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Rights, Remedies, and the Quantum and Burden of Proof

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RIGHTS, REMEDIES, AND THE QUANTUM AND BURDEN OF PROOF

Joëlle Anne Moreno[*]

ABSTRACT

It is tempting to commemorate the 2014 centenary of the exclusionary rule by celebrating our historically progressive role in constitutional rights protection, but those familiar with the facts know that Fourth Amendment violations persist unabated. As New Yorkers consider Judge Scheindlin's damning assessment of police stop-and-frisk practices, and the country erupts in protests following fatal police encounters, are legal scholars who continue to pontificate on constitutional bona fides addressing "real" Fourth Amendment questions?

Traditional academic abstraction and artificial doctrinal divides obscure the fact that rights and remedies are defined by their operation. Constitutional rights have no value if, after they have been violated, meaningful remedies are unattainable. This Article focuses instead on the functional relationship between rights and remedies and on

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[*]Joëlle Anne Moreno is the Associate Dean for Faculty Research & Development and a Professor of Law at Florida International College of Law. For my mother, who is of course not Tina Fey, but might once have shared the same hopes for her daughter:

> Lead her away from Acting but not all the way to Finance.
>
> Something where she can make her own hours but still feel intellectually fulfilled and get outside sometimes
>
> And not have to wear high heels.

Tina Fey, BOSSYPANTS 262 (2011).

new constraints imposed by judicial recalibrations of the quantum and burden of remedial proof.

The Roberts Court's recent shotgun wedding linking exclusion to defense evidence establishing police officer "bad faith" or systemic police negligence illustrates the centrality of proof and evidence questions. Over the past few years, the Court has increased the quantum of defense suppression proof while simultaneously eliminating burden shifting to the prosecution. These shifts make most Fourth Amendment violations irremediable. It is not feasible to demand that defendants aggregate data establishing systemic police negligence. Defendants who seek, in the alternative, to prove that an illegal search was committed knowingly, recklessly, or with gross negligence invariably lack direct evidence of police officer intent. By changing the rules governing suppression under the guise of a narrow focus on deterrence, the Roberts Court has ensured that nearly all illegally seized evidence will be admitted. The only time evidence will be suppressed is when a defendant can prove circumstantially that police misconduct was so patently egregious that defense evidence supports a judicial inference of police "bad faith."

In theory, the Roberts Court has quietly erased a century of exclusion jurisprudence while eliding accountability for more overt action. In practice, if suppression is only available to defendants who can prove flagrant police "bad faith," the Court has effectively resurrected the old due process "shocks the conscience" exclusion standard. New decisions illustrating the type of police behavior that can support an inference of bad faith under include patently race-based seizures, near-suspicionless repeated rectal searches, and (in a truly unforgettable case) the curbside

excision of contraband from a suspect's penis performed by the arresting officer.

The full impact of increasing the quantum and reallocating the burden of proof is fully revealed in recent empirical studies demonstrating that illegally seized evidence is now routinely admitted. Prosecutors' new, easy access to this evidence following warrant-based and warrantless searches will transform not just the small number of cases that go to trial, but plea calculations in every case where evidence was previously excludable on Fourth Amendment grounds.

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INTRODUCTION

This year marks the centenary of the exclusionary rule.[1] Once considered a constitutional mandate, the rule has fallen on hard times, and rumors of its death may not have been greatly exaggerated.[2] While reasonable academic minds continue to debate its constitutional bona fides,[3] the close of the exclusionary rule century precipitates more pressing concerns. Judge Shira A. Scheindlin's recent rejection of New York City's stop-and-frisk program reveals that many police officers

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[1] Weeks v. United States, 232 U.S. 383 (1914).

[2] Four decades ago, Justice Brennan characterized the Supreme Court's approach as a "slow strangulation of the rule." United States v. Peltier, 422 U.S. 531, 561 (1975). More recently, Justice Ginsburg opined that the exclusionary rule cannot survive if the Court "leaves Herring, and others like him, with no remedy for violations of their constitutional rights." Herring v. United States, 555 U.S. 135, 156 (2009) (Ginsburg, J., dissenting); *see also* Albert W. Alschuler, Herring v. United States: *A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 463 (2009) (expressing concern that the current Supreme Court "would leave most violations of the Fourth Amendment without a remedy"); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005-2006 CATO SUP. CT. REV. 283, 284 (2006); Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 420 (2013) ("The rule may thus be one vote away from dying, but its current life force is unquestionably on the wane."). However, dire academic predictions must be measured against the opinion of Justice Kennedy, who, nine years ago, assured us that the "continued operation of the exclusionary rule, as settled and determined by our precedents, is not in doubt." Hudson v. Michigan, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring).

[3] Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 357 (2013) ("Both sides of the exclusionary rule debate regarding whether it is a mere tool to enforce deterrence or whether it is an individual rights based remedy have weighty authority and supporters."); David Gray, *A Spectacular Non-Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 2 (2013) (arguing the Court should adopt a "hybrid theory of the exclusionary rule that embraces retributive principles derived from the constitutional imperatives historically dominant in the Court's exclusionary rule cases"); Taslitz, *supra* note 2, at 420–22.

routinely disregard the Fourth Amendment and interfere with liberty interests for no reason or based on racial or ethnic stereotypes and profiles.[4] The data from New York also demonstrates that stop-and-frisks *rarely* uncover contraband—only 1.5% of 4.4 million people stopped over the past decade were carrying weapons.[5] This new empirical evidence

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[4] New York City announced on January 31, 2014 that it would settle its long-running legal fight over N.Y.P.D. stop and frisk practices and implement many of the specific reforms identified in Judge Scheindlin's decision. Mayor Bill de Blasio's announcement was viewed as a dramatic reversal of the policies of the previous administration, which had credited a drop in violent crime to the same stop-and-frisk practices. Benjamin Weiser, *Mayor Says New York City Will Settle Suits on Stop and Frisk Tactics*, N.Y. TIMES, Jan. 31, 2014, http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html; *see also* Joseph Goldstein, *Judge Rejects New York's Stop and Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html. For an essay exploring the possible effects of Judge Scheindlin's decision, see Katherine Macfarlane, *New York's Stop-and-Frisk Appeals are Still Alive*, BROOK. L. SCH. PRACTICUM (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370556. Similar examples can be found outside of New York. *See, e.g.*, U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 4, 8 (2014), *available at* http://www.justice.gov/usao/nj/Press/files/pdffiles/2014/NPD%20Findings%20Report.pdf (finding that New Jersey Police Department stops have routinely violated the Fourth Amendment); AM. CIVIL LIBERTIES UNION, POLICE BRUTALITY AND SUPPRESSION OF FIRST AMENDMENT RIGHTS IN PUERTO RICO, *available at* https://www.aclu.org/police-brutality-and-suppression-first-amendment-rights-puerto-rico (finding the violation of rights in Puerto Rico).

[5] *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) ("52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found."), *appeal dismissed* (Sept. 25, 2013); David Rudovsky & Lawrence Rosenthal, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 124 (2013); Robert Gearty & Corky Siemaszko, *NYPD Stop-and-Frisk Policy Yielded 4.4 Million Detentions but Few Results: Study*, N.Y. DAILY NEWS, Apr. 3, 2013, http://www.nydailynews.com/new-york/nypd-stop-and-frisk-detains-millions-results-article-1.1307179 (discussing Professor Jeffrey Fagan's research revealing that only one-tenth of 1% of New York City stop-and-frisks resulted in firearms confiscation from 2004 to June 30, 2012).

suggests that our current conceptualization of the Fourth Amendment encourages aggressive policing.[6] When evidence *is* uncovered following an illegal frisk or search, additional legal policy and social justice questions arise. Answers to these questions should help shape the national conversation on police tactics and inform state and federal criminal courts, which routinely address Fourth Amendment issues.

As countless commentators have recognized, remedies are the life force of rights.[7] Constitutional rights questions are not ethereal concerns.

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[6] Jon B. Gould & Stephen Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 333 (2004); David A. Harris, *How Accountability-Based Policing Can Reinforce or Replace the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 154 (2013) (citing a 2004 study by Jon B. Gould and Stephen D. Mastrofski that involved an "investigation of police adherence to search and seizure standards in the field, that is, in the course of street-level police work . . . using first-hand observation of police behavior—not behavior as reported to researchers after the fact or as recorded in court opinions—to see what police in situations presenting actual search and seizure issues really did . . . [and] concluded, Fourth Amendment violations, some quite egregious, showed up in almost a third of all of the observed police investigations"); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 611 (2011) (describing research showing that "15% of police officers interviewed admitted they would intentionally conduct an illegal search . . . [which] probably understates underestimates the extent to which police willfully violate the Fourth Amendment, since it is an admission against interest"); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 540 (2013) (citing studies involving "observation of police officers on patrol that found that 46% of pat-down searches were unconstitutional"); Taslitz, *supra* note 2, at 419–20 ("Empirical data and psychological and economic theory establish . . . [that] law enforcement violations of Fourth Amendment protections are numerous, and the obstacles to alternative remedies so great as to render them largely meaningless.").

[7] For example, Taslitz has addressed the fundamental instrumental function of the exclusionary rule, noting:

> [T]he instrumental function of rights is to give their bearers access to certain benefits to which society deems them entitled. . . . [and] [i]n the case of the Fourth Amendment, a defendant's desired instrumental

Yet our traditional scholarly approach divorces practice from academic inquiry by focusing significant attention on abstract doctrinal questions, such as whether *Weeks v. United States*[8] created a sacrosanct rights-based remedy or a malleable judicial rule.[9] This approach typically ignores the *operation* of rights and remedies, which would also include problems of evidentiary proof and persuasion, along with the myriad procedural constraints.[10] Constitutional rights have no value without remedial protection. Thus, it is a pointless academic exercise to opine on the scope of the Fourth Amendment protections without a basic understanding of how rights and remedies work. At a minimum, this should encompass: (1) the filing and waiver of suppression motions; (2) the quantum of defense proof; (3) realistic limits on defense access to both direct and

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> value is exclusion of evidence against him at trial, thus making it harder, occasionally impossible, to convict him of a crime.

Taslitz, *supra* note 2, at 430–31.

[8] Weeks v. United States, 232 U.S. 383 (1914).

[9] *See generally* Clancy, *supra* note 3; Taslitz, *supra* note 2. Arguably this debate should not have survived Justice Brennan's irrefutable logic in his dissenting opinion in *United States v. Leon*:

> The Court evades this principle by drawing an artificial line between the constitutional rights and responsibilities that are engaged by actions of the police and those that are engaged when a defendant appears before the courts. According to the Court, the substantive protections of the Fourth Amendment are wholly exhausted at the moment when police unlawfully invade an individual's privacy and thus no substantive force remains to those protections at the time of trial when the government seeks to use evidence obtained by the police.

468 U.S. 897, 935 (1984) (Brennan, J., dissenting).

[10] *But see* Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 477, 499 (2013) (noting that "when the Supreme Court engages in Fourth Amendment balancing, the collective social interests asserted by the government almost always outweigh the defendant's insular claims").

circumstantial evidence of illegal police misconduct; (4) burden shifting provisions; (5) recent blurring of historical distinctions between warrant-authorized and warrantless searches; (6) the rules governing judicial discretion to grant suppression hearings enabling defendants to build a record; (7) the case law constraining defense access to a suppression hearing; and (8) the evolving standards of appellate review.

A. THE ROBERTS COURT CREATES A FAUX REASONABLE POLICE OFFICER "GOOD FAITH" STANDARD

Defendants seeking exclusion have always struggled to prove that police officers engaged in illegal conduct,[11] but, in 2009, *Herring v. United States*[12] dramatically changed the scope and operation of the exclusionary rule. After *Herring*, a defendant must first prove by a preponderance of the evidence that a search was illegal. Once this burden has been met, the defendant must further prove, using direct or circumstantial evidence: (1) that the arresting officers acted deliberately,

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[11] As early as three decades ago, Justice Brennan remarked that "[t]o the extent empirical data is available regarding the general costs and benefits of the exclusionary rule, it has shown . . . that the costs are not as substantial as critics have asserted[.]" *Leon*, 468 U.S. at 942 (Brennan, J., dissenting). Justice Brennan's assertion was supported with research demonstrating that, at the time, only approximately 0.2% of federal prosecutions did not proceed based on evidence of an illegal search. *See id.* at 950.

[12] 555 U.S. 135 (2009).

recklessly, or with gross negligence;[13] or, (2) that the illegality was the result of recurring or systemic police negligence.[14]

Chief Justice Roberts, who wrote for the *Herring* majority, was certainly aware that these new evidentiary obstacles would dramatically expand prosecutors' access to illegally seized evidence. While the *Herring* Court purported to rely on *United States v. Leon,*[15] which three decades earlier had established an exclusion exception based on prosecution proof of objective police officer "good faith,"[16] *Herring* is not faithful to precedent. Instead, as discussed below, the Roberts Court used *Herring* to create a faux *Leon* "good faith" standard by (1) shifting the burden of proof on police intent from the prosecution to the defendant thereby making it a "bad faith" standard and (2) by ensuring that the type of objective evidence available to defendants under *Leon* would no longer suffice. This new exclusion standard is such a significant deviation from

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[13] *Id.* at 144 ("As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."); Davis v. United States, 131 S. Ct. 2419, 2427 (2011) (quoting *Herring*, 555 U.S. at 144); *see also* Claire Angelique Nolasco, *What Herring Has Wrought: An Analysis of Post-Herring Cases in the Federal Court*, 38 AM. J. CRIM. L. 221, 222–23 (2011).

[14] In her *Herring* dissent, Justice Ginsburg emphasized the "gravity of recordkeeping errors in law enforcement" and explained that recordkeeping errors "are susceptible to deterrence by the exclusionary rule." *Herring*, 555 U.S. at 150 (Ginsburg, J., dissenting). However, the Court's suggestion that suppression could be obtained following proof of "systematic error" is an empty promise because defendants lack the resources for this type of discovery and, even if they did pursue discovery, police departments have no incentive to maintain these types of records. *See id.*; *see also Davis*, 131 S. Ct. at 2427.

[15] 468 U.S. 897 (1984).

[16] *Leon*, 468 U.S. at 922 (establishing an exception to the exclusionary rule based on proof from the prosecution that a police officer acted in "objectively reasonable reliance" on a "facially-valid search warrant").

precedent that Justice Breyer predicted that it "will swallow the exclusionary rule."[17]

Reaction to *Herring* has been mixed. The case spawned a plethora of academic commentary and piscine puns.[18] However, *Herring* has had traction with a "law and order" public that abhors the exclusion of incriminating evidence without much regard for how it was obtained[19] and a Supreme Court majority with ongoing designs on the exclusionary rule.[20] In 2011, in *Davis v. United States*,[21] the Court emphatically

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[17] *See Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting) ("[I]f the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was 'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule.").

[18] *See, e.g.*, Alschuler, *supra* note 2; Kenneth Earl, *So Long and Thanks for All the Herring: The U.S. Exclusionary Rule after Herring and What the United States Can Learn from the Canadian Exclusionary Rule*, 31 WISC. INT'L L. J. 296 (2013); 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); Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011).

[19] *See* L. Timothy Perrin, et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 672 (1998). The public may be gravely mistaken about defendants' ability to suppress illegally obtained evidence, but this does nothing to curb the view that the exclusionary rule undermines police, prosecutors, and courts seeking to be tough on crime. *See* Jacobi, *supra* note 6, at 629 (noting that the public inaccurately views "the exclusionary rule . . . as a means by which criminals get off on technicalities").

[20] On October 7, 2014, the Supreme Court heard argument in *Heien v. North Carolina*, a case involving whether an officer's mistaken view of the law can form the basis for reasonable suspicion following a traffic stop and seizure of evidence. *See* Petition for Writ of Certiorari, Heien v. North Carolina, No. 13-604 (Nov. 13, 2013), 2013 WL 6091788.

[21] Davis v. United States, 131 S. Ct. 2419, 2427, 2434 (2011).

reaffirmed and expanded *Herring*.[22] In *Davis* the Court clarified that defense proof of illegal police conduct is necessary, but not sufficient, for suppression.[23] As Justice Alito explained for the *Davis* majority, the exclusionary rule should *not* be applied if illegal police "conduct involv[ed] only simple isolated negligence"[24] because under these circumstances the "deterrence rationale loses much of its force and exclusion cannot pay its way."[25] Given the obvious difficulty most defendants will have proving a single instance of illegal police misconduct, increasing the quantum of proof makes the evidentiary hurdle nearly insurmountable.

Some commentators have inaccurately underestimated the Roberts Court's role, positing instead that current limitations on exclusion date back to *Leon*.[26] A majority of the Roberts Court clearly supports this view,[27] as evidenced by the seventeen separate citations to *Leon* that appear in the majority opinion in *Herring*[28] and the ten additional *Leon*

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

[23] *Davis*, 131 S. Ct. at 2427 (noting that "real deterrent value is a necessary condition for exclusion, but it is not a sufficient one").

[24] *Id.* at 2427–28.

[25] *Id.*

[26] *See, e.g.*, John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. KAN. L. REV. 155, 165 (2005) ("[T]he Leon good faith exception to the exclusionary rule might be more aptly termed the good-faith 'inclusionary rule' for warrant searches."); Donald Dripps, *Living With* Leon, 95 YALE L.J. 906, 918 (1986) ("If an unconstitutional search confers on the victim a personal right to suppression of its fruits, the balancing approach of *Leon* proceeds from an erroneous interpretation of the Fourth Amendment.").

