Evidence Laundering: How Herring Made Ignorance the Best Detergent

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ABSTRACT

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

In the years since *Herring* was decided, courts have allowed evidence laundering in a variety of contexts, from cases involving flawed databases to cases stemming from faulty judgments and communication lapses in law enforcement teams. Courts typically zero in on individual officer behavior, or limit their review to a single incident rather than considering the entire course of conduct. In so doing, they have taken the concept of good faith to unprecedented heights.

The expanded good faith doctrine that *Herring* embodies makes visible the individualistic view of police work that is implicit in much of Fourth Amendment doctrine. This atomistic perspective, however, fails to appreciate the realities of modern policing, which depends heavily on teamwork and delegation. Moreover, the increased emphasis on police intentions and on balancing the costs and benefits of exclusion brings our courts into closer alignment with courts elsewhere in the world. As the exclusionary rule doctrine in the U.S. converges with its counterparts abroad, comparative work offers useful insights about future doctrinal developments and the likely effects of the transformed exclusionary rule.
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I.  INTRODUCTION

The exclusionary rule in the United States calls on judges to sort the dirty laundry in the government’s case, to exclude from criminal trials evidence that the police obtain through constitutional violations. The U.S. Supreme Court, however, has grown skeptical about the exclusionary rule that it created over a century ago. As a result, the Court has created several doctrines to limit the relief available to defendants. Those limiting doctrines, taken together, amount to more than an exception here or there, or a few extra wins for the government in close cases. The long-term trend has transformed expectations of courts and police officers, as well as the plausible attorney arguments that form the backdrop for plea negotiations.3

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1 See Weeks v. United States, 232 U.S. 383 (1914).
3 It has also left some courts uncertain about how to conduct suppression analysis in a “rational” and “predictable” manner when relying entirely on cost-benefit analysis. See, e.g., United States v. Thomas, 2009 WL 151180 (W.D. Wisc. 2009).
In this essay we look closely at one such limiting doctrine and explain how it reflects long-term trends for criminal procedure remedies. The cases that interest us here apply the “good faith exception” to the exclusionary rule in multi-officer situations. In these instances, one police officer makes a constitutional mistake when gathering evidence and then passes that evidence along to a second officer, who receives the evidence, develops it further, and delivers it to prosecutors for use in a criminal case. When courts admit the evidence based on the good faith of the second officer, the original constitutional taint disappears; the second law enforcement agent’s limited knowledge of the original violation effectively launders the evidence.

We begin our assessment of evidence laundering by reviewing the Supreme Court opinion that authorized this practice: *Herring v. United States.* As we describe in Part II, the *Herring* court took three steps to extend the good faith exception, making evidence laundering possible. First, although the established doctrine considered the good faith of judges and other government agents who were not members of the law enforcement “team,” the *Herring* Court stretched the good faith exception to cover mistakes by law enforcement agents. Second, the *Herring* court imposed a heightened mental state requirement on proof of officer misconduct, declaring that simple negligence by a police officer, regardless of the context, would not be enough to trigger the exclusionary rule. Third, the Court compartmentalized the relevant actions of each individual officer, rather than interrogating the behavior of the whole law enforcement team.

In Part III, we show more specifically how *Herring* invited evidence laundering by police and laid the groundwork for judicial approval of this practice. Using a hypothetical case, we first consider the behavior of the police actor who makes the initial mistake, along with the actions of his or her colleague who receives the tainted evidence. We then explain how *Herring*—by rhetoric and by example—

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teaches lower courts to turn a blind eye to evidence laundering except when two officers make egregious mistakes in the field as they pursue a suspect.

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

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

The evidence laundering cases make it clear that an effective exclusionary rule must take an organizational perspective on police work. In the world of fragmented
policing\textsuperscript{5} that we can glimpse through the window of these cases, organizational theory tells us more than micro-economic theory. In particular, those who design and control the flow of information among policing organizations should, like the officers who react to information in a particular case, come under constitutional scrutiny. Although the \textit{Herring} opinion did mention that “systemic negligence” could result in exclusion,\textsuperscript{6} the rigors of assembling evidence to support a single defendant’s motion to exclude evidence, together with the limited reach of criminal discovery, make the claim difficult to prove.\textsuperscript{7}

One consequence of the courts’ focus on the conduct of individual officers is to make jurisdictional boundaries important. Under this reading of the good faith doctrine, it becomes easier for officers from one jurisdiction to sanitize tainted evidence by passing it along to colleagues in another jurisdiction. \textit{Herring} thus seems to have reinstituted the silver platter doctrine that the Supreme Court rejected decades ago. The return of the doctrine is especially concerning today because investigations increasingly occur in joint federal-state task forces or across state borders.\textsuperscript{8}

In the latter half of Part V, we evaluate the role of evidence laundering within the political economy of the exclusionary rule. Some observers have noted that a more flexible exclusionary remedy might give judges the political cover they need to declare more vigorous legal limits on law enforcement.\textsuperscript{9} These predictions, however, have not proven accurate. Although the exclusionary rule transformed slowly over

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\textsuperscript{6} 555 U.S. at 144.
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the years into a more flexible balancing enterprise, the substantive limits on police investigations did not appear to strengthen in response.

The final implication that we explore is comparative. In Part VI, we suggest that the evidence laundering technique, like so many other changes to criminal procedure remedies in the United States, brings our courts into closer alignment with courts elsewhere in the world. While new in the U.S., the courts’ emphasis on police intentions and the context in which violations occur has long been common in other nations. As the exclusionary rule doctrine in the U.S. converges with its counterparts in other parts of the world, comparative work can provide us with useful insights as we attempt to anticipate future doctrinal developments and to measure the effects of the exclusionary rule.10

II. THE GOOD FAITH EXCEPTION, THEN AND NOW

The original pronouncement of a good faith exception to the exclusionary rule in United States v. Leon11 carried within it the seeds for growth in many different directions. Nonetheless, the degree to which the Court has strayed from the original, warrant-based context of good faith in just 25 years is remarkable.12

A. Good Faith Then

Leon involved a police officer who relied on the judgment of a magistrate who issued a search warrant when he shouldn’t have. After finding fault with the magistrate’s assessment of probable cause, the Supreme Court considered whether

11 Leon, 468 U.S. 897.
12 Justice Brennan in his Leon dissent predicted this unraveling, as he lamented the day the Court would use good faith to validate “situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances.” 468 U.S. at 959. As we describe below, this prediction has already come true in courts that have taken the broadest reading of Herring. See, e.g, United States v. Massi, 761 F.3d 512 (5th Cir. 2014).
the evidence obtained as a result of the unconstitutional search should be suppressed. In focusing on remedy rather than on violation, the Court asked if it was reasonable for the officer to rely on the magistrate’s judgment. Justice White gave this answer: “We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”

The *Leon* majority stressed the role of the *judicial officer* in producing the constitutional error. So long as officers rely on “neutral and detached” judges for guidance on how to develop their evidence, a cost-benefit calculation supports the government’s use of the evidence at trial, the Court declared. That basic line of reasoning held firm in *Illinois v. Krull* and *Arizona v. Evans*, when officers relied on, respectively, a statute that was later invalidated and an inaccurate court record showing an outstanding arrest warrant. The Court decided that the *Leon* good faith exception applied in both of these contexts for two reasons: (1) neither legislators nor court clerks had any incentive to promote improper searches, and (2) where officers behave appropriately, there is nothing to deter.

When police officers pursue an investigation based on faulty evidence from other law enforcement officers, however, the arguments for allowing the officer to rely on that evidence become weaker. Law enforcement employees are all part of the law enforcement community, a group meant to be constrained by constitutional requirements and deterred by the exclusion of tainted evidence. For that reason, the Court in *Leon, Krull* and *Evans* made much of the distinction between state actors who are “adjuncts to the law enforcement team, engaged in the often competitive enterprise of ferreting out crime” and state actors who hold other, non-law

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enforcement roles and thus “have no stake in the outcome of particular criminal prosecutions.”

The Leon good faith doctrine also implied that exclusion was premised on officer negligence; the defense did not need to prove the officer’s subjective awareness of wrongdoing in order to keep tainted evidence out of the criminal trial. While the Leon Court did not explicitly hold that negligence by an officer would defeat good faith, its opinion stressed that the officer’s claim to good faith reliance on the behavior or judgment of others had to be “objectively” reasonable. In the years since, lower courts have emphasized that negligent conduct is the antithesis of objective reasonableness, thus reinforcing the view that neither intentional wrongdoing nor conscious recklessness by an officer was necessary to secure exclusion of tainted evidence. Negligence alone would — and did — suffice.

B. Good Faith Now

The twenty-first century brought major changes to the law of good faith. We have witnessed both the erosion of the dividing line between law enforcement and other state actors and the removal of simple negligence from the exclusion calculus. Consequently, today’s Supreme Court accepts evidence gathered by law enforcement practices that were previously seen as off limits.

While Leon’s emphasis on the non-law enforcement status of the wrongdoer guided the Court in Krull and Evans, the distinction between law enforcement and non-law enforcement errors no longer seems salient. This change appeared five

17 514 U.S. at 16.
18 468 U.S. at __.
19 See, e.g., United States v. DeLeon-Reyna, 898 F.2d 486 (2d Cir. 1990) (holding that where officer fails to follow office policy when communicating license plate to dispatch and she provides the wrong information as a result, this is officer negligence, which is by definition not objective reasonableness within the meaning of Leon); State v. Allen, 269 Neb. 69 (2005) (holding that negligence by definition is failure to do something reasonably careful person would do under the circumstances).

20 The Court has also expanded good faith protection to officers who rely on binding circuit precedent that is later declared unconstitutional. Davis v. United States, 131 S. Ct. 2419 (2011).
years ago in *Herring v. United States*, when the Court held for the first time that good faith could cure even errors made by law enforcement officers. Specifically, *Herring* held that the exclusionary rule does not apply when an illegal search is based on “isolated [police] negligence attenuated from the arrest.” In *Herring*, a police officer relied on a faulty police report (created by the sheriff’s office of another county) about an outstanding arrest warrant for Bennie Dean Herring. This false report led to the arrest of Herring; the search incident to arrest turned up methamphetamine and an illegal pistol. According to the *Herring* court, “the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” It does not apply outside that context.

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

We cannot be sure if the basis for attenuation under the *Herring* doctrine is temporal (that the arrest occurred five months after the error), spatial (that the arrest occurred in a different jurisdiction from the source of the error) or personal.

