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Systemic Inequality | Recasting the Exclusionary Rule's Net

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COMMENT

RECASTING THE EXCLUSIONARY RULE'S NET

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INTRODUCTION

The summer of 2020 thrust the relationship between law enforcement and racial minorities squarely into this country's collective consciousness. After witnessing horrible instances of police misconduct, large portions of the U.S. population called for reforms, from abolishing the police[1] to revoking legal doctrines like qualified immunity.[2] However, operating behind these visible debates are rules that arguably unfairly tip the scales in favor of the police and effectively make racial minorities vulnerable to unjustifiable coercion at the hands of law enforcement.[3]

One such doctrine is the exclusionary rule. At first glance the rule seems to protect individuals, not assist police—it directs courts to exclude evidence, in certain circumstances, if evidence introduced at trial was obtained through a violation of the individual's Fourth Amendment rights.[4] But in *Herring v. United States*,[5] the U.S. Supreme Court narrowed the circumstances in which the exclusionary rule applies, limiting it to situations involving "reckless, deliberate, or grossly negligent conduct," or to "recurring or systemic negligence."[6] *Herring* effectively eroded any meaningful protection that the exclusionary rule once offered;[7] the rule is now extremely forgiving of police misbehavior.

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1. *See* Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/G7H3-KGQ9].

2. *See* Spencer Bokat-Lindell, Opinion, *The One Police Reform That Both the Left and the Right Support*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/breonna-taylor-police.html [https://perma.cc/F8JX-CL4B].

3. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59-96 (rev. ed. 2012) (discussing how features of the U.S. criminal justice system impact racial minorities).

4. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 482-83 (1976).

5. 555 U.S. 135 (2009).

6. *See id.* at 144.

7. *See id.* at 156 (Ginsburg, J., dissenting).

Herring has had significant impact on minorities. The disproportionately high rate of interactions between minorities and law enforcement places minorities at higher risk of suffering violations to their constitutional rights due to police misconduct.[8] Without a robust exclusionary rule, minorities have few, if any, mechanisms to remedy the wrongs they have experienced.[9] And even when the exclusionary rule can be invoked, access to justice issues make it difficult for minorities to win on their colorable claims.[10]

While *Herring* has erected significant obstacles for minorities attempting to vindicate their constitutional rights, those obstacles are not unassailable. As public attention imposes pressure for reform, litigants may look to address other legal doctrines like qualified immunity, the downstream effect of which would be better compliance with the Fourth Amendment.[11] Litigants could also advocate for recalibrating the exclusionary rule by asking courts to broaden the number of circumstances in which the exclusionary rule applies.[12] Finally, litigants may begin to chip away at the outer limits of *Herring* by drilling down on what the Court meant by asserting that the exclusionary rule applies in instances of "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[13]

Part I explains the exclusionary rule. It begins with the theoretical basis for the rule, then describes how the rule traditionally functioned, and concludes by discussing how *Herring* changed the legal landscape. Part II explains why *Herring* is particularly problematic for minorities looking to vindicate their constitutional rights. Part III explores three avenues of reform.

PART I: THE EXCLUSIONARY RULE AND ITS GOOD FAITH EXCEPTION

The Fourth Amendment guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures" and that "no Warrants shall issue, but upon probable cause."[14] Notably absent in the amendment, however, is a remedy to provide redress when these rights are violated or to ensure the rights are upheld in the first instance. To fill this gap, the U.S. Supreme Court fashioned the exclusionary rule as a remedy providing criminal defendants the opportunity at trial to suppress evidence collected as the result of a Fourth Amendment violation.[15] Without this rule, "the protection of the Fourth Amendment . . . is of no value."[16]

8. *See infra* Part II.
9. *Herring*, 555 U.S. at 156 (Ginsburg, J., dissenting).
10. *See infra* Part II.
11. *See infra* Part III.
12. *See infra* Part III.
13. *Herring*, 555 U.S. at 144; *see also infra* Part III.
14. U.S. CONST. amend. IV.
15. Claire Angelique Nolasco et al., *What* Herring *Hath Wrought: An Analysis of Post-*Herring *Cases in the Federal Courts*, 38 AM. J. CRIM. L. 221, 222 (2011).
16. Weeks v. United States, 232 U.S. 383, 393 (1914).