[27] *See* LaFave, *supra* note 18, at 78 ("[T]he Court would have us believe that *Herring* matches up with these decisions, especially *Leon*.").

[28] 555 U.S. 135 (2009).

citations in the majority opinion in *Davis*.[29] However, recent empirical evidence reveals that *Leon* has played a more limited role and, until *Herring*, played no role in the vast majority of suppression cases because most searches are warrantless.[30] The deliberate analytic jumbling of *Leon* and *Herring* also obscures the impact of replacing *Leon*'s objective (or semi-objective) standard with the inevitably subjective standard of *Herring* and *Davis*.

Leon involved a search pursuant to a warrant and—prior to *Herring*—its effect was almost entirely limited to warrant-based searches.[31] The specific question, according to the *Leon* Court, was whether "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."[32] A reasonable officer, according to the Court, who had read the warrant would have assumed it was "technically sufficient."[33] Thus, the "good faith" exception created in *Leon* could only be established based on review of the evidence available to both the executing officer and the reviewing court. Specifically, the documentary evidence (i.e., the warrant and supporting paperwork) proved notice and reasonable good faith.

Herring and *Davis* ignore *Leon*'s evidentiary contingency and extend the requirement of an inference of police officer intent to all search cases regardless of the available evidence. This shift has two critical effects. First, it unrealistically increases the quantum of defense proof

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[29] *See* Davis v. United States, 131 S. Ct. 2419 (2011).

[30] *See* Robert C. Hauhart & Courtney C. Choi, *The Good Faith Exception to the Exclusionary Rule*, 48 CRIM. L. BULL. 316, 316–17 (2012) (conducting an extensive study of 700 federal appellate cases applying *Leon* to conclude that the cases only governed warrant-based searches).

[31] *See generally id.*

[32] United States v. Leon, 468 U.S. 897, 919–20 (1984).

[33] *Id.* at 921.

necessary to support a judicial inference of police "bad faith" because persuasive documentary evidence of police intent, like a facially invalid warrant, is typically not available to defendants and is never available following warrantless searches. Second, it changes the nature of defense proof. When documentary evidence is not available, inferences about "objective" good or bad faith are difficult or impossible. Instead, defendants will be forced to prove that the "*officers who conducted the search* . . . violate[d] . . . [the defendant's] Fourth Amendment rights deliberately, recklessly, or with gross negligence."[34]

B. THE EXCLUSIONARY RULE AS A RULE OF EVIDENCE

1. A BRIEF HISTORY OF EXCLUSION

The exclusionary rule has been conceptualized as a constitutional remedy, but it functions as a rule of evidence.[35] By recalibrating the rules of evidence governing suppression, the Roberts Court has effectively erased a century of exclusion jurisprudence and ensured that most Fourth Amendments violations will be irremediable.

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[34] *Davis*, 131 S. Ct. at 2428 (emphasis added); *see also* George M. Dery III, *The "Bitter Pill": The Supreme Court's Distaste for the Exclusionary Rule in* Davis v. United States *Makes Evidence Suppression Impossible to Swallow*, 23 GEO. MASON U. C.R. L.J. 1, 25 (2012) (contrasting Horton v. California, 496 U.S. 128 (1990), where the Court found that evenhanded law enforcement is best achieved by the application of objective standards or conduct); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 842 (2013) (noting that, after *Herring*, "proof of reckless – and certainly deliberate – misconduct envisions a subjective inquiry into the state of mind of the actual officer whose actions are in question").

[35] *See generally* Arnold H Loewy, *Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989) (making the general argument that Fourth Amendment rights should be viewed as procedural rights because they are designed to ensure the exclusion of evidence).

The exclusionary rule, created in 1914 in *Weeks v. United States*, initially governed only the federal courts.[36] The problem of providing a remedy for state police violations of constitutional rights was addressed for the first time four decades later in the seminal case of *Rochin v. California,*[37] which established the due process "shocks the conscience" standard. *Rochin* would govern remedial access following Fourth Amendment violations for the next decade, until 1961, when *Mapp v. Ohio*[38] reduced the defendant's burden of proof in state courts to conform to *Weeks*.

Over the past six decades, the *Rochin* "shocks the conscience" standard has been derided for severely restricting access to exclusion. As Justice Stevens opined in 1994 in *Chavez v. Martinez*,[39] the requirement that defendants proffer evidence that shocks the conscience does not work because courts have refused to be shocked by a range of coercive and illegal police procedures.[40] The *Rochin* standard is also inconsistent

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[36] *See* 232 U.S. 383, 398 (1914).

[37] 342 U.S. 165, 172 (1952). As Justice Frankfurter famously opined:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner[']s home], the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 209–10.

[38] 367 U.S. 643 (1961).

[39] 538 U.S. 760, 774–75 (1994) (finding that emergency room interrogation of a suspect shot five times by police officer could not be characterized as "egregious" or "conscience shocking").

[40] *Id.* at 787. In his concurring opinion, Justice Stevens listed the following Supreme Court cases:

because, in a manner typical of "highly subjective substantive due process methodologies,"[41] courts have required that defendants satisfy the near-insurmountable evidentiary standard by proving that police officers had violated undefined "decencies of civilized conduct."[42]

> *Darwin v. Connecticut*, 391 U.S. 346. . . (1968) (suspect interrogated for 48 hours incommunicado while officers denied access to counsel); *Beecher v. Alabama*, 389 U.S. 35, 36. . . (1967) (officer fired rifle next to suspect's ear and said 'If you don't tell the truth I am going to kill you'); *Clewis v. Texas*, 386 U.S. 707. . . (1967) (suspect was arrested without probable cause, interrogated for nine days with little food or sleep, and gave three unwarned 'confessions' each of which he immediately retracted); *Reck v. Pate*, 367 U.S. 433, 439–440. . . (1961) (mentally retarded youth interrogated incommunicado for a week 'during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher'). *Cagle v. State*. . . . 221 So. 2d 119, 120 (1969) (police interrogated wounded suspect at police station for one hour before obtaining statement, took him to hospital to have his severe wounds treated, only then giving the *Miranda* warnings; suspect prefaced second statement with "'I have already give [sic] the Chief a statement and I might as well give one to you, too"'), cert. denied. . . ; *People v. Saiz*, 620 P.2d 15 (Colo. 1980) (two hours' unwarned custodial interrogation of sixteen year-old in violation of state law requiring parent's presence, culminating in visit to scene of crime); *People v. Bodner*, 75 A.D.2d 440. . . (1980) (confrontation at police station and at scene of crime between police and mentally retarded youth with mental age of eight or nine); *State v. Badger*. . . 450 A.2d 336, 343 (1982) (unwarned 'close and intense' station house questioning of 15–year–old, including threats and promises, resulted in confession at 1:20 a.m.; court held '[w]arnings . . . were insufficient to cure such blatant abuse or compensate for the coercion in this case').

Id. at 787 n.1 (Stevens, J., concurring in part and dissenting in part).

[41] Lewis v. Sacramento, 523 U.S. 833, 861 (Scalia, J., concurring).

[42] Rochin v. California, 342 U.S. 165, 172–73 (1952). In a series of cases, the Supreme Court denied exclusion because police misconduct failed to "shock the conscience." *See* Winston v. Lee, 470 U.S. 753 (1985) (finding that forcing a suspect to

This article posits that the Roberts Court has returned suppression decisions to the shocks the conscience standard,[43] but with a twist. In and after *Rochin*, defendants who proffered evidence of shocking police misconduct met the burden of proving illegality and the remedy inured *unless* the prosecution proved specific facts that made exclusion unwarranted (e.g., that the evidence derived from an independent source).

Professor Wayne LaFave has highlighted the importance of suppression burden allocation and burden shifting, noting, "in the past courts have consistently ruled that the government has the burden to prove facts warranting application of the 'good faith' exception."[44] After *Herring* and *Davis*, burden shifting to the prosecution has been eliminated. The defense now bears the burden of proving illegality and (1) systemic police negligence or (2) that the police officers acted knowingly,

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submit to surgical intrusion for forensic testing purposes is unlikely to shock the conscience if the societal interest is great and the physical medical risk is limited), Schmerber v. California, 384 U.S. 757, 770–71 (1966) (holding that it was permissible for police, over defendant's objections, to have a doctor take a blood sample), and Breithaupt v. Abram, 352 U.S. 432, 437 (1956) (explaining that "a blood test taken by a skilled technician [does] not . . . 'shock[] the conscience'"). For an interesting article positing that the Supreme Court should incorporate a doctrine of human dignity into its constitutional criminal procedure cases, see Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291 (2010).

[43] As shown below, the similarity between *Herring*, *Davis*, and the "shocks the conscience" substantive due process standard has attracted attention from some recent lower courts and at least one other commentator. Although Clancy does not explore pragmatic problems of proof of police culpability, his excellent analysis of the constitutionality of the exclusionary remedy includes his observation that "[t]he new culpability standard articulated in *Herring* and *Davis* has remarkable similarities to the 'shocks the conscience' standard that was briefly employed by the Court post-*Wolf* and pre-*Mapp* in a few cases." Clancy, *supra* note 3, at 380. Along these same lines, Clancy posits that recent qualified immunity cases from the Supreme Court will further erode Fourth Amendment protections because, taken together with new exclusion cases, "what will be considered egregious enough to justify exclusion will also be influenced, resulting in increasingly diminished respect for the right to be secure over time." *Id.* at 383.

[44] LaFave, *supra* note 18, at 786 (internal quotation marks omitted).

recklessly, or with gross negligence. Defendants will rarely, if ever, have access to direct evidence of police "bad faith" (e.g., a police officer's statement acknowledging deliberate illegality or willful disregard of the law). So illegally seized evidence will only be suppressed when a defendant can prove circumstantially that police misconduct was so patently egregious that the defense evidence supports a judicial inference of police "bad faith."[45]

This study of the functional relationship between Fourth Amendment rights and remedies differs from more traditional constitutional analyses by: (1) highlighting pragmatic guidance from the Court on the operation of the exclusionary rule; (2) clarifying the interplay among evidentiary burdens, procedural constraints, burden shifting, and remedial access; and, (3) erasing the false divide between doctrine and practice.

2. PRAGMATIC GUIDANCE ON EXCLUSION FROM THE COURT

The Justices typically show little interest in the practice of law. On the rare occasion when these questions arise, the Court's views on proof and procedure can sometimes be surprisingly astute.

For example, in *United States v. Leon*,[46] Justice White deplored the adjudicatory problems and inconsistencies of a suppression standard that involved "sending state and federal courts into the minds of police officers."[47] In his view, requiring defendants to prove actual police officer

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[45] Davis v. United States, 131 S. Ct. 2419, 2437 (2011) (Breyer, J., dissenting) ("The Court's decision in *Herring* and again in *Davis* to 'place determinative weight upon the culpability of an individual police officer's conduct' effects a 'change (which may already be underway) that would affect not an exceedingly small set of cases, but a very large number of cases, potentially many thousands each year.'").

[46] 468 U.S. 897 (1984).

[47] *Id.* at 922 n.23 ("[S]ending state and federal courts into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.").

culpability "would produce a grave and fruitless misallocation of judicial resources."[48] More recently, Justice Breyer opposed linking suppression to a vague and unpredictable "case-by-case, multifactored inquiry into the degree of police culpability."[49] Justice Ginsburg has similarly urged adherence to the Court's longstanding "recognition that application of the exclusionary rule does not require inquiry into the mental state of the police."[50] She has also outlined real-world proof problems, including the fact that "the impecunious defendant" cannot possibly gather sufficient evidence to establish systemic police negligence.[51] Justice Ginsburg's predictions about the costs and effort of evidence gathering have been well substantiated by Judge Scheindlin's recent assessment of stop-and-frisk practices in New York and the massive quantity of supporting empirical and statistical evidence cited therein.[52]

In analogous contexts, Justices have expressed nearly identical concerns. In a case involving the suppression of a statement taken in violation of *Miranda*,[53] Justice O'Connor predicted that requiring defendants to prove police officer culpability would render the rule

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[48] *Id.*

[49] Herring v. United States, 555 U.S. 135, 157, n.7 (2009) (Breyer, J., dissenting).

[50] *See id.* Writing for the *Herring* majority, Chief Justice Roberts dismissed Justice Ginsburg's concerns by explaining "the pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers." *Herring*, 555 U.S. at 136. As discussed below, the Chief Justice's assertion finds little support in logic or doctrine.

[51] *Herring*, 555 U.S. at 157 (Ginsburg, J., dissenting) ("[E]ven when deliberate or reckless conduct is afoot, the Court's assurance will often be an empty promise: How is an impecunious defendant to make the required showing? If the answer is that a defendant is entitled to discovery (and if necessary, an audit of police databases) . . . then the Court has imposed a considerable administrative burden on courts and law enforcement.").

[52] *See* Weiser, *supra* note 4.

[53] Missouri v. Seibert, 542 U.S. 600, 626 (2004).

inoperable because "[d]ifferent officers involved in an interrogation might claim different states of mind regarding the failure to give *Miranda* warnings [and] even in the simple case of a single officer who claims that a failure to give *Miranda* warnings was inadvertent, the likelihood of error will be high."[54] More recently, in a case involving the suppression of suggestive identification evidence, Justice Sotomayor complained that "[b]y rendering protection contingent on improper police arrangement of the suggestive circumstances, the Court effectively grafts a *mens rea* inquiry onto our rule."[55]

3. THE QUANTUM AND BURDEN OF PROOF

Starting with *Weeks* in 1914 in the federal courts,[56] and with *Mapp* in 1961 in the state courts,[57] defendants who proved that they had been illegally searched could expect that any resulting evidence would be suppressed. Before *Leon*, suppression was available in both the federal and state courts *unless* the prosecutor proved that: (1) the evidence was not the fruit of the illegal search (i.e., that the evidence had an independent source or that any taint created by the illegal search had dissipated); or (2) the evidence was seized under exigent circumstances. After *Leon*, evidence seized pursuant to a facially valid warrant could be admitted, if the prosecutor proved that an objectively reasonable police officer who read the warrant would not have noticed the constitutional defect.[58] Although

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[54] *Id.*

[55] Perry v. New Hampshire, 132 S. Ct. 716, 731 (2012) (Sotomayor, J., dissenting).

[56] Weeks v. United States, 232 U.S. 383, 398–99 (1914).

[57] Mapp v. Ohio, 367 U.S. 643, 660 (1961).

[58] United States v. Leon, 468 U.S. 897, 919–20 (1984).

the *Leon* "good faith" exception provided prosecutors with a new tool to avoid exclusion, its effects were limited.[59]

4. PROVING BAD FAITH

All police searches are intentional because, when police officers search for evidence, they invariably have the purpose of achieving a specific result (i.e., uncovering evidence). To the extent that a lucky investigating officer may stumble upon incriminating evidence, that discovery is by definition *not a search*. Thus, after *Herring* and *Davis*, instead defendants must now prove that the Fourth Amendment *violation* was intentional, reckless, or grossly negligent (the defendant cannot simply prove that the search was intentional). As noted above, requiring that defendants prove that illegal police conduct was motivated by "bad faith" police intent creates near-insurmountable proof problems that can only be overcome with the type of evidence that shocks a judge's conscience.[60]

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[59] LaFave has also highlighted the importance of burden-shifting in the exclusionary rule context, noting that "in the past courts have consistently ruled that the government has the burden to prove facts warranting application of the good faith exception." LaFave, *supra* note 18, at 786 (citations omitted).

[60] *See, e.g.*, 31A C.J.S. Evidence § 203 (2014); J.E. on Behalf of G.E. v. State, Dep't of Human Servs., Div. of Developmental Disabilities, 131 N.J. 552, 569 (1993) ("We generally have imposed the burdens of persuasion and production on the party best able to satisfy those burdens."); United States v. Cont'l Ins. Co., 776 F.2d 962, 964 (11th Cir. 1985) ("[We adhere] to the common law guide that the party in the best position to present the requisite evidence should bear the burden of proof"); Ray v. Clements, 700 F.3d 993, 1008 (7th Cir. 2012) *cert. denied,* 133 S. Ct. 2768 (U.S. 2013).

C. LEGAL PRAGMATISM

Exclusion is the principal function of all rules of evidence.[61] Thus, an evidence-based approach to Fourth Amendment jurisprudence has antecedents in prior scholarly efforts to explore the interplay between substantive and procedural rights.[62] This approach is also closely aligned with aspects of legal pragmatism[63] because it focuses on the function and operation of the exclusionary rule, which is treated principally as a pragmatic question.[64] Richard A. Posner, perhaps the most fervent contemporary proponent of legal pragmatism, once explained that pragmatism is "not just a fancy term for ad hoc adjudication; it involves consideration of systemic and not just case-specific consequences."[65] A disquisition on legal pragmatism is beyond the scope of this article. It

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[61] *See* Robert P. Burns, *The Withering Away of Evidence: Notes on Theory and Practice*, 47 GA. L. REV. 691, 695 (identifying four normative sources for evidence exclusion: (1) "a paternalistic judgment regarding the supposed limitations of jurors to assign evidence its appropriate weight;" (2) "a political-philosophical judgment about the nature of the rule of law and the place of the jury in determining the law;" (3) "pragmatic concessions to the shortness of life;" and, (4) "a 'policy goal' distinct from and sometimes in derogation of the purpose of the trial-ascertaining the truth and securing a just determination").

