The End of an Era: Closing the Exclusionary Debate Under Herring v. United States

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NOTE

THE END OF AN ERA: CLOSING THE EXCLUSIONARY DEBATE UNDER HERRING V. UNITED STATES

I. INTRODUCTION

For nearly a century, aggressive judicial correction of government abuses has protected individual privacy rights. Favoring result over method, many of the Supreme Court’s remedies attract harsh criticism for their heavy-handed but uncertain application—subject to constant metamorphoses while maintaining a distinctive bite. Perhaps most galling to critics is the policy of exclusion, inciting spirited debate since its inception. Despite the name of the doctrine, the exclusionary “rule” of the Fourth Amendment looks nothing like a “rule” at all thanks to its numerous and expansive exceptions. Historically amorphous, even slight variations on fact patterns reap widely disparate judgments when the suppression of evidence is at stake. Indeed, the rule’s good faith exception, incontrovertibly established in United States v. Leon, has been consistently redrafted to account for those wrinkles encountered in the unpredictable realm of law enforcement. Such ambiguity has likely been tolerated because all incarnations of the exception have thus far hinged upon one unifying principle: those members of the police department involved in disputed searches and seizures have acted with objective reasonableness. This stasis is now threatened, however, by the Court’s 5-4 decision in Herring v. United States, where officers who

1. See, e.g., People v. Defore, 242 N.Y. 13, 21 (1926) (Cardozo, J.) (providing the infamous criticism that the exclusionary rule permits the criminal to go free because “the constable has blundered”).


3. See, e.g., Hudson v. Michigan, 547 U.S. 586, 599 (2006). (“In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when Mapp was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.”).
sought to invoke the exception, despite error on the part of internal personnel, were granted immunity from exclusionary tenets.\(^4\)

Far from being a mere procedural quirk, the exclusionary rule pivots on fundamental issues such as privacy, Federalism, and judicial efficacy.\(^5\) The policies underlying exclusion, namely, deterrence of police misconduct and removal of inducements to unreasonable invasions of privacy,\(^6\) bear considerable constitutional import. So too, the good faith exception softens the rule, countering the criticism that exclusion diminishes the integrity of the legal system by permitting obviously guilty criminals to skirt punishment. A danger arises, however, when an exception is permitted to swallow the rule that gave it credence.

*Herring* has garnered attention for good reason. The Court originally recognized the good faith exception where a defective warrant issued from a neutral magistrate and an officer reasonably relied upon it in a subsequent arrest and search.\(^7\) The factual variation in *Herring*, however, deviates markedly from those currently articulated in the register of good faith scenarios that sustain compliance. Here, the offending player was actually a member of a neighboring Sheriff’s Department’s staff—not, as has typically been the case, a member of the judiciary.\(^8\) Balancing the tension between the need for deterrence and the impediments imposed by strict application of the exclusionary rule upon the truth-finding functions of the judge and jury, it is apparent that the Supreme Court should not have applied the good faith exception to the case at bar. Such a holding undermines exclusion’s value in situations where police “personnel” fail to observe the requisite objective good faith standards required by the decision in *Leon*.\(^9\) This Note posits that the Supreme Court should have refrained from further expanding the breadth of the exclusionary rule’s good faith exception in *Herring*.\(^10\) The decision portends an irreversible erosion of exclusionary rule protections. By permitting police to reference negligence by other law

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5. See *Leon*, 468 U.S. at 905-07.
7. See *Leon*, 468 U.S. at 919-20.
8. See *Herring*, 129 S. Ct. at 698.
9. 468 U.S. at 919-20. ("In short, where the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" (quoting *Stone v. Powell*, 428 U.S. 465, 539-40 (1976) (White, J., dissenting))).
10. See *Herring*, 129 S. Ct. at 704.

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enforcement agents as a defense to motions for suppression, the Court has contradicted its only justification for applying good faith in previous decisions: the executive’s evenhanded reliance upon neutral sources that are unaffected by the rule’s deterrence capabilities.\textsuperscript{11}

Part II analyzes two distinct eras in exclusionary jurisprudence: the first struggling to establish the rule’s supremacy in both federal and state practice; the second, arguably still in vogue, attempting to methodically diminish the impositions placed upon police conduct by the first. \textit{Herring} came on the crest of this reactionary wave—illustrating a significant factual discrepancy that should have precluded its inclusion in the newest line of cases ignoring exclusionary standards. It was the Court’s duty to buck this trend before finding itself with a total absence of effective Fourth Amendment protections for complainants. Part III will track the development of the good faith exception and the coverage it currently affords in the context of searches and seizures. It will also make clear why \textit{Herring} makes a terrible candidate for good faith consideration. Part IV examines the unique role that the collective knowledge doctrine plays on \textit{Herring}’s specific facts—strengthening the position that good faith has been improperly asserted in the case. Finally, Part V will consider potential alternatives to exclusion (noticeably absent from the decision) and analyze the Court’s continued preference for the deterrent benefits of exclusion.

II. A BRIEF HISTORY OF EXCLUSION

A. Early Decisions Uniformly Extend the Reach of Exclusion Beyond the Scope of the Federal Courts

No one case can be cited as the seminal articulation of exclusionary principles in the Court’s extensive effort to remedy individual violations of Fourth Amendment rights. This has contributed, in no small part, to the precarious circumstances giving rise to the \textit{Herring} scenario now considered. Having developed around case-specific fact patterns, each new application provides an opportunity to wholly redefine the prevailing interpretation of exclusionary tenets. For the first fifty years of the rule’s existence, the Court’s penchant for exclusion produced a host of cases that promoted increasingly broader adherence to the remedy. By 1961, this trend would peak, with mandatory observance required in both the federal and state courts.

\textsuperscript{11} See \textit{Leon}, 468 U.S. at 909.
The rule’s first incarnation took form with the opinion in *Weeks v. United States*,\(^{12}\) in which it was declared:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of [their] power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures.... The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures... should find no sanction in the judgments of the courts...\(^{13}\)

The *Weeks* Court asserted two justifications for excluding illegally obtained evidence. First, it believed that exclusion was the only meaningful way to assure that officials honored the Fourth Amendment guarantee of reasonable privacy.\(^{14}\) It further expressed concern that any endorsement of constitutionally offensive behavior would tarnish the integrity of the judiciary.\(^{15}\) Summing up the important federal interests at stake, the Court cautioned:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.\(^{16}\)

Though a major step in the formation of a cogent theory of exclusion, the opinion contained one glaring blemish in that it specifically rejected applications of the rule (and the Fourth Amendment itself) to misconduct by state or local police.\(^{17}\) Such inconsistency would prove highly problematic as the implications of such an omission were fully realized.\(^{18}\) A response came in *Wolf v. Colorado*,\(^{19}\) which addressed, for the first time, the growing predicament facilitated by the void in exclusionary rule coverage.

\(^{13}\) *Weeks*, 232 U.S. at 391-92.
\(^{14}\) *Id.*
\(^{15}\) *Id.* at 392.
\(^{16}\) *Id.* at 393.
\(^{17}\) *Id.* at 398.
\(^{18}\) See infra text accompanying notes 25-27.
In *Wolf*, the Court expounded that enforcing Fourth and Fourteenth Amendment rights in the States raised "questions of a different order," namely, "[h]ow such arbitrary conduct should be checked, what remedies against it should be afforded, [and] the means by which the right should be made effective." These, it deemed, were "all questions . . . not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution." The Court thus recognized the application of Fourth Amendment principles on state and local officers through the Fourteenth Amendment's Due Process Clause because "[t]he security of one's privacy against arbitrary intrusion . . . is basic to a free society," but refused to compel application of the exclusionary rule as the only acceptable remedy for constitutional violations. At least mildly convinced that the rule offered certain utility in federal cases, the Court nonetheless instructed:

Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.