Perhaps counterintuitively, the rule exists not to redress the particular Fourth Amendment violation the defendant suffered, but rather to "deter future unlawful police conduct."[17] This is because using the tainted evidence at trial is not a constitutional violation—the defective search or seizure is.[18] Thus, whether evidence can be excluded at trial is a separate issue from whether a Fourth Amendment violation occurred.[19] Because the exclusionary rule is not meant to make any one particular individual whole by remedying the constitutional wrong, the rule applies only in those situations where it will actually work: when deterring unlawful police conduct is achievable.[20]

To determine whether deterrence is possible, courts undertake a "rigorous weighing" of costs and benefits,[21] balancing the likelihood of deterring the future bad act with the substantial societal cost of excluding probative evidence from trial and potentially allowing a guilty person to go free.[22] If the likelihood of deterrence is "appreciable," the tainted evidence will be excluded; however, if deterrence is unlikely, exclusion is not warranted, and the evidence is admitted.[23] By this logic, if the officer would have violated a constitutional right even with the threat of exclusion looming, then deterrence is unattainable, the cost of letting the guilty go free is too high, and, accordingly, the exclusionary rule does not apply.

This model should ensure compliance with the Fourth Amendment. Society has an interest in law enforcement abiding by the Constitution and an interest in punishing the guilty. Letting the guilty go free because of excluded evidence should deter officers—who have an interest in "locking away bad guys"[24]—from committing errors. Thus, officers will endeavor to follow the Constitution to keep guilty persons from avoiding punishment. The exclusionary rule, then, ensures that both societal interests are met.

Refining this idea further, the Court has constructed an exception identifying when deterrence is not achievable. This good faith exception explains that "illegally obtained evidence is admissible in court despite the existence of any error or mistake, 'as long as the error or mistake was not committed by the police, or, if committed by the police, the error or mistake was honest and reasonable.'"[25] The exception seems to be congruent with the exclusionary rule's theoretical basis in deterrence—excluding evidence will not deter law enforcement officers from committing constitutional violations if the officers believed they themselves acted reasonably or if they relied upon others whose actions the officers had no reason to suspect were

17. United States v. Calandra, 414 U.S. 338, 347 (1974).
18. *See id.* at 353–54.
19. *See* Arizona v. Evans, 514 U.S. 1, 10 (1995) (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)).
20. *Id.* at 11.
21. Davis v. United States, 564 U.S. 229, 238 (2011).
22. *See* Illinois v. Krull, 480 U.S. 340, 347 (1987).
23. *Davis*, 564 U.S. at 237 (citing United States v. Janis, 428 U.S. 433, 454 (1976)).
24. Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1083 (2011).
25. Nolasco et al., *supra* note 15, at 222 (citation omitted).

unconstitutional.[26] In short, deterrence only works if the law enforcement officials knew or should have known their behavior was inappropriate.[27]

A trilogy of cases demonstrates how the good faith exception operates. In *United States v. Leon*,[28] the Court held that the good faith exception applied when police officers relied on a facially valid, but defective warrant issued by a magistrate to carry out a search, concluding that the costs of excluding "inherently trustworthy tangible evidence" outweighed the possible benefits of deterrence.[29] The exclusionary rule was inapplicable here because (1) the rule was meant to deter police, not magistrates; (2) there was no evidence that judges or magistrates were "inclined to ignore or subvert the Fourth Amendment," so "the extreme sanction of exclusion" was not required to ensure that magistrates followed the law; and (3) applying the exclusionary rule here would not deter future misconduct by judges or magistrates issuing search warrants.[30] In essence, the police reasonably relied on the conduct of a non-law enforcement officer—the magistrate. Excluding evidence would punish the wrong audience—judges, not police—and would not alter any future conduct because police would continue to rely upon the probable cause determination of judges.