[62] *See, e.g.*, Loewy, *supra* note 35, at 910 ("Therefore, the Court was correct in holding the exclusionary rule to be simply a remedial device designed to make the substantive right more meaningful rather than an independent procedural right.").

[63] Michael Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 99 (1996) (noting that "pragmatism, which originated in the United States, and which counts the nineteenth-century American philosopher Charles Sanders Peirce as its first major proponent, has been the dominant philosophy in the United States ever since").

[64] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 47 (2003); *see also* Rosenfeld, *supra* note 63, at 100 ("The deterrent efficacy of the exclusionary rule is ultimately an empirical and not theoretical question, but the available empirical evidence is anything but clear.").

[65] POSNER, *supra* note 64, at 47.

might also be ill advised given Professor Susan Haack's astute observation that pragmatism has already generated "a desperately confusing scholarly mare's nest."[66] But one need not embrace legal pragmatism to recognize that traditional constitutional inquiry would benefit from greater "skeptic[ism] of any philosophy of adjudication that casts the judge in the role of a quester after certainty who employs to that end tools as close to formal logic as possible."[67]

Many academic observers do reject formal logic claims, but these same commentators often inexplicitly accept the Justices' stated pragmatic objectives, which, in the exclusion context, focus on police deterrence.[68] Blind obeisance to the Court's overt goals limit the scope and breadth of academic critique. Some scholars who accept the Justices at their word

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[66] Susan Haack, *On Legal Pragmatism: Where Does the "Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71, 74 (2005).

[67] POSNER, *supra* note 64, at 47; *see also* Rosenfield, *supra* note 63, at 100 (noting that "[b]y shifting the focus from foundations to results, pragmatism invites all members of a pluralist society to turn away from their disputes concerning conceptions of the good in order to join in the common pursuit of practical results").

[68] *See* Cloud, *supra* note 10, at 479 ("Justices holding diverse political views, including competing views about the suppression of evidence, appear to accept without question jurisprudential doctrines essential to the diminishment of the exclusionary remedy."); Kinports, *supra* note 34, at 822 ("Although it is well accepted that the Court now treats the exclusionary remedy as exclusively deterrence-driven, the Court has not articulated a coherent theory explaining how it expects exclusion to deter unconstitutional searches and why it considers deterrence a worthy goal."); LaFave, *supra* note 18, at 787 ("It is not shown that unconstitutional searches and seizures brought about by negligence are either less in need or less capable of deterrence."); Christopher Slobogin, *The Exclusionary Rule is on its Way Out? Should it be?*, 10 OHIO ST. J. CRIM. L. 341, 349 (2013) (proposing that because "[t]he exclusionary rule is not very effective at curbing police misconduct, . . . meaningful deterrence of illegality could be better achieved through damages regime holding miscreant police personally liable without indemnification at a liquidated rate when they act in bad faith, and holding the department liable at the same rate when the police violation is negligent").

have questioned whether exclusion is an *effective* deterrent,[69] while others have commented on the lack of or impossibility of empirical support.[70] It

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[69] *See* Herring v. United States, 555 U.S. 135, 153 (2009) (Ginsburg, J., dissenting) (noting that the majority's assumption that police officers are the only participants in the criminal justice system who can be effectively deterred through imposition of the exclusionary rule "runs counter to a foundational premise of tort law—liability for negligence, i.e., lack of due care, creates an incentive to act with greater care"); *see also* Kinports, *supra* note 34, at 821 ("Academics and jurists of all stripes agree that the Court's case law in this area is a mess."); Nolasco, *supra* note 13, at 223–24 ("[T]he *Herring* decision has weakened the exclusionary rule [and] disregarded the rationale behind the good-faith doctrine."); Slobogin, *supra* note 68, at 341 ("Since 1974, when *United States v. Calandra* definitively established deterrence as the primary objective of the suppression remedy, the Court has nibbled away at the exclusionary rule from a number of different directions.").

It is also hard not to agree with Professor Donald Dripps that "individual officers do not internalize either the benefits or costs of Fourth Amendment activity." Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence"* 37 FORDHAM URB. L.J. 743, 763 (2010), or with Albert Alschuler's astute critique:

> The Court's [*Herring*] analysis rested on an oversimplified view of how the exclusionary rule achieves its instrumental goals. On the one hand, the Court insulted a second occupational group by indicating that court employees do not care whether their mistakes and deliberate wrongs cause the dismissal of otherwise well-founded criminal charges. On the other hand, the Court assumed that the exclusionary rule influences the police only by frustrating their distinctive lust for punishment.

Alschuler, *supra* note 2, at 469. Thus, genuine efforts to establish a more empirically sound basis for these assumptions are worth recognizing. Jacobi describes a formal model that explains:

> [T]he exclusionary rule can deter some searches, [but] it will not do so under typical conditions. . . [and] only works as the Court claims under very unusual circumstances, requiring police to place very little value on getting drugs or weapons off the street; furthermore, the police may still have a dominant strategy to search under other conditions, even if exclusion of evidence is guaranteed.

is possible, but not especially likely, that Justice Ginsburg may garner greater support for her complaint that a micro-focus on police deterrence disrespects the constitutional majesty of the exclusionary rule.[71] But because deterrence has been fully addressed by the Court and countless commentators, this article takes a different approach. Deterrence may be a plausible pragmatic goal, but it is also a red herring concealing other unspoken objectives.

Herring and *Davis* are constructed to avoid skeptical scrutiny of non-deterrence objectives.[72] In fact, both decisions engage in the type of

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Jacobi, *supra* note 6, at 588

[70] Kinports, *supra* note 34, at 856 ("Until the Court is willing to treat the exclusionary rule like other remedies and balance the deterrent function with additional priorities, it is left to fashion an exclusionary remedy relying exclusively on the empirically unanswerable questions surrounding deterrence."); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 272 (1998) ("[A] perpetual problem with the deterrence justification is that it is not capable of exacting empirical proof, whether the subject is a police officer or a burglar . . . . [for example,] [i]f one were to study the deterrence justification by interviewing convicted burglars, one would conclude that the threat of punishment does not deter at all."); *see also* Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 16 (1993) ("[T]he defense of exclusion on the basis of its deterrent effect suffers from similar logical and empirical flaws.").

[71] *Herring*, 555 U.S. at 154 (Ginsburg, J., dissenting) (quotations omitted) (stating that she shares a "more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule"); *see also* United States v. Janis, 428 U.S. 433, 460 (Brennan, J., dissenting) ("[T]he exclusionary rule is a necessary and inherent constitutional ingredient of the Fourth Amendment."). *But see* Clancy, *supra* note 3, at 377 ("If Justice Ginsburg truly believed in a more majestic conception of the rule, she did not apply that concept in *Herring* . . . . She gave us no vision and no guides.").

[72] *See* Davis v. United States, 131 S. Ct. 2419, 2426 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Forth Amendment violations."); *Herring*, 555 U.S. at 141 ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation . . . . [i]nstead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."); *see*

jurisprudential opacity that Justice Scalia has (in other contexts) disparaged as "faux judicial restraint as judicial obfuscation."[73] As noted above, while purporting to apply *Leon* (a case involving search warrants), the Roberts Court has begun blocking remedial access after warrantless searches by expanding the quantum of proof (proof of illegality is now insufficient), changing the standard from good to bad faith, and shifting the burden of proof on police intent from the prosecution to the defendant. As the current Chief Justice approaches his second decade on the Court, "the charge of faux judicial restraint has become something of a familiar theme in criticisms—from both the right and left—of Justice Roberts's characterization of precedents."[74] It is an especially apt criticism in the exclusion context.

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also Clancy, *supra* note 3, at 367–68 ("As to the purpose of the rule, the view that the rule is designed to deter future police misconduct has evolved to be the rule's sole purpose."); Eugene Milhizer, *The Exclusionary Rule Lottery Revisited*, 59 CATH. U. L. REV. 747, 749 (2010) ("According to the Court, the contemporary reductionist Fourth Amendment exclusionary rule is a judicially created mechanism, designed with the sole purpose of deterring future police misconduct by excluding from trial evidence obtained through unconstitutional searches and seizures.").

[73] FEC v. Wisc. Right to Life, Inc., 551 U.S. 449, 498–99 (2007) (Scalia, J., concurring). The decision might also be viewed as emblematic of how, according to Professor Laurence Tribe, "the Chief Justice talks the talk of moderation while walking the walk of extreme conservatism." *See* Jeffrey Toobin, *No More Mr. Nice Guy,* NEW YORKER, May 25, 2009, http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin?currentPage=6; *see also* LaFave, *supra* note 18, at 759 ("The holding in *Herring* finds little support in the Chief Justice's opinion for the majority, which perhaps accurately reflects his apparent longstanding opposition to the exclusionary rule, but is totally unconvincing and in many respects irrelevant and disingenuous.").

[74] Jeffrey Rosen, *Originalism, Precedent, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 129, 133 (2011).

D. THE ROADMAP

This article diverges from traditional Fourth Amendment inquiries by focusing on how problems of proof define rights and remedies. The article integrates constitutional theory and criminal practice as a direct response to Judge Posner's complaint that scholars have "an insufficiently aggressive conception of the judicial role in enforcing constitutional rights."[75]

This article contains five sections. It begins with a brief exploration of how the Roberts Court has transformed the operation of the exclusionary rule. The second section places the exclusionary rule in context by incorporating analyses of the substantive and procedural constraints on the operation of the constitutional standard (which are invariably omitted from scholarly analyses), including: (1) federal and state criminal procedure rules; (2) the nature and weight of defense evidence typically available following warrant-authorized and warrantless searches; (3) judicial discretion to grant or refuse a pretrial evidentiary hearing; (4) burden allocation and shifting on the element of police intent; and, (5) appellate review. The third section examines Supreme Court

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[75] Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 686 (2004). Some commentators believe that *Herring* suggests that Chief Justice Roberts may share Judge Posner's famous distaste for a "highfalutin rhetoric of absolutes" and prefer that the Court base action on facts and consequences rather than on "conceptualisms, generalities, pieties, and slogans." Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing: Closer to Justice Breyer's Approach to Standing then to Justice Scalia's*, 50 HOUS. L. REV. 71, 103 (2012) (quoting RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227 (1999)); *see also* Rosenfeld, *supra* note 63, at 100 ("Thus, under pragmatism, justice according to law would depend neither on particular conceptions of the good, nor on finding an Archimedean point between these conceptions, nor on systematically severing law from other normative or social endeavors. Instead, justice according to law would be measured by its practical consequences, by the actual results to which it leads.").

decisions addressing relevant problems of proof and procedure.[76] The fourth section disaggregates the Roberts Court's *stare decisis* claims. The fifth section explores new cases illustrating the recent impact of *Herring* and *Davis*. In conclusion, the article posits that the Court has covertly returned suppression to a "shocks the conscience" standard.

I. THE ROBERTS COURT TRANSFORMS THE OPERATION OF THE EXCLUSIONARY RULE

A. *HERRING V. UNITED STATES*

1. THE FACTS

Shortly after *Herring* was decided in 2009, Professor LaFave described it as "not simply wrong, it is wrong over and over again!"[77] The facts of *Herring* are a simple (if cautionary) tale. On July 7, 2004, Mr. Bennie Dean Herring, whom Chief Justice Roberts colorfully described as "no stranger to law enforcement,"[78] made the strategic mistake of entering the Coffee County Sheriff's Department parking lot to retrieve the methamphetamine and gun (which as a felon he could not lawfully possess) he had left in the cab of his impounded truck. Investigator Mark Anderson spotted Mr. Herring because he was apparently "known to the sheriff's department" and requested a computerized warrant check.[79] After

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[76] "In the usual scenario, the process starts with the defendant seeking to invoke the exclusionary rule through his or her motion to suppress . . . Once the defendant is able to convince the court by the preponderance of the evidence that his or her privacy rights were violated, it becomes the state's responsibility to raise the good faith exception." Hauhart & Choi, *supra* note 30, at 324.

[77] LaFave, *supra* note 18, at 758.

[78] Herring v. United States, 555 U.S. 135, 137 (2009).

[79] The story of their acquaintance may be more complicated. Mr. Herring had apparently "told the District Attorney, among others, of his suspicion that Anderson had been involved in the killing of a local teenager, and Anderson had pursued Herring to get him to drop the accusations." *Herring*, 555 U.S. at 149 (Ginsburg, J., dissenting).

no warrants were uncovered in Coffee County, Investigator Anderson requested a database search for neighboring Dale County, and the search revealed an outstanding warrant.[80]

Investigator Anderson followed Herring from the impound lot, arrested him on the Dale County warrant, and uncovered the gun and drugs during a search incident to arrest.[81] Almost immediately afterwards, the inspector was notified that the warrant had been recalled five months earlier. However, when Herring moved pretrial to suppress the illegally seized physical evidence, the trial court rejected the defendant's motion.[82] In the trial court's opinion, Investigator Anderson had acted in "good faith" based on erroneous information provided by sheriff's department personnel.[83] The Eleventh Circuit agreed, holding that the illegal warrantless search fell within the reasonable police "good faith" exception established to cover the execution of a facially valid warrant in *United States v. Leon*.[84]

Although no further details appear in the case, in April 2000, Investigator Anderson was investigated, but not indicted, after he engaged in a high-speed chase with a sixteen year-old girl who failed to stop when he tried to pull her over for a traffic violation. It is possible that Mr. Herring was referring to this incident. *See Deputy Not Indicted in Connection with Traffic Death of Zion Chapel High School Student*, SE. SUN ALA., Oct. 18, 2000, www.southeastsun.com/home/article_57838e7f-2b71-588a-9842-6c44a47b53c3.html.

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

[81] *Id.*

[82] *See* United States v. Herring, 451 F. Supp. 2d 1290, 1293 (M.D. Ala. 2005), *aff'd*, 492 F.3d 1212 (11th Cir. 2007), *aff'd*, 555 U.S. 135 (2009).

[83] *Id.* at 1292.

[84] *See* United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007), *aff'd*, 555 U.S. 135 (2009) (citing United States v. Leon, 468 U.S. 897 (1984)).

2. THE EVIDENCE

The *Herring* Court began with the assumption that the exclusionary rule is both limited and malleable. According to the Court, notwithstanding defense proof establishing (1) an illegal search *and* (2) that prosecution evidence was obtained as a direct result of that illegal search, "suppression is not an automatic consequence."[85]

According to the *Herring* Court, defendants seeking to suppress illegally obtained evidence can attempt to prove that the illegal search or seizure was attributable to "recurring or systemic negligence"[86] by the police. However, there are obvious and manifold impediments to defense acquisition of proof establishing that an officer or police department (the *Herring* Court fails to specify which) engaged in regular systemic negligence. According to the four *Herring* dissenters, "impecunious defendants" can never engage in the necessary "audit of police databases" [87] that could reveal system-wide patterns of behavior. Moreover, the Court naïvely assumes that such records always exist. Even in the unlikely event that police departments create and retain accurate records memorializing routine officer negligence (not merely records detailing disciplinary proceedings), a review of such records "impose[s] a considerable burden on courts and law enforcement."[88]

The *Herring* Court's decision that non-systemic police negligence should not result in suppression is both unduly burdensome as an evidentiary matter and unprecedented. During a century of federal exclusion cases and a half-century of state cases, in every court until

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

[86] *Id.* at 144. The *Herring* Court notably failed to clarify whether the evidentiary burden on the defendant is to establish repeated negligence by this officer, systemic negligence by this police department, or perhaps both.

[87] *Id.* at 157.

[88] *Id.*

Herring, suppression was available in cases involving isolated police misconduct. The creation of the new rule depends on selective and misleading citations to *United States v. Leon* that omit critical contradictory language.

For example, according to the *Herring* Court, "because the error was merely negligent," the evidence seized from Bennie Dean Herring was "admissible under the good-faith rule of *United States v. Leon*."[89] However, writing for the *Leon* majority, Justice White specifically found that illegally obtained evidence should be suppressed whenever "the police have engaged in willful, *or at the very least negligent*, conduct . . . depriv[ing] the defendant of some right."[90] Throughout the decision, the *Leon* Court clearly referred to the single "act," i.e., the illegal search at issue, and never mentioned proof of systemic departmental negligence or a pattern of prior illegal police officer conduct. *Leon* further clarified the defendant's evidentiary burden by stating that suppression is justified because "courts hope to instill in those particular investigating officers . . . a greater degree of care toward the rights of an accused."[91] Unlike *Herring*, *Leon* clearly contemplated exclusion based on proof of ordinary negligence ("degree of care") and isolated illegality (by "those particular investigation officers").

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[89] *Id.*

[90] United States v. Leon, 468 U.S. 897, 919 (1984); *see also* Kinports, *supra* note 34, at 841–42 (noting that although "the *Herring* majority claimed that an officer's 'knowledge and experience' can be taken into account as one of the relevant 'circumstances' in applying an objectively reasonable person test without converting the standard into a subjective one . . . that is a negligence standard and not one of the higher levels of culpability required by *Herring*").

