Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence

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TRAWLING FOR *HERRING*: LESSONS IN DOCTRINAL BORROWING AND CONVERGENCE

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Abstract

The Supreme Court’s 2009 decision in *Herring v. United States* has prompted both criticism and puzzlement concerning the source, meaning, and implications of the new culpability-based framework that it announced for the Fourth Amendment exclusionary rule. This Article proposes that *Herring* may be better understood not solely by reference to the exclusionary rule precedents to which the majority opinion claims fidelity, but rather in the context of the important and largely unexamined influence that constitutional tort doctrine has had in shaping exclusionary rule jurisprudence. That influence has been driven by the interrelated processes of borrowing and convergence – the former, a deliberate tactic employed when the Court in *United States v. Leon* drew from qualified immunity jurisprudence to define the contours of the exclusionary rule’s good faith exception; the latter, a gradual and progressive effect of that initial borrowing, whereby first the good faith exception, and eventually other areas of exclusionary rule doctrine, have increasingly drawn from and grown aligned with constitutional tort doctrine.

The Article identifies and traces these dynamics of borrowing and convergence in the arena of the exclusionary rule, illuminating the specific mix of historical contingency, adjudicatory pragmatism, and, perhaps most interestingly, tactical considerations that drove the influence of constitutional tort doctrine on the exclusionary rule generally, in *Herring* more specifically. This examination affords greater understanding of the source, contours, and likely trajectory of the exclusionary rule framework that *Herring* enunciates. Moreover, close examination of borrowing and convergence in this particular context provides a basis for mapping a more systematic understanding of why and how disparate strands of doctrine come to cross-fertilize – in the particular realm of criminal procedure, in the broader arena of constitutional remedies, and in the law more generally. The story

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of these dynamics in the exclusionary rule context offers a largely cautionary tale of the risks that convergence poses to substantive legal standards as well as jurisprudential values such as transparency, particularly in constitutional remedial jurisprudence.

INTRODUCTION

The Fourth Amendment exclusionary rule has taken its share of lumps in the decades since Mapp v. Ohio extended its remedial reach to both federal and state criminal proceedings.¹ A steady stream of decisions has beaten back the doctrine, progressively curtailing its availability as a remedy for Fourth Amendment violations. Even against that beleaguered backdrop, the Court’s 2009 decision in Herring v. United States² marked a turning point. The Court denied suppression of evidence seized pursuant to an unquestionably invalid arrest warrant pulled from an Alabama sheriff’s department’s outdated computer records, on the grounds that police had not displayed “deliberate, reckless, or grossly negligent conduct,” and were not driven to their constitutional violation by any “recurring or systemic negligence.”³ By grounding its holding in an assessment of the link between police culpability and the ensuing constitutional violation, Herring announced a significant, and potentially far-reaching, reformulation of the exclusionary rule: No previous curtailment had premised suppression upon such a showing of heightened misconduct, or had announced such an apparently far-reaching carve-out from its scope.

To date, commentary on Herring has consisted as much of general puzzlement as critique. Leading Fourth Amendment scholars have adjudged the Court’s approach both inscrutable and without a discernable basis in exclusionary rule precedents.⁴ But these reactions have overlooked the extent to which Herring both exemplifies and is illuminated by an important and little-attended-to thread in the fabric of the Court’s exclusionary rule doctrine: the influence of constitutional tort jurisprudence in shaping the exclusionary remedy. The aim of this Article is to trace that influence, both to shed light on the meaning and implications of Herring, but also, by way of case study, to probe broader issues in the dynamics of

² 129 S.Ct. 695 (2009).
³ Id. at 702.
doctrinal formation and remedial jurisprudence.

In *United States v. Leon*, the Supreme Court announced a “good faith exception” to the exclusionary rule where police officers reasonably rely on a judicially issued warrant as the basis for a search or seizure that is subsequently found to violate the Fourth Amendment.\(^5\) Critically, the contours of the exception were not drawn primarily by reference to prior exclusionary rule jurisprudence. Rather, the Court adopted the legal standard for a “good faith defense” to civil damages actions for constitutional violations announced in *Harlow v. Fitzgerald*, which extended immunity from suit to government officials who do “not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\(^6\)

This deliberate deployment of qualified immunity jurisprudence to shape the exclusionary rule exemplifies what scholars Nelson Tebbe and Robert Tsai have recently classified as “borrowing” – a strategy of doctrinal persuasion and transformation that “draws on one domain of . . . knowledge in order to interpret, bolster, or otherwise illuminate another domain.”\(^7\) The practice is common in the law, as Tebbe and Tsai observed in their examination of borrowing in constitutional doctrine.\(^8\) But two features of *Leon* and its aftermath are distinctive. On the one hand, *Leon* was unusual and potentially controversial in its importation of tort doctrine into the realm of criminal law. Remedial doctrines in these separate spheres do not naturally encounter each other in the normal course of litigation – courts do not simultaneously consider suppression motions and constitutional damages actions – and hence this type of borrowing requires greater intentionality than, say, importation of equality concerns into due process analysis, or infusion of trademark reasoning with copyright principles.\(^9\) More importantly, the aims and concomitant design of remedies in these two spheres are distinguishable in a number of important respects that are exemplified by the very doctrines at issue here: from constitutional tort, a personal defense to an action for damages recoverable from a culpable individual; to criminal procedure, and a remedy to which no

\(^8\) Id. at 463, 467.
\(^9\) See id. at 461 (discussing borrowing of equality ideas in *Lawrence v. Texas* due process analysis); Dana Beldiman, Protecting the Form but Not the Function: Is U.S. Law Ready for a New Model?, 20 Santa Clara Comp. & High Tech L.J. 529 (discussing copyright and trademark convergence).
individual is “personally” entitled,\textsuperscript{10} whose cost is borne institutionally. These differences suggest that borrowing would encounter resistance, not only from those who disagreed with the substantive agenda of the tactic (\textit{i.e.}, narrowing the exclusionary rule), but more broadly from forces raising concerns about the integrity of fit between the two doctrines. And yet, despite arguable problems of theoretical coherence, the move stuck – so effectively, indeed, that the subsequent two decades of exclusionary rule jurisprudence, culminating in \textit{Herring}, feature progressively greater enmeshment with not only qualified immunity, but constitutional tort jurisprudence more generally.

\textit{Leon}’s deployment of the language and logic of qualified immunity yielded strategic benefits to proponents of a good faith exception to the exclusionary rule. It grounded rollback of the exclusionary rule in an existing doctrinal framework that enjoyed support across the Court’s political spectrum. And, it shored up the Court’s flagging deterrence-based rationale for scaling back the exclusionary rule. These significant strategic advantages combined with adequate if debatable symmetries between constitutional tort remedies and the exclusionary rule – symmetries facilitated by transformations already afoot in the elevation of deterrence as the exclusive justification for the exclusionary remedy – to generate more far-reaching dynamics than the initial borrowing encompassed.

Soon after \textit{Leon}, the Court would expressly treat the standards for qualified immunity from civil suit and the good faith exception to criminal suppression as not just analogous, but wholly synonymous.\textsuperscript{11} Eventually, the influence of constitutional tort jurisprudence beyond the confines of qualified immunity would be seen on exclusionary rule doctrine beyond the confines of the good faith exception. The Article identifies three examples of that trend: the influence of municipal liability doctrine under 42 U.S.C. § 1983 on an emergent “systemic” view of the exclusionary rule; \textit{Hudson v. Michigan}’s adoption of an exclusionary rule causation framework that is resonant with that utilized in constitutional tort litigation; and the increasing tendency of the Court to consider the availability of constitutional tort remedies as a justification for curtailing application of the exclusionary rule. These areas exemplify not only an increasing permeability of the barrier between the separate remedial realms of criminal and civil Fourth Amendment enforcement, but also the merging, at a functional if not a

\textsuperscript{10} See Leon, 468 U.S. at 906 (describing exclusionary rule as judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved”).

\textsuperscript{11} See Malley v. Briggs, 475 U.S. 335 (1986).
formal level, of two previously independent remedial paths into one. This dynamic is distinct in its operation and effect from the initial act of borrowing. It is instead best characterized as *convergence*.

Critically, however, the two dynamics are intertwined. Both borrowing and convergence depend for their success upon the existence of certain background conditions that foster receptivity to the source doctrine by the target. The Article’s examination of borrowing and convergence in the exclusionary rule context focuses on two general circumstances in that regard: fit – meaning sufficient congruence between the source and target doctrines to satisfy minimum principles of legal reasoning and jurisprudential legitimacy; and motive – meaning some impetus on the part of the court to reach beyond doctrinal boundaries. This account suggests that in practice these criteria are highly relative and interdependent. More tenuous fit may be tolerated where the strategic interest in borrowing is strong. Additionally, with respect to both criteria, borrowing and convergence are self-generative. Borrowing sets the stage for convergence, supplies advocates and judges with the strategic motivation, jurisprudential warrant, and habits of mind that drive further exploration of ties between the source and target doctrines. And convergence deepens those ties and begets further borrowing. These devices thus exhibit hydraulic properties that drive farther reaching doctrinal transformation than what might have been contemplated or foreseen at the initial act of borrowing.

*Herring* both exemplifies and is elucidated by these dynamics. In particular, the meaning of the Court’s newly announced tests of individual and systemic culpability, and the likely scope of the decision’s impact on exclusionary rule doctrine and Fourth Amendment litigation more generally, are all illuminated by recovering the exclusionary rule’s history of doctrinal borrowing and convergence. This analysis helps make sense of those features of the decision that have puzzled commentators to date, and facilitates assessment of *Herring*’s place in the future development of the exclusionary rule and Fourth Amendment remedies generally. Indeed, there are already signs that the dynamics identified by this Article may influence *Herring*’s aftermath, as lower courts interpreting *Herring* have begun to draw upon various aspects of constitutional tort doctrine in interpreting and applying various aspects of the decision.12

12 See, e.g., United States v. Gonzalez, __ F.3d __, 2010 WL 917204 (9th Cir. 2010) (Bea, J., dissenting from denial of reh’g en banc); United States v. Campbell, 603 F.3d 1218, 1235—36 (10th Cir. 2010); United States v. Amos, No. 3:08-CR-145, 2010 WL
Significantly, many points in the story told herein lend themselves to serious criticism: The reliance upon Harlow in Leon, each expansion of the good faith exception, and other moves are highly vulnerable to criticism on any number of grounds, including most relevantly the questionable substantive appropriateness of the Court’s borrowing.\textsuperscript{13} The Article’s goal is not, however, to fulminate against pages in the exclusionary rule’s history that no academic assessment can now turn back. Rather, the goals are primarily descriptive and explanatory – to understand the twin dynamics of borrowing and convergence, and in so doing to illuminate both the exclusionary rule’s development up to and culminating in Herring, and the nature of the jurisprudential practice of borrowing. Nevertheless, the account offered does facilitate normative assessment of the immediate and future consequences of these dynamics for the exclusionary rule, the Fourth Amendment, and constitutional enforcement more generally. In particular, exploration of convergence reveals an undesirable doubling down effect in the Court’s curtailment of the exclusionary rule: The overall mix of opportunities for constitutional redress is reduced not once, but twice, when standards for two remedies converge. This effect is particularly troubling in light of the Court’s recent trend toward purportedly calibrating the alternative regimes of suppression and damages. Convergence renders coordination of these remedial avenues illusory, as contraction of one limits the other in kind.

These dynamics also shed light on issues of doctrinal construction beyond the Fourth Amendment context upon which this Article focuses.

\textsuperscript{13} Surprisingly little such criticism can be found in the literature. This gap follows from the relative lack of systematic attention that has been paid to the dynamics identified in this Article. But see Alschuler, supra note 4, at 484--86 (noting the interplay of the exclusionary rule “good faith” exception and qualified immunity doctrine after Leon and Harlow, but asserting after brief discussion that Herring departs from prior symmetry with qualified immunity); Philip M. Coffin III & Paul F. Driscoll, Comment, The Development and Consequences of the ‘Good Faith’ Exception to the Exclusionary Rule and the Qualified ‘Good Faith’ Immunity from Liability Under Section 1983, 33 Maine L. Rev. 325, 353 (1981) (noting without sustained discussion the similar contours of good faith in exclusionary rule and qualified immunity contexts). Most work that has placed the exclusionary rule and constitutional tort litigation in dialog has focused on the issue of substitutability, rather than convergence, of remedial paths. See, e.g., Donald Dripps, The Fourth Amendment, The Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis, 85 Chi.-Kent L. Rev. 209, 215—19 (2010); Alschuler, supra note 4, at 489—507; David B. Owens, Comment, Fourth Amendment Remedial Equilibration: A Comment on Herring v. United States and Pearson v. Callahan, 62 Stan. L. Rev. 563, 585—89 (2010).
Both borrowing and, to a lesser extent, convergence are at work throughout the law, and indeed significant attention has been paid to both descriptive and normative aspects of these processes in other legal realms.\textsuperscript{14} In contributing an account from the fields of criminal procedure and constitutional remedies, this Article offers a previously unappreciated vantage point on these dynamics, thus enriching understanding and assessment of the circumstances under which borrowing and convergence occur. It also contributes to the important but oft-neglected examination of criminal procedure’s theoretical resonances with closely related but separately conceived fields of constitutional law and remedies.\textsuperscript{15}

The Article proceeds as follows. Part I briefly sketches and preliminarily assesses the \textit{Herring} litigation and decision, highlighting three aspects of the decision that depart from the precedents to which the Court claims deference, and are in other respects important, puzzling, and unexplained by \textit{Herring} itself: the Court’s turn to culpability as the driving premise of exclusion; its adoption of a rule incorporating systemic misconduct inquiries; and its individuated assessment of law enforcement fault. The analysis is provisional, laying a foundation upon which to postulate that much of what \textit{Herring} appears on its face to leave unexplained may be illuminated when the influence of constitutional tort doctrine on the exclusionary rule’s lineage is recovered.

Part II embarks on that recovery, describing the dynamics that animated the exclusionary rule’s borrowing from, and convergence with, constitutional tort jurisprudence. Part III returns to \textit{Herring}, to connect its reformulation of the exclusionary rule to the convergence trend previously identified. It also explores how the trajectory of borrowing and convergence might shape the fallout from \textit{Herring}, including the question of how, if at all, the exclusionary rule applies to legally invalidated searches such as those now being litigated in the aftermath of last Term’s decision in


\textsuperscript{15} Cf. Carol Steiker, “First Principles” in Constitutional Criminal Procedure: A Mistake?, 112 Harv. L. Rev. 680, 684 (1999) (describing criminal procedure scholarship as “too often isolated” and agreeing with Akhil Amar’s call for criminal procedure scholars “to recognize the important relationship between the constitutional regulation of the criminal justice system and the rest of constitutional law and theory”).
Arizona v. Gant. Part IV closes by briefly sketching broader questions of constitutional remedial design and the general propriety of borrowing and convergence. In particular, the exclusionary rule context offers a number of cautionary lessons in the capacity for borrowing and convergence to undermine both the substantive goals of a remedial regime – a consequence of particular concern where, as here, those goals are constitutional in nature.

I. HERRING BACKGROUND AND INITIAL ASSESSMENT

A. The Herring Litigation

Bennie Dean Herring was well known to law enforcement when he appeared at the Coffee County, Alabama Sheriff’s Department in July 2004 to retrieve possessions from an impounded truck. In fact, he had a special relationship with Coffee County Investigator Mark Anderson: Herring had informed the district attorney, among others, that he suspected Anderson’s involvement in a local murder, and only shortly before his arrest Anderson had gone to Herring’s home, apparently to address the accusation. When Anderson spotted Herring at the office that day, he asked the Department’s clerk, Sandy Pope, to check whether there were outstanding warrants for Herring’s arrest. A search of the Coffee County computerized warrant system found nothing. But at Anderson’s request, Pope contacted neighboring Dale County Sheriff’s Department. Her Dale County counterpart reported that the computer database showed an outstanding November 2003 warrant for Herring’s arrest.

Pope asked that the warrant be faxed, and told Anderson of its existence. Immediately, Anderson pursued Herring as he drove from the station, stopping him and effectuating a search of his person and vehicle that yielded methamphetamine and weapons. But as Herring’s arrest was transpiring, Sandy Pope received a phone call from Dale County. An unsuccessful search of Department files followed by a cross-check with the court revealed that the warrant listed in the sheriff’s computer records had in fact been recalled five months earlier. While standard procedure called for the Dale County Sheriff’s Department clerk to both dispose of the physical copy and update the Department’s database, in this instance the second step had not taken place. Pope called Anderson to inform him of

18 Herring, 129 S.Ct. at 698.
19 Id.
20 Herring, 129 S.Ct. at 698.
the error, but in the fifteen minutes that had elapsed Anderson had already arrested and searched Herring.\textsuperscript{21}

Following his indictment in federal court on drug and weapons charges,\textsuperscript{22} Herring moved to suppress the evidence recovered by Investigator Anderson. The Government conceded that the arrest and attendant search violated the Fourth Amendment. It contended, however, that suppression was not warranted in light of the Coffee County sheriff personnel’s reasonable, “good faith” reliance on Dale County’s representations concerning the warrant.\textsuperscript{23}

The district court denied suppression, finding after two hearings that Dale County sheriff’s personnel had been negligent in their warrant tracking and reporting, but that Coffee County personnel had acted reasonably and in good faith.\textsuperscript{24} The Eleventh Circuit affirmed, and Herring was off to the Supreme Court.

With the Fourth Amendment violation conceded, the only issue before the Court was the availability of the remedy of suppression.\textsuperscript{25} The Court’s five-four opinion initially framed the issue before it narrowly, as whether exclusion was an available remedy “if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee.” But the opinion proceeded to answer the question before it in more sweeping terms. Its analysis proceeded in three steps.

First, the Court segregated its consideration of Dale County’s and Coffee County’s respective roles in causing Herring’s unlawful arrest, rejecting Herring’s invitation to draw a bright line between police and other criminal justice actors and to collectively consider the actions of the former. The Court accepted the lower courts’ finding that the Dale County Sheriff’s Department was negligent, but emphasized that “[t]he Coffee County officers did nothing improper. Indeed, the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant.”\textsuperscript{26} The “admoni[tion]” of \textit{United States v. Leon} to “consider the actions of all

\textsuperscript{21}Id. at 698.
\textsuperscript{22}Herring’s case was transferred to the jurisdiction of that U.S. Attorney’s Office pursuant to a federal-local task force agreement. See Catherine Hancock, \textit{Herring} symposium piece (forthcoming).
\textsuperscript{23}United States v. Herring, 492 F.2d 1212, 1215 (11th Cir. 2007).
\textsuperscript{24}United States v. Herring, 451 F. Supp. 2d 1290, 1292—93 (M.D. Ala. 2005).
\textsuperscript{25}Herring, 129 S.Ct. at 698.
\textsuperscript{26}Herring, 129 S.Ct. at 700.
the police officers involved” meant, the Court asserted, that the reasonableness and “good faith” of the Coffee County law enforcement personnel must be the focus of inquiry, and not solely the failings of Dale County.  

Second, the Court identified as “crucial” to its holding the fact that the Dale County personnel were merely negligent, and “not reckless or deliberate” in their failures vis-à-vis the warrant tracking system. The Court asserted that its exclusionary rule jurisprudence had consistently rested on the premise that evidentiary suppression is an available remedy only where it will deter police misconduct, and that the efficacy of deterrence, in turn, varies with the culpability of the action that led to the constitutional violation. At the same time, assessment of culpability must be “objective,” encompassing inquiry into “a particular officer’s knowledge and experience,” but not “into the subjective awareness of arresting officers.”

Third, the Court asserted that in addition to individual reckless or deliberate misconduct “recurring or systemic negligence” might “in some cases” justify suppression as a Fourth Amendment remedy. Thus, irrespective of whether any individual police official had acted reasonably, negligently, or recklessly in violating a suspect’s Fourth Amendment rights, if a given police department had “been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified.”

These three tracks of analysis converged in the Court’s ultimate, and broadest, statement of the holding: that application of the exclusionary rule is unwarranted “when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements.” In respect of all three premises, the Court planted itself firmly in the lineage of Leon and its progeny, contending that these “prior cases” “laid out” a trajectory that the Court was merely following to its logical conclusion. This Article advances two responses to that contention: first, that it is

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27 Id.
28 Id. at 700 (quoting United States v. Leon, 468 U.S. 897, 916 (1984)).
30 Herring, 129 S.Ct. at 703 (quoting Reply Brief for Petitioner, at *4--*5).
31 Id.
32 Id. at 704
33 Id. at 700-01, 703—04.
misleading or at least incomplete, in that the principles and reasoning expressly provided by the *Herring* majority appear in fact to be significant departures from the precedents cited in support of them; second, that a truer if entirely implicit accuracy in the *Herring* majority’s claim to precedential lineage is revealed in the convergent genealogies of exclusionary rule and constitutional tort doctrine. The next section takes up the first critique. The second must await development in Parts II and III.