Leon's logic appears clearly in the next two cases of the trilogy. In *Illinois v. Krull*,[31] the good faith exception applied when an officer relied on a state statute later declared to be unconstitutional.[32] The Court noted that exclusion would have minimal deterrent effect because the officer "simply fulfilled his responsibility to enforce the statute as written."[33] And like magistrates, the Court found no reason to believe exclusion would successfully ensure that legislators wrote constitutional statutes.[34] Similarly, in *Arizona v. Evans*,[35] the good faith exception applied to officers' reliance on "erroneous computer record[s]" maintained by court officials.[36] Again deploying *Leon*, the Court found no evidence that court employees are "inclined to ignore or subvert the Fourth Amendment" or that exclusion would deter future court employee misconduct.[37] Finally, there was no indication that exclusion would deter the arresting officer either—officers would continue to rely on records produced by court staffs.[38]

Despite this established case law, the Court's decision in *Herring* appears to have significantly altered the good faith exception. The facts of the case

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26. *See id.*
27. Tort law can be seen as a corollary to the exclusionary rule. *See* Herring v. United States, 555 U.S. 135, 153 (2009) (Ginsburg, J., dissenting).
28. 468 U.S. 897 (1984).
29. *Id.* at 907.
30. *Id.* at 915–17.
31. 480 U.S. 340 (1987).
32. *Id.* at 355–57.
33. *Id.* at 350.
34. *Id.* at 351.
35. 514 U.S. 1 (1995).
36. *Id.* at 14.
37. *Id.* at 11 (quoting Illinois v. Krull, 480 U.S. 340, 348 (1987)).
38. *Id.* at 15–16.

are well rehearsed. In July 2004, Bennie Dean Herring arrived at the Coffee County, Alabama Sherriff's Department to retrieve items from his impounded truck.[39] Investigator Mark Anderson learned that Herring was at the department, and knowing that Herring had a criminal record, asked the county's warrant clerk to check for any outstanding warrants naming Herring.[40] When the clerk found none, she contacted her colleague in neighboring Dale County, who determined that Dale County indeed had an outstanding warrant for Herring's arrest.[41] Armed with this information, Anderson arrested Herring as he left the department and found him in possession of drugs and a pistol.[42] However, the Dale County clerk had made a mistake.[43] As Herring was being stopped in Coffee County, the Dale County clerk realized there was an error with the record—Herring's warrant had been recalled five months earlier.[44] The realization occurred too late—Herring had already been arrested.[45]

Upon first glance, it appears like the exclusionary rule should have applied. Unlike in the trilogy discussed above, here *police* conduct was defective. Nevertheless, the Court found that the good faith exception applied.[46] Affirming *Leon* and its progeny, the Court recognized that the exclusionary rule is triggered when exclusion meaningfully deters future bad conduct.[47] But apparently breaking with precedent, the Court added a heightened fault requirement, writing that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[48] Errors resulting from "nonrecurring and attenuated negligence [are too] far removed from the core concerns that" led to the rule's adoption.[49] Finding no evidence that the police were reckless in relying on the incorrect record or that there was systemic negligence in maintaining the database, Herring's motion to suppress was denied.[50]

Although the Court couched its opinion as an incremental extension of the rule, scholars have noted a number of reasons why *Herring* is a significant change.[51] First, before *Herring*, the Court's exclusionary rule jurisprudence had never required "a showing of heightened misconduct"[52] by incorporating

39. Herring v. United States, 555 U.S. 135, 137 (2009).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 138.
45. *Id.*
46. *Id.* at 138–39.
47. *See id.* 147–48.
48. *Id.* at 144.
49. *Id.*
50. *Id.* at 147–48.
51. There is extensive scholarship on *Herring* and the exclusionary rule more generally. For a more complete discussion, *see generally, e.g.*, Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).
52. Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 671 (2011).

a form of mens rea into the deterrence calculus.[53] No longer would mere negligence be enough to trigger the exclusionary rule because, in the Court's opinion, such low levels of fault cannot be meaningfully deterred.[54] According to some commentators, *Herring* severely diluted the rule by "effectively narrow[ing] [it] to evidence obtained only pursuant to systemic negligence and to flagrant and reckless violations of the Fourth Amendment."[55] Second, pre-*Herring*, the good faith exception applied to "evidence illegally obtained by police officers in 'objectively reasonable reliance' on errors committed by nonlaw-enforcement personnel."[56] But in *Herring,* the Court applied the exception to an error committed by the police and thereby broke down the law enforcement/non-law enforcement distinction central to the Court's previous holdings. At bottom, *Herring*'s cabining of the exclusionary rule has left most violations of the Fourth Amendment without a remedy.[57]