[91] *Leon*, 468 U.S. at 919.

B. *DAVIS V. UNITED STATES*

1. THE FACTS

In June 2011, the Supreme Court decided *Davis v. United States*. An evidence-based analysis of *Davis* must begin with the threshold question of why the Court even granted certiorari in this case. *Davis* arose following a 2007 traffic stop that resulted in an arrest and a search incident to the arrest of the passenger compartment of the suspect's car, which uncovered a handgun.[92] At the time, the search was authorized under binding Supreme Court precedent because the Eleventh Circuit had "long read *New York v. Belton* to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrest."[93] In his suppression motion, Davis argued that the search was illegal because the Supreme Court overruled *Belton* in 2009 while his appeal was pending. Thus, the question of retroactivity should have been determinative to both the Eleventh Circuit[94] and the Supreme Court.

An inquiry into police officer good/bad faith was not before the *Davis* Court. In fact, the Eleventh Circuit had easily recognized that any police officer's "[r]elying on a court of appeals' well-settled and unequivocal precedent is analogous to relying on a statute."[95] Justice Alito, who wrote for the *Davis* majority, reached the same conclusion by citing *Illinois v. Krull*,[96] arguing that "penalizing the officer for the legislature's error cannot logically contribute to the deterrence of Fourth Amendment violations, [so] [t]he same should be true of Davis's attempt

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[92] Davis v. United States, 131 S. Ct. 2419, 2426 (2011).

[93] *Id.* (citing New York v. Belton, 453 U.S. 454 (1980)).

[94] United States v. Davis, 598 F.3d 1259, 1264 (11th Cir. 2010), *aff'd*, 131 S. Ct. 2419, 2426 (2011).

[95] *Id.* at 1267.

[96] 480 U.S. 340 (1987) (extending the *Leon* reasonable good-faith exception to searches conducted in reasonable reliance on subsequently invalidated state statutes).

here to penalize the officer for the appellate judge's error."[97] Justice Sotomayor made a similar observation in her concurrence, explaining, "this case does not present the markedly different question of whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled."[98] Prior to *Davis*, *Krull* was not the rule in every appellate court.[99] But because the *Davis* Court unnecessarily entered the sticky morass of police officer intent, aligning the circuits on the minor distinction between binding law and binding Supreme Court precedent was probably not the real objective.

2. THE EVIDENCE

Justice Alito began his review of the evidence by noting the obvious: the Fourth Amendment "says nothing about suppressing evidence."[100] Then without explanation, he explicitly rejected the Court's previous "expansive dicta . . . suggest[ing] that the [exclusionary] rule was a self-executing mandate implicit in the Fourth Amendment itself."[101] In the *Davis* Court's view, the Court had "abandoned the old reflexive application of the doctrine, and imposed a more rigorous weighing of its costs and benefits."[102] According to the majority, exclusion is "not a personal constitutional right,"[103] but a rule created solely as "a deterrence sanction that bars the prosecution from introducing evidence obtained by

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[97] *Davis*, 131 S. Ct. at 2429.

[98] *Id.* at 2435 (Sotomayor, J., concurring).

[99] *Davis*, 598 F.3d at 1266 (noting that circuits vary on whether exclusionary rule should apply when police have relied on clear, well-settled judicial precedent).

[100] *Davis*, 131 S. Ct. at 2427.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 2426.

way of a Fourth Amendment violation."[104] The disaggregation of the remedy from the right echoes *Herring* and a handful of more tentative steps in the same direction.[105] However, *Davis* more specifically addressed the burden of proof, holding that a finding that suppression has "real deterrent value is a necessary condition for exclusion, but it is not a sufficient one."[106] Consistent with *Herring*, the burden of proving police intent would no longer shift to the prosecutor upon proof of police illegality but would remain with the defendant.[107]

Finally, Justice Alito opined that judges must carefully weigh suppression's "high costs[s] to both truth and public safety."[108] But he put a finger on the scale, because the *Davis* Court instructs judges to presume that suppression "almost always requires courts to ignore reliable,

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[104] *Id.* at 2423.

[105] *Id.* at 2427–28 (citing as examples *Hudson v. Michigan*, 547 U.S. 586 (2006), *Arizona v. Evans*, 514 U.S. 1 (1995), and *United States v. Calandra*, 414 U.S. 338 (1974)).

[106] *Davis*, 131 S. Ct. at 2427. Although the *Davis* Court quotes selectively here from *Hudson v. Michigan*, 547 U.S. 586, 596 (2006), that citation repeats a significant misreading of *United States v. Calandra*, 414 U.S. 338 (1974) (its sole source). Despite subsequent reliance by both the *Hudson* and *Davis* Courts, the *Calandra* Court did not hold that the defense-proffered evidence, sufficient to support a finding of real deterrent value, did not warrant exclusion. Instead, the *Calandra* Court was making the entirely distinct point that "it does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *Calandra*, 414 U.S. at 350. Moreover, the *Hudson* Court had not relied on *Calandra* to support an analysis of real deterrence, but to bolster that Court's view that, based on the facts at issue, deterring violations of the "Knock and Announce" rule rather than the Fourth Amendment would "achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises." *Hudson*, 547 U.S. at 596. Given these facts, it is misleading for Justice Alito to suggest that, in *Hudson* and *Calandra*, the Court concluded a finding of actual deterrent value could not justify the suppression of illegally seized evidence.

[107] *Davis*, 131 S. Ct. at 2423.

[108] *Id.*

trustworthy evidence bearing on guilt or innocence."[109] The exclusionary rule is a "bitter pill"[110] swallowed *only* when the defendant has proved that "the police exhibit[ed] 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" [111] because the remedy "suppress[es] the truth and set[s] the criminal loose in the community without punishment."[112] Given the facts of *Davis*, Justice Alito's emphatic endorsement of the new *Herring* standard was wholly this entire discussion was unnecessary to resolution of the case.

II. OPERATION OF THE EXCLUSIONARY RULE IN THE FEDERAL AND STATE COURTS

The nature and scope of rights are defined pragmatically by access to remedial protection. Thus any useful examination of how Fourth Amendment rights work must include: (1) the rules governing filing and waiver of suppression motions; (2) the quantum of defense proof; (3) real-world limits on defendants' access to persuasive direct and circumstantial evidence; (4) burden shifting provisions; (5) the blurring of historical distinctions between warrant-authorized and warrantless searches; (6) the rules defining judicial discretion to grant suppression hearings; (7) the case law constraining defense access to a suppression hearing and limiting defendants' ability to build a record; and (8) the standards of appellate review.

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[109] *Id.* at 2427.

[110] *Id.*

[111] *Id.*

[112] *Id.*

A. FILING THE SUPPRESSION MOTION

The mechanics of suppression in the federal courts are governed by the Federal Rules of Criminal Procedure, and similar rules operate in the state courts. For example, as a threshold matter, under Rule 12(b) of the Federal Rules of Criminal Procedure[113] and its state counterparts, the motion to suppress must be made pretrial. Rule 12(e)[114] further provides that the defendant who fails to file a suppression motion pretrial is deemed to have waived his constitutional objections *unless* he can provide adequate reasons for the delay.

When defendants seek to exclude evidence seized during a warrant-authorized search, federal and state courts require proof by a preponderance of the evidence that: (1) the warrant was unsupported by probable cause;[115] (2) the warrant was facially invalid;[116] or, (3) that the evidence discovered during the search exceeded the scope of the warrant authorization.[117] In contrast, when defendants seek to suppress evidence illegally seized during a warrantless search, federal and state courts require proof by a preponderance of the evidence that the defendant's

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[113] FED. R. CRIM. P. 12(b)(3)(C).

[114] FED. R. CRIM. P. 12(e) ("Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.").

[115] *See, e.g.*, Spinelli v. United States, 393 U.S. 410, 423 (1969); Aguilar v. Texas, 378 U.S. 108, 121 (1964).

[116] *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 558 (2004).

[117] *See, e.g.*, Horton v. California, 496 U.S. 128, 142 (1990) ("[I]tems seized from petitioner's home [must be] discovered during a lawful search authorized by a valid warrant" unless they are found in "plain view"); United States v. Jackson, 120 F.3d 1226, 1228 (11th Cir. 1997) ("If a search exceeds the scope of terms of a warrant, any subsequent seizure is unconstitutional.").

Fourth Amendment rights were violated by an "unreasonable" search or seizure.[118]

B. PRAGMATIC LIMITS ON DEFENSE EVIDENCE

Motions to suppress illegally seized evidence are typically supported by affidavits based on the personal knowledge and observations of the defendant or (less commonly) the additional personal knowledge and observations of a defense witness.[119] As one court recently held, "the defendant, in moving for a suppression hearing, *must* include an affidavit of someone alleging personal knowledge of the relevant fact, and that fact must put the issue of the legality of the warrantless . . . [police act] into contention."[120]

Although precise data regarding warrantless searches is nearly impossible to find, it is a common and reasonable assumption that most searches are warrantless. Warrantless searches only infrequently result in published judicial opinions, and the documentary evidence following a warrantless search is normally limited to police reports and chain of custody records for seized evidence. Suppression motions in these cases typically rely on personal affidavits filed by the defendant recounting the alleged police misconduct.[121] In many cases, this will be the *only* evidence

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[118] *See Groh*, 540 U.S. at 559 (noting that warrantless searches must be reasonable and that "searches and seizures inside a home without a warrant are presumptively unreasonable").

[119] United States v. Lonzo, 793 F. Supp. 57, 58–59 (N.D.N.Y. 1992).

[120] United States v. Marquez, 367 F. Supp. 2d 600, 603 (S.D.N.Y. 2005).

[121] *See, e.g.*, People v. Patterson, 735 N.E.2d 616, 627 (Ill. 2000) (demonstrating how defendant attached affidavit with his own personal allegations of police misconduct as well as the affidavits of two others to support a suppression motion); Com. v. Santosuosso, 501 N.E.2d 1186, 1189 (Mass. App. Ct. 1986); State v. Ofenham, 260 P.3d 722, 725 (Or. Ct. App. 2011) (defendant replies that his present argument is encompassed in the post-conviction judgment because an argument that defendant was not properly

establishing the Fourth Amendment violation,[122] regardless of whether the defendant has alleged: (1) that he did not consent to the warrantless search; (2) that evidence was not found in plain view; (3) that there were no exigent circumstances; or, (4) that the police seizure and/or search exceeded the scope of a *Terry* stop-and-frisk.

Defendants seeking exclusion based on other analogous constitutional arguments have greater access to relevant and persuasive evidence. For example, a defendant seeking to exclude his own statement based on a *Miranda* violation normally has had the opportunity to review *Miranda* waiver forms, written statements by the police or the defendant, police reports, and in some jurisdictions, video or audiotapes of the warnings, waiver, and interrogation.[123] Defendants can aggregate this evidence to establish critical facts for the reviewing court, including: the timing of the arrest; the duration of custody; the inadequacy of warnings; the lack of a knowing and intelligent waiver; effective invocation of the right to silence and/or the right to counsel; or, any other police

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advised of his rights is a claim of "police misconduct" and because the judgment waives the requirement of preservation); State v. Raflik, 636 N.W.2d 690, 702 (Wis. 2001) (appealing denial of Motion to Suppress, and seeking to use affiant's affidavit for support).

[122] *See* United States v. Holland, 522 F. App'x 265, 270 n.2 (6th Cir. 2013) (noting that, during a suppression hearing based on defendants' argument that they had not consented to the search, the trial judge emphasized the defendants' right "to put on testimony that you believe would be in conflict with the testimony that the Court has heard from the officers and from the FBI agent . . . because you have an absolute right to testify in your suppression hearings").

[123] *See* Brown v. Illinois, 422 U.S. 590, 603–04 (1975) ("The question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant.") (citations omitted).

misconduct.[124] The quantum of evidence available to defendants for suppression based on *Miranda* violations is not just greater; the burden of proof is lighter. In these cases, once the violation has been established, the burden shifts to the prosecution to prove that the statement should be admitted despite the *Miranda* violation.[125] As of today, no court has held that a defendant seeking suppression of evidence under *Miranda* bears the additional burden of proving that defective *Miranda* procedures were caused by deliberate, reckless, or grossly negligent police misconduct or systemic police illegality in the administration of *Miranda* protections, which is paradoxical given the Supreme Court's consistent view that *Miranda* defects are not constitutional violations.

C. *HERRING* MUDDIES THE DISTINCTION BETWEEN WARRANT-AUTHORIZED AND WARRANTLESS SEARCHES

It is a fundamental principle of *stare decisis* that cases must be sufficiently analogous for past precedent to govern. On its facts, *Leon* appeared to be limited to warrant-based searches. This assumption was recently confirmed in a 2012 study of over 700 federal appellate court cases finding that, prior to *Herring*, *Leon* was applied almost exclusively to warrant-based searches.[126] In *Herring*, Chief Justice Roberts began his dramatic expansion of *Leon* with a distortion of the predicate question of fact—the existence or non-existence of a valid warrant.

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[124] *Id.* at 604 ("The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution.") (citations omitted).

[125] *Id.*; *see also* United States v. Augustus, No. 10-CR-629, 2012 WL 3241190, at *5 (E.D.N.Y. Aug. 6, 2012) (noting that once the defendant established a defect, the burden shifted to the government to prove, by a preponderance of the evidence, that defendant's statements are admissible under a *Miranda* exception).

[126] Hauhart & Choi, *supra* note 30, at 343–46.

This is a simple question. The infamous affidavit waived by the police at Dollree Mapp clearly was *not a warrant*,[127] and the prosecutor never argued that any of the seven officers sent to search her rooming house reasonably believed that they were acting pursuant to a warrant. In contrast, the facially-valid search warrant executed in "good faith" by Officer Rombach in *Leon* clearly *was a warrant*, despite subsequent discovery of latent constitutional defects.[128]

In *Herring*, there was no warrant at the time of the arrest and search. Thus, it is surprising that Chief Justice Roberts described the search in *Herring* as a seizure of "evidence . . . obtained in objectively reasonable reliance on a *subsequently* recalled warrant."[129] The warrant for Bonnie Dean Herring was not subsequently recalled; it had been recalled five months *before* his arrest. Under nearly analogous circumstances less than a decade earlier in *Arizona v. Evans*,[130] the Court had candidly and accurately acknowledged that a "police officer [who] acted in reliance on a police record indicating the existence of an outstanding arrest warrant—a record that is later determined to be erroneous" executes "an arrest resulting from an inaccurate computer record."[131] The *Evans* Court did not muddy the analysis by mischaracterizing the evidence but properly treated the search based on a mistake as warrantless.

Chief Justice Roberts' description of the "subsequently recalled warrant" in *Herring* is misleading because it grants unprecedented evidentiary weight to police testimony regarding their own beliefs. Suppression motions following warrantless searches easily devolve into credibility contests between the defendant and the police officer(s). To suggest, as the Chief Justice has, that a police officer's self-serving belief

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[127] Mapp v. Ohio, 367 U.S. 643, 644–45 (1961).

[128] United States v. Leon, 468 U.S. 897, 925–26 (1984).

[129] Herring v. United States, 555 U.S. 135, 146 (2009) (emphasis added).

[130] 514 U.S. 1 (1995).

[131] *Id.* at 4–6.

may function as a quasi-warrant will complicate this inquiry, as similar problems inevitably arise:

> Our courts experience daily computer errors: a court clerk, upon hearing an angry judge's mere warning, "Next time I'll issue a bench warrant," incorrectly enters a "warrant issued" notation, or even more simply, inaccurately notes "warrant issued" against the wrong party in her daily stack of cases due to similarity in names or dates of birth. These cases, as well as a myriad of other such errors, involve no warrant ever being issued against the arrestee in the first place.[132]

After *Herring*, illegally seized evidence can be admitted based on police testimony describing a short-lived, mistaken belief that a long-vacated warrant was valid.

The inaccurate reference to a "subsequently recalled warrant" could also be designed to distract attention from the Court's elision of the historical distinctions between warrant-based and warrantless searches. The Fourth Amendment speaks directly to the requirement of a warrant, which was originally assumed to be an essential component of a reasonable search. Warrant-based searches are, as a matter of theory and practice, more amenable to exceptions like "good faith" because warrants impose clear evidence-gathering limitations, require neutral pre-execution scrutiny and authorization, and create a paper trail capable of post-execution review. In contrast, the constitutionality of warrantless searches is determined based on self-interested recollections and speculations of the same police officers who conducted the investigation.

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[132] George M. Dery III, *The Unwarranted Extension of the Good Faith Exception to Computers: An Examination of Arizona v. Evans and Its Impact on the Exclusionary Rule and the Structure of Fourth Amendment Litigation*, 23 AM. J. CRIM. L. 61, 83 (1995).

D. THE EVIDENTIARY HEARING

Defendants in federal and state court may seek a pretrial evidentiary hearing to build a record supporting suppression. The evidentiary hearing confers strategic advantages by enabling cross-examination of police officer participants, which may yield persuasive defense evidence. An evidentiary hearing also serves to memorialize testimonial inconsistencies and contradictions by police witnesses for subsequent defense use at trial, regardless of the hearing outcome.