B. Assessing *Herring* – A First Pass

Contrary to the *Herring* majority’s insistence, each of the three strands of argument described above represents significant enlargement of or departure from the very precedents invoked. Parts II and III will reveal that these enlargements and departures are neither inexplicable nor untethered to the Court’s exclusionary rule jurisprudence, once that body of law is read in light of the constitutional tort principles that have shaped its trajectory. They are, however, only tenuously justified by the reasoning that is most apparent from the majority opinion itself. This Section thus serves as both preliminary critique of *Herring*’s reasoning, and a preface to the balance of the Article’s elucidation of the dynamics of borrowing and convergence.

1. The “Critical” Role of Culpability

*Herring*’s tying of the exclusionary rule to judicial findings of heightened police culpability is a significant change to exclusionary rule doctrine – one that garnered significant, and mostly negative, immediate scholarly attention.\(^{34}\) Notwithstanding the Court’s invocations of precedent – in particular, its decisions in *United States v. Leon*, *Illinois v. Krull*, *Arizona v. Evans*, and *Franks v. Delaware* – *Herring* breaks new ground in treating police culpability as not simply a relevant factor, but a categorical determinant, in evaluating the availability of the remedy of suppression.

*United States v. Leon*, relied on most prominently by the Court, dictates no such result. To be sure, the Court’s holding, that suppression of evidence was unavailable where a Fourth Amendment violation stemmed from inadequate warrants served by police acting in “good faith” and reasonable reliance on issuing magistrates,\(^{35}\) made the egregiousness of police error relevant to the exclusionary rule’s scope. Yet the Court’s

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\(^{34}\) See, e.g., LaFave, supra note 4, at 764—69 (2009); Alschuler, supra note 4, at 486.

holding did not rest solely – much less “crucially” – on a general benchmark for adequate police culpability to invoke the exclusionary rule. Rather, the Court’s analysis was closely tethered to the context of warrants, and in particular the important oversight role traditionally played by magistrates in that process. Moreover, the Court’s conclusion that police reliance on magistrates’ warrant approvals was presumptively reasonable – i.e. not even negligent – effective removed the issue of culpability from the picture.

While Krull and Evans magnified the import of Leon’s analysis by expanding the factual settings in which the good faith exception would be applied, neither decision extended or generalized Leon’s culpability analysis. Rather, both essentially recapitulated Leon’s reasoning, and extended the good faith exception upon determinations both that the police conduct at issue fell short of negligence, and that the contexts of legislative and judicial errors featured in those cases manifested circumstances and institutional safeguards analogous to those applicable to magistrate-reviewed warrants treated by Leon. Neither of these decisions enunciated anything like the framework or substantive culpability standard that Herring attributes to them.

Franks presents a slightly more complicated data point, but one that is no more helpful to the Herring Court. In holding that only “deliberate falsehood or reckless disregard for the truth” in a warrant application rose to the level of a Fourth Amendment violation, Franks indeed pegged substantive review of warrants to a finding of police culpability. But even more than in Leon, the reasoning in Franks is deeply rooted in analysis of the historical and functional role of the magistrate, rather than operation of the exclusionary rule: Franks asserted that it was announcing only a “limited” basis for Fourth Amendment challenges based on concerns that almost exclusively flowed from the traditional deference given to magistrate review of warrants. The Court’s analysis made clear that its decision to

36 Herring, 129 S.Ct. at 700.
38 See, e.g., Restatement (Third) of Torts: Liability for Physical Harm § 3 (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”); Model Penal Code § 2.02.
40 Franks v. Delaware, 438 U.S. 154, 165–70 (1978) (enumerating six considerations motivating a rule of “limited scope,” five of which concern the magistrate role – and only
sanction scrutiny of officials’ subjective states of mind in regard to warrant applications was self-consciously exceptional – a departure from the Court’s longstanding preference in Fourth Amendment doctrine as in other areas of criminal procedure. Thus, Franks is an outlier. Reliance upon it for the proposition that the general availability of Fourth Amendment remedies should hinge on assessments of police culpability requires further explanation, which the Court does not provide.

Concededly, the Court has consistently stated that where police do act with culpability exceeding negligence, suppression would be warranted. And, the Herring majority correctly characterized early cases enshrining the exclusionary rule as featuring “flagrant” police misconduct. Yet, as Albert Alschuler has observed, it also failed to note instances of far less egregious police behavior, perhaps not constituting and certainly not exceeding negligence, that have triggered the Court’s Fourth Amendment scrutiny. Indeed, an example arose just months before the Herring decision in Arizona v. Gant, which affirmed suppression of evidence in a case where police had unquestionably relied upon a reasonable, then-prevailing interpretation of the legality of their actions.

Perhaps, however, the tenuous invocation of authority can be overlooked in light of other persuasive reasoning, rooted in principle if not precedent, offered for Herring’s culpability approach. On this score, the
The Court grounded its analysis in the logic of deterrence, which certainly has, at least since *United States v. Calandra*, emerged as the central if not sole justifying principle for the exclusionary rule. 46  *Herring* posited a deceptively simple syllogism: Exclusion may only be justified by a net deterrent effect; mere negligence cannot be “meaningfully deter[red]”; therefore, mere negligence cannot trigger the exclusionary rule. 47  But as Justice Ginsburg noted in her dissent, this bare assertion flies squarely in the face of a host of legal principles – not the least of which is the predominant theory of tort remedies. 48

Finally, as for the particular culpability test that *Herring* announces – “deliberate, reckless, . . . grossly negligent conduct, or in some circumstances recurring or systemic negligence,” all judged objectively49 – the Court could not and does not even purport to borrow or derive the standard from the Fourth Amendment precedents to which it claims fidelity. *Leon* and its progeny do not support “gross negligence” as a floor for actionable Fourth Amendment misconduct, as all involved police action that the Court described as falling short of bare negligence. 50  *Franks* required more, of course, but as argued above its reasoning is highly specific to the warrant context. And in any event, *Franks* says nothing to support or elucidate the notion of “objective” measures of heightened culpability. Neither any reasoning set forth in the precedents to which the Court alludes, nor any discussion that appears in *Herring* provides a clue as to why – or how – courts should operationalize an “objective” assessment of law enforcement culpability.

2. The “Systemic Error” Standard

A second innovation of *Herring*, and a corollary to its culpability focus, was its adoption of an exclusionary rule test expressly aimed at institutional rather than individual misconduct. 51  The Court allowed, in

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47 *Herring*, 129 S.Ct. at 702.
49 Id. at 702.
51 *Herring*, 129 S.Ct. at 703.
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purported deference to its precedents,\textsuperscript{52} that even in the face of apparently blameless action by a law enforcement officer, evidence of “systemic error” or, phrased differently, “systemic negligence,” would justify application of the exclusionary rule.\textsuperscript{53} Beyond incantation of these apparent terms of art, virtually no explanation is provided as to their meaning. Nor, in fact, can the meaning of these phrases be discerned from prior exclusionary rule decisions, since no case prior to \textit{Herring} had held that systemic Fourth Amendment misconduct could provide the basis for a motion to suppress.

This is not to say that systemic rather than individual considerations had been absent from the Court’s prior exclusionary rule decisions. In the context of the deterrence-driven analysis of the exclusionary rule’s application since \textit{Calandra}, the Court had gestured at the potential relevance of evidence that particular institutions were prone to widespread Fourth Amendment transgressions – though never had the Court found such evidence to exist or warrant suppression.\textsuperscript{54} No doubt in light of such statements by the court, criminal defendants moving for suppression clearly have sought since \textit{Leon} to adduce evidence of systemic Fourth Amendment failures.\textsuperscript{55} But no prior decision had held that evidence of departmental policies or other systemic dynamics that undermined the Fourth Amendment might standing alone, and in the absence of individual law enforcement misconduct, justify granting suppression. Nor had any decision suggesting the relevance of such evidence provided guidance as to what quantum of systemic misconduct would be required, or precisely how it would be weighed in the calculus. Against that backdrop, and as others have observed, \textit{Herring}’s own rule, requiring “systemic error” or “systemic negligence,” is far from self-explanatory.\textsuperscript{56}

3. Individuation of Fault

\textsuperscript{52} See id. at 702 (stating that “as laid out in [the Court’s] cases” a showing of “recurring or systemic negligence” will “sometimes” support granting a motion to suppress).

\textsuperscript{53} Id. at 702, 704 (2009).

\textsuperscript{54} See, e.g., Krull, 480 U.S. at 1168 n.8 (1987); Leon, 468 U.S. at 916 (noting absence of evidence that magistrates or judges were “inclined to ignore or subvert” the Fourth Amendment in deciding warrant applications, or that police engaged in magistrate-shopping in the course of obtaining warrants).

\textsuperscript{55} See, e.g., Herring, 129 S.Ct. at 708 (Ginsburg, J., dissenting) (discussing deficiencies in Dale County warrant procedures); Evans, 514 U.S. at 15 (discussing suppression hearing testimony concerning court clerk’s practices).

\textsuperscript{56} See LaFave, supra note 4, at 784 (referring to the term “systemic negligence” in the \textit{Herring} opinion as “a term never before used by the Supreme Court’); Alschuler, supra note 4, at 488—89 (asserting generally that “no decision prior to \textit{Herring} . . . had suggested or implied that the exclusionary rule should be limited in the way the Court proposed”).
A third doctrinal move of significance in the *Herring* opinion is the Court’s individuation of the relevant law enforcement actors to separately parse the fault. By the majority’s lights, this approach was dictated by *Leon*’s directive that assessment of “police” behavior underlying a Fourth Amendment violation must examine the actions of “all” officers involved in a search or seizure transaction – both those immediately involved in the conduct leading to the illegal arrest or search, and others whose conduct led to but did not immediately precipitate the constitutional violation.\(^57\)

The majority’s purported reliance on *Leon* to support this move is nothing short of revisionist. The import of *Leon*’s “admonition” concerning the scope of inquiry into police culpability was clearly the opposite of the meaning attached to it by the *Herring* Court. *Leon* cautioned in dicta that the opinion should not be read to preclude suppression where, for example, one police officer uses a “bare bones” affidavit to obtain a warrant, which is later executed in good faith but in violation of the Fourth Amendment by a different officer. In other words, *Leon* suggested that culpable conduct by one law enforcement official is imputable to the entire “team” for purposes of the exclusionary rule.\(^58\) The implication in *Herring* would arguably be that the negligence of Dale County must be the focus of the analysis – not the good faith of Coffee County personnel. But *Herring* deployed *Leon* to precisely the opposite end: Examination of “all” police conduct permitted the conceded good faith of Coffee County to cleanse Dale County’s negligence. Whatever the potential sense of that approach, it surely is not what the Court’s “longstanding precedents” dictate.\(^59\)


\(^58\) That this was the thrust of the *Leon* Court’s view is further supported by its citation to *Whitely v. Warden*, *Leon*, 468 U.S. at 923 n.24., which emphasized that while “police officers called upon to aid other officers in executing arrest warrants are entitled to assume” that their colleagues acted reasonably with regard to obtaining a warrant, “an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.” 401 U.S. 560, 568 (1971).

\(^59\) A curious feature of the Court’s distortion of this facet of *Leon* is the apparent lack of payoff for its slight of hand. Because of the rule ultimately invoked by the Court – that suppression requires a culpability showing that exceeds negligence – the issue of Coffee County’s good faith is moot: Dale County’s negligence, even if imputed to its neighbor, could not justify suppression. Why, then, play fast and loose with *Leon* to such little effect? One answer may lie in the “systemic error” prong of the Court’s new standard, and the Court’s desire to rebut any suggestion that such conduct was discernable in *Herring*’s case. If the reasonableness of Coffee County’s conduct was beyond dispute, Dale County’s foul-ups were arguably “isolated.” See *Herring*, 129 S.Ct. at 702. The Court’s views on individuation of fault may also, however, carry implications for interpreting *Herring*’s broader impact on exclusionary rule doctrine, as discussed in Part III.A., *supra*. 
4. Another View: Is *Herring* a Much Smaller Fish?

In response to the preceding assessment, one might lodge an allegation of overstatement. *Herring* might best be read as a far more limited decision, yet another piecemeal curtailment, rather than far-reaching revision, of the exclusionary rule. For example, the decision might spell the end of the exclusionary rule only in the context of “technical,” or perhaps merely “clerical” Fourth Amendment errors by police. This possibility is suggested by the fact-sensitive frame that the Court initially gave to the question posed: “What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?”  

Alternately, the decision might be limited by the Court’s description of *Herring*’s Fourth Amendment violation as “attenuated” from the police errors that led to it. 

As should be clear from the foregoing, this Article takes the view that these are not the most plausible readings of *Herring*, or predictions of its likely fallout. First, any reading that embraces the Court’s narrowest language still must grapple with the presence of far broader statements – some of the broadest of which are fairly characterized as the decision’s holding. Indeed, in response to the narrow question posed in its opening paragraph, the Court announces a general rule that admits of no fact-specific limitation: “Our cases establish that . . . . the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest.”

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60 *Herring*, 129 S.Ct. at 698; see also id. at 704 (“[W]hen police mistakes are the result of negligence such as that described here, . . . any marginal deterrence does not ‘pay its way.’”); see Alschuler, supra note 4 (considering and rejecting this view).

61 *Herring*, 129 S.Ct. at 698; see Craig M. Bradley, Two and a Half Cheers for the Court, 45 Trial 48, 49 (Aug. 2009) (characterizing the Court’s discussion of attenuation as “crucial” to *Herring*); Craig M. Bradley, Red *Herring* or the Death of the Exclusionary Rule?, 45 Trial 52, 54 (Apr. 2009) (characterizing *Herring* as only a “minor” “chip out of the exclusionary rule,” because “most illegal searches will not be attenuated from the error that caused them”).

62 Albert Alschuler has made this point in far pithier terms than I could achieve. See Alschuler, supra note 4, at 475 (“The *Herring* Court’s ‘big blast’ statements are consistent with its ‘little blast’ statement. Indeed, they seem to swallow it. A monarch’s decree might announce in its opening paragraph that all bachelors must report for induction. It might explain later that bachelors must report because they are men, and earlier decrees, properly understood, establish that all men must report. The monarch’s mode of expression would be odd, but his decree would seem to leave no room for a subordinate authority to conclude that married men may stay at home.”).

63 *Herring*, 129 S.Ct. at 698.
far-reaching: “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. The error in this case does not rise to that level.” Furthermore, the Court contends that these broadest principles are not new or novel but rather follow inexorably from its precedents since at least Leon, not all of which involved only technical violations of the Fourth Amendment or warrants, or anything arguably characterized as “attenuated” Fourth Amendment violations. Given that the Court claimed to derive its animating principles from cases not even presented as being factually on par with that before it, there is no reason to think that it did not view those principles as fully applicable in future cases not arising from the type of error that sealed Herring’s fate.

As for the work that the Court’s scattered references to “attenuation” may be doing – either to limit or simply clarify the decision’s meaning – closer analysis is required. The Court did indeed characterize the constitutional violation at issue as resulting from “attenuated” negligence – though significantly the three isolated uses of the word do not expound on its significance. This is important, as it appears not to mean what it has in past exclusionary rule cases. Most decisions rejecting exclusionary rule claims on a finding of “attenuation” had involved significant passages of time, or intervening events that had rendered an earlier “but for” cause of the constitutional violation too remote to warrant suppression. More recently, in Hudson v. Michigan, the Court described a second “attenuation” scenario, in which “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” But the majority in Herring could not plausibly have been invoking either of these senses of the word. The causal connection between Dale County’s error and evidence seized from Herring was not broken or remote, since the search was conducted incident to an arrest that was directly triggered by Dale County’s ongoing failure to detect the flaw in its warrant tracking system, and its personnel’s erroneous reporting of the warrant status. And, in contrast to the connection between the knock-and-announce rule and the recovery of evidence that Hudson considered, it

[^64]: Id. at 702.
[^67]: See Hudson, 547 U.S. at 593.
seems clear that the warrant requirement protects precisely the privacy and possessory interests that were violated by the arrest and search of Herring. 68

“Attenuat[ion]” in the sense used by Herring could simply reference the fact that Herring was not arrested by the same police who were purportedly responsible for causing the constitutional error. This, however, would be a new use of the term in the Court’s exclusionary rule cases. And if this is the meaning intended it would indeed signal an important shift in conceptualization of the rule. Attaching significance to the role of multiple law enforcement actors in furthering an otherwise continuous chain of events leading to a Fourth Amendment violation suggests a view of suppression as a penalty directed against individual criminal justice actors, rather than assessed “against” the criminal justice system as a whole – an understanding that runs counter to prior exclusionary rule decisions, as well as the general approach to criminal procedure remedies. 69 Moreover, if the Court did intend to rest its holding on this new understanding of the term, it never grappled with the fact that the prosecution was ultimately brought (and the costs of suppression most immediately faced) by neither Dale nor Coffee County but by the United States. More significant “attenuation” surely flows from this gap between prosecuting authorities bearing the immediate loss of suppression, and investigating authorities responsible for the Fourth Amendment violation, but that dynamic is not even noted in the opinion. Perhaps most importantly, however, the culpability standard ultimately enunciated by the Court renders this sense of “attenuation” irrelevant to the case’s outcome: By all accounts, Dale County’s actions were no more than negligent, and Coffee County’s were entirely non-culpable, and hence regardless of the jurisdictional “attenuation” of the Fourth Amendment error suppression would not be warranted. Thus, whatever meaning the Court might have attached to the word, any argument that it cabins the reach of Herring’s holding appears tenuous.

Finally, predictions that Herring’s bark will exceed its bite are rendered all the more implausible when the Court’s exclusionary rule doctrine is understood, as this Article argues it must be, as having extensively borrowed from, indeed converged with, constitutional tort jurisprudence. These are the critical forces that powered the Court to its analysis in Herring, and that will shape the decision’s prospective effect on

68 Indeed, even the Hudson Court viewed cases concerning “the fruits of unlawful warrantless searches” as squarely presenting unattenuated Fourth Amendment error. Id. at 593.
69 See infra note 262 and accompanying text.
II.

BORROWING AND CONVERGENCE IN EXCLUSIONARY RULE DOCTRINE

The Court’s 1984 decision in *United States v. Leon*\(^70\) was at once a watershed and a yawn in the annals of exclusionary rule jurisprudence. In announcing a “good faith exception” that denied the remedy of suppression to criminal defendants whose Fourth Amendment rights were violated by the “reasonable” execution of warrants that lacked probable cause, the decision expanded the twenty-year retreat from *Mapp v. Ohio*\(^71\) into an arena previously treated as the exclusionary rule’s core and rightful home: the criminal trial.\(^72\) And yet, the decision was in a strong sense anticlimactic. Members of the Court had flirted for years with some form of a good faith limitation on the rule,\(^73\) and had nearly made its move the previous Term in *Illinois v. Gates*.\(^74\) But *Leon*’s most consequential aspect might have been one least noticed by commentators,\(^75\) and only subtly marked by the Court itself. The decision’s express borrowing from constitutional tort jurisprudence caselaw to define the parameters of the good faith exception that it announced would significantly shape the trajectory of exclusionary rule doctrine in the subsequent decades – culminating most fully and recently in *Herring*.

This Part begins with an account of the road from *Mapp* to *Leon*, with the aim of placing the well-known story of the exclusionary rule’s progressive curtailment in a particular historical and strategic light. In particular, the narrative probes the historical, jurisprudential, and strategic circumstances that coalesced to prompt *Leon*’s borrowing and sustain that

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\(^72\) See, e.g., *Stone v. Powell*, 428 U.S. 465, 493 (1976) (affirming that exclusionary rule applied in criminal trials and on direct review, while rejecting rule as premise for habeas claim).


\(^74\) *Illinois v. Gates*, 462 U.S. 213, 216 (1983) (noting that the Court ordered reargument to explore adoption of a good faith exception to the exclusionary rule, but opted not to rule on that ground).

\(^75\) See supra note 13.
move’s doctrinal impact. It then examines the longer-term consequences of borrowing – most importantly, the trajectory of convergence with constitutional tort doctrine more broadly that the exclusionary rule has followed since *Leon*.

