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Herring v. United States: A Threat to Fourth Amendment Rights?

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Comment

HERRING V. UNITED STATES: A THREAT TO FOURTH AMENDMENT RIGHTS?†

I. INTRODUCTION

The Fourth Amendment protects privacy by forbidding unreasonable searches and seizures without a warrant.[1] The Fourth Amendment grew out of the colonists' experience with excessive searches and seizures, which the English used as tools of censorship and tyranny.[2] Over time, the Supreme Court of the United States developed the exclusionary rule as a response to Fourth Amendment violations.[3] The Court has shaped the rule by defining exceptions that limit its application.[4] One limitation the Court has established is the good-faith exception, which seeks to minimize the social costs[5] of exclusion by allowing evidence when law enforcement officials conduct unconstitutional searches and seizures in good faith.[6] In *Herring v.*

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† Winner of the 2009 Valparaiso University Law Review Case Comment Competition.

1 The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2 Potter Stewart, *The Road to* Mapp v. Ohio*: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1371 (1983). Stewart outlines the history of searches and seizures grounded in the English general warrant and writ of assistance, which were viewed as a threat to individual liberty. *Id.* at 1369–71. Stewart suggests that this perspective led the Framers to craft the Fourth Amendment. *Id.*

3 *See* Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (establishing the exclusionary rule as mandatory); Weeks v. United States, 232 U.S. 383, 398 (1914) (forbidding use of improperly obtained evidence at trial). *See generally* Stewart, *supra* note 2, at 1372–77 (summarizing the slow progression of jurisprudence that led to *Weeks*).

4 *See* Elizabeth Canter, Note, *A Fourth Amendment Metamorphosis: How Fourth Amendment Remedies and Regulations Facilitated the Expansion of the Threshold Inquiry*, 95 VA. L. REV. 155, 177–85 (2009) (discussing the constraints upon the exclusionary rule that developed after *Weeks*).

5 *See* Illinois v. Gates, 462 U.S. 213, 257–58 (1983) (describing the cost of exclusion as denying "the jury access to clearly probative and reliable evidence"); United States v. Payner, 477 U.S. 727, 734 (1980) (viewing exclusion as an impediment to the judicial fact-finding process); People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (describing the social costs of exclusion as letting the criminal "go free because the constable has blundered").

6 *See* Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (recognizing the good-faith exception applied to errors of judicial personnel); Illinois v. Krull, 480 U.S. 340, 349–50 (1987) (applying exception to warrantless searches in reliance on a statute); United States v. Leon,

United States, the Court granted certiorari to interpret the application of the exclusionary rule to a Fourth Amendment violation resulting from negligent police record-keeping.[7] Weighing the deterrent effect of exclusion against the social costs of suppressing the evidence, the Court held, in a five-to-four decision, that the evidence should not be suppressed because exclusion would not meaningfully deter merely negligent clerical conduct of police personnel.[8]

This Comment first presents the facts of *Herring v. United States*.[9] Next, this Comment outlines the legal background supporting *Herring*.[10] Lastly, this Comment analyzes the Court's decision in *Herring* and assesses the current and future status of the exclusionary rule.[11]

II. STATEMENT OF THE FACTS IN *HERRING V. UNITED STATES*

In July, 2004, Bennie Dean Herring ("Herring"), a convicted felon, drove to an Alabama Sherriff's Department to recover an item from his impounded car.[12] An investigator had the county warrant clerk search for outstanding warrants for Herring; when none were found, the clerk contacted her counterpart in a neighboring county.[13] The other clerk found an active arrest warrant for Herring in the database, which was relayed to the investigator.[14] After requesting a copy of the warrant be faxed to him, the investigator and a deputy immediately pursued Herring and arrested him, which led to the discovery of methamphetamine in his pocket and a pistol in his car.[15]

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468 U.S. 897, 922 (1984) (establishing exception if police act "in objectively reasonable reliance" on invalid warrant); United States v. Peltier, 422 U.S. 531, 542 (1975) ("[Evidence] should be suppressed only if . . . the law enforcement officer had knowledge . . . that the search was unconstitutional under the Fourth Amendment.").