PART II: *HERRING* AND MINORITY COMMUNITIES

Herring has potentially far-reaching consequences,[58] which will not be felt evenly throughout the population. Like many Fourth Amendment doctrines, *Herring*'s revamped good faith exception may disproportionately impact minority communities, who disproportionately interact with law enforcement, and thus will be disproportionately subjected to the errors that law enforcement officials inevitably commit. Statistics on law enforcement interactions show that minorities are involved in all stages of the criminal justice system more than they should be based on their share of the total population.[59] According to data from 2015, Black people make up 18 percent of individuals stopped by police, while only accounting for 12 percent of the total population.[60] Data reflecting interactions with police in New York City between 2014 and 2017 show that Black people accounted for 53 percent of stops, Latinx people 28 percent, and white people 11 percent.[61] Similarly, in

53. Kerr, *supra* note 24, at 1105.

54. Laurin, *supra* note 52, at 682. This does not seem to comport with deterrence in other contexts, most notably torts. *See Herring*, 555 U.S. at 153 (Ginsburg, J., dissenting).

55. Nolasco et al., *supra* note 15, at 224 (citation omitted).

56. *Id.* at 223 (first citing United States v. Leon, 468 U.S. 897, 921-22 (1984); then citing Illinois v. Krull, 480 U.S. 340, 359–60 (1987)).

57. *See* Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 463 (2009).

58. *See generally, e.g.*, Kay L. Levine et al., *Evidence Laundering in a Post*-Herring *World*, 106 J. CRIM. L. & CRIMINOLOGY 627 (2017) (describing how evidence tainted by a constitutional violation is "laundered" as it passes from the offending officer to a second officer to, ultimately, the prosecutor).

59. *See* ALEXANDER, *supra* note 3, at 97–139 (arguing why crime rates cannot explain this incongruence).

60. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), https://www.prisonpolicy.org/blog/2020/07/27/disparities/ [https://perma.cc/2JQ8-JKYT].

61. CHRISTOPHER DUNN & MICHELLE SHAMES, N.Y. CIV. LIBERTIES UNION, STOP-AND-FRISK IN THE DE BLASIO ERA 9 (2019),

Washington, D.C., 72 percent of individuals stopped are Black, despite accounting for only 46 percent of D.C.'s population.[62]

Numbers on arrests and prison sentences tell a similar story. According to the National Association for the Advancement of Colored People (NAACP), while Black and Latinx people together only represent 32 percent of the total U.S. population, they represent 56 percent of the country's incarcerated population.[63] Black people are also more likely to be arrested and more likely to be arrested multiple times in the same year.[64] 21 percent of people arrested once in 2017 were Black, and 28 percent arrested multiple times in 2017 were Black.[65] The Prison Policy Initiative determined that "42% of people arrested and booked 3 or more times were Black."[66]

Herring makes this outsized contact with law enforcement problematic for at least two reasons. First, extending the new good faith exception, with its heightened fault requirement, to police officers and their support staffs immunizes them from a wide range of errors, particularly computer errors, which like in *Herring* itself, could lead to mistaken warrants, criminal histories, or identifying information used to justify searches resulting in illegally seized evidence. According to amicus briefs filed by the Electronic Privacy Information Center, law enforcement relies on databases rife with errors, and those errors spread quickly among government entities through federal programs encouraging law enforcement cooperation.[67] These databases contain records of "incident, offense, and case reports, as well as arrest, booking, incarceration, and parole or probation information from federal, state, local, and tribal law enforcement entities," as well as personally identifiable information.[68] In a 2005 report by the Department of Justice (DOJ), state criminal history records, which national databases collect, are rife with significant backlogs, outdated records and records without final dispositions; they are also infrequently audited.[69] Recognizing the problem,

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https://www.nyclu.org/sites/default/files/field_documents/20190314_nyclu_stopfrisk_singles.pdf [https://perma.cc/T8RW-YEFE].

62. METRO. POLICE DEP'T WASH., D.C., STOP DATA REPORT: FEBRUARY 2020 9 (2020), https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf [https://perma.cc/LF7H-GUAG].