A. Prelude to the Good Faith Exception

*Mapp v. Ohio*, decided in 1961,\(^76\) was one of the earliest shots fired in the “criminal procedure revolution” of the Warren Court.\(^77\) Overruling its decision just twelve years earlier in *Wolf v. Colorado*,\(^78\) the Court held as a matter of federal law that evidence seized by police in violation of the Fourth Amendment may not be introduced in a state prosecution.\(^79\) The Court took this bold step on unstable ground: The petitioner had not sought reconsideration of *Wolf*, the holding contravened the practice of half the states, and the bare plurality opinion could not muster a single unifying rationale for its holding.\(^80\) This combination of a sweeping federal reversal of widespread state practice, a fractured Court majority for an opinion lacking a clear legal basis, and the appearance that the Court was “reaching out”\(^81\) to decide an issue not ripe for its resolution created the perfect storm for a backlash that only increased in potency as the Warren Court’s criminal procedure revolution progressed through the 1960s.\(^82\)

The political momentum generated by the confluence of those reactions with the general tumult of the 1960s paved the way for President Richard Nixon’s concerted campaign in the late 60’s and early 70’s to halt or reverse the Court’s criminal procedure trajectory through judicial

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\(^76\) 367 U.S. 643 (1961).


\(^79\) *Mapp*, 367 U.S. at 655.

\(^80\) See id. at 674, 680 (Harlan, J., dissenting); Henry Monaghan, *Constitutional Common Law*, 81 Harv. L. Rev. 1, 28 n.145 (1975) (characterizing *Mapp*’s posture toward the states not as seeking consonance with an emerging trend, but as “enforc[ing] the exclusionary rule” “[w]hen a significant number of states . . . refused to act”).

\(^81\) Id. at 674 (Harlan, J., dissenting).

\(^82\) See, e.g., Thomas Y. Davies, *An Account of Mapp v. Ohio That Misses the Larger Exclusionary Rule Story*, 4 Ohio St. J. Crim. L. 619, 631—32 (2007) (recounting that *Mapp* combined with other forces to “scare and incite” the public, and coalesce over time with a broader backlash against the Warren Court’s criminal procedure and civil rights agenda).
appointments – most importantly, that of Warren Burger to succeed Earl Warren as chief justice.\textsuperscript{83} Burger came to the Court with a well-known record of hostility toward the exclusionary rule,\textsuperscript{84} and over the course of his tenure pursued an agenda directed toward its curtailment.\textsuperscript{85}

The Chief Justice wasted no time in staking out a clear position of retrenchment, seizing upon his dissent in \textit{Bivens v. Six Unknown Federal Agents}\textsuperscript{86} to outline the terms of a systematic offensive against “a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment.”\textsuperscript{87} The exclusionary rule, Burger asserted, rested solely and exclusively upon the goal of deterring police misconduct.\textsuperscript{88} At the same time, however, Burger declared this rationale to be empirically unsupported, and he exhorted the Court to cease “continuing

\textsuperscript{83} See, e.g., Richard Nixon, RN: The Memoirs of Richard Nixon 419-20 (1978) (attributing attraction to Warren Burger as candidate for chief justice to 1967 U.S. News and World Report article feature comments by Burger hostile to Warren Court criminal procedure decisions); Davies, supra note 84, at 632—33  (recounting importance of opposition to exclusionary rule in Nixon judicial appointments strategy); Powe, supra note 77, at 482—83 (describing Burger’s status as one of the most “prominent critic[s] of the Warren Court . . . in the judiciary” and his writings on criminal justice as central to Nixon’s appointment reasoning).

\textsuperscript{84} See generally Warren Burger, Who Will Watch the Watchmen?, 14 Am. U. L. Rev. 1 (1964); see also Bob Woodward & Scott Armstrong, The Brethren 429 (1979) (describing Burger’s record of opposition to the exclusionary rule as an appeals court judge prior to elevation to the Court).

\textsuperscript{85} See, e.g., id. (discussing Burger’s “search[] for cases that would provide an occasion for striking down or drastically modifying the exclusionary rule’’); Conference Notes of Justices Brennan and Douglas, \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}, 403 U.S. 388 (1971), \textit{in} The Supreme Court in Conference (1940 – 1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 487 (2001) (Del Dickerson, ed.) [hereinafter Supreme Court in Conference] (recounting Chief Justice Burger as stating at conference that \textit{Bivens} provides “a good first step toward abolishing the exclusionary rule”).

\textsuperscript{86} It was particularly notable that the Chief expressed these views in \textit{Bivens}, a constitutional tort case that did not raise or directly implicate criminal Fourth Amendment remedies in any way. The opinion not only shows the concerted nature of his efforts but also presages the confluence of criminal and civil Fourth Amendment thinking that was to characterize the exclusionary rule’s evolution.


\textsuperscript{88} \textit{Bivens}, 403 U.S. at 413—15 (Burger, C.J., dissenting) (asserting that “the exclusionary rule has rested on the deterrent rationale” and rejecting competing rationales).
to enforce the suppression doctrine inflexibly, rigidly, and mechanically.”

Presciently, Burger gestured toward the possibility of modifying the rule along lines that would permit its application to differentiate between “honest mistakes” and “deliberate and flagrant . . . violations of the Fourth Amendment.”

Four years later, in *Calandra v. United States*, Burger solidified a majority behind the major premises of his *Bivens* salvo. While the narrow holding of the case was that the exclusionary rule was unavailable in grand jury proceedings to suppress testimony premised on illegally seized evidence, the decision broadly sketched a more fundamental reassessment of the remedy’s contours and rationale. Critically, the exclusionary rule was not to be conceived as a “right of the party aggrieved,” as *Mapp* had suggested in advancing a constitutional basis for imposition of the remedy. Rather, the rule dwelt in the realm of mere “remedial device[s],” application of which would be “restricted to those areas where its remedial objectives are most efficaciously served.” These “objectives,” the majority announced, were primarily rooted in deterrence of Fourth Amendment violations. And determination of the rule’s “efficacy[y]” would be evidence-based and data driven: The benefits of applying the rule in any given context must demonstrably exceed its costs. Noting the absence of “relevant empirical statistics,” the Court adjudged “[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings” to be “uncertain at best” – hence application of the remedy was unjustified.

*Calandra* thus ushered in an exclusionary rule jurisprudence fixated on empirical measurement – or alleged lack thereof – of the remedy’s value. Researchers rose to the challenge, producing numerous empirical studies to fill the void cited by the Court, but few clear conclusions about the remedy’s net benefit emerged. Initial studies that seemed to suggest minimal deterrent effects from the exclusionary rule and significant costs in terms of lost charges or convictions, were in due course answered with further empirical studies appearing to bear out opposite conclusions.

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89 Id. at 416.
90 Id. at 418 (Burger, C.J., dissenting).
92 Id. at 348
94 Id.
95 Id. at 348 n.5.
96 Id. at 349.
97 See United States v. Janis, 428 U.S. 433, 452 n.22 (1976) (collecting more than a
Data, it seemed, would not provide the empirical clarity that *Calandra* sought.

The stalemate in the emerging research on the exclusionary rule was reflected in the Court’s increasingly hedged and uncertain deployment of deterrence-driven cost-benefit framework for piecemeal contraction of the exclusionary rule’s scope. In one sense, the deck was stacked against the rule even in the face of ambivalent data, by *Calandra*’s demand that the suppression’s benefits be both concretely shown and demonstrably greater than their costs. But at the same time, as the Court was repeatedly presented with competing empirical claims concerning the rule’s impact on the criminal justice system, and faced with its own limited capacity (and motivation) to meaningfully assess that contest, *Calandra*’s approach placed it in the awkward position of offering increasingly inadequate explanations for the ambiguous data before it. In *United States v. Janis*, decided just two years after *Calandra*, the Court acknowledged the reams of empirical and theoretical exclusionary rule assessments that had been produced since *Mapp*. Yet it asserted curiously that it was “in no better position” than it had been prior to *Mapp* when it asserted that it lacked sufficient data to “positively . . . demonstrate[] that enforcement of the criminal law is either more or less effective under” the exclusionary remedy. That same term, in *Stone v. Powell*, the Court faced the question of whether state prisoners could obtain federal habeas review of Fourth Amendment suppression motions, and said once again that “[t]he answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.”

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98 See *Calandra*, 414 U.S. 338, 352 (1974). Moreover, *Calandra* suggested that far more “speculative” insights would be tolerated in the Court’s calculation of the exclusionary rule’s costs. See id. at 349 (1974); see also Schneckloth v. Bustamonte, 412 U.S. 218, 267—68 & n.26 (1973) (Powell, J., concurring) (noting, together with the Chief Justice and then-Justice Rehnquist, empirical research refuting deterrence rationale for the exclusionary rule, and asserting without empirical data that “[w]hatever the rule's merits on an initial trial and appeal . . . the case for collateral application of the rule is an anemic one”).


100 Id. at 453 (quoting *United States v. Elkins*, 428 U.S. 433, 453 (1960)).

Court again asserted an “absence of supportive empirical evidence” respecting the exclusionary rule’s deterrent benefits, but in the next breath conceded that a “sharp debate” of views born out in competing research had rendered the empirical deterrence debate “inconclusive.” Ultimately, the Court resorted to what was concededly, and embarrassingly, its own “assum[ption]” about the potential for deterrence through suppression at criminal trials, and the lack of marginal deterrent benefit generated by the threat of a lost conviction on habeas.

Ironically, the logical strictures of the deterrence and cost-benefit frameworks themselves combined with the inconclusive nature of the available empirical data to trap the exclusionary rule’s detractors in something of a dilemma. As framed by Burger’s Bivens dissent and the majority in Calandra, the rule’s principle defects were the speculative nature of its capacity to enforce Fourth Amendment compliance, paired with its questionable historical/doctrinal legitimacy. Interposed against this was the objective and determinate rhetoric of empirics and cost-benefit analysis. And yet, the available “hard” facts presented an equally unstable foundation upon which to erect its transformation. Thus, any effort by opponents of the exclusionary rule to gain a superior claim to legitimacy through premises less speculative than those advanced by the exclusionary rule’s defenders appeared futile. This likely contributed to the piecemeal, death-by-a-thousand-paper-cuts trajectory of the rule in the decade between Calandra and Leon. But this approach was broadly dissatisfying, and in particular the increasingly and openly tenuous cost-benefit analysis that the Court’s decisions deployed generated criticism from multiple fronts for its unprincipled and disingenuous tenor.

102 Id. at 492.
103 Id. at 492 n.32.
104 Id. at 492 (1976); see also California v. Minjares, 443 U.S. 916, 926 (1979) (Rehnquist, J., dissenting from denial of application for stay).
107 See, e.g., United States v. Peltier, 422 U.S. 531, 560 (1975) (Brennan, J., dissenting) (“If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no opportunity afforded parties most concerned to be heard . . . clearly demeans the adjudicatory function, and the institutional integrity of this Court.”); Philip Halpern, Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell, 82 Colum. L. Rev. 1, 12—15 (1982) (criticizing
B. Good Faith in Two Contexts

It is against the backdrop of this dilemma that the “good faith exception” emerged as a principle of limitation upon the exclusionary rule. In legal, academic, and policy circles that were attentive to criminal procedure debates, the general notion of cabining the rule to more culpable or egregious Fourth Amendment violations had been in play even since the Warren Court era, but attracted significantly greater attention after Burger’s installment as chief justice. With the election of Ronald Reagan, rumblings over the good faith exception coalesced into a full campaign. In 1981, Attorney General William French’s Task Force on Violent Crime published recommendations for a comprehensive strategy to implement Reagan’s tough-on-crime election promises. As part of that strategy, the Task Force urged that the exclusionary rule be reformed to remove from its ambit “evidence . . . obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution,” and that this position be advanced by Department of Justice lawyers in future criminal litigation. That same year, Congress entered the fray to consider legislative amendment of the federal exclusionary rule, with the leading proposal essentially adopting the formulation urged by the Attorney General’s Task Force.

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108 Judge Henry Friendly was perhaps the most prominent early spokesperson for the concept, writing in 1965 that the deterrent aims of the exclusionary rule would be adequately served “if the police were denied the fruit of activity intentionally or flagrantly illegal – where there was no reasonable cause to believe there was reasonable cause.” Henry Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929, 251—52 (1965). The Fifth Circuit was the first federal court to formally adopt a “good faith exception” to the exclusionary rule in United States v. Williams, 622 F.3d 830, 847 (5th Cir. 1980) (en banc). Several states and lower federal courts followed suit. See, e.g., United States v. Nolan, 530 F. Supp. 386, 396—400 (W.D. Pa. 1981); United States v. Wyler, 502 F. Sup. 969, 973—74 (S.D.N.Y. 1980); State v. Mincey, 130 Ariz. 389, 402 (1981); Holloman v. Commonwealth, 221 Va. 947, 950 (1981); People v. Adams, 53 N.Y.2d 1, 9—11 (1981); People v. Eichelberger, 620 P.2d 1067, 1071 n.2 (Colo. 1980) (en banc); see also Ariz. Rev. Stat. Ann. § 13-3925 (1982); Colo. Rev. Stat. § 16-3-308 (1982).

109 U.S. Dept. of Justice, Attorney General’s Task Force on Violent Crime, Final Report, at 55 (Aug. 17, 1981) (“We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both.”).

110 See The Exclusionary Rule Bills, Hearings Before the Subcommittee of the Committee on the Judiciary, United States Senate, 97th Congress, Serial No. J-97-41, at 9, 206, 281, 610 (reflecting endorsement of Attorney General’s formulation of good faith exception by, among others, state attorneys general and police and district attorney
On the Court, support for adopting some variant of the good faith exception emerged a full decade before Leon, with at least three justices publicly pushing for its adoption, and more expressing privately their amenability to some form of limitation on the exclusionary rule’s scope. Justice White, who would eventually author the opinion in Leon, offered the most full-throated early view on the matter in Stone v. Powell. Dissenting from the Court’s denial of a cause of action in federal habeas for already-litigated Fourth Amendment claims, Justice White nevertheless was “constrained to say . . . that [he] would join four or more other Justices in substantially limiting the reach of the exclusionary rule as presently administered under the Fourth Amendment in federal and state criminal trials.” Specifically, Justice White would abandon a formulation of the rule that would apply “where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief.”

During this time period, the question of “good faith” limitations on constitutional remedies was likewise percolating in another area of the Court’s docket: constitutional tort litigation. The concept of a good faith defense to a civil suit for violations of constitutional rights had been a feature of constitutional tort jurisprudence practically since the Warren Court breathed new life into federal civil rights litigation in Monroe v. Pape. The decision interpreted 42 U.S.C. § 1983 to permit private plaintiffs to sue state and local officials who violated federal constitutional or statutory rights while “‘clothed with authority of state law.’” Given the sweep of the text of Section 1983 – creating liability for “[e]very” official associations).

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111 See Brown v. Illinois, 422 U.S. 590, 606—16 (1975) (Powell, J., concurring in part); Stone v. Powell, 428 U.S. 465, 496—502 (Burger, C.J., concurring); id. at 538 (White, J., dissenting); see also Peltier v. United States, 422 U.S. 531, 537—39 (1975) (asserting, for five justices in context of whether the Fourth Amendment may be applied retroactively, that “‘[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct . . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.’” (quoting Michigan v. Tucker, 417 U.S. 433, 446 (1974))).

112 See Conference Notes of Justice Brennan, in Supreme Court in Conference, supra note 85, at 487 (indicating that Justice Blackmun was open to restricting exclusion to instances of “blatant disregard of the rules,” and that Justice Marshall was “receptive to a limitation of the exclusionary rule”).


114 Id. at 538 (White, J., dissenting).

115 Monroe v. Pape, 365 U.S. 167, 184, 187 (1960) (quoting United States v. Classic, 313 U.S. 299, 325—26 (1941), and “conclud[ing] that the meaning given ‘under color of law’ in the Classic case . . . was the correct one”).
who “subjects or causes to be subjected” any person within the United States to a deprivation of federal rights\textsuperscript{116} – and given the Warren Court’s concurrent project of substantially expanding substantive constitutional and statutory rights, the effect of \textit{Monroe} was potentially dramatic. Federal courts saw significant increases in case filings under Section 1983 following \textit{Monroe} – a phenomenon that attracted the notice of legal and political forces that perceived the remedial expansion as placing a significant, and perhaps unwarranted, burden on the federal courts.\textsuperscript{117}

Against that backdrop of controversial federal litigation activity, the Warren Court’s own authorization of a potentially expansive field of judge-made defenses to Section 1983 is perhaps unsurprising.\textsuperscript{118} With unanimous support, Chief Justice Warren wrote for the Court in \textit{Pierson v. Ray} that police officials sued by civil rights protestors for unconstitutional arrest were “excus[ed] . . . from liability for acting under a statute that [they] reasonably believed to be valid but that was later held unconstitutional on its face or as applied.”\textsuperscript{119} The holding was rooted in the history of common law search and seizure actions, which according to the Court extended a defense to arresting officers who acted with probable cause and in good faith reliance on existing law. Section 1983 had not abrogated common law immunities, and the plaintiffs’ Fourth Amendment action was therefore

\textsuperscript{116} 42 U.S.C. §1983.

\textsuperscript{117} See Butz v. Economou, 438 U.S. 478, 526—27 (1978) (Rehnquist, J., concurring in part and dissenting in part) (noting that “[t]he steady increase in litigation, much of it directed against governmental officials and virtually all of which could be framed in constitutional terms, cannot escape the notice of even the most casual observer,” and that this threat of litigation may deter officials from taking socially desirable action); Aldisert, Judicial Expression of Federal Jurisdiction: A Federal Judge’s Thoughts on Section 1983, Comity & Federal Caseload, 1973 Law & Soc. Ord. 557, 563 (calling post-\textit{Monroe} filings a “deluge” and noting 110% rise in cases brought under the statute between 1960 and 1970); Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. Senate, 95th Congr., 2d Sess., on the Civil Rights Improvement Act of 1977, at 1 (Feb. 8, 1978) (Opening Statement of Hon. Birch Bayh) (attributing “congested court calendars and unacceptable delays in the adjudication of important cases” to growth of federal law and increase of federal case filings, particularly under Section 1983).

\textsuperscript{118} Others have observed that the rights “retrenchment” that is often attributed to the post-Warren era actually began before its close. See, e.g., Yale Kamisar, The Warren Court (Was It Really So Defense Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices, in The Burger Court: The Counter-Revolution that Wasn’t 62 (Vincent Blasi ed., 1983); Carol Steiker, Counter-Revolution in Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2495—2503 (1996).

subject to the immunity defenses it would have faced if brought as an ordinary tort action. But the “good faith defense” would not long remain tethered to the common law analogy that birthed it. Quickly, the Court moved from authorizing a limited defense of “good faith and probable cause” for the police, to a broader notion of qualified immunity for a variety of government officials sued for an array of unconstitutional action. At the same time, the good faith defense was transformed from a putative descendent of the common law to an unabashedly policy-driven doctrine.

In *Scheuer v. Rhodes*, the Court, again unanimous, extended qualified immunity to a variety of state executive officials sued under Section 1983 for alleged substantive due process violations in connection with the Kent State shootings. Notwithstanding the lack of any connection between the various defendants or the constitutional claims to any search and seizure lineage, the scope of such immunity was essentially identical to the parameters drawn in *Pierson*: “[R]easonable grounds” for believing that official action was legally undertaken, “coupled with good-faith belief . . . affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.” The Court’s opinion divined in the law a twin concern for “the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion,” and “the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.” That latter consideration, the Court asserted, had been the primary “policy condition . . . pervade[ing] the analysis” of immunity in American law - a consideration the Court found amply applicable to the defendants in *Scheuer* – and, the Court suggested, to executive officials more generally. Subsequent decisions affirmed the twin rationales of optimal deterrence and fairness to extend the good faith defense in a variety

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120 As others have noted, however, the Court’s historical account may be tenuous. See, e.g., Alschuler, supra note 4, at 503—06; Yale Kamisar, *Gates*, “Probable Cause,” “Good Faith,” and Beyond, 69 Iowa L. Rev. 551, 596 (1984); Ann Woolhander, Patterns of Immunity, 37 Case W. Res. L. Rev. 396, 413 (1987).
122 Id.
123 Id.
124 Id. at 241 (“[O]ne policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public.”).
125 Id. at 241–42 (asserting as to “[p]ublic officials, whether governors, mayors or police, legislators or judges,” that such officials “may err,” but “[t]he concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all”).
of claims against a range of government officials, with little dissent and effectively no suggestion of any common law analog. Qualified immunity would soon come to protect from suit any state official “if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate . . . constitutional rights . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights.”

