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Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing

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MOVING TARGETS: PLACING THE GOOD FAITH DOCTRINE IN THE CONTEXT OF FRAGMENTED POLICING

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INTRODUCTION

Don't say that he's hypocritical;
Say, rather, that he's apolitical.
"Once the rockets are up, who cares where they come down?
That's not my department," says Wernher von Braun.
Tom Lehrer, The Ballad of Wehrner von Braun

The debate sparked by *Herring v. United States*[1] is a microcosm of the quintessential debate about the scope of the Fourth Amendment's exclusionary rule and ultimately the appropriate breadth of police authority and constitutional review by courts.[2] The Good Faith Doctrine focuses on situations in which it is clear, in hindsight, that authority was wrongly exercised. Whether courts choose to suppress evidence to deter police from committing similar mistakes in the future reveals their position on the appropriate balance between efficiency and procedural justice, a balance well illustrated in Herbert Packer's classic book *The Limits of the Criminal Sanction*.[3]

In the book, Packer provided two "ideal type" models of the criminal process: the Crime Control Model and the Due Process Model.[4] Crime control emphasizes an efficient criminal process through early determination of guilt by law enforcement agents.[5] The model requires substantial

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1. 129 S. Ct. 695 (2009).

2. *See* Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 423-33 (2009) (tracing the history of Fourth Amendment jurisprudence as it relates to police discretion).

3. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

4. Neither of the two models is designed to provide a realistic description of the criminal justice system. As Packer explains, they are merely "ideal types," which provide two ends of a spectrum along which one might locate a specific system or track transitions in its adherence to certain principles. *Id.* at 152-54. It is important to keep in mind that Packer's book was written in 1968, based on a piece published in 1964, at the height of the Warren Court's involvement in constitutionalizing criminal procedure; Packer used this model to demonstrate how constitutional incorporation encouraged a move from crime control to due process. For more background on these choices, see Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671 (1999).

5. For example, Packer points out:

> The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty. The precise point at which this occurs will vary

deference to police officers and prosecutors, the "gatekeepers" of the criminal process.[6] As a corollary, the model allows patience with their mistakes.[7] By contrast, the Due Process Model's main goal is preserving accuracy and avoiding the conviction of the innocent.[8] Under a due process paradigm, law enforcement discretion is seen as potentially biased[9] and is therefore carefully curtailed by constitutional review and procedural hurdles as a "quality control" mechanism.[10]

Packer's models have been widely critiqued over the years.[11] Among the more convincing critiques is the notion that the models do not share an

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> from case to case; in many cases it will occur as soon as the suspect is arrested, or even before, if the evidence of probable guilt that has come to the attention of the authorities is sufficiently strong. But in any case the presumption of guilt will begin to operate well before the "suspect" becomes a "defendant."

PACKER, *supra* note 3, at 160.

6. *Id.* at 158-61.

7. Packer continues:

> In the presumption of guilt this model finds a factual predicate for the position that the dominant goal of repressing crime can be achieved through highly summary processes without any great loss of efficiency . . . , because of the probability that, in the run of cases, the preliminary screening process operated by the police and the prosecuting officials contain adequate guarantees of reliable fact-finding. Indeed, the model takes an even stronger position. It is that subsequent processes, particularly those of a formal adjudicatory nature, are unlikely to produce as reliable fact-finding as the expert administrative process that precedes them is capable of. The criminal process thus must put special weight on the quality of administrative fact-finding. It becomes important, then, to place as few restrictions as possible on the character of the administrative fact-finding processes and to limit restrictions to such as enhance reliability, excluding those designed for other purposes.

Id. at 162. This systemic reliance on administrative processes is confirmed by empirical evidence pointing to the large amounts of discretion exercised daily by police officers. This was noticed by police scholars during the Warren Court era. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966); *see also* NAT'L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (Wesley Skogan & Kathleen Frydl eds., 2004) [hereinafter FAIRNESS AND EFFECTIVENESS IN POLICING].

8. PACKER *supra* note 3, at 164-65.

9. The Crime Control Model:

> [A]s we have suggested, places heavy reliance on the ability of investigative and prosecutorial officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event. The Due Process Model rejects this premise and substitutes for it a view of informal, nonadjudicative fact-finding that stresses the possibility of error.

Id. at 163.

10. *Id.* at 230-33.

11. *See, e.g.*, Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 35 LAW & SOC. INQUIRY (forthcoming 2010).

epistemological basis, that the Due Process Model relates largely to doctrinal and normative mandates, while the Crime Control Model is by nature a pragmatic description of the everyday management of law enforcement.[12] Scholars today widely acknowledge that the post-Warren Court's decisions reflect a pendulum swing toward crime control. The shift is explained in four main themes.[13] First, the post-Warren Court emphasized that the ultimate mission of the criminal justice system is convicting the guilty and ensuring that the innocent go free, rather than creating bright-line rules. The Court placed more emphasis on the defendant's actual guilt—a practical application of Packer's "presumption of guilt."[14] Second, the Court shifted from relying on clear standards of action to allowing an assessment of police activities through a "totality of the circumstances" test.[15] Third, the post-Warren Court expressed more deference to police discretion, a recurring theme of acknowledging that police act in good faith under difficult conditions.[16] Finally, the Court tended to intervene less on behalf of the defendant on appeal, particularly collateral attacks before state courts.[17] Significant for this paper, these characteristics of the post-Warren Court are closely correlated with an important feature of the Crime Control Model—the increasing reliance on earlier steps in the criminal process and, in particular, broad deference to police discretion. Everyday officers exercise tremendous discretion and make on-the-spot decisions about exercising

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12. Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407 (1973); *see also* SKOLNICK, *supra* note 7; FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7.

13. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 4-10 (5th ed. 2008).

14. *Id.* at 4. The best example of this is perhaps the erosion of *Miranda v. Arizona*, 384 U.S. 436 (1966), to a "stepchild" in the constitutional family of rights, held by justices to be technical. United States v. Patane, 542 U.S. 630 (2004); Dickerson v. United States, 530 U.S. 428 (2000); Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); New Jersey v. Portash, 440 U.S. 450 (1979); Michigan v. Tucker, 417 U.S. 433 (1974).

15. WHITEBREAD & SLOBOGIN, *supra* note 13, at 6-7. This transition is notable in the shift from defining probable cause as two "prongs"—veracity and basis of knowledge, to examining it in light of the "totality of the circumstances." *Compare* Spinelli v. United States, 393 U.S. 410 (1969), *and* Aguilar v. Texas, 378 U.S. 108 (1964), *with* Illinois v. Gates, 462 U.S. 213 (1983). We discuss this later in greater detail.

16. WHITEBREAD & SLOBOGIN, *supra* note 13, at 7-8. See, for example, the expansion in *United States v. Leon*, 468 U.S. 897 (1984), and its continuous erosion until the recent decision in *Herring*, which gives the police leeway when relying on their own mistakes, as long as they are merely "negligent," rather than "reckless" or "intentional."

17. WHITEBREAD & SLOBOGIN, *supra* note 13, at 8-10. The narrowing of the door on habeas is particularly important. *See* Teague v. United States, 489 U.S. 288 (1989). In keeping with the main theme, actual innocence—a situation in which the "presumption of guilt" is violated—is not a barrier from collateral attack. Murray v. Carrier, 477 U.S. 478 (1986); Jackson v. Virginia, 443 U.S. 307 (1979).

their authority[18] or refraining from doing so.[19] Courts are well aware of this feature but defer to vague standards when it comes to police discretion. Courts do not view police discretion as a "necessary evil" but as a desirable feature of professionalism.[20] There are sound reasons for the policy. No web of bright-line rules could cover all situations in which police officers find themselves, and the system has vested interest in assuring both officer resourcefulness and officer safety.[21] Additionally, broad discretion to discard potential cases early in the process is an efficient way to control expensive and time-consuming caseloads. Mistakes, however, are bound to occur in this process and the application of the exclusionary rule reflects the extent to which courts are willing to "forgive" police mistakes for the sake of efficiency. A simple reading of *Herring* reveals a triumph of crime control over due process. The Supreme Court expanded the good faith exception in an opinion that applies broadly on its face. *Herring* declares,

> In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." In such a case, the criminal should not "go free because the constable has blundered."[22]

The holding sparked a lively debate about the fate of the exclusionary rule. Some commentators described the *Herring* decision as a "fundamen-

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18. Justice Warren's decision in *Terry v. Ohio*—decided at the height of the due process revolution—is an excellent example of the Court's awareness of the realities of police discretion: "[I]t is frequently argued that, in dealing with the rapidly unfolding and often dangerous situations on citystreets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." 392 U.S. 1, 10 (1968).

19. Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552-54 (1960).

20. For example, *Terry* stated:

> Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation.

Terry, 392 U.S. at 13.

21. A good example of this is the emergence of the "protective sweep" of houses, Maryland v. Buie, 494 U.S. 325 (1990), and cars, Michigan v. Long, 463 U.S. 1032 (1983), which are aimed at police safety and rely on an assessment of discretion regarding "reasonable suspicion." The suspicion needs to be articulable, but its nature is not proscribed.

22. Herring v. United States, 129 S. Ct. 695, 704 (2009) (internal citations omitted).

tal shift in exclusionary rule analysis."[23] Others argued that *Herring* is not a remarkable decision because it does not settle the complicated question of suppression when the law enforcement officer herself made the mistake.[24] Both arguments have some merit because *Herring*'s importance regarding who makes the mistake is neither clear on the face of the opinion, nor in current case law interpreting the good faith rule.

This distinction is vital for understanding *Herring*, and we therefore offer a new way to read the case. Relying on *Herring*'s facts, as well as the current circuit split with regard to illegal predicate searches, and on a previous case, *Arizona v. Evans*,[25] this Article argues that *Herring* reflects a healthy dosage of *real politik* and particular awareness of the realities of fragmented policing. American policing involves multiple agencies with a largely local focus and a lack of strong hierarchical oversight at the state or federal level. The outcome of *Herring*, when limited to its facts, acknowledges the complexities of decisionmaking, information-sharing, and overview in a multilateralized policing structure; it takes into account the possibility that vague responsibilities and redundancies will lead to mistakes and acknowledges that multilateralism significantly decreases the expectations of accountability and the effects of deterrent court rulings. When read in this fashion, *Herring* reflects a deep understanding of the organizational dimension of policing. Thus, *Herring* can be analogized to the Warren Court's realistic decision in *Terry v. Ohio*,[26] in which realities from the field entered case law in a more explicitly drafted opinion.

The Court's realism, however, has a dark side. Courts must be careful that realism's shortcomings do not outweigh its advantages.[27] On one hand, *Herring* contributes to a richer exclusionary rule discourse as a decision that fosters realistic understandings of accountability structures. Realism is more helpful for shaping effective deterrence structures than the abstract assumption that Supreme Court decisions deter law enforcement agencies. On the other hand, *Herring* also implies complacency with flawed accountability structures and allows the government to shirk responsibility for its mistakes by hiding behind multiple agencies and blurring the path of accountability. *Herring* allows a potential for future abuse

23. Steve C. Posner, *Posner on* Herring v. United States, *the Exclusionary Rule, and the USA PATRIOT Act "Fall of the Wall"*, 2009 EMERGING ISSUES 3647 (LEXIS), Feb. 6, 2009.

24. Andrew Z. Lipson, *The Good Faith Exception as Applied to Illegal Predicate Searches: A Free Pass to Institutional Ignorance*, 60 HASTINGS L.J. 1147, 1147 (2009).

25. 514 U.S. 1 (1995).

26. 392 U.S. 1 (1968).

27. It could be said that, as with *Terry*, there is a "good *Herring*" and a "bad *Herring*." Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1097-1100 (1998).

by discouraging efficient collaboration between agencies and incentivizing redundancies and inefficiency. Part I of the Article presents our interpretation of *Herring* as a case hinging upon the question "who made the mistake?" as the decisive element in establishing good faith. We rely on the actual holding of *Herring* in light of its facts, on the Court's previous decision in *Evans*, and on the current circuit split with regard to illegal predicate searches to conclude that a narrow and reasonable reading of the *Herring* doctrine is the appropriate reading. Part II expands upon the realities of fragmented policing that explain the *Herring* decision. This Article presents findings from the fields of public policy, criminology, and geography to support the assertion that American policing is characterized by a fragmented, localized structure with little overview and control, and much reliance on local agencies. Subsequently, Part II discusses problematic implications, detailing potential abuses and disincentives of not holding one police agency accountable for the mistakes of another. Finally, the segment argues that a "moving target" government party to the criminal process is fundamentally unfair to defendants without proper safeguards. Part III proceeds to discuss the legal and administrative paths to deal with the problem of fragmentation and accountability, with suggestions for collaboration and overview in the administrative context. The section then shifts to the legal arena and demonstrates how U.S. and Canadian law have handled fragmentation in other contexts. We then offer a solution: a multivariate analysis of the proper deterrence incentives, which will not only provide protection to the citizen tackling "moving targets," but also clearer and more detailed guidelines for future decisions.

I. *HERRING* IN CONTEXT: POLICE ACCOUNTABILITY IN A REALITY OF FRAGMENTATION

A. *Herring*'s Facts: Agency and Reliance

The story behind *Herring* is a bureaucratic computer blunder. The Dale County Sheriff's Office maintained warrant records for Dale County, and Sharon Morgan worked as the warrant clerk.[28] Generally, the clerk or judge would call the Sheriff's Office to notify them when the court recalled a bench warrant so that it could be removed from the system.[29]

On July 7, 2004, Investigator Mark Anderson of neighboring Coffee County learned that the defendant stopped at the Coffee County Sheriff's

28. Herring v. United States, 129 S. Ct. 695, 698 (2009).
29. *Id.*

Office to pick up some items.[30] He asked his county's warrant clerk, Sandy Pope, to check if the defendant had any outstanding warrants.[31] Sandy Pope called Sharon Morgan in Dale County, who checked her computer database and confirmed an active arrest warrant for failure to appear on a felony criminal case.[32] Sandy Pope relayed the information to Investigator Mark Anderson. He asked Sharon Morgan to fax a copy of the warrant as confirmation.[33] Investigator Mark Anderson stopped the defendant in his car, leading to the discovery of a gun and drugs within a few hundred yards of the Coffee County Sheriff's Office.[34]

Sandy Pope did not, however, find a copy of the warrant in her files.[35] She called the court clerk and learned that the judge recalled the warrant five months prior.[36] Sandy Pope called Sharon Morgan to inform her of the recall and Sharon Morgan contacted Investigator Mark Anderson by secure radio within ten to fifteen minutes.[37] By the time she reached him, the arrest and search had already occurred.[38] The Eleventh Circuit Court of Appeals found that someone in Dale County should have updated the database, found the error negligent and not reckless or deliberate, discussed extensively the purpose of the exclusionary rule, and affirmed the conviction.[39] The Supreme Court agreed.[40]

The Supreme Court concluded, "Petitioner's claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases."[41] While the Court admitted that suppression of evidence for a negligent police mistake is instructional, it explicitly declared that the benefit

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 699-700; *see also* United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007).
40. *Herring*, 129 S. Ct. at 699.
41. *Id.* at 704. Thus, the Court explained,

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. 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. The error in this case does not rise to that level.

Id. at 702.

does not outweigh the harm to the justice system.[42] Rather, the Court analogized to the legal standard for traversal of a search warrant, which requires intentional or reckless disregard for the truth.[43] Significantly, the Court also characterized the facts as "isolated negligence attenuated from the arrest."[44]

B. *Herring*'s Predecessors: The Good Faith Doctrine in *Leon* and *Evans*

Supreme Court decisions that preceded *Herring* suggest that the identity of the agent is a significant factor in analyzing accountability. In *United States v. Leon*,[45] decided in 1984, the Supreme Court first established an exception to the exclusionary rule for a law enforcement officer's "good faith" reliance on a facially valid search warrant that is later determined to be invalid. The Court explicitly directed trial courts to consider both the actions of the affiant as well as the actions of the officers who execute the warrant in considering good faith reliance.[46]

Subsequent decisions expanded good faith exceptions to include reliance on a magistrate's failure to make clerical corrections on the warrant,[47] reliance on a statute later declared to be unconstitutional,[48] and reliance on a warrant entry mistakenly present in the court's warrant records.[49] Many assumed a dividing line whereby the court would suppress evidence resulting from a law enforcement officer's error and not for an error by anyone else. The argument arose after *Evans*, where officers relied on an invalid warrant in records maintained by the court.[50] The Supreme Court's opinion explained that suppression for a judicial error does not serve the same instructional purpose as suppression for an error by a law enforcement officer.[51] Thus, "the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was

42. *Id.* at 704.

43. *Id.* at 703; *see also* Franks v. Delaware, 438 U.S. 154 (1978) (establishing the redact and retest analysis for intentional lies or reckless disregard for the truth in a search warrant affidavit).

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

45. 468 U.S. 897 (1984).

46. *Id.* at 923 n.24.

