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**

HADAR AVIRAM* JEREMY SEYMOUR** AND RICHARD LEO *** ****

**ABSTRACT**

Recent critiques of the Supreme Court decision in Herring v. United States have focused on the impact of the new *mens rea* standard for good faith on the scope of the exclusionary rule. This article offers a different reading of the Herring decision. Using the facts of Herring, its relationship to Arizona v. Evans, and examining the circuit split regarding illegal predicate searches, Herring can be understood as an acknowledgment of the realities of the localized and fragmented nature of American policing. In a universe of multiple police agencies, with formal and informal collaborations and problematic jurisdictional boundaries, the Herring decision can be read to suggest that the Constitution cannot hold one police agency accountable for the mistake of another.

The article moves on to argue that the Herring outcome shapes the good faith doctrine in a fundamentally unfair way. The police wield government power as an overarching actor in search and seizure situations, but avoid accountability for mistakes and violations due to fragmentation. This structure is particularly problematic in light of the Supreme Court’s reliance on deterrence as the main rationale for the exclusionary rule, and opens the door to several forms of abuse at the local level, in addition to wasteful incentives which may hinder consolidation of, and collaboration among, different agencies.

In light of this problematic outcome, the article calls for a clearer standard for good faith, which acknowledges the need for unified, consistent government accountability for police mistakes.

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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* is, in many ways, a microcosm of the quintessential debate about the scope of the Fourth Amendment and the exclusionary rule, which is, in essence, an ongoing discussion about the appropriate breadth of police authority and its constitutional review by courts. In the case of the Good Faith Doctrine, the debate focuses on situations in which it is clear, in hindsight, that authority was wrongly exercised. Whether courts choose to suppress evidence as a mechanism for deterring police from committing similar mistakes in the future is a function of their position on the appropriate balance between efficiency and procedural justice. This balance is well illustrated in Herbert Packer’s classic book *The Limits of the Criminal Sanction*.  

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3 (1968)The Limits of the Criminal Sanction, Herbert Packer
In the book, Packer provides two “ideal type” models of the criminal process: the crime control model and the due process model. The crime control model emphasizes an efficient criminal process through an early determination of guilt by law enforcement agents. This model requires substantial deference to police officers and prosecutors, who are the “gatekeepers” of the criminal process, and, as a corollary, patience with their mistakes. By contrast, the due process model’s main goal is preserving accuracy and avoiding the conviction of the innocent. Under a due process paradigm, law enforcement

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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. 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 The Journal of Criminal Law and Criminology 671 (1999).

5 “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 here 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 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, ibid. ***.

6 “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 (as previously defined), because of the probability that, in the run of cases, the preliminary screening process operated by the police and the prosecuting officials contains 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.” Packer, ibid. ***. 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). Also see: Wesley G. Skogan and Kathlee Frydl, Fairness and Effectiveness in Policing: The Evidence (Washington D.C., 2004).

7 Packer, ibid.
discretion is seen as potentially biased and is therefore carefully curtailed by a “quality control” mechanism of constitutional review and procedural hurdles.

Packer’s models have been widely critiqued over the years. Among the more convincing critiques is the notion that the models do not share an epistemological basis: While the Due Process model relates largely to doctrinal, normative mandates, the Crime Control model is by nature a pragmatic description of the everyday management of law enforcement, which was true even in the formative years of the Warren Court. In any case, if Packer’s intent was to delineate the transition from crime control to due process in the era of the Warren Court, it is widely acknowledged that the post-Warren Courts decisions reflect a pendulum swing toward crime control, manifesting itself in four main themes. First, the post-Warren court has emphasized that the ultimate mission of the criminal justice system was to convict the guilty and let the innocent go free, and rather than creating bright-line rules, it placed more emphasis on the defendant’s actual guilt—a practical application of Packer’s “presumption of guilt”. Second, the court shifted from relying on clear standards of action to allowing an assessment of police activities through

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8 The Crime Control Model, as 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”. Packer, ibid.

