

**SO LONG AND THANKS FOR ALL THE *HERRING*: THE
US EXCLUSIONARY RULE AFTER *HERRING* AND
WHAT THE UNITED STATES CAN LEARN FROM THE
CANADIAN EXCLUSIONARY RULE**

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INTRODUCTION

The United States Constitution guarantees the right of the people “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹ The Founders inserted this crucial right into the Bill of Rights to limit the power and authority exercised by government officials.² To fully ensure and protect this right, the US Supreme Court declared that the exclusion of wrongfully obtained evidence was the most efficient and meaningful way to prevent the protection of privacy in the Fourth Amendment from becoming nothing more than an “empty promise.”³ The Court stated that the exclusionary rule was meant as a tool not only to discourage illegal and unconstitutional acts on the part of officers, but also as a way to ensure the integrity of the judicial system.⁴

However, over the ensuing decades, the court has created numerous exceptions to the exclusionary rule based on the “good faith” of the violating officer.⁵ With these exceptions came a change in the stated purpose of the rule from the protection of individual rights and judicial integrity to the deterrence of unconstitutional police behavior.⁶ After the latest ruling in *Herring v. United States*, the Fourth Amendment’s right to privacy sits on shaky ground, with the protection against the right to privacy at its lowest ebb since the pre-exclusionary rule era. Consequently, the door is open for simple negligence to be used to excuse any police officer’s Fourth Amendment violation.⁷ If the current path of expansive good-faith exceptions to the exclusionary rule is not reversed, the protections of the Fourth Amendment may indeed become nothing more than an empty promise.

As one law professor has opined, the Supreme Court’s blow to the protections of the Fourth Amendment in the *Herring* decision has “signaled to police nationwide that they need not avoid negligence by an

¹ U.S. CONST. amend. IV.

² *Weeks v. United States*, 232 U.S. 383, 392 (1914).

³ *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

⁴ *Id.* at 660.

⁵ See *United States v. Leon*, 468 U.S. 897, 905 (1984); *Arizona v. Evans*, 514 U.S. 1, 14 (1995); *Herring v. United States*, 555 U.S. 135, 144 (2009).

⁶ *Leon*, 468 U.S. at 900.

⁷ Robert W. Smith, *Herring v. United States: The Continued Erosion of the Exclusionary Rule*, 61 MERCER L. REV. 663, 679 (2010).

individual law enforcement agent.”⁸ Instead, a police officer may disregard the negligent behavior of his colleague to wrongfully violate an individual’s right against unreasonable search and seizure “as long as the mistake was not intentional or reckless” and not have to worry that the evidence will be excluded.⁹ Although *Herring* concerned only the negligent actions of a police clerk and not a police officer,¹⁰ it is not difficult to imagine a lower court applying *Herring*’s ruling to the negligent actions of a police officer in the field. This is especially true given the ambiguity in the Supreme Court’s reasoning in *Herring*.

For example, if one officer negligently informs a fellow officer that he believes there is probable cause to make an arrest, and the first officer subsequently makes an arrest that turns up incriminating evidence, is the exclusionary rule inapplicable because the officer was simply relying on the information he got from his fellow officer in making the arrest?¹¹ What if the informing officer knew there was no probable cause? There could be a myriad of opportunities for abuse that this loophole could create. Theoretically, if an investigative department divided an investigation among numerous officers, it would not have to worry about violating the exclusionary rule as long as the officers relied on the negligent information of fellow officers. And, much more importantly (and much more frighteningly), there would be little incentive for individual officers to worry about making mistakes during the course of their investigation.¹² In essence, the Fourth Amendment’s protections against unreasonable searches and seizures would all but vanish.

The problems with the current state of the exclusionary rule lie not with the harshness of the rule itself, but instead with the numerous and confusing additions of good-faith exceptions.¹³ By examining the treatment of the exclusionary rule in the Canadian court system, the United States can find direction to correct the jumbled path the Supreme

⁸ George M. Dery, III, *Good Enough for Government Work: The Court’s Dangerous Decision, in Herring v. United States, to Limit the Exclusionary Rule to Only the Most Culpable Police Behavior*, 20 GEO. MASON U. C.R. L.J. 1, 27 (2009).

⁹ *Id.*

¹⁰ Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule after Herring v. United States*, 43 CREIGHTON L. REV. 175, 198 (2009).

¹¹ See Smith, *supra* note 7, at 679.

¹² See David H. Kaye, *Unraveling the Exclusionary Rule: From Leon to Herring to Robinson—and Back?* 58 UCLA L. REV. DISCOURSE 207, 210–11 (2011).

¹³ See *United States v. Leon*, 468 U.S. 897, 905 (1984); *Arizona v. Evans*, 514 U.S. 1, 14 (1995); *Herring v. United States*, 555 U.S. 135, 144 (2009).

Court has traveled down in recent years and adopt a more flexible application of the rule.

Part I of this article will examine the development and history behind the American exclusionary rule and analyze why the *Mapp* rule is still tenable in today's legal system. Part II will examine the course of Canada's balancing approach to the exclusionary rule and its effect on Canadian law enforcement. Finally, Part III will show what the United States can take away from the Canadian treatment of the exclusionary rule to correct the confusion of the good-faith exceptions implemented in recent years.

PART I: THE DEVELOPMENT AND HISTORY OF THE AMERICAN EXCLUSIONARY RULE

A. PRE-WEEKS TREATMENT OF FOURTH AMENDMENT VIOLATIONS

Despite the protection against unreasonable searches and seizures that the Fourth Amendment offers, the provision is entirely silent as to the proper enforcement of those rights or the proper remedy for a violation.¹⁴ Because of this lack of direction, the United States Supreme Court has struggled with the proper way to prevent the protection from becoming nothing more than an empty promise.¹⁵ To know why and how the Supreme Court has approached the enforcement of the Fourth Amendment in the way it has, it is important to know the history and purpose behind the protection against unreasonable searches and seizures in the Bill of Rights.

Starting from the sixteenth century onward, the English monarchy was able to use "general warrants" as a way to silence critics of the Crown and to stifle the free flow of information in the empire.¹⁶ General warrants were issued without probable cause and usually without any suspicion of actual wrongdoing—no name was listed on the warrant and no time limit was placed on the warrant.¹⁷ The warrants allowed officers of the Crown to take and destroy any material "offensive to the state."¹⁸ According to historians, it was the Framers'

¹⁴ U.S. CONST. amend. IV.