63. *Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ [https://perma.cc/KCH4-7JBQ] (last visited Apr. 28, 2021).

64. *See* Press Release, Alexi Jones & Wendy Sawyer, Prison Pol'y Initiative, Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html [https://perma.cc/5S77-6W3H].

65. *Id.*

66. *Id.*

67. Brief of Amici Curiae Electronic Privacy Information Center (EPIC) et al. in Support of Petitioner at 7–8, Herring v. United States, 555 U.S. 135 (2009) (No. 07-513) [hereinafter *Herring* Amicus].

68. Brief of Amici Curiae Electronic Privacy Information Center (EPIC) et al. in Support of Respondent at 11–12, Utah v. Strieff, 136 S. Ct. 2056 (2016) (No. 14-1373) (citation omitted) [hereinafter *Strieff* Amicus].

69. *Herring* Amicus, *supra* note 67, at 11. The 2005 report found a backlog of 2.5 million records and that twenty three states had not completed full audits to verify the accuracies of

the DOJ invested $390 million to fix these deficiencies, but its 2005 report admitted that the influx of capital did little to remedy the problem.[70] The DOJ also recognized in 2001 that there is a "substantial risk that . . . user[s] will make . . . incorrect or misguided decision[s]" based on these national law enforcement databases.[71] As of 2016, the reliance on computer databases has only increased and the errors persist.[72]

In sum, officers are armed with immense amounts of data that can be used during searches and seizures, and now, with *Herring*'s protection, they can justify their actions with error-riddled information while facing almost no repercussions if their actions are unconstitutional. Herring himself provides a prime example. If not for the faulty Dale County record, he could have avoided prosecution. The problem is exacerbated for minorities, who disproportionately interact with law enforcement agents. More interactions, even if they result in no formal charges, mean more opportunities for law enforcement to collect information that could later be improperly relied on during a search or seizure in violation of an individual's Fourth Amendment rights.

Second, even when a defendant has a colorable suppression claim, *Herring*'s heightened fault standard makes it almost impossible to vindicate the defendant's rights. This is because only "especially explicit and egregious" conduct, of the type that clearly demonstrates "[c]ontempt for the law," will fulfill *Herring*'s requirement that police action be reckless, deliberate, or grossly negligent.[73] Although *Herring* contends that determining whether conduct rises to this standard is an objective inquiry,[74] recklessness or gross negligence necessarily requires some subjective analysis.[75] Given the Court's established reluctance to consider subjectivity in Fourth Amendment cases,[76] defendants must have experienced a facially flagrant constitutional violation, or marshal significant discovery to show the police error satisfies *Herring*.[77] Courts are unlikely to ever grant such discovery, setting up a situation where members of minority communities—those who are most likely to interact with police and thus most likely to suffer

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their criminal records in the previous five years. Meanwhile, thirteen states reported no plans to do an audit in the subsequent three years. *Id.* at 14–15.

70. *Id.* at 15–16.

71. *Id.* at 15 (emphasis omitted) (citation omitted).

72. *See generally Strieff* Amicus, *supra* note 68. As of 2016, the National Crime Information Center, a major federal database, contained more than 13 million records accessible by organizations including state, city, tribal agencies, sentencing commissions, and penal institutions. *Id.* at 8. The National Data Exchange, a central repository used by various criminal justice entities, contained 500 million records as of 2015. *Id.* at 11.

73. Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1551 (2018).

74. Herring v. United States, 555 U.S. 135, 145–46 (2009).

75. Kerr, *supra* note 24, at 1105.

76. *See* Whren v. United States, 517 U.S. 806, 813–14 (1996).

77. See Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019) (demonstrating how much discovery is required, albeit in the administrative law context, to show the subjective decision-making processes of government officials).

abuse—cannot in practice meet the pleading requirement despite, in theory, having a viable claim.[78]

Even assuming a defendant can access the necessary evidence, *Herring*'s standard impacts minorities in even more indirect ways. *Herring* requires complicated legal work—properly requesting discovery, reviewing evidence, filing the appropriate motion, and demonstrating the elements have been met—which necessitates effective representation. While the Sixth Amendment mandates providing criminal defendants effective counsel,[79] the considerable pressures exerted on public defenders and their clients push cases to plea bargaining long before motions to suppress are heard.[80] And while defendants have the option of retaining private representation, doing so is frequently unattainable, either because an individual defendant cannot afford a lawyer or simply does not have the knowledge or support to find one. The very people who most disproportionately interact with the criminal justice system—members of minority communities—are also the people faced with significant access to justice obstacles that make success for the sliver of cases *Herring* left on the table unlikely.