47. Massachusetts v. Sheppard, 468 U.S. 981 (1984).

48. Illinois v. Krull, 480 U.S. 340 (1987)

49. Arizona v. Evans, 514 U.S. 1 (1995).

50. *Id.* at 3-4.

51. *Id.* at 14-16.

ultimately found to be defective."[52] The distinction between the facts in *Evans* and *Herring* is that in *Herring*, the mistaken records were maintained by law enforcement employees, rather than by the court; and, it is important to note that, despite *Herring*'s focus on mens rea as the primary test for good faith, the decision did not overrule *Evans*.

C. *Herring*'s Uncertainties: The Debate on *Herring*'s Application to Illegal Predicate Searches

Had only the mens rea rationale of *Herring* been universally accepted, all questions of agent identity and fragmentation would have been resolved and the material question would be the egregiousness of the mistake. Circuit courts split regarding the broader implications. As Andrew Lipson points out, the fact patterns of *Herring* and its predecessors leave this question open as all five good faith decisions from the Supreme Court still involve good faith reliance by one actor on another.[53] Thus, Lipson argues that the good faith exception cannot apply where the same officer violates the Fourth Amendment with respect to a defendant before he personally obtains a warrant.[54] He terms this conduct the "illegal predicate search."[55] To Lipson, *Herring* simply affirms the previous principles of the Fourth Amendment by extending the good faith rule to illegal predicate searches,[56] while circuits that accept predicate searches depart dramatically from the Supreme Court's good faith case law.[57] Circuits that depart apply a rule that errors "close to the line of validity" do not merit suppression.[58] Lipson argues that such a rule encourages police misconduct when applied to an officer's own mistake and relies heavily on comparing three appellate opinions with similar facts spanning nearly a decade. Based on subsequent opinions in 1991 and 1996 after a 1989 ruling, he argues "it appears that the police forces in those cases did nothing to change their practice in airports in order to comport with the law."[59] Thus, he concludes, "Without exclusion, there is no reason for police departments and their officers to change their practices of violating the law."[60]

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52. *Krull*, 480 U.S. at 348; *see also* People v. Machupa, 872 P.2d 114, 119-24 (Cal. 1994).

53. Lipson, *supra* note 24, at 1154.

54. *Id.* at 1148.

55. *Id.*

56. *Id.* at 1147-48.

57. *Id.* at 1167.

58. *Id.* at 1168; *see also* United States v. McClain, 444 F.3d 556, 566 (6th Cir. 2006); United States v. White, 890 F.2d 1413, 1419 (8th Cir. 1989).

59. Lipson, *supra* note 24, at 1169.

60. *Id.*

D. *Herring*'s Silence: Implicitly Acknowledging Fragmentation

Case law that preceded *Herring* and the lower-court controversy that remained in its aftermath strongly suggest that the Court's decision was eased by the facts of the case, which featured one agent relying on another agent's mistake. The expansive transition from affirming police reliance on non-police governmental agents, as in *Evans*, to affirming reliance of one policing agency on another, becomes understandable if we assume that the Court did not see much difference between these two situations. The similarities stem from an understanding of the fragmented nature of American policing and the need to rely on other agencies' discretion and information.

Nevertheless, it is important to keep in mind that *Herring* never explicitly delves into a realistic description of policing. It is useful to contrast *Herring*'s silence to the much more explicit and realistic reasoning of *Terry*. In *Terry*, decided at the height of the Warren Court era and authored by Justice Warren himself, the Court upheld police authority to conduct lesser searches and seizures, such as stops and frisks, on the basis of reasonable suspicion, a lesser suspicion level than that which is required for full searches and arrests.[61] While the holding—especially in light of its progeny—appears to be a classic example of crime control, some commentators have argued that *Terry*'s "good" aspect is the Court's acknowledgment of the realities of policing, and that subsequent decisions wade into an area of police conduct that it had previously left completely unregulated for state agents and subject to a rigid probable cause analysis for federal agents.[62] In doing so, as Warren's clerk at the time explained later, *Terry* "set an important example for the Supreme Court and lower courts in later cases in their approach to the myriad issues that grow out of what Chief Justice Warren called 'the protean variety of the street encounter.'"[63]

Had *Herring* been explicit in its acknowledgment of fragmented policing, it could have been seen as a decision in the spirit of *Terry*—one that recognizes certain characteristics of the organization of policing, brings them into the light, and sets boundaries for police authority. Rather, the *Herring* opinion elected not to mention the divisions between the departments. The United States, however, briefed the following issue for *Herring*:

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61. Terry v. Ohio, 392 U.S. 1 (1968).

62. *See* Amar, *supra* note 27, at 1098-99.

63. Earl C. Dudley, Jr., Terry v. Ohio, *the Warren Court, and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 898 (1998).

> The lack of appreciable deterrent effects that would flow from requiring suppression in this case is further confirmed by the fact that the employee who made the negligent error in recordkeeping works for an entirely different police department than the officers who made the arrest.[64]

The United States went on to brief several issues dealing with agency and then distinguish several cases based on the difficulty of imputing knowledge between agencies.[65] At oral argument, Chief Justice Roberts mentioned the problem of imposing responsibility for checking warrants at every chain of command and specifically discussed the likelihood of poor resources for particular departments.[66] Justice Alito asked about the difficulty of dealing with protected civil-service employees in different departments,[67] and Justice Scalia specifically indicated that he would not impute knowledge to the officer.[68] The briefings and comments strongly suggest that the Justices' perceptions of how to realistically assess policing today directed their decision.

However, even had the *Herring* opinion included factually descriptive honesty of the *Terry* variety, it would not necessarily ensure a healthy policy outcome. In the context of *Terry*, frank discussion of overenforcement against minorities[69] did not prevent racial profiling.[70] In the context of *Herring*, fragmentation of accountability and governmental fairness must be balanced against the necessity of accountability.

II. MOVING TARGETS: AUTHORITY AND ACCOUNTABILITY IN POLICING

A. Policing in America: Plural, Multilateralized, Fragmented

In order to understand *Herring*, it is useful to examine the realities of a policing strategy referred to by police scholars as the "police industry."[71] In a study of democratic countries, David H. Bayley and Clifford D. Shear-

64. Brief for the United States at 33, Herring v. United States, 129 S. Ct. 695 (2009) (No. 07-513).

65. *Id.* at 36-43.

66. Transcript of Oral Argument at 20, *Herring*, 129 S. Ct. 695 (No. 07-513).

67. *Id.* at 21-22.

68. *Id.* at 11-12.

69. Terry v. Ohio, 392 U.S. 1, 14-15 (1968).

70. Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1275-77 (1998); *see also* Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133 (1998).

71. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7, at 47.

ing found a restructuring of policing worldwide, manifested as an increased fragmentation between different factions of policing.[72] Part of this trend is increased privatization of police services, but Bayley and Shearing refer to a broader process of "multilateralization."[73] Authorization and execution of policing are segregated so that commercial companies, nongovernmental authorizers of policing, individuals, and governments provide policing.[74] Many nongovernmental providers now perform the same tasks as the public police.[75] Governmental providers tend to prevent crime through punishing, but nongovernmental providers do so through exclusion and the regulation of access.[76] Even Jérôme Ferret, who objects to the term "multilateralization," highlights the considerable part played increasingly by local agencies, which is particularly impressive in European countries with a strong state tradition.[77]

The United States led the fragmentation curve for quite some time for a variety of political reasons.[78] Federalism and emphasis on municipal politics led to a persistent reluctance to unify fragmented government,[79] in particular to consolidate police departments or centralize law enforcement in other ways.[80] Many attempts to consolidate police departments faced strong resistance from local agencies, due to political and bureaucratic interests.[81] Local political control is perceived as a vital aspect of the legitimacy of the police.[82]

As an outcome, policing services are offered to the public by different providers.[83] While the estimated count of all federal, state, and local law enforcement agencies varies, Wesley Skogan and Kathleen Frdyl count

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72. DAVID H. BAYLEY & CLIFFORD D. SHEARING, THE NEW STRUCTURE OF POLICING: DESCRIPTION, CONCEPTUALIZATION, AND RESEARCH AGENDA vii-3 (2001), *available at* http://www.ncjrs.gov/pdffiles1/nij/187083.pdf.

73. *Id.* at 3.

74. *Id.* at 13-15.

75. *Id.* at 13-14.

76. *Id.* at vii.

77. Jérôme Ferret, *The State, Policing and "Old Continental Europe": Managing the Local/National Tension*, 14 POLICING & SOC'Y 49 (2004).