7 129 S. Ct. 695, 699 (2009). The majority also indicated that the Court's holding would resolve any conflict among jurisdictions. *Id*. *Compare* United States v. Herring, 492 F.3d 1212 (11th Cir. 2007) (denying Herring's motion to suppress illegally obtained evidence), *with* Hoay v. State, 71 S.W.3d 573 (Ark. 2002) (excluding illegally obtained evidence as result of police clerical error).

8 *Herring*, 129 S. Ct. at 702.

9 *See infra* Part II (laying out the pertinent facts of *Herring v. United States*).

10 *See infra* Part III (explaining the development of the exclusionary rule as a judicially created mechanism for enforcing Fourth Amendment rights).

11 *See infra* Parts IV.A–B (analyzing the *Herring* decision and discussing its impact on the Supreme Court's Fourth Amendment jurisprudence).

12 *Herring*, 129 S. Ct. at 698.

13 *Id.* Herring's brief suggested that the investigator sought to arrest Herring for personal reasons because he had information to connect Herring to a local murder. *Id*. at 705 (Ginsburg, J., dissenting).

14 *Id.* at 698.

15 *Id.*

Shortly after Herring's arrest, the investigator learned that the warrant was invalid because a clerical error in the neighboring county prevented the database from being updated.[16] Yet, Herring was still indicted for illegal possession of the gun and methamphetamine.[17] Before trial, Herring moved to suppress the evidence on Fourth Amendment grounds.[18] The trial court denied the motion based on the investigator's good-faith reliance on the warrant.[19] The Eleventh Circuit affirmed and held that the error was merely negligent, not deliberate, and the deterrent benefit of exclusion would be marginal or nonexistent.[20] The Supreme Court then granted certiorari.[21]

III. LEGAL BACKGROUND OF *HERRING V. UNITED STATES*

The Fourth Amendment allows governmental searches and seizures only when proper measures are taken to protect the privacy rights of citizens.[22] In 1914, the Supreme Court established the exclusionary rule when it suppressed illegally obtained evidence in *Weeks v. United States*.[23] *Weeks* is the starting point in the evolution of exclusionary rule jurisprudence.[24]

In 1949, the Court in *Wolf v. Colorado* described the exclusionary rule as only one of the effective remedies available to the states to protect Fourth Amendment rights, and did not extend the rule to the states.[25] In 1961, however, *Wolf* was overruled by *Mapp v. Ohio*.[26] In *Mapp*, the Court

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16 *Id.*

17 *Id.* at 699. 18 U.S.C. § 922(g)(1) (2006) prohibits possession of a firearm by a convicted felon. 21 U.S.C. § 844(a) (2006) prohibits possession of illegal drugs such as methamphetamine.

18 *Herring*, 129 S. Ct. at 699.

19 *Id.*

20 *Id.*

21 *Id.* *See supra* note 7 and accompanying text (explaining the Court's rationale for granting certiorari).

22 *See supra* note 1 (presenting text of the Fourth Amendment).

23 232 U.S. 383, 398 (1914). In *Weeks*, police violated the Fourth Amendment by invading Weeks's home without a warrant and confiscating his personal belongings. *Id.* at 387–88. Police improperly retained part of the property to use at trial. *Id*. at 388. The Court excluded the evidence because if it had been returned, it would have been unavailable at trial. *Id*. at 398.

24 *See* Stewart, *supra* note 2, at 1380–89 (discussing three possible constitutional bases for exclusion: (1) the Constitution itself; (2) the government's interest in preserving its integrity by preventing courts from reviewing tainted evidence and committing a second Fourth Amendment violation; and (3) a constitutionally required remedy because it is the only effective incentive for Fourth Amendment compliance).

25 338 U.S. 25, 27, 31 (1949).

26 367 U.S. 643, 655–56 (1961). In *Mapp*, a woman was arrested, tried, and convicted of possessing obscene materials, which were seized by police when they forced themselves

held "that all evidence obtained by searches and seizures in violation of the Constitution [was][] . . . inadmissible," which solidified the rule announced in *Weeks* as the constitutionally required remedy for Fourth Amendment violations.[27] Then, in 1974, the Court decided *United States v. Calandra*, which resulted in a shift from exclusion as the rule to exclusion as the exception, applicable only when it achieved a deterrent effect.[28]