Ascribing to the States the responsibility of fashioning penalties that would ensure observance of the search and seizure clause among their executive branches, the Court portrayed the exclusionary rule as a wholly federal device—capable of adoption should individual States so choose, but by no means compulsory. This line of reasoning persisted for twenty more years, during which federal agents made use of this enforcement discrepancy by exploiting the "silver platter doctrine," which allowed the use in federal court of evidence seized illegally by state and local police. Consequently, exclusion was readily circumvented where state officers proffered the illegal evidence. This gave federal prosecutors the "wholesale ability to include illegally

21. *Id.*
22. *Id.*
23. *Id.* at 27.
24. *Id.* at 31.
obtained state evidence because the actions of state officials were not judged under federal standards."^{27}

Again, the Supreme Court countered in *Elkins v. United States*,^{28} delivering a decision that ultimately held state officers accountable to Fourth Amendment standards in investigations where federal law would be implicated. Henceforth, evidence seized under the authority of any officer, state or federal, in violation of constitutional mandates was deemed inadmissible in a federal court.^{29} Two important grievances were thus redressed: First, the decision assured that although the states bore no restrictions on the use of the evidence in their own courts, they would nevertheless "suffer some deterrence in that [their] federal counterparts would be unable to use the evidence in federal criminal proceedings."^{30} Second, it "discouraged federal authorities from using a state official to circumvent the restrictions of *Weeks*."^{31}

*Elkins* continued a tradition of "exclusionary expansion" practiced by the Court since *Weeks*, affording the rule greater bite with each successive visitation. The decision very nearly realized the full extent of the doctrine's capabilities with the exception that it did not prohibit the use of disputed evidence in an offending officer's respective state court. This final measure was imposed in *Mapp v. Ohio*,^{32} a decision that established the rule's primacy as the favored deterrent for Fourth Amendment infringements. The Court reasoned, "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."^{33} The decision expressed a concern that,

[w]ere it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of

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^{28} 364 U.S. 206 (1960).
^{29} Id. at 223.
^{31} Id. at 446.
^{33} Id. at 655.
coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."\(^{34}\)

This language, much like that of the cases preceding *Mapp*, expressed a greater concern for the "imperative of judicial integrity," a justification that has faded in modern exclusionary decisions.\(^{35}\) Even more interestingly, the majority's summation of the opinion included no discussion of the rule's deterrence benefits—by all accounts the most prominent rationale asserted by today's courts.\(^{36}\) Although just twelve years had passed between *Wolf* and *Mapp*, the Court premised much of its decision on a growing perception that no alternative state remedies could provide Fourth Amendment protections as readily as could exclusion.\(^{37}\) As discussed in Part V, existence of adequate remedies therefore became a significant factor to be weighed before courts imposed the harsh evidentiary penalty.

Thus was the state of exclusionary jurisprudence before the Court embarked upon its systematic corrosion of the standard's framework. This second phase was precipitated by the rule's classification as a mere "court-made remedy" without constitutional backing. Permitted to devise unique alternatives and exceptions to the rule that drew heavily on the inference that they were not constitutionally required to impose a singular penalty on illegally obtained evidence, the judiciary hastily turned its back on a remedy meticulously crafted by its predecessors.\(^{38}\) Whereas *Mapp* signaled the height of exclusion's influence on state and federal evidentiary admissibility, successive opinions have so distanced themselves from the policies of *Weeks* and its progeny that, today, *Herring* stands to render the rule virtually obsolete.

**B. The Court Has Recently Adopted a Policy of Withdrawal from Mapp, Devising Exceptions that Threaten to Swallow the Exclusionary Rule in Its Entirety**

Legitimized on the national stage by *Mapp*, the exclusionary rule enjoyed a brief period of undisturbed supremacy in Fourth Amendment jurisprudence before new judicial tendencies began to slowly erode a

\(^{34}\) *Id.*  
\(^{36}\) *See id.* at 266.  
\(^{38}\) *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) (characterizing the rule as a "judicially created remedy" rather than a "personal constitutional right").
half-century of federal precedent. While the Mapp Court had stated that "the exclusionary rule was 'part and parcel of the Fourth Amendment's limitation upon governmental encroachment of individual privacy' and 'an essential part of [both] the Fourth and Fourteenth Amendments," this concept soon proved burdensome to police and courts alike, many of whom had already criticized the penalty as an excessive reaction that bestowed undeserved benefits on wrongdoers. Commentators, too, "maligned exclusion as a 'crude' deterrent" and undoubtedly contributed to its demise post Mapp. So began the second, and current, stage of Supreme Court exclusionary decision-making—one favoring greater Executive autonomy and tempering evidentiary standards.

1. Shifting Focus: Deterrence and Cost-Benefit Analysis

The watershed moment came in 1974 with the opinion handed down in United States v. Calandra. There, a witness summoned to appear before a grand jury was not permitted to disregard questions on the ground that they were based on the fruits of an unlawful search. Though the holding spoke only to a relatively narrow circumstance (grand jury proceedings), the Court reinforced its decision with a critical declaration that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." This limited approach to exclusion was premised in part on the language of the Fourth Amendment itself, which says nothing of the remedial device, much less its role as sole guarantor of any constitutional right to privacy.

Calandra went far beyond redefining the Fourth Amendment implications of exclusion, however. The Court also made "explicit" a tentative balancing approach considered in previous decisions and

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40. See, e.g., People v. Defore, 242 N.Y. 13, 21 (1926) (noting the resistance and scrutiny the new doctrine faced in state courts).
42. 414 U.S. 338 (1974).
43. Stewart, supra note 26, at 1390.
44. Calandra, 414 U.S. at 348.
45. SALTZBURG ET AL., supra note 39, at 356.
46. See, e.g., Alderman v. United States, 394 U.S. 165, 174-75 (1969) ("The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence . . . . But we are not convinced that the
declared it to be "the test for determining whether illegally obtained evidence must be excluded from a particular class of proceedings." In keeping with one constant tradition in the Court’s exclusionary analysis, Calandra’s cost-benefit approach maintained a markedly fact-specific focus—considering social costs explicit to the context of grand jury proceedings and not, as many would expect, the general social costs of the exclusionary rule. As for the rule’s potential benefits, the Calandra Court conceded that “[s]uppression of the use of illegally seized evidence against the search victim in a criminal trial is thought to be an important method of effectuating the Fourth Amendment.” But, reiterating that the rule in no way exemplified a universal constitutional right, it concluded that “[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best.” In sum, the benefits that would be achieved by the rule’s application did not warrant “substantially impeding the role of the grand jury.”

The ruling has led many to contend that the years between Mapp and Calandra saw “the exclusionary rule degenerate[] from an engine for the protection of individual constitutional rights and of the integrity of the judiciary to a cost-accounting problem.” In any event, the newly minted balancing test proved instrumental in promoting the rise of the second stage of thought, littered with opinions that have found the respective social costs at issue to outweigh the benefits of exclusion. Notably, the Court has decided on the basis of the test that impeachment proceedings were exempt from exclusion’s reach, that testimony obtained from those witnesses found through illegal searches was not

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47. Stewart, supra note 26, at 1391.
48. Calandra, 414 U.S. at 349 (“In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context.”).
49. Rayburn, supra note 25, at 806.
51. Id. at 351.
52. Rayburn, supra note 25, at 807. (quoting Calandra, 414 U.S. at 352).
54. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984) (holding that the exclusionary rule does not apply in civil deportation hearings); United States v. Janis, 428 U.S. 433, 454 (1976) (holding that “exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion”).
impermissible as fruit of the poisonous tree,\textsuperscript{56} and that an arrest founded on the authority granted by an unconstitutional substantive criminal statute would not merit exclusion.\textsuperscript{57} Yet, perhaps most significant in the Court’s new cost-benefit analysis has been its development of the good faith exception.

