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, OPINION ON THE STATUS OF ILLEGALLY OBTAINED EVIDENCE IN CRIMINAL PROCEDURES IN THE MEMBER STATES OF THE EUROPEAN UNION 12–13 (2003) (discussing Denmark); AYA GRUBER ET AL., PRACTICAL GLOBAL CRIMINAL PROCEDURE: UNITED STATES, ARGENTINA, AND THE NETHERLANDS 223 (2012) (citing the Dutch Code of Criminal Procedure, art. 359a, §2); Ties Prakken & Taru Spronken, *The Investigative Stage of the Criminal Process in the Netherlands*, *in* SUSPECTS IN EUROPE 155, 174 (Ed Cape et al. eds., 2007); Lorena Bachmaier Winter, *Spain: The Constitutional Court's Move from Categorical Exclusion to Limited Balancing*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 183, at 209, 216–17.

[201] *See* Stephen C. Thaman, *"Fruits of the Poisonous Tree" in Comparative Law*, 16 SW. J. INT'L L 333, 353 (2010).

[202] Choo, *supra* note 186, at 343 (noting that in deciding whether to exclude indirect evidence, English courts consider whether the initial violation continued to exert a "malign influence" on the indirect evidence obtained (quoting Y. v. DPP, [1991] Crim. LR 917)); *see also* Borgers & Stevens, *supra* note 187, at 190 n.25 (noting that Dutch courts exclude derivative evidence only when it is "exclusively" the result of the unlawful act and that "[i]t

the initial breach and the derivative evidence, they may still decline to exclude. To decide the exclusion question, English judges also consider whether the initial breach is "flagrant or merely technical,"[203] or in another formulation, whether it is deliberate.[204] Australian, German, and Israeli courts entirely reject the "fruit of the poisonous tree" doctrine,[205] while other courts recognize it in a limited fashion.[206]

In short, foreign courts tend to admit fruits of unlawfully obtained evidence and evidence obtained in good faith by the police, just as our courts increasingly do after *Herring*. And similar to the way in which U.S. courts now weigh the costs and benefits of exclusion, so too, their foreign counterparts resolve questions of exclusion after balancing competing aims of the criminal justice system.

Given the combination of these factors, it is not surprising to find that "good faith" mistakes by officers are frequently excused abroad, including in cases of evidence laundering.[207] Indeed, foreign courts sometimes admit evidence even when the "good faith" mistake involves a single officer,

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is not sufficient (any more) that the fruit of the poisonous tree is *largely* the result of those actions"); Findlay Stark & Fiona Leverick, *Scotland: A Plea for Consistency*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW, *supra* note 183, at 69, 88–89 (noting that Scottish courts consider "whether the accused's right to a fair trial would be violated by . . . leading [derivative] evidence" (citation omitted)).

[203] Choo, *supra* note 186, at 343 (citing R. v. Wood, [1994] Crim. LR 222).

[204] *Id.* (citing Y. v. DPP, [1991] Crim. LR 917).

[205] *See, e.g.*, CrimA 5121/98 Yissacharov v. Chief Military Prosecutor, 1 IsrSC 320, 382 [2006] (Isr.); Arenson, *supra* note 196, at 18 (discussing how the "fruit of the poisonous tree" doctrine had been "rejected altogether" in Australia); Gless, *supra* note 184, at 128 (Germany).

[206] Runar Torgersen, *Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial in Norway*, FOLK.UIO.NO 11, http://folk.uio.no/giudittm/IACL_Truth%20or%20due%20process.pdf. In Spain, courts use a balancing test to determine whether to exclude evidence indirectly derived from a breach, and the officer's state of mind in committing the breach is an important factor. Winter, *supra* note 200, at 232.

[207] *See, e.g.*, R. v. Wilson, [2003] CarswellOnt 9051 (Can. Ont. Sup. Ct. J.) (WL) (admitting evidence in *Herring*-type scenario where database error led officer to make wrongful arrest and search incident to arrest); R. v. White, [2006] O.N.C.J. 147 (Can. Ont.) (noting that the burden of proof with respect to reliability of arrest warrant and criminal record database is on the prosecution but, after balancing several factors, refusing to suppress at least in part because officer's reliance on erroneous database was not flagrant); R. v. Koziak, [2005] ABQB 278, paras 30–33, 58 (Alta. Q.B.) (admitting evidence where it was uncovered as a result of one officer's reliance on another officer's misinterpretation of a database result); *cf.* NICK KASCHUK, 24(2): EXCLUSION OF EVIDENCE UNDER THE *CHARTER* 82–88 (2014) (discussing Canadian cases in which evidence was admitted on the grounds that it was obtained in "good faith" by police).

similar to the scenario in *Massi*.[208] In some respects, foreign courts excuse a broader range of "good faith" errors by police officers than U.S. courts currently do (although *Massi* suggests that our exclusionary rule jurisprudence may be moving in the same direction).