From the perspective of the screening judge or magistrate, the evidentiary hearing serves to "assist the court in ruling upon a defendant's specific allegations of unconstitutional conduct."[133] Justice Breyer recently described the suppression hearing process as follows:

> Defendants frequently move to suppress evidence on Fourth Amendment grounds. In many, perhaps most, of these instances the police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective "good faith." Yet, in a significant percentage of these instances, courts will find that the police were wrong. And, unless the police conduct falls into one of the exceptions previously noted, courts have required the suppression of the evidence seized.[134]

Under the federal rules and their state counterparts, judges have wide latitude to grant or refuse evidentiary hearing requests.[135]

Rule 12 of the Federal Rules of Criminal Procedure and similar state rules do not specify when a defense request for an evidentiary

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[133] United States v. Hines, 628 F.3d 101, 105 (3d Cir. 2010).

[134] Davis v. United States, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting).

[135] *See* FED. R. CRIM. P. 12(c) (the court "may" schedule a motion hearing); *see also* United States v. Sophie, 900 F.2d 1064, 1071 (7th Cir. 1990) (a suppression hearing should not be granted "just because a party asks for one").

hearing on a suppression motion should be granted. In the absence of a clear standard, courts have generally held that a defendant's motion seeking an evidentiary hearing must establish a "colorable claim."[136] This may be a difficult hurdle for any defendant relying solely on a first-hand account of events because, to be "colorable," a claim "must consist of more than mere bald-faced allegations of misconduct."[137] Thus, judges may properly deny a hearing request unless the defendant has proffered evidence establishing that a hearing is necessary to determine "issues of fact material to the resolution of the defendant's constitutional claim."[138]

Judicial discretion to grant an evidentiary hearing on a suppression motion may be further constrained by relevant case law. For example, the Second Circuit has held that such hearings should be granted only "if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact . . . are in question."[139] More recently, the First Circuit held that a hearing "is required *only* if the movant makes a sufficient threshold showing that material facts are in doubt or dispute, and that such facts *cannot reliably be resolved on a paper record*."[140] This decision elaborated on an earlier Ninth Circuit decision finding that "[a]n evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist."[141] Because the only evidence of illegality available to many defendants is their own first-hand account,

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[136] *See, e.g.*, United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994) (hearing required if defendant alleged facts that, if true, "could violate a defendant's rights").

[137] United States v. Voigt, 89 F.3d 1050, 1067 (3d Cir. 1996).

[138] *Id.*

[139] United States v. Watson, 404 F.3d 163, 167 (2d Cir. 2005).

[140] United States v. Cintron, 724 F.3d 32, 36 (1st Cir. 2013) (emphasis added).

[141] United States v. McTiernan, 695 F.3d 882, 891 (9th Cir. 2012) (citing United States v. Quoc Viet Hoang, 486 F.3d 1156, 1163 (9th Cir. 2007)).

when judges deny defendants' hearing requests they preclude the defendant from developing additional evidence, which may ensure that the motion will fail.[142]

Even when a defendant has proffered sufficient evidence to establish a colorable suppression claim, the rules governing evidentiary hearing procedures operate to the defendant's disadvantage. With the exception of privileges, federal and state rules of evidence do *not* apply during suppression hearings.[143] Although this practice may be expeditious, the routine admission of hearsay evidence typically benefits only the prosecution.[144]

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[142] Under these new rules, suppression hearings may not be available even when defendants have amassed significant evidence of police misconduct. For example, in *Cintron*, the district court's denial of defendant's motion to suppress and refusal to grant an evidentiary hearing was upheld despite the fact that the defendant's affidavit rebutting the officer's assertion that the gun was in plain view included a sworn statement that, at the time of his arrest, the defendant's gun was concealed in his buttoned right pocket and:

> [W]as not visible and that the troopers did not discover the gun in his pocket until after they had frisked him. The federal defender [had] also submitted photographs of: 1) Cintron's jacket; 2) a gun similar to the one possessed by Cintron; 3) the jacket containing the gun in a pocket lying on a table; and 4) a model wearing the jacket containing the gun in the pocket. The gun does not protrude from the pocket in either of the latter two photographs . . . Finding that the government letters did not materially alter the troopers' accounts of the stop, the court found no basis to revisit the holding that the gun was in plain view before it was seized.

724 F.3d at 35–36.

[143] United States v. Matlock, 415 U.S. 164, 173–74 (1974) (noting that the district court deciding defendant's motion to suppress "is not bound by the Rules of Evidence except those with respect to privilege").

[144] United States v. Merritt, 695 F.2d 1263, 1269–71 (10th Cir. 1982) (court may rely on hearsay evidence during suppression hearing).

As illustrated in a Tenth Circuit case admitting police hearsay statements during a suppression hearing,[145] courts rely on police hearsay to bolster testimony from an executing officer that a warrantless search was based on probable cause. According to this court:

> If the police may rely on hearsay, even the hearsay of an anonymous but reliable informant, as the basis for reasonable suspicion to make a stop, they should also be permitted to offer that same hearsay as testimony to support their reasonable suspicion when a defendant moves to suppress evidence on the ground that reasonable suspicion did not exist.[146]

These situations are not analogous. Police officers investigating a crime rely on hearsay because the exigencies of police work can demand prompt decision-making, *not* because these statements are necessarily more reliable. We tolerate mid-investigation police officer reliance on hearsay precisely because the pretrial suppression hearing interposes a reliability failsafe of judicial review between investigation and disposition. After the suppression hearing, the court will determine whether police search and seizure decisions based on hearsay statements were actually supported by probable cause. Thus, it makes little sense to posit, as the Tenth Circuit has, that investigative exigency short cuts should govern post hoc judicial review intended to identify and ameliorate the very problems created by those exigencies.

Finally, a small but growing body of new empirical research provides insight into the evidentiary hearing process in the state courts. Professor Tonja Jacobi recently conducted a meta-analysis of various suppression research projects.[147] She began by examining the early post-*Mapp* studies, which showed that police officers responded to the nationwide imposition of the exclusionary rule in the state courts with a

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[145] *Id.* at 1270.

[146] *Id.*

[147] Jacobi, *supra* note 6, at 608–11.

dramatic increase in (presumably perjured) testimony.[148] Specifically, police testimony explaining that contraband was discovered, not as the result of a search, but in "plain view," either in the suspect's hands or on the ground nearby, significantly increased after *Mapp*.[149] These findings are consistent with the justifiably famous 1992 Orfield study finding that "95% of Chicago police and 97% of judges, public defenders, and prosecutors believed that police officers changed their testimony to avoid evidence exclusion and that many judges failed to suppress evidence when they knew searches were illegal."[150] Paradoxically, *Herring* and *Davis* may actually reduce police perjury because—by increasing the burden on defendants to prove both illegality and bad faith or systemic negligence and eliminating burden shifting to the prosecution—today fewer police witnesses need to lie for prosecutors to win suppression motions.

E. APPELLATE REVIEW

Decisions on suppression motions are treated like all other evidentiary decisions for appellate review purposes. If a trial court denies a defense motion to suppress (with or without granting an evidentiary hearing) the decision can be reviewed on appeal only for abuse of discretion.[151] Defendants who plead guilty in federal or state court do not

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[148] *Id.* at 608 (citing Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 100 (1968)).

[149] *Id.*

[150] *Id.* at 608–09 (citing Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992)).

[151] *See, e.g.*, *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 157, 165 (2d Cir. 2008) ("The denial of a defendant's request for a suppression hearing is reviewed for abuse of discretion.").

automatically waive their right to appeal a denial of a suppression motion.[152]

III. THE SUPREME COURT CONSIDERS THE OPERATION OF THE EXCLUSIONARY RULE

Over the past century, the Supreme Court has regularly reflected on how well the Fourth Amendment and the exclusionary rule serve to balance individual privacy against the effective enforcement of our criminal laws. A majority of the Roberts Court now views the deterrence of egregious police misconduct as the sole objective of the exclusionary rule. However, the Court arrived at its current calibration only after extensive and repeated consideration of a range of issues, including, on occasion, the pragmatic operation of the exclusionary rule. What follows is not a comprehensive doctrinal history of Fourth Amendment jurisprudence. Instead, it is a narrowly-focused exploration of the Justices' evolving views on the actual operation of the exclusionary rule, revealing how procedural impediments constrain the scope of substantive rights.

A. EXCLUSION IN THE FEDERAL COURTS

When the exclusionary rule was announced a century ago in *Weeks v. United States*,[153] the case involved federal agents investigating an illegal lottery. These agents "unlawfully" conducted a warrantless search of the defendant's home, seizing "all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other

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[152] *See, e.g.*, United States v. Abramski, 706 F.3d 307, 314–15 (4th Cir. 2013) (appellate court had discretion to address denial of defendant's motion to suppress despite the fact that his guilty plea did not specifically identify this motion).

[153] Weeks v. United States, 232 U.S. 383 (1914).

property in said home[.]"[154] With no clear remedy, Mr. Weeks simply asked that the evidence be returned to him before trial. The trial judge agreed that the warrantless search had violated the Fourth Amendment, but instead ordered that all irrelevant materials be returned to Mr. Weeks, which enabled the federal prosecutor to introduce all the relevant, illegally-seized papers and letters at trial.[155]

Writing for a unanimous Court, Justice Day announced a clear and simple exclusionary rule designed to bar the future admission of *all* evidence illegally seized by federal agents.[156] Under this new rule, following sufficient defense proof that a search had violated the Fourth Amendment, the remedy of exclusion should inure. According to the *Weeks* Court, permitting the use of illegally-seized evidence would "affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[157] If the remedy was denied after:

> letters and private documents . . . [were] seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th 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.[158]

According to Professor Thomas Clancy, Justice Day was writing during "an era of muscular individual rights, including rights afforded by the Fourth Amendment, and the *Weeks* Court enforced those rights with an

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[154] *Id.* at 387.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 394.

[158] *Id.* at 393.

equally strong remedy."[159] The presumption of near-automatic operation of remedial access was based on the Court's explicit conclusion that the remedy and right are non-severable.[160] According to the *Weeks* Court, suppression protects and preserves the right by curbing "the tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures."[161] The new rule did not require proof of police officer intent or individual harm.

Six years after *Weeks*, the Court expanded the exclusionary rule to include derivative evidence. *Silverthorne Lumber Co. v. United States* involved the illegal seizure of papers and records by federal agents from a place of business.[162] The government argued that *Weeks* precluded only the introduction of illegally-seized tangible evidence, but not derivative use of such evidence for other prosecution purposes. In a decision dramatically altering the operation of the rule, Justice Holmes rejected the possibility that the prosecution could "study the papers before it returns them, copy them, and then use the knowledge that it has gained to call upon the owners in a more regular form to produce them."[163] The government had improperly sought to reduce the remedy to a "form of words."[164] In response, the *Silverthorne* Court held that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that

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[159] Clancy, *supra* note 3, at 358–59.

[160] *See* United States v. Leon, 468 U.S. 897, 938–39 (1984) (Brennan, J., dissenting) ("[I]t is clear why the question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases from *Weeks* to *Olmstead*. In those formative decisions, the Court plainly understood that the exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purposes, but rather by a direct constitutional command.").

[161] *Weeks*, 232 U.S at 391–92.

[162] 251 U.S. 384 (1920).

[163] *Id.* at 390.

[164] *Id.*

not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[165] After *Silverthorne*, the prosecution could avoid exclusion *only* if it could prove that the evidence did not result from the illegal search, but instead derived from a lawful "independent source."[166]

B. EXCLUSION IN THE STATE COURTS

After a robust introduction and three decades of operational expansion in the federal courts, exclusion in the states had a rocky start in 1949 in *Wolf v. Colorado*.[167] Until *Wolf*, the Court had addressed the operation of the exclusionary rule in relatively few cases, most of which involved federal gambling investigations and warrantless FBI searches of homes and businesses. *Wolf*—with its interesting and provocative facts—posed new and more challenging suppression questions.

In the mid-1940s, the Denver police suspected that Dr. Julius Wolf was performing illegal abortions.[168] Based solely on this "suspicion," state police officers entered the defendant's medical office without a warrant and seized his medical appointment record books, which were introduced against him at trial. It is impossible to estimate the extent to which *Wolf* was shaped by the powerful normative questions of reproductive control in the mid-twentieth century, but it would be naïve to assume that the nature of the illegally-seized evidence was irrelevant to the Justices' decision to avoid this moral morass by continuing to defer to the states.

Justice Frankfurter, who wrote for the *Wolf* majority, quickly concluded that Dr. Wolf's medical records were protected against illegal searches conducted by federal and state actors. According to the *Wolf*

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[165] *Id.* at 392.

[166] *Id.*

[167] 338 U.S. 25 (1949).

[168] *Id.* at 25.

Court, the security of privacy embodied in the Fourth Amendment is "implicit in the concept of ordered liberty."[169] Yet the Court held that the remedy of suppression was not available to Dr. Wolf. In Justice Frankfurter's view, "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure," [170] because the exclusionary rule is not a constitutional command, but "a matter of judicial implication."[171] As one commentator has speculated, in *Wolf*, "the Court engaged in a radical reordering of the relationship of the exclusionary rule to the substantive protections of the Amendment within a due process framework."[172] States remained free to add exclusionary rules to their own constitutions,[173] but the *Wolf* Court's attenuation of the right and remedy ensured that the remaining states could continue to rely on a range of "alternative" non-exclusion remedies.[174]

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[169] *Id.* at 28.

[170] *Id.* at 33; *see also* Clancy, *supra* note 3, at 362–63 ("*Wolf* was thus a begrudging extension of constitutional protection against unreasonable search and seizures to state actors. Justice Frankfurter, the author of *Wolf*, was a consistent advocate of a view of due process that saw that right as not incorporating all of the Fourth Amendment's features.").

[171] *Wolf*, 338 U.S. at 28.

[172] *See* Clancy, *supra* note 3, at 361.

[173] Clancy, *supra* note 3, at 383 (noting that in the pre-*Wolf* era, states relied on state constitutions to justify adoption of the exclusionary rule).

[174] According to the *Wolf* Court, states provided numerous civil remedies including damages from: (1) the officer who conducted the search; (2) the officer who procured the warrant (if it was done maliciously and without probable cause); (3) the magistrate (if he acted without jurisdiction in issuing the warrant); and (4) any persons who assisted in the execution of the illegal search. *See Wolf*, 338 U.S. at 30 n.1. The *Wolf* Court also cited a range of state statutory protections including punishment for: (1) maliciously procuring a search warrant; (2) willfully exceeding one's authority in executing a search warrant; (3) issuing a general search warrant; or, (4) issuing a warrant unsupported by affidavit. *Id.* at

C. ALTERNATIVE REMEDIES

In Justice Frankfurter's opinion, exclusion was not uniformly required to preserve fundamental Fourth Amendment protections because these interests could be adequately protected by alternative means. However, even at the time, the *Wolf* Court's pragmatic assumption that defendants could avail themselves of substitute remedies was factually unsupportable. Specifically, the Court simply ignored both the *additional* evidentiary burdens placed on any defendant seeking an alternative remedy and the inadequacy of these remedies as a substitute for suppression. For example, to recover civil damages under the law of several states, defendants had to prove that the search was illegal *and* (1) that a police officer acted with malicious intent; (2) that the magistrate who issued the warrant lacked jurisdiction; or, (3) that the warrant was so lacking in specificity that it was the equivalent of a general warrant.[175] These operational obstacles were not lost on Justice Murphy, who wryly observed in his dissent, "[s]elf-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."[176] More importantly, in the unlikely event that a defendant satisfied this burden, even non-negligible civil damages would provide cold comfort to the defendant convicted based on illegally-seized evidence.

Wolf survived for a dozen years while the exclusionary rule gained traction in the state courts. In 1961, in *Mapp v. Ohio*, the Court would cite a national trend towards exclusion in the state courts as one of many

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29, 30 n.1 (finding that "(t)he contrariety of views of the States" on the adoption of the exclusionary rule of *Weeks* was "particularly impressive").

[175] *Wolf*, 338 U.S. at 30 n.1.

[176] *Id.* at 42 (Murphy, J., dissenting).

reasons to overturn *Wolf*.[177] According to Justice Clark, who wrote for the *Mapp* majority, *Wolf* had been correct that "the exclusion doctrine [is] an essential part of the right to privacy," but incorrect in withholding the remedy, which reduced the Fourth Amendment to a "form of words, valueless and undeserving of mention."[178] Professor Donald Dripps has characterized *Mapp* as "faithfully reflect[ing] the doctrinal incoherence of the federal exclusionary rule cases."[179] But the *Mapp* Court's conclusion, that without the exclusionary rule, courts "grant the right but in reality . . . withhold its privilege and enjoyment," marked the short-lived apotheosis of exclusion as a near constitutional mandate.[180]

The *Mapp* Court directly addressed the pragmatic operation of the exclusionary rule in its lengthy discussion of California practice. Justice Clark began by observing that the type of civil alternatives to exclusion contemplated in *Wolf* had proved "worthless and futile,"[181] because they "have completely failed to secure compliance with the constitutional provisions."[182] The *Mapp* Court relied principally on findings cited in *People v. Cahan*, a 1955 decision from the California Supreme Court.[183]

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[177] According to the *Wolf* Court, in 1949, two-thirds of the states had rejected the exclusionary rule. *See Wolf*, 338 U.S. at 42. But by 1961, the remedy had been adopted (in whole or part) by just over half of the states. The shift may principally have been attributable to Justice Jackson's call to arms in *Irvine v. California*, 347 U.S. 128, 134 (1954) ("Now that the *Wolf* doctrine [the guarantee of the Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth] is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the [exclusionary] rule would be an unwarranted use of federal power.").