78. *See* Trevor Jones & Tim Newburn, *The Transformation of Policing?*, 42 BRIT. J. CRIMINOLOGY 129, 131 (2002) (comparing the amount of public police in the United States with that in the United Kingdom).

79. ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 14-16 (2001).

80. *Id.* at 233.

81. *See* ELINOR OSTROM ET AL., PATTERNS OF METROPOLITAN POLICING (1978).

82. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7, at 51.

83. *Id.* at 48 (citing OSTROM ET AL., *supra* note 81).

21,143 agencies and mention that others have estimated around 40,000.[84] These agencies significantly vary in size.[85]

Municipal police departments provide the lion's share of police service in the United States.[86] The Bureau of Justice Statistics mentions 13,524 agencies, with only 46 of these police departments employing more than 1,000 officers, and 771 of them with only one officer.[87] Local law enforcement at the county level includes approximately 3,000 sheriff's departments.[88] While fragmentation implies both redundancy and specialization, it also requires collaboration and division of labor between the multiple agencies. Elinor Ostrom, Roger B. Parks, and Gordon P. Whitaker, who conducted a large-scale survey of police services from the perspective of producers and consumers explained police as an "industry model."[89] They found that different functions were performed by different agencies. Duties such as general area patrol (the most resource-consuming police task) and traffic patrol are conducted by local agencies, as well as state police and highway patrol, based on geographical jurisdiction.[90] Within local police agencies, most traffic duties are performed by general patrol officers, and more complicated tasks, such as homicide investigations, are often outsourced to the county agencies.[91] Auxiliary services, such as radio communication, pretrial detention, entry-level training, and crime laboratory are shared services.[92] There are also a variety of informal arrangements for assistance and sharing information.[93] The report found more cooperation between agencies than expected.[94] Even within agencies, police officers have broad discretion about engaging in law enforcement, and large urban departments tend to compartmentalize their various services.[95]

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84. *Id.*

85. *Id.*

86. *Id.* at 49.

87. *Id.*

88. *Id.*

89. OSTROM ET AL., *supra* note 81, at 3.

90. *Id.* at 71-75, 105-12. For more on the geographical distribution of policing, see Nicholas R. Fyfe, *The Police, Space, and Society: The Geography of Policing*, 15 PROGRESS HUM. GEOGRAPHY 249 (1991).

91. OSTROM ET AL., *supra* note 81, at 320.

92. *Id.* at 321.

93. *Id.* at 321-24.

94. *Id.* at 321.

95. *See* HUNG-EN SUNG, THE FRAGMENTATION OF POLICING IN AMERICAN CITIES: TOWARD AN ECOLOGICAL THEORY OF POLICE-CITIZEN RELATIONSHIPS (2002). It should be mentioned that the book was criticized for using a twenty-five-year-old database. R. L. Garner, *Book Review: The Fragmentation of Policing in American Cities: Toward an Ecological Theory of Police-Citizen Relationships*, 23 CRIM. JUST. REV. 410, 410 (2003). This, however, demonstrates that fragmentation is not a new phenomenon.

The federal level encompasses sixty-nine law enforcement agencies.[96] There are also special district police, such as the American Indian Tribal Law Enforcement police.[97] Federal influence on local state agencies is very limited and federal initiatives consistently play a very small part in local policing.[98] Only senior officers train at the police academy.[99] Some police departments are supervised by the federal government through consent decrees aimed at improving services and curbing police brutality.[100] Until recently, little was known about the impact of post-9/11 initiatives on federal-state collaboration.[101] New research, however, in sixteen diverse police agencies suggests that the federal pressure to increase anti-terrorism enforcement and intelligence gathering practices did not trickle down as hoped.[102] The call to shift toward proactive data gathering met much resistance among local agencies, many of whom actually bolstered their community policing and outreach efforts.[103]

The state role is usually confined to setting minimum standards for the certification of police officers[104] or to the creation of law governing special police actions, such as high-speed pursuits or domestic violence incidents.[105] As with federal control, independence and fragmentation of local agencies considerably limits the effects of state control. For example, Ryken Grattet and Valerie Jenness found that despite statewide policies about hate crime, different localities interpreted these completely differently and implemented them in very different ways.[106]

In addition to federal, state, and local agencies, policing is provided by a broad range of specialized organizations, such as the Occupational Safety and Health Administration,[107] as well as by an enormous private sector.[108]

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96. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7, at 50.

97. *Id.*

98. *Id.* at 53.

99. *Id.*

100. *Id.*

101. *Id.* at 52.

102. Christopher W. Ortiz et al., *Policing Terrorism: The Response of Local Police Agencies to Homeland Security Concerns*, 20 CRIM. JUST. STUD. 91, 101, 103, 106 (2007).

103. *Id.* at 107.

104. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7, at 54.

105. *Id.* at 55.

106. Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC'Y REV. 893 (2005).

107. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7, at 56.

108. *Id.* at 55; *see also* RICHARD V. ERICSON & KEVIN D. HAGGERTY, POLICING THE RISK SOCIETY (1997).

Thus, some commentators perceive fragmentation as an aspect of privatization and commodification of policing.[109]

To mitigate the effects of fragmentation, local police agencies share services.[110] The International City Management Association estimates that police communications and jail services are among the government services most commonly shared through contracting or joint agreements between local governments.[111] In addition, police offices range from federally to locally created joint taskforces as well as similar ad-hoc collaborations.[112]

Steadfast support for fragmentation and localization of policing can be attributed to some of the policing innovations introduced in the last few decades. One such innovation was the introduction of the community policing paradigm, conceived in the late 1970s[113] and implemented throughout the 1990s,[114] which aimed at moving away from reactive, politicized crime control toward citizen involvement and a problem-solving mentality.[115] While definitions of community policing differ even among police officers,[116] it is common to understand it as Robert Trojanowicz, Victor E. Kappeler, Larry K. Gaines, and Bonnie Bucqueroux define it—as an "organizational strategy that promotes a new partnership between people and their police . . . [who] must work together as equal partners to identify, prioritize, and solve contemporary problems."[117] Fragmentation and localization are important features of community policing, because, as Trojanowicz, Kappeler, Gaines, and Bucqueroux point out, it "rests on decentralizing and personalizing police service, so that line officers have the opportunity, freedom, and mandate to focus on community building and community-based problem solving, so that each and every neighborhood

109. *See* Tim Newburn, *The Commodification of Policing: Security Networks in the Late Modern City*, 38 URB. STUD. 829, 832, 840 (2001).

110. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7, at 52.

111. *Id.*

112. For more on the evolution of such collaborative efforts, see FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL-LOCAL COLLABORATION (2003).

113. Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236, 250-57 (1979).

114. JEREMY M. WILSON, COMMUNITY POLICING IN AMERICA 2 (2006).

115. Kevin Stenson, *Community Policing as a Governmental Technology*, 22 ECON. & SOC'Y 373, 383-85 (1993). Some critics, however, question the extent of consent and collaboration involved in the strategy precisely because of its localization. Paul Gordon, *Community Policing: Towards the Local Police State?*, 4 CRITICAL SOC. POL'Y 39, 56 (1984).

116. Jayne Seagrave, *Defining Community Policing*, 15 AM. J. POLICE 1, 7 (1996).

117. ROBERT TROJANOWICZ ET AL., COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE 6 (2d ed. 1998).

can become a better and safer place in which to live and work."[118] Community policing requires a relaxation of police hierarchy, broad discretion to individual departments, and attention to neighborhood-specific problems and incidents.[119]

Similarly conducive to localized policing is a focus on carefully identified problem areas, referred to as "hot spots," and increased proactive police presence in these areas.[120] Numerous controlled studies have proven hot spots policing to be more effective than traditional reactive policing.[121] Hot spots policing is rooted in place-specific theories of crime, and subsequently, its successful implementation requires a good level of acquaintance with the local field and its particular problems and challenges.[122]

Other factors that support the localization of policing is fear of crime and public demand for accountability.[123] The emphasis on risk generated public reliance on a multitude of agencies.[124]

Fragmentation and specialization, however, are only one force among many that have shaped changes in policing. Police agencies constantly balance between the need for uniformity (civil liability, accreditation, technology, war on drugs), diversity (community policing, police unions), balancing forces, and the big picture (policing American societies and streets). Each police agency is the product of a unique balance of forces within its jurisdiction. It is this balance that explains the difference between police agencies.[125]

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118. *Id.*

119. WILSON, *supra* note 114, at 41-42.

120. Anthony A. Braga, *Hot Spots Policing and Crime Prevention: A Systematic Review of Randomized Controlled Trials*, 1 J. EXPERIMENTAL CRIMINOLOGY 317, 317-18 (2005).