2. Tipping the Scales with Good Faith

Good faith is useful in the balancing context as it repudiates the argument that exclusion will serve a deterrent function.\textsuperscript{58} Though mentioned intermittently prior to 1984, the exception gained legal recognition in the landmark case United States v. Leon.\textsuperscript{59} There, officers executed a facially valid search warrant issued by a State Superior Court Judge and discovered large quantities of drugs at respondent Albert Leon’s residence.\textsuperscript{60} Even though the affidavit in support of the warrant request was subsequently found insufficient to establish probable cause, the evidence obtained pursuant to the warrant was not excluded at trial, despite Leon’s objection, because the officers had acted with objectively reasonable good faith.\textsuperscript{61}

To justify its newly-formulated exception, the Court borrowed heavily from Calandra, reasoning that the exclusionary rule had no constitutional basis, as “[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure ‘work[s] no new Fourth Amendment wrong.’”\textsuperscript{62} In this vein, since the constitutional wrong occurs when the illegal search or seizure occurs—and not when the evidence is admitted at trial—exclusion is “neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’”\textsuperscript{63} With the stature of the rule thus diminished, the Court formally set forth Calandra’s balancing test as the standard to determine the merits of suppressing evidence obtained in this manner.\textsuperscript{64} It considered the implications of “interfering with the role of the judge and

\textsuperscript{56}. United States v. Payner, 447 U.S. 727, 735 (1980).
\textsuperscript{58}. See infra text accompanying notes 128-31.
\textsuperscript{60}. Id. at 902.
\textsuperscript{61}. Id. at 920.
\textsuperscript{62}. Id. at 906 (quoting United States v. Calandra, 414 U.S. 338, 354 (1974)).
\textsuperscript{63}. Id. (quoting Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting)).
\textsuperscript{64}. Id. at 906-07.
and allowing some guilty defendants to go free as the main social costs imposed by applying exclusion to the facts at hand. Against these concerns, the Court found that only minimal deterrence could be expected as a potential benefit, as "the exclusionary rule [was] designed to deter police misconduct rather than to punish the errors of judges and magistrates." Because the officers here acted upon an invalid warrant, the culprit—that is, the "detached and neutral magistrate"—would have little incentive to modify his conduct should exclusion be enforced. Good faith excusal is thus deemed applicable when "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." Integrating previous decisions while careful not to overtly trod on Mapp, the Court in Leon utilized the balancing test as a capable device to circumvent the strict controls of exclusion's early precedent—a strategy that it has embraced in subsequent decisions.

Among these later opinions, Arizona v. Evans enjoys facts most comparable to those of Herring. Evans dealt with an officer's good faith reliance on a warrant that had been quashed, but not removed from court records, two weeks before a traffic stop uncovered marijuana in the defendant's car. Examining the procedure by which such voided warrants were removed from the Sheriff's Department's database, the Court discovered that negligent performance on the part of a justice court clerk had resulted in the discrepancy. This, when coupled with Leon's strong presumption against applying exclusion against the mistakes of those situated outside the Executive Branch, supported a "categorical exception to the exclusionary rule for clerical errors of court employees." The majority reasoned that "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive

65. Rayburn, supra note 25, at 808.
66. Leon, 468 U.S. at 907.
67. Id. at 916.
68. Id. at 900.
69. Id. at 922.
70. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (holding that the exclusionary rule should not apply to civil deportation hearings where likely additional deterrent value would be small and the social costs of application would be high).
71. 514 U.S. 1, 4-6 (1995).
73. Evans, 514 U.S. at 4.
74. Id. at 5.
75. Id. at 16.
enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions."\(^7\)

More importantly for the context of \textit{Herring}, the opinion served to bestow upon "virtually all court personnel the detachment and neutrality found in judges and magistrates."\(^7\) Thus, where the \textit{Leon} court limited itself to "distinguishing officers from 'judges' and 'magistrates,'"\(^7\) \textit{Evans} expanded the division, "isolating all law enforcement personnel, even civilian clerks, from 'court employees.'"\(^7\) Lumping law enforcement personnel indiscriminately with law enforcement officers should have been dispositive, if the distinction had held onto \textit{Herring}, where the exception was sought in spite of in-house misconduct.\(^8\) In this respect, \textit{Evans} is valuable in providing an articulation of the subtle niche that exclusion is supposed to occupy.

And yet, \textit{Evans} is also a decision that permitted an arresting officer to rely upon a "representation that an arrest warrant existed"—not upon the arrest warrant itself.\(^8\) This "warrantless good faith exception" to exclusion, far removed from the context of \textit{Leon}’s intended good faith rationale, serves as a shield to the very kind of behavior that warrants were meant to forbid\(^2\) and established a theoretical basis upon which the officers in \textit{Herring} mounted their case.\(^8\) \textit{Evans} thus offered both assistance and impediments to the government’s argument, giving credence to the "warrantless good faith" concept but also explicitly distinguishing police employees from court personnel.\(^8\) Faced with this interesting tension, the Court was primed in 2006 to reevaluate its exclusionary position when it addressed in \textit{Hudson v. Michigan}\(^8\) whether the exclusionary rule applied to knock-and-announce violations.

\begin{itemize}
  \item \(^7\) \textit{Id.} at 15 (citation omitted).
  \item \(^7\) \textit{Id.} (quoting United States v. \textit{Leon}, 468 U.S. 897, 916 (1984)).
  \item \(^7\) \textit{Id.} (quoting \textit{Evans}, 514 U.S. at 14).
  \item \(^8\) Herring v. United States, 129 S. Ct. 695, 698 (2009).
  \item \(^8\) Dery, \textit{supra} note 77, at 82.
  \item \(^8\) \textit{Id.} at 83 (claiming that the Court’s extension of \textit{Leon} to warrantless situations outstrips the good faith exception’s original rationales).
  \item \(^8\) \textit{Herring}, 129 S. Ct. at 703-04.
  \item \(^8\) \textit{Arizona v. Evans}, 514 U.S. 1, 14 (1995).
  \item \(^8\) 547 U.S. 586, 588 (2006).
\end{itemize}
3. The Race to the Bottom

In *Hudson*, the Court sought to address whether the exclusionary rule applied to violations of the knock-and-announce rule, which stipulates that police officers must adequately communicate their presence when executing a search warrant at an individual's home. The rule is designed to protect citizens in their homes against property damage and privacy infringements that flow from unannounced entry by officers.

The complaint in *Hudson* stemmed from a police search, pursuant to a warrant, that uncovered large quantities of cocaine rocks and firearms in the home of petitioner Booker Hudson. He argued that the officers' method of entry, namely, waiting only three to five seconds after announcing their presence to enter his home, violated Fourth Amendment privacy rights. After outlining the judiciary's stance on the knock-and-announce rule, Justice Scalia reiterated the Court's cautious position "against expanding" the exclusionary rule, and its "repeat[ed] emphasi[s] that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." Justice Scalia found two distinct costs incurred by application of exclusion to knock-and-announce cases. First, it would provide criminals a "get-out-of-jail-free card" because evidence of their guilt was suppressed. Second, he worried that overextending the rule would "produce a flood of cases where individuals would claim that either officers violated the knock-and-announce rule or that the various exceptions that permit officers not to knock were inapplicable." Finding against these interests only minimal deterrence benefits, the majority held that "[r]esort to the massive remedy of suppressing evidence of guilt [was] unjustified."