Yet the flexible balancing approach means that negligent mistakes will sometimes lead to suppression in foreign courts. The Canadian Supreme Court has explicitly stated that "ignorance of [constitutional] standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith."[209] While foreign courts do not always take such a clear view on the distinction between negligence and good faith, they do occasionally suppress evidence for negligent breaches.[210]

This points to an important remaining difference between the U.S. and foreign approaches. Although U.S. courts increasingly weigh the costs and benefits of exclusion, this balancing is typically translated into a categorical approach subject to a host of exceptions (attenuation, standing, independent source, inevitable discovery, and so on). Ours remains a somewhat more rule-bound approach, even if the proliferation of factors for courts to consider after *Herring* has made our rule more flexible and closer to the balancing approach used in other countries.[211] As a result, our categorical exceptions to the exclusionary rule at times sweep more broadly and result in the admission of tainted evidence in cases where a fully discretionary

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[208] United States v. Massi, 761 F.3d 512 (5th Cir. 2014); *see supra* Part III. For examples of foreign jurisdictions addressing this issue, see, e.g., R. v. Ramsammy, [2013] O.N.S.C. 7374 (Can. Ont. Sup. Ct. J.) (admitting evidence seized as a result of "good faith" mistake by officer in reading the code from a breath screening device); R. v. Tiplady, (1995) 159 J.P. 548 (Eng.) (admitting evidence resulting from good faith mistake by officers about the application of statute to them); Tobias Paul, *Unselbständige Beweisverwertungsverbote in der Rechtsprechung*, 9 NSTZ 489, 491 (2013) (discussing case in which German court admitted evidence obtained by an officer who mistakenly assumed that the person taking a blood sample was a doctor (as required under the law) when in fact, the person was a medical assistant unauthorized to draw a suspect's blood under the circumstances).

[209] R. v. Grant, [2009] 2 S.C.R. 353, para. 75 (Can.) (original in French).

[210] *See, e.g.*, R. v. Wilson, 2003 CarswellOnt 9051 (citing unnamed case in which trial judge excluded evidence in *Herring*-type case); R. v. R. (J.F.R.), [1991] Y.J. No. 235 (Can. Yukon Terr. Ct.) (excluding evidence); *see also* R. v. Veneroso, [2001] Crim. LR 306 (U.K.) (excluding evidence even though police acted in "good faith" but misinterpreted the law); R v. Goodwin [1993] NZLR 153 (CA) (noting that to excuse a violation of the Bill of Rights on the grounds that it was done in good faith would encourage police ignorance of the law); R v. Narayan [1992] 3 NZLR 145 (CA), 1992 NZLR LEXIS 646, at *15 (excluding evidence despite good faith conduct by police); DPP v. Godwin [1991] R.T.R. 303, 308 (Q.B.) (Eng.) (upholding exclusion of evidence even though police had not acted in "bad faith" in arresting defendant for refusing to submit to breath test).

[211] Herring v. United States, 555 U.S. 135 (2009).

rule would lead to suppression. For example, under *Herring*, an illegal search incident to arrest does not result in exclusion of evidence if the search is based on "isolated [police] negligence attenuated from the arrest."[212] By contrast, under a full-blown balancing approach, negligent conduct may occasionally (albeit very rarely) trigger exclusion, even if attenuation is also present.[213]

Even as the U.S. approach remains somewhat more categorical than that of foreign courts, the common trend toward balancing and consideration of officer culpability is notable. Our courts probably still exclude evidence at greater rates than their foreign counterparts, but that gap appears to be narrowing.

E. SOME IMPLICATIONS OF INTERNATIONAL CONVERGENCE ON REMEDIES

The converging trends in exclusionary rule doctrines around the world might offer us valuable information as we speculate about the future of criminal justice remedies in the United States. The balancing approach applied by foreign jurisdictions has both advantages and disadvantages that U.S. courts should consider as our approaches converge.