¹⁵ Smith, *supra* note 7, at 666.

¹⁶ Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 81 COLUM. L. REV. 1365, 1369 (1983).

¹⁷ *Id.*

¹⁸ *Id.*

distrust of these general warrants (in addition to writs of assistance, which gave customs officials the unlimited right to search any cargo)¹⁹ that led to the inclusion of the Fourth Amendment in the Bill of Rights.²⁰

The first US Supreme Court case dealing with the exclusion of evidence was actually a civil case involving a subpoena of business papers.²¹ In *Boyd v. United States*, the Supreme Court combined the Fourth Amendment's protection against unreasonable seizures and the Fifth Amendment's protection against self-incrimination and held that the business papers in question must be excluded from evidence because they were the functional equivalent of the defendant testifying against himself.²² In the opinion, Justice Bradley wrote that while subpoenaing the personal business papers lacked "many of the aggravating incidents of actual search and seizure," it was a constitutional violation in "substance and essence."²³

The next time the Supreme Court dealt with the issue of excluding evidence, it was a step back from the exclusionary overtones in *Boyd*.²⁴ In the 1904 case of *Adams v. New York*, a state prosecutor attempted to use personal papers against the defendant in proving that he was involved in a gambling ring.²⁵ But the court never had the opportunity to comment on whether the exclusion of evidence was a viable remedy for a Fourth Amendment violation—it simply found that no constitutional violation had occurred.²⁶ In a major blow to the venerable protections of the Fourth Amendment, Justice Day stated that if competent evidence exists that would help prove the guilt of the defendant, "the courts do not stop to inquire as to the means by which the evidence was obtained."²⁷ Although it looked like the right to be free from unreasonable searches and seizures was about to become obsolete, the Supreme Court resurrected Fourth Amendment protections a decade later in *Weeks v. United States*.²⁸

¹⁹ *Id.* at 1369–70.

²⁰ *Id.* at 1369.

²¹ *Boyd v. United States*, 116 U.S. 616, 617–18 (1886).

²² *Id.* at 629–30. *See also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 787 (1994).

²³ *Boyd*, 116 U.S. at 635.

²⁴ *Adams v. New York*, 192 U.S. 585, 594 (1904).

²⁵ *Id.* at 586–87.

²⁶ *Id.* at 594.

²⁷ *Id.*

²⁸ *Weeks v. United States*, 232 U.S. 383, 383 (1914).

B. FROM *WEEKS* TO *MAPP*: THE BIRTH OF THE MODERN EXCLUSIONARY RULE

In *Weeks*, police officers entered a defendant's house without probable cause and without a warrant and proceeded to seize a large amount of Weeks' property, including books, letters, and papers.²⁹ Before his trial, Weeks motioned the court for the return of his property, not necessarily for the exclusion of the evidence at trial, but because the district attorney's retention of the property deprived Weeks of his use of it.³⁰ Justice Day, again writing for the majority, stated that allowing the district attorney to retain the evidence would violate Weeks' constitutional right to property. For the Court "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution."³¹ Justice Day distinguished Weeks' situation from that in *Adams v. New York* by stating that in *Adams* there was a valid search warrant which the police officers relied upon but exceeded, whereas the officers in *Weeks* acted without any color of warrant at all.³² With his ruling, Justice Day laid the groundwork for the exclusionary rule in federal court, although he warned that the Court's decision did not extend to state actors.³³

The Court again addressed the exclusionary rule in 1949 in *Wolf v. Colorado*, when it took up the question of whether the Fourteenth Amendment requires the Fourth Amendment's protections against unreasonable searches and seizures to extend to the states.³⁴ Justice Frankfurter, writing for the majority, stated that the Fourth Amendment did apply to the states, reasoning that if a state were to "affirmatively . . . sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."³⁵ However, the court did not go so far as to state that states must automatically exclude evidence obtained in violation of the Fourth Amendment. The Court instead gave states broad discretion in implementing their own remedy for violations, reasoning that while "in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court

²⁹ *Id.* at 387.

³⁰ *See id.* at 393.

³¹ *Id.* at 394.

³² *Id.* at 395.

³³ *See id.* at 398.

³⁴ *Wolf v. Colorado*, 338 U.S. 25, 25–26 (1949).

³⁵ *Id.* at 28.

to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."³⁶

Over the next twelve years, the exclusionary rule remained a mandatory remedy for only federal violations of the Fourth Amendment. Yet, in 1961 the Supreme Court finally declared that the exclusionary rule must be applied to state actors as well when it issued its landmark decision in *Mapp v. Ohio*.³⁷ After paraphrasing and quoting from the holdings in *Weeks* and *Wolf*, the Court stated that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Thus, the exclusionary rule finally applied to the states.³⁸ Justice Clark, writing for the majority, criticized the fact that evidence must be excluded in a federal court but could then be admitted in a state court across the street.³⁹ As he famously stated, "[t]here is no war between the Constitution and common sense."⁴⁰ Justice Clark restated the constitutional origins of the *Weeks* rule: "the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed."⁴¹ The Court also emphasized another purpose behind the exclusionary rule: the protection of the "judicial integrity so necessary in the true administration of justice."⁴²

Since its inception, the *Mapp* ruling has been highly controversial, with heated arguments arising both for and against such a hardline exclusionary rule.⁴³ However, the *Mapp* decision remained untouched until 1984 when the Court landed the first blow against the protections of the Fourth Amendment.

³⁶ *Id.* at 31.

³⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁸ *Id.* at 655.

³⁹ *Id.* at 657.

⁴⁰ *Id.*

⁴¹ *Id.* at 649.

⁴² *Id.* at 660.

⁴³ See Stewart, *supra* note 16, at 1392–96.