[178] Mapp v. Ohio, 367 U.S. 643, 655–56 (1961).

[179] Dripps, *supra* note 69, at 747.

[180] *Mapp*, 367 U.S. at 655–56.

[181] *Id.* at 652.

[182] *Id.* at 651.

[183] 282 P.2d 905 (1955). The court stated:

In *Cahan*, the state court held that "case after case has appeared in our appellate reports describing unlawful searches and seizures against the defendant on trial, and those cases undoubtedly reflect only a small fraction of the violations of the constitutional provisions that have actually occurred." [184] California's experience demonstrated that Fourth Amendment rights were essentially unprotected because "reported cases involving civil actions against police officers are rare, and those involving successful criminal prosecutions against officers are nonexistent."[185] In retrospect, the discussion of alternative remedies is especially prescient as the principal difficulty is the defendant's inability to prove police malice or bad faith.

D. THE MECHANICS OF BURDEN SHIFTING TO THE PROSECUTION

1. BURDEN SHIFTING GENERALLY

To understand how the Supreme Court has addressed the pragmatic operation of burden shifting, we must return briefly to *Silverthorne Lumber Co. v. United States*. [186] In 1920, *Silverthorne* established that, after the defendant had proved that the search or seizure was illegal, the burden shifted to the prosecution to prove that evidence

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> When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge.

Id. at 912.

[184] *Id.* at 913.

[185] *Id.*

[186] 251 U.S. 385 (1920).

should not be excluded. In *Silverthorne*, the specific question was whether the prosecution could establish that the evidence was *not* the result of the illegal search but was instead derived from a lawful independent source.[187] A half-century later, in *Wong Sun v. United States*,[188] the Court clarified that after "granting the establishment of the primary illegality" based on defense proof by a preponderance of the evidence, the burden shifts to the prosecution to prove that "the evidence . . . has been come at by . . . means sufficiently distinguishable to be purged of the primary taint."[189]

Suppression burden shifting to the prosecution is not unique. The Supreme Court has created identical burden shifting procedures in analogous contexts. In *Brown v. Illinois*, the Court stated that, following defense proof of a *Miranda* violation, "the burden of showing admissibility rests, of course, on the prosecution."[190] In *Miranda* cases, the Court has specified that, following defense proof of an illegal arrest and subsequent custodial interrogation, the prosecutor bears the burden of proving that the confession was not obtained by exploitation of the illegal arrest[191] and that this burden cannot be satisfied by proof that *Miranda* warnings were given and waived.[192]

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[187] While the *Silverthorne* Court clearly opined that information contained in illegally obtained evidence should not always be "sacred and inaccessible," it is interesting to note that the facts of *Silverthorne* did not actually support an independent source argument by the government in that case. *See id.* at 392.

[188] 371 U.S. 471 (1963).

[189] *Id.* at 488.

[190] Brown v. Illinois, 422 U.S. 590, 603–04 (1975).

[191] *Id.*

[192] Dunaway v. New York, 422 U.S. 200, 217 (1979).

2. PROSECUTION PROOF OF REASONABLE POLICE "GOOD FAITH": *UNITED STATES V. LEON*

The most substantive reevaluation of the pragmatic mechanics of exclusion did not occur until 1984.[193] The facts of *United States v. Leon* are simple. The case began with a 1981 investigation into drug trafficking in Burbank, California. The state police received an anonymous tip that Alberto Leon was storing drugs in multiple locations and sought a search warrant.[194] However, the affidavit filed in state court to establish probable cause for the search contained two defects: (1) it lacked any information regarding the reliability of the informant; and, (2) it failed to provide a nexus between the confidential tip received by the state police and Alberto Leon.[195] Because the search warrant was issued pursuant to the defective affidavit,[196] the defendant challenged the legality of the search and the admission of the seized narcotics.[197] The reviewing court found that the search had been illegal because it was not supported by probable cause, and that evidence resulting from the illegal search should have been suppressed.[198]

The U.S. Supreme Court began *Leon* by concluding that exclusion is not "a personal constitutional right" but "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect[.]"[199] This conclusion, which the Court based on *United*

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[193] *Id.*

[194] United States v. Leon, 468 U.S. 897, 900–02 (1984).

[195] *Id.*

[196] *Id.* at 904.

[197] *Id.* at 903.

[198] *Id.*

[199] *Id.* at 906 (citing United States v. Calandra, 414 U.S. 338, 348 (1974)).

States v. Calandra,[200] would eventually redound to all subsequent exclusion cases.[201]

The *Leon* Court's new burden-shifting provision would prove equally, if not more, consequential than its denigration of the remedy's constitutional bona fides. According to Justice White, who wrote for the *Leon* majority, the prosecution is entitled to prove that "a reasonably well trained officer"[202] would not have known that "the search was illegal in

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[200] 414 U.S. at 348. Given the centrality of *Calandra* to the *Leon* Court and its ubiquitous place in contemporary exclusion jurisprudence as the case that de-constitutionalized exclusion, it may be surprising to know that police deterrence was not an essential or obvious concern for the *Calandra* Court. Thus, dicta from the decision to the effect that "the rule's prime purpose is to deter future unlawful police misconduct" was not clearly or necessarily intended as a generalization. *Id.* at 347. Instead, it is equally or more likely that the Court was describing its narrow finding that the defendants lacked standing to object to the admission of illegally obtained evidence in the grand jury because the role of the grand jury is to investigate and not to prosecute crimes. This interpretation is further supported by the fact that the Court did not address police deterrence in any detail, noting merely that the only police officer likely to be deterred by excluding evidence from the grand jury was the hypothetical officer who conducted an "investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation." *Id.* at 351. This led Justice Brennan to complain in his dissent that "[t]his downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule." *Id.* at 356 (Brennan, J., dissenting).

[201] *Calandra*, decided just a decade after *Mapp*, has routinely been characterized by courts and commentators as the case that "de-constitutionalized" the exclusionary remedy. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 437 (1974) ("We have recently said, in [*Calandra*], that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."'); Clancy, *supra* note 3, at 367 (referring to *Calandra* as the case where the Court "emphatically de-constitutionalized" the exclusionary rule); Cloud, *supra* note 10, at 510 (noting "the Supreme Court altered the face of exclusionary theory with a single opinion . . . . *United States v. Calandra*").

[202] *Leon*, 468 U.S. at 922.

light of all of the circumstances."[203] If the prosecutor satisfies this burden, any "reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate . . . should be admissible in the prosecution's case in chief."[204] Astute commentators have opined that *Leon* conflates two different standards because "the term, 'reasonable good-faith belief,' seems to be both objective and subjective[;] . . . [t]hat is, the policeman must subjectively believe in the validity of the warrant, and that belief must be objectively reasonable."[205] Even if the requirement of subjective good faith was implicit, the *Leon* Court clearly contemplated that future courts would review evidence of illegality from the perspective of an objectively reasonable police officer. *Leon* was a significant departure from previous exclusionary rule jurisprudence, but it played little, if any, role in warrantless searches until the Roberts Court got involved.

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[203] *Id.*

[204] *Id.* at 913.

[205] *See* Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 353–54 (2006) (noting that evidence of police officer state of mind regarding the legal standard of probable cause is actually irrelevant to the determination because "the test in warrant cases is whether a reasonable officer would have believed in the warrant's validity"); Dery, *supra* note 34, at 26 (noting that the problem with *Herring* was that the Court created a new "inquiry [that] stripped the straightforward assessment of what a reasonable person would do in a particular circumstance. . . . [and] leads to questions of intent and motivation of a particular person and inquiry explicitly rejected by the court in *Whren*"); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1105 (2011) (suggesting that although "the *Leon* opinion made clear that the Court had in mind an objective inquiry into costs and benefits: the proper inquiry was objective reasonableness, not subjective good faith. . . . [b]ut the phrase 'good faith' has led some courts to assume that the good faith exception applies when an officer acts in subjective good faith"); Kinports, *supra* note 34, at 840 (noting that "the standard adopted in *Herring* is quite different from the objective standard of reasonableness articulated in *Leon* and its earlier progeny") (citations omitted).

IV. THE NEW FAUX REASONABLE POLICE OFFICER "GOOD FAITH" STANDARD

A. THE *HERRING* AND *DAVIS* COURTS APPLY *LEON*

A quarter century after *Leon*, Chief Justice Roberts created a new faux reasonable police officer "good faith" standard. The new standard is faux for two reasons. First, it does not rely on objective standards. Second, it requires defendants to prove actual police bad faith. Ignoring the obvious and longstanding distinctions between warrantless and warrant-based warrantless searches, *Herring* contains seventeen separate citations to *United States v. Leon*.[206] The *Herring* Court dismissed concerns that the imposition of new evidentiary requirements would result in "an inquiry into the subjective awareness of arresting officers" because "[w]e have already held [in *Leon*] 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.'"[207] Two years later, the Roberts Court would engage in a similar blurring of the distinction between warrantless and warrant-based searches in *Davis*, which cited ten times to *Leon*[208] and purported to contemplate a fully objective standard. However, in *Davis*, the analogy to *Leon* is somewhat more plausible given the police officer's objectively reasonable reliance on then-valid United States Supreme Court precedent.

The faux nature of the *Herring*/*Davis* reasonable police officer "good faith" standard is revealed though an examination of the evidence. Under *Leon*, a prosecutor seeking to establish reasonable "good faith" reliance on a warrant could proffer evidence that the police officer had "obtained a search warrant from a judge or magistrate and acted within its

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[206] 555 U.S. 135 (2009).

[207] *Id.* at 145 (citing *Leon*, 468 U.S. at 922 n.23).

[208] *See* Davis v. United States, 131 S. Ct. 2419 (2011).

scope."[209] The "good faith" inference could be substantiated by this evidence because, for all warrant-based searches, "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment."[210] In the *Leon* Court's view, the "search warrant provides the detached scrutiny of a neutral magistrate . . . a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime."[211] No reasonable reading of *Leon* supports the *Herring* Court's extension of this rationale to warrantless searches where such documentary evidence, including the warrant, affidavit, and other supporting paperwork, is unavailable for review.

B. *FRANKS V. DELAWARE*

The *Herring* Court also relied on *Franks v. Delaware*,[212] as an "analogy," to justify the new extension of the "good faith" exception to warrantless searches.[213] In Chief Justice Roberts' view, *Herring* and *Franks* are analogous because both cases involved pretrial judicial assessment of "false information provided by the police."[214] However, even a superficial inspection of *Franks* reveals that the case is procedurally and substantively distinct.

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[209] *Leon*, 468 U.S. at 920.

[210] *Id.*

[211] *Id.* at 913.

[212] 438 U.S. 154 (1978).

[213] Herring v. United States, 555 U.S. 135, 145 (2009) ("Our decision in *Franks v. Delaware* . . . provides an analogy.").

[214] *Id.*

Franks is procedurally distinct because the Court did not address the judicial assessment of defense evidence establishing police culpability. Instead, *Franks* was the first Supreme Court challenge to the "four corners" of the warrant rule, which raised the very different question of whether defense challenges involving evidence outside the warrant and affidavit are procedurally barred.[215] A basic understanding of the facts is essential to comprehension of the unique procedural question before the *Franks* Court.

In *Franks*, detectives investigating an alleged rape received a detailed description of the assailant's clothing from the victim.[216] Based on this information, the detectives submitted a sworn affidavit in support of a search warrant application purporting to recount two separate telephone interviews confirming that the defendant typically wore an outfit matching the described apparel.[217] No other evidence supporting probable cause was provided to the magistrate. Before trial, it was revealed that both telephone interviews were complete fabrications.[218] The trial judge applied the "four-corners" rule and denied both the defendant's request for a suppression hearing and his motion to suppress.[219] The Delaware Supreme Court affirmed, finding that, under the "four corners" rule, "under no circumstances could any defendant challenge the veracity of a sworn statement used by police to procure a search warrant."[220]

When the case reached the Supreme Court, the Justices opted to ignore the proof requirements for suppression and instead focused solely on the threshold question of the continued viability of the "four corners"

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[215] Franks v. Delaware, 438 U.S. 154, 156 (1978).

[216] *Id.*

[217] *Id.*

[218] *Id.* at 158.

[219] *Id.*

[220] *Id.*

rule. The fact that *Franks* was cabined to the predicate question of whether the defendant could seek an evidentiary hearing is essential to the Court's decision. To the extent that the *Franks* Court inquired into the police officers' "deliberate or reckless disregard for the truth," it was not engaged in a general assessment of police misconduct for suppression (or any other) purpose. Instead, in *Franks*, the Court was seeking a pragmatic alternative to the "four corners" rule. *Herring* misreads *Franks* as a broad decision on police officer bad faith. In fact, the *Franks* Court was merely attempting to set limits on defense access to suppression hearings to avoid opening the floodgates to every defendant who argued that police officers could have exercised greater care during the investigation.

Similarly, as a matter of substantive law, *Franks* provides no precedential support for *Herring*. Justice Blackmun, who wrote for the *Franks* majority, never suggested that suppression should be contingent only on deliberate, reckless, or grossly negligent constitutional violations, nor did the Court even consider warrantless searches.[221] Instead, the *Franks* Court focused on the narrow goal of eliminating the "four corners" rule because it imposed a "flat ban on impeachment of veracity [which] could denude the probable-cause requirement of all real meaning" by incentivizing and immunizing police perjury and reckless disregard for the truth.[222]

Why does the *Herring* Court cite *Franks* if the case is inapposite? Perhaps *Herring* is designed to lay the groundwork for future attempts to

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[221] *See* Dery, *supra* note 34, at 26 (noting that "[i]n *Franks*, which considered a motion to traverse a warrant, the Court found 'negligence or innocent mistake' to be insufficient to support an attack on a warrant affidavit, instead requiring that the misconduct rise to 'allegations of deliberate falsehood or of reckless disregard for the truth'" and that "[t]he entire point of assessing a deliberate falsehood is to look inside an individual's mind to see not only what he or she knew but also what he or she meant to make others believe").

[222] *Franks*, 438 U.S. at 156; *see also* United States v. DeLeon, 979 F.2d 761, 764 (9th Cir. 1992) (extending *Franks* to cases where defendants proved deliberate falsehood or reckless omission by government official who was not the affiant).

further align the two cases. In *Franks*, despite compelling direct and persuasive defense evidence that the detectives lied to the magistrate, the Court did *not* find that suppression was warranted, nor did the Court find that the defendant was entitled to an evidentiary hearing. Instead, the meager remedy prescribed in *Franks* is that deliberate or recklessly false evidence must be stricken from the evidence supporting the warrant application.[223] If the remaining evidence provides probable cause, the defendant's request for an evidentiary hearing and for suppression should be denied.[224] The fact that Chief Justice Roberts calls *Franks* a suppression "analogy" is troubling for two reasons. As a general matter, *Franks* clearly assumes that we should tolerate *some* systemic police negligence and *some* police officer "bad faith" as long as the police do not engage in shocking behavior that could support an inference of deliberate or reckless misconduct. More specifically, linking the two cases raises concern that the Court could impose *Franks*-type remedial limitations on a range of future defendants by focusing on police misconduct that was merely negligent.

C. PROOF OF POLICE "GOOD FAITH"

Over three decades ago, the *Leon* Court predicted that requiring proof of actual (rather than reasonable) police bad faith, even in warrant-based cases, would "send[] state and federal courts on an expedition into the minds of police officers [and] would produce a grave and fruitless

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[223] *Franks*, 438 U.S. at 155.

[224] *See id.* at 171–72; *see also* United States v. Friedemann, 210 F.3d 227, 229 (4th Cir. 2000) (requiring suppression only if false statements were necessary to finding of probable cause); Wilkes v. Young, 28 F.3d 1362, 1365 (4th Cir. 1994) ("[A] false or misleading statement in a warrant affidavit does not constitute a Fourth Amendment violation unless the statement is 'necessary to the finding of probable cause.'") (internal citations omitted).

misallocation of judicial resources."[225] A quarter century later, the Court purports to avoid these pragmatic problems by simply averring that "the pertinent analysis of deterrence and culpability is objective"[226] and that "the question . . . whether to apply the exclusionary rule when the police conduct a search . . . [is] objectively reasonable."[227] These assurances, especially in warrantless search cases, are either naïve or disingenuous.[228]

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[225] United States v. Leon, 468 U.S. 897, 922 (1984).

[226] Herring v. United States, 555 U.S. 135, 145 (2009).

[227] Davis v. United States, 131 S. Ct. 2419, 2428 (2011).

[228] As discussed herein, *Leon* does not support an inference that the *Herring* police culpability requirement will involve an inquiry limited to objective information. Moreover, Chief Justice Roberts' second citation to *Ornelas v. United States*, 517 U.S. 690 (1996) is equally misplaced. In that case, the Court held that police determination of probable cause and reasonable suspicion should be reviewed de novo based on the vast amount of information known to the individual officer. The Court stated:

> For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee. That city is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. The 85-mile width of Lake Michigan blocks any further eastward progress. And while the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee's average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine is only 38 percent. It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business or to visit family or friends. The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts.