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22 *Id.* at 137. While the Court’s statement specified “arrest,” the holding applies to any police action. The arrest language derives from the factual circumstances of *Herring*.
23 *Id.* at 144.
25 On this basis, courts admit tainted evidence that is removed (by time and intervening event) from the original illegality, see *id.*, or because they believe such evidence would have been inevitably discovered through lawful police channels. See *Nix v. Williams*, 467 U.S. 431 (1984). For an analysis of the interconnected nature of these doctrines, see *Cloud*, supra note 1.
(that someone other than the arresting officer was responsible for the faulty record-keeping).\textsuperscript{26} Whichever the meaning, the attenuation concept suggests that when the primary investigating officer is removed in some way from the error, deterrence of future misconduct is both less likely to result and too costly to impose.\textsuperscript{27} The most important aspect of attenuation in the \textit{Herring} opinion, for our purposes, extends good faith protection through personal attenuation—situations where the offending officer is not the same as the subsequent officer who receives tainted evidence.\textsuperscript{28}

In addition to expanding the types of actors who could benefit from good faith protection and adapting the attenuation doctrine to fit the good faith context, the \textit{Herring} opinion also made a far-reaching change to the standard for judging the culpability of the police officers.\textsuperscript{29} It jettisoned the simple negligence standard that was at the heart of the \textit{Leon} opinion. The \textit{Herring} opinion instead used various formulations to describe the type of police wrongdoing that would suffice to justify suppression: “flagrant” violations, “knowledge” that the search was unconstitutional, “intentional conduct that was patently unconstitutional.”\textsuperscript{30} In short, the police conduct must be

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  \item \textsuperscript{26} For a fuller discussion of the ambiguity of attenuation in the \textit{Herring} opinion, see LaFave, \textit{supra} note 2, at 770-82.
  \item \textsuperscript{27} Some commentators have suggested that the attenuation qualifier in \textit{Herring} was added only to secure a fifth vote for the majority, and that it may well be dropped in the near future. Craig Bradley, \textit{Red Herring or the Death of the Exclusionary Rule?} \textit{45 TRIAL} 52, 53 (Apr. 2009); LaFave, \textit{supra} note 2, at 771 (citing Richard Mc Adams, \textit{Herring and the Exclusionary Rule}, U. Chi. Faculty Blog (Jan. 17, 2009) and Tom Goldstein, \textit{The Surpassing Significance of Herring}, SCOTUS Blog (Jan. 14, 2009)).
  \item \textsuperscript{28} For the remainder of our analysis, we assume that attenuation in this instance was primarily personal, rather than spatial or temporal, as that seems the most likely reading of \textit{Herring} on its facts. Justice Ginsburg in her dissent declared that the fact that the error occurred “in Dale County rather than in Coffee County is inconsequential in the suppression analysis.” 555 U.S. at 150, n. 1. This may track the Court’s longstanding rejection of the silver platter doctrine. Elkins v. United States, 364 U.S. 206 (1960). However, the Eleventh Circuit emphasized the spatial dimension of attenuation, commenting that exclusion would inappropriately “scuttle a case brought by officers of a different department in another county[.]” United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007).
  \item \textsuperscript{29} Others have heavily criticized the Court for crafting this heightened mental state requirement in the name of deterrence. See, \textit{e.g}, Alschuler, \textit{supra} note 2; Thomas K. Clancy, \textit{The Irrelevancy of the Fourth Amendment in the Roberts Court}, \textit{85 CHI-KENT L. REV.} 191 (2010); Dery, \textit{supra} note 2; La Fave, \textit{supra} note 2, at 772.
  \item \textsuperscript{30} \textit{Herring}, 555 U.S. at 142-44. Ironically, \textit{Herring’s} embrace of subjectivity as the true test for constitutional violations contradicts the Court’s assessment of subjectivity in cases like Whren v. US, 517 U.S. 806 (1996); in \textit{Whren} the Court asserted that a focus on the officer’s subjective mental state
sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.\textsuperscript{31}

In the absence of this heightened mental state, the Court said, exclusion of highly relevant evidence seems unfair to those police officers who do follow the law.\textsuperscript{32} Moreover, the Court asserted that only officers or departments who act according to this heightened mental state could be deterred by exclusion.\textsuperscript{33} For those reasons, exclusion should be limited to cases in which serious concerns about officer culpability are present.

The Court in \textit{Herring} used conflicting language to describe whether this inquiry into the officer’s culpability is subjective or purely objective. At one point the Court wrote in a subjective vein, “The exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct.”\textsuperscript{34} Likewise, the majority asserted that, “[W]hen police mistakes are the result of negligence ... rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not pay its way.”\textsuperscript{35} But at another point in the opinion the Court insisted that, “The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers. ... [O]ur good faith inquiry is confined to the

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\textsuperscript{31} \textit{Id.} at 144.

\textsuperscript{32} This issue of the unfairness of excluding evidence obtained by one person based on mistakes made by another person has run the through the entire line of \textit{Leon} cases. But as Justice Brennan argued in \textit{Leon}, this conception of fairness equates deterrence with punishment of individuals, when the whole point of deterrence through exclusion is “to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.” 468 U.S. at 952-55 (Brennan, J., dissenting).

\textsuperscript{33} \textit{Herring}, 555 U.S. at 143-44.

\textsuperscript{34} \textit{Id.} at 150-51.

\textsuperscript{35} \textit{Id.} at 147-48.
objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances." 36 While the first two statements signal that officer intent matters because deliberate or reckless misconduct is the only sound basis for exclusion, this last statement renders the subjective mental state of the officers irrelevant. 37

Whether objective or subjective, precisely which government agents must display this level of culpability? Three groups of government officials created the unjustified arrest of Bennie Dean Herring. The first was the arresting officer, Mark Anderson, who worked for the Coffee County Sheriff’s Department. He learned that he would soon encounter Mr. Herring (who was “no stranger to law enforcement” 38) and asked the warrants clerk in his own office to check for any outstanding arrest warrants. When the Coffee County clerk found no warrants, Anderson asked her to check in nearby Dale County. The clerk in Dale County (the second government agent in this scenario) did find a computer record of an outstanding arrest warrant, but—unbeknownst to her—the record was faulty because the court had “recalled” the warrant five months earlier. Somehow, the routine communication between the Dale County sheriff’s department and the court clerk for Dale County (the third agent) broke down, and an outdated record stayed in the system.

The Supreme Court’s opinion showed no particular curiosity about the agents in Dale County: “For whatever reason, the information about the recall of the warrant for Herring did not appear in the database.” 39 The opinion noted only that “there was no evidence that errors in the Dale County warrant system are routine or

36 Id. at 145.
37 Justice Ginsberg highlighted this discrepancy in her Herring dissent; she accused the majority of not clearly “squar[ing] its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police.” Id. at 157, n.7 (Ginsberg, J., dissenting); see also United States v. DeLeon-Reyna, 898 F.2d 486, 490-491 (5th Cir. 1990) (to argue that evidence should not be excluded unless the officer’s conduct was dishonest or reckless “ignores the overwhelming weight of authority which stresses that the officer’s belief and conduct must be objectively reasonable. ... [I]t [is] oxymoronic for the government to suggest that an error made through negligence is ‘reasonable.’”).
38 Herring, 555 U.S. at 137.
39 Id. at 138.
The majority opinion never mentioned the fact that the state actors did not routinely audit their system for accuracy, nor that Alabama showed a 13% error rate in its state databases. The Court instead congratulated the Dale County clerk for informing Coffee County about the error “immediately” after she learned about the problem. This notification was of course too late for Mr. Herring, as he had already been arrested and searched.

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

By conducting this shallow inquiry into the source of the error (and thereby neglecting the likelihood of other errors by these departments) the Herring Court betrayed the original goal of the good faith exception. Leon emphasized that because the goal of the exception is deterrence of police misconduct, the conduct of

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40 Id. at 146-47. In making this claim, the Court ignored evidence from amici documenting that law enforcement databases are “insufficiently monitored and often out of date.” Id. at 155 (Ginsburg, J., dissenting).
41 Id. at 154. She wrote: “Is it not altogether obvious that the Department could take further precautions to ensure the integrity of its database?” See also Herring v. United States, 2008 WL 4527979 (transcript of oral argument) October 7, 2008.
42 555 U.S. at 138.
43 Id. at 146.
44 Id. at 140.
45 Id. at 140-141 ("Leon admonished that we must consider the actions of all the police officers involved."). The broad approach to police liability that the Court approved in Leon is premised on, and reinforced by, the collective knowledge doctrine articulated by the Supreme Court in Whiteley v. Warden, 401 U.S. 560 (1971) and United States v. Hensley, 469 U.S. 221 (1985).
all of the police officers involved should come under scrutiny. The Leon Court cautioned that a more cursory approach would permit officers to use their deliberately ignorant colleagues to do what they themselves cannot do. Hence, “the good faith required by Leon — which means an objectively considered reasonable basis for police action — refers to the knowledge and information possessed by the law enforcement community as a whole ... To do otherwise would affirmatively encourage ... careless, perhaps deliberately neglectful [behaviors].”

But after Herring, lower courts might be inclined to eschew the law enforcement team approach, scrutinizing only the behavior of the officer who triggered the prosecution. In other words, they might put more stock in the outcome that Herring endorsed, rather than heed the opinion’s mention of Leon and its proposal that systemic negligence should defeat good faith. As long as a court finds that the last officer in the chain “did nothing improper,” judges might be content to remain in the dark about how the error happened. This approach, Wayne LaFave argues, would effectively nullify the collective knowledge doctrine. Others have said it “put[s] a premium on police ignorance.”

In sum, following Herring, an attenuated police mistake occurs when the misbehaving officer hands off his file to a second officer, who can then use the

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46 Herring, 555 U.S. at 140, citing Leon, 468 U.S. at 923 n. 24 (“references to ‘officer’ throughout this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable cause determination.”).
47 Id.
48 See Albo v. State, 477 So. 2d 1071, 1074, 1076 (Fla. 1985); see also People v. Turnage, 162 Ill. 2d 299, 310 (1994) (refusing to “allow the police to effectively thwart ... constitutional protections” by limiting attention only to the officer who executed a defective warrant).
49 Herring, 555 U.S. at 140.
50 See LaFave, supra note 1. Arizona v. Evans made clear that because Whiteley v. Warden, 401 U.S. 560 (1971), was decided at a time when error was equivalent to exclusion, its precedential value on the issue of exclusion was “dubious,” 514 U.S. at 13, but the collective knowledge doctrine was not eliminated.
52 Some lower courts have extended Herring to the one-officer situation, where the same officer who makes the mistake conducts the arrest or search that leads to the challenged evidence. See, e.g., United States v. Massi, 761 F.3d 512 (5th Cir 2014), discussed in Part IV, infra.
evidence based on a claim of reasonable reliance if he does not know of the first officer’s mistake.\textsuperscript{53} As long as the court is convinced the error was the result of simple negligence only, personal attenuation allows the second officer to do what the first officer cannot. We call this process “evidence laundering.”\textsuperscript{54}

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

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

The attenuated misconduct story begins with a Law Enforcement Team Member\textsuperscript{55} — let’s call him “Officer Mutt” — who makes a mistake. For example, he

\textsuperscript{53} Of course, if the facts also suggest temporal and/or spatial dimensions to attenuation, that improves the government’s position on the likelihood and value of deterrence. The temporal concerns were salient even in the pre-\textit{Herring} days. For example, lower courts found negligence in State v. Stringer, 372 S.E.2d 426 (Ga. 1988) (bench warrant should have been withdrawn 21 months earlier); Albo v. State, 477 So.2d 1071 (Fla. App. 1985) (failure to update police computers for several months); Carter v. State, 18 Md. App. 150 (1973) (stolen vehicle report not rescinded for two months after car was recovered); \textit{cf.} Childress v. United States, 381 A.2d 614 (D.C. App. 1977) (tolerating some “administrative delay” in failure to remove satisfied warrants from urban police database).