C. LEON, EVANS, AND HERRING: THE CREATION OF THE GOOD-FAITH
EXCEPTION AND THE WEAKENING OF EXCLUSIONARY RULE

I. *United States v. Leon: Invalid Search Warrant Not Grounds for
Exclusion—the Birth of the Good-Faith Exception*

In *United States v. Leon*, the Supreme Court had the opportunity to determine whether the exclusionary rule applied to the culpability of a government actor rather than a police officer.⁴⁴ In *Leon*, police officers, relying on information garnered from a confidential informant with no prior showing of credibility, began an investigation and surveillance of two men suspected of selling cocaine and methaqualone out of their house.⁴⁵ During the course of their investigation, the officers discovered what they felt was ample probable cause to obtain a warrant from a magistrate judge.⁴⁶ A state superior judge granted the warrant, and the ensuing search revealed a large amount of drugs and other incriminating evidence.⁴⁷ However, the district court determined that while the search warrant itself was facially valid, the affidavit of the officer who had applied for the warrant did not contain enough probable cause to support the issuing of a warrant.⁴⁸ The court therefore suppressed the evidence, and the Ninth Circuit Court of Appeals affirmed the decision.⁴⁹

The Supreme Court subsequently granted certiorari and reversed the lower courts, holding that a police officer acting with good-faith reliance on a magistrate-issued warrant that later turned out to be void was not grounds for the exclusion of the wrongfully obtained evidence.⁵⁰ In reaching this decision, Justice White presented three reasons why the exclusionary rule should not be applied to this good-faith reliance, reasons which would be reiterated in future cases to justify the further expansion of the good-faith exception: (1) the exclusionary rule was designed to deter police behavior, not the behavior of judges or magistrates, (2) there is no evidence that judges and magistrates are inclined to subvert the Fourth Amendment, and (3) there is no evidence the exclusion of the evidence would have any effect on the behavior of

⁴⁴ *United States v. Leon*, 468 U.S. 897, 900 (1984).

⁴⁵ *Id.* at 901.

⁴⁶ *Id.* at 902.

⁴⁷ *Id.*

⁴⁸ *Id.* at 903.

⁴⁹ *Id.* at 903–05.

⁵⁰ *Id.* at 920–21.

judges or magistrates.⁵¹ However, what was most notable about Justice White's opinion was not the simple adoption of an exception to the exclusionary rule, but was the way the Court framed the goals of the rule: "deter[ri]ng official misconduct and removing inducements to unreasonable invasions of privacy" on one hand, and "establish[ing] procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'" on the other.⁵² The only mention of the judicial integrity language of *Weeks* and *Mapp* comes via a footnote responding to Justice Stevens' dissent.⁵³

In his scathing dissent, Justice Stevens voiced his strong disagreement with the majority's decision and cautioned against the dangers of chipping away at the strong exclusionary rule that the Court had developed in *Weeks* and *Mapp*.⁵⁴ Justice Stevens pointed out the slippery slope that the majority's holding might have on police conduct, warning that "[t]he Court's approach—which, in effect, encourages the police to seek a warrant even if they know the existence of probable cause is doubtful—can only lead to an increased number of constitutional violations."⁵⁵ Harkening back to the judicial integrity language of *Mapp*, Stevens warned that if a court allows illegally obtained evidence at trial, "then the courts become not merely the final and necessary link in an unconstitutional chain of events, but its actual motivating force."⁵⁶ Stevens concluded by admitting the exclusionary rule levies a high cost on society—the possibility of a guilty suspect going free—but he reiterates that the steep price is "also one the Fourth Amendment requires us to pay."⁵⁷

Justice Brennan wrote an equally forceful dissent, voicing his concerns about the majority's treatment and change of exclusionary rule jurisprudence.⁵⁸ Justice Brennan lamented that the "Court's victory over the Fourth Amendment is complete" because with their holding, the majority had "sanction[ed] the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been

⁵¹ *Id.* at 916.

⁵² *Id.* at 900–01 (quoting *Alderman v. United States*, 394 U.S. 165, 175, (1969)).

⁵³ *Id.* at 921 n.22.

⁵⁴ *Id.* at 960–61 (Stevens, J., dissenting).

⁵⁵ *Id.* at 975–76.

⁵⁶ *Id.* at 978.

⁵⁷ *Id.* at 979.

⁵⁸ *Id.* at 928 (Brennan, J., dissenting).

violated.”⁵⁹ Justice Brennan, like Justice Stevens, criticized the majority for emphasizing the “cost” of the exclusionary rule over the “benefits,” and warned that focusing wholly on deterrence and the cost-benefit analysis could “have a narcotic effect.”⁶⁰ In light of the subsequent erosion of the exclusionary rule in *Evans* and *Herring*, Justice Brennan’s concern seems all too prescient. Justice Brennan emphasized the “fundamental constitutional importance” of the Fourth Amendment’s protections, and stated that the majority was treating the exclusionary rule as a judicially created remedy that could be altered at will, rather than as the constitutional mandate that the Court characterized it as in its holding in *Leon*.⁶¹

Justice Brennan’s dissent tracked the development of the exclusionary rule in *Weeks* and asserted that it was clear that “the question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases” because the solid constitutional basis of the rule precluded any judicial alteration of its application.⁶² Indeed, Brennan lambasted the majority for having “robbed the rule of legitimacy”⁶³ and called for the need to guarantee that “an individual whose privacy has been invaded in violation of the Fourth Amendment has a right grounded in that Amendment to prevent the government from subsequently making use of any evidence so obtained.”⁶⁴

2. *Arizona v. Evans: The Exclusionary Rule Does Not Apply to Mistakes of a Judicial Clerk—Rehnquist Champions Deterrence over Judicial Integrity*

The next major blow to the exclusionary rule came in *Arizona v. Evans*, when the Supreme Court applied the rationale from *Leon* to a police officer acting on an outstanding warrant that was later found to be void due to the error of a judicial employee.⁶⁵ In *Evans*, a police officer noticed the defendant, Isaac Evans, driving the wrong direction down a

⁵⁹ *Id.* at 929.

⁶⁰ *Id.*

⁶¹ *Id.* at 931–32.

⁶² *Id.* at 938–39.

⁶³ *Id.* at 943.