9 Packer, ibid.


13 Whitebread and Slobogin, 4. The best example of this is perhaps the erosion of Miranda v. Arizona (1966) to a “stepchild” in the constitutional family of rights, held by justices to be technical: Quarles, Elstad, Tucker, Portash, Patane, Dickerson.
a “totality of the circumstances” test.\textsuperscript{14} Third, the post-Warren court expressed more reliance on, and more deference for, police discretion, and a recurring theme in its decisions is the acknowledgment that the police acts in good faith, and that its decisions are made under difficult conditions.\textsuperscript{15} Finally, the court’s tendency to intervene on behalf of the defendant on appeal, and particularly in collateral attacks, has greatly diminished, particularly in respect to proceedings before state courts.\textsuperscript{16}

For our purposes, these main characteristics of the post-Warren court are closely correlated with an important feature of the crime control model: An increasing reliance on the earlier steps in the criminal process, and, in particular, broad deference to police discretion. During the course of their workday, police officers exercise a great degree of discretion and make many on-the-spot decisions about exercising their authority\textsuperscript{17} (or refraining from doing so).\textsuperscript{18} The courts are well aware of this feature, and their reliance on vague standards for assessing discretion reflects deference to this discretion.

Moreover, the courts do not merely acknowledge police discretion as a “necessary evil”,

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\textsuperscript{14} Whitebread and Slobogin, 5. This transition is notable in the shift from defining probable cause as two “prongs” – veracity and basis of knowledge (Aguilar and Spinelli) to examining it in light of the “totality of the circumstances” (Gates). We discuss this later in greater detail.
\textsuperscript{15} Whitebread and Slobogin, 6-7. See, for example, the expansion in good faith: Leon, and its continuous erosion until the recent decision in Herring, which gives the police leeway when relying on its own mistakes, as long as they are merely “negligent”, rather than “reckless” or “intentional”.
\textsuperscript{16} Whitebread and Slobogin, 7-8. The narrowing of the door on habeas is particularly important. Teague. 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: Jackson v. Virginia, Murray v. Carrier.
\textsuperscript{17} is -decided at the height of the due proess revolution – (1968)Ohio .s decision in Terry v'Justice Warren [I]" is awareness of the realities of police discretion'an excellent example of the Courtt 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.”
\end{quote}
but as a desirable feature of law enforcement professionalism. There are sound reasons for this policy. No web of bright-line rules will ever cover a hundred percent of all situations in which police officers may find themselves, and the system has vested interest in assuring not only their resourcefulness, but also their safety. As to organizational variables, broad police discretion to discard potential cases early in the process is an efficient way to control expensive, time-consuming caseloads. In the course of this process, however, mistakes are bound to occur, and the application of the exclusionary rule reflects the extent to which courts are willing to “forgive” such mistakes for the sake of efficiency.

A simple reading of *Herring* reveals it to be a quintessential example of the triumph of crime control over due process. In the decision, the Supreme Court expanded the good faith exception to the Fourth Amendment 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 and harm to the justice system, *e.g.* *Leon*, 468 U.S. at 909–910, we conclude that when police mistakes are the result of negligence such as that described here, rather than systematic error or reckless disregard of constitutional requirements, any marginal

\[19^a\] 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* v. Ohio, ibid.

\[20^a\] A good example of this is the emergence of the “protective sweep” of houses (Maryland v. Buie) and cars (Michigan v. Long), which is aimed at police safety and relies on an assessment of discretion regarding “reasonable suspicion”. The suspicion needs to be articulable, but its nature is not proscribed.
deterrence does not ‘pay its way.’ [Citation]. In such a case, the criminal should not ‘go free because the constable has blundered.’ [Citation].

The holding has sparked a lively debate about the fate of the exclusionary rule. Some commentators have described the *Herring* decision as a “fundamental shift in exclusionary rule analysis.” Others have argued that *Herring* is not a remarkable decision, because it does not settle the complicated question of suppression in situations in which the law enforcement officer herself made the mistake. Both arguments have some merit, because *Herring*’s importance regarding who makes the mistake is unclear on the face of the opinion or in case law interpreting the good faith rule.