\textsuperscript{54} See State v. Hicks, 146 Ariz. 533 (1985), \textit{aff’d on other grounds}, Arizona v. Hicks, 480 U.S. 321 (1987) (“police officers cannot launder their prior unconstitutional behaviors by presenting the fruits of it to a magistrate”).

\textsuperscript{55} Sometimes the errant team member is not a uniformed officer, see, e.g., People v. Robinson, 47 Cal.4th 1104 (2010) (defendant’s blood sample taken in violation of state statute and later used to match defendant to a new crime); United States v. Humbert, 336 Fed. Appx. 132 (2009) (defendant’s DNA sample was obtained in violation of state law, but police use a match derived from it to get a new warrant for a new sample). Some cases stem from factual mistakes made by the police dispatcher, who provides incorrect information to an officer on patrol about a defendant’s driver’s license or warrant status. \textit{See, e.g.}, State v. Brock, 91 So.3d 1003 (2012); United States v. Groves, 559 F.3d 637 (7th Cir. 2009); State v. Handy, 206 N.J. 39 (2011). In other settings the factual mistake is contained in a police-maintained computer database about stolen cars or active warrants, on which the patrolman relies when stopping or arresting the defendant; in these cases it is usually unclear
arrests a suspect without probable cause, he wrongly enters (or fails to delete) the suspect’s information in a police-maintained database, or he executes a stale search warrant at the suspect’s house. Officer Jeff then enters the scene and rehabilitates the evidence. Rehabilitation is possible, under *Herring*, because Mutt and Jeff communicate in a way that allows Jeff to deny that he knew or should have known of Mutt’s mistake.\(^{56}\)

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

When the government files charges, the accused moves to suppress the evidence that Officer Jeff gathered, claiming this evidence is all fruit of the poisonous tree — Officer Mutt’s error. The prosecution admits the original error but argues that Officer Jeff’s evidence should not properly be considered fruit of the poisonous tree. Due to the deniability built into the communication between the officers, Officer Jeff did not know of Officer Mutt’s mistake, and thus his good faith behavior insulates the evidence from the earlier error. In short, the reasonable, good faith reliance of Officer Jeff on his fellow officer (or on the allegedly reliable police database) breaks the chain.

which employee made the erroneous input. *See e.g.*, State v. Geiter, 190 Ohio App. 3d 541 (2010); McCain v. State, 194 Md. App. 252 (2010); United States v. Esquivel-Rios, 2014 WL 3955379 (D. Kan. 2014); United States v. Altman, 2009 WL 4065047 (C.D. Ill. 2009) (warrant was for wrong person).\(^{56}\) This is the sort of “working arrangement[] that would allow circumvention of Fourth Amendment protections” about which the Court was warned by Amici in *Herring*, see *Herring* v. United States, Brief For Amicus Curiae National Association of Criminal Defense Lawyer in Support of Petitioner, 2008 WL 2117118 (May 16, 2008); it was also foreshadowed by Wayne LaFave in his influential treatise: “getting some other officer to do the dirty work ... and then us[ing] any incriminating evidence obtained incident [thereto] means the day will have finally arrived when the Fourth Amendment is truly nothing more than ‘a form of words.’” *WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (5th ed. 2012), section 1.8(e)(4).
The *Herring* opinion calls for some inquiry into the reasonableness of Officer Jeff’s reliance on the information he received. Did Officer Jeff actually know, or should he have known, of Officer Mutt’s misconduct? Recall that *Herring* regards mere negligence as insufficient to trigger exclusion; instead, systemic negligence, gross negligence, recklessness or deliberate intent is required to make exclusion pay its way. Presumably, more serious errors should be harder to launder.

Proving that Officer Jeff had actual knowledge of the prior misconduct may be difficult for a defendant.\(^57\) Evidence of malicious or reckless intent is often hard to come by, especially when officers are testifying under oath. But in this setting proof of willful blindness\(^58\) is a real possibility.\(^59\) Did Officer Jeff ignore clues about misconduct? Did Officer Jeff purposely refrain from asking Officer Mutt important questions that, if answered truthfully, would have revealed the misconduct? Was Officer Mutt’s misconduct so flagrant that any reasonable officer in Officer Jeff’s position must have known of it?

In the absence of malicious intent, the defense may still be able to establish gross negligence or systemic negligence. The credibility of Officer Jeff’s claim to reasonable reliance depends in part on the professional reputation of Officer Mutt—for obedience, caution, sloppiness, intentional flouting of rules, or something in between. It’s more believable that Officer Jeff could remain ignorant about a first-time error of Officer Mutt than about a continuation of Mutt’s persistent

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\(^57\) *See Herring*, at 157 (Ginsburg, J., dissenting, “How is an impecunious defendant to make the required showing?”).

\(^58\) In other criminal law settings willful blindness is morally and factually equated with knowledge of the misconduct, or at the very least with recklessness. *See, e.g.*, Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060 (“The doctrine of willful blindness is well established in criminal law ... Courts applying the doctrine ... hold that defendants cannot escape the reach of ... statutes by deliberately shielding themselves from clear evidence of critical facts strongly suggested by the circumstances.”); Model Penal Code section 2.02(7) (“knowledge is established if a person is aware of a high probability of its existence”). A similar analysis applies in the context of money laundering. *See United States v. Nicholson*, 176 Fed. Appx. 386 (2006); *United States v. Wert-Ruiz*, 228 F.3d 250 (3d Cir. 2000).

\(^59\) *See People v. Jennings*, 54 N.Y.2d 518 (1981) (court rejects the “white heart and empty head standard” that might otherwise sanitize police reliance on mistake made by fellow officers).
carelessness or regular misconduct. Moreover, this inquiry might extend beyond individual reputations. If the officers hail from distinct departments, Officer Jeff may be on notice if Officer Mutt’s *department* has a reputation for misconduct or carelessness.

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

In sum, if the trial court finds that Officer Jeff was at most negligent in his decision to rely on the information provided by Officer Mutt, and if it fails to identify hard evidence of significant or recurring misconduct by Officer Mutt, *Herring* instructs the court to admit the evidence. The original violation is thus washed away through reasonable reliance on a fellow officer. To borrow a phrase crafted by the California Supreme Court in the years before *Herring*, this type of good faith causes an otherwise defunct case to be “magically resuscitate[d] … phoenix-like,” through the reliance of one officer upon another officer’s silence about his misconduct.

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60 The *Herring* majority itself recognizes this tendency, as it suggested that officers would be reckless for trusting others known for systemic negligence. 555 U.S. at 704.


62 People v. Ramirez, 34 Cal. 3d 541, 545 (1983). California now follows *Herring*, pursuant to a state constitutional amendment that requires state law exclusionary rules to directly track federal rules. Proposition 8 (codified as Cal. Const. art I, section 28 (a)).
*Herring* thus rewards a predictable and limited form of communication among police officers and agencies.63

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

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

The Mutt and Jeff hypothetical we presented in the previous Section offered a stark example of how courts might inspire evidence laundering if they follow the acquiescent approach to fault and attenuation suggested by *Herring*. In our review of the case law in this Section, we identify courts that have permitted boldly problematic hand-offs of the sort contemplated by the hypothetical. But even in the less obviously problematic cases, acquiescent reasoning or insufficient fact-finding by courts suggests a tolerance for evidence laundering that not only is troubling on its face but might also inspire evasive tactics by law enforcement in the future.64

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63 See State v. Snee, 743 So.2d 270 (La. App. 1999) (rewarding police officer for relying on misconduct of another officer defeats the intention of the Fourth Amendment and the exclusionary rule); State v. Peterson, 171 Ariz. 333 (1991) (refusing to allow police to “exploit” errors made by their colleagues”); People v. Joseph, 128 Ill. App. 3d 668, 672 (1984) (refusing to allow law enforcement authorities to “rely on an error of their own making.”); United States v. Noster, 590 F.3d 624 (9th Cir 2009) (Shadur, dissenting) (“the majority seeks to transmute base metal into gold”).

64 The ability of a Supreme Court case to create perverse incentives for police is well-known. For example, until the Court put an end to the two-step custodial interrogation, where *Miranda* warnings bifurcate an interrogation instead of preceding it, many police officers took the cues provided by Oregon v. Elstad, 470 US 298 (1985) and gave *Miranda* to custodial suspects once they had already confessed. Missouri v. Seibert, 542 US 600 (2004). See also Charles D. Weisselberg, *In the Stationhouse after Dickerson*, 99 Mich. L. Rev. 1121 (2000-01) (demonstrating how the Court’s various exceptions to *Miranda* have led to police training each other how to question outside *Miranda*).
To get an early read on the impact of *Herring*, we searched Westlaw databases for federal and state cases that applied *Herring* in the handoff scenario.\(^\text{65}\) We conducted two related inquiries: (1) a search for federal and state cases from 2009-2014 that cite and discuss the Supreme Court’s decision in *Herring*, particularly mentioning headnote 8 (the headnote describing the Court’s factual analysis of the handoff procedure) and (2) a digest search for all federal and state cases from 2009-2014 invoking the key number that describes good faith in this setting.\(^\text{66}\) Our search turned up 21 federal and state cases examining the kind of attenuated police behavior that was at issue in *Herring*. Table 1 summarizes those cases.

\(^{65}\) An early post-*Herring* work adopting a similar approach is Claire A. Nolasco, Roman V. del Carmen and Michael S. Vaughn, *What Herring Hath Wrought: An Analysis of Post-Herring Cases in the Federal Courts*, 38 AM. J. CRIM. L. 221 (2010-11) (collecting and analyzing cases that cite and discuss *Herring* from January 2009-March 2010). They found six cases addressing the attenuation issue that forms the core of our study.