⁶⁴ *Id.*

⁶⁵ *Arizona v. Evans*, 514 U.S. 1, 14 (1995).

one-way road.⁶⁶ During the subsequent traffic stop, the officer searched for Evans' name in the police department's warrant database. The system indicated Evans had an outstanding warrant for a misdemeanor.⁶⁷ The police officer arrested Evans and performed a search of his vehicle, discovering a small bag of marijuana.⁶⁸ Evans moved to have the marijuana suppressed on the grounds that the warrant that the officer relied upon in making his arrest did not actually exist at the time of the arrest and had been quashed days earlier.⁶⁹ During a suppression hearing, it was revealed that the warrant had indeed been quashed in 1990, but a judicial clerk had failed to call the sheriff's department to inform them of the quashed warrant so they could update their databases accordingly.⁷⁰

The trial court granted the motion to suppress the evidence, refusing to find a distinction between errors by employees of a police department and employees of the judicial department when applying the standards of *Leon*.⁷¹ The Arizona Court of Appeals reversed the trial court, reasoning that *Leon* was only intended to deter the conduct of police officers and those directly involved with the arrest, not employees of a separate branch.⁷² The Arizona Supreme Court reversed the decision of the appeals court, determining that no such distinction exists between police employees and judicial employees. After granting certiorari, the US Supreme Court reversed the Arizona Supreme Court, agreeing with the Arizona Court of Appeals that *Leon* applies only to deter the conduct of employees of the police.⁷³

Chief Justice Rehnquist, writing for the majority, restated the three reasons from *Leon* as grounds not to exclude the illegally obtained evidence: the rule only deters police action, there was no evidence court employees are inclined to circumvent the Fourth Amendment, and there was no evidence applying the rule here would have affected the behavior of court employees.⁷⁴ Much like the holding in *Leon*, the majority in *Evans* relied wholly on the deterrence factor of the exclusionary rule,

⁶⁶ *Id.* at 4.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 5.

⁷¹ *Id.*

⁷² *Id.* at 6.

⁷³ *Id.* at 14.

⁷⁴ *Id.* at 14–15.

without any mention of notions of judicial integrity or constitutional foundations.⁷⁵

In her dissenting opinion, Justice Ginsburg criticized the majority's distinction between a court employee's error and police employee's error. Ginsburg doubted the majority's claim that court employees would not be deterred from making negligent mistakes by applying the exclusionary rule here.⁷⁶ Acknowledging the effect computer technology had had on law enforcement in recent years, Ginsburg supported the Arizona Supreme Court (which had applied the exclusionary rule in this case) and recognized its fear of a "potential for Orwellian mischief" in the government's increasing reliance on computer technology in law enforcement.⁷⁷ Ginsburg stated that the deterring effect of the exclusionary rule extended beyond police officers and that applying the exclusionary rule would provide a much-needed incentive for states to maintain precise and up-to-date recordkeeping systems.⁷⁸ According to Ginsburg, the increasing reliance on computers and electronic record keeping systems easily blurred the line between the actors in making an arrest and any distinction between police clerks and court clerks was artificial.⁷⁹ She warned that if a mistake caused the deprivation of constitutional rights, "it may be difficult to pinpoint whether one official, e.g., a court employee, or another, e.g., a police officer, caused the error to exist or to persist."⁸⁰

Justice Stevens also dissented from the judgment, once again emphasizing the constitutional nature of the exclusionary rule and its fundamental history.⁸¹ Stevens criticized the majority for focusing entirely on the police-deterrence aspect of the rule, despite the fact that "the constitutional text and the history of its adoption and interpretation identify a more majestic conception."⁸²

Justice Stevens detailed how the Fourth Amendment "is a constraint on the power of the sovereign, not merely on some of its agents" and that the "high costs" of the exclusionary rule merely

⁷⁵ *Id.*

⁷⁶ *Id.* at 24–25 (Ginsburg, J., dissenting).

⁷⁷ *Id.* at 25 (*quoting* *State v. Evans*, 866 P.2d 869, 872 (1994)).

⁷⁸ *Id.* at 29.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 18 (Stevens, J., dissenting).

⁸² *Id.*

“motivat[es] it to train all of its personnel to avoid future violations.”⁸³ As he did in his dissent in *Leon*,⁸⁴ Justice Stevens stated that the exclusionary rule did not represent an “extreme sanction”—it was simply a constitutional mandate that placed the government and its actors in the same position they would have been in before the illegal search and seizure.⁸⁵

Although he thoroughly eschewed the deterrence-only view of the exclusionary rule, Justice Stevens reasoned that even if the only goal of the rule was deterrence, the Arizona Supreme Court still made the correct decision in allowing the suppression of the evidence and that the majority’s reliance on *Leon* was misguided.⁸⁶ Stevens pointed out that in *Leon*, the arresting officer actually *had* a facially valid warrant when he made the arrest, whereas in the present case there was never a warrant (facially valid or otherwise) on which the police officer could rely.⁸⁷ Accordingly, “[t]he reasoning in *Leon* assumed the existence of a warrant; it was, and remains, wholly inapplicable to warrantless searches and seizures.”⁸⁸ Justice Stevens would therefore limit the holding in *Leon* to apply only for the “limited proposition that courts should not look behind the face of a warrant on which police have relied in good faith.”⁸⁹ But regardless of what interpretation of *Leon* was used, Justice Stevens believed the deterring aspect of the exclusionary rule still called for the exclusion of the evidence because “law enforcement officials, who stand in the best position to monitor such errors as occurred here, can influence mundane communication procedures in order to prevent those errors.”⁹⁰ Just as Justice Ginsburg stated in her dissent, “[t]he deterrent purpose extends to law enforcement as a whole, not merely to ‘the arresting officer.’”⁹¹

Justice Stevens concluded by stating that, even if clerical errors such as the one at hand was as rare as the chief clerk had stated in her testimony (the chief clerk had stated that errors occurred only once per every three or four years—a statement she then immediately contradicted

⁸³ *Id.* at 18–19.

⁸⁴ *United States v. Leon*, 468 U.S. 897, 960 (1984).

⁸⁵ *Arizona v. Evans*, 514 U.S. 1, 19 (1995).

⁸⁶ *Id.*

⁸⁷ *Id.* at 19–20.

⁸⁸ *Id.* at 20.

⁸⁹ *Id.*

⁹⁰ *Id.* at 21.