121. *Id.* at 328-30.

122. David Weisburd et al., *Contrasting Crime General and Crime Specific Theory: The Case of Hot Spots of Crime*, *in* NEW DIRECTIONS IN CRIMINOLOGICAL THEORY 45, 50-52 (Freda Adler & Wiliam S. Laufer eds., 1993).

123. David I. Ashby, *Policing Neighbourhoods: Exploring the Geographies of Crime, Policing and Performance Assessment*, 15 POLICING & SOC'Y 413, 421, 435 (2005). For more on the impact of fear of crime on all aspects of public policy, see JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

124. ERICSON & HAGGERTY, *supra* note 108, at 3-14.

125. ROBERT H. LANGWORTHY & LAWRENCE F. TRAVIS III, POLICING IN AMERICA: A BALANCE IN FORCES (1994). One force that has impacted police in the opposite direction is the introduction of COMPSTAT as a management technique that emphasized hierarchy and close supervision of regional commanders. James J. Willis et al., *Making Sense of COMPSTAT: A Theory-Based Analysis of Organizational Change in Three Police Departments*, 41 LAW & SOC'Y REV. 147, 151-55 (2007). It is important to keep in mind, however, that COMPSTAT has been implemented almost exclusively in large metropolitan areas and at the municipal level, and that its implementation in tandem with community policing presents various challenges. James J. Willis et al., COMPSTAT and Community

B. Fragmentation and the Problem of Accountability

The fragmented nature of policing presents several challenges. The major source of concern is poor organization, stemming from redundancy of services and hierarchy.[126] Some studies, however, recognized situations in which fragmented policing actually increases law enforcement efficiency. As Mark Button, Tim John, and Nigel Brearley mention, some forms of offenders, such as militant environmentalists, are best addressed through organized surveillance and action conducted by several agencies separately, cooperating with regard to information.[127] But this must be weighed against the ability to safeguard quality and citizens' rights in the face of increasingly multilateralized policing.[128] Martha Minow suggests that fragmentation, particularly when multiple agencies are privatized, offers the advantages of improved quality and competition.[129] There are also advantages in localized services that have to do with the need to reach multiple constituencies in a personal way: "[i]t makes sense for a nation as large as the United States to recognize and value the capacities of groups smaller than the nation or the state but bigger than the individual or the family."[130] She expresses, however, serious concerns about accountability and commitment to civil rights and welfare.[131]

If Minow's argument can be restricted to situations in which public services are privatized, Donald Dobkin expresses concern about "the Administrative State" as a set of separate actors that are alienated from citizen concern, and whose decisionmaking is likely to be immune to review due to the courts' deference.[132] Similarly, David Markell has argued that excessive regulation reduces transparency and therefore hinders accountability.[133] According to Markell, the increased fragmentation allows government to achieve its goals through important allies, but the government

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Policing: Lessons from the Field, Paper Presented at the Annual Meeting of the American Society of Criminology, Atlanta, Georgia, (Nov. 2007), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/2/0/0/2/6/pages200265/p200265-1.php.

126. FAIRNESS AND EFFECTIVENESS IN POLICING, *supra* note 7, at 52.

127. Mark Button et al., *New Challenges in Public Order Policing: The Professionalisation of Environmental Protest and the Emergence of the Militant Environmental Activist*, 30 INT'L J. SOC. L. 17, 27-30 (2002).

128. BAYLEY & SHEARING, *supra* note 72, at 29-32.

129. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1241 (2003).

130. *Id.* at 1245.

131. *Id.* at 1260.

132. Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y 362, 364-65 (2008).

133. David Markell, *"Slack" in the Administrative State and Its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1, 4-5 (2005).

subsequently loses the ability to exert complete control over its operations.[134] Markell also highlights the fact that fragmentation creates more regulator/regulated relationships.[135] Ronald Moe, examining the "reinventing government" initiative of the early 1990s, critiques the movement for reducing traditional accountability by reducing hierarchy within agencies.[136]

Some commentators draw distinctions between different agencies and conditions with regard to the desirability of fragmentation. Colin Scott, who sees governmental fragmentation and redundancy in services as a positive development overall, nevertheless expresses concern about the undermining of traditional accountability structures with increased fragmentation.[137] Dorit Reiss, who studied the liberalization in markets of pluralized service providers, comes to the conclusion that in such situations "the question is less 'how much' accountability there is, but what form it takes."[138] She finds that agencies tended to be accountable to stakeholders for the services they provided (electricity and telecommunications), except in situations that required expert technical judgment.[139] Michael Ting, presenting a game theory model, argues that fragmentation and redundancy of service is a positive phenomenon when the different agencies have different goals in mind, but not when they share the same goals.[140]

While accountability issues are important for various types of agencies, problems of accountability are particularly acute with regard to the police. Even commentators who identify situations in which fragmentation is beneficial to accountability find that police fragmentation presents a unique set of problems. While localized police agencies possess unique goals and expertise pertaining to their particular community, they share the broader goal of crime control and law enforcement. The police are not only a service agency but also a coercive power. Concerns about abuse and lack of accountability are much more salient than with regard to service providers.

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134. *Id.* at 7-8.

135. *Id.* at 8.

136. Ronald C. Moe, *The "Reinventing Government" Exercise: Misinterpreting the Problem, Misjudging the Consequences*, 54 PUB. ADMIN. REV. 111, 113-16 (1994).

137. Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & SOC'Y 38 (2000).

138. Dorit Rubinstein Reiss, *Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden*, 31 LAW & POL'Y 111, 111 (2009).

139. *Id.* at 131-33.

140. Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274 (2003).

In addition, echoing Dobkin's concerns,[141] courts are increasingly deferent to police decisionmaking, particularly in Fourth Amendment contexts.[142]

Ian Loader pointed out that the multiplicity of institutional forms involved in police services presents challenges to several suppositions about the relationship between police and government. Loader argues for principles of police regulation that connect policing to processes of public will formation but remain plausible under the altered conditions of plural and networked policing.[143] As Loader explains,

> we can no longer adequately make sense of policing (if, indeed, we ever could) as the attempt of a sovereign body (the state) to exercise control over a bounded territory by means of a single institution (the police) in which is vested a monopoly over the use of legitimate violence—significant though that body and that institution are likely to remain.[144]

Instead, the developments in policing techniques

> call attention . . . to the appearance of a multiplicity of agencies, relationships, programmes and techniques by which the ordering of social life is carried out. In terms of *regulation*, these transformations indicate that we can no longer solely concern ourselves with how the public police can be made accountable to government, whether by legal, democratic or—as has been prominent of late—managerialist means. The pluralization of policing has generated a situation in which established intra-organizational modes of accountability (and their supporting structures of thought) are rendered limited and inadequate, and where novel policing forms are fast outstripping the capacity of existing institutional arrangements to monitor and control them. The world of plural policing remains, at best, weakly or obscurely accountable.[145]

To Loader, plural policing presents disadvantages in shifting responsibility for crime prevention to the citizens[146] and a sense of overregulation stemming from the multiplicity of the "quiet force of policing" that governs life from unexpected places.[147]

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141. Dobkin, *supra* note 132, at 364-65.

142. This was true even at the height of the Warren Court era: "[I]t is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." Terry v. Ohio, 392 U.S. 1, 10 (1967). For more on the courts' consistent deference to police discretion and its causes, see Aviram & Portman, *supra* note 2.

143. Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEGAL STUD. 323, 323-24 (2000).

144. *Id.* at 324.

145. *Id.*

146. *Id.* at 331.

147. *Id.* at 333.

More specifically, Claudia Dahlerus, who sampled nineteen European countries, found a strong correlation between institutional decentralization and repressive policing, finding that respect for civil rights decreases in decentralized settings, particularly pertaining to police repression of protesters and civil and political rights violations overall.[148] Some propositions to amend these problems on the policy level include creating a certain stratification of police services, according to which law enforcement problems are solved on the neighborhood level and with the community's support.[149]

These critiques suggest that serious concerns accompany police fragmentation. As we argue next, *Herring* increases the importance of systematically and formally addressing these concerns.

C. Concerns of Inefficiency and Abuse

When read in the context of fragmentation, *Herring* sends a problematic message to police agencies. The Court does not expect one police agency to be accountable for the mistakes of another. This premise is problematic in several ways.

First, the lack of unified accountability and existence of multiple agencies means that a person might be subject to search, seizure, and other manifestations of police power vis-à-vis several agencies simultaneously. This presents people with the difficulty of claiming redress from multiple agents in case of violation or mistake.