In subsequent cases, the Court limited exclusion to cases of flagrant, official misconduct.[29] The Court eroded the exclusionary rule further by affording deference to magistrates in determining probable cause and to police officers acting without warrants.[30] Then, in 1984, the Court in *United States v. Leon* established the good-faith exception, which prevented exclusion unless it achieved a substantial deterrent effect.[31] The Court reasoned that when an agent of the State conducted a search that reasonably relied on an invalid warrant, the deterrent effect of exclusion was minimal and insufficient to outweigh its social costs.[32] Thus, *Leon* defined the good-faith exception and the balancing test that would later support the majority opinion in *Herring*.[33]

After *Leon*, the Court applied the good-faith exception to cases involving judicial and legislative errors.[34] In 1995, *Arizona v. Evans*

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into her home without a warrant claiming to be searching for a bombing suspect. *Id.* at 644–45. *Mapp* also applied the exclusionary rule to the states. *Id.* at 655.

27 *Id.* at 655–56.

28 414 U.S. 338, 348 (1974) (describing the exclusionary rule as a judicially created remedy to "safeguard Fourth Amendment rights generally through its deterrent effect"). *See also* Elkins v. United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

29 *See* Franks v. Delaware, 438 U.S. 154, 155–56 (1978) (finding negligent police miscommunications insufficient to invalidate a search); Stone v. Powell, 428 U.S. 465, 486 (1976) (requiring deterrent effect before excluding illegally obtained evidence at trial); United States v. Janis, 428 U.S. 433, 454 (1976) (applying the exclusionary rule only when it resulted in "appreciable deterrence[]"); Brown v. Illinois, 422 U.S. 590, 610–11 (1975); United States v. Peltier, 422 U.S. 531, 542 (1975) (applying the exclusionary rule only if the State agent had knowledge that the search was illegal).

30 *See* Ornelas v. United States, 517 U.S. 690, 699 (1996) (affording deference to police officers); Illinois v. Gates, 462 U.S. 213, 236 (1983) (requiring deference to magistrates).

31 468 U.S. 897, 922 (1984). In *Leon*, a police officer executed a facially valid search warrant that led to an arrest and the seizure of large quantities of illegal drugs. *Id.* at 902. The trial court found no probable cause to support the warrant, yet determined that the officer acted in good-faith. *Id.* at 903.

32 *Id.* at 919 (citing *Peltier*, 422 U.S. at 539 ; Michigan v. Tucker, 417 U.S. 433, 447 (1974)).

33 Herring v. United States, 129 S. Ct. 695, 699–701 (2009).

34 *See supra* note 6 (citing cases where the Court applied the exclusionary rule to errors committed by judicial and legislative personnel).

applied the good-faith exception to the errors of court clerical personnel,[35] but refused to decide whether the exception applied to errors committed by police personnel.[36] The Court reasoned that the exclusionary rule sought to curb police misconduct, not judicial misconduct; that court employees were unlikely to intentionally violate the Fourth Amendment; and that nothing suggested exclusion of the evidence would deter similar errors.[37] Justice O'Connor noted in a concurring opinion, however, that systemic or recurring clerical errors should trigger exclusion.[38]

In 2006, the Court considered the exclusionary rule again in *Hudson v. Michigan* and held that a violation of the "knock-and-announce" rule did not require exclusion.[39] Justice Scalia, writing for the majority in the five-to-four decision, depicted the exclusionary rule as a last resort, not a first impulse in response to Fourth Amendment violations.[40] Justice Scalia also emphasized the increasing professionalism of police forces, which implied that the exclusionary rule's success made it less necessary.[41] Justice Kennedy, however, intentionally stated in his concurring opinion that "the continued operation of the exclusionary rule[] . . . is not in doubt."[42] In his dissent, Justice Breyer defended the exclusionary rule as the primary tool for enforcing Fourth Amendment rights.[43] It was upon this stage of intra-Court dissonance regarding

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35 514 U.S. 1, 16 (1995). In *Evans*, a policeman arrested Evans based on a warrant found in the police database and seized marijuana from his car. *Id.* at 4. Evans sought exclusion of the evidence because the warrant had been quashed before the arrest. *Id.* A court clerk's error had prevented the police database from being updated to reflect the change. *Id.* at 5.

36 *Id.* at 16 n.5.

37 *Id.* at 15–16.

38 *Id.* at 16–17. *But see* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(e) (2004) (arguing that the Court in *Evans* should have focused on systemic deterrence rather than specific deterrence of particular players within the criminal justice system).