⁹¹ *Id.*

by saying once Evans' error was found, the department discovered two or three others at the same time⁹²), the low occurrence rate of the errors would only minimize the cost of enforcing the exclusionary rule and would weigh in favor of suppressing the evidence in this case.⁹³

After *Leon*, the protections of the exclusionary rule had been markedly restricted, but it still seemed like the good-faith exception of the exclusionary rule would only apply to mistakes by those outside of the police department (whether it be a magistrate judge issuing a warrant without probable cause or a judicial clerk erroneously forgetting to inform the police about a quashed warrant).⁹⁴ However, that all changed in 2009 when the Court handed down its decision in *Herring*.

3. *Herring v. United States: Evans Extended to Negligence of a Fellow Police Officer—Is Exclusion only for “Sufficiently Deliberate” Violations?*

In *Herring*, Chief Justice Roberts, writing for majority, delivered a tremendous blow to the protections of the exclusionary rule when he stated that “the exclusionary rule is not an individual right and applies only where it result[s] in appreciable deterrence.”⁹⁵ According to Chief Justice Roberts, the Court has repeatedly “rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.”⁹⁶ This, interestingly enough, seems to run contrary to the stated history and purposes of the exclusionary rule in past cases.⁹⁷ After stating that “the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,” the court declined to apply the exclusionary rule when a police clerk this time negligently forgot to update a warrant database.⁹⁸

The facts of *Herring* were rather similar to the facts in *Evans*. The defendant, Bennie Dean Herring, had driven to the police station to retrieve some possessions from his recently impounded pickup truck.⁹⁹

⁹² *Id.* at 15.

⁹³ *Id.* at 22.

⁹⁴ *See id.* at 14.

⁹⁵ *Herring v. United States*, 555 U.S. 135, 141 (2009) (internal quotation marks omitted).

⁹⁶ *Id.*

⁹⁷ *See Mapp v. Ohio*, 367 U.S. 643 (1961).

⁹⁸ *Herring*, 555 U.S. at 144.

⁹⁹ *Id.* at 137.

Herring was well-known to the officers at the police station, having had numerous run-ins with law enforcement in the past, and he caught the eye of one of the investigators in the departments.¹⁰⁰ On a whim, the officer, Mark Anderson, asked the county's warrant clerk to check for any outstanding warrants for Herring in the county, but the report came back negative.¹⁰¹ However, he then asked the warrant clerk to check with a neighboring county's warrant clerk to see if Herring had any outstanding warrants in that county.¹⁰² As it turned out, the neighboring county's database showed an outstanding warrant for Herring stemming from a failure to appear on a felony charge.¹⁰³ Anderson asked the neighboring county to fax a physical copy of the warrant confirmation. However, the clerk could not find the warrant and subsequently learned it had been quashed five months prior—the outstanding warrant had not actually existed.¹⁰⁴ However, this information did not come to light until after Anderson arrested Herring and found methamphetamine and a pistol in his truck.¹⁰⁵

During a suppression hearing, the district court denied suppression of the evidence, finding that Anderson had relied in good-faith on the supposedly outstanding warrant, meaning there was not an unreasonable search and seizure under the Fourth Amendment, and that regardless, the officer's good-faith reliance would mean that use of the exclusionary rule would have no deterring effect.¹⁰⁶ The Eleventh Circuit Court of Appeals affirmed the decision, stating that while a law enforcement official was likely responsible for not updating the warrant database, the error was simply "negligent and attenuated from the arrest," not a deliberate or tactical choice.¹⁰⁷ As stated above, the Supreme Court then granted certiorari and summarily affirmed the decisions of the lower courts.¹⁰⁸

What is concerning about the Court's holding in *Herring* is not just the fact that it reaffirmed the deterrence-only goal of the exclusionary rule that was laid out in *Leon* and *Evans*, but that it applied

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 138.

¹⁰⁵ *Id.* at 137.

¹⁰⁶ *Id.* at 138.

¹⁰⁷ *Id.* at 138–39.

¹⁰⁸ *Id.* at 139.

the good-faith exception to law enforcement employees.¹⁰⁹ *Herring* effectively forced Fourth Amendment violations to meet some ambiguous standard of reaching a level of “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence” for the exclusionary rule to apply.¹¹⁰ The Court further added to the confusion by stating that “nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place.”¹¹¹

PART III: THE DEVELOPMENT OF THE EXCLUSIONARY RULE IN CANADA

A. PRE-CHARTER EXCLUSION OF EVIDENCE AT COMMON LAW

Whereas the United States’ Constitution does not explicitly call for the creation of the exclusionary rule, the Canadian Charter of Rights and Freedoms clearly states that that illegally obtained evidence shall be excluded if “the admission of it in the proceedings would bring the administration of justice into disrepute.”¹¹² Section 24 of the Canadian Charter lays out the groundwork for the enforcement of guaranteed rights and freedoms, stating in part that

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.¹¹³

Along with the protections of section 24, the Canadian Charter of Rights and Freedoms contains many more enumerated substantial

¹⁰⁹ *Id.* at 144.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 24 (U.K.).

¹¹³ *Id.*

rights than those listed in the United States' Bill of Rights.¹¹⁴ Apart from the length and substance of the two countries' rights-protecting documents, one other glaring difference between the Canadian Charter and the US Bill of Rights is that while US courts have had the opportunity to interpret and define the rights found in the US Bill of Rights for over two centuries (since 1791), the Canadian Charter was only ratified approximately thirty years ago in 1982, leaving Canadian courts with less than three decades to interpret the rights of the Charter.¹¹⁵ However, similar to the development of the exclusionary rule in the United States, Canadian courts had dealt with the issue of excluding evidence at common law for a number of years.¹¹⁶ While this common law treatment for suppressing evidence did not provide a completely clear path for courts to follow, it did lay the foundation for the language that would become section 24 of the Charter and established the importance of protecting the civil rights of Canadian citizens.¹¹⁷

Prior to the enactment of the Charter of Rights and Freedoms, Canadian courts looked to English common law for guidance on the treatment of wrongfully obtained evidence, which focused primarily only on the relevance and reliability of the evidence.¹¹⁸ The first examination of where and how evidence was obtained arose in the 1969 case *R. v. Wray*, when a trial court judge refused to admit evidence into the record that was obtained as a result of an involuntary confession.¹¹⁹ Upholding the lower court's decision, the judge for the Ontario Court of Appeals stated that the trial judge had the discretion to exclude evidence if "he considers that its admission would be unjust or unfair to the accused or calculated to bring the administration of justice into disrepute."¹²⁰ However, the Canadian Supreme Court reversed the lower courts, refusing to grant trial courts the ability to consider how otherwise-admissible evidence was obtained.¹²¹ The majority reasoned that if

¹¹⁴ See generally *id.*; Robert A. Harvie, *The Exclusionary Rule and the Good Faith Doctrine in the United States and Canada: A Comparison*, 14 LOY. L.A. INT'L & COMP. L. REV. 779, 782 (1992).