\(^{66}\) The key number is 110k392.38.
# TABLE 1: EVIDENCE LAUNDERING SCENARIOS IN STATE COURTS AND LOWER FEDERAL COURTS, 2009-2014

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Citation</th>
<th>Good Faith?</th>
<th>Jurisdictions</th>
<th>Source of Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shotts v. State</td>
<td>925 NE2d 719 (Ind. 2010)</td>
<td>Yes</td>
<td>Two states</td>
<td>Arrest Warrant database</td>
</tr>
<tr>
<td>State v. Johnson</td>
<td>6 So.3d 195 (La. App. 2009)</td>
<td>Yes</td>
<td>One police department</td>
<td>Arrest Warrant database</td>
</tr>
<tr>
<td>State v. Brock</td>
<td>91 So.3d 1003 (La. App. 2012)</td>
<td>Yes</td>
<td>Two parishes</td>
<td>Arrest Warrant database</td>
</tr>
<tr>
<td>U.S. v. Echevarria-Rios</td>
<td>746 F.3d 39 (1st Cir. 2014)</td>
<td>Yes</td>
<td>One police department</td>
<td>Arrest Warrant database</td>
</tr>
<tr>
<td>Domino v. Crowley City PD</td>
<td>65 So.3d 289 (La. App. 2011)</td>
<td>Yes</td>
<td>One police department</td>
<td>Arrest Warrant database</td>
</tr>
<tr>
<td>Case Title</td>
<td>Citation</td>
<td>Relevant Information</td>
<td>Department</td>
<td>Database</td>
</tr>
<tr>
<td>------------------------</td>
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<td>--------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>U.S. v. Groves</td>
<td>559 F.3d 637 (7th Cir. 2009)</td>
<td>Yes</td>
<td>One police department</td>
<td>Arrest Warrant database</td>
</tr>
<tr>
<td>People v. Robinson</td>
<td>47 Cal.4th 1104 (2010)</td>
<td>Yes</td>
<td>State corrections, sheriff</td>
<td>DNA database</td>
</tr>
<tr>
<td>U.S. v. Davis</td>
<td>690 F.3d 226 (4th Cir. 2012)</td>
<td>Yes</td>
<td>Two counties in same state</td>
<td>DNA database</td>
</tr>
<tr>
<td>State v. Geiter</td>
<td>190 Ohio App.3d 541 (2010)</td>
<td>Yes</td>
<td>One police department</td>
<td>Stolen vehicle database</td>
</tr>
<tr>
<td>U.S. v. Campbell</td>
<td>603 F.3d 1218 (10th Cir. 2010)</td>
<td>Yes</td>
<td>One police department</td>
<td>Search warrant</td>
</tr>
<tr>
<td>Case</td>
<td>Citation</td>
<td>Decision</td>
<td>Agency</td>
<td>Reason</td>
</tr>
<tr>
<td>----------------------------------</td>
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<td>-------------------------------</td>
</tr>
<tr>
<td>U.S. v. Woerner</td>
<td>709 F.3d 527 (5th Cir. 2013)</td>
<td>Yes</td>
<td>FBI and city police</td>
<td>Search warrant</td>
</tr>
<tr>
<td>People v. Arnold</td>
<td>394 Ill. App. 3d 63 (2009)</td>
<td>No</td>
<td>One sheriff’s office</td>
<td>Arrest warrant database</td>
</tr>
</tbody>
</table>
We found 17 two-step cases in which courts invoked the *Herring* formula to admit evidence even though it was laundered through the handoff process. There were 4 cases in which courts found deliberate misconduct, recklessness or gross negligence sufficient to sustain exclusion.\(^6\) Given the vagaries of the search process we are confident this does not represent the entire field of post-*Herring* cases in the two-step scenario, but it may well embody a fair cross section of court activity\(^6\) on this issue.\(^6\) At the very least, we can look to these cases to generate examples of how courts handle this issue in recurring factual settings.

Turning first to the cases that applied *Herring* to validate the handoff, the opinions most frequently contain facts that mirror the facts of *Herring* itself: a police

\(^6\) There was one additional case that found misconduct in the two-step scenario but it did not cite *Herring*; it relied exclusively on state law and other Supreme Court precedents to conclude that good faith was inapplicable. State v. Bromm, 20 Neb. App. 76 (2012) (where officer received erroneous license plate and vehicle registration from dispatcher and used that information to stop and search a car, mistake should be attributed to law enforcement team; deterrence is needed in this circumstance to make team members more careful). Another case identified misconduct by federal DEA agents in failing to supervise the execution of a warrant but did not decide the question in the context of good faith. United States v. Pineda-Buenaventura, 622 F.3d 761 (7th Cir. 2010).

\(^6\) Of course, this group of cases does not account for the full impact of *Herring* because it only tracks written court decisions. It does not include instances in which motions were filed but then withdrawn pursuant to a plea agreement, and also does not account for defendants who were deterred from filing a motion because they assumed that they could not prove deliberate or reckless or grossly negligent conduct by the officer.

\(^6\) There are many other cases in which courts have cited and discussed *Herring* for its dicta that the exclusionary rule from this point forward must always pay its way. Hence, some courts cite *Herring* for the proposition that only deliberate, reckless or grossly negligent mistakes of any sort should lead to exclusion. See, e.g., United States v. Ponce, 734 F.3d 1225 (10th Cir. 2013) (finding good faith where officer reasonably believed his canine alert provided sufficient justification for search); United States v. Koch, 625 F.3d 470 (8th Cir. 2010) (finding good faith where officers opened flash drive and discovered pornography) United States v. Alabi, 943 F.Supp.2d 1201 (D.N.M. 2013) (finding good faith where officers obtained credit card information without a warrant). These applications far exceed the boundaries of the “isolated negligence, attenuated” from the original error factual setting of *Herring*.

That said, some courts that have applied *Herring* broadly have found deliberate or reckless misconduct that is worthy of suppression. See, e.g., United States v. Taylor, 963 F. Supp. 595 (S.D.W. Va. 2013) (finding the police department’s policy of permeation during traffic stops to be a deliberate violation of the Fourth Amendment); United States v. Stokes, 733 F.3d 438 (2nd Cir. 2013) (finding officer’s deliberate entry into the defendant’s hotel room without a warrant or consent to justify exclusion); United States v. Williams, 731 F.3d 678 (7th Cir. 2013) (finding officer’s frisk of defendant in the absence of reasonable suspicion to be deliberate and culpable to an extent that warrants suppression); United States v. Garias, 755 F.3d 125 (2nd Cir. 2014) (finding no good faith where government agents exploited warrant and retained defendant’s property for 2 years).
officer executes an arrest warrant found in a law enforcement database that later turns out to be invalid or recalled.90 Nine of the opinions invoked the good faith exception in this warrant database scenario. For example, in Bellamy v. Commonwealth, during the course of a domestic violence investigation the officer asked dispatch to run a warrant check on the participants. When the dispatcher found an outstanding warrant for Bellamy, the officer took him into custody, performed a search incident to arrest, and found a bullet in his pocket. The officer later learned that the warrant reported by the police dispatcher had previously been served.91 Citing Herring but offering little analysis of the facts, the Virginia Court of Appeals asserted that the officer was objectively reasonable in relying on the dispatcher’s report and declared that the dispatcher’s error was not the result of “systemic error or reckless disregard of constitutional requirements.”92 Hence, the court concluded, “application of the exclusionary rule to deter police misconduct [in this case] ‘does not pay its way.’”93

Courts have also regularly refused to suppress where officers relied on erroneous stolen vehicle reports94 or erroneous car registration information95 acquired from their department (or more general law enforcement) databases. In these three cases, the courts assert — usually in a cursory fashion — that officers are entitled to trust these resources in the absence of known recurring error. For example, in State v. Geiter, the Ohio Appellate Court asserted, without documenting any facts about system reliability, that the arresting officer “had no reason to

90 See, e.g., Domino v. Crowley City Police Dept., 65 So.3d 289 (2011); Shotts v. State, 925 N.E.2d 719 (Ind. 2010); State v. Brock, 91 So. 3d 1003 (La. App. 2012); United States v. Echevarria-Rios, 746 F.3d 39 (1st Cir 2014) (arrest warrant later declared invalid because summons never served); United States v. Smith, 354 Fed. Appx. 99 (5th Cir. 2009); United States v. Alman, 2009 WL 4065047 (C.D. Ill. 2009); Bellamy v. Commonwealth, 60 Va. App. 125 (2012); State v. Johnson, 6 So. 3d 195 (Louisiana App 2009); see also United States v. Groves, 559 F.3d 637 (7th Cir. 2009) (officer is told by dispatcher there is a warrant for the defendant, but it’s just a “watch out” bulletin which provides at most reasonable suspicion, not probable cause to arrest; court finds good faith).
92 Id. at 132.
93 Id. at 133, quoting Herring, supra, at 147-48, quoting United States v. Leon, 468 US at 907-08.
94 See, e.g., State v. Geiter, 190 Ohio App. 3d 541 (2010).
question the reliability of the local system’s information.” Even when the facts should lead a reasonable person to question reliability, courts seem reluctant. Consider *McCain v. State*, where the arresting officer testified that he had encountered inaccurate information in the database “maybe once out of the month.” The Maryland Court of Appeals, failing to even consider whether other officers in the department had similar experiences with the database, concluded this error was not sufficiently frequent to make the database unreliable.

Courts have conducted a more searching inquiry into the source of the error in cases that involve the past illegal procurement of a blood or DNA sample, which was then used by a different officer to match the defendant to another crime. In these three cases, courts looked to the reason for the original error, asking if there was deliberate, reckless or grossly negligent error in taking the sample or in entering the information in the law enforcement database. They also watched for any signs that the second officer was deliberate, reckless or grossly negligent in relying on the sample or the database report in the new investigation of the defendant. These discussions about database and user reliability were far more extensive than the cursory reviews of the warrant and auto data bases, often containing pages of detail. Yet despite the serious attention that courts directed to the systematic nature of the original error in the DNA database cases, they still typically invoked the good faith exception; all three were wins for the government. To be fair, the crimes solved by the second officers using DNA were serious, which likely factored into the courts’

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78 Id. The court said this was “an occasional discrepancy” and agreed with the trial court that “there’s nothing in [the] record that indicates these officers knew that there were frequent occurrences of MVA mistakes.” Id. (emphasis added). Having defined “systemic” error as requiring “frequent” error, the court concluded that even monthly errors were not enough to impose exclusion. Id.
80 Humbert, 336 Fed. Appx. 132 (robbery and carjacking); Robinson, 47 Cal.4th 1104 (rape); Davis, 690 F.3d 226 (murder).
calculus.\footnote{See, e.g., \textit{Davis}, 690 F.3d at 256 ("the price to society of application of the exclusionary rule here, especially since DNA evidence against Davis was compelling, would be to allow a person convicted of deliberate murder to go free.").} Additionally, given the fairly new deployment of rules governing the taking and maintenance of DNA samples, the courts may have felt constrained to conclude that the errors amounted to understandable mistakes. In sum, in the DNA database context, while courts appear to conduct a more probing analysis than they offer in the warrant or auto database context, they still regularly hold that these systems are reasonably sufficient.

As one might predict, the degree of attenuation increases when we add the spatial dimension to the personal, triggering an inquiry that involves actors from multiple jurisdictions or agencies. There were nine such cases in our dataset,\footnote{This total includes arrest warrant database cases, auto database cases, DNA database cases, and individual officer conduct cases.} and all nine resulted in findings of good faith. The attenuation claim was particularly strong where the behavior crossed state lines. Consider the Indiana Supreme Court's opinion in \textit{Shotts v. State}.\footnote{925 N.E.2d 719 (Ind. 2010). The crossing of jurisdictional lines also arose in State v. Brock, 91 So. 3d 1003 (La. App. 2012), where the warrant was issued in Shreveport, Louisiana but executed by officers in Caddo Parish, Louisiana. The differing jurisdiction did not seem to factor into the court's analysis of good faith, though, as the court simply declared that the Caddo Parish officers were not acting with reckless disregard for constitutional requirements or with gross negligence by relying on the warrant. \textit{Id} at 1007.} Indiana officers arrested Shotts based on an arrest warrant from Alabama, eventually leading to a criminal prosecution in Indiana.\footnote{925 N.E.2d 719 (Ind. 2010).} When the warrant's status under Alabama law was called into question, Shotts filed a motion to suppress the evidence acquired by the Indiana police. The Indiana Supreme Court found that the officers did all they could to verify the warrant and could not have known of the Alabama state law problem. Moreover, the court doubted that exclusion would hold its typical deterrent power when two jurisdictions are involved: "[e]xclusion by an Indiana court in a proceeding under Indiana law would not deter the Alabama officer who applied for the [defective] Alabama warrant."\footnote{Id at 726.} \textit{Shotts} thus signals that exclusion is particularly inappropriate
when multiple officers from multiple jurisdictions are involved in the defendant’s case.