The good faith defense proved to be a significant hurdle for civil rights plaintiffs, notwithstanding the lack of controversy that its expansion generated within even the Court’s liberal wing. For some, however, the bar was not high enough. From the standpoint of its critics the deficiency of the good faith defense lay in its “subjective” prong, which denied the shield of immunity to officials who had acted with ill motive, regardless of the objective reasonableness of their actions under the law at that time. While subjective intent is notoriously difficult to prove, and hence in all likelihood was rarely a boon for civil rights plaintiffs, those who feared excessive civil rights litigation and recovery pointed to the ease with which it could be pled: Bare allegations of malice subjected public officials to, at the very least, extensive merits litigation through the summary judgment

126 See Procunier v. Navarette, 434 U.S. 535, 562—66 (1978); (extending qualified immunity to prison officials); O’Connor v. Donaldson, 422 U.S. 573, 577 (1975) (extending qualified immunity to state mental hospital superintendent); Wood v. Strickland, 420 U.S. 308, 318—20 (1976) (extending qualified immunity to school officials); see also Procunier, 434 U.S. at 568 (Stevens, J., dissenting) (asserting that Procunier, “coupled with O’Connor v. Donaldson, strongly implies that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability,” and dissenting as to application of the Court’s standard but expressing “no quarrel with the extension of a qualified immunity defense to all state agents” (internal citation omitted)). In Butz v. Economou, the Court held that identical immunity principles apply in both Section 1983 as well as Bivens actions against federal officers. Butz v. Economou, 438 U.S. 478, 497 (1978).

127 Wood, 420 U.S. at 322 (emphasis added).

128 Peter Schuck, whose seminal theoretical explication of qualified immunity would be cited by the Court in Harlow, was among those who expressed concern that the doctrine operated to defeat legitimate claims and “reduce [an official’s] willingness to pursue the objectives that his agency is required to advance,” Peter H. Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281, 287—88 (1980); see also Jon O. Newman, 87 Yale L.J. 447, 459—62 (1978) (describing hurdle of good faith defense).

129 Wood, 420 U.S. at 321 (holding that the qualified immunity standard “contains elements of both” a subjective and objective test).

130 See, e.g., Schuck, supra note 128, at 328 (“In practice, subjective bad faith or improper motivation is infrequently found. The availability of the immunity ordinarily turns on an assessment of the objective circumstances in which the disputed action was taken . . . .”).
stage of a suit. Regardless of whether a plaintiff ultimately prevailed at trial, even the preliminary burdens of litigation generated by the discovery-intensive nature of motive-based claims were thought to generate the very ill effects at which Pierson had aimed.

Anxiety about the inadequacy of a subjective good faith test ultimately moved the Court to action in Harlow v. Fitzgerald. Unanimously and without argument or briefing on the issue, the Court in Harlow refashioned the good faith defense to eliminate its subjective prong and “defin[e] the limits of immunity in essentially objective terms,” shielding government officials from civil liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” By precluding inquiry into the subjective motivations of government officials, the Court aimed to facilitate “the dismissal of insubstantial lawsuits without a trial,” and hence protect the oft-repeated aims of the good faith defense: protection of officials’ impetus to energetically act within their full range of discretion,

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131 See, e.g., Halperin v. Kissinger, 606 F.2d 1192, 307 (D.C. Cir. 1979) (Gesell, J., concurring) (describing burden of answering suit and participating in discovery, given that “[i]t is not difficult for ingenious plaintiff’s counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker’s mental processes are involved”); Schuck, supra note 128, at 326—27, 330 (“[T]he qualified ‘good-faith’ immunity standard, far from assuring an official that vigorous decision making will be rewarded, is pregnant with risk to him: a rather small risk that he will ultimately be held liable, a somewhat higher risk that the immunity will ultimately be denied, and a substantial risk that a full-dress trial will be necessary to establish its applicability and scope.”).

132 See Halperin, 606 F.2d at 307 (Gesell, J., concurring) (arguing that the burden of litigating subjective motivations has an “obvious” negative “effect” “upon the willingness of individuals to serve their country”); see also Butz v. Economou, 438 U.S. 478, (Rehnquist, J., concurring in part and dissenting in part) (“The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. . . . [T]he fear that inhibits is that of a long, involved lawsuit and a significant money judgment, not the fear of liability for a certain type of claim”).

133 See 457 U.S. 800, 814 n.22, 817 n.29 (1984) (citing work by Peter Schuck and Judge Gesell’s concurrence in Halperin).


135 Id. at 818, 819.
and the shielding of “innocent” officials from frivolous claims.\textsuperscript{136} The new standard called for a court to inquire only into whether that law applicable to the plaintiff’s constitutional claim “was clearly established at the time an action occurred”; if that latter inquiry is answered in the negative, immunity should be extended and the suit dismissed.\textsuperscript{137}

Although the case garnered little notice at the time – no doubt overshadowed by the Court’s grant of absolute immunity to the beleaguered Richard Nixon in a companion decision\textsuperscript{138} – it was to have a significant impact on the viability of constitutional tort actions\textsuperscript{139} and, most relevantly, on the arena of Fourth Amendment litigation in criminal proceedings.

C. Adoption of the Good Faith Exception

1. The Road to \textit{Leon}

During the time period leading up to \textit{Harlow}, both the Court and advocates before it were cognizant of, and exploited, potential synergies between good faith remedial limitations in the civil and criminal realms. Chief Justice Burger’s dissent in \textit{Bivens} had already posited that questions of Fourth Amendment remedial design be examined across the criminal and tort divide.\textsuperscript{140} But other, more explicit parallels were drawn.

Thus, Justice White’s early and influential push for the good faith exception in \textit{Stone} expressly invoked the Court’s line of immunity decisions from \textit{Pierson} to the recent \textit{Wood} and \textit{O’Connor}, and asserted that Fourth Amendment remedies in criminal and tort adjudication should be commensurate.\textsuperscript{141} Critically, White relied on not only the language and authority, but also the rationale, of the Court’s qualified immunity jurisprudence. Following the lead of the petitioner’s brief, White added a twist to the standard cost-benefit argument against the exclusionary rule by invoking, for the first time, the specter of over-deterrence:

\begin{itemize}
  \item \textsuperscript{136} Id. at 815—16.
  \item \textsuperscript{137} Id. at 818.
  \item \textsuperscript{138} See Nixon v. Fitzgerald, 547 U.S. 731 (1982).
  \item \textsuperscript{139} See, e.g., Sheldon H. Nahmod, Constitutional Wrongs Without Remedies: Executive Official Immunity, 62 Wash. U. L.Q. 221, 222 (1985) (“[T]he Court went far towards converting the form of qualified immunity into the substance of absolute immunity.”).
  \item \textsuperscript{141} Stone v. Powell, 428 U.S. 465, 540—42 (1976) (White, dissenting).
\end{itemize}
[W]hen the officer is convinced that he has probable cause to arrest he will very likely make the arrest. . . . Making the arrest in such circumstances is precisely what the community expects the police officer to do. Neither officers nor judges issuing arrest warrants need delay apprehension of the suspect until unquestioned proof against him has accumulated. The officer may be shirking his duty if he does so. . . . [T]he officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.”

Three years later in Michigan v. DeFillippo, the Court was again invited to adopt a good faith exception to the exclusionary rule, this time in the context of an arrest under a subsequently invalidated city ordinance. Arguing that the propriety of “a suppression remedy . . . depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused,” Michigan relied in part on a Fifth Circuit decision that had invoked Pierson v. Ray to deny suppression of evidence illegally seized through reasonable, good faith police conduct. Indeed, the respondent saw the state’s implicit invocation of Pierson as sufficiently significant to offer a specific refutation of the analogy to constitutional tort doctrine in its brief. DeFillippo’s perception of the argument’s potency appeared apt. The Court’s ruling declined to reach the exclusionary rule issue, upholding the conviction instead on substantive Fourth Amendment grounds. But the Chief Justice’s opinion for the majority nevertheless invoked both the fairness and over-deterrence rationales for a good faith tort defense, with express

142 Id. at 538—40 (White, dissenting); see Petitioner’s Brief, Stone v. Powell, 428 U.S. 465 (1976), 1975 WL 173601, at *29—*30 (“The officer’s reasonable reliance upon another branch of the government is not misconduct. Indeed, to the extent that suppression discourages such reliance, the exclusionary rule has a negative impact upon law enforcement and civil liberties.”).
143 See Brief for the Petitioner, Michigan v. DeFillippo, 443 U.S. 31 (1979), 1978 WL 223184, at *14—*16 (Nov. 16, 1978); see also United States v Kilgen, 445 F2d 287, 289—90 (5th Cir. 1971). The court in Kilgen suggested both that arrest based on probable cause under a then-valid statute did not violate the Fourth Amendment, and that such an arrest coupled with “police official[s’] . . . good faith belief in the validity of the statute” did not warrant suppression. Id. It would be nine years before the Fifth Circuit would unequivocally adopt a good faith exception to the exclusionary rule, in United States v. Williams, 622 F.3d 830, 847 (5th Cir. 1980) (en banc)
reliance on Pierson: “A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional”; “[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.”

Despite further urging from litigants, not until Illinois v. Gates would the Court again consider the question of a good faith exception. After initially granting cert and hearing argument on only the question of whether a search warrant based upon an anonymous informant’s tip was supported by probable cause, the Court sua sponte ordered reargument on a new issue: “Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.” Significantly, the Court’s formulation of the good faith issue echoed the objective qualified immunity standard that the Court had arrived at in Harlow v. Fitzgerald just weeks prior to ordering reargument. The unusual request and the specificity of the Court’s question strongly suggested substantial – if not yet majority – support on the Court for moving to a good faith exception for “reasonable” violations of the Fourth Amendment.

The significance of Harlow was not lost on the litigants – including the Solicitor General’s office, which had suggested even in its initial brief that the Court consider the good faith issue. Following the Court’s reargument order the United States relied expressly on Harlow to urge adoption of an “objective reasonableness” standard to assess good faith for purposes of applying the exclusionary rule. Again, yet more

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146 Id. at 39—40 (quoting Pierson v. Ray, 386 U.S. 547, 557 (1967)).
resoundingly than in *Stone*, the parties not only argued within the framework of the *Calandra* deterrence rationale, but advanced the over-deterrence rationale of immunity doctrine.\(^{152}\)

But after placing good faith front and center through its unusual reargument order, the Court conspicuously equivocated, announcing “with apologies to all” that because the issue had not been “pressed or passed upon” by the courts below, it was not properly considered by the Court.\(^{153}\) The rationale was sound enough, but puzzling under the circumstances: Surely the Illinois courts’ lack of consideration of the issue would have been clear enough to the Court before ordering reargument. Whether the shift in position was attributable to a new-found sense of restraint by some justices, or rather to an ability to forge a consensus around the contours of a good faith defense is unclear. Justice White, for his part, nevertheless seized the opportunity in his concurring opinion to again advance his support for a good faith exception drawn explicitly along the lines of qualified immunity – though this time in terms that tracked *Harlow*’s new objective standard.\(^{154}\) Significantly, White’s analysis of the “costs” of applying the exclusionary rule was ever more resonant with qualified immunity analysis. Not only, in White’s view, must the Court be wary of the risk that “[t]he suppression doctrine . . . deter[red] legitimate as well as unlawful police activities” and “hinder[ed] the solution and even the prevention of crime,” and that it “burden[s] . . . the state and federal judicial systems” with motion practice – an invocation of judicial economy resonant

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\(^{153}\) *Gates*, 462 U.S. at 224. *Gates* was instead decided on substantive Fourth Amendment grounds, announcing a “totality of the circumstances” test for evaluating the adequacy of probable cause to support a warrant. Id. at 230.

\(^{154}\) Id. at 266—67 (White, J., concurring).
with the Court’s analysis in Harlow.\textsuperscript{155}

Whatever the reason for the Court’s backpedal in Gates, its eagerness to address the good faith exception was evident when it took up the issue again the very next Term in United States v. Leon.\textsuperscript{156} Considering only the question of remedy for a search conducted pursuant to a warrant unsupported by probable cause,\textsuperscript{157} the Court adopted what amounted to a limited good faith exception, drawn along the objective lines proposed by White in Gates, but cabined within the factual context of the case: “[T]he 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.”\textsuperscript{158} Justice White’s opinion for the Court followed his previous calls for adoption of the doctrine, and the lead of the Government’s briefing,\textsuperscript{159} in relying upon Harlow as the source of its “objective” inquiry into the “reasonableness” of an officer’s reliance on a warrant.\textsuperscript{160}

2. Assessing Borrowing

The Leon Court provided virtually no justification for its resort to a legal doctrine that was not only outside the universe of exclusionary rule precedents, but outside the entire realm of criminal law and criminal procedure remedies. The move seemed conspicuously vulnerable to charges of overreaching and poor analogical correspondence. Principles of legal reasoning and jurisprudential legitimacy counsel that the use of analogy and precedent in judicial decisions be grounded in reasoning that

\textsuperscript{155} Id.; see Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

\textsuperscript{156} 468 U.S. 897 (1984).

\textsuperscript{157} Several commentators have noted, and criticized, Leon’s sidestepping of the underlying Fourth Amendment question to decide the remedial issue. Given that Gates was decided after the Ninth Circuit heard Leon, and given Gates’s loosening of the standard for assessing warrant sufficiency, there was almost certainly in actuality no Fourth Amendment violation to remedy in the case. See, e.g., Silas Wasserstrom & William J. Mertens, The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?, 22 Am. Crim. L. Rev. 85, 97 (1984); Dripps, supra note 108, at 914—15. This only emphasizes the deliberateness with which the Court sought to adopt the good faith exception, only shortly after passing on the question in Gates.

\textsuperscript{158} Leon, 468 U.S. at 922; see also id. at 913 (“[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution’s case in chief.” (emphasis added)).

\textsuperscript{159} Brief for the United States, United States v. Leon, 468 U.S. 897, 1983 WL 482697, at *79 (Sept. 9, 1983).

\textsuperscript{160} Leon, 468 U.S. at 922 & n.23.
by some definition is a “fit” with the matter before the Court.\textsuperscript{161} This imperative is only enhanced when a court draws from outside the immediate doctrinal domain in which a case dwells. Here, the Court had repeatedly stated that the exclusionary rule was not a “personal” remedy, and that its aim was neither recompense nor punishment but deterrence – goals that, like those embodied in most criminal procedure remedies, are fundamentally systemic in their rationale and costs.\textsuperscript{162} Qualified immunity, on the other hand, protected individual officials from the burdens of suit and judgment, the costs of which were (theoretically) borne by them personally, and the fruits of which flowed directly to the victim of the constitutional deprivation.\textsuperscript{163} On its face, the Court’s borrowing seemed inapt. Surprisingly, however, the move generated relatively little notice or criticism, not even in Justice Brennan’s full-throated dissent in \textit{Leon}.\textsuperscript{164}

This lack of controversy generated by the Court’s invocation of \textit{Harlow} is instructive in considering what will constitute adequate fit to support borrowing. There were superficial elements of appeal to the analogy, including perhaps most importantly that it exploited a factual consonance between Fourth Amendment doctrine and the origins of qualified immunity: Recall that the Court’s earliest fashioning of the good faith defense in \textit{Pierson} was premised upon purported common law immunity for “good faith” but erroneous searches and seizures.\textsuperscript{165} Given that \textit{Leon} formally confined the good faith exception it announced to the context of reasonably but erroneously served warrants, it positioned itself to exploit this factual resonance with qualified immunity’s purported common


\textsuperscript{163} See, e.g., Pierson v. Ray, 386 U.S. 547, 555 (1967).

\textsuperscript{164} In academic circles, little notice was paid to this aspect of \textit{Leon}. Prior to the decision, however, both Wayne LaFave and Yale Kamisar had negatively assessed the affinity among advocates of the good faith exception for arguments by analogy to qualified immunity. See Wayne R. LaFave, The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith, 43 U. Pitt. L. Rev. 307, 343—46 (1982); Kamisar, supra note 118, at 590—94.

\textsuperscript{165} See supra note 120 and accompanying text.
law roots, and also suggested that the borrowing it employed could be factually cabined. This lessened the potential doctrinal impact of the above-described problems of theoretical resonance – though of course, as described below, the effect of the Court’s borrowing was not in fact to remain so limited.

Nevertheless, the assertion of problematic theoretical fit should not be overstated. Justice White’s long attraction to the good faith defense analogy, and its eventual triumph in *Leon*, is itself suggestive that at least some members of the Court harbored a conception of the exclusionary rule that was in fact resonant with the individualistic and punitive framework of a civil damages regime. Indeed, some evidence of this strain may be found in prior exclusionary rule opinions reflecting a concern for the exclusionary rule’s *specific* deterrent effect on law enforcement officials, and a disregard of more systemic deterrent concerns. Conversely, constitutional tort doctrine had itself long sought to accommodate what the Court had repeatedly described as twin rationales of compensation and deterrence. While the Court had declared the latter to be effectively subservient to the former – with the deterrent effect of constitutional tort actions flowing as a consequence of the imposition of compensatory damages – it nevertheless remained the case that constitutional tort jurisprudence itself reflected a more explicit concern for systemic, regulatory goals than would be found in ordinary tort law. To foreshadow, the existence of some fertile ground in which to plant the seed for conceiving of the exclusionary rule as a remedy premised upon fault and desert would become significant for the eventual blossoming of the logic of constitutional tort doctrine in exclusionary rule jurisprudence.

In all events, it must be conceded that the jurisprudential warrant for *Leon*’s borrowing was arguable at best – perhaps sufficient to sustain support for a one-time-only resort to analogy, but seemingly inadequate by itself to sustain any lasting foothold for constitutional tort doctrine in the realm of the exclusionary rule. Nevertheless, the Court was strongly

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166 See, e.g., *United States v. Peltier*, 422 U.S. 531, 556—57 (1975) (Brennan, J., dissenting) (criticizing majority for reasoning from “specific deterrence” to limit the exclusionary rule where “general” deterrence was the appropriate framework).

167 See, e.g., *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (“§ 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.”); *Robertson v. Wegmann*, 436 U.S. 584, (Blackmun, J., dissenting) (asserting, with Justices Brennan and White, that “Section 1983’s critical concerns are compensation of the victims of unconstitutional action, and deterrence of like misconduct in the future.”).

motivated and bolstered in its move by significant strategic advantages that it afforded for the agenda of the Court’s exclusionary rule skeptics.

Most immediately, borrowing from the Court’s relatively well-developed qualified immunity jurisprudence enhanced the legitimacy of Leon’s significant modification of the exclusionary rule. Notwithstanding widespread discontent with the rule, the Court had, up to Leon, continued to demarcate the criminal trial as an arena in which Mapp remained sacrosanct. Adoption of the good faith exception therefore worked a significant erosion of Fourth Amendment remedies. This demanded not only explanation, but also reassurance to some members of the majority and the Court’s public audiences that it was not, at least formally, reducing the Fourth Amendment to a merely theoretical protection against government encroachment. The existence of immunity defenses to constitutional tort actions despite a formal commitment to full effectuation of Section 1983’s enforcement scheme offered a well-accepted analog for the exclusionary rule’s decoupling of right from remedy while maintaining a veneer of respect for constitutional commandments. Aligning exclusionary rule analysis with this framework reinforced the appearance of respect for the Fourth Amendment, despite curtailment of a principle enforcement mechanism. Moreover, those limitations were the invention of conservative or revisionist judicial forces, but rather of the Warren Court – the very architect of the exclusionary rule.

Closely related to these advantages of legitimacy were qualities of feasibility that borrowing contributed to the new doctrinal formulation that Leon announced. On this score, notions of doctrinal “fit” converge somewhat with more strategic concerns, and highlight the critical role that Harlow, and its abandonment of the subjective prong of the good faith defense, played in facilitating adoption of the good faith exception.