¹¹⁵ Canadian Charter of Rights and Freedom, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

¹¹⁶ See Harvie, *supra* note 114, at 791–95.

¹¹⁷ *Id.*

¹¹⁸ Larry Glasser, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 GEO. WASH. INT'L L. REV. 159, 167 (2003).

¹¹⁹ *R. v. Wray* (1969), [1970] 2 O.R. 3 (Can. Ont. C.A.).

¹²⁰ *Id.* ¶ 6.

¹²¹ *R. v. Wray* (1970), [1971] S.C.R. 272, 272–73 (Can.).

evidence “is relevant, it is admissible, and the court is not concerned with how it was obtained.”¹²² The court stated that “[t]he task of a judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule. If this course is followed, an accused person has had a fair trial.”¹²³ As can be seen from the plain language of the decision, the Court based its reasoning wholly on the concept of fairness at trial, without any consideration of the violation of rights or egregious behavior of investigating officers prior to trial.¹²⁴ There were, nevertheless, three judges who dissented from the opinion.¹²⁵

The issue of excluding wrongfully obtained evidence again came before the Canadian Supreme Court in 1981, just one year before the adoption of the Charter of Rights and Freedoms. In the case *R. v. Rothman*, the trial court once again excluded evidence that was obtained by an illegal coerced confession via an undercover officer speaking to a suspect in a prison cell who had already refused to talk to the police. The Ontario Court of Appeals reversed the lower court’s decision to exclude the evidence.¹²⁶ (Interestingly, Judge Dublin, dissenting from the opinion of the Court of Appeals, quoted an American case, *Escobedo v. Illinois*, where Justice Goldberg warned against the dangers of allowing illegally obtained “confessions” in a court proceeding without any extrinsic corroborating evidence.)¹²⁷

The Canadian Supreme Court affirmed the ruling of the court of appeals, stating that the “Court is not immediately concerned with the truth or reliability of the statement made by the accused, but with the question as to whether the statement he has made was free and voluntary, within the stated rules and whether the confession was the utterance of an operating mind.”¹²⁸ Therefore, the court determined that an analysis into the means by which the confession was obtained had no role in the trial court.¹²⁹ Justice Estey, dissenting from the opinion, used reasoning similar to the dissent by Stevens in *Evans* and argued that the confession should not be admitted because “[c]onfessions are not admissible where

¹²² *Id.* at 298

¹²³ *Id.* at 299–300.

¹²⁴ *See id.*

¹²⁵ *Id.*; the Canadian Supreme Court has nine members, similar to the US Supreme Court.

¹²⁶ *R. v. Rothman* (1978), [1979] 42 C.C.C. 2d 377 (Can. Ont. C.A.).

¹²⁷ *Id.* at 389–90 (Dublin, J.A., dissenting).

¹²⁸ *R. v. Rothman* [1981] 1 S.C.R. 640, 672 (Can.).

¹²⁹ *Id.*

to admit them would bring the administration of justice into disrepute, i.e., would prejudice the public interest in the integrity of the judicial process.”¹³⁰ This language is very similar to that found in the final draft of section 24 of the Charter.¹³¹

B. THE ADOPTION OF THE CHARTER AND THE SUPREME COURT OF CANADA’S INTERPRETATION OF SECTION 24

After the adoption of the Charter of Rights and Freedoms, Canadian courts finally had concrete language to follow in determining whether to admit questionably obtained evidence at trial. Unlike the American exclusionary rule, which is not textually stated in the US Constitution, the Canadian Charter specifically states in section 24 that the purpose behind the rule is to prevent “the admission of it in the proceedings would bring the administration of justice into disrepute.”¹³² Therefore, unlike the language of the majority in *Leon*, *Evans*, and *Herring*, deterrence is not a factor that Canadian courts consider when gauging the admissibility of evidence.¹³³ In fact, the Canadian Supreme Court has repeatedly claimed that the goal of section 24 of the Charter is *not* to deter police conduct.¹³⁴ Former Canadian Justice Claire L’Heureux-Dubé has stated that “[the] main reason for this is that the price of exclusion is not paid by the police, and that consequently, from the police point of view, exclusion generally would amount to no punishment at all.”¹³⁵ As Professor Robert A. Harvie stated, the Canadian exclusionary rule “is aimed at protect[ing] the reputation of the judicial system by safe-guarding the fairness of the trial.”¹³⁶

The seminal case interpreting section 24 of the Charter was *R. v. Collins* in 1987.¹³⁷ In *Collins*, police officers accosted Collins while she was sitting in a bar, identifying themselves as police officers and then grabbing her throat to prevent her from swallowing any heroin they

¹³⁰ *Id.* at 649 (Estey, J., dissenting).

¹³¹ See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 24 (U.K.).

¹³² *Id.* § 24(2).

¹³³ See *United States v. Leon*, 468 U.S. 897, 906 (1984); *Arizona v. Evans*, 514 U.S. 1, 14–15 (1995); *Herring v. United States*, 555 U.S. 135, 143–45 (2009).

¹³⁴ See Harvie, *supra* note 114, at 795–96.

¹³⁵ *R. v. Duguay*, [1989] 1 S.C.R. 93, 123 (Can.); See also Harvie, *supra* note 114, at 795.

¹³⁶ Harvie, *supra* note 114 at 796.