Despite the substantial changes *Herring* wrought, the decision emphasizes the traditional balance between the societal costs of suppressing evidence and the likelihood of deterring future unconstitutional behavior that lies at the core of exclusionary rule jurisprudence. But it does so at great harm to communities subjected to outsized contact with law enforcement. And while it was not the intention, *Herring* ultimately is another mechanism perpetuating this problem.

PART III: WHAT TO DO ABOUT *HERRING*?

Herring has clearly made it difficult for a defendant to successfully exclude evidence, and given that subsequent good faith exception cases have approvingly cited the new standard,[81] it appears *Herring* is here to stay. So, what should be done? This Part highlights three avenues of exploration, where recalibrating the scales so that police officers do not run roughshod over constitutional rights seems at least plausible.

A: Looking Elsewhere

Because *Herring* is entrenched as good law,[82] it may be fruitful to look elsewhere for relief. A civil corollary to the exclusionary rule is 42 U.S.C. § 1983 (§ 1983).[83] Section 1983 allows individuals who suffer violations of

78. *See* ALEXANDER, *supra* note 3, at 111, 117.

79. U.S. CONST. amend. VI.

80. The Court has acknowledged that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Missouri v. Frye, 556 U.S. 134, 143 (2012) (citation omitted). As a result, the Court has stated that the criminal justice system "is for the most part a system of pleas, not a system of trials." Lafler v. Cooper, 556 U.S. 156, 170 (2012).

81. *See* Davis v. United States, 564 U.S. 229, 239 (2011).

82. *See id.*

83. 42 U.S.C. § 1983.

their constitutional rights committed by state officials in their official capacities to sue for money damages or injunctive relief.[84] In limited circumstances, § 1983 allows individuals to also sue government entities, like police departments, for money damages or injunctive relief.[85] But just as the good faith exception excuses officers for violating constitutional rights in the exclusion context, the qualified immunity doctrine excuses officers in the § 1983 context.[86] According to that doctrine, an officer is responsible for a constitutional violation only if the "contours of the right [were] sufficiently clear that a reasonable official would understand that what he [was] doing violates that right."[87] This standard requires "exceptionally clear evidence that a defendant's actions were so objectively ultra vires that he or she either knew or should have known that what he or she did was wrong,"[88] which ultimately protects "all but the plainly incompetent or those who knowingly violate the law."[89] While qualified immunity presents its own problems, the trouble is compounded when considered alongside the exclusionary rule. The exclusionary rule will not deter police officers as evidence will almost always be admitted, and they will not fear civil penalties under § 1983 because they enjoy qualified immunity. Taken together there is little deterring officers from violating constitutional rights.

But, perhaps unlike the exclusionary rule, there is reason to think qualified immunity will be reformed. Justice Thomas has repeatedly called for the Court to review qualified immunity, arguing that the doctrine rests on rocky jurisprudential footing.[90] He has argued that the current immunity test has no connection to the tort immunities that served as the drafting backdrop for § 1983.[91] And further, he has asserted that good faith was not always enough historically to protect officials from answering for their constitutional wrongs.[92] Justice Thomas is not alone—the recent events surrounding the deaths of George Floyd[93] and Breonna Taylor[94] have thrust qualified immunity firmly into the public view and inspired mainstream news outlets to write comprehensive pieces on the doctrine.[95] Such public attention,

84. *Id. See generally* Monroe v. Pape, 365 U.S. 167 (1961).
85. *See generally* Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658 (1978).
86. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6–9 (2017).
87. Anderson v. Creighton, 483 U.S. 635, 640 (1987).
88. Huq & Lakier, *supra* note 73, at 1550.
89. *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).
90. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1863–64 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari); Ziglar v. Abbasi, 137 S. Ct. 1843, 1870–72 (2017) (Thomas, J., concurring in part and concurring in the judgment).
91. *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from the denial of certiorari).
92. *Id.*
93. *What to Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES (Mar. 23, 2021), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/UQ57-BTFK].
94. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/86HB-V3MX].
95. Andrew Chung et al., *Supreme Defense*, REUTERS (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus/ [https://perma.cc/JA9V-7P98]; *see also* Hailey Fuchs, *Qualified Immunity Protection for*

combined with apparent judicial willingness, could create a powerful movement to make critical changes.