Among advocates of the good faith exception, one of the most salient points of division was whether the test for invoking the exception would be purely objective, inquiring only whether law enforcement had acted reasonably in light of then-existing law; purely subjective, demanding

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170 Cf. Steiker, supra note 118, at 2466.
171 Leon, 468 U.S. at 924—25 (citing “cases addressing questions of good-faith immunity under 42 U.S.C. § 1983” to counter proposition that “application of a good faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state”).
only that an officer manifest a good faith belief in the legality of her conduct; or a two-pronged standard incorporating both good faith and reasonableness.\textsuperscript{172} Objections to a subjective good faith rule garnered particularly significant traction.\textsuperscript{173} Opponents of a subjective good faith exception argued that barring exclusion whenever law enforcement officials actually believed in the correctness of their conduct would incentivize a lowest-common-denominator in Fourth Amendment compliance – learned incompetence – causing Fourth Amendment principles to be diluted by operation of the cabined remedy.\textsuperscript{174} These arguments were particularly problematic for exclusionary rule opponents who desired both conceptual separation between the exclusionary rule and the Fourth Amendment itself, and to maintain that this theoretical move would not diminish the adequacy of incentives for law enforcement to comply with the Fourth Amendment.\textsuperscript{175} Moreover, the proposition that courts would undertake any subjective inquiry in identifying or remedying rights violations in the realm of criminal adjudication courts ran afoul of strong norms in the arena of criminal procedure. Concern with crowded criminal dockets, the strong societal interest in a criminal trial’s focus remaining upon the guilt or innocence of an accused, and perhaps a professional disinclination on the part of judges to routinely scrutinize the mental states of repeat players in

\textsuperscript{172} See, e.g., United States v. Williams, 622 F.3d 830 (5th Cir. 1980) (en banc) (precluding application of exclusionary rule was “the conduct in question . . . was . . . taken in a reasonable, good-faith belief that it was proper”); Respondent’s Brief on Reargument, Illinois v. Gates, 462 U.S. 213 (1983), 1983 WL 482676, at *11 (Feb. 14, 1983) (“Petitioner and its \textit{amici} disagree as to whether subjective state-of-mind determinations, objective conditions, or both are appropriate standards for judicial application of the proposed “exception” to the exclusionary rule.”); Conference Notes of Justice Brennan, Stone v. Powell, 428 U.S. 465 (1976), \textit{in} The Supreme Court in Conference (1940 – 1985): The Private Discussions Behind Nearly 300 Supreme Court Decisions 489—90 (2001) (Del Dickerson, \textit{ed.}) (describing views of the justices supporting modification of exclusionary rule as ranging from suppression only if “there is a blatant disregard of the rules,” to adoption of “a good faith, objective standard,” to adoption of “an objective test of reasonableness”);.

\textsuperscript{173} Leon, 468 U.S. at 919 n.20 (“Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers.”) (quoting Illinois v. Gates, 462 U.S. 213, 216 n.15 (White, J., concurring in the judgment))).

\textsuperscript{174} See, e.g., Potter Stewart, The Road to\textit{Mapp} and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Colum. L. Rev. 1365, 1400 (1983).

\textsuperscript{175} See, e.g., Leon, 468 U.S. at 924 (“The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect.”); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 412—16 (1971) (Burger, C.J., dissenting) (asserting that limitations on exclusionary rule can coexist with adequate constitutional enforcement).
their courts, have typically discouraged courts from inquiring into the mental states of government officials to adjudicate defensive claims in criminal trials.\footnote{See, e.g., id. at 922 n.33 (“Although . . . [o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule, we believe that sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.” (internal quotations omitted)); Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting) (“[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”); Jennifer E. Laurin, Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure, 110 Colum. L. Rev. 1002, 1022—23 (2010) (describing reasons why criminal procedure standards eschew inquiries into state of mind).}{176}

Harlow’s elimination of the subjective prong of the good faith defense facilitated borrowing by offering a model for a good faith exception that did not exhibit these deficiencies in fit. In so doing, it furthered exclusionary rule instrumentalists’ strategic two-step around the relationship between right and remedy and the adequacy of constitutional enforcement. As Leon observed, the qualified immunity standard borrowed from Harlow “require[d] officers to have a reasonable knowledge of what the law prohibits,” and hence would “‘retain[] the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment.”\footnote{Leon, 468 U.S. at 919 n.20 (quoting Illinois v. Gates, 462 U.S. 213, 261 n.15 (White, J., concurring)).}{177} And in Illinois v. Gates, Justice White would point to qualified immunity litigation as validating the proposition that such limitations on constitutional remedies could co-exist with adequate rights enforcement.\footnote{Gates, 462 U.S. at 265 & n.18 (White, J., concurring).}{178} Thus, borrowing provided both a logical and anecdotal framework for justifying growth of the good faith exception.

Finally, borrowing in Leon may be seen to have set the stage for advancing more enduring strategic aims, by triggering a subtle theoretical shift in the deterrence rationale and thereby providing a way out of the Court’s fraught relationship with empirically driven cost-benefit analyses. To be sure, Leon continued the Court’s tortured attempts to mount a cost-benefit offense against the exclusionary rule, and in fact reached the pinnacle of ambivalence in that endeavor.\footnote{The opinion asserted the existence of “substantial social costs,” chiefly “that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains.” But in the next breath the Court acknowledged that “[m]any . . . researchers}{179}
exclusionary rule decision – in a line extending from Calandra – to engage in these embarrassing data contortions in support of its roll-back of the exclusionary rule. Facilitating the Court’s extrication from the shackles of empirical evidence was its borrowing from Harlow and concomitant adoption of the logic of over-deterrence from qualified immunity jurisprudence, to offer a new variable that would both negate the rule’s purported benefit and demonstrate its cost.\textsuperscript{180} Justice White wrote for the Court that exclusion of evidence following a police officer’s “reasonable” albeit illegal action would “not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.”\textsuperscript{181} In other words, the “good faith exception” embodied a zone of police behavior that not only was undeterrable, but that society should take care not to deter; notwithstanding its unconstitutional consequences, the conduct was in fact socially desirable. The assertion of course echoed a primary rationale for the good faith defense in constitutional tort actions – expressed in Harlow as a concern for “the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”\textsuperscript{182} Critically, all members of the Court had long accepted, in the civil context, the notion that inducing public officials to “err on the side of caution”\textsuperscript{183} was a true social cost of constitutional remedies – despite the absence of empirical interrogation or substantiation of the proposition.\textsuperscript{184} This logic thus permitted proponents of the good faith exception to rest upon an empirically unassailable, though untested, device for clearing both sides of

\begin{footnotesize}
\begin{enumerate}
\item[180] See supra Part II.C.1 (discussing over-deterrence principle as animating qualified immunity jurisprudence).
\item[184] See supra notes 119—127 and accompanying text. Peter Schuck offered the seminal theoretical analysis of the over-deterrence risk, in work cited by the Court on this score. See generally Schuck, supra note 128; see also Davis v. Scherer, 468 U.S. 183, 196 (1984) (citing Schuck); Harlow, 457 U.S. at 814 n.22.
\end{enumerate}
\end{footnotesize}
its cost-benefit balance sheet.\textsuperscript{185} The Court would repeatedly invoke this over-deterrence principle in subsequent decisions expanding the good faith exception and otherwise limiting the exclusionary rule.\textsuperscript{186}

Thus, in borrowing both the language and the theoretical underpinnings of qualified immunity, the Court in \textit{Leon} shored up its flagging deterrence analysis for the benefit of the exclusionary rule’s detractors. Going forward, the ambiguity of the existing and emerging empirical research on deterrence would only work against application of the rule, by adding a heads-I-win-tails-you-lose dimension to cost-benefit analysis: The Court posited that the exclusionary rule generated zero deterrence in the case of objectively reasonable missteps; but if it did in fact deter, this was now to be understood as an undesirable \textit{cost} of the rule.\textsuperscript{187}

3. Identifying Convergence

The trajectory of the Court’s exclusionary rule doctrine following \textit{Leon} reveals an even more significant characteristic of borrowing: a tendency to progressively blur the boundaries between the source and target, sparking further borrowing and moving the target doctrine toward a point of convergence with the source. In this sense, borrowing possesses hydraulic properties, which under suitable conditions may be activated to generate far-reaching doctrinal transformation.

In \textit{Malley v. Briggs}, a Section 1983 action for Fourth Amendment violations that came to the Court two years after \textit{Leon}, Justice White’s opinion for a nearly unanimous Court made clear that his earlier importation

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\textsuperscript{185} See New York v. Harris, 495 U.S. 14, 24 (1990) (Marshall, J., dissenting) (citing \textit{Leon} for the proposition that “excluding evidence that is the product of [a good faith] violation may result in deterrence of legitimate law enforcement efforts,” because “officers fear that if their judgment as to the constitutionality of their conduct turns out to be wrong, the consequences of their misjudgments may be too costly to justify the possible law enforcement benefits” (internal citation omitted)).

\textsuperscript{186} See, e.g., Hudson v. Michigan, 547 U.S. 586, 595 (2006) (asserting that a consequence of suppressing evidence derived from knock-and-announce violations “would be police officers’ refraining from timely entry after knocking and announcing.”); Arizona v. Evans, 514 U.S. 1, 15 (1995) (quoting \textit{Leon} for proposition that “‘Excluding the evidence can in no way affect [the officer’s] future conduct unless it is to make him less willing to do his duty.’” (quoting Leon, 468 U.S. at 920 (internal quotations omitted))).

\textsuperscript{187} Cf. Pennsylvania Bd. of Parole and Probation v. Scott, 524 U.S. 327, 368 (1998) (asserting, as justification for refusing to apply exclusionary rule in parole revocation proceedings, that rule was unnecessary to deter police from violating probationers rights because police \textit{will be deterred} from violating Fourth Amendment rights by the application of the exclusionary rule to criminal trials” (emphasis added)).
\end{flushright}
of qualified immunity doctrine to exclusionary rule analysis had been neither incidental nor isolated. In the course of articulating the applicable standard for qualified immunity, White wrote, “[T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.”\(^{188}\) The Court implicitly reiterated this in its next major good faith exception decision, *Illinois v. Krull*. Citing *Harlow*, *Krull* reasoned that just as officials who reasonably rely on clearly established law are not liable for rights violations when changes in law render previously constitutional action unconstitutional, so too should evidence not be excluded when a statute reasonably relied upon to arrest is subsequently invalidated.\(^{189}\) Indeed, Justice O’Connor’s dissent in *Krull* balked at the Court’s “importation” of the *Harlow* standard, asserting that in contrast to assessment of civil damages against a public officials, exclusion of evidence where the law was not “clearly established” at the time of the constitutional violation does not offend considerations of “public policy” and “fairness.”\(^{190}\) A year after *Malley*, Justice O’Connor’s protestations came too late. By the time of the Court’s decision in *Groh v. Ramirez*, the assertion that the test for qualified immunity and the good faith exception were identical was accepted by every member of the Court.\(^{191}\)

This was a form of doctrinal interaction that was deeper and conceptually distinguishable from the act of borrowing. Aligning qualified immunity and the good faith exception with a single, identical test for their application removed the lines of conceptual separation between source and target maintained by the metaphor of borrowing. The idea of convergence better captures the evolution that *Malley* announced: The good faith exception and the good faith defense had, according to the Court, become

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\(^{188}\) *Malley v. Briggs*, 475 U.S. 335, 344 (1986) (internal citation omitted). Justices Powell and Rehnquist would have pushed even harder than the majority did on specific application of *Leon* as precedent in the suit, arguing that the Court should have decided without remand that the defendant officers were entitled to qualified immunity because, as in criminal suppression hearings after *Leon*, the decision of a magistrate as to probable cause supporting a warrant should be treated as presumptively correct. Id. at 349—50 (Powell, J., concurring in part and dissenting in part). See also *Groh v. Ramirez*, 540 U.S. 551, 564—65 & n.8 (2004) (“Although both *Sheppard* and *Leon* involved the . . . “good faith” exception to the Fourth Amendment’s general exclusionary rule, we have explained that ‘the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer.’” (quoting *Malley*, 475 U.S. at 344).  


\(^{190}\) *Krull*, 480 U.S. at 366—67 (O’Connor, J., dissenting).  

\(^{191}\) See *Groh*, 540 U.S. 551.
functionally indistinguishable; two had become one.

As a practical matter, this move would have at least two logical consequences of significance. First, and perhaps most obviously, it meant that where the good faith exception rendered the exclusionary rule available or unavailable, an equivalent outcome would generally flow in the realm of civil liability by operation of qualified immunity. From the standpoint of deterrence, this meant that the overall mix of constitutional remedial options had been diminished. Importantly, the consequence of aligning remedial doctrine in this manner is not inevitably less litigation or enforcement of the Fourth Amendment, since alignment of remedies could doubly diminish or expand the availability of a remedy. As a practical matter in this context, however, contraction was the more likely outcome, given that both the good faith exception and qualified immunity operated by design to be protective rather than permissive of remedial opportunities meant that

Second, more subtly, and yet more importantly, convergence enhanced the conditions for sparking borrowing’s hydraulic properties, fostering further borrowing and progressively greater convergence of the two fields. The Court initial adoption of the Harlow qualified immunity standard in Leon gave constitutional tort doctrine a “foot in the door” to the exclusionary rule. But admittance could easily have been limited – for reasons described in the above discussion of limitations on the argument for fit between constitutional tort doctrine and the exclusionary rule. The Court could, for example, have reasoned that given the nature of qualified immunity’s origins in search and seizure doctrine, it provided an apt analogy to good faith in the context of warrants – but not to other areas of Fourth Amendment jurisprudence – thus cabining Leon’s borrowing and reestablishing the doctrinal barriers that the decision’s reliance on Harlow had lowered. But in Malley the Court expressed a much broader view of the connection between the good faith exception and the good faith defense. Declaring the two doctrines to be not simply “analogous” but identical, and thus opening the door to authoritative reliance upon caselaw across the criminal and civil remedial realms, necessarily (though implicitly) suggested sameness of function and justification for the doctrines. This, in turn, implied deeper kinship between exclusionary and tort remedies more generally, and had the effect of increasing the permeability of doctrinal barriers.

192 The only exception to this outcome would be the rare instance of municipal liability being imposed. See infra Part II.C.3.a.
193 See supra notes 161—165 and accompanying text.
Such dynamics were not inevitable, but rather flowed from the confluence of arguable fit and powerful strategic incentive, with the opportunities provided by the exclusionary rule’s status as a still highly contested doctrine. The ongoing presence of a judicial agenda to limit its reach, means that members of the Court will frequently seek justifications for pushing, pulling, and redefining its contours. In contrast to what might be seen in a more stable jurisprudential arena, exclusionary rule doctrine was ripe for further borrowing and, in turn, further convergence. The balance of this Part discusses three examples of the Court’s continuing inclination after Harlow and Leon to incorporate the language and logic of constitutional tort doctrine in formulating its approach to the exclusionary rule. It then concludes by exploring the causal relationship between the initial act of borrowing and these broader manifestations of convergence.

a. Municipal liability.—In Monell v. New York City Department of Social Services, the Court for the first time authorized Section 1983 actions against governmental entities.195 In the decisions that followed and interpreted Monell, the Court developed a doctrine of municipal liability for constitutional torts that was premised upon a specialized showing of governmental fault. In contrast to ordinary tort law, respondeat superior liability for the constitutional violations of government officials would not lie under Section 1983.196 Rather, a plaintiff was required to point either to a formal governmental policy that had breached a constitutional guarantee, or to a pattern of governmental action or inaction that was sufficiently pervasive that it could be said to amount to “deliberate indifference to the rights of persons with whom [officials] come into contact.”197

In a series of exclusionary rule decisions prior to and culminating in Herring, several justices appeared to borrow from this framework for municipal constitutional tort liability to push exclusionary rule doctrine toward a focus on systemic rather than individual Fourth Amendment violations. In Arizona v. Evans, Justice O’Connor (joined by Justices Souter and Breyer) concurred in the Court’s extension of the good faith exception to warrants issued as a result of a court’s recordkeeping error, but offered that suppression might be warranted upon a demonstration that “the recordkeeping system itself” could not “reasonabl[y]” be relied upon.198

196 See Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 403 (1997).
Such would be the case, O’Connor wrote, if “a recordkeeping system . . . has no mechanism to ensure its accuracy over time and . . . routinely leads to false arrests.”199 This formulation echoes O’Connor’s views in two seminal Section 1983 municipal liability decisions. In City of Canton v. Harris, O’Connor wrote in her concurring opinion that civil municipal liability for a constitutional violation could be established if either “a municipality . . . fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face,” or “it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion.”200 This requirement for imposition of municipal liability garnered the support of the Court in Board of County Commissioners v. Brown, as announced in Justice O’Connor’s opinion for the majority two terms after Evans.201

Justice Kennedy, too, evinced an inclination to draw from municipal liability standards to understand the parameters of the exclusionary rule. Concurring in the Court’s denial of suppression in Hudson v. Michigan, he wrote that “[i]f a widespread pattern of violations were shown, . . . there would be reason for grave concern.”202 Kennedy’s language tracked even more closely the formulation for municipal liability that Justice O’Connor first articulated in the City of Canton concurrence that he had joined, and that the Court had adopted in Brown.203

This exploration of the import of systemic misconduct to application of the exclusionary rule was in one sense “nothing new” in the Court’s Fourth Amendment jurisprudence.204 As noted in Part I, prior decisions

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199 Id. at 17 (O’Connor, J., concurring) (emphasis added).
200 Id. at 396—97 (O’Connor, J., concurring) (emphasis added).
201 Brown, 520 U.S. 397, 404 (“[A]n act performed pursuant to a “custom” that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.”).
202 Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring). Justice Breyer’s dissent suggests that he embraces a similar standard, though found evidence to satisfy it in Hudson’s case. See id. at 609 (Breyer, J., dissenting) (observing that “cases reporting knock-and-announce violations are legion” and “seem sufficiently frequent and serious as to indicate ‘a widespread pattern’” of violations (quoting id. at 604 (Kennedy, J., concurring))).
203 See Brown, 520 U.S. at 404; City of Canton, 489 U.S. at 396—97 (O’Connor, J., concurring) (noting concurrence joined by Justices Scalia and Kennedy); City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (“[A] plaintiff may be able to prove the existence of a widespread practice” amounting to a “custom or usage” (quoting 42 U.S.C. § 1983)).
204 See Arizona v. Evans, 514 U.S. 1, 17 (1995) (O’Connor, J., concurring) (stating of
limiting the exclusionary rule had noted the absence of reason to believe that the remedy was necessary to address endemic constitutional violations, though without specifying the weight to be assigned to such evidence, or the appropriate manner of assessing it, if it were adduced. Relatedly, a debate had long brewed within and beyond the Court over whether the deterrence rationale was properly grounded upon the exclusionary rule’s deterrent signals being targeted at individual or institutional actors – with the former view appearing to prevail. O’Connor’s and Kennedy’s concurrences were the first to suggest something like a rule for granting exclusion upon proof of widespread Fourth Amendment deficiencies, notwithstanding individual “good faith.” But the fact that the Court’s jurisprudence contained some basis for evaluating systemic factors in the context of a Fourth Amendment violation provided important impetus and warrant for O’Connor and Kennedy to draw from a disparate field that had also attended to those ideas – constitutional tort – to conceptualize a framework for expressly incorporating them into exclusionary rule doctrine.

O’Connor’s and Kennedy’s moves would bear fruit in Herring, with a majority of the Court expressly adopting the view that “systemic” Fourth Amendment violations may be remedied through the exclusionary rule. Part III considers the question of how full of a convergence between the remedies of suppression and municipal tort liability may be effectuated by Herring. But for present purposes, the point is simply to observe the manner and circumstances under which borrowing planted the seeds for that doctrinal and theoretical alignment.

b. Causation and Hudson.—In Hudson v. Michigan, the Court denied suppression of evidence seized following police entry into a dwelling in violation of the Fourth Amendment “knock and announce” rule. The majority opinion offered apparently independent rationales for

205 See supra Part I.B.2.
206 See, e.g., United States v. Peltier, 422 U.S. 531, 556 (1975) (Brennan, J., dissenting) (“Contrary to the Court’s assumption, the exclusionary rule does not depend in its deterrence rationale on the punishment of individual law enforcement officials.”); John M. Burkoff, Bad Faith Searches, 57 N.Y.U. L. Rev. 70, 121 (1982); Kamisar, supra note 125, at 590.
207 See Hudson, 547 U.S. at 599; see also Wilson v. Arkansas, 547 U.S. 927, 931—36 (1995) (holding that the common law requirement that police announce their presence at a home and give an opportunity for consensual admittance was also required by the Fourth Amendment).
its holding: that for a variety of reasons (discussed above and below) exclusion’s costs would exceed its benefits; that the warrant that authorized the search, and not the police officers’ hasty entry, was the but-for cause of the evidentiary discovery; and that police “seeing or taking evidence described in a warrant” was not an interest that the knock-and-announce rule protected, and therefore “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”

It is this third concern, which the Hudson majority described as “attenuation,” that is the focus of this Part.