¹³⁷ *R. v. Collins*, [1987] 1 S.C.R. 265 (Can.).

suspected she had in her mouth.¹³⁸ Upon a subsequent search of Collins, the police officers discovered a balloon of heroine clenched in her hand, which she attempted to have suppressed at trial under section 24.¹³⁹ The trial court judge ruled that the assaulting officer did not have reasonable suspicion to search Collins, so the search that resulted in finding the heroin was unreasonable under section 24(2).¹⁴⁰ However, the judge decided that the admission of the evidence would not bring the administration of justice into disrepute and allowed the heroin to be admitted.¹⁴¹ Collins was convicted, and the British Columbia Court of Appeals dismissed her appeal.¹⁴² Justice Lamer, writing for the majority of the Canadian Supreme Court, overturned the decision of the trial court and called for a new trial without the admission of the heroin.¹⁴³

Justice Lamer stated that the standard for excluding wrongfully obtained evidence is lower than the traditional “shock the conscious” test that courts had been implementing when deciding whether to exclude evidence.¹⁴⁴ Lamer explained that “[t]he ‘community shock’ test is not determinative of admissibility of evidence obtained in violation of Charter rights. In the context of a Charter violation, the threshold for exclusion of evidence is lower as it involves a violation of the most important law of the land.”¹⁴⁵ Instead, the Court stated that now “the test is whether admission of the evidence would bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case.”¹⁴⁶ The Court listed the main factors to be considered as “those which affect the fairness of the trial, those relating to the seriousness of the Charter violation and those which relate to the effect of excluding the evidence.”¹⁴⁷ Hence, after the ruling in *Collins*, the test for the exclusion of evidence became more of a balancing test of factors.

¹³⁸ R. v. Collins, [1983] W.C.D. 64 (Can. B.C. Cnty. Ct.).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² R. v. Collins, [1983] B.C.W.L.D. 1390 (B.C. App.).

¹⁴³ R. v. Collins, [1987] 1 S.C.R. 265, para. 42 (Can.).

¹⁴⁴ *Id.* at 267.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

C. THE *COLLINS* FACTORS REVISITED: *GRANT* AND ITS PROGENY

The *Collins* balancing test and factors remained the primary guide for excluding evidence under section 24(2) for approximately twenty years until the Canadian Supreme Court revisited the *Collins* factors in 2009 in *R. v. Grant*.¹⁴⁸ Admitting that the guidelines set out in *Collins* have resulted in inconsistent application, Chief Justice McLachlin began the Court's opinion by stating "[e]xisting jurisprudence on the issues of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results." Therefore, McLachlin believed, it was time to reexamine the test laid out in *Collins* two decades prior.¹⁴⁹

In *Grant*, three police officers approached the defendant after they noticed he was fidgeting with his coat and pants and acting "in a way that aroused their suspicions."¹⁵⁰ He was told to keep his hands in front of him, and two of the officers stood behind Grant, obstructing his ability to freely move about.¹⁵¹ After questioning, Grant admitted that he had some marijuana and a firearm on him, which the police officers found on his person.¹⁵² At trial, Grant moved to have the evidence suppressed, claiming that he had been unreasonably detained and that the officers had violated his Charter rights.¹⁵³ The trial judge ruled that there had been no Charter breach, and the firearm was allowed into evidence.¹⁵⁴ The Ontario Court of Appeals reversed the trial court's finding that there was a Charter violation, but held that the firearm should still be admitted as per section 24(2).¹⁵⁵ The Canadian Supreme Court agreed that there had been a Charter violation, and also agreed that "the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute."¹⁵⁶ In doing so, the Court developed new criteria for determining whether evidence should be excluded under section 24(2), overturning the traditional *Collins* test.

The majority reiterated that section 24(2) is intended to "maintain the good repute of the administration of justice."¹⁵⁷ This,

¹⁴⁸ *R. v. Grant* [2009] 2 S.C.R. 353, 355 (Can.).

¹⁴⁹ *Id.* at 367–68.

¹⁵⁰ *Id.* at 369.

¹⁵¹ *Id.* at 441.

¹⁵² *Id.* at 354.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 354–55.

¹⁵⁶ *Id.* at 356–57.

¹⁵⁷ *Id.* at 392.

according to the Court, “embraces maintaining the rule of law and upholding Charter rights in the justice system as a whole.”¹⁵⁸ And once again, the Court specifically stated that the exclusionary rule “is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns.”¹⁵⁹ In determining whether or not to admit wrongfully obtained evidence at trial, the Court said that the trial court must

assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society’s interest in the adjudication of the case on its merits.¹⁶⁰

In clarifying the need for balancing, the Court explained that “[t]he more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the courts to dissociate themselves from that conduct.”¹⁶¹ Therefore, the Court did away with the more abstract factors listed in *Collins*, and created a more workable test for courts to follow, placing even more emphasis on the need to maintain judicial integrity.¹⁶²

PART III: LOOKING NORTH—WHAT THE UNITED STATES CAN LEARN FROM THE CANADIAN EXCLUSIONARY RULE

A. DRAWBACKS OF THE CANADIAN EXCLUSIONARY RULE

As Professor William H. Pizzi observed, the new, simplified test set out in *Grant* does not always create a simple answer to the question of excluding evidence, but it does elicit a “far more honest discussion of what is at stake” than the United States’ exclusionary rule, where the balancing is done behind the scenes in the form of “technical battles” over probable cause or reasonable suspicion.¹⁶³ In addition, the *Grant* balancing test avoids the convoluted and “impossible burden of

¹⁵⁸ *Id.* at 393.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 394.

¹⁶¹ *Id.*

¹⁶² *Id.* at 395.

¹⁶³ William H. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679, 719 (2010).

establishing that exclusion will in fact deter police in the future.”¹⁶⁴ The exclusionary rule under *Grant* is also beneficent because it makes “the seriousness of the Charter violation . . . the key consideration no matter how serious the offence [sic].”¹⁶⁵

However, there are still numerous drawbacks to the balancing test created in *Grant*, particularly the fact that the *Grant* criteria still leaves open for debate just how serious a government actor’s rights-infringing violation must be before it requires exclusion.¹⁶⁶ And, most crucially, by still allowing evidence to be omitted for minor violations of Charter rights,¹⁶⁷ the Canadian Supreme Court places less emphasis on (and possibly does a grave disservice to) on the importance and sanctified status of the rights laid out in the Canadian Charter. This stands in stark opposition to the “fundamental constitutional importance” of the Fourth Amendment’s protections that was once exalted by the United States Supreme Court.¹⁶⁸

B. WHAT THE UNITED STATES CAN LEARN FROM *GRANT* TO FIX ITS EXCLUSIONARY RULE

After the ambiguity and uncertainty created in *Herring*, there is little doubt that the American exclusionary rule needs to be revisited and clarified.¹⁶⁹ Although *Herring* as it stands now only applies to a police officer’s reasonable reliance on a warrant, it is easy to imagine the holding being applied to cases where officers make an erroneous determination of probable cause or where an officer does not have adequate reasonable suspicion to stop a suspect.¹⁷⁰ Also, if courts begin regularly admitting illegally obtained evidence, police officers might begin acting within the “good faith error” margin defined by the court in making probable cause determinations, without regard to whether their actions actually fall within the Fourth Amendment.¹⁷¹ As one commentator put it, allowing police officers the discretion to determine

¹⁶⁴ Don Stuart, *Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms*, 16 SW. J. INT’L L. 313, 320 (2010).