As we argue, this distinction is hugely important for understanding *Herring*, and we therefore offer a third way to read the case. Relying on *Herring*’s facts, as well as on the current circuit split with regard to illegal predicate searches, and on a previous case, *Arizona v. Evans*, we argue that *Herring* reflects a healthy dosage of *real politik*, and particularly awareness to the realities of fragmented policing. As we argue, American policing is characterized by 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

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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* can be said to reflect a deep understanding of the organizational dimension of
policing; it can be analogized to the Warren Court’s realistic decision in *Terry v. Ohio*, in which realities from the field were folded into the discussion in a more explicit way.

However, as with *Terry*, the Court’s realism has a dark side, and its shortcomings might
outweigh its advantages. On one hand, as stated above, our interpretation reflects

*Herring*’s contribution to a richer exclusionary rule discourse, as a decision that fosters
realistic understandings of accountability structures, which are more helpful for shaping
effective deterrence structures than the abstract assumption that Supreme Court decisions
deter law enforcement agencies. On the other hand, our reading of *Herring* reflects its
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. Not only does *Herring* encourage “slack” on direct responsibilities to
citizens, it also has significant potential for future abuse 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 a 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

25 *Terry*.

26 It could be said that, as with *Terry*, there is a “good Herring” and a “bad Herring”: AKHIL REED AMAR,
in Arizona v. Evans, and on the current circuit split with regard to illegal predicate searches. These factors lead us to conclude that a narrow and reasonable reading of the Herring doctrine

Part II expands upon the realities of fragmented policing, which, in our opinion, explain the Herring decision. We present 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. We then move on to discuss the problematic implications of this structure, detailing the potential abuses and disincentives stemming from not holding a police agency accountable for another’s mistakes. We end this part by analyzing Herring’s contribution to the problem, deconstructing the Court’s perception of deterrence, and arguing that a “moving target” government party to the criminal process is fundamentally unfair to defendants.

Part III proceeds to discuss the legal and administrative paths to deal with the problem of fragmentation and accountability. Opening with suggestions for collaboration and overview in the administrative context, we then shift to the legal arena and demonstrate how U.S. and Canadian law has handled fragmentation in other contexts. We then offer our own solution: a multivariate analysis of the proper deterrence incentives, which will not only 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 one of a bureaucratic computer blunder. The Dale County Sheriff’s Office maintained warrant records for Dale Count and Sharon Morgan worked as the warrant clerk. 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.

On July 7, 2004, Investigator Mark Harrison of neighboring Coffee County learned that the defendant stopped at the Coffee County Sheriff’s Office to pick up some items. He asked his county’s warrant clerk, Sandy Pope, to check if the defendant had any outstanding warrants. Sandy Pope called Sharon Morgan in Dale County, who checked her computer database and then confirmed an active arrest warrant for failure to appear on a felony criminal case. Sandy Pope relayed the information to Investigator Mark Anderson and then asked Sharon Morgan to fax a copy of the warrant as confirmation. Investigator Mark Anderson stopped the defendant in his car and found a gun and drugs within a few hundred yards of the Coffee County Sheriff’s Office.

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28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
Sandy Pope did not find a copy of the warrant in her files. She called the court clerk and learned that the judge recalled the warrant five months ago. Sandy Pope called Sharon Morgan back to let her know and Sharon Morgan contacted Mark Anderson by secure radio within ten to fifteen minutes. However, it was too late: The arrest and search already occurred. The Eleventh Circuit Court of Appeals found that someone in Dale County should have updated their database and found the error negligent, not reckless or deliberate, discussed extensively the purpose of the exclusionary rule, and affirmed the conviction. The Supreme Court agreed.

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.” While the Court admitted that suppression of evidence for a negligent police mistake is instructional, it explicitly declared that the benefit does not outweigh the harm to the justice system. Rather, the Court analogized to the legal standard for traversal of a search warrant, which requires intentional or reckless disregard for the truth. Significantly, the Court also characterized the facts as “isolated negligence attenuated from the arrest.”