86. Id. at 590.
88. Id.
89. *Hudson*, 547 U.S. at 588.
90. Id.
91. Id. at 591 (quoting Colorado v. Connelly, 479 U.S. 157, 166 (1986)).
93. Id. at 595.
94. Weitzman, supra note 87, at 1221.
95. *Hudson*, 547 U.S. at 596.
96. Id. at 599.
Seen as the beginning of the end for the Fourth Amendment exclusion remedy, the opinion serves chiefly to suggest that the "Kennedy Court" is likely to "remain very deferential to police in criminal procedure cases for the foreseeable future." The "willingness of four Justices—Roberts, Scalia, Thomas, and Alito—to overrule decades-old precedents and eliminate the exclusionary rule certainly gives a sense" that exclusion's continued application in the realm of Fourth Amendment consideration is precarious at best. Alluding heavily to the existence of alternative remedies capable of filling the void that would be left by exclusion's termination, the Hudson court seemed to anticipate as much. Indeed, coupled with Herring's newest spin on the doctrine, it is painfully clear that "the heydays of [the Court's] exclusionary-rule jurisprudence, and the days of its 'reflexive application of the exclusionary rule'" are at an end.

Herring came on the cusp of this anti-exclusionary fervor. The limitations imposed by this second stage, rife with decisions intent on deconstructing barriers raised long ago to protect vital Fourth Amendment privacy interests, have gone far to remove themselves from the near ubiquitous exclusionary applications of Mapp. It was important in the opinion, then, for the Court to reevaluate the utility of exclusion and take strides to restore, at least in part, a threat of evidentiary suppression. It failed to do so. This Note thus argues that reconciling old and new must begin at the micro level, that is to say, with the highly scrutinized cost-benefit inquiry. Therefore, Part III will examine good faith's substantial distortion and the subsequent impact on balancing test results since Calandra. Distinguishing the facts of Herring from those of


98. See generally Erwin Chemerinsky, The Kennedy Court: October Term 2005, 9 Green Bag 2d 335 (2006) (expanding on the power of Justice Kennedy to decide the outcome of cases before the Court with his swing vote).

99. Id. at 344.

100. Id.

101. See Hudson, 547 U.S. at 597 ("Dolree Mapp could not turn to . . . 42 U.S.C § 1983, for meaningful relief; Monroe v. Pape, 365 U.S. 167 (1961), which began the slow but steady expansion of that remedy, was decided the same Term as Mapp. . . . Citizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after Mapp, with this Court’s decision in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).").

typical "exception-eligible" cases, Part IV will show that here, while still remaining faithful to precedent, the Court should have ruled good faith inapplicable.

4. A Recitation of the Facts of Herring

On July 7, 2004, Bennie Dean Herring drove to the Coffee County, Alabama Sheriff's Department to retrieve an item from his impounded truck.\(^{103}\) After a brief search of the vehicle, he prepared to leave.\(^{104}\) However, at that moment, Investigator Mark Anderson arrived at work and spotted the defendant (with whom he had some history) exiting the lot.\(^{105}\) Knowing that there was good reason to suspect that there might be an outstanding warrant for Herring's arrest, Anderson immediately asked the warrant clerk for the Sheriff's Department to inspect the county's database.\(^ {106}\) The search revealed no active warrants for Herring in Coffee County.\(^ {107}\)

Undeterred, Anderson next asked the warrant clerk to contact the Sheriff's Department in neighboring Dale County to see if there were any outstanding warrants for Herring there.\(^ {108}\) The subsequent search of the Dale database produced an active warrant charging Herring with failure to appear on a felony charge.\(^ {109}\) Acting quickly on the information, Investigator Anderson and a Coffee County deputy sheriff followed Herring as he drove away from the Department.\(^ {110}\) They pulled him over and arrested him on the strength of the Dale Country warrant.\(^ {111}\) The officers' ensuing search turned up some amount of methamphetamine in Herring's pocket as well as a pistol under the front seat of his truck.\(^ {112}\)

In the meantime, the Dale County warrant clerk that had issued the information had yet to locate a copy of the actual warrant that Anderson had relied upon to effect Herring's arrest.\(^ {113}\) Fearing that her search may be in vain, she checked with the Dale County Clerk's Office, which informed her that the warrant had been recalled some five months

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104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id.
112. Id.
113. Id.
earlier.114 This information was immediately relayed to Coffee County, but the officers on scene had already performed the search just described.115 All of this occurred within ten to fifteen minutes, according to court records.116

Herring was indicted on charges of possessing methamphetamine, in violation of 21 U.S.C. § 844(a) and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).117 He moved to suppress any evidence of the methamphetamine and firearm on grounds that the searches that turned them up were not incident to a lawful arrest, because the arrest warrant on which the officers acted had been rescinded.118 The District Court denied the motion because the arresting officers had acted in a good faith belief that the warrant was still outstanding, and the Court of Appeals for the Eleventh Circuit affirmed.119

When compared against previous cases in the Leon120 era, it is clear that Herring presented a unique scenario under which modern exclusionary interpretation would favor a defendant. From Calandra's balancing approach121 to the more deferential good faith standard discussed in Part III—all signs pointed to a rare application of the potent remedy. Instead, the Court, with great bravado, skewed the rule's interpretation to facilitate a desired outcome. As a result, exclusion can no longer be looked upon with certainty, as the Court has proven that it will refuse to consider cases bearing on the issue even-handedly, instead propagating an agenda on behalf of the nation's Executive Branch (a troublesome stance to be taken under a Constitution principled on the merits of checks and balances).

114. Id.
115. Id.
116. Id.
117. Id. at 699.
118. Id.
119. Id.
III. THE GOOD FAITH EXCEPTION, LONG EXPLOITED TO DISRUPT THE COST-BENEFIT EQUILIBRIUM, SHOULD RECEIVE CONSIDERATION ONLY WHERE A POLICE DEPARTMENT HAS ABSTAINED FROM CONTRIBUTING TO A SEARCH’S ILLEGALITY.

The Fourth Amendment serves as the Constitution’s chief arbiter of individual rights and privacy.122 The protection that the Amendment affords is “prophylactic,” as it “is designed to prevent, not simply to redress, unlawful police action.”123 As such, the exclusionary rule is “neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’”124 It is “calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”125 Deterrence is the palpable consequence of exclusion. Unlike maintenance of an “imperative of judicial integrity,” it can be measured and regulated and, perhaps most importantly, play upon an intense American aversion to excessive regulations of liberty and privacy. Deterrence is the most conspicuous of exclusionary rationales—asserted by many as the only viable justification for the rule.126 Exceptions to exclusion, therefore, have been premised almost exclusively on deterrence in the post-Mapp foray of decisions limiting exclusion’s reach. Good faith, the prototype for all such exceptions, has found solid recognition (for good reason) among federal courts since its introduction in United States v. Leon127 due to its seamless conformity with the deterrence justification and related balancing test analyses. As this section will demonstrate, however, good faith is only germane under exceedingly specific circumstances, and it was error on the part of the Court to apply it under the Herring fact pattern.