Id. at 699–700. Not only does *Ornelas* fail to address the distinction between an objective and subjective inquiry, the enormous list of factors subjectively known to the police officer and used to determine probable cause or reasonable suspicion reveals that any determination of deliberate, reckless, or grossly negligent culpability will focus on the subjective knowledge and intent of the individual officer.

Even the most inexperienced trial lawyer knows that calling a standard "objective" does not magically eliminate the requirement that judges ascertain the facts and information known to *that* police officer at the time of *that* illegal search.[229] In the exclusionary rule context, despite repeated invocation of *Leon*, the Roberts Court cannot genuinely contemplate an objective inquiry. The *Davis* Court effectively conceded as much when it characterized the problem at hand as determining whether the "officers who conducted the search . . . violate[d] Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence."[230] The *Herring* Court reveals a similar weakness in its reliance on *Franks*, which is discussed above. If *Franks* is an "analogy" to *Herring*, the Court must remember that a *Franks* hearing is always a subjective inquiry, because the defendant must prove that these police officers used false statements or recklessly disregarded the truth when they applied for this warrant.[231] If *Herring* and *Davis* presage a subjective inquiry, this shift is inconsistent with the Court's long-held view that "subjective intentions play no role in ordinary. . . Fourth Amendment analysis."[232] A subjective

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[229] *See* Kinports, *supra* note 34, at 842 (noting that after *Herring*, "proof of reckless—and certainly deliberate—misconduct envisions a subjective inquiry into the state of mind of the actual officer whose actions are in question"); Dery, *supra* note 34 (explaining that in *Horton v. California*, 496 U.S. 128 (1990), the Court found that "evenhanded law enforcement is best achieved by the application of objective standards of conduct").

[230] *Davis*, 131 S. Ct. at 2427.

[231] *See* United States v. DeLeon, 979 F.2d 761, 765 (9th Cir. 1992) (extending *Franks* to cases where defendants proved deliberate falsehood or reckless omission by government official who was not the affiant).

[232] Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Missouri v. Seibert, 542 U.S. 600, 624–25 (2004) (O'Connor, J., concurring) (finding that a violation cannot be based on police intent because "[t]houghts kept inside a police officer's head cannot affect that experience" as "[a] suspect who experienced exactly the same interrogation. . . save for a difference in the undivulged, subjective intent of the interrogating officer when

inquiry also cannot be reconciled with the Court's longstanding "recognition that application of the exclusionary rule does not require inquiry into the mental state of the police."[233]

Professor Albert Alschuler agrees that there are sound reasons to doubt that the *Herring* "inquiry can be confined to the objectively ascertainable *Leon* question of whether a reasonably well trained officer would have known that the search was illegal."[234] In his view, *Herring* created a "partly subjective standard"[235] because, as Chief Justice Roberts' suggested, suppression might be based on defense proof that the "police have been shown . . . to have knowingly made false entries to lay the groundwork for future false arrests."[236] According to the *Herring* Court, "exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation."[237] In Professor Alschuler's view, the Chief Justice's hypothetical is utter fiction, because it is pragmatically impossible for any defendant to obtain proof that police officers "*knowingly* made false entries to lay the groundwork for future false arrests."[238] Even if such proof were available, the police officers who

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he failed to give *Miranda* warnings, would not experience the interrogation any differently").

[233] Herring v. United States, 555 U.S. 135, 157 n.7 (2009); *see also Seibert*, 542 U.S. at 625-26 (O'Connor, J., concurring) ("[A]n exception. . . for intentional [*Miranda*] violations would require focusing constitutional analysis on a police officer's subjective intent, an unattractive proposition that we all but uniformly avoid.").

[234] Alschuler, *supra* note 2, at 487 (citing Herring v. United States, 555 U.S. 135, 145 (2009)).

[235] *Id.*

[236] *Id.* at 488 (citing *Herring*, 555 U.S. at 145).

[237] *Id.*

[238] *Id.*

make the mistakes would inevitably offer innocent explanations for their past behavior.[239]

V. APPLICATION OF THE FAUX "GOOD FAITH" STANDARD IN THE LOWER COURTS

A. RECENT EXAMINATION OF THE IMPACT OF *LEON*

There have been few empirical studies of the effects of Supreme Court cases. Thus, very recent efforts to measure *Leon*'s effects in the federal courts are of note.[240]

In a study published in 2012, Professors Robert Hauhart and Courtney Choi found that two-thirds of reviewing judges accept the veracity of police officer testimony when applying *Leon* to assess the reasonable "good faith" of a police officer who has executed an illegal warrant.[241] These researchers also found that, in *Leon*-based suppression decisions, courts typically rely on evidence establishing that: (1) the warrant was based "on a deliberately or recklessly false affidavit;"[242] (2) the magistrate "abandoned his or her judicial role and failed to perform his or her neutral and detached function;"[243] (3) the warrant "was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;"[244] or (4) the warrant "was so

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[239] *Id.*

[240] *See* Hauhart & Choi, *supra* note 30, at 318 (describing their research as "an exploration of the application of the 'good faith' exception since its origination in 1984" and their methods as "examin[ing] nearly a third of the federal court of appeals opinions in which 'good faith' has been raised since that time").

[241] *See id.* at 330 ("Approximately two-thirds (64.6% of the 175) federal appellate decisions we examined will accept an officer's good faith claim.").

[242] *Id.* at 324 (citing United States v. Harris, 464 F.3d 733, 739 (7th Cir. 2006)).

[243] *Id.* at 325.

[244] *Id.* at 326.

facially deficient that it failed to particularize the place to be searched or the things to be seized."[245] More generally, the researchers conclude that before *Herring* and *Davis*, the federal courts consistently understood that by creating this four-part test, the *Leon* "Court did not intend for the 'good faith' exception to swallow the Fourth Amendment."[246]

It is notable that, within the much smaller subset of cases rejecting prosecution evidence of reasonable police "good faith," approximately 10% relied on evidence outside the four-part *Leon* test.[247] Thus, some reviewing courts continued to suppress illegally seized evidence, despite prosecution proof of police "good faith," especially in cases involving warrantless searches. For example, in 1986, the Ninth Circuit noted that, despite prosecution proof of reasonable police "good faith," evidence illegally seized during a warrantless border search must be suppressed.[248] As the appellate court reasoned, proof of good faith was irrelevant because "the officer, who was given broad authority to inspect vehicles on the border, should have known that he had no authority to conduct those searches."[249] Over a decade later, the Ninth Circuit used similar reasoning to ignore prosecution evidence of police "good faith" during the illegal seizure of evidence at a traffic stop.[250] In this case, testimony from the officer explaining his honest but mistaken belief that the defendant had improperly affixed his vehicle registration sticker did *not* result in application of the *Leon* "good faith" exception. Other post-*Leon* courts

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[245] *Id.* at 327.

[246] *See* Hauhart & Choi, *supra* note 30, at 328.

[247] *Id.* at 336.

[248] *See id.* at 338 (citing United States v. Whiting, 781 F.2d 692 (9th Cir. 1986)).

[249] *Id.*

[250] *See id.* at 339–40 (citing United States v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000)).

have similarly refused to recognize police "good faith" exception evidence in cases involving seizures of unreasonable duration.[251]

Based on this study, Professors Hauhart and Choi concluded that "[t]he most common reason federal appellate courts ignore the argument of police "good faith" is [because] they find nothing 'inherently defective' with the affidavit and find probable cause is present in the executed warrant."[252] However, as this study reveals, until recently, federal appellate courts rejected evidence of police "good faith" in warrantless search cases and in a range of factual circumstances.[253]

B. A RECENT EXAMINATION OF THE IMPACT OF *DAVIS*

In the wake of the Supreme Court's 2012 decision in *United States v. Jones*,[254] defining the use of extended GPS surveillance as a "search" under the Fourth Amendment, Professor Susan Freiwald has attempted to measure suppression results post-*Jones* and post-*Davis*.[255] Her research reveals that "rather than beginning to answer the questions that *Jones* left open, courts are largely avoiding substantive Fourth Amendment analysis of location data privacy."[256] Professor Freiwald, whose research includes the more recent post-*Jones* cases has found that courts are consistently "finding that officers who engaged in GPS tracking and related surveillance operated in "good faith" based on the new exception to the

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[251] *See* United States v. Song Ja Cha, 597 F.3d 995, 999–1000 (9th Cir. 2010) ("Of course, a seizure reasonable at its inception . . . may become unreasonable as a result of its duration or for other reasons.") (citations omitted).

[252] *See* Hauhart & Choi, *supra* note 30, at 339–40.

[253] *Id.*

[254] 132 U.S. 945 (2012).

[255] Susan Freiwald, *The Davis Good Faith Rules and Getting Answers to the Questions Jones Left Open*, 14 N.C. J. L. & TECH. 341, 341–42 (2013).

[256] *Id.*

exclusionary remedy that the Supreme Court laid out in the 2011 case of *Davis v. United States*."[257]

The *Jones* decision may presage the development of new Fourth Amendment guidelines responsive to police departments' rapidly increasing access to new technologies. However, in Professor Freiwald's view, the combination of these two cases is yielding especially problematic results because, by "[f]ollowing *Davis*, lower courts are refusing to grant a suppression remedy on appeal to targets of searches that were almost surely unconstitutional under *Jones*."[258] Based on her research, she has concluded that courts are using "[a] broad interpretation of *Davis* [that] untethers officers' conduct from appellate precedent and may lead courts to excuse that conduct, and refuse to engage the *Jones's* questions, whenever judges consider the officers' conduct not to be egregious."[259] Although Professor Freiwald's work is new and covers just three years of case law, her work suggests that suppression will not be available unless police officers engage in misconduct so shocking that it supports an inference of bad faith.

C. OPERATING THE FAUX "GOOD FAITH" STANDARD

A review of recent federal court decisions confirms concerns raised by commentators and the empirical research that the faux reasonable police "good faith" standard will make constitutional violations irremediable.

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[257] *Id.*

[258] *Id.* at 344.

[259] *Id.* at 379.

1. THE OVERALL BALANCE

New federal appellate cases applying *Herring* are recalibrating the balance of safety and liberty by finding that "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system,"[260] that "suppression is not an automatic consequence of a Fourth Amendment violation,"[261] and that "evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'"[262] These cases take a similar approach to *Davis*, dictating that "[w]hether suppression is the right remedy in any particular case requires, the Supreme Court has said, 'an assessment of the competing social costs and benefits associated with exclusion,'"[263] that suppression should be granted only "[w]hen law enforcement officers exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs,"[264] and that, to determine "whether law enforcement personnel acted with an objectively reasonable good-faith belief that their conduct was lawful, we must consider whether the totality

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[260] *See, e.g.*, United States v. Johnson, 734 F.3d 270, 277 (4th Cir. 2013) (quoting Herring v. United States, 555 U.S. 135, 147 (2009)).

[261] United States v. Smith, 741 F.3d 1211, 1218–19, (11th Cir. Dec. 23, 2013) (quoting *Herring*, 555 U.S. at 137); United States v. Starnes, 501 F. App'x 379, 385 (6th Cir. 2013) (quoting *Herring*, 555 U.S. at 137); *see also* United States v. Brown, 631 F.3d 638, 647 (3d Cir. 2011) (citing *Herring*, 555 U.S. at 141).

[262] United States v. Allen, 625 F.3d 830 (5th Cir. 2010) (quoting *Herring*, 555 U.S. at 142–43).

[263] United States v. Nicholson, 721 F.3d 1236, 1256 (10th Cir. 2013) (citing *Davis*, 131 S. Ct. at 2427).

[264] United States v. Wright, 493 F. App'x 265, 271 (3d Cir. 2012) (quoting *Davis*, 131 S. Ct. at 2427).

of circumstances is greater than the sum of its attendant parts."[265] Taken together, *Herring* and *Davis* have clearly tipped the balance in favor of admitting illegally seized evidence in all cases where defendants cannot prove systemic misconduct or deliberate or reckless illegality.

2. SUPPRESSION FOLLOWING WARRANT-AUTHORIZED SEARCHES

As noted above, Professors Hauhart and Choi found that 90% of successful suppression motions in the federal appellate courts were based on defense proof that (1) the affidavit was deliberately or recklessly false, (2) the magistrate failed to perform her neutral and detached function, (3) the affidavit was so lacking in probable cause that official belief in its existence was unreasonable, or (4) the warrant was facially deficient.[266] In these cases, evidence supporting one or more of these conclusions ensured suppression in the overwhelming majority of cases, regardless of prosecution evidence of police "good faith." But this review of post-*Herring* and post-*Davis* cases reveals that, despite defense proof of an illegal search that falls within the *Leon* four-prong test, illegally seized evidence is now routinely admitted.

For example, under the first prong, which is based on *Franks v. Delaware*,[267] suppression should be granted if the defendant has proved that the warrant was based on "a deliberately or recklessly false affidavit."[268] This approach was rejected by the Third Circuit in a case admitting evidence seized illegally pursuant to a search warrant supported

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[265] United States v. Katzin, 732 F.3d 187, 211 (3d. Cir. 2013) (citing *Davis*, 131 S. Ct. at 2427).

[266] *See* Hauhart & Choi, *supra* note 30, at 336.

[267] 438 U.S. 154 (1978).

[268] United States v. Leon, 468 U.S. 897, 924 (1984) (quoting United States v. Harris, 464 F.3d 733 (7th Cir. 2006)).

by false police statements.[269] The *Leon* reasonable "good faith" exception should *not* apply to cases where police officers evince a willful disregard for the truth,[270] but, in *United States v. Hicks*, the appellate court reasoned that *Herring* paved the way for admission of this evidence because the defense had only proved "isolated negligence and had failed to prove that the police officer's conduct demonstrated reckless disregard of the Constitution." [271] *Hicks* sets the bar impossibly high by blocking suppression even when a defendant can prove that a warrant was based on deliberately or recklessly false police officer statements.

It is interesting to note that one year earlier in *United States v. Brown*,[272] in a similar case involving *Franks* evidence, the Third Circuit reached the opposite conclusion. The *Brown* court held that the new requirement of defense of police recklessness under *Herring* had "no bearing on the defendant's constitutional rights, which are violated, if at all, by the execution of a warrant obtained through the use of a materially false application."[273] In fact, the court in *Brown* specifically concluded that:

> [T]he invention of baseless averments is plainly the sort of behavior that exclusion can be expected to deter. . . . [and] also a brand of behavior worth deterring . . . [because] the idea of a police officer fabricating facts or even entire

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[269] United States v. Hicks, 460 F. App'x 98, 102 (3d. Cir. 2012).

[270] *Hicks* can be contrasted with a similar pre-*Herring* case from the Sixth Circuit, *United States v. West*, 520 F.3d 604 (6th Cir. 2008). The *West* Court found that no amount of prosecution evidence of reasonable police "good faith" could prevent the exclusion of evidence seized pursuant to a "bare bones" affidavit that failed to connect the suspect's residence and van. *See West*, 520 F.3d at 610.

[271] *Hicks*, 460 F. App'x at 102–03.

[272] 631 F.3d 638 (3d Cir. 2011).

[273] *Id.* at 647.

> affidavits in order to obtain probable cause is quite obviously repugnant to the Fourth Amendment.[274]

In a recent Tenth Circuit case, the appellate court employed a bizarre interpretation of *Herring* to assess defense evidence demonstrating that a police officer lied during a suppression hearing.[275] In *United States v. Madden*,[276] the court cited both *Herring* and *Davis* to support its conclusion that direct evidence that a particular police officer lied under oath during a pretrial evidentiary hearing was irrelevant to suppression. As the appellate court illogically reasoned, "whether Officer Balderrama lied at the suppression hearing is irrelevant in determining whether the good-faith exception applies in this case: [because] it has no bearing on the 'objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal[.]"[277] Under *Madden*, direct, relevant, and persuasive evidence that a police officer committed perjury to conceal his illegal search is now irrelevant to the suppression analysis.[278]

The second post-*Leon* prong requires suppression whenever a magistrate "abandoned his or her judicial role and failed to perform his or her neutral and detached function."[279] In 2010, the Sixth Circuit addressed this question in the context of a motion to suppress based on uncontroverted defense evidence that the issuing judge lacked authority under state law to authorize the warrant.[280] When this question arose in

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[274] *Id.* at 649.

[275] United States v. Madden, 682 F.3d 920, 928–29 (10th Cir. 2012)

[276] *Id.*

[277] *Id.* at 928.

[278] Herring v. United States, 555 U.S. 135, 145–46 (2009) ("The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers.").

[279] United States v. Hodge, 246 F.3d 301, 308 (3d Cir. 2001).

[280] United States v. Master, 614 F.3d 236, 239–40 (6th Cir. 2010).