Making it easier to hold law enforcement officers civilly liable for their actions may encourage them to change their behavior to avoid liability resulting from successful § 1983 claims. As a derivative effect, we would see fewer Fourth Amendment violations, resulting in fewer situations in which a defendant would face *Herring*'s high bar for exclusion. Some commentators believe that officers would be sensitive to the consequences of civil liability.[96] While studies have shown that officers are not sensitive to the financial risk,[97] some evidence suggests that officers will change their behavior if they believe a constitutional violation will result in a guilty person going free.[98] It is also worth noting that according to one study, police pay money damages so infrequently–fewer than one half of 1 percent in a study of forty-four major jurisdictions–[99] that it is no surprise they do not fear the monetary consequences of a § 1983 suit. If qualified immunity is relaxed so that officers face liability more often than they do now, the financial pressure may also lead to better police behavior.

B: Getting Back to Basics

Another approach to find relief in *Herring*'s wake is to challenge the foundations on which the exclusionary rule is built. The traditional inquiry for the rule asks whether the likelihood that excluding evidence will prevent the undesirable constitutional violation from happening again outweighs the intense societal cost of letting a guilty person go free.[100] This analysis is arguably a myopic one, however, as it only considers two variables; there are potentially other societal costs to consider.

One such factor, especially in light of recent examples of social and racial injustice, is judicial integrity. As people lose faith in the justice system, the rule of law can falter, and data suggests that the public is at least skeptical of our current system. According to the NAACP, 84 percent of Black adults believe that police treat white people better than Black people, and 63 percent of white adults agree with this opinion.[101] Similarly, 87 percent of Black adults believe the U.S. criminal justice system, which includes the judiciary, "is more unjust towards Black people" than white people.[102] 61 percent of white adults share this opinion.[103]

Police Emerges as Flash Point Amid Protests, N.Y. TIMES (Mar. 8, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/W2P3-LZ4Q].

96. *See* Huq & Lakier, *supra* note 73, at 1566–68.

97. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354–57 (2000).

98. *See* Huq & Lakier, *supra* note 73, at 1566–68.

99. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).

100. *See supra* notes 17–23 and accompanying text.

101. *Criminal Justice Fact Sheet*, *supra* note 63.

102. *Id.*

103. *Id.*

Including judicial integrity as part of the balancing test is not a foreign concept, especially in the criminal law context. Judicial integrity has been weighed in determining whether sentencing guidelines have been miscalculated,[104] whether a defendant has suffered prejudicial error at trial,[105] and even whether evidence should be suppressed.[106] Scholars, too, have proposed revamped balancing tests to better account for integrity and fairness in the criminal process.[107]

Certainly, concerns about judicial integrity, coupled with the deterrent value of exclusion, should not lead to suppression of evidence in every instance. Instead, introducing a new variable like judicial integrity should recalibrate the balancing test to make the process fairer. Fairness and integrity are not simply normative values—they are cornerstones of our Constitution.[108] Vindicating constitutional rights in the correct cases, even if they will not appreciably lead to deterrence, can instill (or rebuild) trust in the judicial process that is critical to our core notions of the rule of law.

Decisions about exclusion do not only impact police officers. Consequences ripple to the individuals whose constitutional rights were infringed and those watching, who believe that excusing the "constable's blunder" is a failure of our system.[109] Changing the balance by considering judicial integrity might begin to rectify the problem *Herring* exacerbated.