In addition, the *Herring* decision downplays deterrence. Fourth Amendment litigation consistently relies on the exclusionary rule as the best way to enforce provisions,[150] and concern about the quality of deterrence was a driving force behind the Good Faith Doctrine's design.[151] Em-

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148. Claudia Dahlerus, *Who's Minding the Locals? Decentralization, Diversity, and Political Conflict in European Democracies*, Paper Presentated at the Annual Meeting of the Midwest Political Science Association, Chicago, Illinois (Apr. 2007), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/1/9/7/1/3/pages197138/p197138-1.php.

149. DAVID H. BAYLEY, POLICE FOR THE FUTURE 138 (1994).

150. In *Mapp v. Ohio*, the Court stated:

> In short, the admission of the new constitutional right . . . could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

367 U.S. 643, 656 (1961).

151. For example, in *Hudson v. Michigan*, the Court stated:

> We have rejected indiscriminate application of the rule and have held it to be applicable only where its remedial objectives are thought most efficaciously served,—that is, where its deterrence benefits outweigh its substantial social costs.

pirical findings do exist that support the power of the exclusionary rule.[152] Additionally, as mentioned earlier, one of the reasons for upholding *Evans* was the assumption that suppression of evidence would not properly deter court records from computer blunders.[153] The expansion in *Herring*, however, implies that police agencies are not deterred when penalized for the mistakes of other agencies. Because such an assumption cannot always be the case, at a minimum, further analysis of actual deterrence is required.

Finally, *Herring*'s implicit deference to police fragmentation risks disincentivizing police agencies from consolidating and working mutually and efficiently. The concern is that agencies will prefer fragmentation to the risks and burdens of shouldering greater accountability. While *Herring* itself is unlikely to generate broad organizational changes within the police, in conjunction with other factors, the decision may lead to further fragmentation and overspecialization within departments and agencies.

III. UNTANGLING THE ACCOUNTABILITY MESS: LEGAL AND ADMINISTRATIVE SOLUTIONS

A. Agent Identity's Importance to the Exclusionary Rule

Since the identity of the agent or agency who made the mistake is intimately connected to the effectiveness of deterrence, this factor has been taken into consideration in various contexts of judicial review of policing. It is important to keep in mind that, since 1984, the good faith exception has assumed an application in a number of areas where courts previously struggled to define the proper remedy for seemingly minor errors. The case law now covers a broad array of conduct and circumstances with sometimes-contradictory relationships.

In *Boyd v. United States*,[154] the Supreme Court first established an exclusionary rule based on a fusion of Fourth Amendment protection from unreasonable search and seizure and Fifth Amendment protection from

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> . . . [W]hether the exclusionary sanction is appropriately imposed in a particular case . . . is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.

547 U.S. 586, 591-92 (2006) (internal citations and quotation marks omitted).

152. SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990 11 (1993). Interestingly, Walker has expressed dissatisfaction with the misinterpretation of his findings by Justice Scalia in *Hudson v. Michigan*, 547 U.S. 586 (2006), where his evidence in support of the success of the exclusionary rule was cited in support of an argument that the rule has already "worked" and is therefore no longer necessary. Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at 5.

153. Arizona v. Evans, 514 U.S. 1, 14-15 (1995).

154. 116 U.S. 616 (1886).

self-incrimination. The Court struggled to define the basis for exclusion and relied heavily on protection from self-incrimination:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty. [sic] and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other.[155]

The Court's opinion relied heavily on a famous British case discussing government intrusion more generally. Justice Bradley cited *Entick v. Carrington*,[156] a decision by Lord Camden in 1765, and explained that, "his great judgment on that occasion is considered as on [sic] of the landmarks of English liberty."[157] Reliance on *Entick* links the exclusionary rule to the social contract and the premise that legitimate government acts only when within the social contract.

In *Entick*, the jury found by special verdict that a member of the King's Privy Council, the Earl of Halifax, issued a warrant to officers to search on November 6, 1782.[158] Officers executed the warrant on November 11, 1782.[159] Lord Camden rejected several arguments regarding the identity of the Earl of Halifax as a magistrate and then took up the question of the legality of the warrant itself.[160] Lord Camden looked to the social contract and tort of trespass to explain the origin of a challenge to property seizures by the government:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law

155. *Id.* at 630.
156. 19 Howell's State Trials 1029 (1765).
157. *Boyd*, 116 U.S. at 626.
158. *Entick*, 19 Howell's State Trials at 1029.
159. *Id.*
160. *Id.*

> for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. [sic] If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.[161]

Lord Camden went on to distinguish special procedures for warrants to recover stolen property and rejected the claimed private privilege of office to search.[162] Finally, he cited to the English revolution for the principle that the King cannot violate the law by necessity and explained, "If the king himself has no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative."[163] *Entick* and *Boyd* firmly tie the origins of the exclusionary rule to the idea that government only acts legitimately where it acts within the proper boundaries of authority.

B. Struggling with Accountability: State Solutions for Fragmentation Problems

The problem of fashioning proper deterrence standards in fragmentation situations comes up in various stages of the criminal process. One particular example is the *Petite* policy, which places policy limits on the dual sovereignty doctrine by refraining from prosecuting in multiple jurisdictions for the same crime unless absolutely necessary.[164] For the purposes of this Article, however, we focus on two examples pertaining to policing: (1) execution of county-to-county state warrants, and (2) the assessment of warrant overbreadth. Different court systems relying on the same general prin-

161. *Id.*

162. *Id.*

163. *Id.*

164. Petite v. United States, 361 U.S. 529 (1960). The *Petite* policy is an example of the systematic use of discretion to evaluate and resolve issues of prosecutorial fragmentation.

ciples consider agency in fashioning the proper scope of deterrent remedies, albeit in a different applications.

1. County-to-County State Warrants and the Federal Fundamental Test

The Supreme Court established a firm Fourth Amendment exclusionary rule in 1914,[165] but later held that the rule did not apply to States.[166] The Court reversed course in 1961 and incorporated the exclusionary rule against the States in *Mapp v. Ohio*.[167] As federal and state law enforcement agencies cooperated, federal courts confronted unique issues of jurisdiction and competence. California developed new analyses that took into account its own different agencies and federal courts applied a non-constitutional exclusionary remedy. Both eventually drifted toward the application of the standard good faith analysis in *Leon*.

A California judge may issue a warrant to search in any county, so long as there is probable cause that the evidence they expect to find is linked to a crime committed in the judge's county.[168] The judge, however, must order law enforcement from his own county to conduct the search in the county where the evidence is to be found.[169] The limitation emerged in *People v. Fleming* after dicta from two previous decisions compelled a definitive answer to the question.[170] In *People v. Grant*, the California First District Court of Appeal published that "[w]e find little authority, but nevertheless considerable reason, supporting the theory that the effect of a search warrant should be limited at least to the county of its origin."[171] The court upheld the search on the basis of hot pursuit.[172] In *People v. Ruster*, a defendant challenged a Santa Clara County judge's decision to issue a war-

165. Weeks v. United States, 232 U.S. 383 (1914). Within four years, the Court expanded the rule to include indirect evidence. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

166. Wolf v. Colorado, 338 U.S. 25 (1949).

167. 367 U.S. 643 (1961).

168. People v. Fleming, 631 P.2d 38, 44 (Cal. 1981); *see also* People v. Galvan, 5 Cal. Rptr. 2d 195, 196 (Cal. Ct. App. 1992). However, California judges may not issue a warrant to search out of state. *See* Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873). Thus, in order to execute an out-of-state warrant, California law enforcement officers must seek an out-of-state law enforcement agency and find an officer who will swear to the contents of the warrant before a competent court of that State, with a clause providing for the retention of the evidence by California law enforcement officers and California courts. Those officers then execute the warrant and transfer the evidence to California officers. *See generally* ALAMEDA COUNTY DIST. ATTORNEY, CALIFORNIA CRIMINAL INVESTIGATION (12 ed. 2008).

169. CAL. PENAL CODE § 1528(a) (West 2009).

170. 631 P.2d 38, 43-44 (Cal. 1981).