One of the chief weaknesses of the balancing approach is that its flexibility carries the risk of inconsistent and unpredictable decisions. To the extent it relies on a subjective evaluation of officers' state of mind, a balancing approach also raises practical difficulties for defendants in proving this element. And finally, because balancing expands in some respects the range of cases in which unlawfully obtained evidence is admitted, this likely reduces the disciplinary effect of exclusion.

Yet balancing also offers some potential advantages. In certain circumstances, its openness allows judges to exclude evidence to ensure systemic integrity where our deterrence-oriented approach would call for admission. The flexibility of the balancing approach also permits courts to consider alternative remedies, such as sentence reductions or jury cautions, in some cases where our zero-sum approach would lead to admissibility because of concerns about the costs of exclusion. While empirical evidence

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[212] *Id.* at 137.

[213] In Canada, the jurisdiction that appears to have the strictest balancing test, evidence in *Herring*-type cases is admitted in the overwhelming majority of cases. *See supra* note 207. For an example of a rare exception, see R. v. Wilson, 2003 CarswellOnt 9051 (citing unnamed case in which trial judge excluded evidence in *Herring*-type case); R. v. R. (J.F.R.), [1991] Y.J. No. 235 (Can. Yukon Terr. Ct.) (excluding evidence).

on the practical effects of the balancing approach is very limited, existing data suggest that it need not severely undermine the exclusionary rule.

The first observation about the convergence in international practices under the exclusionary rule is that a balancing test might produce inconsistent and seemingly arbitrary results. This has been a concern in a number of systems, both civil-law and common-law.[214] While some courts have attempted to restrict the factors to be used in the balancing approach, unpredictability remains.[215] One area of exclusionary analysis in which a number of foreign courts have struggled to apply a consistent approach concerns officers' culpability. While courts tend to agree that bad faith (or deliberate violations) should favor exclusion, they disagree on what constitutes "good faith" and how a finding of "good faith" should affect the exclusionary analysis.[216]

Because balancing remains more malleable, decisions may reflect the proclivities of individual judges, rather than the law.[217] A study of the Israeli exclusionary rule, which found that about half of the decisions to exclude evidence in the country could be traced to just two liberal judges, suggests that this concern may be justified.[218]

Beyond unpredictability, another disadvantage of the balancing approach is that it is likely to expand the range of cases in which tainted evidence is admitted. As we noted earlier, foreign courts frequently admit evidence derived from the "good faith" mistake of a single officer—

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[214] *See* Scott L. Optican & Peter J. Sankoff, *The New Exclusionary Rule: A Preliminary Assessment of* R v Shaheed, 2003 N.Z. L. REV. 1, 23 (noting that the discretionary balancing approach endorsed by the New Zealand Court of Appeal "is horribly uncertain and capable of infinite manipulation and/or abuse"); Stark & Leverick, *supra* note 202, at 72.

[215] *See* Optican & Sankoff, *supra* note 214, at 23; David Ormerod & Diane Birch, *The Evolution of the Discretionary Exclusion of Evidence*, 2004 CRIM. L. REV. 767, 785–86; Stark & Leverick, *supra* note 202, at 89; Weigend, *supra* note 187.

[216] *See, e.g.*, Steve Coughlan, *Good Faith, Bad Faith and the Gulf Between: A Proposal for Consistent Terminology*, 15 CAN. CRIM. L. REV. 197, 198 (2011); Jordan Hauschildt, *Blind Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct*, 56 CRIM. L. Q. 469 (2010); Optican & Sankoff, *supra* note 214, at 24–25 (discussing the ambiguity in New Zealand case law as to whether good faith weighs in favor of admitting the evidence); Stuart, *supra* note 197, at 328 (noting that the terms good faith and bad faith had "produced uncertainty and inconsistency").

[217] *See, e.g.*, Optican & Sankoff, *supra* note 214, at 23–24 (arguing that New Zealand's open-ended balancing test is "a licence for personal judicial predilection to masquerade as principle").