The good faith exception is generally used to advance the presumption of minimal deterrence within a cost-benefit context. As discussed above, the fact-specific Calandra balancing test was established to weigh the potential deterrent benefits of exclusion against

122. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).
123. Lammon, supra note 41, at 1101 (quoting Chimel v. California, 395 U.S. 752, 766 n.12 (1969)).
126. Stewart, supra note 26, at 1399.
127. Leon, 468 U.S. at 907-08.
the social costs imposed when evidence is suppressed.\textsuperscript{128} Even without the aid of good faith, the Court has traditionally expressed a heavy propensity for evidentiary admissibility.\textsuperscript{129} Factoring in the exception, then, only tips the scales further in favor of admission. For instance, the Leon Court deftly employed its new good faith standard to downplay the deterrence benefits typically associated with exclusion, reasoning that “the marginal or nonexistent [deterrent] benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.”\textsuperscript{130} Among those principal costs of exclusion cited by the Court was its “interference with the criminal justice system’s truth-finding function,” such that “some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains.”\textsuperscript{131} In this way, good faith developed into a nearly fool-proof method of skirting exclusionary burdens. Once it can be established that the exception applies under a given set of facts, deterrence can no longer be practically weighed against the register of social costs implicit in the rule’s application, and exclusionary cases become rather one-sided.

Herring, however, should not have presented an opportunity for the Court to further extend its already burgeoning dependence upon good faith “evasion.” Leon should be considered the rare exception. There, California officers initiated a search sanctioned by a warrant issued by a State Superior Court Judge.\textsuperscript{132} The subsequent discovery of large quantities of drugs was nullified, though, by a District Court determination that the warrant lacked sufficient probable cause.\textsuperscript{133} Using Calandra as an outline, the Leon Court explained, “[a]s yet, we have not recognized any form of good-faith exception to the Fourth Amendment exclusionary rule. But the balancing approach that has evolved during the years of experience with the [exclusionary] rule provides strong support for the modification currently urged upon us.”\textsuperscript{134} First, the Court conceded that “great deference” should be accorded a magistrate’s

\textsuperscript{129} See, e.g., Nadine Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. REV. 1173, 1195 (1988) (stating that “the Supreme Court too often has conducted its [F]ourth [A]mendment balancing tests with ‘the judicial thumb . . . planted firmly on the law-enforcement side of the scales’”).
\textsuperscript{130} Leon, 468 U.S. at 922 (emphasis added).
\textsuperscript{131} Id. at 907.
\textsuperscript{132} Id. at 902.
\textsuperscript{133} Id. at 903.
\textsuperscript{134} Id. at 913 (footnote omitted).
decision to issue a search warrant. Moreover, "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." Last, and most importantly, the Court could "discern no basis," and was "offered none, for believing that exclusion of evidence seized pursuant to a warrant [would] have a significant deterrent effect on the issuing judge or magistrate." Since little to no evidence existed suggesting that "judges and magistrates are inclined to ignore or subvert the Fourth Amendment" (as police may be tempted to do), and where official action was pursued in complete good faith, the Court deemed the extreme sanction of exclusion to be improper after weighing social costs against the potentially nonexistent benefits amassed by penalizing the offending magistrate.

The Court's argument rested heavily on the presumption that the deterrence rationale fails when officers acting with "objective good faith" obtain a search warrant from a judge and proceed within its scope because "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus." Therefore, the Leon Court determined that in this instance "[e]xcluding ... evidence [could] in no way affect [an officer's] future conduct unless it is to make him less willing to do his duty." Such reasoning cannot be reconciled with Herring. This most recent decision by the Court opines, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Such an argument contaminates the persuasive rhetoric of Leon. It is a regression back to Calandra balancing—absent any true good faith validation. Consequently, the decision serves not to clarify situations where police involvement in the faulty search is more direct, but only highlights the Court's unwillingness to streamline its exclusionary procedure. Introducing an approach that now focuses on an officer's level of culpability—and downplaying Leon's heavy reliance on the offending

135. Id. at 914 (noting that while deference to a magistrate is not boundless, these "neutral and detached" entities are more readily positioned to make a reasonable determination of warrant viability).
136. Id. at 916.
137. Id.
138. Id. at 916, 922.
139. Id. at 920.
140. Id. at 911.
141. Id. at 920 (quoting Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting)).
actor’s identity—Herring has removed the only bright-line distinction available to defendants seeking exclusion. Now, such determinations become even more subjective, with some “good faith” dispensation available for culpable conduct by officers involved in the search itself. In effect, the question becomes not “Who was at fault?” but “How wrong is too wrong?”—a standard that will permit more posturing by executive officers and, accordingly, more court approval of tainted evidence. So, despite the Court’s fervent assertion “that ‘our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all of the circumstances,’” the practical reality of the decision is that the test has become more attenuated from objectivity, permitting greater flexibility to an Executive Branch already dominating exclusionary jurisprudence.

An examination of the Evans judgment supports this point. Evans, as discussed above, holds most true to the facts disputed in Herring. There, a police search of defendant’s car pursuant to an outstanding misdemeanor warrant produced some quantities of marijuana and an eventual arrest. Despite its presence in the Sheriff’s Office’s database, however, the warrant had been quashed seventeen days prior to defendant Evans’ arrest. The discrepancy was not remedied only because it was the duty of the Chief Clerk’s office (a judicial entity) to call and notify the Sheriff’s Department of any changes in a warrant’s status. Both the Clerk’s and Sheriff’s records indicated that no such call had been made.

With much emphasis given to the fact that the mistake had originated from the Clerk, and not from the Phoenix Police Department, the Court applied the good faith exception and upheld the officer’s search. Professedly applying the reasoning of Leon, the Court deduced that “exclusion of evidence at trial would not sufficiently deter future errors [by court employees] so as to warrant such a severe sanction” because “the exclusionary rule was historically designed as a means of

143. Id.
144. Id. at 703
145. Id. (quoting Leon, 468 U.S. at 922 n.23).
146. See supra text accompanying notes 71-74.
148. Id.
149. Id. at 5.
150. Id.
151. Id. at 16.
152. Id. at 14.
deterring police misconduct, not mistakes by court employees."\textsuperscript{153} Further, no evidence existed to support the proposition "that court employees [were] inclined to ignore or subvert the Fourth Amendment."\textsuperscript{154} Most importantly, the Court determined that there was "no basis for believing that application of the exclusionary rule in these circumstances [would] have a significant effect on court employees responsible for informing the police that a warrant [had] been quashed."\textsuperscript{155} Scrutinized closely by the \textit{Leon} Court, this crucial last point applied similarly in \textit{Evans} because court clerks, like judges, "are not adjuncts to the law enforcement team," having "no stake in the outcome of particular criminal prosecutions."\textsuperscript{156}

Despite what appeared to be a clear distinction drawn between non-law enforcement and law enforcement error in \textit{Evans}, the Court in \textit{Herring} extended the exception to officer misconduct by arguing that "[a]n error that arises from nonrecurring and \textit{attenuated} negligence is thus far removed from the core concerns that led us to adopt the rule in the first place."\textsuperscript{157} Given previous interpretations, this line of reasoning seems misplaced where mistakes emanated solely from police employees. On this point the Court offers little guidance—neither specifying whether "attenuation" as used pertains to time, place, or personnel (court clerks as opposed to officers). This limitation "appears to refer to the fact that the clerical error was made five months before the arrest and made by personnel other than the arresting officer,"\textsuperscript{158} but the point is not made explicit. It is possible that "[t]he Court may be leaving open the possibility that the good faith exception requires that the officer conducting the illegal search . . . is not the same officer who made the error."\textsuperscript{159} Its reasoning, however, is not consistent with this proposition either.\textsuperscript{160} The only real effect of the language's inclusion, therefore, is further strengthening an already heavy presumption against exclusion.\textsuperscript{161}

And, even if swept aside as an unintentional reference to past

\begin{footnotes}
\item[153.] \textit{Id.}
\item[154.] \textit{Id.} at 14-15.
\item[155.] \textit{Id.} at 15.
\item[156.] \textit{Id.}
\item[159.] \textit{Id.}
\item[160.] \textit{Id.}
\item[161.] \textit{Id.}
\end{footnotes}
exclusionary cases, Herring's ambiguity nonetheless skews precedent and provides unpersuasive support for its ultimate decision.