2001 in *United States v. Scott*, the Sixth Circuit had easily concluded that the illegally obtained evidence should be suppressed and that any evidence of reasonable police "good faith" was irrelevant because *Leon* did not alter "the probable-cause standard and the various requirements for a valid warrant." [281] This earlier finding was consistent with pre-*Herring* precedent establishing that an officer's "good faith" in executing a warrant "does nothing to confer legal status upon the deficient warrant"[282] because "[a]t the core of these various requirements is that the warrant be issued by a neutral and detached judicial officer."[283] However, in 2010, the court held that *Scott* was "no longer viable in light of more recent Supreme Court cases."[284]

Herring and *Davis* have clearly changed the suppression lanscape. In 2012, the Sixth Circuit again held that the fact that a warrant was issued by a judge who lacked authority is inadequate defense proof for suppression. [285] In this case, the federal appellate court reasoned that, because "[a]n error in judgment or a mistake that is not systematic does not amount to being deliberate, reckless, or grossly negligent," [286] then "[u]nder the *Herring* balancing test the benefits of deterrence, if any, do not outweigh the costs."[287]

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[281] United States v. Scott, 260 F.3d 512, 515 (6th Cir. 2001) (holding that where a search warrant is "signed by someone who lacks the legal authority necessary to issue search warrants, the warrant is void *ab initio*").

[282] *Id.*

[283] *Id.* at 515.

[284] United States v. Master, 614 F.3d 236, 242 (6th Cir. 2010).

[285] United States v. Master, 491 F. App'x 593, 595 (6th Cir. 2012) ("The supposed 'good faith' of the officer who executes the warrant can do nothing to confer legal status upon the deficient warrant.").

[286] *Id.* at 596.

[287] *Id.* at 597.

Under the third prong, suppression should be granted if the defendant proves that the affidavit was so lacking in indicia of probable cause that no reasonable police officer could believe it was valid. The Sixth Circuit recently refused to suppress evidence despite defense proof that previously would have satisfied this prong. In *United States v. Kinison*, the court reversed a decision suppressing illegally seized evidence based on a finding that the magistrate's probable cause determination was patently unreasonable.[288] Citing *Davis*, the appellate court held that the suppression "cost-benefit analysis" had been "recalibrated . . . to focus the inquiry on the 'flagrancy of the police misconduct' at issue."[289] Suppression was unwarranted in this case because the defendant lacked proof of deliberate, reckless, or grossly negligent police misconduct.[290]

The fourth prong of the post-*Leon* test contemplates suppression based on defense proof that the warrant "was so facially deficient that it failed to particularize the place to be searched or the things to be seized."[291] In new cases involving facially invalid warrants, the circuits have, so far, reached varying conclusions. The Tenth Circuit recently held that, despite defense proof that the search warrant on its face was too broad, evidence should be admitted unless the defendant could also prove that the defective warrant was the result of a "flagrant or deliberate violation of rights" under *Herring*.[292]

The Fifth Circuit recently held that evidence seized pursuant to a facially invalid warrant (listing the wrong year) should be admitted after

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[288] United States v. Kinison, 710 F.3d 678, 687 (6th Cir. 2013).

[289] *Id.* at 685 (citing *Davis*, 131 S. Ct. at 2427).

[290] *Id.* (quoting Herring v. United States, 555 U.S. 135, 144 (2009)).

[291] United States v. Primo, 223 F. App'x 187, 189–90 (3d Cir. 2007) (describing the four exceptions to a finding of *Leon* reasonable police "good faith").

[292] United States v. De La Torre, 543 F. App'x 827, 830 (10th Cir. 2013) (quoting *Herring*, 555 U.S. at 143).

Herring because the mistake was mere negligence and the defendant could not prove that the police officer's conduct was deliberate or culpable.[293] Taking a different approach, the Second Circuit suppressed evidence seized from a second-floor apartment pursuant to a warrant that identified a first-floor apartment as the place to be searched.[294] This decision was consistent with a similar case from the Seventh Circuit holding that a search based on a facially invalid warrant does not meet the *Leon* reasonable "good faith" exception and is reckless under *Herring*.[295] Finally, the Sixth Circuit recently suppressed evidence seized during the search of a house not identified in the warrant noting that, in addition to the facially invalid warrant, the police officers had falsely informed the occupant that the warrant was "for this address."[296] These cases suggest a significant divide in recent cases involving facially invalid warrants.

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[293] United States v. Guerro, 500 F. App'x 263, 264–65 (5th Cir. 2013).

[294] *See* United States v. Voustianiouk, 685 F.3d 206, 215–16 (2d Cir. 2012) (finding that the *Leon* "good faith" exception did not apply and that the culpability requirement of *Herring* was satisfied because nothing in the warrant or affidavit authorized a search of the second floor apartment); *see also* United States v. Pineda-Buenaventura, 622 F.3d 761, 776 n.5 (7th Cir. 2010) (noting that the "good faith" exception would not apply when warrant limited search to apartment A but police searched apartment B and that such behavior would be reckless under the *Herring* standard).

[295] United States v. Pineda-Buenaventura, 622 F.3d 761, 776 n.5 (7th Cir. 2010). The appellate court also reasoned that it was irrelevant under the collective knowledge doctrine that none of the officers who executed the warrant were aware of its limitation to a different apartment. *See id.* ("We agree with the district court's conclusion that the DEA's failure to properly inform or supervise the executing police of this fact was reckless, meaning the exclusionary rule is in play.") (citing *Herring*, 555 U.S. at 143).

[296] United States v. Shaw, 707 F.3d 666, 667 (6th Cir. 2013).

3. SUPPRESSION FOLLOWING WARRANTLESS SEARCHES

a. Stop and Frisk Cases

Herring and *Davis* have also begun to shape judicial assessments of defense evidence seized during illegal stop-and-frisks. In a very recent decision from the Seventh Circuit, the court addressed the suppression of evidence based on persuasive defense proof that the officer had lacked reasonable suspicion under *Terry*.[297] Applying the reasoning of *Herring*, *United States v. Williams* held that courts should admit such evidence unless the police actions were "sufficiently deliberate that exclusion can meaningfully deter" similar future actions.[298] The court opined that suppression should be limited to shockingly egregious misconduct because police officers must be "sufficiently culpable that such deterrence is worth the price paid by the judicial system."[299] Following a review of the fact, the *Williams* court found that the defendant had proved the police officer "had little articulable reason to suspect that Mr. Williams was armed and dangerous."[300] Thus, in this case, the police officer's misconduct "was both deliberate and culpable to an extent that warrants suppression under *Herring*."[301]

b. Traffic Stops

The Sixth Circuit recently addressed the impact of *Herring* on suppression motions following traffic stops. As noted above, the Supreme

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[297] United States v. Williams, 731 F.3d 678, 687 (7th Cir. 2013) (noting that "[n]one of . . . [the] facts, alone or together, could have supported a reasonable suspicion that Mr. Williams was armed and dangerous").

[298] *Id.*

[299] *Id.* at 687 (quoting *Herring*, 555 U.S. at 144).

[300] *Id.* at 690.

[301] *Id.*

Court has grated certiorari and heard arguments in the similar case of *Heien v. North Carolina*.[302] In *United States v. Godfrey*, the Sixth Circuit considered the suppression of evidence seized pursuant to a traffic stop resulting from police error in entering a license plate number into a computer located in the patrol car, along with the officer's failure to verify the accuracy of the erroneous notice of an outstanding warrant.[303] According to the court, the evidence should have been admitted because, under *Herring*, the defense failed to prove that the search was caused by "deliberate, reckless, or grossly negligent [police misconduct] . . . or . . . recurring or systemic negligence."[304] The appellate court relied on a broad understanding of *Herring*'s impact on warrantless search cases reasoning that "the Court in *Herring* held that the exclusionary rule did not apply to bar evidence seized after an accidental police error" because "[a]ccidental typographical mistakes are not the sort of police behavior that suppression would deter."[305] *Godfrey* is consistent with other recent federal appellate cases holding that, when police officers seize evidence pursuant to traffic stops made by mistake, this evidence should be admitted unless the defendant can prove "systemic error or reckless disregard of constitutional requirements."[306] This question should be resolved in the 2014–2015 term.[307]

CONCLUSION

There is good reason to worry that, especially in warrantless search cases, the Roberts Court's faux reasonable police "good faith" standard

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[302] 135 S. Ct. 33 (2014).

[303] United States v. Godfrey, 427 F. App'x 409, 410 (6th Cir. 2011).

[304] *Id.* at 411.

[305] *Id.* at 412.

[306] *See* United States v. Silva, 473 F. App'x 569, 570 (9th Cir. 2012).

[307] *See supra*, note 20.

has covertly returned our criminal courts to a "shocks the conscience" suppression approach. This is especially evident in the handful of cases from the federal courts finding that the bad faith standard of *Herring* and *Davis* has been satisfied.

A. RACE-BASED SEIZURES

The Fourth Circuit recently applied *Herring* to suppress evidence illegally seized based on an apparently race-based illegal search and seizure, supported by specific defense proof of an illegal stop. According to the appellate court:

> Two police officers, in a marked patrol cruiser, closely followed a car from a public road onto private property, and then blocked the car's exit. The officers observed no traffic violation. The only assertedly suspicious activity they saw was the car's presence in a high-crime neighborhood with out-of-state tags. These facts alone led the officers to suspect that the car's occupants, four African American men, were involved in drug trafficking.[308]

After an initial determination that this traffic stop constituted a "seizure" cognizable under the Fourth Amendment,[309] the court found that "this was not a routine encounter, but one targeted at Jones [the defendant] . . . given that the officers blocked in Jones's car to effectuate the encounter"[310] and that, in their interactions with the defendant, "the officers continued their show of authority."[311] According to the court, the circumstantial evidence proffered by the defendant established that the seizure was illegal because "a review of the totality of the facts in this case requires us to conclude

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[308] United States v. Jones, 678 F.3d 293, 295 (4th Cir. 2012).

[309] *Id.* at 299–300.

[310] *Id.* at 301.

[311] *Id.* at 303.

that the officers detained Jones before they had any justification for doing so."[312]

The *Jones* court rejected the prosecutor's argument that *Herring* should preclude exclusion.[313] According to the Fourth Circuit, under *Herring*, when the defendant has proved this this type of egregiously illegal conduct by a preponderance, "exclusion of evidence . . . [is] the proper remedy in this case because of the potential . . . to deter wrongful police conduct."[314]

B. RECTAL PROBES

The Sixth Circuit recently concluded that, even after *Herring* and *Davis*, circumstantial defense evidence establishing that a police officer ordered a rectal search that included involuntary intubation, digital examination, and the suspect's temporary paralysis, warranted suppression.[315] *United States v. Booker* involved a traffic stop for expired tags during which a K-9 officer thought he smelled marijuana coming from the suspect's car.[316] The suspect denied the presence of any drugs and consented to a search. However, while the officer checked the status of the suspect's license and ascertained the existence of any outstanding warrants, he noticed the suspect "moving around, as if he was attempting to conceal something."[317] Although a frisk of the suspect found no evidence of marijuana sufficient to support an arrest under state law, the officer handcuffed the suspect, placed him in the back of the patrol car and

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[312] *Id.* at 305.

[313] *Id.* at 305, n.7.

[314] *Jones*, 678 F.3d at 305, n.7 (citing *Herring*, 555 U.S. at 137).

[315] United States v. Booker, 728 F.3d 535, 548 (6th Cir. 2013).

[316] *Id.* at 537.

[317] *Id.*

drove him to the police station.[318] At the station, officers again frisked the suspect and "shook his pants by pulling them up until they were loose and jarring them to dislodge any articles jammed 'inside of his pants or in [his] boxers.'"[319] After nothing was found, they drove the suspect to a medical center where a digital rectal examination was performed. When nothing was recovered during this examination, the naked and handcuffed suspect was subjected to a second rectal examination[320] followed by a more extensive rectal search performed under sedation. This final search recovered a rock of crack cocaine.

In a clear illustration that we are returning to a "shocks the conscience" standard, the appellate court actually began its exclusion analysis by citing *Rochin v. California*.[321] According to the Sixth Circuit:

> The similarity between the present case and *Rochin* is apparent. While factual and legal differences exist, what shocked the conscience in *Rochin* was the use of the forced emetic. Forced paralysis, intubation, and digital rectal examination is at least as shocking as stomach pumping. The main legal difference is that *Rochin* analyzed the practice under the "fundamental fairness" standard of the Due Process Clause of the Fourteenth Amendment, while Booker bases his challenge on the Fourth Amendment's prohibition of "unreasonable searches," which applies to the states via the Due Process Clause of the Fourteenth Amendment. However, this difference is immaterial because investigative conduct that would shock the

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[318] *Id.*

[319] *Id.* at 538.

[320] *Id.* at 538–39.

[321] *Booker*, 728 F.3d at 545 (citing Rochin v. California, 342 U.S. 165, 172 (1952)).

> conscience for purposes of the Due Process Clause is "unreasonable" for purposes of the Fourth Amendment.[322]

Shortly after the discussion of *Rochin*, the *Booker* Court noted that forced surgery is unconstitutional when "three factors weighed against its substantive reasonableness: (1) 'the extent to which the procedure may threaten the safety or health of the individual,' (2) 'the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity,' and (3) 'the community's interest in fairly and accurately determining guilt or innocence.'" [323] Thus, *Booker* suggests that circumstantial evidence of this type – because it "shocks the conscience" – mandates suppression "notwithstanding the Supreme Court's ruling in Herring[,] . . . . [because] [b]ased on the circumstances of this case, a reasonably well-trained officer and physician would have known that the search was unlawful."[324]

C. POLICE EXCISION OF SUSPECTED CONTRABAND FROM A SUSPECT'S PENIS

In a final unforgettable recent case, the Fourth Circuit wisely opined that courts "cannot discount the real possibility that a suspect may suffer injuries when a knife is employed, even when it is used to remove contraband from the suspect's genitals in a well-lit and private setting."[325] *United States v. Edwards* arose following a complaint that Edwards had brandished a gun during a domestic assault. [326] Four police officers approached Edwards on the street, noting that as they approached they "were not worried" because he "looked like he was just walking down the

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[322] *Id.* at 545–46.

[323] *Id.* at 546 (citing Winston v. Lee, 470 U.S. 753, 761–62 (1985)).

[324] *Id.* at 548.

[325] United States v. Edwards, 666 F.3d 877, 887–88 (4th Cir. 2011).

[326] *Id.* at 879.

street."[327] As they later testified, Edwards did not pose a threat because he "did not exhibit any characteristics generally associated with an individual who is armed."[328] While waiting for the police transport van to arrive, the officers patted Edwards down checking everywhere on his person where a weapon could be concealed.[329]

Unsatisfied with their fruitless pat-down, the officers shined a flashlight down the front of Edward's underpants and observed a plastic sandwich bag containing smaller baggies tied in a knot to his penis.

> Upon discovering the sandwich baggie tied around Edwards' penis, another officer held Edwards' pants and underwear open while Bailey put on gloves, took a knife that he had in his possession, and cut the sandwich baggie off Edwards' penis with the knife. After [Officer] Bailey cut the baggie, he reached into Edwards' underwear and removed the baggie and its contents.[330]

Based on these facts, the Fourth Circuit concluded, "that the search conducted inside Edwards' underwear is properly characterized as a strip search, which includes the exposure of a person's naked body for the purpose of a visual or physical examination."[331]

The appellate court considered both *Herring* and *Davis*, but found that, based on the extensive circumstantial evidence of egregiously illegal police conduct, "the application of the exclusionary rule is especially appropriate in this case."[332] In the *Edwards* court's view, the defense evidence established the type of "deliberate, reckless, or grossly negligent

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[327] *Id.*

[328] *Id.* at 880.

[329] *Id.* at 879.

[330] *Id.* at 881.

[331] *Edwards*, 666 F.3d at 882.

[332] *Id.* at 885.

conduct" that "the exclusionary rule serves to deter."[333] Finally and surprisingly, the court opined that this type of search is not especially uncommon noting that the defense had proffered additional evidence establishing that "Baltimore City police officers conduct searches inside the underwear of about 50 percent of arrestees, in the same general manner as the strip search performed on Edwards."[334]

D. BACK TO THE FUTURE

Herring and *Davis* presage a return to the "shocks the conscience" suppression standard. This "throw-back to highly subjective substantive due process methodologies"[335] will limit suppression to cases where defendants can prove illegal police actions that "den[y] the decencies of civilized conduct."[336] Resurrection of the shocks the conscience standard for all warrant-authorized and warrantless illegal searches will impact our entire criminal justice system. Prosecutors' easy access to illegally-seized evidence transforms not just the small number of cases that go to trial, but also the plea calculations in every case involving evidence that previously may have been excluded on Fourth Amendment grounds.

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[333] *Id.* at 885 (citing Herring v. United States, 555 U.S. 135, 144 (2009)).

[334] *Id.* at 886.

[335] Lewis v. Sacramento, 523 U.S. 833, 861 (1998) (Scalia, J., concurring).

[336] Rochin v. California, 342 U.S. 165, 172–73 (1952); *see also* Winston v. Lee, 470 U.S. 753, 766 (1985) (finding that forcing a suspect to submit to surgical intrusion for forensic testing purposes is unlikely to shock the conscience if the societal interest is great and the physical medical risk is limited); Schmerber v. California, 384 U.S. 757, 770–71 (1966) (holding that it was permissible for police, over defendant's objections, to have a doctor take a blood sample); Breithaupt v. Abram, 352 U.S. 432, 443 (1956) (explaining that "a blood test taken by a skilled technician [does] not . . . 'shock[] the conscience'").