¹⁶⁵ *Id.* at 326.

¹⁶⁶ *Id.* at 327.

¹⁶⁷ *Id.* at 321.

¹⁶⁸ *United States v. Leon*, 468 U.S. 897, 931 (1984) (Brennan, J. dissenting).

¹⁶⁹ See *supra* notes 109–111 and accompanying text.

¹⁷⁰ Smith, *supra* note 7, at 680.

¹⁷¹ *Id.* at 681.

the scope of the Fourth Amendment protections is “for all practical purposes asking the fox to guard the henhouse.”¹⁷²

So how can the United States look to Canadian law for guidance in determining the proper scope of the exclusionary rule? One option would be to simply overrule the long-held precedent of *Mapp v. Ohio* and simply adapt a balancing test similar to the one the Canadian Supreme Court laid out in *Grant*.¹⁷³ This route could create much more transparency in judicial decisions regarding excluding evidence and could create more guidance for lower courts.¹⁷⁴ However, American courts already seem to be implementing a type of balancing test, as the Supreme Court has stated the “the benefits of deterrence must outweigh the costs” before evidence should be excluded.¹⁷⁵

Yet, overruling *Mapp* and implementing a balancing test consisting of arbitrary factors would undermine the very constitutional mandate from which the exclusionary rule flows—specifically, that “the *Weeks* rule is of constitutional origin.”¹⁷⁶ Just as true in 1961 when the *Mapp* decision was handed down, allowing evidence obtained in violation of the Fourth Amendment, no matter how minor, would make “the assurance against unreasonable federal searches and seizures . . . ‘a form of words.’”¹⁷⁷

What the United States should take note of from Canadian Supreme Court in *Grant* is the first factor laid out: the seriousness of the Charter-infringing state conduct, or, put another way, if the admission of evidence would give the impression the judicial system condones the state conduct.¹⁷⁸ In order to rectify the mess created by *Herring* and the other good faith exceptions to the exclusionary rule, American courts should return to a strict following of the *Mapp* precedent and exclude all evidence obtained in violation of the Fourth Amendment.¹⁷⁹ However, US courts could start using a “seriousness” test in their determination of whether there was a Fourth Amendment violation at all. For example, in *Herring*, instead of finding a warrantless search and seizure, the court could look at the officer’s good-faith reliance on the supposed warrant

¹⁷² *Id.*

¹⁷³ See Pizzi, *supra* note 163, at 685–86.

¹⁷⁴ *Id.* at 731.

¹⁷⁵ *Herring v. United States*, 555 U.S. 135, 141 (2009).

¹⁷⁶ *Mapp v. Ohio*, 367 U.S. 649 (1961).

¹⁷⁷ *Id.* at 654–55.

¹⁷⁸ *R. v. Grant* [2009] 2 S.C.R. 353, 357 (Can.).

¹⁷⁹ See *Mapp*, 367 U.S. at 654–55.

and determined that there was no Fourth Amendment violation.¹⁸⁰ In other words, it could determine there was no warrantless search because, in essence, there was a warrant that was relied upon in good faith.¹⁸¹ Because there was no violation, the exclusionary rule would not apply, and the court's good faith determination would revolve around the violation itself, not whether the exclusionary rule should apply or whether exclusion would deter police conduct.¹⁸² On the other hand, if it was found that an officer deliberately placed an innocent person's name in a warrant database, which led to a subsequent arrest, then the seriousness of the incident is escalated, and a court could find there was a Fourth Amendment violation and *Mapp* would automatically apply.¹⁸³ This method would definitely not be without its problems, as courts would still be left to grapple with the notion of negligent versus intentional conduct in determining whether a violation occurred.¹⁸⁴ However, these determinations would be dealt with in the proper context of whether any illegal act occurred, not what the proper penalty should be. Trial courts can examine facts and testimony to determine whether the Fourth Amendment was violated, not whether excluding evidence would reach some ambiguous standard of deterrence.¹⁸⁵ And although subject to its own criticism and scrutiny, this method would ensure that the constitutional origins of the American exclusionary rule is respected and enforced.¹⁸⁶

CONCLUSION

In order to eliminate the erosion of the constitutional protections of the Fourth Amendment due to the expansion of good faith exceptions to the exclusionary rule, the United States Supreme Court should overrule the decisions in *Leon*, *Evans*, and *Herring*, and return to the hardline rule of *Mapp v. Ohio*.¹⁸⁷ While an explicit balancing test like the one the Canadian Supreme Court set out with their decision in *Grant* could create more clarity and predictability for lower courts, the

¹⁸⁰ See *Herring*, 555 U.S. at 137.

¹⁸¹ *Id.*

¹⁸² See *id.* at 138.

¹⁸³ See discussion *supra* Part I.A.

¹⁸⁴ See *Herring*, 555 U.S. at 144.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 141.

¹⁸⁷ See *United States v. Leon*, 468 U.S. 897 (1984); *Arizona v. Evans*, 514 U.S. 1 (1995); *Herring v. United States*, 555 U.S. 135 (2009); *Mapp v. Ohio*, 367 U.S. 649 (1961).

constitutional origin of the US exclusionary rule requires mandatory exclusion for evidence obtained in violation of the Fourth Amendment.¹⁸⁸ If courts must utilize a balancing test, it should come at the stage of determining whether a violation occurred, not what the proper penalty for a violation should be. Only through a strict adherence to the hardline rule in *Mapp* can courts truly uphold the sanctity of American Fourth Amendment protections.

¹⁸⁸ *Leon*, 468 U.S. at 931 (Brennan, J., dissenting).