That being said, it is apparent that the Court erred in making certain appeals to good faith in its opinion in Herring. Its newest "spin" on the exception, designed to compensate for the obvious factual limitations of the case, further perverts an analysis already tending towards Executive preference. The opinion incorporates levels of "tolerable culpability" for officers—a revision that confuses both the logic and efficiency of the original good faith scheme laid out in Leon. Now, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."

No consideration is given to the maker of the mistake. Instead, blame is assigned only where an officer's behavior rises to a level considered a "["flagrant or deliberate violation of rights.""

In this regard, negligent conduct appears to be exempt from exclusionary penalty. Only, for example, where "police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests" will exclusion be applied. A system of such leniency is useless for the protection of Fourth Amendment rights. Whereas the bright-line distinction drawn in Evans between law enforcement and other actors offered at least some consistency to the application of the rule, Herring's outcome befuddles the once reasonable rationalization for good faith.

IV. BOLSTERED BY THE DIRECTIVES OF THE COLLECTIVE KNOWLEDGE DOCTRINE, THE FACTS IN HERRING SHOULD NOT HAVE SUPPORTED THE GOVERNMENT'S MOTION FOR SUPPRESSION.

A. The Collective Knowledge Doctrine, All but Forgotten in the Court's Typical Good Faith Analyses, Should Have Been Highly Influential to the Herring Decision

Further consequences flow from the Herring Court's new focus on the mental culpability of the wrongdoer, and not—as had been the

162. Herring, 129 S. Ct. at 702 (emphasis added).
164. Id. at 704.
165. Id. at 703.
CLOSING THE EXCLUSIONARY DEBATE

convention beforehand—on her identity. The Dale County Sheriff’s Department blunder offered the Court its “perfect storm”—an extraordinary collision of fact, theory, and precedent. It failed to act on this anomaly. *Herring*, unlike any other major exclusionary case in the last half-century, may have implicated the long dormant collective knowledge doctrine—seen only infrequently since its introduction some forty years ago. The theory, traditionally employed to insulate conduct performed by one officer (acting only with constructive knowledge) on behalf of another (with actual knowledge), may have been used in the reverse to attribute one officer’s negligence onto another acting in concert for the purposes of exclusion. Such arguments have been expressed throughout the *Leon* era, but, until *Herring*, no fact pattern has existed that convincingly supported the inference. The slight factual rift distinguishing *Herring* from its predecessors—police responsibility in authorizing the unlawful search—could have given credence to the potential application of collective knowledge. The opinion, however, carefully foreclosed this line of argumentation by pardoning the officer’s negligent conduct. The Court thus missed an opportunity to employ fresh legal concepts on a considerably lopsided and stagnant area of criminal procedure.

First outlined in *Whiteley v. Warden*, the collective knowledge doctrine was designed to serve an agency function, offering an “especially pure example of a rule that increases the efficacy of policing without tipping the Fourth Amendment balance.” In essence, “[w]hen an officer sends out a message deputizing others to act for him, the recipients are treated as standing in his shoes and sharing his knowledge, and so the validity of the arrest turns on whether that knowledge was sufficient for probable cause.” In *Whiteley*, a local police department

167. Id.
168. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 13 (1995) (noting that “*Whiteley* clearly retains relevance in determining whether police officers have violated the Fourth Amendment,” but that “its precedential value regarding application of the exclusionary rule is dubious”).
169. See *Herring*, 129 S. Ct. at 704 (“In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’”) (citation omitted) (quoting United States v. Leon, 468 U.S. 897, 908 n.6 (1984)).
172. Id. at 1100.
173. Id. at 1094-95.
in Wyoming, absent the requisite probable cause necessary to obtain a valid warrant, issued a state item over the radio giving the names and descriptions of two suspects potentially responsible for a breaking and entering.\textsuperscript{174} The message was transmitted throughout the state and received by officers in a number of jurisdictions.\textsuperscript{175} Relying only on the information offered by the radio item, patrolmen from neighboring Laramie Police Department initiated an arrest and search of the suspects' car which revealed a number of objects introduced as evidence in the ensuing trial.\textsuperscript{176} Though the Supreme Court would eventually apply the exclusionary rule (due to the initial department's overt lack of probable cause), it introduced the theoretical basis for the collective knowledge doctrine, avowing, "[c]ertainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause."	extsuperscript{177} Acting on a properly executed warrant obtained by unaffiliated officers would thus not violate Fourth Amendment privacy rights. However, where "the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."\textsuperscript{178} Herring presented a model illustration of the latter scenario, and the Court, following a \textit{Whiteley} construction, should have excluded the evidence seized by Coffee County deputies.

Courts have been remarkably hesitant to utilize collective knowledge as an impediment to police activity. The rule, which imputes those facts known by the first officer at the time of instruction onto the acting officer, so that "one officer’s actual knowledge becomes another’s constructive knowledge,"\textsuperscript{179} has been used almost exclusively at one end of the spectrum: "permit[ting] searches and arrests when there is no instruction and no officer has probable cause."\textsuperscript{180} But this interpretation is decidedly insular.

More appropriate, in cases like \textit{Herring}, would be an application of collective knowledge that also imputes a first officer's negligence (or worse) onto "field agents." Drawing a direct corollary between the

\textsuperscript{174} \textit{Whiteley}, 401 U.S. at 562-63.
\textsuperscript{175} \textit{Id.} at 563.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} at 568.
\textsuperscript{178} \textit{Id.} (emphasis added).
\textsuperscript{179} \textit{Stern}, \textit{supra} note 171, at 1089.
\textsuperscript{180} \textit{Id.} at 1089-90.
"deputizing" officer and acting officer, this framework would democratize collective knowledge, still providing safe harbor where appropriate (the traditional function), but no longer insulating negligent conduct by officers who happen to be working in concert. It is an egregious misinterpretation to allow the doctrine to stand as is. The mere coincidence of joint police work should not present such inequitable advantages to Executive personnel. A more even-handed approach would substantiate the doctrine's credibility and application under Herring-like circumstances.

Leon considered the influence of collective knowledge on exclusionary tenets, but, like Evans, lacked the requisite collaborative police conduct found in Herring. Therefore, the Court hypothetically discussed the possibility, stating:

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. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.

Further clarification would come in United States v. Hensley, where the Court reasoned:

[W]hen evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its admissibility turns on whether the officers who issued the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance.

Both opinions explicitly foreclosed the benefits of collective knowledge where the initial communicator lacked sufficient probable cause or engaged in misconduct.

Tailored to the facts of Herring, it would seem that such attitudes should have controlled the outcome therein. Finally addressing a situation where both exclusion and collective knowledge converged, this inference should have been arrived at almost implicitly. The Dale

182. Id. at 923 n.24.
184. Id. at 231.
County warrant clerk, a member of the Sheriff’s Department, hastily relayed incorrect records to Coffee County, thus resulting in a wrongful search. Imputing her negligence (through collective knowledge) to the acting officers would have barred a good faith defense, and exclusion, by necessity, would have followed. Instead, the decision denies Herring the opportunity to utilize collective knowledge altogether, as identity no longer factors into the Court’s analysis. Thus stricken entirely from the realm of exclusion, aggrieved plaintiffs lose still more ground to an ever expanding Executive immunity. Endorsed as a “relatively costless way of increasing a police department’s efficiency,” it seems a drastic and unnecessary measure to reject all applications of collective knowledge in these cases. It is certainly difficult—almost impossible—to find doctrinal support for such a blatant double standard. Where information exchanged between officers, only one of whom is performing a search, can effectively sanitize otherwise inadmissible evidence, these same communications, when erroneous, should operate to disqualify the items at issue.