34 Id.
35 Id.
36 Id.
37 Id.
38 Id. at 700; see also United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007).
39 129 S.Ct. 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.
40 See 129 S. Ct. at 704 n.5.
41 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).
42 Herring v. United States, 129 S.Ct. at 698.
B. Herring’s Predecessors: The Good Faith Doctrine in Leon and Evans

Herring’s legacy is best understood when keeping in mind the considerations that led the Court to assess the police’s good faith in previous cases. The good faith doctrine can best be understood as an exercise in accountability, and the Supreme Court decisions that preceded Herring suggest that the identity of the agent is a significant factor in analyzing accountability. In Leon, 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.

Subsequent decisions expanded good faith to reliance on a magistrate’s failure to make clerical corrections on the warrant, reliance on a statute later declared to be unconstitutional, and reliance on a warrant entry mistakenly present in the court’s warrant records. Many assumed a dividing line where the court would suppress for a law enforcement officer’s error and not for an error by anyone else. The argument arose after Arizona v. Evans, where officers relied on an invalid warrant in records maintained by the court. The Supreme Court’s opinion explained that suppression for a judicial

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error does not serve the same instructional purpose as suppression for an error by a law enforcement officer. 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 ultimately found to be defective.” 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 the mens rea rationale of Herring been universally accepted and understood, all questions of agent identity and fragmentation would have been resolved; supposedly, after Herring, the material question is the egregiousness of the mistake, rather than the identity of the agent who made it. Circuit courts, however, have been split regarding the broader implications Herring. As Andrew Lipson points out, the fact patterns of Herring and its predecessors leave this question open; all five good faith decisions from the Supreme Court still involve good faith reliance by one actor on another. Thus, he 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.

51 Lipson at 1154.
52 Lipson at 1148.
He terms this conduct the “illegal predicate search.”\textsuperscript{53} While \textit{Herring} simply affirms the previous principles of the Fourth Amendment,\textsuperscript{54} extending the good faith rule to illegal predicate searches by four circuits departs dramatically from the Supreme Court’s good faith case law.\textsuperscript{55} They apply a rule that errors “close to the line of validity” do not merit suppression, but Lipson argues that such a rule encourages police misconduct when applied to an officer’s own mistake.\textsuperscript{56} He 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 rule, he argues “it appears that the police forces in those cases did nothing to change their practice in airports in order to comply with the law.”\textsuperscript{57} Thus, he concludes, “Without exclusion, there is no reason for police departments and their officers to change their practices of violating the law.”\textsuperscript{58}

D. Herring’s Silence: Implicitly Acknowledging Fragmentation

The caselaw that preceded Herring and the lower-court controversy that remained in its aftermath strongly suggest that the Court’s pro-Government decision was eased by the facts of the case, which featured an 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 a more understandable logical leap if we assume that the court did not see much difference

\textsuperscript{53} Lipson at 1148.
\textsuperscript{54} Lipson at 1148.
\textsuperscript{55} Lipson at 1167.
\textsuperscript{56} Lipson at 1168; see also \textit{United States v. McClain}, 444 F.3d 556, 566 (6th Cir. 2006); \textit{United States v. White}, 890 F.2d 1413, 1419 (8th Cir. 1989).
\textsuperscript{57} Lipson at 1169.
\textsuperscript{58} Lipson at 1169.
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 realistic reasoning of Terry v. Ohio.\(^59\) 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 required for full searches and arrests. 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 subsequent decision to 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.\(^60\) In doing so, as the 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’.”\(^61\) 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

\(^{59}\) Terry citation.


\(^{61}\) Dudley, 898.
boundaries for police authority. But even such descriptive honesty would be of no avail if the decision did not promote healthy policy outcomes. In the context of Terry, as several commentators rightfully observed, its frank discussion of overenforcement against minorities did not justify the problematic outcome, which allowed performing lesser searches and seizures and opened the door to racial profiling. In the context of Herring, even a forgiving reading of the decision, as a reflection of fragmented policing, does not cure the ailments of fragmentation in the arena of accountability and governmental fairness. We now turn to explain these issues in more detail.