C. Taking Herring *Hook, Line, and Sinker*

Finally, litigants could confront *Herring* on its own terms. *Herring* made clear that the exclusionary rule will apply when law enforcement conduct is "deliberate, reckless, or grossly negligent."[110] Less clear is what the Court meant when it said that the rule applies to "systemic negligence."[111] If police conduct will rarely satisfy the reckless, deliberate, and grossly negligent prong, perhaps attacking instances of systemic negligence is the key. Justice Sandra Day O'Connor foreshadowed this possibility in *Evans*:

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104. *See generally, e.g.*, Rosales-Mireles v. United States, 138 S. Ct. 1897 (2018) (considering judicial integrity in the sentencing guidelines context).

105. *See generally, e.g.*, Henderson v. United States, 568 U.S. 266 (2013) (considering judicial integrity when deciding whether a defendant suffered prejudicial error at trial).

106. *See generally, e.g.*, Stone v. Powell, 428 U.S. 465 (1976). The Court asserted that "courts, of course, must ever be concerned with preserving the integrity of the judicial process" but found that this consideration is not dispositive and could not overcome the cost of excluding the evidence. *Id.* at 485–86.

107. *See generally, e.g.,* Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. 1411 (2021). Indeed, Murray underscores the connections between harmless error review and the exclusionary rule. *Id.* at 1448–49.

108. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1890–91 (2014) (explaining how due process can justify the exclusionary rule).

109. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1047 (1984), which evokes People v. Defore, 150 N.E. 585, 587 (N.Y. 1026) (Cardozo, J.) ("The criminal is to go free because the constable has blundered.").

110. Herring v. United States, 555 U.S. 135, 144 (2009).

111. *Id.*

> Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).[112]

Justice O'Connor made her point in the context of electronic databases, which law enforcement officials heavily rely upon despite the abundance of errors in these databases that could easily lead to Fourth Amendment violations.[113] Justice Ruth Bader Ginsburg's dissenting opinion made this point again in *Herring* itself.[114] Nevertheless, the Court has not taken the bait to rule that extensive errors in computer databases without attempts at remediation qualify as systemic negligence.[115] Naturally, one might ask, if that is not systemic negligence, what is?

Despite this hazard, defining systemic negligence more precisely may be the vulnerable underbelly to an otherwise sealed doctrine. At least in the recordkeeping context, there is evidence to marshal a claim, and the Court itself has intimated that computer databases contain characteristics that could make a systemic negligence claim colorable. There may be other contexts to pursue as well.[116] Nevertheless, the evidentiary lift to succeed with this strategy is likely significant, especially given the access to justice issues that many criminal defendants face.[117] But this small opening should still be exploited to determine exactly where the contours of systemic negligence fit within the exclusionary rule. It may be a fruitful way to take *Herring* head on.

CONCLUSION

Despite claims that it is a logical extension of existing doctrine, *Herring* changed the good faith exception to the exclusionary rule by requiring a heightened fault standard and breaking down the law enforcement/non-law enforcement distinction central to the Court's previous exclusionary rule cases. *Herring's* impact is not simply doctrinal; the case disproportionately harms minority communities. Because of their heightened contact with police, minorities are more likely than their white counterparts to suffer a violation of their constitutional rights. And with the high bar *Herring* imposes, it is difficult to vindicate those wrongs. But *Herring* does not have to be the end of the line. Litigants may try to mend exclusionary rule doctrine

112. Arizona v. Evans, 514 U.S. 1, 17 (1995) (O'Connor, J., concurring).

113. *See supra* notes 67–72 and accompanying text.

114. *Herring*, 555 U.S. at 155–57 (Ginsburg, J., dissenting). Even the majority accepted that not "all recordkeeping errors by the police are immune from the exclusionary rule." *Id.* at 146 (majority opinion).

115. *Id.* at 146–47. *But see* United States v. Song Ja Cha, 597 F.3d 995, 1006 (9th Cir. 2010) (determining that a "nonchalant" attitude towards warrant applications pervading Guam law enforcement constituted systemic negligence under *Herring*).

116. *See generally, e.g.*, Floyd v. City of N.Y., 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (holding that New York City's stop-and-frisk policy was unconstitutional).

117. See *supra* Part II.

by reforming related legal principles like qualified immunity; recalibrating the balance at the core of the exclusionary rule; or working to define the boundaries announced in *Herring* more clearly. While it will not be easy, restoring balance to the exclusionary rule will help mitigate at least some of the wrongs our country's minorities experience at the hands of our justice system.