V. THERE EXIST NO ALTERNATIVE REMEDIES TO EXCLUSION CAPABLE OF ACHIEVING THE KIND OF DETERRENCE NECESSARY TO COMPEL POLICE REGARD FOR FOURTH AMENDMENT PRIVACY RIGHTS.

Although absent from the Court’s latest opinion, most exclusionary cases reference the availability of various alternatives to exclusion and premise decisions in large part on the efficacy of innovative remedies. Indeed, following Mapp, there was a strong presumption that “[t]he existence of adequate alternative remedies may be the ‘touchstone of the inquiry’ in determining whether and to what extent the exclusionary rule should apply to the states.” But, “[i]n considering whether the

186. See supra text accompanying notes 162-63.
187. Stern, supra note 171, at 1090 (emphasis added).
188. See, e.g., Hudson v. Michigan, 547 U.S. 586, 596-97 (2006) (claiming that the increased availability of civil suits and attorney’s fees for civil-rights plaintiffs provide alternative remedies for search and seizure violations, resulting in diminished need for deterrence); Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949) (stating that “[t]he common law provides actions for damages against the searching officer[,] against one who procures the issuance of a warrant maliciously and without probable cause[,] and against persons assisting in the execution of an illegal search”) (citations omitted); see also United States v. Mosley, 454 F.3d 249, 267-68 (3d Cir. 2006) (“[T]he exclusionary rule was founded on, and is grounded in, the continuing exercise of pragmatic judicial supervision of the law enforcement activities of the executive branch, effectuated by expansion and contraction of the bubble of proximate cause as courts face particular concrete factual situations.”).
189. Rayburn, supra note 25, at 802 (quoting Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 900 (5th Cir. 1977)).
CLOSING THE EXCLUSIONARY DEBATE

exclusionary rule is constitutionally required, the inquiry into the existence of adequate alternative remedies must examine the present, not the past. Thus, proposals have been widespread, ranging from civil damage actions and injunctions to criminal prosecution of offending officers. Of these, civil damage actions are most frequently cited, offering relief under statute or case law depending upon whether the offense issued is from state or federal enforcement agencies, respectively. At the heart of the inquiry are a suggested remedy’s deterrent capabilities—a principal concern in cases addressing Fourth Amendment violations. Exclusion maintains its primacy, therefore, because “the most ‘powerful’ remedies, criminal prosecutions for willful violation of the fourth amendment and actions for injunctions against large-scale violations, are rarely brought and rarely succeed... [D]amage actions are also expensive, time-consuming, not readily available, and rarely successful.” Therefore, “the deterrent effect of these actions can hardly be said to be great, since the prospect of a judgment for money damages is extremely remote.” Despite these deficiencies, the existence of alternative remedies is a relevant inquiry deserving at least menial consideration, and Herring further errs in failing to address it whatsoever.

A. Civil Damage Actions

Congress passed 42 U.S.C. § 1983 to give “private citizens and businesses the power to sue the government when it violates their constitutional or federal statutory rights.” The Act provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

190. Stewart, supra note 26, at 1385.
191. SALTZBURG ET AL., supra note 39, at 361-63.
192. Id. at 361.
193. Id. at 361-62.
195. Stewart, supra note 26, at 1388.
196. Id.
shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .198

In addition to the statute, the Supreme Court had earlier provided plaintiffs a cause of action against federal officers for alleged violations of federal law in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.199 Working in conjunction, the law and ruling make it a crime for anyone acting under color of law to deprive a person of rights protected by the Constitution—including the right to be free from unreasonable searches and seizures.200 Both were relied on heavily by Justice Scalia in Hudson,201 where it was suggested that the need for exclusion had been directly undermined by their development.202 Some commentators agree, finding distinct benefits to civil damages. First, the remedy compensates both innocent victims of a Fourth Amendment violation as well as those guilty of criminal offenses.203 Exclusion, on the other hand, only benefits wrongdoers struggling to check introduction of evidence in a subsequent trial. Second, civil damages introduce an element of "proportionality because the amount of a judgment may be varied to reflect the egregiousness of the constitutional violation."204 No amount of judicial creativity can create this kind of flexibility with the exclusion remedy. Lastly, imposing a sanction directly upon individual violators, civil damages produce a "measure of what is frequently described as 'specific deterrence.'"205 It can easily be argued that exclusion does not produce the desired deterrent effect advocated by the courts because offending officers do not feel the direct sting of punishment. Instead, the costs of exclusion are borne more generally by the justice system and society.206 In this light, civil damages

201. Erwin Chemerinsky, The Roberts Court and the Police, in EIGHTH ANNUAL SUPREME COURT REVIEW: OCTOBER 2005 TERM 17, 20 (2006) (stating that Scalia, in Hudson, places "the presumption against the application of the exclusionary rule"); Rayburn, supra note 25, at 827 ("In applying Calandra [in his opinion in Hudson], Justice Scalia discounts the need for deterrence based on present day civil remedies and the current state of professionalism and training in law enforcement.").
202. Hudson v. Michigan, 547 U.S. 586, 598 (2006) ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.").
203. Stewart, supra note 26, at 1387.
204. Id.
205. Id.
206. See, e.g., United States v. Leon, 468 U.S. 897, 907 (1984) (stating that "[a]n objectionable collateral consequence of [exclusion's] interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains").
may prove their utility in illegal search and seizure cases, dodging exclusion's extreme sanction in situations of less offensive police conduct, and thereby encouraging courts to provide restitution where deserved.

But, the civil damage remedy is not without drawbacks. Perhaps of greatest concern is partiality of juries. The average citizen is "inclined to believe the testimony of law enforcement officials because the vast majority of them are honest and endeavor to perform their jobs in accordance with the Constitution." When coupled with the good faith exception, it becomes extremely difficult to obtain a judgment against police. Furthermore, competent counsel is difficult to obtain in these actions, as the likelihood of success is still doubtful at best. Lastly, no guarantee of payment can be made when the responsibility falls squarely upon the individual officer because, like all other civil defendants, police can be deemed judgment proof, thus precluding the possibility of any recovery. These deficiencies were seized upon and highlighted by the Rehnquist Court, which crippled civil damage remedies when it adopted an "expansive conception of the 'qualified immunity' available to police" in search and seizure cases. In this regard, the Herring decision loses nothing of substance in failing to address the possibility of civil damages, but for the sake of scholarship, the omission only adds to a prevailing sense of incompleteness. In an effort to further strengthen its decision (a shaky one by all accounts) it was the Court's responsibility to address even minute facets of exclusionary scrutiny. Civil damages have been promoted extensively as a viable replacement for exclusion. Total disregard for their existence is but another example of the Court's contrived analysis.