II. Moving Targets: Authority and Accountability in Policing

A. Policing in America: Plural, Multilateralized, Fragmented

In order to understand Herring better, it is useful to examine the realities of a policing strategy that has been referred to, by police scholars, as the “police industry”.

In a study of democratic countries, David Bayley and Clifford Shearing found a restructuring of policing worldwide, which manifested as an increased fragmentation between different factions of policing. Part of this trend is related to increased privatization of police services, but Bayley and Shearing refer to it as a broader process of “multilateralization”.

Authorization of policing and execution of policing have been segregated; commercial companies, nongovernmental authorizers of policing, individuals, and governments

62 Terry, 14-15.
64 Skogan and Frydl, 47.
provide policing. Many nongovernmental providers now perform the same tasks as the public police. Governmental providers tend to prevent crime through punishing; nongovernmental providers do so through exclusion and the regulation of access.⁶⁶ Even Jérôme Ferret, who objects to the term “multilateralization”, highlights the considerable part played increasingly by local agencies, which is particularly impressive in European states with a strong state tradition.⁶⁷

The United States has been ahead of this fragmentation curve for quite some time for a variety of political reasons.⁶⁸ Federalism, as well as the emphasis on municipal politics, have led to a persistent reluctance to unify fragmented government,⁶⁹ and in particular to consolidate police departments or centralize law enforcement in other ways.⁷⁰ Many attempts to consolidate police departments have faced strong resistance from local agencies, due to political and bureaucratic interests.⁷¹ Local political control is perceived as a vital aspect of the legitimacy of the police.⁷²

As an outcome, policing services are offered to the public by different providers.⁷³ While the estimated count of all federal, state and local law enforcement agencies varies, Wesley Skogan and Kathleen Frdyl count 21,143 agencies, and mention that others have

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⁶⁶ Id. at
⁷⁰ Id. at
⁷¹ Ostrom, Whitaker and Parks 1978.
⁷² Skogan and Frdyl, 51.
estimated around 40,000. These agencies significantly vary in size.

Municipal police department provide the lion’s share of police service in the US. The Bureau of Justice Statistics mentions 13,524 agencies; only 46 of these police departments employ more than 1,000 officers, and 771 of them had only one officer. Local law enforcement at the county level includes approximately 3,000 sheriff’s departments. While fragmentation implies redundancy and specialization in performing tasks, it also requires collaboration and division of labor between the multiple agencies. Ostrom, Parks and Whitaker, who conducted a large-scale survey of police services from the perspective of produces and consumers, explained police as an “industry model”. 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. Within local police agencies, most traffic duties are performed by general patrol officers, but more complicated tasks, such as homicide investigation, are often outsourced to the county agencies. Auxiliary services, such as radio communication, pretrial detention, entry-level training, and crime laboratory are shared services. There are also a variety of informal arrangements for assistance and

74 Skogan and Frydl, 48.
75 Skogan and Frydl, id.
76 Skogan and Frydl, 49.
77 Skogan and Frydl, 49.
78 Skogan and Frydl, 49.
79 Ostrom, et al.
81 Ostrom, et al.
82 Id. at
sharing information. The report found more cooperation between agencies than expected. Even within agencies, police officers have a broad discretion about engaging in law enforcement, and large urban departments tend to compartmentalize their various services.