[218] Binyamin Blum, *"Exclude Evidence You Exclude Justice"? A Critical Evaluation of Israel's Exclusionary Rule After* Issacharov, 16 SW. J. INT'L L. 385, 403–04 (2010).

whether a mistake of fact[219] or of law.[220] Moreover, to the extent that balancing courts use a subjective approach to analyze the officer's state of mind, defendants have had difficulty proving that an officer has deliberately violated the law.[221] As a result, only egregious and obvious instances of bad faith have tended to result in exclusion, while negligent and sloppy policing has frequently remained unaddressed.[222] Balancing has also led foreign courts generally to admit indirect fruits of an unlawful police search or seizure.[223] Finally, when the crime charged is very serious and the evidence central to the case, foreign courts have sometimes admitted even evidence derived from a significant and deliberate violation of the law.[224] Under the balancing approach, the public interest in resolving a serious crime on the merits often outweighs the interests in disciplining the police and safeguarding individual rights.

While on average, open-ended balancing likely leads to more frequent admission of tainted evidence than even the weak post-*Herring* U.S. exclusionary rule, there are some instances in which the balancing approach will prove more protective of defendants' rights. On occasion, the commitment to systemic integrity will lead to exclusion under a balancing approach even when the nominally categorical, deterrence-oriented U.S. approach would call for admission of the evidence. For example, even if one officer relies in "good faith" on the actions of another officer who has acted merely negligently, a court concerned with systemic integrity may suppress evidence in order to discourage sloppy law enforcement, especially if the crime charged is not serious.[225] By contrast, under an

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[219] *See, e.g.*, Paul, *supra* note 208.

[220] *See, e.g.*, R. v. Tiplady, (1995) 159 J.P. 548 (Eng.).

[221] *See, e.g.*, Stephen G. Coughlan, *Good Faith and Exclusion of Evidence Under the Charter*, 11 C.R. (4th) 304, 312 (1992); Hauschildt, *supra* note 216, at 471, 490, 502; Ormerod & Birch, *supra* note 215, at 781.

[222] Coughlan, *supra* note 221, at 312; Hauschildt, *supra* note 216, at 471, 490, 502; Ormerod & Birch, *supra* note 215, at 781 (noting this toleration of sloppy policing and arguing that the emphasis on bad faith in English case law "might even be to encourage the police to be sloppy in their investigations since if an officer is unaware of the regulation he cannot be said to have acted in bad faith").

[223] *See supra* notes 201–206 and accompanying text.

[224] *See, e.g.*, R. v. White, [2006] O.N.C.J. 147 (Can. Ont.) (noting that the burden of proof with respect to reliability of arrest warrant and criminal record database is on the prosecution but, after balancing several factors, refusing to suppress at least in part because officer's reliance on erroneous database was not flagrant); KASCHUK, *supra* note 207; Gerson Trüg & Jörg Habetha, *Beweisverwertung trotz rechtswidriger Beweisgewinnung—insbesondere mit Blick auf die "Liechtensteiner Steueraffäre,"* 9 NSTZ 481, 485–86 (2008).

[225] *See supra* note 213 and accompanying text.

approach that categorically declares good faith reliance does not justify the cost of exclusion, considerations about the integrity of the justice system would not be taken into account.

Perhaps the most interesting comparative question, however, is one we know the least about: Does balancing increase or reduce the likelihood of exclusion? There is no comparative empirical study that answers this question. Nor is it clear that any study could provide an answer, since judges' readiness to exclude evidence depends on much more than doctrine. The severity of the crime, public attitudes towards the balance between security and liberty, and legal tradition (including whether the exclusionary rule is relatively recent) may all influence suppression decisions.[226]

It is nonetheless informative to review some of the data that do exist on exclusion rates in different countries and to consider the correlation between these rates and the approach to exclusion. Among the studies we reviewed, the one that reported the lowest suppression rate was from Israel. It found that the balancing test developed by the Israeli Supreme Court in 2006 has led to suppression of evidence in only 11% (14 of 126) of cases in which the constitutional violation claim succeeded on the merits.[227]

A 2001 study from Australia—where courts also use a balancing approach to exclusion—found that trial courts excluded evidence in 24% of cases where a violation was found.[228] In Belgium, though no empirical study is available, observers have noted that as a result of a shift toward balancing that started in 2003, unlawfully obtained evidence is "rarely

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[226] *See, e.g.*, Arenson, *supra* note 196, at 20, 35 (noting that the severity of the crime influenced decisions on exclusion, even though it was not a factor formally considered under the doctrine); Blum, *supra* note 218, at 389–90; Andrew L.T. Choo & Susan Nash, *Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales?*, 11 INT'L J. EVIDENCE & PROOF 75, 104 (2007) (noting the importance of a "rights culture" to the effectiveness of an exclusionary rule); Bram Presser, Research Note, *Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence*, 25 MELB. U. L. REV. 757 (2001).