39 547 U.S. 586, 588 (2006).

40 *Id.* at 591.

41 *Id.* at 598–99. *But see* Craig M. Bradley, *Red Herring or the Death of the Exclusionary Rule?*, 45 TRIAL 52, 54 (2009) (commenting on the public's instinct to trust police too much); Stewart, *supra* note 2, at 1389 (stating that the only effective remedy to inspire police officers to control their professional zeal and to avoid violations of the Fourth Amendment is the exclusionary rule); Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706 (2009) [hereinafter *Retreat*] (arguing against the easing of police regulation and suggesting that improved professionalism makes it easier for the police to better regulation, such as the exclusionary rule).

42 *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment). *See* Bradley, *supra* note 41, at 53 (labeling Kennedy as the critical fifth vote in favor of keeping the exclusionary rule alive).

43 *Hudson*, 547 U.S. at 630 (Breyer, J., dissenting).

Fourth Amendment jurisprudence and a weakening exclusionary rule that Bennie Dean Herring entered.

IV. ANALYSIS OF HERRING V. UNITED STATES

A. The Herring *Opinion*

In granting certiorari in *Herring v. United States*, the Supreme Court cited its intent to resolve a circuit split regarding the application of the exclusionary rule to police personnel errors.[44] Many wonder if the Court's intent was truly that narrow or if the Court used the case to move toward overruling *Mapp* or eliminating the exclusionary rule altogether.[45] On its face, the *Herring* decision did not overturn *Mapp*, but extended the good-faith exception by finding that the marginal deterrence achieved by excluding evidence based on negligent police error was not sufficient to overcome the social costs of exclusion.[46]

Chief Justice Roberts opened by introducing important premises of the Court's decision.[47] First, Chief Justice Roberts accepted the parties' assumptions that Herring's Fourth Amendment rights were violated.[48] Next, Chief Justice Roberts used Supreme Court precedent to establish the principle that exclusion of evidence is not guaranteed in the event of a Fourth Amendment violation.[49] Chief Justice Roberts then agreed with the Eleventh Circuit and identified the nature of the police misconduct in *Herring* as merely negligent.[50]

Endorsing *Hudson*'s holding that exclusion is a last resort, Chief Justice Roberts reviewed the established constraints on the exclusionary

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44 Herring v. United States, 129 S. Ct. 695, 699 (2009). *See also supra* note 7 (noting that the Court also sought to resolve a split on the issue among the federal circuits).

45 *See* Canter, *supra* note 4, at 202 (questioning whether *Herring* will "erode the exclusionary rule as substantially as its rhetoric suggests"); Todd C. Berg, *Ruling by U.S. Supreme Court May Extend Beyond 'Good Faith' Cases*, MICH. LAWYER'S WEEKLY, Feb. 9, 2009, *available at* 2009 WLNR 7602532 (noting that criminal law specialists view *Herring* as more than mere interpretation of the good-faith exception); Bradley *supra* note 41, at 52; Adam Cohen, *Is the Supreme Court About to Kill Off the Exclusionary Rule?*, N.Y. TIMES, Feb. 16, 2009, at A22, *available at* 2009 WLNR 3010228 (describing a memo written during the Reagan administration by Chief Justice Roberts supporting elimination of the exclusionary rule); Barry Kamins, *The Exclusionary Rule: Beginning of the End?*, 241 N.Y. L. J. 3 (Apr. 6, 2009) (considering whether *Herring* extended *Evans* or set the stage for overturning *Mapp*).

46 *Herring*, 129 S. Ct. at 704.

47 *Id.* at 699–700 (Justices Scalia, Kennedy, Thomas, and Alito joined Chief Justice Roberts' majority opinion).

48 *Id.* at 699. Chief Justice Roberts questioned this assumption, however, and briefly commented that some searches based on faulty probable cause determinations would not constitute a constitutional violation. *Id.*

49 *Id.* (tracing this concept from *Weeks* through *Calandra, Leon,* and *Evans*).