The federal level encompasses 69 law enforcement agencies. There are also special district polices, such as the American Indian Tribal Law Enforcement police. Federal influence on local state agencies is very limited; federal initiatives have been consistently found to play a very small part in local policing. Only senior officers train at the police academy. Some police departments are supervised by the federal government through consent decrees aimed at improving services and curbing police brutality. Until recently, little was known about the impact of post-9/11 initiatives on federal-state collaboration. However, new research conducted in 16 diverse police agencies suggested that the federal pressure to increase anti-terrorism enforcement and intelligence gathering practices has not trickled down as hoped. The call to shift toward proactive data gathering met much resistance among local agencies, many of whom who actually

bolstered their community policing and outreach efforts.\textsuperscript{93}

The state role is usually confined to setting minimum standards for the certification of police officers,\textsuperscript{94} or to the creation of law governing special police actions, such as high-speed pursuits or domestic violence incidents.\textsuperscript{95} As with federal control, the independence and fragmentation of local agencies considerably limit the effects of state control. As Ryken Grattet and Valerie Jenness found, for example, despite statewide policies about hate crime, different localities interpreted these completely differently and implemented them in very different ways.\textsuperscript{96}

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\textsuperscript{97}, as well as by an enormous private sector.\textsuperscript{98} Some commentators have, therefore, perceived fragmentation as an aspect of privatization and commodification of policing.\textsuperscript{99}

To mitigate the effects of fragmentation, local police agencies share a substantial range of services.\textsuperscript{100} The International City Management Association estimates that police communications and jail services are among the government services most commonly

\begin{itemize}
  \item \textsuperscript{93} Id. at
  \item \textsuperscript{94} Skogan and Frydl, 54.
  \item \textsuperscript{95} Skogan and Frydl, 55.
  \item \textsuperscript{96} \textsc{Ryken Grattet} \& \textsc{Valerie Jenness}, \textit{The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime}, 39 Law \& Society Review 893, (2005).
  \item \textsuperscript{97} Skogan and Frydl, 56.
  \item \textsuperscript{98} Skogan and Frydl, 55; \textsc{Richard V. Ericson} \& \textsc{Kevin D. Haggerty}, Policing the Risk Society (University of Toronto Press Incorporated. 1997).
  \item \textsuperscript{99} \textsc{Tim Newburn}, \textit{The Commodification of Policing: Security Network in the Late Modern City}, 38 Urban Studies 829, (2001).
  \item \textsuperscript{100} Skogan and Frydl 52.
\end{itemize}
shared through contracting or joint agreements between local governments. In addition, in some situations, several police offices at different levels, ranging from the federal to the local, have created joint taskforces and similar ad-hoc collaborations.

The 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 and implemented throughout the 1990s, which aimed at moving away from reactive, politicized crime control toward citizen involvement and a problem-solving mentality.

While definitions of community policing differ even among police officers, it is common to understand it as Robert Trojanowicz 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”. Fragmentation and localization are important features of community policing, because, as Trojaowicz 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 can become a better and safer place in

101 Skogan and Frydl 52.
104 JEREMY M. WILSON, Community Policing in America (Routledge. 2006), 21.
which to live and work.” Community policing requires a relaxation of police hierarchy, broad discretion to individual departments and attention to neighborhood-specific problems and incidents.

Similarly conducive to localized policing is focusing on carefully identified problem areas, referred to as “hot spots”, and increasing police proactive presence in these areas. Numerous controlled studies have proven Hot Spots policing to be more effective than traditional reactive policing. 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.

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

It is important to point out that fragmentation and specialization 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.

\[\text{Aviram: Moving Targets}\]

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(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.  

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. Some studies, however, have recognized situations in which fragmented policing actually increases law enforcement efficiency. As Button, John, and Brearley mention, the emergence of 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.

A more serious set of concerns, however, pertain to the ability to safeguard quality and

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114 ROBERT H. LANGWORTHY & LAWRENCE P. TRAVIS III, Policing in America: A Balance in Forces (Prentice Hall Second ed. 1998). 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 & Society Review 147, (2007). However, it is important to keep in mind 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 Policing: Lessons from the Field (2007).
115 Skogan and Frydl 52.
citizens’ rights in the face of increasingly multilateralized policing. This concern transcends policing and is raised in varying contexts of

Martha Minow suggests that fragmentation, particularly when multiple agencies are privatized, offers the advantages of improved quality and competition. 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.” She expresses, however, serious concerns about accountability and commitment to civil rights and welfare.