Hudson’s attenuation analysis was widely criticized in part – as with Herring – for its lack of grounding in prior exclusionary rule jurisprudence. While the concept of attenuation as limiting application of the exclusionary rule ran was well-established within certain parameters, Hudson’s use of the term was a new one. Prior decisions had been concerned with significant time, responsibility, or other proximate cause gaps between a Fourth Amendment violation and an arrest or discovery of evidence. But those circumstances were not applicable in Hudson, where the evidence sought to be excluded followed immediately and exclusively from the illegal police entry.

Hudson’s conception of attenuation was not only new, but its resonance with a rights-based understanding of the exclusionary rule appeared to conflict with the Court’s long-standing commitment to a wholly instrumental approach to the remedy. Any conceptual mis-match between the constitutional interests of the rights holder and the consequence of suppression would seem to be irrelevant to the remedy’s efficacy insofar as its sole aim is to generate a deterrent effect vis-à-vis the police. Postulating strict connection and parity between the Fourth Amendment right and the scope of exclusion appeared to enter territory that the Court had foresworn in Calandra.

208 Hudson, 547 U.S. at 592—93.
210 See id. at 1865—68.
211 See supra note 66 and accompanying text.
212 See Alschuler, supra note 209, at 1764; Tomkovicz, supra note 209, at 1869—70.
On the other hand, *Hudson’s* attenuation analysis was not novel to the extent that it resonated with similar principles in tort law. Notions of proximate cause in common law negligence suits have long demanded a correspondence between the harms that a legal duty aims to avoid and the injury actually incurred. That notion has been expressed and applied with varying formulations, with one prominent approach being the “risk rule” articulated by Dean Keeton – demanding, roughly, that an actor be held responsible only for harm that “is a result within the scope of the risks by reason of which the actor is found to be negligent.”

Others have suggested that *Hudson’s* attenuation approach appears essentially to adopt Keeton’s risk rule. That explanation, however, appears incomplete. Putting Keeton’s original conception to the side, in practice courts typically employ the risk rule, or some variant of it, to determine whether there was actionable negligence in the first instance; where breach of a legal duty occurred but the only harms flowing from it were not those which the duty aimed to prevent, the actor’s conduct is not deemed wrongful. And, conversely, where a plaintiff’s harms were within the scope of risks contemplated by the legal duty, then all foreseeable damages from those harms are likely to be compensated. In *Hudson*, however, the police unquestionably breached their constitutional duty to knock and announce, and harms corresponding to the interests protected by the Fourth Amendment rule were suffered – including, as the Court noted, breach of privacy interests. *Hudson’s* attenuation analysis was framed as implicating the secondary question of remedy. And on that score, whether or not the seizure of evidence that also occurred was an outcome that the knock and announce rule was specifically designed to prevent, the notion that such a consequence did not flow foreseeably from law enforcement’s violation of Fourth Amendment interests is difficult to embrace. Attribution of *Hudson’s* attenuation analysis to the tort “risk rule” thus appears somewhat strained – or, at a minimum, points to a significant tension in the Court’s attempt to press the doctrine into service.

> A closer parallel to *Hudson’s* attenuation analysis might be found in

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217 See id. at 594—95.
218 Albert Alschuler has also made this point. See Alschuler, supra note 202, at 1763—64.
notions of damages causation that have animated judicial and scholarly analysis in constitutional tort litigation. In *Carey v. Piphus*, involving a Section 1983 claim for violation of due process in the course of a school disciplinary hearing, the Court held that plaintiffs must prove actual damages in civil due process claims, and are not entitled to recover for the abstract value of the right alone. In so holding, the Court rejected the plaintiff’s argument that the deterrent purposes of Section 1983 supported awards of presumed damages upon a finding of constitutional violation.\(^{219}\)

Further, the Court observed that the rules governing the scope of damages recoverable must “further the purpose of § 1983,” and be guided but not dictated by the common law of torts: “[T]he rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question . . . .”\(^{220}\)

The Court has not had occasion to consider precisely how this principle would guide or limit awards of damages in constitutional tort litigation, however a number of lower courts have applied *Carey*’s “interests”-based approach to compensation in Fourth Amendment Section 1983 actions, to preclude recovery for damages attendant to criminal adjudication that followed the unlawful seizure of evidence. As the Second Circuit explained in *Townes v. City of New York*, such claims present “a gross disconnect between the constitutional violations ([the] right to be free from unreasonable searches and seizures) and the injury or harm for which Townes seeks a recovery (his subsequent conviction and incarceration),” because “[t]he evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all.”\(^{221}\) John Jeffries has advocated that precisely this approach be broadly enshrined in constitutional tort doctrine, arguing for adoption of Keeton’s risk rule to “limit[] . . . constitutional tort liability to constitutionally relevant risks.”\(^{222}\)

Significantly, Jeffries’s views appear to enjoy the support of at least one member of the Court: Justice Scalia, author of the majority opinion in *Hudson*, whose concurrence in the Section 1983 decision *Chavez v. Martinez* flatly stated that Section 1983 does not “provide a remedy for actions inconsistent with the perceived 'purpose' of a constitutional


\(^{220}\) Id. at 258—59, 263.


Scalia’s attenuation analysis in *Hudson* does not cite or expressly advert to his statement in *Chavez*, the view of Jeffries, or any source directly tied to constitutional tort analysis. Indeed, Scalia relied solely on *New York v. Harris*, an exclusionary rule decision that did indeed employ the interest-based language of *Hudson*’s attenuation analysis – albeit in a somewhat off-handed addendum to the Court’s primary analysis of the classic “attenuation” problems in the case. As discussed below, however, other portions of the *Hudson* opinion are steeped in analysis of the relationship between constitutional tort remedies and the exclusionary rule. Given the confluence of civil and criminal remedial thinking already present in the case, and particularly given Scalia’s own views on the relationship between wrong and remedy in constitutional tort litigation, it is reasonable to speculate that the dynamic of convergence played some role in generating a new attenuation test that is functionally resonant with an emerging principle in civil constitutional remedies.

To be sure, the singularity of constitutional tort doctrine’s role in driving the Court’s innovative approach to “attenuation” in *Hudson* should not be overstated. This was far from the first occasion when exclusionary rule jurisprudence had incorporated principles of causation. Both the “independent source” doctrine and the “inevitable discovery” rule are grounded in the premise that there must be a sufficient “but-for” causal connection between the Fourth Amendment violation and recovery of the challenged evidence in order to justify suppression of the latter. So too does the classic understanding of the term “attenuation” with respect to the exclusionary rule resonate with tort requirements of proximate cause. But as in the preceding example of municipal liability’s role in shaping a systemic framework for suppression, the existence of some precedent within exclusionary rule jurisprudence for resort to tort law’s consideration of causation is consistent, not in tension, with the account of borrowing and

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224 See *New York v. Harris*, 495 U.S. 14, 20 (1990) (stating, after “hold[ing] that the station house statement in this case was admissible because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else,” that “[t]o put the matter another way, suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris’ in-house arrest illegal”).
226 See *United States v. Leon*, 468 U.S. 897, 910—11 (1984) (citing classic attenuation cases as exemplifying Court’s rejection of “a per se or ‘but for’ rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest”).
convergence. While these causal doctrines neither supported the novel attenuation analysis, nor themselves drew from constitutional tort doctrine, their existence enhanced the fit and legitimacy of drawing from outside criminal law’s boundaries to supply reasoning that the Court advanced in *Hudson*.

**c. Alternate Remedies.**—In addition to these instances of incorporating specific aspects of constitutional tort jurisprudence into the exclusionary rule, the Court’s exclusionary rule jurisprudence has also exhibited convergence through a broader theoretical framework that increasingly views suppression and civil damages as alternative, and mutually exclusive, remedial avenues.

*Hudson v. Michigan* again exemplifies the most full-throated expression of this conception of remedial trade-offs. There, the Court engaged in an extensive, if empirically thin, examination of constitutional tort litigation since *Mapp*, to conclude that civil remedies (along with increased “police professionalization”) offered sufficient deterrence of Fourth Amendment violations, and that suppression of evidence obtained following violation of the knock-and-announce rule was therefore unnecessary to generate adequate deterrence. In part, the prominence of that finding in the Court’s reasoning reflected the priority given by the parties to arguments about the availability of alternative remedies. The briefs had contained extensive debate, echoed at the two oral arguments in the case, concerning the need for an exclusionary remedy in light of the possibility of constitutional tort actions.

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227 Indeed, the United States argued a similar point as amicus in *Hudson*. See Brief for the United States as Amicus Curiae, *Hudson v. Michigan*, 547 U.S. 586 (2006), 2005 WL 2747672, at *12 (Oct. 9, 2005) (arguing that “inevitable discovery, independent source, and the causation rules” all “reflect the principle that suppression is too high a price to pay for a particular violation when the causal link between the violation and the acquisition of evidence is weak, non-existent, or irrelevant to exclusionary-rule policies” and support interest-based attenuation theory).


229 In spite of evidence suggesting that in fact civil verdicts were rarely obtained for knock-and-announce violations, the Court was satisfied that “[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.” *Hudson v. Michigan*, 547 U.S. 586, 596–99 (2006).

The significant attention to this issue by advocates, which was by no means limited to the Hudson litigation, was responsive to a trend in the Court’s exclusionary rule cases since the time of Leon. The earliest example came in Nix v. Williams—decided a month prior to Leon—when the Court proffered as one reason for extending the “inevitable discovery” exception to the exclusionary rule the fact that “the possibility of . . . civil liability . . . lessen[ed] the likelihood that the ultimate or inevitable discovery exception will promote police misconduct.” Those same considerations were offered as reasons for restricting the exclusionary rule in Segura v. United States and INS v. Lopez-Mendoza, both decided same day as Leon. Subsequently, both Krull and Pennsylvania Board of Parole and Probation v. Scott, which eliminated the exclusionary rule in parole violation proceedings, relied on the availability of alternative remedies as reasons to restrict the rule.

In fact, the seeds of this approach were in a sense laid much earlier. As early as Chief Justice Burger’s opinion in Bivens, suggestions appeared in the Court’s opinions that the exclusionary rule might be restricted if “[r]easonable and effective substitutes” for it could be developed. But it was not until the time when both advocates and the Court were drawing upon constitutional tort doctrine to buttress claims about the very contours of the exclusionary rule that the occurrence of civil litigation emerged as an independent factor counseling in favor of a more restricted suppression remedy. Not incidentally, this coincided with the above-discussed shift in the exclusionary rule’s deterrence rationale from skepticism regarding

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232 467 U.S. 431, 446.


235 Indeed, a similar tendency can also be seen in recent constitutional tort jurisprudence, in which the Court has held of criminal adjudication as an alternative forum for elaboration of rights in the face of civil procedural rulings that have limited constitutional tort litigation. See Pearson v. Callahan, 129 S. Ct. 808, 821--22 (2009) (rejecting contention that structured qualified immunity inquiry mandated was necessary for elaboration of constitutional principles, partly on basis that criminal adjudication fulfilled that aim).

suppression’s behavioral effects to the concern that over-deterrence was a primary cost of applying the remedy.\textsuperscript{237} The implicit reasoning underlying a refusal to suppress in the face of alternative avenues of redress, at least within the Court’s cost-benefit analysis of the exclusionary rule, is that authorizing an additional remedy generates too much deterrence of law enforcement activity.\textsuperscript{238} Thus, the emergence of over-deterrence arguments dovetailed with, and may well have independently facilitated, this example of convergence.

It is worth observing that this impetus toward coordination of multiple available remedies for identical legal harms is not limited to exclusionary rule jurisprudence.\textsuperscript{239} But the present context is notable, if not unique, in revealing a potential pitfall of aiming to coordinate multiple remedies. The confluence of the Court’s move toward positing suppression and tort recovery as alternative rather than supplementary remedies for Fourth Amendment violations, and the progressive convergence of these doctrines, exposes an illusory premise underlying the Court’s framework of purported remedial coordination. As noted above, as the contours of the exclusionary remedy merge with those of constitutional tort actions, recourse from Fourth Amendment violations will be identically available – or, more to the point, unavailable – in both realms.\textsuperscript{240} Thus, rather than achieving the coordinate remedial mix advertised by the Court, convergence

\textsuperscript{237} See supra notes 180—186 and accompanying text.


\textsuperscript{239} The availability of Bivens actions for federal officials’ violations of constitutional rights depends expressly upon whether other “adequate” remedies exist. See, e.g., Correctional Services Corp. v. Malesko, 534 U.S. 61, 72—74. More generally, of course, equitable remedies lie within the discretion of courts and depend on the unavailability of alternate “adequate” remedies. See, e.g. Ex parte Young, 209 U.S. 123, 163—65 (1908). Instances of judicial consideration of remedial coordination are, however, more commonly of this ad hoc variety, rather than in the nature of determining permanent, prospective remedial rules.

\textsuperscript{240} Cf. Herring v. United States, 129 S.Ct. 695, 707—08 (2009) (Ginsburg, J., dissenting) (observing that “by restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves Herring, and others like him, with no remedy” given that a civil rights action would be likewise unviable); Arizona v. Evans, 514 U.S. 1, 22—23 (Stevens, J., dissenting) (“[T]he police officer who reasonably relies on the computer information would be immune from liability in a § 1983 action. Of course, the Court has held that respondeat superior is unavailable as a basis for imposing liability on his or her municipality. Thus, if courts are to have any power to discourage official error of this kind, it must be through application of the exclusionary rule.” (internal citation omitted)).
accelerates overall diminishment of opportunities for Fourth Amendment litigation.

4. The Hydraulics of Borrowing and Convergence

These shifts in exclusionary rule doctrine are not simply independent examples of convergence with the field of constitutional torts. Rather, they are at least in part causally linked to each other and to the Court’s initial move in *Leon* to borrow qualified immunity jurisprudence to fashion the good faith exception. It is this generative dynamic that the Article has referred to as the “hydraulic” properties of borrowing and convergence.\(^\text{241}\)

Such claims of cause and effect must of course be qualified. As has already been seen, many factors will be at play in the Court’s decision to adopt a particular line of reasoning in any given case, and even the various members of a majority who adopt that reasoning are likely to have varying rationales for doing so.\(^\text{242}\) Relatedly, as discussed above, borrowing can never drive doctrinal transformation solely by its own force. Borrowing “works” in the first instance only where there is some *plausible* resonance or fit between the source and target doctrines – as illustrated by the pivotal role played by *Harlow*’s move to an objective qualified immunity inquiry in the Court’s move to borrow that standard in *Leon*.\(^\text{243}\) Further borrowing and convergence will manifest only where there is further opportunity for fit between the doctrinal arenas. The farther the distance that the source doctrine must travel across jurisprudential lines and legal fields – and here the distance was significant – the more pre-existing resonance will be required to legitimately accommodate it. With respect to the initial attraction of borrowing qualified immunity, this condition was arguably fulfilled by the existing confluence between the Fourth Amendment exclusionary rule and the origins of the good faith defense in common law search and seizure doctrine.\(^\text{244}\) The above-discussed examples of convergence featured fertile conditions for further borrowing, with each

\(^{241}\) See supra Part II.C.3.

\(^{242}\) The focus of analysis thus far has been on the Supreme Court, but of course borrowing and convergence may be done at any judicial level, and indeed these dynamics may well trickle up and down in the hierarchy of courts. See, e.g., infra Part III (discussing lower court borrowing after *Herring*); cf Nelson & Tebbe, supra note 7, at 462 (discussing constitutional borrowing by non-judicial actors).

\(^{243}\) See supra notes 161—168 and accompanying text. The qualifier “plausible” is important. I mean here to treat “fit” as a quality measured by reference to tactical feasibility of the borrowing, rather than logical absolutes characterizing its propriety.

\(^{244}\) See supra note 165 and accompanying text.
occurring in the context of exclusionary rule doctrine already containing some arguable warrant for the type of reasoning that the borrowed constitutional tort doctrine enhanced or cemented. At the same time, these dynamics muddle attempts to causally attribute doctrinal change to borrowing or convergence per se. Thus, it is arguably unclear whether, say, Hudson’s incorporation of tort principles to govern the exclusionary rule was “really” driven by the hydraulics of borrowing rather than a background tradition of various causation principles becoming enshrined in exclusionary rule exceptions.

Notwithstanding these important caveats, there are plausible reasons to assert, at minimum, a correlation between borrowing and the subsequent trend of convergence. First, the initial borrowing will have both legitimated and created the tactical impetus to pursue further analogies between the two doctrinal fields. The Court’s prior alignment of the good faith exception and qualified immunity had, albeit only impliedly, conveyed a view that the exclusionary rule and constitutional tort liability were broadly analogous notwithstanding the criminal-civil divide between them. From the standpoint of advocates and judges, then, borrowing opens the door to new tools of persuasion, to argue that other subsets of the source field are equally appropriate to be pressed into service – at least when some strategic aim can be fulfilled by doing so.

Second and relatedly, borrowing begets opportunities for its own enlargement. A court’s initial act of borrowing brings a new set of ideas and sources into play, not only in the case where borrowing occurs, but in subsequent cases as well. At least for some time period, advocates and judges (and their clerks) will be likely to return to the source doctrine in order to better inform their application of the new, borrowed principle. Thus, for example, practitioners before the Court continued to cite Harlow in good faith exception cases following Leon, rather than simply Leon itself – and the Court followed suit. In returning to the specific source of the borrowing, these actors are likely to “read around,” familiarizing themselves with related ideas within that doctrinal field that were not germane in the initial impetus to borrow. This in turn breeds greater knowledge and capacity for reasoning about where other fertile points for transplantation of doctrine may lie. Furthermore, repeated concurrence

247 See, e.g., Transcript of Oral Argument, United States v. Herring, 129 S.Ct. 695
of citations to and reasoning across doctrinal lines will be likely to prompt continued thinking across those boundaries when there are plausible points of connection.\textsuperscript{248} Thus, borrowing is likely to generate the raw material to sustain its own propagation.

A third explanatory point flows from the admonition that this account should not be taken to suggest that convergence must follow a deliberate or purposeful path. Indeed, this is a feature that distinguishes the dynamic of convergence from the initial borrowing, which is by definition an intentional act.\textsuperscript{249} Convergence may be knowingly pursued – as it was when the Court expressly aligned the good faith exception with qualified immunity doctrine in \textit{Malley v. Briggs}. But it may also be a phenomenon that is observable only in retrospect, in the aftermath of a series of borrowing moves that were independently conceived. Moreover, convergence may accelerate in an almost unconscious manner, as the rhetoric or rationales of distinctive jurisprudential arenas seep and merge in the minds of advocates, clerks, and judges who are shaping the contours of doctrine. Thus, for example, Justice Kennedy’s suggestion in \textit{Hudson} of a “widespread pattern” test for applying the exclusionary rule may or may not have \textit{consciously} drawn from the field of municipal constitutional tort litigation. But the trajectory of convergence in those two arenas may nevertheless have in some sense “caused” that phrase to resonate in Justice Kennedy’s attempt to describe when a remedy for systemic constitutional misconduct is warranted. More significantly, the effect will likely be the same regardless of the move’s deliberateness: The phrase is liable to be interpreted by reference to the Court’s other invocations of it – namely, the field of constitutional tort.

As it turns out, in the convergence story that concerns us here, an important chapter in understanding those effects is \textit{Herring}. It is to that examination that the next Part turns.

\begin{itemize}
\item \textsuperscript{248} To the extent that borrowing is effectuated most simply by importation of particular legal terms of art from one field to another, a background dynamic is the role of computer-based legal research and the related importance of judicial law clerks and their legal research habits in shaping opinion craft. See, e.g., Casey R. Fronk, The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in Federal Appellate Courts, 2010 U. Ill. J.L. Tech. & Pol’y 51, 61; J. Daniel Mahoney, Law Clerks: For Better or for Worse?, 54 Brooklyn L. Rev. 321, 339 (1988).
\item \textsuperscript{249} See supra note 7 and accompanying text.
\end{itemize}
HERRING REASSESSED

If the convergence story of Part II is to credited, then Herring must be understood against the backdrop of not only the Court’s exclusionary rule decisions, but also the constitutional tort jurisprudence upon which those decisions have both expressly and implicitly drawn. Read in that light, some of the knots in Herring’s reasoning that were outlined in Part I might be at least loosened, if not entirely undone. And conversely, viewing Herring as at least partly a culmination of and contributor to convergence further illuminates the operation of that dynamic.