The most egregious case of evidence laundering we found, United States v. Woerner, involved cross-jurisdictional conduct between state and federal agents in Texas. Mark Woerner was subject to “parallel investigations” by state and federal authorities for possession of child pornography. The state officers executed what they knew was a stale search warrant at Woerner’s home; based on what they found, they arrested Woerner. While the defendant was in their custody following this arrest, federal agents came to the police station to talk to him. What they learned from that interview they used to get a new search warrant for Woerner’s computer, and the evidence seized from the computer search provided the basis of the federal prosecution of Woerner. Although there was some evidence in the record that the federal agents were aware of the state officers’ misconduct, the Fifth Circuit held that the federal agents were “at most” negligent in interrogating Woerner while he was in state custody and in using those statements in its warrant application; therefore, suppression was not warranted. Notably, the court did not evaluate the flagrancy of the state officers’ misconduct at all.

One might be tempted to view Woerner as just an anomaly, a Fifth Circuit mistake that will likely be confined to its egregious facts. But that would be an unwise assumption. Just one year after the Woerner opinion was issued the Fifth Circuit decided United States v. Massi, in which it relied on Woerner to allow an

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86 United States v. Woerner, 709 F.3d 527 (5th Cir. 2013).
87 Woerner, 709 F.3d at 535.
88 The federal agent asked the state agent how long Woerner could be held before he had to be let go. United States v. Woerner, 2012 WL 7993302 (5th Cir.) (Appellate Brief of Defendant-Appellant Mark Woerner). Such a question signals that the federal agent was aware of potential problems with the arrest; his interrogation thus amounted to exploitation of the illegality.
89 Woerner, 709 F.3d at 535. The appellate court cited the conclusion of the district court with approval here: “the police misconduct leading to the inclusion of Woerner’s statements ... in the warrant application was at most the result of negligence of one or more law enforcement officers.” Id.
officer to launder his own evidence. According to the Massi opinion, Woerner "signals an openness to applying the good faith exception where an earlier-in-time constitutional violation exists alongside a search warrant that was sought and executed in good faith." The court cited cases from the Sixth, Second and Eighth Circuits in support of its assertion that "in certain circumstances, the good faith exception can overcome a taint from prior unconstitutional conduct," even when the same officer is involved from start to finish. In that circumstance, the invocation of the good faith exception should depend on that officer’s "awareness ... that [his] conduct violated constitutional rights." By casting the officer's awareness of his own errors as the trigger for exclusion, the Massi court elevated the officer culpability standard set forth in Herring and abandoned the possibility of exclusion based on even gross or systemic negligence. In light of the Fifth Circuit's sweeping decisions in Woerner and Massi, we have little reason to be optimistic about future courts' willingness to reject or constrain evidence laundering.

In contrast to the cases that validated the handoff procedure — often based on a superficial view of the conduct at issue — courts that have chosen suppression as the appropriate remedy articulated a more robust understanding of the problematic behavior and emphasized the need for deterrence of misconduct wherever it occurs in the law enforcement team. For example, in People v. Morgan, the Illinois Court of

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90 In Massi, one officer performed all of the relevant actions: illegally arresting the defendant, seeking a search warrant based on observations made during that illegal arrest, and executing the search warrant to obtain tangible evidence. The Fifth Circuit opined that good faith does not require there to be a distinction between the officers who commit the error and the officers who ultimately obtain the challenged evidence. United States v. Massi, 761 F.3d 512, 528 (5th Cir. 2014).
91 Id. at 526.
92 Id. at 527 (citing United States v. McClain, 444 F.3d 556, 564-66 (6th Cir. 2005), United States v. Fletcher, 91 F.3d 48, 51-52 (8th Cir. 1996), and United States v. Thomas, 757 F.2d 1359, 1368 (2d Cir. 1985)). It did note that the Ninth and Eleventh Circuits refuse to apply the good faith exception to instances where a search warrant is issued on the basis of unconstitutionally obtained evidence. Massi, 761 F.3d at 527 (citing United States v. McGough, 412 F.3d 1232, 1239-40 (11th Cir. 2005) and United States v. Vasey, 834 F.2d 782, 789-90 (9th Cir. 1987)).
93 Massi, 761 F.3d at 528. Finding that the officer in question had reason to believe his behavior was constitutionally acceptable, the court concluded that exclusion "would not serve the interest of deterring future constitutional violations." Id. at 532.
94 Notably, the Massi opinion does not cite to Herring at all. Woerner is its main precedent.
95 People v. Morgan, 901 N.E.2d 1049 (Ill. Ct. App. 2009) (because the correct warrant list would have not included the defendant's name, this case isn't really about attenuation; it's just simple error by
Appeals found that an officer who relied on a three-day-old warrant list without attempting to verify the defendant’s status was being “willfully blind to the facts” and thus reckless, rather than simply negligent. In State v. Handy, the New Jersey Supreme Court scolded a dispatcher who failed to alert a police officer to discrepancies between the defendant’s name and birthdate and the information she was reporting from the database; calling the dispatcher a “co-operative” in the defendant’s arrest, the court declared that exclusion was necessary to deter such “slipshod” behavior by members of the law enforcement team. Any other result, the court said, would mean that “police operatives ... are free to act heedlessly and unreasonably, so long as the last man in the chain does not do so.”

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

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96 Morgan, 901 N.E.2d at 1062.
98 Id. at 52. For this reason, the Handy court said its facts did not fall within the “niche” carved out by Herring, which addressed only clerical and database errors. Handy, 206 N.J. at 53.
99 Id. at 53.
100 Id. at 54.
102 Id. at 1262-63. This position is consistent with pre-Herring jurisprudence in the Ninth and Eleventh Circuits, where a search warrant issued on the basis of unconstitutionally obtained evidence cannot be saved by good faith. United States v. McGough, 412 F.3d 1232, 1239-40 (11th Cir. 2005) and United States v. Vasey, 834 F.2d 782, 789-90 (9th Cir. 1987).
To sum up: overall, the government’s chances of winning a “handoff” case seem especially strong in the database context. When the original error involves the faulty assembly or maintenance of an arrest warrant database, DNA database, vehicle registration database, or some comparable collection of information for law enforcement purposes, the good faith exception almost always carries the day; fifteen of the seventeen database error cases we examined resulted in a government win. This trend is perhaps not surprising, given the anonymous nature of database inputs. It is hard to identify who is responsible for entry of (or failure to remove) erroneous information, let alone that person’s motives. The timing of the error also helps the government: the commission of the error might be months or years removed from its effect in the defendant’s case. Generally speaking, when the nameless, faceless source of the error cannot be interrogated, it is the defendant who loses. Anonymity dilutes the burden of proof the prosecution is supposed to bear in the suppression hearing, to justify why illegally obtained evidence should be admitted despite the constitutional error.

Identity issues aside, these opinions display an extraordinary confidence in the reliability of databases generally, a confidence that does not seem to be warranted. The Electronic Privacy Information Center wrote in its amicus brief that accompanied Herring’s certiorari petition that “government and commercial databases are filled with errors, according to the federal government’s own reports.” Moreover, because these database systems are exempt from “important privacy and accuracy requirements set out in federal laws,” the true scope of the error rate may be difficult to calculate. For example, problems have been identified in the National Crime Information Center database, which receives information from state criminal history repositories as well as from federal authorities, yet audits at the federal and local level are “infrequent,” often occurring less than once every five

\begin{footnotesize}
\begin{enumerate}
\item[103] See Florida v. Riley, 488 U.S. 445 (1989) (Brennan, J. dissenting) (arguing that where the “State has greater access to information concerning” a technology or practice at issue, it ought to bear the burden of proof in a suppression hearing about whether use of that technology or practice violates the Constitution.)
\item[105] Id.
\end{enumerate}
\end{footnotesize}
years. For this reason, the Bureau of Justice Statistics has lamented that “inadequacies in the accuracy and completeness of criminal history records [are] the single most serious deficiency affecting the Nation’s criminal history record information systems.” Given the publicly available nature of these reports, courts that reflexively call databases reliable seem to be shirking their responsibilities to dig deeper when faced with a prosecution claim of good faith.

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

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

V. EVALUATING EVIDENCE LAUDERING

106 Id. (citing Bureau of Justice Statistics, Improving Access to and Integrity of Criminal History Records, NCJ 200581 (July 2005)).
107 Id. (citing Bureau of Justice Statistics, Report of the National Task Force on Privacy, Technology and Criminal Justice Information, NCL 187669 (Aug. 2001)).
What do the opinions applying the good faith exception in handoff situations suggest about the trajectory of the exclusionary rule? In this section we consider the domestic implications of these decisions in an era of fragmented law enforcement authority. In the section that follows, we examine the *Herring* line of cases from a comparative perspective.

A. Post-*Herring* Case Law and the Realities of Modern Policing

The first key takeaway from our review of *Herring* and the decisions that followed it is the importance of evaluating law enforcement conduct from an organizational perspective. *Herring* may make sense if we focus on the individual officer who reasonably relied on the actions or representations of a fellow officer. But in an environment where police action is increasingly the product of coordination among multiple officers and agencies, the case has some troubling effects. By permitting the laundering of tainted evidence through the handoff technique we described earlier, the doctrine encourages a lack of communication and a culture of ignorance among officers about the evidence collection practices of their colleagues. This not only undermines the efficacy of exclusion, but also impairs valuable law enforcement efforts.¹⁰⁸

Multi-jurisdictional cases pose a particularly significant risk of evidence laundering. Lines of communication between authorities from different jurisdictions are typically less developed, and ignorance about the evidence-gathering practices of colleagues is more common.¹⁰⁹ Courts are also more apt to tolerate evidence laundering in such cases, under the reasoning that officers from foreign jurisdictions would not be deterred from exclusion in the forum court.¹¹⁰ This reasoning pre-

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¹⁰⁸ “Inevitably, the care and attention devoted” to communication will “dwindle” if the courts fail to regard communication as important, and police officers will provide each other “only the bare minimum of information” in order to retain the cloak of deniability. *Leon*, 897 U.S. at 957 (Brennan, J., dissenting).

¹⁰⁹ See, e.g., GERARD R. MURPHY ET AL., MANAGING A MULTI-JURISDICTIONAL CASE: IDENTIFYING THE LESSONS LEARNED FROM THE SNIPER INVESTIGATION 35-36 (2004); Aviram et al., supra note 5.