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. Similarly, David Markell has argued that excessive regulation reduces transparency and therefore hinders accountability. According to Markell, the increased fragmentation allows government to achieve its goals through important allies, but the government subsequently loses the

117 BAYLEY & SHEARING.
119 Id. at 1245.
120 Id. at 1260.
ability to exert complete control over its operations.\textsuperscript{123} Markell also highlights the fact that fragmentation creates more regulator/regulated relationships.\textsuperscript{124} Ronald Moe, examining the “reinventing government” initiative of the early 1990s, critiques the movement for reducing traditional accountability by reducing hierarchy within agencies.\textsuperscript{125}

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.\textsuperscript{126} 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.”\textsuperscript{127} She finds that the extent to which agencies were accountable to the public for the services they provided (electricity and telecommunications), except in situations that required expert technical judgment.\textsuperscript{128} 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.\textsuperscript{129}

\begin{thebibliography}{99}
\bibitem{123} Id. at 7.
\bibitem{124} Id. at 7.
\bibitem{125} \textsc{Ronald C. Moe}, \textit{The Reinventing Government' Exercise: Misinterpreting the Problem, Misjudging the Consequences}, 54 Public Administration Review 111, (1994).
\bibitem{126} \textsc{Colin Scott}, \textit{Accountability in the Regulatory State}, 37 Journal of Law and Society 38, (2000).
\bibitem{127} \textsc{Dorit Rubinstein-Reiss}, \textit{Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden (p 111-141)}, 31 Law & Policy 111, (2009), 111.
\bibitem{128} Id. at ?
\bibitem{129} \textsc{Michael M. Ting}, \textit{A Strategic Theory of Bureaucratic Redundancy}, 47 American Journal of Political Science 274, (2003).
\end{thebibliography}
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 would be beneficial for accountability and service provision would 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 do share the broader goal of crime control and law enforcement. Also, and more importantly, by contrast to other agencies, the police is not only a service agency but also a coercive power. As such, concerns about abuse and lack of accountability are much more salient than with regard to service providers. In addition, echoing Dobkin’s concerns, courts have been increasingly deferent to police decisionmaking, particularly in Fourth Amendment contexts.

Ian Loader, for example, has pointed out that the multiplicity of institutional forms involved in police services present challenges to several (liberal) suppositions about the relationship between police and government. Loader argues for principles of police regulation that are both normatively adequate to the task of connecting policing to processes of public will-formation and sociologically plausible under the altered conditions of plural, networked policing. As Loader explains,

[w]e can no longer adequately make sense of policing (if, indeed, we ever could)

130 DOBKin.

131 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.

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. ¹³³

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. ¹³⁴

To Loader, plural policing presents disadvantages in shifting responsibility for crime
prevention to the citizens. ¹³⁵ Also, a sense of overregulation stemming from the
multiplicity of “quiet policing” that governs one’s life in various ways and aspects,

¹³³ Loader, Id, 324.
¹³⁴ Loader, Id.
¹³⁵ Loader, 331.
coming at you from unexpected places.\textsuperscript{136}

More specifically, Claudia Dahlerus, who sampled 19 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.\textsuperscript{137} 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.\textsuperscript{138}

These critiques suggest serious concerns that accompany police fragmentation. As we argue next, \textit{Herring} exacerbates these concerns.

\begin{flushleft}
C. Herring’s Disincentives: Encouraging Inefficiency and Abuse
\end{flushleft}

In the particular case of the United States, the empirical outcome of police fragmentation is made explicit by the Court’s decision in \textit{Herring}. When read in the context of fragmentation, \textit{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 lacks fundamental fairness with regard to the

\textsuperscript{136} Loader, 333.
\textsuperscript{137} \textsc{Claudia Dahlerus}, Who’s Minding the Locals? Decentralization, Diversity, and Political Conflict in European Democracies (2007).
\textsuperscript{138} \textsc{David H. Bayley}, Police for the Future (Oxford University Press. 1994). 138
citizens. The existence of multiple agencies, particularly when they overlap, means that a person might be subject to search, seizure, and other manifestations of police power vis-à-vis several agencies simultaneously. Beyond the violation of the bilateral nature of the adversarial process, this presents people with the difficulty of claiming redress from multiple agents in case of violation or mistake.