171. People v. Grant, 81 Cal. Rptr. 812, 815 (1969).

172. *Id.* at 816.

rant to search his apartment in San Mateo County. The California Supreme Court published a similar hypothetical dictum,

> If the property of a stranger to a criminal investigation were seized in one county pursuant to a warrant issued by a magistrate in another county, it might well be inconvenient for him to contest the validity of the search or seizure in the county issuing the warrant. But that is not the case here.[173]

Nevertheless, they upheld the search on the narrow facts because the defendant was already in Santa Clara County's custody at the time of the search.[174]

Subsequently, Fleming challenged a Santa Barbara County judge's decision to issue a search warrant to be executed on his property in Los Angeles County and reached the California Supreme Court relying on the dicta above. He argued that the judge did not have jurisdiction to issue the warrant.[175] The Supreme Court recognized the competing interest of the defendant to discourage law enforcement from forum shopping for a judge to issue a warrant and the need to contest the evidence where it is seized, as well as the State's need for access to the evidence to go forward with a criminal proceeding and struck a balance by limiting the magistrate's power to issue the warrant to crimes committed in his county.[176] The court held that "a magistrate has jurisdiction to issue an out-of-county warrant when he has probable cause to believe that the evidence sought relates to a crime committed within his county and thus pertains to a present or future prosecution in that county."[177]

Fleming, however, is not a federal constitutional principle and it did not survive California's ban on independent state grounds for the exclusion of evidence.[178] In a voter initiative, California voters found that, "broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."[179] Accordingly, they passed a law that was later interpreted to eliminate all inde-

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173. People v. Ruster, 548 P.2d 353, 360 (Cal. 1976).

174. *Id.*

175. He also asserted generally that the warrant lacked probable cause.

176. People v. Fleming, 631 P.2d 38, 43-44 (Cal. 1981).

177. *Id.* at 44.

178. *In re* Lance W., 694 P.2d 744 (Cal. 1985). Justice Mosk dissented from this interpretation of voter intent in Proposition 8 noting that, "[t]he avowed purpose of Proposition 8 is thus to implement safeguards for victims of crimes and to deal more harshly with violent criminals." *Id.* at 768 (Mosk, J., dissenting). He explained that interpreting the requirement to admit all relevant evidence would remove many safeguards to victims. *Id.* However, the principle is now well settled in California law.

179. In re *Lance W.*, 694 P.2d at 768 n.8.

pendent state grounds for the exclusion of evidence.[180] Thus, California courts had to determine whether the *Fleming* rule could survive under federal law.

In *People v. Ruiz*, the Placer County narcotics task force requested and received a warrant for Sacramento County but failed to specifically state that the confidential informant's controlled buys occurred in Placer County.[181] The Attorney General accepted the error and relied exclusively on the good faith rule to justify the search.[182] The Court of Appeal agreed and after an extensive discussion of jurisdiction,[183] the court ultimately concluded that,

> [I]t is nevertheless clear that the *Fleming* limitation does not implicate a magistrate's jurisdiction in the fundamental sense of the power to hear and determine the matter, nor does it implicate traditional Fourth Amendment standards. Accordingly, the failure to comply with the *Fleming* rule is not a type of irregularity which will, on its face, preclude application of the *Leon* rule. Of course, where an officer engages in forum shopping and knowingly or recklessly misleads the magistrate then the good faith required for application of the *Leon* rule will be lacking. But where good faith otherwise exists, the failure to include a *Fleming* showing in the affidavit for a search warrant does not render the affidavit constitutionally deficient and does not compel suppression under the Fourth Amendment.[184]

Accordingly, courts continue to apply the *Ruiz* analysis to allow searches in good faith, despite a California law enforcement officer's mistake regarding which county's magistrate he should approach with his warrant request.[185] Thus, the *Fleming* rule has been subsumed into the good faith exception, fundamentally linking the issue of who seeks the warrant and who issues it to the good faith exception of the warrant clause.

In making the *Ruiz* decision, California courts looked to an extensive body of federal case law interpreting who has the authority to issue a warrant under the good faith rule. The *Ruiz* decision discussed a number of cases that used a non-fundamental and fundamental test to determine the remedy for common errors between agency interactions.[186] Ultimately,

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180. CAL. CONST. art. I, § 28(a).

181. People v. Ruiz, 265 Cal. Rptr. 886, 888 (1990).

182. *Id.* at 890.

183. *Id.* at 891-95.

184. *Id.* at 894-95.

185. *See, e.g.*, People v. Galvan, 7 Cal. Rptr. 2d 195, 197 (Cal. Ct. App. 1992).

186. *See Ruiz*, 265 Cal. Rptr. at 893 (citing United States v. Luk, 859 F.2d 667, 671-72 (9th Cir. 1988); United States v. Comstock, 805 F.2d 1194, 1205-06 (5th Cir. 1986); United States v. Ritter, 752 F.2d 435, 440-41 (9th Cir. 1985); United States v. Loyd, 721 F.2d 331,

Leon's good faith test subsumed a substantial part of the test for dealing with these types of problems.[187]

The legal change that *Ruiz* noted took some time. One year after the Supreme Court decided *United States v. Leon* in 1984,[188] the Ninth Circuit confronted good faith reliance on a Rule of Criminal Procedure (i.e. Rule 41) in *United States v. Ritter.*[189] In *Ritter*, Border Patrol agents sought a telephonic warrant from a state magistrate rather than a federal judge as required by Rule 41 of the Federal Rules of Criminal Procedure.[190] Rule 41 provided that, "If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means."[191] However, the Court of Appeals explained that the Rule did not allow State magistrates to dispense with formalities and issue federal warrants by telephone.[192] At the time, Ninth Circuit precedent provided that errors violating the Fourth Amendment were fundamental and suppression automatic, while technical errors only required suppression if there was prejudice or deliberate disregard of the rule.[193] Thus, *Ritter* stated a non-constitutional good faith rule. On the facts, the Ninth Circuit assumed a technical error for this kind of violation of Rule 41 and affirmed the trial court's findings of no prejudice or deliberate disregard on the record.[194] The Ninth Circuit did not explicitly discuss the constitutional good faith standard of *Leon* in the decision.

One year later, the Fifth Circuit also addressed a violation of Rule 41 by federal and state interaction and explicitly re-evaluated its rationale for automatic suppression.[195] In *United States v. Comstock*, the Fifth Circuit explained,

> [W]here there is no constitutional violation nor prejudice in the sense that the search would likely not have occurred or been as abrasive or intrusive had Rule 41 been followed, suppression in these circumstances is not ap-

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332-33 (9th Cir. 1983); United States v. Johnson, 660 F.2d 749, 753 (9th Cir. 1981); United States v. Stefanson, 648 F.2d 1231, 1235 (9th Cir. 1981)).

187. *Ruiz*, 265 Cal. Rptr. at 893.

188. United States v. Leon, 468 U.S. 897 (1984).

189. *Ritter*, 752 F.2d 435.

190. *Id.* at 440-41. The relevant rule of criminal procedure has been materially changed since this case.

191. *Id.* at 440 (quoting FED. R. CRIM. P. 41).

192. *Id.* at 441.

193. *Id.*

194. *Id.*

195. United States v. Comstock, 805 F.2d 1194, 1205-06 (5th Cir. 1986); *see also* United States v. Luk, 859 F.2d 667, 672-73 (9th Cir. 1988) (discussing the Fifth Circuit's adoption of the rule).

> propriate if the officers concerned acted in the affirmative good faith belief that the warrant was valid and authorized their conduct. Good faith in this context implies not only that Rule 41 was not knowingly and intentionally violated, but also that the officers did not act in reckless disregard or conscious indifference to whether it applied and was complied with. On the other hand, for these purposes, we do not mean by "good faith" that the officers' conduct must be objectively reasonable. We recognize, of course, that in *Leon* and *Sheppard* objective reasonableness was required to avoid suppression where the Fourth Amendment had been violated. Nevertheless, we believe that a less stringent standard is appropriate where, as here, we are not concerned with deterring unconstitutional conduct.[196]

In a footnote, the Fifth Circuit rejected appellant's distinction between reliance on a state magistrate and reliance on state law enforcement officers for the basis of the violation.[197] The Court first pointed out that it created a lesser standard than the good faith exception for constitutional violations for Rule 41 violations, but also proceeded to question the application of the distinction to constitutional violations under *Leon*.[198]

Two years later, the Ninth Circuit again confronted the issue of a Rule 41 violation and the fundamental/non-fundamental test described in *Ritter* and *Comstock*. This time, the Ninth Circuit held that courts must also apply the standard good faith test of *United States v. Leon* if they find suppression necessary under the fundamental/non-fundamental test.[199] In *United States v. Luk*, an agent of the Department of Commerce's Office of Export Enforcement obtained a warrant for a search at the direction of an Assistant United States Attorney ("AUSA"), but the record did not show that the AUSA or anyone from his office spoke to the magistrate.[200] Thus, the court found a technical violation.[201] After finding that the error was not fundamental, did not occur in bad faith, and did not result in prejudice,[202] however, the Ninth Circuit did not end its inquiry. Rather, the court went on to consider the good faith test under *United States v. Leon* in dicta. The Ninth Circuit explained, "Even if the instant Rule 41 violation were initially determined to be either a fundamental or a suppression-required nonfun-

196. *Comstock*, 805 F.2d at 1207.
197. *Id.* at 1210 n.18.
198. *Id.*
199. *Luk*, 859 F.2d at 674-75.
200. *Id.* at 669.
201. *Id.* at 673.
202. *Id.* at 674.

damental violation, then the suppression sanction is still not required under *Leon*."[203]

Thus, both state and federal courts have used the good faith exception as the general framework for a wide variety of issues since its inception. Formerly divergent tests have come together under one principle with widely distinct applications.