50 *Id.* at 700.

rule in order to ascertain its applicability to Herring's case.[51] First, Chief Justice Roberts affirmed deterrence of police misconduct as the goal of the exclusionary rule.[52] Chief Justice Roberts then validated the deterrence standard enunciated in *Leon* that exclusion applied only when appreciable deterrence can be achieved.[53] Chief Justice Roberts rated the social costs of exclusion as very high, which made the standards of appreciable deterrence even higher when considering exclusion.[54] Chief Justice Roberts proffered as evidence of this standard the Court's good-faith exception to the exclusionary rule, which was formulated in *Leon*, *Krull,* and *Evans*, and was based on the lack of significant deterrent effect the exclusionary rule had on judicial personnel and legislatures.[55]

Second, Chief Justice Roberts incorporated the culpability of law enforcement conduct into the exclusionary rule analysis.[56] Chief Justice Roberts concurred with the Court that exclusion is most effective in response to flagrant Fourth Amendment abuses.[57] Noting that the Court never applied the exclusionary rule to a case of nonrecurring, attenuated negligence,[58] the Chief Justice concluded that a "flagrant or deliberate violation of rights[,]" not mere negligent behavior, was required to trigger the exclusionary rule.[59] Furthermore, Chief Justice Roberts addressed two misconceptions about exclusionary rule analysis. First, Chief Justice Roberts clarified that analysis of deterrence and culpability was an objective inquiry.[60] And, second, the Chief Justice refuted the implication that all record-keeping errors by police were immune from exclusion.[61] Finally, Chief Justice Roberts confronted Justice Ginsburg's concern about unreliable databases[62] and conceded that routine errors or

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51 *Id.* at 700–03.

52 *Id.* at 700.

53 *Id.*

54 *Id.* at 700–01. Chief Justice Roberts addressed the social costs standard in light of the *Leon* balancing test weighing the deterrent benefits of exclusion against its social costs to determine the exclusionary rule's applicability. *See* United States v. Leon, 468 U.S. 897, 920–22 (1984).

55 *Herring*, 129 S. Ct. at 701. *See supra* notes 6, 34–37 and accompanying text.

56 *Herring*, 129 S. Ct. at 701–02.

57 *Id.* at 702.

58 *Id.*

59 *Id.* Chief Justice Roberts conceded that liability for negligence deters misconduct, but contended its irrelevance because the deterrent effect of exclusion on negligent misconduct did not outweigh its social costs. *Id.* at n.4.

60 *Id.* at 703 (responding to the claim that investigator that arrested Herring had an ulterior motive in arresting Herring).

61 *Id.*

62 *See infra* note 69 and accompanying text (citing statistics suggestive of unreliable government databases).

patterns of Fourth Amendment violations by police record-keeping staff were worthy of exclusion.[63]

Ultimately, the Court did not apply the exclusionary rule, and Herring's conviction was affirmed.[64] After balancing the deterrent effect of exclusion against the social costs to the justice system, the Court concluded that the negligent police conduct that Herring experienced did not generate sufficient deterrence to "'pay its way'" and did not involve any "systemic error or reckless disregard of constitutional requirements."[65]

In dissent,[66] Justice Ginsburg argued that negligent record-keeping by police personnel threatened individual liberty, can be deterred, and lacked effective remedies besides exclusion.[67] Justice Ginsburg advocated for a forceful exclusionary rule to adequately protect Fourth Amendment rights.[68] Additionally, Justice Ginsburg described modern technology as pervasive and unreliable,[69] which created a palpable threat to individual liberty.[70] Noting the deterrent effect of tort liability for negligence, Justice Ginsburg concluded that exclusion could—and must—deter negligent record-keeping errors.[71] Justice Ginsburg rejected

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63 *Herring*, 129 S. Ct. at 704 (citing concurring opinions in *Evans* and *Hudson*).

64 *Id.*

65 *Id.*

66 *Id.* Justices Stevens, Souter, and Breyer joined Justice Ginsburg's dissent. Justice Breyer, joined by Justice Souter, dissented separately arguing that the good-faith exception should only apply to non-police errors resulting in constitutional violations. *Id.* at 710–11 (Breyer, J., dissenting).

67 *Id.* at 710 (Ginsburg, J., dissenting). Justice Ginsburg adopted "'a more majestic conception'" of the exclusionary rule as protecting privacy rights and limiting the tyrannical power of the government, not just its agents. *Id.* at 707 (Ginsburg, J., dissenting). Chief Justice Roberts dismissed Justice Ginsburg's dissent because she relied predominantly on dissenting opinions and secondary material. *Id.* at 700 n.2.