¹¹⁰ Shotts v. State, 925 N.E.2d 719 (Ind. 2010); United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007).
dates *Herring* in some state court decisions, but *Herring*’s broader view of attenuation strengthened this view.\(^\text{111}\) *Herring* effectively breathed new life into the silver platter doctrine that the Supreme Court rejected years ago.\(^\text{112}\)

Officers in one jurisdiction now have an incentive to pass along tainted evidence to officers in another jurisdiction, without revealing problems in the evidence collection process, because the good faith doctrine will insulate their handoff. State and federal law enforcement often interact with each other in joint task forces,\(^\text{113}\) and interstate cooperation in the gathering of evidence is on the rise.\(^\text{114}\) Courts’ toleration of “dirty silver platters” therefore has a much greater practical significance today than it did in the 1940s, when the Supreme Court initially accepted the doctrine.\(^\text{115}\)

The effects of *Herring* extend beyond reviving the silver platter doctrine, however. Courts have also permitted evidence laundering when it concerns different officers within the same jurisdiction and, indeed, even within the same department. A number of two-step decisions focus exclusively on the effect that exclusion would have on the second officer, who may have acted reasonably in gathering evidence he did not know was tainted by earlier misconduct. In doing so, courts overlook the culpability of the first officer. Judges appear to be assuming that,


\(^{112}\) *Elkins v. United States*, 364 U.S. 206 (1960). As early as the 1920s, the Supreme Court began scrutinizing cooperation between federal and state authorities in gathering evidence and excluded evidence where an unlawful search or seizure was the product of joint action between the two. Logan, *supra* note 8, at 296.


when it comes to the first officer, the broader educational effect of exclusion is too attenuated to be worth the costs.\textsuperscript{116}

This cost-benefit analysis runs contrary to a long-established line of cases, including \textit{Leon} itself, that insist the deterrence conversation is supposed to be about law enforcement as a whole — not the particular officer who made the arrest.\textsuperscript{117} It also ignores the realities of modern policing, in which responsibility for law enforcement within the same jurisdiction is frequently dispersed through several agencies.\textsuperscript{118} In this environment, a focus on attenuation and individual culpability fails — systemically and predictably — to ensure proper accountability for law enforcement actions. More broadly, it discourages “police agencies from consolidating and working mutually and efficiently.”\textsuperscript{119}

\section*{B. Weaker Remedy, Stronger Rights?}

Could there be a silver lining to this paring down of the exclusionary rule? One might argue that the tighter restrictions on the exclusionary rule could help ensure the rule’s future survival. The rule remains highly controversial, and calls for its abolition persist.\textsuperscript{120} If courts restrict the use of exclusion to cases of egregious police misconduct, this may make the exclusionary rule more palatable.

\begin{itemize}
  \item \textsuperscript{117} It also runs counter to collective responsibility doctrines that govern policing in other contexts, such as the inability of any police officer to interrogate a suspect who has invoked his right to counsel. Under the Edwards line of cases, all officers – not just those who are aware of the invocation – are prohibited from contacting the custodial suspect following a right to counsel invocation, unless the suspect reinitiates contact himself. Edwards v. Arizona, 451 U.S. 477 (1981); Arizona v. Roberson, 486 U.S. 675 (1988). Indeed, in Roberson, Justice Stevens asserted that no significance could be attached to the fact that different officers were involved at different stages.
  \item \textsuperscript{118} Aviram et al., \textit{supra} note 5, at 722.
  \item \textsuperscript{119} Id. at 730.
\end{itemize}
At the same time, even as the U.S. Supreme Court has reined in the exclusionary rule, it has sharpened its rhetorical assault on the rule over the last decade.\(^{121}\) One could argue that each new cutback has made the rule’s future seem more precarious and its elimination more likely. Despite Justice Kennedy’s assurance that these cutbacks are merely refinements and the exclusionary rule is here to stay,\(^{122}\) there is reason to doubt its staying power.\(^{123}\)

Another positive effect of a more limited exclusionary remedy might be that we see better search and seizure jurisprudence if courts are not so concerned that finding a violation will lead to exclusion and, in most cases, a dismissal of the case.\(^{124}\) A number of scholars have argued that the bluntness of the exclusionary rule has caused courts to restrict Fourth Amendment rights.\(^{125}\) While this may be the case, it is not clear that the converse is also true—that contracting the exclusionary remedy would lead courts to interpret rights more generously.\(^{126}\) Limitations on the exclusionary rule seem to be happening at the same time as jurisprudence cutting back on the scope of the rights themselves, with a few recent exceptions.\(^{127}\) This


\(^{122}\) Hudson, 547 U.S. at 603 (Kennedy, J., concurring) (“[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”).

\(^{123}\) See, e.g., Maclin, supra note 121, at 346-47.


\(^{125}\) E.g., Amar, supra note, at 799; Calabresi, supra note 9, at 112-13; Slobogin, supra note, at 401-03; see also Stuntz, supra note, at 793 (“The government pays for criminal procedure rules in the coin of forgone arrests and convictions.”)

\(^{126}\) One Canadian scholar has suggested that the Canadian Supreme Court’s broader interpretation of privacy in search and seizure cases is the result at least in part of the more flexible Canadian exclusionary rule. James Stribopoulos, Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate, 22 B.C. Int’l & Comp. L. Rev. 77, 81 (1999). While this is a plausible interpretation, it is also possible that differences in the text of the Canadian Charter and U.S. Constitution, the interpretive methods of the two Supreme Courts, and the ideology of the Justices may also have played a role.

suggests that a decades-long habit of interpreting Fourth Amendment rights narrowly may be too ingrained and difficult to reverse, even if the remedy becomes more flexible.

Compounding this problem, defendants may be discouraged from bringing complaints as the odds of exclusion decline. As the petitioner in *Davis v. United States* argued, criminal defendants have no incentive to litigate the scope of constitutional rights if they are not likely to obtain some personal benefit from the litigation.\textsuperscript{128} If defendants increasingly forgo challenging police misconduct, this would not only hinder the development of Fourth Amendment law, but also deprive the public of the educational and expressive benefits of suppression hearings, such as teaching police officers about rules on search and seizure and expressing society's strong commitment to enforcing those rules.\textsuperscript{129}

A softer, less predictable exclusionary rule may stunt the development of Fourth Amendment doctrine in another way as well. When the decision on exclusion is dispositive, courts may decide the remedial question first and fail to properly analyze the legality of the underlying conduct.\textsuperscript{130} The more frequently this happens,

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\textsuperscript{128} Oral Argument, *Davis v. United States*, 131 S.Ct. 2419 (2011); Alschuler, supra note 2, at 464-65, 495-96. \textit{But cf.} Harry M. Caldwell & Carol A. Chase, \textit{The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom}, 78 MARQ. L. REV. 45, 50 (1994) (citing to 1978 GAO study, which found that 80-90 \% of suppression motions were unsuccessful, suggesting that a number of defendants were willing to file unmeritorious motions given the low costs of doing so compared to the great benefit if exclusion is granted); Stephen Valdes, \textit{Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations}, 153 U. PA. L. REV. 1709, App. B (reporting results of 2005 survey showing that suppression motions had an 11.6\% success rate).


\textsuperscript{130} *Leon* itself advised that “courts could reject suppression motions … by turning immediately to a consideration of the officers’ good faith.” Some courts are already doing that. \textit{See, e.g.}, United States v. Smith, 354 Fed. Appx. 99, 102 (5th Cir. 2009) (deciding only the good faith question and not determining whether the warrant was valid); United States v. Alabi, 943 F. Supp. 2d 1201 (D.N.M. 2013) (finding good faith where officers obtained credit card information without a warrant, without deciding whether warrant was necessary). Courts have long been allowed to do this in the qualified
the less we are likely to see development in Fourth Amendment law. While it is possible that doctrine will still evolve in the context of civil cases, it remains true that "most Fourth Amendment law is made in criminal proceedings." Given the marginal contribution of civil actions to doctrinal growth, we believe the exclusionary rule remains an important tool for regulating police conduct.

VI. A COMPARATIVE ASSESSMENT OF HERRING AND ITS PROGENY

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

immunity context, when section 1983 actions are filed. See Pearson v. Callahan, 129 S. Ct. 808 (2009). This has caused some commentators to assert that the development of the doctrine on violations has suffered. E.g., Paul W. Hughes, Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights, 80 U. COLO. L. REV. 401, 401 (2009); Jack M. Beerman, Qualified Immunity and Constitutional Avoidance, 2009 SUP. CT. REV. 139, 149-50 (2010); cf. Nancy Leong, The Saucier Qualified Immunity Experiment: An Empirical Analysis, 36 PEPP. L. REV. 667 (2009) (finding that deciding the merits first leads to the "articulation of more constitutional law, but not the expansion of constitutional rights").

132 David Sklansky, Is the Exclusionary Rule Obsolete?, 6 OHIO ST. J. CRIM. L. 567, 580 (2008). For a proposal on how civil actions can be made more effective (e.g., by imposing individual liability for bad faith police conduct), see Slobogin, supra note.
134 Id. at 1634.
decisions such as *Herring* (not to mention its predecessor, *Hudson v. Michigan*), and its successor, *Davis v. United States*, the Supreme Court has brought our exclusionary rule much closer to its counterparts in foreign systems, both common-law/adversarial and civil-law/inquisitorial. In the pages that follow, we identify these areas of convergence and then discuss their implications.

**A. International Convergence in the Exclusionary Remedy**

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

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136 *Hudson v. Michigan*, 547 U.S. 583 (2006). Hudson’s claim that “suppression of evidence has always been our last resort, not our first impulse” is historically inaccurate. *See* Sharon L. Davies & Anna B. Scanlon, *Katz in the Age of Hudson v. Michigan: Some Thoughts on “Suppression as a Last Resort”*, 41 U.C. Davis L. Rev. 1035 (2008). But if suppression is now our last resort, we are in line with the approach taken by other nations who embrace a sliding scale of remedies.


of indirect evidence is disfavored more often in U.S. courts after *Herring*, just as it is in many other common-law and civil-law systems.

Modern exclusionary rules across a number of common-law and civil-law jurisdictions are converging towards a balancing approach. Historically, common-law courts ignored irregularities in the gathering of evidence, as long as the evidence obtained was deemed reliable.\(^{140}\) Contemporary common-law courts, such as those in Canada, England, and Australia, now accept the exclusion remedy on a limited basis. These courts exclude evidence when they conclude, upon examination of the totality of circumstances, that an illegality in the evidence-gathering process would undermine the integrity of the judicial system or the fairness of the proceedings.\(^{141}\)

A number of continental European countries, including Belgium, the Netherlands, and Germany, likewise rely on a case-by-case balancing approach in deciding whether to exclude evidence obtained in violation of rules pertaining to search or seizure.\(^{142}\) A similar exclusionary rule applies in international criminal


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

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

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JUDICIAL DISCRETION IN DEALING WITH PROCEDURAL FAULTS, IN DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT *6 (Michele Caianiello, et al., eds., forthcoming) (manuscript on file with authors) (noting that German courts engage in an "open-ended weighing of the interests involved").

Countries such as France and Italy, which at first glance appear to use a more categorical nullities approach, nonetheless rarely exclude evidence obtained in violation of search and seizure provisions because courts have developed broad exceptions to nullities. In France, courts apply a nullity in only about 25% of cases where a nullity is requested, largely because of a requirement that the nullity must have damaged the interests of the party requesting it (i.e., the defendant). Jean Pradel, France: Procedural Nullities and Exclusion, in EXCLUSIONARY RULES IN COMPARATIVE LAW 145, 149 (Stephen C. Thaman ed. 2013); see also Richard Frase, France, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 212-14 (Craig Bradley ed. 2d ed. 2008). In Italy, courts treat seizures separately from searches, so violations occurring during a search are rarely found to taint the subsequent seizure of the evidence. Italian courts thus regularly admit evidence obtained as a result of an unlawful search. See, e.g., ANDREA RYAN, TOWARDS A SYSTEM OF EUROPEAN CRIMINAL JUSTICE: THE PROBLEM OF ADMISSIBILITY OF EVIDENCE 202-07 (2014).