[227] Blum, *supra* note 218, at 402–04; E-mail from Binyamin Blum, Faculty of Law, Hebrew University of Jerusalem, to Jenia Turner, Professor, SMU Dedman School of Law (Dec. 8, 2014, 10:56 CST) (on file with author). Blum argues that this very low suppression rate cannot be attributed entirely to the structure of the balancing test, which closely resembles the test used by Canadian courts. Instead, the low exclusion rate reflects the Israeli judiciary's outcome-driven approach to procedure and a broader "security agenda" that influences attitudes towards the regulation of police in Israel. Blum, *supra* note 218, at 435–44.

[228] Presser, *supra* note 226, at 776 (finding that courts excluded evidence in six out of twenty-five cases in which the court found that the police had violated the law).

excluded."[229]

While these numbers may suggest that discretionary exclusionary rules tend to be rather feeble, data from Canada point in the other direction. In several studies, researchers have found that Canadian courts exclude evidence in about 70% of cases in which a constitutional violation is found.[230] The evidence from Canada thus suggests that a balancing approach need not undermine the exclusionary rule; even under a discretionary rule, courts might still exclude evidence in a significant number of cases where a violation is found to have occurred. This is all the more likely in countries like Canada and the United States, where restraints on police powers are grounded in a Constitution, rather than in statutes.[231]

In the end, comparative data on exclusion rates do not answer other questions that are critical for assessing the effects of the exclusionary rule: Does a balancing approach discourage defendants from bringing challenges to unlawful searches and seizures?[232] And conversely, are courts more likely to interpret the law on search and seizure more generously if they are no longer concerned about a rigid and inflexible exclusionary rule?[233] While both possibilities have been raised by scholars writing about foreign balancing rules, there is—as yet—no clear empirical answer.[234] Likewise,

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[229] Meese, *supra* note 187, at 65; *see also* Jan Fremon et al., *The Investigative Stage of the Criminal Process in Belgium*, *in* SUSPECTS IN EUROPE 29, 54 (Ed Cape et al. eds., 2007) (noting that "illegal actions by investigators will normally not lead to exclusion of the evidence obtained as a consequence of their action").

[230] Ariane Asselin, *Trends for Exclusion of Evidence in 2012*, 1 C.R. (7th) 74 (2013) (finding 73% rate of exclusion at the trial level); Mike Madden, *Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of* R. v. Grant, 15 CAN. CRIM. L. REV. 229, 237 (2011) (noting a roughly 70% rate of exclusion under the more concrete Canadian balancing test after *R. v. Grant*); Thierry Nadon, *Le paragraphe 24(2) de la* Charte *au Québec depuis* Grant*: si la tendance se maintient!*, 86 C.R. (6th) 33, 42 (2011) (finding a 64% post-*Grant* exclusion rate in Quebec).

[231] Stribopoulos, *supra* note 172, at 81.

[232] For a concern that this may have occurred in Canada, see, for example, Stephen G. Coughlan, *Good Faith and Exclusion of Evidence Under the* Charter, 11 C.R. (4th) 304, 312 (1992); Hauschildt, *supra* note 216, at 525.

[233] Stribopoulos, *supra* note 172, at 132–33, 136.

[234] Stribopoulos suggests that "[t]he Supreme Court of Canada has consistently taken a more expansive view than the United States Supreme Court on the type of police behavior that constitutes an intrusion upon reasonable expectations of privacy warranting constitutional protection." *Id.* at 133. He attributes this more generous interpretation of privacy provisions at least in part to the discretionary exclusionary rule in Canada. *Id.* At the same time, a number of countries with discretionary exclusionary rules have privacy protections that are at least in some respects narrower than those afforded by Fourth Amendment case law in the United States. *See, e.g.*, Slobogin, *supra* note 184, at 286-87.

no comparative study has analyzed the effects of a discretionary exclusionary rule on police compliance with constitutional rules.