207. Stewart, supra note 26, at 1387.
208. Id.
209. See supra text accompanying notes 128-30.
211. Id. at 1388.
212. Id.
214. Id. ("In particular, Anderson v. Creighton, 483 U.S. 635 (1987), ruled that officers are entitled to immunity, and thus to the pretrial dismissal of such suits prior to discovery, unless case law existing at the time of the police misconduct clearly established that the police conduct at issue violated the Constitution. In other words, lawsuits against police will be dismissed unless prior case law has previously declared unconstitutional virtually the same police conduct in virtually the same factual situation.").
215. See, e.g., Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 757-58 (1994) ("Much of what the Supreme Court has said in the last half century—that
B. Other Potential Alternatives Are Similarly Uncertain to Produce the Deterrent Effects Necessary to Advocate for Their Use

It therefore bears to briefly examine other proposed remedies for Fourth Amendment violations. Prior to the *Mapp* decision,\(^{216}\) state courts had experimented with a host of alternative remedies, as the Court was reluctant to interpret the Constitution as *demanding* exclusion upon any but federal jurisdictions.\(^{217}\) Today, alternatives are still cited, but typically disregarded under Fourth Amendment jurisprudence. Among the most prominent include imposition of governmental liability, criminal prosecution of offending officers, and police regulations coupled with departmental discipline.\(^{218}\)

At the federal level, the Federal Tort Claims Act\(^{219}\) creates a rule of governmental liability that is subject to several broad exceptions,\(^{220}\) affording an extremely limited scope that all but precludes tort damages under the statute.\(^{221}\) Deterrence, the accepted rationale for any Fourth Amendment remedy,\(^{222}\) is speculative at best and thus not reasonably served under a system with so little certainty.\(^{223}\) Premising liability on such extensive factors, the likelihood of a court finding for aggrieved litigants is incredibly small. So too, then, is the threat of monetary repercussions against the government (and in turn, those officers making arrests on its behalf). Police do not fear, and indeed, have no incentive to fear, a punishment with no practical application. Therefore, deterrence is not practically achieved. Like civil damages, governmental liability pales in comparison to exclusion as far as effectiveness in achieving this result. While, as in the discussion above, *Herring* is not irreparably

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the Amendment generally calls for warrants and probable cause for all searches and seizures, and exclusion of illegally obtained evidence—is initially plausible but ultimately misguided. . . . [T]he Amendment presupposes a civil damage remedy, not exclusion of evidence in criminal trials . . . .”)


\(^{217}\) Id. at 645-46.

\(^{218}\) SALTBURG ET AL., supra note 39, at 362-63.


\(^{220}\) Meltzer, supra note 194, at 285 n.201 (“Traditionally, the Act excluded liability for claims arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, defamation, misrepresentation, deceit, or interference with contract rights. Since 1974, the Act has permitted liability for most of these claims when committed by ‘investigative or law enforcement officers,’ a category defined to mean federal officials empowered to make searches or arrests.” (quoting 28 U.S.C § 2680(h))).

\(^{221}\) Id. at 285.

\(^{222}\) Id. at 249 (“[T]he principal, or at times exclusive, purpose of allowing [litigants] to obtain a deterrent remedy is to benefit the public at large (or at least some portion of it) by deterring government conduct that threatens to violate the constitutional rights of others.”).

\(^{223}\) Id. at 285.
harmed by its omission of this remedy or those discussed herein, their consideration plays a necessary role, however small, in Fourth Amendment discourse.

Criminal prosecutions of offending officers have garnered even less support. Although “[r]emedies aimed directly at officers who break the law seem, at least in theory, more suited to the task of deterring police misconduct,” there is an understandable reluctance among lawmakers and the judiciary to adhere (with any enthusiasm) to a rule of law criminalizing often harmless conduct. Furthermore, “a criminal prosecution would require some showing of intent, which would mean that many violations of the Fourth Amendment standards of objective reasonableness would go unpunished and undeterred.” This, in effect, would mark an extension of Herring logic, immunizing any conduct by law enforcement that fails to meet some heightened mens rea constraint. A Fourth Amendment violation, even if committed with mere negligence, demands some form of recourse. Imposing possible criminal sanctions upon those policemen subverting the Constitution would only provide more opportunity for courts to craft exceptions where an offense stemmed only from negligence. And, such an inference would be far more sufferable than the immunity set forth in Herring, since here, prosecution far outstrips exclusion in terms of severity. As a result, it is unlikely that the remedy would be “rigorously enforced in any but the most egregious cases,” especially since enforcement would be the “task for other government actors, including police departments and prosecutors.”

The last, and most inconspicuous, of the proposed remedies, police regulations and departmental discipline, receive far less recognition than civil damages, but promise to achieve “much of what those monetary damage actions may not, at least by way of individual law enforcement actor’s compliance with constitutional regulations.” Perhaps less extreme than criminal prosecution but with more bite than civil damages, Professors Roger Goldman and Steven Puro have offered strong support for “decertification” of officers who have violated the

225. SALTBURG ET AL., supra note 39, at 362.
226. Cloud, supra note 224, at 504.
227. Id.
Constitution in the course of their official duties. As opposed to termination of an officer's employment by a local department, which "does not prevent the officer from being rehired by a different department," revocation of a certificate "prevents the officer from continuing to serve in law enforcement" anywhere in the state. The most prominent benefit to this approach is its "middle of the road" nature—neither too harsh nor too uncertain. The poles of this spectrum merit far greater criticism than decertification: one for not realizing any true deterrent assistance, the other for being legislatively unpopular. Goldman and Puro’s proposal may in some senses then, be considered a "viable alternative or supplement to the exclusion of evidence in a criminal case." However, its primary limitation, as compared to exclusion, is that it "leaves the individual whose rights were compromised out of the equation." Though deterrence may be achieved, no redress is made available for litigants in Herring’s position.

It remains clear that exclusion holds a position of favor in Fourth Amendment search and seizure cases. No alternative remedies provide the same mix of deterrence and recourse. While the Court’s Herring opinion would have done well to strike some balance between the benefits and deficiencies of each, it is apparent that exclusion was the focus of the inquiry, and until more expedient remedies become available, this trend will continue. It is a flaw, slight in consequence, but a flaw nonetheless, to omit this discussion altogether in any search and seizure opinion, especially now, when it has been made apparent that exclusion needs either redefinition or replacement. Therefore, discussions of alternatives, even if dicta, become far more significant to modern exclusionary scholarship.

VI. CONCLUSION

Herring casts an ominous shadow over a line of constitutional interpretation long cultivated by judicial process. Stare decisis is far from absolute, but some deference is justified where time and experience have uncovered no major defects in a court rule or holding. Mapp

231. Id.
232. Halliburton, supra note 228, at 541 n.111.
233. Id.
marked that point at which federal exclusionary practice peaked—the final stage of a calculated evolution. And, to this day, no alternatives have been considered adequate replacements. Why ignore this precedent? Though Leon’s good faith exception added valuable functionality (perhaps a necessary development), its many incarnations have so tempered the actual exclusionary rule that its guarantees of redress are now practically baseless. 234 Herring has hammered the final nail into the exclusionary rule’s coffin. Before, victims of unlawful searches and seizures could at least rely upon Evans’s distinction between court and police personnel. 235 Now, exclusion turns on an entirely subjective determination of any offender’s level of mental culpability—a calculus that will undoubtedly favor officers charged with misconduct. Imparting this ambiguity is just one of the decision’s many flaws. It also overlooks the collective knowledge doctrine’s unique applicability to the case, an argument that, if made, would have displayed great judicial resourcefulness in the face of difficult constitutional issues. As it now stands, the decision exhibits only the outcome-driven analysis of a Court harshly divided by partisanship. And moreover, it forecloses the possibility of any consistency in exclusionary judgments—marking an uncertain standard for those seeking justice. Throwing the Fourth Amendment to the wayside, Herring v. United States marks a failure of both Constitutional interpretation and judicial neutrality.

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234. See supra text accompanying notes 39-57.
235. See supra text accompanying notes 151-56.
236. See supra text accompanying notes 157-59.

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