A. The Herring Culpability Test

Herring’s most significant feature may be the culpability-based framework that it laid out for invoking the remedy of suppression. It may also be the aspect of the decision most difficult to square with the Court’s repeated insistence that it was merely applying the commands of its exclusionary rule precedents.  

But while Leon and its exclusionary rule progeny do not by their express terms support Herring’s reasoning, the Court’s qualified immunity jurisprudence subsequent to Harlow and the trajectory of its convergence with the exclusionary rule does illuminate the source and meaning of Herring’s culpability test. To be sure, Herring’s baseline of gross negligence (or perhaps even recklessness) appears to run counter to the test of “objective reasonableness” adopted in Harlow – a standard that resonates with the common “reasonable person” formulation of negligence in both tort and criminal law. But the Court’s qualified immunity decisions subsequent to Harlow reveal that, in application, that standard has forayed into increasingly culpability-focused terrain that has challenged conventional distinctions between objective and subjective legal inquiries.

Malley first signaled this shift when Justice White described “the qualified immunity defense [as it] has evolved” as “provid[ing] ample protection to all but the plainly incompetent or those who knowingly violate the law” – a threshold closer to gross negligence or willfulness than the

250 See supra Part I.B.
251 See Farmer v. Brennan, 511 U.S. 825, 836 n.4 (1994) (noting that gross negligence and recklessness had been treated as functionally identical).
252 See, e.g., Model Penal Code § 2.02; Restatement (Second) of Torts § 282; see also Alschuler, supra note 4, at 485.
Harlow notion of objective reasonableness. Shortly thereafter, Anderson v. Creighton would put more flesh on the bones of the Malley formulation in the context of a Bivens action for a warrantless home search.\textsuperscript{254} Rejecting the plaintiff’s contention that any reasonable officer would have understood at the time of the search in 1983 that a warrant was required in the absence of probable cause or exigent circumstances, the Court asserted that its qualified immunity precedents demanded a far more particularized showing that a constitutional right was “clearly established” at the time of the alleged illegality.\textsuperscript{255} “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right,” or in other words, “in the light of preexisting law, the unlawfulness must be apparent.”\textsuperscript{256} The inquiry was an “objective” one, but required an examination of the circumstances known to the defendant official at the time of the incident.\textsuperscript{257} Accordingly, in subsequent qualified immunity decisions the Court would examine not only whether judicial decisions had treated specific factual scenarios similar to those facing a defendant officer, but also would inquire into knowledge actually possessed by that officer, including for example the content of policies and training actually received concerning their legal obligations.\textsuperscript{258}

Hence, after announcing what appeared to be a negligence standard for qualified immunity in Harlow, the Court progressively ratcheted the showing that would be demanded to demonstrate that official conduct was “unreasonable.” The decisions continued to reject any return to the pre-Harlow regime of assessing “malice” or bad motive.\textsuperscript{259} At the same time, however, the Court embraced a highly particularized conception of “notice” of illegality as the touchstone of official liability, which approached a

\textsuperscript{255} Id. at 639—40.
\textsuperscript{256} Id.
\textsuperscript{257} Id. at 641 (1987) (“The relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. [The officer’s] subjective beliefs about the search are irrelevant.”); see also Wilson v. Layne, 526 U.S. 603, 615 (1992) (“[T]he appropriate question is the objective inquiry whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed.”).
\textsuperscript{259} See Anderson, 483 U.S. at 641 (noting that fact-specific inquiry did “not reintroduce into qualified immunity analysis the inquiry into officials’ subjective intent that Harlow sought to minimize”).
standard sounding more in gross negligence or recklessness. In asserting that constructive notice of illegality would suffice where such wrongfulness was flagrant, the Court strongly implied the insufficiency of negligence in the ordinary case.

While Herring did not acknowledge any debt to qualified immunity doctrine in setting its gross negligence baseline for application of the exclusionary rule, its test reflects the trend of convergence in three respects. First, and most generally, Herring’s elevation of culpability as the “critical” feature of the Court’s exclusionary rule inquiry squarely aligns the suppression remedy with the fault-based framework of constitutional torts—in contrast to the norm in criminal procedure remedies. Second, in ratcheting the standard for suppression from Leon’s negligence-resonant requirement of objective reasonableness to a heightened standard of culpability, Herring brought the exclusionary rule formally into line with the contours of qualified immunity doctrine as it has been applied since Malley and Anderson. And third, in appearing to move from the context-specific approach to the good faith exception taken by Leon, Krull, and Evans, to a categorical carve-out for conduct not meeting the threshold of gross negligence, Herring reformulated the exclusionary rule to operate in a manner consistent with constitutional tort remedies: subject to an across-the-board qualified “defense” pegged to an individual official’s culpability in committing a constitutional violation. All three aspects of the decision vindicate the premise of Malley that qualified immunity and the good faith exception are functionally equivalent doctrines, and advance the path of convergence between those doctrines.

Herring’s debt to the qualified immunity framework may also assist in solving the puzzle of the Court’s “objective” culpability analysis. On

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260 See, e.g., Model Penal Code § 2.02(2)(c) (defining recklessness as constituting “conscious” disregard of “substantial” risk of harm); see also Groh, 540 U.S. at 565 (responding to defendant officer’s contention that search at issue in Section 1983 suit “was the product, at worst, of a lack of due care, and that our case law requires more than negligent behavior before depriving an official of qualified immunity” not by rejecting suggestion of heightened culpability requirement, but by asserting that case fit within Leon’s prohibition on warrants so “‘facially deficient’” that no officer could presume them to be valid). In this contention I part company with prominent scholars of constitutional remedies and the Fourth Amendment, who have characterized the state of mind required to rebut qualified immunity as bare negligence. See Alschuler, supra note 4, at 485; John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 89 (1999).

261 See, e.g., id. at 92—95; Laurin, supra note 176, at 1022—23.

262 See supra, Part I.B.1; see also Alschuler, supra note 4, at 467—68 (“By declaring the exclusionary remedy available in cases of deliberate, reckless, and grossly negligent misconduct, the Supreme Court appeared to establish a partly subjective standard. As soon
its face, the Court’s insistence that the standard it articulates be applied objectively seems nonsensical: Even if the lowest grade of culpability to trigger exclusion, gross negligence, could be assessed solely by reference to objective factors, proof of reckless or deliberate conduct is typically conceived as necessitating a subjective inquiry.

But the Court’s qualified immunity jurisprudence has long engaged in a similar dance, insisting both that assessment of an immunity defense should be confined to solely objective factors, and describing the threshold for rebutting the defense as recklessness or worse – as in Malley’s description of qualified immunity as protecting “all but the plainly incompetent or those who knowingly violate the law.” The Malley formulation points to the distinction between objective and subjective inquiries that animate the Court’s qualified immunity decisions. Plain incompetence – perhaps the equivalent of Herring’s gross negligence threshold – is the easiest to square with an objective test. In the context of qualified immunity, the phrase refers to the extent of departure from “clearly established law,” and implies that the departure must be great, and the law must be quite “plain,” to trigger liability. This view was elucidated in Anderson, when the Court explained that the legal standard at issue must be “particularized,” and unlawfulness must be “apparent” under the circumstances faced by the defendant official. Such assessment would not necessitate examination of an official’s “subjective beliefs,” but does require appreciation of “information the . . . officers possessed” – an inquiry that Anderson characterized as “objective (albeit fact-specific).”

The extent of the defendant official’s awareness of constitutional strictures and compliance with them is therefore relevant. Note, however, that these are circumstances that as a practical matter will almost certainly be more often proved through objective than subjective evidence – e.g., proof of available training, rather than an officer’s admissions as to her knowledge and understanding. On the other hand, the official’s motives or purpose in action – facts that could only be proved through subjective inquiry – are irrelevant to the qualified immunity inquiry. Recalling the background as it had set forth this standard, however, the Court insisted that it had done no such thing.

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263 LaFave, supra note 4, at 784.
264 See, e.g., Model Penal Code § 2.02; Restatement (Second) of Torts § 12.
267 Id. at 641(emphasis added).
268 Id.
history of the good faith defense and Harlow’s rejection of a “malice”-based test, Anderson can perhaps best be understood as distinguishing between what in criminal law terms might be described as “knowing” versus “purposeful” or “intentional” mental states.\textsuperscript{270} This understanding is further reflected in lower courts’ adjudication of qualified immunity claims.\textsuperscript{271}

The point here, it must be emphasized, is not to defend the stability or sensibility of the Court’s attempt to balance its purported commitment to solely objective inquiries in immunity decisions with the heightened culpability showing that it entertains in that setting. Rather, it is to suggest a source for understanding how the Herring Court may have conceived of the culpability standard it enunciated, and provide a basis for predicting how that standard is likely to be applied going forward. In this latter regard, two issues of application percolating in lower courts might be illuminated by understanding Herring’s culpability framework as effectively converged with qualified immunity.

The first concerns whether Herring opens the door to an exclusionary rule exception where law enforcement officials arrest or seize evidence based upon a mistaken legal understanding of the lawful scope of their authority – in particular, where subsequent judicial action invalidates a previously legal law enforcement practice. Consideration of this question by the lower courts has been driven by Arizona v. Gant, decided the same term as Herring, which effectively overturned the prevailing, expansive view of the scope of vehicle searches pursuant to the Court’s prior decision in New York v. Belton.\textsuperscript{272} Gant meant that many searches that lower courts would unquestionably have affirmed on direct appeal would now be deemed in violation of the Fourth Amendment.\textsuperscript{273} But does it also mean

\begin{itemize}
  \item \textsuperscript{270} See, e.g., Model Penal Code § 2.02; see also Crawford-El v. Britton, 523 U.S. 574, 592 (describing “motive” as an irrelevant consideration for purposes of qualified immunity).
  \item \textsuperscript{271} See, e.g., Hammond v. Kunard, 148 F.3d 692, 697 (7th Cir. 1998) (“Looking at what the officers knew at the time of the alleged constitutional deprivation does not constitute a “subjective” test for qualified immunity. We are not looking at the motives for engaging in the questioned conduct, but rather at the information before the officer when he ascertained whether his conduct would violate a clearly established constitutional right. This is part of the objective reasonableness inquiry, not a subjective inquiry into an officer’s motives . . . ”).
  \item \textsuperscript{273} Rules concerning retroactivity would appear to dictate that the new Gant principle will be substantively applicable in cases pending on direct appeal. See Griffith v. Kentucky, 479 U.S. 314 (1987); United States v. Johnson, 457 U.S. 537 (1982). Arguably,
that the fruits of those searches must be suppressed? Courts have divided in their answers, and the United States has asked the Court to intervene in the coming Term.

This Article’s convergence thesis suggests that the Court would be likely to extend the logic of Herring to preclude application of the exclusionary rule in instances of Gant violations and similar “mistake of law” scenarios. Unquestionably, as the Court stated in Gant itself, officers who seized evidence in reliance upon pre-Gant caselaw that authorized their searches would be immune from civil suit. Given how “clearly established” the broader interpretation of Belton was prior to Gant, any reasonable police officer would have relied upon it — indeed was undoubtedly trained to do so. Likewise, searches in reliance upon pre-Gant caselaw can hardly be said to be “gross[ly] negligent” — if they were negligent at all. These circumstances in and of themselves support the conclusion that Herring would be read to deny exclusion — in step with denial of a civil remedy. Indeed, the United States has advanced precisely this argument in its petition for certiorari on this issue.

But subtler features of Herring also support this conclusion, by virtue of their amplification of “fit” between the rationale of qualified immunity and the exclusionary rule’s good faith exception in this context. As noted in Part I, the Herring majority was at pains to portray exclusionary rule doctrine as premised not only upon official “culpability,” but upon

however, the question of remedy is a separate one. Cf. Illinois v. Gates, 462 U.S. 213, 222 (1983) (“The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.”).

274 Compare, e.g., United States v. Davis, 598 F.3d 1259, 1263—68 (11th Cir. 2010) (holding that good faith exception precluded application of exclusionary rule to remedy Gant error), and United States v. McCane, 573 F.3d 1037, 1042—45 & n.5 (10th Cir. 2009) (same), with United States v. Gonzalez, 578 F.3d 1130, 1132 (9th Cir. 2009), en banc reh’g denied, 598 F.3d 1095 (9th Cir. 2010) (holding to the contrary); 668 F. Supp. 2d 1042, 1051 (W.D. Mich. 2009) (same).


276 See Gant, 129 S.Ct. at 1722 n.11.


279 Petition for Writ of Certiorari, United States v. Gonzalez, No. 10-82, 2010 WL 2786992, at *14 (Jul. 14, 2010) (arguing that Gant observation concerning qualified immunity “directly supports the conclusion that the good faith exception to the exclusionary rule applies in criminal prosecutions because the qualified immunity test turns on the same standard of reasonableness as the good faith exception”).
highly individuated fault assessments.\textsuperscript{280} The Court emphasized that, notwithstanding Dale County’s negligence, “Coffee County officers did nothing improper,” and in fact facilitated timely correction (albeit not in time for Herring) of the warrant error.\textsuperscript{281} The import of the distinction drawn by the Court appears driven by a conception of the exclusionary remedy as flowing to Herring from the officials who recovered the evidence to be suppressed – hence the Court’s echoing of the Eleventh Circuit’s suggestion that those officers were not the appropriate target of “punish[ment].”\textsuperscript{282} Together with the elevation of culpability considerations, this aspect of Herring suggests that the Court is increasingly moving toward drawing the exclusionary rule’s contours along lines that track a private remedies framework, rather than a criminal procedure model of systemically borne remedies.\textsuperscript{283}

Given this, the rhetoric and logic of qualified immunity will have far greater salience in the context of the “mistake of law” issue posed by post-\textit{Gant} suppression inquiries, which, in the framework of Herring, must ask whether an officer’s failure to anticipate a change in law can be deemed sufficiently culpable conduct to trigger exclusion. Were the Court to have taken a broader view of the fault inquiry, the question might be a more difficult one: Police departments, prosecutors, judges, and other institutional or individual actors might arguably have a duty to anticipate legal shifts; or, regardless of whether such shifts could be anticipated, it is arguably that the criminal justice system, rather than a criminal defendant, should bear the cost of the slow pace of the law’s development and clarification. But when viewed through a more individual lens, the question seems far easier: Individual police officers are expected to know the law as it exists – as it is presumptively taught to them through departmental training – and \textit{not} to act upon prediction or speculation as to the law’s future trajectory. It seems likely that the Court’s culpability approach dictates denial of suppression for \textit{Gant} errors and similar “mistake of law” scenarios.

On the other hand, convergence will not invariably lead to the exclusionary rule being applied with less frequency. Reading Herring as

\textsuperscript{280} See supra Part I.B.3.
\textsuperscript{281} Herring, 129 S.Ct. at 700—01.
\textsuperscript{282} United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007).
\textsuperscript{283} Whether the rationale underlying this view is deterrent – \textit{i.e.}, ensuring the remedy’s salience by assessing it against only the actor whose conduct should be altered – or sounding in corrective justice – \textit{i.e.}, “punishing” the culpable official with the sanction of lost evidence, is a question of importance, but is not material to the instant point.
aligned with the Court’s qualified immunity framework also serves to preserve contexts in which suppression had, prior to *Herring*, been held appropriate. One important example is “facially deficient” warrants, which *Leon* exempted from its good faith exception.  

*Leon*’s dicta in that regard became holding in the constitutional tort case of *Groh v. Ramirez*, in which the Court denied qualified immunity to an officer who had served such a warrant, citing *Leon* for the proposition that such conduct fell within the zone of heightened culpability required to render official conduct “clearly” unconstitutional.

Following *Herring*, lower courts have split on the question of whether *Leon* and *Groh* perdure, i.e., whether execution of a “facially invalid warrant” meets the threshold of gross negligence required by *Herring*.  

Convergence suggests that the correct answer – the one the Court is likely to reach as well – is “yes”: Such conduct is “gross negligence” or recklessness, in that, as *Groh* also reasoned, it contravenes law so clearly established, and manifests a deficiency so apparent, that a reasonable official should have known that her actions created a high risk of constitutional harm.

**B. Systemic Negligence**

As discussed in Part I, *Herring* leaves largely unexplained both the origins and meaning of its alternative standard for application of the exclusionary rule: proof of “systemic error” even in the absence of wrongdoing on the part of an individual officer.  

*Herring*’s view that suppression might remedy constitutional harm that is not attributable to any individual misconduct, but instead is traceable to system-level failure is obviously resonant with the Court’s post-*Monell* approach to entity-based liability under Section 1983.  

*Herring*’s attribution and elaboration of systemic error by reference to Justices

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286 See, e.g., United States v. Lazar, 604 F.3d 230, 237—38 (6th Cir. 2010) (answering the question in the affirmative); United States v. Hamilton, 591 F.3d 1017 (8th Cir. 2010) (answering the question in the negative).
287 See supra Part I.B.2
288 See supra Part II.C.3.a.
O’Connor’s and Kennedy’s views that “routine[]” police error” or a “widespread pattern of violations” might trigger suppression, further enhances the linguistic and conceptual ties between *Herring* and municipal liability doctrine. The importance of Justice Kennedy’s views in particular is heightened by his role in supplying the crucial fifth vote in *Herring*, as he had previously in *Hudson*. In contrast to the earlier decision, however, Kennedy fully joined Chief Justice Roberts’s majority opinion, without qualification. It is highly plausible that the majority’s adoption of the “systemic negligence” standard was a gesture that secured Kennedy’s vote. Moreover, the opinions in *Herring* as well as the content of the briefing and oral argument revealed that, as in *Hudson*, issues concerning the interaction between suppression and civil damages for Fourth Amendment violations were at the forefront of the justices’ minds.

These circumstances support the view that *Herring*’s systemic error standard reflects both borrowing and at least partial convergence. I denominate the effect “partial” because it remains to be seen to what extent the Court’s conceptual alignment of the exclusionary rule with municipal tort liability will give way to substantive alignment of the two standards. This Article’s thesis predicts that the hydraulics of convergence will generate a powerful impetus to draw upon those principles in applying *Herring*’s new exclusionary rule test. But prediction of convergence’s magnitude requires assessment of the conditions that foster its development – in particular, the extent of doctrinal “fit” and the existence of strategic opportunity or advantage in pursuing such a course. While the factors at play in those dynamics are too numerous to fully enumerate, they may be explored by exploring the potential for constitutional tort doctrine to supply answers to perhaps the most salient question raised by the unexplained “systemic error” standard: What magnitude of error will qualify as “systemic” for purposes of invoking the exclusionary rule?

While this question goes in a sense to the heart of the Court’s approach, *Herring* itself gives few clues as to its answer. The two examples appearing in the opinion of systemic conduct that would trigger exclusion –

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290 See *Herring*, 129 S.Ct. at 707, 709 (Ginsburg, J., dissenting); supra note 247.
291 See supra Part II.C.2.
292 Other questions that might plausibly be answered by reference to municipal liability standards include what level of culpability must be proved as to any such error, and how the causal link between systemic deficiencies and the constitutional violation should be assessed.
police “reckless[ness] in maintaining a warrant system,” or the “knowing[]” making of “false entries to lay groundwork for future arrests,” – are suggestive of a requirement that defendants point to specific policies or repeated practices within the relevant law enforcement institution. On the other hand, identification of pervasive deficiencies does not, in itself, seem to encapsulate the Court’s intended approach. This conclusion is suggested by the record evidence of such failures in Herring’s case, which Justice Ginsburg cites in dissent and the majority entirely ignores: Dale County lacked any electronic connection to the County Clerk’s warrant database, maintained physical copies of the warrants in a manner that made it difficult to reliably search for and locate the documents, and lacked any “routine practice of checking the database for accuracy.” These circumstances are certainly “systemic” in the sense that they reflect the “routine” practice of Dale County. It is not clear from the face of the Herring opinion what warrants the majority’s disregard of these facts. That these facts play no role in the Court’s analysis suggests, however, that the majority’s use of the term “systemic negligence” to describe the magnitude of error that it envisions should not be taken at face value. Surely it is arguable that Dale County’s approach failed to meet a baseline standard of care in regard to warrant maintenance.