The comparative analysis does point to another potential advantage of balancing, however. The balancing approach has led a number of foreign systems to experiment with a sliding scale of remedies for procedural violations. When a violation is minor or made in good faith, for example, many foreign courts may decide to grant the defendant a sentence reduction or to instruct the jury about the violation, rather than to exclude the evidence.[235] This minimizes the negative effect of the remedy on truth-seeking while still arguably advancing the goals of protecting individual rights and preserving the integrity of the judicial system. While American commentators have debated the vices and virtues of sentencing reductions as an alternative or complement to the exclusionary rule,[236] the U.S. Supreme Court—despite its embrace of balancing—has not seriously considered alternatives to exclusion *within* the criminal process.[237] If the Court were to openly embrace a balancing approach, it should also reconsider the range of remedies available in criminal cases for violations of Fourth Amendment rights.[238]

In short, comparative analysis helps us appreciate better both the advantages and disadvantages of a shift to balancing. While empirical data on the practical effects of balancing is mixed, the Canadian experience suggests that a balancing approach need not eviscerate the exclusionary rule. Balancing may even bring some beneficial effects, broadening the range of available remedies and expanding the court's ability to exclude

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The scope and content of these rights is likely shaped by too many factors to permit a valid comparative empirical study about the effects of the exclusionary rule.

[235] *See, e.g.*, BUTLER & BUTLER, *supra* note 192, at 1037 § 29.6.5 (2005). On sentence reductions, see, for example, Borgers & Stevens, *supra* note 187, at 190; Chraidi v. Germany, 47 Eur. Ct. H.R. 2, 53 (2006). In Canada, sentence reductions are used in lieu of exclusion only rarely. *See* R. v. Nasogaluak (2007), 229 C.C.C. (3d) 52 (Alta. C.A.). On English courts' use of jury instructions in lieu of exclusion, see Andrew Choo, *supra* note 186, at 343–47.

[236] *Compare* Calabresi, *supra* note 20, at 115–17, *and* Caldwell & Chase, *supra* note 174, at 73–74, *with* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J. L. & PUB. POL'Y 119, 136 (2003); David A. Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 201–03 (2009).

[237] The Court has, however, referred to the supposed availability of civil remedies and internal discipline as a reason to curtail the exclusionary rule. Hudson v. Michigan, 547 U.S. 586, 597–99 (2006).

[238] *Cf.* Calabresi, *supra* note 20, at 115–17 (proposing sentence reductions as an alternative to the exclusionary rule); Caldwell & Chase, *supra* note 174, at 73–74 (same).

evidence in order to discourage evidence laundering and other instances of police carelessness. Despite these potential benefits, as our courts move more closely to a discretionary approach to exclusion, they must also remain alert to its significant downsides—inconsistency, unpredictability, and a potentially weaker deterrence effect.

CONCLUSION

Our analysis of published court decisions between 2009 and 2014 suggests that *Herring* delivered exactly what it promised (or threatened). The fault-based doctrinal test in *Herring*, which focuses on an individual officer's state of mind, creates serious blind spots for the courts, particularly in situations where more than one officer is involved in the investigation. The published opinions do not inquire deeply into the ways that many small mistakes can accumulate into unreliable systems, particularly in the context of law enforcement databases. As a result, the good faith doctrine now operates entirely apart from police realities. Deterrence of police misconduct is not a realistic objective for a doctrine that ignores how law enforcement organizations shape the conduct of individual officers. The outcome in a good faith case represents the trial court's view of individual, transactional justice, rather than a reality-based strategy to promote lawful policing. Too often the result is evidence laundering.

Herring and its progeny have further entrenched the balancing test for excluding evidence, weighing the benefits of deterring police misconduct against the costs of excluding probative evidence. This embrace of balancing, and the related interest in the level of police culpability, brings American courts closer to their counterparts in other common-law systems and a number of European civil-law systems. We therefore can look to foreign systems for insights about how the exclusionary rule in the United States might progress.

Comparisons to other systems offer conflicting evidence on the effects of the modified exclusionary rule on litigation outcomes. In some countries, a softer version of the exclusionary remedy results in many government victories; in others, the litigation impact is less dramatic. It is too early to know the effects that the shift to balancing might have on the effectiveness of the U.S. exclusionary rule or on the breadth of Fourth Amendment doctrine, but if this is the direction we are heading, we ought to be having a parallel conversation about increasing the range of remedies inside the criminal case for constitutional violations that, on balance, deserve some recognition but do not merit exclusion.

Our comparative analysis also suggests some concerns about the

malleability of the balancing test and about the possibility that a low rate of success may discourage defendants from bringing suppression motions in the first place. What is clear, however, is that as our exclusionary rule increasingly resembles the remedial rules of other major legal systems, comparative conversations become more relevant. What once seemed far removed now hits close to home.