68 *Id.* at 706–07 (Ginsburg, J., dissenting) (citing Justice Brennan's dissent in *Calandra* that described the goals of exclusion to be deterrence of official misconduct, judicial collusion with official lawlessness, and promotion of public trust in government by assuring citizens that constitutional violations will not be tolerated). *See also* Terry v. Ohio, 392 U.S. 1, 13 (1968) (explaining that admitting evidence at trial "legitimize[d] the conduct" used to seize the evidence, thus requiring exclusion in cases of misconduct to avoid blessing the violation with official approval).

69 *Herring*, 129 S. Ct. at 708–09 nn.3–5 (Ginsburg, J., dissenting) (supporting her claim with government statistics highlighting flaws in terrorist watch-list databases, government employment verification systems, and criminal databases). *See generally* 122 HARV. L. REV. 1706, *supra* note 40 and accompanying text (discussing the effect of modernizing and professionalizing police forces).

70 *Herring*, 129 S. Ct. at 709 (Ginsburg, J., dissenting) (depicting an innocent citizen being stripped of his or her dignity by an illegal search caused by a public employee's database management error).

71 *Id.* at 708 (Ginsburg, J., dissenting).

the result of weakening the exclusionary rule—leaving citizens with no effective remedy to Fourth Amendment violations.[72]

B. Appraisal of the Exclusionary Rule and Its Future Post-Herring

Although seemingly on shaky ground, the exclusionary rule still exists post-*Herring*. Adhering to exclusionary rule precedent, the majority in *Herring* focused on balancing deterrence and social costs while clarifying the role of culpability in the analysis, which implies the vitality of the rule.[73] Yet, underneath the majority's holding lies a conflicted Court[74] and hints that the exclusionary rule is not as necessary as it once was, suggesting *Herring* has broader implications on the exclusionary rule.[75] Omission of pertinent discussions reveals the majority's broader goals.

For example, the Court dismisses *Mapp's* formative role in the history of the exclusionary rule by omitting reference to its holding that all illegally-obtained evidence is inadmissible in court.[76] While the majority correctly respects modifications to *Mapp*'s holding through the good-faith exception, it fails to consider the full stature of the Fourth Amendment's constitutional guarantee that the exclusionary rule serves to ensure.[77] Additionally, the majority's focus on deterrence as the sole purpose of the exclusionary rule ignores the value of excluding evidence to protect the integrity of the government.[78] Calculating the social costs of exclusion, Chief Justice Roberts also neglects the cost of public distrust

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72 *Id.* at 709 (Ginsburg, J., dissenting) (finding the following limitations to an effective remedy: (1) official immunity precluding a remedy through 42 U.S.C. § 1983 (2006), (2) lack of any incentive for police to improve databases, and (3) insurmountable burden of proof necessary for defendants to qualify for exclusion).

73 *Id.* at 704.

74 In both *Herring* and Hudson v. Michigan, 547 U.S. 586 (2006), the Court returned five-to-four decisions with Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito constituting the majorities and Justices Stevens, Breyer, Souter, and Ginsburg comprising the dissents. *See generally,* Kamins, *supra* note 45 (discussing Justice Kennedy's role in limiting the majority's ability to eliminate the exclusionary rule).

75 *Supra* note 41 and accompanying text (citing Justice Scalia's suggestion in *Hudson* that police professionalism makes civil liability sufficient as an incentive for officers to avoid Fourth Amendment violations and presenting perspectives that challenge Justice Scalia's conclusions about how police officers behave).

76 *Herring*, 129 S. Ct. at 699–700. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

77 *Mapp*, 367 U.S. at 655 (extending the exclusionary rule to the States and asserting the need to protect the constitutional right of privacy equallyagainst the Federal Government and the States given the incorporation of the Fourth Amendment through the Fourteenth Amendment).

78 *See id.* at 659 (citing Elkins v. United States, 364 U.S. 206, 222 (1960)); United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting); Terry v. Ohio, 392 U.S. 1, 13 (1968); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

of the government that results from the good-faith exception. By ignoring this "'more majestic conception'" of exclusion,[79] the majority implies a prioritization of police interests over individual liberties. Similarly, while the majority's analysis announces a general approach to determining the applicability of exclusion,[80] it relies on established standards of deference[81] without acknowledging them or the resulting increased burden of proof required to support exclusion.[82] The Court's deferential approach and the increased burden of proof ultimately eliminate any effective remedy for Fourth Amendment violations.[83] Again, these omissions by the majority appear to dismiss any concern for Fourth Amendment rights.