2. *Whose Affidavit? Curing Overbreadth*

Additionally, courts have also taken into account identity of officers to cure warrant overbreadth, in this case forgiving more where the applying officer executes a warrant than where another officer executes. The general rule is that a warrant must contain sufficient particularity or it is unconstitutional.[204] However, one important factor is the knowledge of the officer executing the warrant. In *United States v. Gitcho*, the Ninth Circuit explained that great importance can be given to the fact that authorities knew the property to be searched and held it to be searched while obtaining the warrant, despite several specific deficiencies in the warrant obtained.[205]

The actual knowledge of the officer and agency that he comes from can be of vital importance. In *Luk*, the Ninth Circuit considered the actual knowledge of the affiant and the officer executing a search warrant to cure it from overbreadth under the good faith analysis. First, the court considered the knowledge of the affiant and explained,

> Unlike our decision in *United States v. Washington*, there is no evidence here that the affiant, Agent Koplik, knew the warrant was overbroad. Nor is there any evidence that would support a claim that Koplik was "dishonest or reckless in preparing [her] affidavit." On the contrary, the affidavit was diligently prepared by Koplik with Rossbacher's assistance.[206]

The court recognized that under its own precedent an affidavit must be attached and incorporated by reference to cure overbreadth. However, the court considered the officer executing the warrant's knowledge of and application of the twenty-two page affidavit to limit his search to relevant evidence:

> [T]he affidavit did act as this sort of limit on the search. Agent Bammer, who was specifically authorized to execute the warrant, read Agent Koplik's affidavit prior to the search; at the briefing immediately prior to the

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203. *Id.*

204. U.S. CONST. amend. IV.

205. United States v. Gitcho, 601 F.2d 369, 371-72 (8th Cir. 1979); *see also* Harman v. Pollock, 446 F.3d 1069, 1078-79 (10th Cir. 2006) (citing *Gitcho* for this proposition).

206. *Luk*, 859 F.2d at 677 n.9 (internal citations omitted).

> warrant's execution, Koplik apprised Bammer and the two other agents who assisted in the search of the particular items to seize; Koplik was present at the premises and advised the agents concerning what items were properly within the scope of the search; and the agents specifically relied on the affidavit in determining at the scene what items were properly within the scope of the search.[207]

Thus, the court directly reviewed the communication of officers when deciding particularity. The fact that officers are closely connected aided the good faith argument because the officers knew what they sought and clearly pursued a limited course of conduct to obtain, eliminating the problem of particularity and allowing the good faith exception.

C. Proposed Solution: Incorporating Agency Identity into the Good Faith Standard

In order to generate a more consistent Good Faith Doctrine, future decisions must be aware of the need to carefully assess when a deterrent remedy is appropriate. While the *Herring* court referred to "our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system,"[208] it is important to remember that the good faith rule—and, with it, immunity from deterrent remedies—expanded significantly since it emerged in 1984. While the limited exceptions to the exclusionary rule, such as attenuation,[209] inevitable discovery,[210] and good faith[211] have expanded, no overall test for the expansion has been developed. Nor have courts developed an intellectually honest system for weighing the exclusionary rule under the circumstances.

Lower courts currently struggle with the scope of the *Herring* decision. One District Court sought to limit the decision to preclude its application to warrantless searches[212] while acknowledging an appellate decision in the same Circuit that can be read to suggest application to warrantless searches.[213] The *Herring* opinion seems to invite courts to read it broadly, but provides little guidance as to how to apply it to new facts.

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207. *Id.* at 677.

208. Herring v. United States, 129 S. Ct. 695, 704 (2009).

209. Wong Sun v. United States, 371 U.S. 471 (1963).

210. Nix v. Williams, 467 U.S. 431 (1984).

211. United States v. Leon, 468 U.S. 897 (1984).

212. *See, e.g.*, United States v. McCarty, 672 F. Supp. 2d 1085 (D. Haw. 2009) (*Herring* does not apply to warrantless TSA searches).

213. *See, e.g.*, United States v. Monghur, 576 F.3d 1008, 1013-14 (9th Cir. 2009) (remanding for a container search without a warrant).

The Canadian Supreme Court did provide such guidance to courts in Canada. The court applied a three-step approach to the suppression of evidence:

> When faced with an application for exclusion under s. 24(2), a 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.* At the first stage, the court considers the nature of the police conduct that infringed the Charter and led to the discovery of the evidence. The 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, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law. The second stage of the inquiry calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute. At the third stage, a court asks whether the truth seeking function of the criminal trial process would be better served by admission of the evidence or by its exclusion. Factors such as the reliability of the evidence and its importance to the Crown's case should be considered at this stage. The weighing process and the balancing of these concerns is a matter for the trial judge in each case. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.[214]

The Canadian solution expressly directs inferior courts to discuss the impact of the exclusion on the record, the lesson to police and the prosecutors, the societal value that suppression supports, and the means by which suppression in a particular case will further those goals. In another decision, the Canadian Supreme Court demonstrated in a vigorous debate how the principle that it asked lower courts to apply could be argued, as justices

214. R. v. Grant, [2009] 2 S.C.R. 353, 2009 SCC 32, ¶¶ 71-85 (Can.) (emphasis added); *see also* Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 216 (1978) (noting universal rejection of the American rule by other common law jurisdictions). *But see* Hedieh Nasheri, *The Exclusionary Rule: Differing Trends in Canada and the United States*, 21 CRIM. JUST. REV. 161, 162 (1996) (arguing that Canada will expand its exclusionary rule as the United States contracts to suppress less evidence).

fought over whether the justice system could be associated with the flagrancy of certain police conduct.[215]

In future decisions on the Good Faith Doctrine, the Supreme Court might find it useful to provide lower courts with some guidance regarding the appropriateness of exclusion. In the context of fragmented policing, the identity of the actors, the size of the agency, the degree of collaboration between agencies, and the reasonable level of mutual reliance expected from agencies with overlapping or close jurisdictions should be taken into account. It would not be difficult to provide such guidelines as a way to inject the *Herring* mens rea standard with content. After all, in order to assess the degree of negligence involved in a policing mistake, the court relies on external parameters for the egregiousness of the mistake. Agency identity provides important variables to be weighted in the analysis. A balancing test would also have the advantage of consistency with the strong preference for warrants: the rule provides a means for officers subject to a variety of jurisdictions to ensure the validity of their cases and provides a simple means for prosecutors from every jurisdiction to encourage their officers to seek the involvement of a magistrate, regardless of where the case will be filed. Additionally, the rule encourages courts to actively consider the purposes of the exclusionary rule on the facts in front of them and create a record of the error and the reason for the error.

CONCLUSION

Our reading of *Herring* suggests that the decision was informed by a realist assessment of fragmented policing; however, realism in itself, particularly when implicit, is not enough. While *Herring* invites our courts to second-guess a blanket exclusionary rule, there is no similar systematic approach or test for our courts to apply. The assumptions of many scholarly analyses continue to avoid discussion of many of the differences that underlie the broad test for the good faith exception.

The Court must be honest about the interests that it is asking lower courts to weigh. The solution includes, at minimum, a declaration that in cases where police obtain evidence pursuant to a warrant, the court must weigh a balancing-test accounting for these questions. A clear standard enables trial courts to exercise the necessary judicial review of deterrence rationales in *Herring*-type cases, ensuring that the exception does not swallow the rule. Additionally, creating the proper incentives for police departments to perform their individual and collaborative duties diligently

215. *Compare* R. v. Harrison, [2009] 2 S.C.R. 494, 2009 SCC 34, ¶¶ 25-42 (Can.) *with* R. v. Grant, [2009] 2 S.C.R. 353, 2009 SCC 32, ¶¶ 71-73 (Can.) (Deschamps, J., dissenting).

and effectively generates professional, cost-effective policing, thus enhancing policing services for the community's benefit as well as protecting citizens' rights and freedoms.