To the extent that the “systemic error” standard reflects at least conceptual convergence with municipal liability for constitutional torts, two features of the latter doctrine appear likely to influence, if not dictate, the Court’s thinking in this regard. First, municipal liability is imposed under Section 1983 only upon satisfaction of “rigorous” standards of culpability with respect to the entity itself; respondeat superior liability will not lie. This requirement flows from the statutory framework of Section 1983: In Monell and subsequent decisions the Court has repeatedly affirmed that the statute’s requirement that a “person . . . cause[]” deprivations of rights mandates that a municipal “person” must be directly, not vicariously, responsible for constitutional harm. While no such statutory framework guides or constrains courts in applying the exclusionary rule, the language and overall approach of Herring nevertheless suggests some requirement of independent culpability in connection with the systemic error inquiry. Furthermore, Herring’s disregard of the record evidence considered by

293 Herring, 129 S.Ct. at 703—04 (2009).
294 Id. at 708 (Ginsburg, J., dissenting) (internal citations omitted).
295 Id. at 702.
296 See Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 403 (1997); Monell v. New York City Department of Social Services, 436 U.S. 658, 689 (1978).
Justice Ginsburg, and its reference to “reckless” conduct as exemplary of systemic error, suggests that the envisioned threshold might not be far off from the test followed in assessing municipal liability – a standard of “deliberate indifference” that the Court has described as tantamount to recklessness.297

This points to the second potential area of convergence on this score: the methods of proving “deliberate indifference” that courts have entertained in the context of constitutional tort claims. The Court has generally outlined two paths of proof: evidence either facially illegal policies, or “practice[s] . . . so widespread as to have the force of law” that endanger constitutional rights.298 Critically, the precise contours of the widespread practice standard, and the minimum threshold for establishing “deliberate indifference,” is a still-contested question. Lower court decisions have varied as to the minimum evidentiary showing required on this score, with most requiring significant evidence of repeated, similar instances of wrongdoing that risk constitutional injury, usually paired with additional evidence concerning inadequacy of departmental policies and training.299 But at a minimum, the Supreme Court has repeatedly rejected municipal liability claims premised on “isolated” practices, and has members of the Court have strongly suggested that even multiple,300 and has held that even evidence of systemic deficiencies in policies and training will not necessarily suffice where the need for improvement was not “obvious” based upon “usual and recurring situations” with which officials must deal.301 Here again, this limitation is resonant with Herring’s characterization of the Fourth Amendment violation as being attributable only to “isolated negligence,” and systemic error as constituting “routine”

298 See Brown, 520 U.S. 397, 403—04 (1997); Farmer, 511 U.S. at 836, 840—41.
299 Compare, e.g., Pineda v. City of Houston, 291 F.3d 325, 329 (5th Cir. 2002) (holding that evidence of eleven incidents of warrantless entry did not establish a “pattern”), and Estate of Moreland v. Dieter, 395 F.3d 747, 759—60 (7th Cir. 2005) (reversing verdict against jail that was supported by evidence of several incidents of improperly pepper-spraying inmates, and allegations but no proof of inadequate policies or training); with Thomas v. Cook County Sheriff’s Dep’t, 604 F.3d 293, 303 (7th Cir. 2010) (finding sufficient evidence of “widespread custom or practice,” based on proof of numerous inadequate policies, despite lack of evidence of prior constitutional violations).
300 Brown, 520 U.S. at 415; City of Canton v. Harris, 489 U.S. 387, 399 (1989) (O’Connor, J., concurring); City of Oklahoma City v. Tuttle, 471 U.S. 808, 820 (1985). The Supreme Court will consider the scope of “pattern” evidence required to impose municipal liability, and the question of when, if ever, a single constitutional violation will support municipal liability, this coming term in Thompson v. Connick, No. 09-571.
301 City of Canton, 489 U.S. at 390—91.
or “widespread” occurrences. Thus, the linguistic and conceptual alignment of *Herring*’s systemic error discussion with the Court’s municipal liability doctrine signals the strong possibility that the latter is likely to inform, if not dictate, application of the former standard. Indeed, lower courts have already taken this cue, drawing from municipal liability jurisprudence to reject exclusionary rule claims premised on systemic misconduct.  

If this assessment is accurate, several predictions can be hazarded concerning the fate of criminal defendants seeking to invoke this prong of *Herring*. First and most obviously, the systemic error standard is likely to address only egregious deficiencies. While counsel for *Herring* asserted at oral argument that no “Barney Fife defense” exists to the exclusionary rule, courts have certainly exhibited sympathy toward a “Mayberry defense” in the municipal liability context, particularly in regard to policing: Departmental policies and training need only be “adequate,” as the Court has admonished that “[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city ‘could have done’ to prevent the unfortunate incident.” The Court’s disregard of the record evidence cited by Justice Ginsburg suggests that the same would hold in application of the “systemic error” standard to suppression claims.

Second, reading *Herring* as informed by municipal liability standards suggests that highly generalized evidence of systemic deficiencies not tied to the institutions implicated in a particular suppression claim will

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302 Compare, e.g., United States v. Campbell, 603 F.3d 1218, 1235—36 (10th Cir. 2010) (denying suppression because violation was at most “single incident” and there was no evidence of a “policy or practice”), with Moss v. Kopp, 559 F.3d 1155, 1169 (10th Cir. 2009) (stating in context of Section 1983 action that “proof of a single incident of unconstitutional activity is ordinarily not sufficient to impose municipal liability,” without evidence that incident occurred “pursuant to a decision made by a person with authority to make policy decisions on behalf of the entity being sued” (emphasis added)).

303 Transcript of Oral Argument, Herring v. United States, 129 S.Ct. 695 (2009), 2008 WL 4527979, at *20 (Oct. 7, 2008) (recording comment of petitioner’s counsel, in response to rumination by Chief Justice that Dale County personnel “probably don’t have the latest version of WordPerfect, or whatever it is” and “are probably making do with whatever they can under their budget and doing the best they can”).

304 City of Canton, 489 U.S. at 392. Lower courts have followed suit. See, e.g., Grazier ex rel. White v. City of Philadelphia, 328 F.3d 120, 125 (3d Cir. 2003); Pineda v. City of Houston, 291 F.3d 325, 332—33 (5th Cir. 2002) (rejecting claim that special Fourth Amendment training was required to deal with scenario under which constitutional violation occurred, where minimal general training was received); Palmquist v. Selvik, 111 F.3d 1332, 1345 (7th Cir. 1997) (“The estate’s argument boils down to ‘no special training = deficient training.’ We cannot accept this equation.”).
not suffice to establish entitlement to suppression. Indeed, *Herring* itself may demonstrate this constraint, given the Court’s disregard of the empirical research and anecdotal data from reported Fourth Amendment caselaw pointing to non-trivial rates of error in warrant databases in Alabama and across the country. 305 Such evidence would almost certainly lack the requisite specificity to establish a particular entity’s culpability for purposes of municipal Section 1983 liability. 306 But *Herring* had good reason to offer such evidence in seeking suppression: Prior exclusionary rule decisions alluding to the potential relevance of systemic Fourth Amendment deficiencies had described precisely such categories of data. 307 The *Herring* Court’s disinterest in these facts suggests that its systemic error standard means something different – and more stringent – than those prior cases had suggested. Paired with the Court’s emphasis on the centrality of culpability in its analysis, and its parroting of the standard of “widespread” misconduct required for municipal liability, it is reasonable to speculate that the Court’s systemic error standard may, in step with municipal tort liability, require a demonstration of deficiencies traceable to a specific entity whose conduct is implicated by a suppression motion.

A third consequence, related to realization of the first two, is that defendants hoping to obtain suppression of evidence on this ground will face significant, perhaps nearly insurmountable, hurdles of proof. In constitutional tort litigation, clearing the culpability hurdle is a notoriously laborious task for plaintiffs, routinely requiring testimony from high-level decisionmakers, discovery as to municipal policies and training, and frequently the retention of experts. Nothing even approaching that level of discovery is feasible or desirable in the criminal context. Conceivably, repeat players in the criminal defense field would be able, over time, to collect and aggregate data concerning Fourth Amendment practices and outcomes – and perhaps *Herring* will have the salutary consequence of spurring precisely such endeavors. But for the vast majority of defense counsel and their clients, access to data concerning “widespread” or “routine” practices, or other opportunities to prove anything approaching institutionally “reckless” conduct, will be beyond reach. As the *Herring*

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307 See supra notes 54 & 55.
systemic error standard moves farther along a spectrum from conceptual to substantive convergence, with its contours more closely tracking those of municipal liability, its viability as a remedial pathway diminishes.

It is of course feasible that the Court will not follow a path of substantive convergence, and that *Herring*’s systemic error standard will be interpreted in a less stringent light. With that possibility in mind, it is worth observing again that convergence – at least at the conceptual level – does not inevitably mean a reduction in overall remedial opportunities. Indeed, on its face *Herring*’s systemic error test potentially expanded the scope of the exclusionary rule. As Part I observed, prior cases had made reference to the potential relevance of assessing constitutional compliance at the institutional, rather than individual level. But none had affirmatively held that evidence of “systemic” deficiencies causing a Fourth Amendment violation might, standing alone and in the absence of individual misconduct, justify granting suppression. In this respect, limited convergence of the exclusionary rule and constitutional tort doctrine could serve, at least formally, to expand the remedial options available to criminal defendants. Moreover, it would do so in a manner that quite possibly would generate better-tailored deterrence. Both empirical assessments and logic strongly suggest that individual officers’ behavioral incentives are only weakly tied to adjudicatory outcomes, whereas at the level of police management there are greater political and bureaucratic incentives, and likely greater information, to ensure that searches and arrests bear fruit in ultimate case dispositions. *Herring* suggests the possibility of a world in which suppression hearings adduce evidence of departmental policies and training, or systemic patterns in law enforcement tactics – a scenario more likely to generate institutionally felt deterrence through ultimate suppression rulings as well as the very process of information gathering. Moreover, litigation

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308 See supra Part I.B.2.

309 Fourth Amendment scholars running the gambit of dispositions toward the exclusionary rule had long urged greater attention to systemic considerations in conceiving of the exclusionary remedy. See, e.g., Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 367—72, 416—31 (1974); Jerold Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L. Rev. 1319, (1977); John Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1050—53 (1974). Indeed, even before *Leon* Yale Kamisar specifically and presciently endorsed analogy between the exclusionary rule and municipal constitutional tort liability. Kamisar, supra note 118, at 596.

310 Police chiefs and their immediate deputies – those who make departmental policy – are likely to be directly accountable to a mayor or city council officials – actors whose political fortunes rise and fall with criminal convictions. It is also more likely that prosecutors would communicate trends in suppression statistics to police management, than that individual officers would be abreast of outcomes in individual cases.
of systemic Fourth Amendment deficiencies through suppression hearings will address a category of systemic error that is effectively beyond the reach of civil remedies: federal law enforcement action.\textsuperscript{311}

But these salutary aspects of \textit{Herring}’s systemic error holding are less likely to be captured as application of the Court’s standard substantively converges with municipal liability principles. Whatever additional deterrent benefit might be seen from the formal enlargement of the exclusionary rule to include consideration of systemic error would be swallowed by the force of convergence.

\section*{IV. Broader Implications}

The primary aims of this Article have been to illuminate the dynamics of borrowing and convergence in the somewhat idiosyncratic context of exclusionary rule jurisprudence, and to consider the more specific question of how those dynamics might inform our understanding of the \textit{Herring} decision. Lurking in the not-too-distant background of that exploration, however, have been larger questions about the nature of the exclusionary rule as a constitutional remedy, and the general propriety and effect of doctrinal borrowing in that context and more generally. While space and scope constraints require that these issues be attended to here only in passing, it is worthwhile to sketch their outlines, and thereby perhaps lay groundwork for future study.

With regard to the first question, discussion of the manner in which the exclusionary rule has been shaped by borrowing and convergence begs the enormous question of what \textit{are} appropriate criteria and processes for defining the contours of that doctrine. In part, the answer will depend upon the view one adopts of the rule’s substantive rationale – either the \textit{Calandra} deterrence framework, or a “‘more majestic conception’” of the sort described in Justice Ginsburg’s \textit{Herring} dissent,\textsuperscript{312} or some other view. But more foundationally, the answer depends upon how one conceives of the nature of the exclusionary rule as legal doctrine. On this score, I wish to advance the view that, even embracing the prevailing instrumental rationale, the circumstances under which suppression will follow from a Fourth

\textsuperscript{311} \textit{Bivens} damages actions are only maintained against individual officers, and direct claims under the Federal Tort Claims Act are premised on vicarious liability, and hence systemic misconduct will rarely if ever have occasion to be explored in civil suits concerning federal action.

Amendment violation are the stuff of constitutional doctrine broadly writ. Specifically, the exclusionary rule is a species of “remedial rules” as that term has been coined by Mitchell Berman in his work on constitutional decision rules.\footnote{313} As such, the Court’s frequent admonition that suppression is not a “right” unto itself does not end the inquiry into the relationship between that remedy and the constitutional meaning that it enforces. I have suggested elsewhere that remedial rules in constitutional criminal procedure, like the exclusionary rule, may be developed by reference to highly functional, non-rights-based criteria\footnote{314} – including, for example, selecting a goal of maximizing deterrence at a systemic level rather than effectuating maximum remediation at an individual level. But at the same time, a remedial rule’s status as a component of constitutional doctrine creates an imperative of crafting it by reference to, and in a manner that does not undermine, rules that implement the background constitutional meaning.\footnote{315}

In the present context, these principles mean at a minimum that courts should hesitate before developing the exclusionary rule’s contours by borrowing from trans-substantive remedial doctrine, as the Court has with constitutional tort jurisprudence.\footnote{316} The hazards are particularly clear with regard to the use of qualified immunity to shape the good faith exception, as in that instance both remedial doctrines act, effectively, as conduct rules for law enforcement – to wit, act reasonably, or not with gross negligence, by reference to clearly established legal principles. To the extent that \textit{Herring} facilitates complete convergence of the good faith exception with immunity doctrine, such that its culpability test applies across the range of Fourth Amendment contexts, this new conduct rule will often – if not always – set the bar lower than what the Court has held the Constitution to itself require.\footnote{317} This is a negative outcome by any measure: Whether the exclusionary rule is seen as substantively tethered to the Fourth Amendment itself, or simply a device for ensuring optimal constitutional compliance, functional diminishment of the constitutional standard is undesirable.

\footnote{313}{See Mitchell Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 12 (2004).}
\footnote{314}{See Laurin, supra note 176, at 1060—61.}
\footnote{315}{Id.}
\footnote{316}{To counsel hesitation does not, of course, equate with general condemnation. For example, the novel “attenuation” approach advanced in \textit{Hudson v. Michigan} is on its face consistent with the broad principles of constructing remedial rules that I have proposed. See supra Part II.C.3.b.}
\footnote{317}{Note, of course, that the same criticism could be lodged against qualified immunity itself. However, the complex nature of qualified immunity as constitutional remedial doctrine, and the complexity of its interaction with statutory enforcement mechanisms and the Constitution itself, are beyond the scope of this Article.}
Yet there may be justifications for such an effect. Indeed, in positing a framework of alternate remedies – the exclusionary rule being denied where civil liability may lie – the Court has offered one such justification, along the lines of Fallon and Meltzer’s description of “a general structure of constitutional remedies adequate to keep government within the bounds of law.” As the foregoing analysis has suggested, however, the expansion of convergence largely negates the coordinate advantages of such a regime, doubling down on the functional dilution of Fourth Amendment norms. The question of whether it is desirable or feasible for the Court to fashion remedial doctrine with an eye to such coordination is a significant one deserving of further exploration. In the present context, however, the story of convergence reveals a critical pitfall in that approach, at least as it is emerging in exclusionary rule jurisprudence.

More broadly, the account herein carries implications for the study and practice of borrowing. As a general matter, prior analysis of doctrinal borrowing has pointed to a number of favorable attributes of the practice. Thus, for example, Nelson and Tebbe take a generally favorable view of constitutional borrowing, conceding that particular instances may exhibit inadequate substantive fit, but arguing that there are greater upsides than downsides to the practice – in particular, the potential to amplify the influence of legal ideas, and its facilitation of “generality, participation, and accountability” in the development of legal doctrine. These advantages track those cited in other fields in which scholars have pointed to cross-fertilization of ideas, harmonization of legal rules, and convergence around normatively preferable legal standards as potential salubrious features of borrowing.

Without negating those up-sides to the dynamics of borrowing and convergence as a general matter, the account here offers a cautionary tale concerning some of borrowing’s consequences for the process of doctrinal development. While the hydraulic nature of borrowing and convergence is categorically neither positive nor negative, it is a property that should give advocates and judges some pause in deciding whether to pursue, or how to oppose, a tactic of borrowing. The exclusionary rule context suggests that particularly where the strategic motivations to borrow might be most

318 Fallon & Meltzer, supra note 162; supra Part II.C.3.c.
319 Nelson & Tebbe, supra note 7, at 462, 464.
powerful, the doctrinal maneuver is also likely to take on a life of its own. One potential consequence may be convergence, where only a limited instance of borrowing was initially envisioned. Thus, for example, negative reaction to Leon’s borrowing from Harlow might have been muted in part by the appearance that the move could be cabined in the warrant context.\footnote{See supra note 165 and accompanying text.}

The hindsight perspective provided herein suggests, however, that, from the perspective of those who would oppose diminishment of the exclusionary rule, earlier and more sustained challenge would have been necessary to halt the cascading effect of that decision.

A related, and perhaps more serious effect of convergence is its own potential to occlude its very operation. As borrowing comes to deepen the theoretical ties between two doctrinal fields, further importation across doctrinal lines may become more implicit, and the source of the borrowed principles less apparent. Herring, and the confusion as to the meaning and origins of the framework that it announced, appears to be a case in point. In this sense, borrowing and convergence can have the negative effect of diminishing jurisprudential transparency. Concomitantly and more practically, they will, as tactics, become progressively less amenable to identification and resistance. In the present context, an additional and even more practical consequence flows from these observations. Revealing the influence of constitutional tort doctrine on the Court’s evolving exclusionary rule jurisprudence also suggests that advocates on all sides will be far better positioned to advance their claims to the extent their own legal literacy tracks the Court’s position of straddling the criminal-civil line with regard to Fourth Amendment enforcement.

These reflections are all preliminary, and of course limited by the vantage point of this Article: the peculiar history and features of Fourth Amendment doctrine and the field of constitutional criminal procedure. But undoubtedly, the questions raised – concerning both remedial design and its relationship to the operative substance of constitutional protections, and the propriety and effects of borrowing more generally – merit further scholarly exploration. At least if not more importantly, these concerns warrant attention from judges, advocates, and other legal actors who are on the front lines of doctrinal development.

CONCLUSION

Although Herring v. United States was acclaimed and bemoaned as
one of the most consequential criminal procedure decisions of the Supreme Court’s 2008 Term, discerning its meaning and probable legacy has been vexing to legal scholars – confounded by the opinion’s hedging between broad and narrow formulations, and its deployment of seemingly new, unprecedented, and sweeping standards for cabining the Fourth Amendment exclusionary rule. A primary aim of this Article has been to illuminate some of Herring’s more puzzling features by bringing to light a little-noted trend in the last two-and-a-half decades of exclusionary rule jurisprudence: its borrowing of, and increasing convergence with, constitutional tort doctrine. The Article’s identification and exploration of those dynamics yields at least two important categories of insights. First, the analysis identifies the Court’s decision in Herring as not a doctrinal break but rather a culmination of a discernable evolution in the exclusionary rule’s conceptual and substantive content, when understood as significantly rooted in the logic and substance of constitutional tort litigation. Perhaps more bleakly for supporters of the exclusionary rule, this observation also suggests that the meanings embedded in Herring’s more ambiguous language, and which will be played out in future exclusionary rule cases, may well represent a sweeping roll-back of the exclusionary remedy that will effectively preclude any remedy for entire categories of Fourth Amendment violations—in particular, those resulting from negligent police conduct.

More broadly close examination of how the dynamics of borrowing and convergence have operated in this specific doctrinal context offers a richer understanding of processes of doctrinal change generally and in the specific context of constitutional remedial doctrine which the exclusionary rule occupies. Greater attention to these effects is warranted in all areas of the law, but particularly in the arenas of constitutional remedies, and criminal procedure more specifically – where arguably the impact on substantive legal doctrine carries the highest democratic and moral stakes. And on that score, this Article’s lessons are not solely of academic interest. Rather, the account herein sounds a cautionary note for judges, advocates, and other legal audiences and actors, to appreciate powerful, and perhaps unpredictable, influence that borrowing and its tandem dynamic of convergence can exert.