Taken together, these unspoken statements by the majority indicate an underlying intent to eliminate the exclusionary rule.[84] Justice Scalia's announcement in *Hudson* that increased police professionalism reduced the need for the exclusionary rule adds credibility to this suggestion.[85] Yet, it is not the potential loss of the exclusionary rule that needs to be mourned, but the impending demise of the Fourth Amendment looming post-*Herring*. Decreased exclusion of illegally obtained evidence undermines individual liberties and buttresses police power.[86] The risks of tyrannical power emerging from such a scenario led the Framers to craft the Constitution and Bill of Rights as guarantees of individual

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79 *Herring*, 129 S. Ct. at 700 n.2.

80 *See* Bradley, *supra* note 41, at 53.

81 *See supra* note 30 and accompanying text.

82 *See* Berg, *supra* note 45, paras. 14–15 (asserting that *Herring* could make life easier for prosecutors by decreasing the number of cases where deliberate constitutional violations could be proven); Stewart, *supra* note 2, at 1403 (predicting that a good-faith exception to the exclusionary rule would shift the police's attention to what courts will allow rather than what the Fourth Amendment requires, making it easier for police to avoid exclusion).

83 *Herring*, 129 S. Ct. at 709–10 (Ginsburg, J., dissenting). *See* Canter, *supra* note 4, at 179–83 (describing the contraction of the exclusionary rule resulting from deferential standards toward local judges and police); Stewart, *supra* note 2, at 1389 (concluding that the exclusionary rule represents the only effective remedy to Fourth Amendment violations).

84 *See* Cohen, *supra* note 45, at A22 ("[C]ritics of the exclusionary rule have high hopes that the Roberts [C]ourt will take the ultimate step of overruling Mapp v. Ohio."); Kamins, *supra* note 45, at 3 (stating that some believe that "*Herring* has established a foundation for the Court to chip away at the exclusionary rule over an extended period of time.").

85 *See supra* note 41 and accompanying text (discussing Justice Scalia's emphasis on increased police professionalism in *Hudson* and offering alternative perspectives on the resulting need for the exclusionary rule).

86 *See* Bradley, *supra* note 41, at 54 (criticizing *Herring*'s general attack on exclusion); *Retreat*, *supra* note 41, at 1727 (arguing that if the police "'capture' the judiciary," a police state is likely to result).

liberties.[87] Should *Herring* lead to continuing erosion of the exclusionary rule, a return to the constitutional abuses of the past could follow.[88]

V. CONCLUSION

Herring, although commendable for its loyalty to precedent, espouses flawed reasoning and incomplete consideration of public policy relative to the protection of constitutional rights. Consequently, the future of the exclusionary rule remains unclear. Given the current make up of the Court, the exclusionary rule is not likely to disappear soon. Nevertheless, *Herring* symbolizes a step onto a slippery slope necessitating renewed commitment to the foundational liberties established in the Fourth Amendment, so as to avoid the risk of tyranny that any future restrictions of the rule may create. If the exclusionary rule is at risk, an alternative remedy that effectively ensures law enforcement's adherence to the Constitution is needed to protect the valued right to privacy enshrined in the Fourth Amendment.[89]

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[87] *See* Stewart, *supra* note 2, at 1369–71 (tracing the Revolutionary history of the United States that resulted in the adoption of the Fourth Amendment in the Bill of Rights); *Retreat*, *supra* note 41, at 1727 ("If the police could . . . 'capture' the judiciary[,]" or in other words, eliminate the exclusionary rule, "the resulting system would be truly suggestive of a police state." (quoting JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 72 (3d ed. 1994))).

[88] *See* sources cited *supra* note 87 (implying the risk of tyranny associated with any failure by the Court to effectively protect citizens from violations of the Fourth Amendment).

[89] *See* Stewart, *supra* note 2, at 1397 (measuring proposals to amend or abolish the exclusionary rule by a standard that ensures protection of Fourth Amendment rights through sufficiently effective alternative remedies).

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