144 See, e.g., Police and Criminal Evidence Act 1984 (PACE) § 78(1) (adopting a fairness-oriented approach); Can. Charter of Rights and Freedoms § 24(2) (1982) ("[T]he evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute"); R v. Grant, 2 S.C.R. 353, ¶¶ 68-70 (2009) (Can.) (elaborating on the judicial integrity rationale established by Section 24(2) of the Canadian Charter); D.P.P. v. Kenny, [1990] 2 I.R. 110, 134 (Ire.) (justifying exclusion with reference to the "unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen'"); Weigend, supra note 142, at *7 (noting that German courts typically weigh the protection of individual rights against the search for truth in deciding whether to exclude). See generally Slobogin, supra note 139.

intentional, reckless, or part of a pattern. For less serious breaches, these courts may impose less drastic remedies, such as declaratory relief or sentence discounts after conviction.

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

The focus on the flagrancy of the officer’s misconduct is not limited to Anglo-American nations; it can be found throughout Europe. For example, the first factor

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148 Id.
149 EVID. ACT 1995, § 138 (3) (Cth.) (Austl.).
150 Bunning v. Cross (1978) 141 CLR 54, 80 (holding that in deciding whether to exclude unlawfully obtained evidence, judges should consider the nature of the crime charged, whether the violation was deliberate, reckless, or accidental; whether the violation affected the reliability of the obtained evidence; the ease with which the authorities might have complied with the law in procuring the evidence in question; and the legislative intention in respect to the law said to be violated); Kenneth J. Aronson, Rejection of the Fruit of the Poisonous Tree Doctrine in Australia: A Retreat from Progressivism, 13 U. Notre Dame Aust’l L. Rev. 17, 20 (2011).
Belgian courts consider when balancing interests is whether the authorities violated the law deliberately.\textsuperscript{152} German courts are also more likely to exclude evidence where officers purposefully or systematically violate the law.\textsuperscript{153} A similar inquiry into the officer’s motivation and state of mind occurs in Denmark, the Netherlands, and (with respect to indirect evidence) in Spain.\textsuperscript{154}

In addition to limiting exclusion mostly to cases where the police deliberately violated the law, many foreign courts tend to admit evidence that was an indirect product of an unlawful search or seizure (or in U.S. parlance, “fruit of the poisonous tree”).\textsuperscript{155} English courts focus on the causal connection between the initial breach and the derivative evidence, but the existence of a causal connection is not dispositive.\textsuperscript{156} Instead, judges consider whether the initial breach is “flagrant or merely technical,”\textsuperscript{157} or in another formulation, whether it is deliberate.\textsuperscript{158}

\textsuperscript{152} Meese, supra note 142, at 64–65.
\textsuperscript{153} Weigend, supra note 142, at *9 (citing BVerfG (Kammer), Judgment of Nov. 9, 2011, Case No. 2 BvR 2101/09, 2011 NJW 2417) (evidence would be excluded “if there has been a grave, conscious, or arbitrary violation of procedural law which infringed upon the protection of an individual’s fundamental rights in a planned or systematic fashion”); \textit{id.} at *10 (citing BGH, Judgment of Apr. 18, 2007, 51 Entscheidungen des Bundesgerichtshofes in Strafsachen 285) (upholding exclusion where the police “intentionally circumvented the protective warrant requirement”). Thomas Weigend has noted a trend toward exclusion in recent German decisions, “especially where important individual rights have been violated and the law enforcement officer acted without good faith.” \textit{id.} at *12.
\textsuperscript{156} Choo, supra note, at 343 (citing Y v. DPP, [1991] Crim. LR 917) (noting that in deciding whether to exclude indirect evidence, English courts consider whether the initial violation continued to exert a “malign influence” on the indirect evidence obtained); \textit{see also} Stark & Leverick, supra note, at 88-89 (noting that Scottish courts consider “whether the accused’s right to a fair trial would be violated by the leading of the [derivative] evidence”); Borgers & Stevens, \textit{supra} note, at 190 n.25 (noting that Dutch courts exclude derivative evidence only when it is “exclusively” the result of the unlawful act and that “[i]t is not sufficient (any more) that the fruit of the poisonous tree is largely the result of those actions”).
Australian, German, and Israeli courts entirely reject the “fruit of the poisonous tree” doctrine,\(^{159}\) while other courts recognize it in a limited fashion.\(^{160}\)

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

Given the combination of these factors, it is not surprising to find that “good faith” mistakes by officers are frequently excused abroad, including in cases of evidence laundering.\(^{161}\) Indeed, foreign courts sometimes admit evidence even when the “good faith” mistake involves a single officer, similar to the scenario that arose in \textit{Massi}.\(^{162}\) In some respects, foreign courts excuse a broader range of “good


\(^{160}\) Runar Torgersen, \textit{Truth or Due Process? The Use of Illegally Gathered Evidence in the Criminal Trial in Norway} 4, at \texttt{http://folk.uio.no/giudittm/IACL_Truth%20or%20due%20process.pdf}. In Spain, courts use a balancing test to determine whether to exclude evidence indirectly derived from a breach, and the officer’s state of mind in committing the breach is an important factor. Winter, \textit{supra} note, at __.

\(^{161}\) See, e.g., \textit{R. v. Wilson}, 2003 CarswellOnt 9051 (2003) (admitting evidence in \textit{Herring}-type scenario where database error led officer to make wrongful arrest and search incident to arrest); \textit{R. v. White}, 2006 CarswellOnt 2534 (noting that the burden of proof with respect to reliability of arrest warrant and criminal record database is on the prosecution but, after balancing several factors, refusing to suppress at least in part because officer’s reliance on erroneous database was not flagrant); \textit{R. v. Kozlak}, [2005] A.J. No. 478, ¶¶ 30-33, 58 (Alta. Q.B.) (admitting evidence where it was uncovered as a result of one officer’s reliance on another officer’s misinterpretation of a database result); \textit{cf.} Nick Kaschuk, 24(2): \textit{Exclusion of Evidence Under the Charter} 82-88 (2014) (discussing Canadian cases in which evidence was admitted on the grounds that it was obtained in “good faith” by police).

\(^{162}\) \textit{US. v. Massi}, 761 F.3d 512 (5th Cir. 2014), discussed supra Part IV. For examples of foreign jurisdictions addressing this issue, see, e.g., \textit{R v. Ramsammy}, 2013 CarswellOnt 180 (admitting evidence seized as a result of “good faith” mistake by officer in reading the code from a breath screening device); Tobias Paul, \textit{Unselbständige Beweisverwertungsverbote in der Rechtsprechung}, NStZ 2013, 489, 491 (discussing case in which German court admitted evidence obtained by an officer who mistakenly assumed that the person taking a blood sample was a doctor (as required under the law) when in fact, the person was a medical assistant unauthorized to draw a suspect’s blood under the circumstances); \textit{R v. Tiplady} [1995] 159 JP 548 (admitting evidence resulting from good faith mistake by officers about the application of statute to them).
faith" errors by police officers than U.S. courts currently do (although Massi suggests that our exclusionary rule jurisprudence may be moving in the same direction).

Yet the flexible balancing approach means that negligent mistakes will sometimes lead to suppression in foreign courts.163 Some foreign courts, including the Canadian Supreme Court, explicitly state that “ignorance of [constitutional] standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith.”164 While other courts do not take such a clear view on the distinction between negligence and good faith, they do occasionally suppress evidence for negligent breaches.

This points to an important remaining difference between the U.S. and foreign approaches. Although U.S. courts increasingly weigh the costs and benefits of exclusion, this balancing is typically translated into a categorical approach subject to a host of exceptions (attenuation, standing, independent source, inevitable discovery, and so on). Ours remains a more rule-bound approach, even if the overarching cost-benefit analysis results in the admissibility of tainted evidence in many of the same circumstances where an explicit balancing approach would call for exclusion. As a result, our categorical exceptions to the exclusionary rule at times sweep more broadly and result in the admission of tainted evidence in cases where a fully discretionary rule would lead to suppression. For example, under Herring, an illegal search incident to arrest does not result in exclusion of evidence if the search is based on “isolated [police] negligence attenuated from the arrest.”165 By contrast, under a full-blown balancing approach, negligent conduct may

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occasionally (albeit very rarely) trigger exclusion, even if attenuation is also present.\textsuperscript{166}

While a few important differences remain between the U.S. and foreign approaches to exclusion, the common trend toward balancing and consideration of officer culpability is notable. Although our courts probably still exclude evidence at greater rates than their foreign counterparts, that gap appears to be narrowing.

**B. Some Implications of International Convergence on Remedies**

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

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

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

would lead to admissibility because of concerns about the costs of exclusion. While empirical evidence on the practical effects of the balancing approach is very limited, existing data suggest that it need not severely undermine the exclusionary rule.

The first observation about the convergence in international practices under the exclusionary rule is that a balancing test might produce inconsistent and seemingly arbitrary results. This has been a concern in a number of systems, both civil-law and common-law. While some courts have attempted to restrict the factors to be used in the balancing approach, unpredictability remains. Because balancing remains more malleable, decisions may reflect the proclivities of individual judges, rather than the law. A study of the Israeli exclusionary rule, which found that about half of the decisions to exclude evidence in the country could be traced to just two liberal judges, suggests that this concern may be justified.

One area of exclusionary analysis in which a number of foreign courts have struggled to apply a consistent approach concerns officers’ culpability. While courts tend to agree that bad faith (or deliberate violations) should favor exclusion, they disagree on what constitutes “good faith” and how a finding of “good faith” should affect the exclusionary analysis. Moreover, commentators have noted the difficulties for defendants in proving, and for courts in evaluating, an officer’s

169 See, e.g., Optican & Sankoff, supra note 167, at 23-24 (arguing that New Zealand’s open-ended balancing test is "a licence for personal judicial predilection to masquerade as principle").
171 See, e.g., Steve Coughlin, Good Faith, Bad Faith, and the Gulf Between: A Proposal for Consistent Terminology, 15 CAN. CRIM. L. REV. 197 (2011); Jordan Hauschildt, Blind Faith: The Supreme Court of Canada, S. 24(2) and the Presumption of Good Faith Police Conduct, 56 CRIM. L. Q. 469 (2010); Optican & Sankoff, supra note 167, at 25 (discussing the ambiguity in New Zealand case law as to whether good faith weighs in favor of admitting the evidence); Stuart, supra note 151, at 328 (noting that the terms good faith and bad faith had “produced uncertainty and inconsistency”).
subjective state of mind. When courts apply a subjective standard, only egregious and obvious instances of bad faith tend to result in exclusion, while negligent and sloppy policing often remains unaddressed. The problems with the application of the good faith factor in other countries might offer a preview of troubles on the horizon in the United States.

Beyond unpredictability, another disadvantage of the balancing approach is that it is likely to expand the range of cases in which tainted evidence is admitted. As we noted earlier, foreign courts frequently admit evidence derived from the “good faith” mistake of a single officer—whether a mistake of fact or of law. Balancing has also led foreign courts generally to admit indirect fruits of an unlawful police search or seizure. Moreover, if the crime charged is very serious and the evidence central to the case, foreign courts will sometimes admit even evidence derived from a significant and deliberate violation of the law. Under the balancing approach, the public interest in resolving a serious crime on the merits often outweighs the interests in disciplining the police and safeguarding individual rights.

While on average, open-ended balancing likely leads to more frequent admission of tainted evidence than even the weak post-\textit{Herring} U.S. exclusionary rule, there will be some instances in which the balancing approach will prove more protective of defendants’ rights. On occasion, the commitment to systemic integrity


173 Coughlan, \textit{supra} note 171, at 312; Hauschildt, \textit{supra} note 171, at 471, 490, 502; Ormerod & Birch, \textit{supra} note, at 781 (noting this toleration of sloppy policing and arguing that the emphasis on bad faith in English case law “might even be to encourage the police to be sloppy in their investigations since if an officer is unaware of the regulation he cannot be said to have acted in bad faith”).

174 See, e.g., Paul, \textit{supra} note 162.


176 See supra notes 155-160 and accompanying text.

177 See, e.g., KAUSCHUK, \textit{supra} note 161; R. v. White, 2006 CarswellOnt 2534 (noting that the burden of proof with respect to reliability of arrest warrant and criminal record database is on the prosecution but, after balancing several factors, refusing to suppress at least in part because officer’s reliance on erroneous database was not flagrant); Gerson Trüg & Jörg Habetha, \textit{Beweisverwertung trotz rechtswidriger Beweisgewinnung—insbesondere mit Blick auf die “Liechtensteiner Steueraffäre,”} NStZ 2008, 481, 485-86.
will lead to exclusion under a balancing approach even when the nominally
categorical, deterrence-oriented U.S. approach would call for admission of the
evidence. For example, even if one officer relies in “good faith” on the actions of
another officer who has acted merely negligently, a court concerned about systemic
integrity may suppress evidence in order to discourage sloppy law enforcement,
especially if the crime charged is not serious.\(^{178}\) By contrast, under an approach that
categorically declares good faith reliance does not justify the cost of exclusion,
considerations about the integrity of the justice system would not be taken into
account.

The balancing approach has another potential advantage as well: It has led a
number of foreign systems to experiment with a sliding scale of remedies for
procedural violations. When a violation is minor or made in good faith, for example,
many foreign courts opt to grant the defendant a sentence reduction or to instruct
the jury about the violation, rather than to exclude the evidence.\(^{179}\) This minimizes
the negative effect of the remedy on truth-seeking while still arguably advancing the
goals of protecting individual rights and preserving the integrity of the judicial
system. While American commentators have debated the vices and virtues of
sentencing reductions as an alternative or complement to the exclusionary rule,\(^{180}\)
the U.S. Supreme Court — despite its embrace of balancing — has not seriously
considered alternatives to exclusion within the criminal process.\(^{181}\) If the Court were
to openly embrace a balancing approach, it should also reconsider the range of
remedies available in criminal cases for violations of Fourth Amendment rights.

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\(^{178}\) See supra note 166 and accompanying text.
\(^{179}\) See, e.g., ANDREW BUTLER & PETRA BUTLER, THE NEW ZEALAND BILL OF RIGHTS ACT: A COMMENTARY 1037
§ 29.6.5 (2005). On sentence reductions, see, for example, Bogers & Stevens, supra note 142; Chraidi
v. Germany, 47 Eur. Ct. H.R. 2, ¶¶ 24-25 (2006). In Canada, sentence reductions are used in lieu of
use of jury instructions in lieu of exclusion, see ANDREW CHOO, EVIDENCE 164-65 (2012).
\(^{180}\) Compare Calabresi, supra note 9; and Caldwell & Chase, supra note, at 73-74, with Yale
Kamisar, In Defense of the Search and Seizure Exclusionary Rule, 26 HARV. J. L & PUB. POL’Y 119, 136
(2003); and David A. Harris, How Accountability-Based Policing Can Reinforce-or Replace-the Fourth
Amendment Exclusionary Rule, 7 OHIO ST. J. CRIM. L 149, 201-03 (2009).
\(^{181}\) The Court has, however, referred to the supposed availability of civil remedies and internal
discipline as a reason to curtail the exclusionary rule. Hudson v. Michigan, 547 U.S. 586, 597-99
Perhaps the most interesting comparative question, however, is one we know the least about — namely, does balancing in fact increase or reduce the likelihood of exclusion? There is no comparative empirical study that answers this question. Nor is it clear that any study could provide an answer, since judges’ readiness to exclude evidence depends on much more than doctrine. The severity of the crime, public attitudes towards the balance between security and liberty, and legal tradition (including whether the exclusionary rule is relatively recent) may all influence suppression decisions.\footnote{See, e.g., Arenson, \textit{supra} note 159, at 20 (noting that the severity of the crime influenced decisions on exclusion, even though it was not a factor formally considered under the doctrine); Blum, \textit{supra} note 170 at 389-90; Andrew L.T. Choo & Susan Nash, \textit{Improperly Obtained Evidence in the Commonwealth: Lessons for England and Wales?}, 11 INT'L J. EVID. & PROOF 75, 104 (2007) (noting the importance of a “rights culture” to the effectiveness of an exclusionary rule); Bram Presser, \textit{Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence}, 25 MELB. U. L. REV. 757 (2001); see also \textit{supra} note and accompanying text.}

It is nonetheless informative to review some of the data that do exist on exclusion rates in different countries and to consider the correlation between these rates and the approach to exclusion. Among the studies we reviewed, the one that reported the lowest suppression rate was from Israel. It found that the balancing test developed by the Israeli Supreme Court in 2006 has led to suppression of evidence in only 11\% (14 of 126) of cases in which the constitutional violation claim succeeded on the merits.\footnote{Blum, \textit{supra} note 178, at 403-04; E-mail from Binyamin Blum to Jenia Turner, Dec. 8, 2014. Blum argues that this very low suppression rate cannot be attributed entirely to the structure of the balancing test, which closely resembles the test used by Canadian courts. Instead, the low exclusion rate reflects the Israeli judiciary’s outcome-driven approach to procedure and a broader “security agenda” that influences attitudes towards the regulation of police in Israel. Blum, \textit{supra} note 178, at 435-44.}

A 2001 study from Australia — where courts also use a balancing approach to exclusion — found that trial courts excluded in 24\% of cases where a violation was found.\footnote{Presser, \textit{supra} note 182, at 776 (finding that courts excluded evidence in 6 out of 25 cases in which the court found that the police had violated the law).} In Belgium, though no empirical study is available, observers have noted...
that as a result of a shift toward balancing that started in 2003, “illegally obtained evidence is rarely excluded.”\textsuperscript{185}

While these numbers may suggest that discretionary exclusionary rules tend to be rather feeble, data from Canada point in the other direction. In several studies, researchers have found that Canadian courts exclude evidence in about 70\% of cases in which a constitutional violation is found.\textsuperscript{186} The evidence from Canada thus suggests that a balancing approach need not undermine the exclusionary rule; even under a discretionary rule, courts might still exclude evidence in a significant number of cases where a violation is found to have occurred. This is all the more likely in countries like Canada and the United States, where restraints on police powers are grounded in a Constitution, rather than in statutes.\textsuperscript{187}

In the end, comparative data on exclusion rates do not answer other questions that are critical for assessing the effects of the exclusionary rule: Does a balancing approach discourage defendants from bringing challenges to unlawful searches and seizures?\textsuperscript{188} And conversely, are courts more likely to interpret the law on search and seizure more generously if they are no longer concerned about a rigid and inflexible exclusionary rule?\textsuperscript{189} While both possibilities have been raised by scholars writing about foreign balancing rules, there is no clear empirical answer.\textsuperscript{190}

\textsuperscript{185} Meese, supra note 142, at 65; see also Jan Fremon et al., The Investigative Stage of the Criminal Process in Belgium, in SUSPECTS IN EUROPE 29, 54 (Ed Cape et al. eds. 2007) (noting that “illegal actions by investigators will normally not lead to exclusion of the evidence obtained as a consequence of their action”).

\textsuperscript{186} Ariane Asselin, Trends for Exclusion of Evidence in 2012, 1 C.R. (7th) 74 (2013) (finding 73\% rate of exclusion at the trial level); Mike Madden, Marshalling the Data: An Empirical Analysis of Canada’s Section 24(2) Case Law in the Wake of R. v. Grant, 15 CAN. CRIM. L. REV. 229, 237 (2011) (noting a roughly 70\% rate of exclusion under the more concrete Canadian balancing test after R. v. Grant); Thierry Nadon, Le paragraphe 24(2) de la Charte au Québec depuis Grant : si la tendance se maintient!, 86 C.R. (6th) 33, 42 (2011) (finding a 64\% post-Grant exclusion rate in Quebec).


\textsuperscript{188} For a concern that this may have occurred in Canada, see, for example, Stephen G. Coughlan, Good Faith and Exclusion of Evidence Under the Charter, 11 C.R. (4th) 304, 312 (1992); Hauschildt, supra note 171, at 525.

\textsuperscript{189} Stribopoulos, supra note 187, at 132-33.

\textsuperscript{190} Stribopoulos suggests that “the Supreme Court of Canada gas consistently taken a more expansive view than the United States Supreme Court on the type of police behavior that constitutes an
 Likewise, no comparative study has analyzed the effects of a discretionary exclusionary rule on police compliance with constitutional rules.

Although much remains unknown about the practical effects of a shift to balancing, the Canadian experience suggests that a balancing approach need not eviscerate the exclusionary rule. Balancing may even bring some beneficial effects, broadening the range of available remedies and expanding the court’s ability to exclude evidence in order to discourage evidence laundering and other instances of police carelessness. Despite these potential benefits, as our courts move more closely to a discretionary approach to exclusion they must remain alert to some of its downsides— inconsistency, unpredictability, and a potentially weaker deterrence effect.

VII. CONCLUSION

Our analysis of court decisions since 2009 suggests that Herring delivered exactly what it promised (or threatened). The fault-based doctrinal test in Herring, which focuses on an individual officer’s state of mind, creates serious blind spots for the courts, particularly in situations where more than one officer is involved in the investigation. The published opinions do not inquire deeply into the ways that many small mistakes can accumulate into unreliable systems, particularly in the context of law enforcement databases. As a result, the good faith doctrine now operates entirely apart from police realities. Deterrence of police misconduct is not a realistic objective for a doctrine that ignores how law enforcement organizations shape the conduct of individual officers. The outcome in a good faith case represents the trial intrusion upon reasonable expectations of privacy warranting constitutional protection.” Id. He attributes this more generous interpretation of privacy provisions at least in part to the discretionary exclusionary rule in Canada. At the same time, a number of countries with discretionary exclusionary rules have privacy protections that are at least in some respects narrower than those afforded by Fourth Amendment case law in the United States. The scope and content of these rights is likely shaped by too many factors to permit a valid comparative empirical study about the effects of the exclusionary rule.
court’s view of individual, transactional justice, rather than a reality-based strategy to promote lawful policing. Too often the result is evidence laundering.

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

Comparisons to other systems offer conflicting evidence on the effects of the modified exclusionary rule on litigation outcomes. In some countries, a softer version of the exclusionary remedy results in many government victories; in others, the litigation impact is less dramatic. It is therefore too early to know the effects that the shift to balancing might have on the effectiveness of the U.S. exclusionary rule or on the breadth of Fourth Amendment doctrine.

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