In addition, the *Herring* decision downplays the power of deterrence. Fourth Amendment litigation has been consistently founded on the principle that the exclusionary rule is the best way to enforce Fourth Amendment provisions; the concern about the quality of deterrence was a driving force behind the good faith doctrine’s design. As mentioned earlier, one of the reasons for upholding *Arizona v. Evans* was the assumption that suppression of evidence would not properly deter court records from computer blunders. The expansion in *Herring*, therefore, implies that police agencies are not deterred from committing mistakes when penalized for the mistakes of other agencies. This implication misunderstands the character of general deterrence, as well as ignores empirical findings regarding the power of the exclusionary rule.

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139 “In short, the admission of the new constitutional right by Wolf 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.”. *Mapp v. Ohio*, 367 U.S. 643 (1961), 656.

140 “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’ . . . Whether 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.” *Hudson v. Michigan*, 547 U.S. 586 (2006).

141 *Az. v. Evans*, supra note ___.

Finally, *Herring*’s implicit deference to police fragmentation carries the risk of 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*, in itself, is unlikely to generate broad organizational changes within the police, it might support, in conjunction with other factors, further fragmentation and overspecialization within departments and agencies.

Granted, there are situations in which it is unreasonable to expect one agency to be accountable for another’s mistakes. This is especially true in situations in which a particular department or agency has been found to have recurring problems of constitutional violations. In such situations, it is healthy to demand accountability from the agency in which the problem lays. These accountability measures will often take the form of §1983 lawsuits. In the case of computer blunders, or more commonplace mistakes, it is fair to assume that the risk of mistake is more evenly distributed across departments, and therefore a broad deterrent remedy may be more appropriate. We now proceed to examine some examples of practical solutions fashioned by state courts for gauging the appropriate level of accountability and deterrence, as well as a proposal inspired by Canadian doctrine.

III. Untangling the Accountability Mess: Legal and Administrative Solutions

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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*, the Supreme Court first established an exclusionary rule based on a fusion of the Fourth Amendment protection from unreasonable search and seizure and the Fifth Amendment protection from 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 farther 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 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 offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his

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144 116 U.S. 616 (1886)
conviction of some public offence, -- 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.\footnote{145}

The Court’s opinion relied heavily on a famous British case discussing government intrusion more generally. Justice Bradley cited\textit{Entick v. Carrington},\footnote{146} a decision by Lord Camden in 1765, and explained that, “his great judgment on that occasion is considered as one of the landmarks of English liberty.”\footnote{147} Reliance on\textit{Entick} links the exclusionary rule to the social contract and the premise that legitimate government acts only when within the permissible conduct of the social contract.

In\textit{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. Officers executed the warrant on November 11, 1782. 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. Lord Camden looked to the social contract to explain the origin of a challenge to property seizures by the government,

\footnotesize\textsuperscript{145}\textit{Boyd v. United States}, 116 U.S. 616, 630 (1886).
\footnotesize\textsuperscript{146} 19 Howell’s State Trials 1029 (1765).
\footnotesize\textsuperscript{147} \textit{Boyd v. United States}, 116 U.S. 616, 626(1886).
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 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. 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.  

Lord Camden went on to distinguish special procedures for warrants to recover stolen property and rejected the claimed private privilege of office to search. 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

148 19 Howell’s State Trials 1029 (1765).
violated for reason of state, I am sure we his judges have no such prerogative.”\textsuperscript{149} 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.

A. 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 requiring that a defendant be prosecuted in multiple jurisdictions for the same crime unless absolutely necessary.\textsuperscript{150} For the purposes of this article, however, we focus on two examples pertaining to policing: The execution of county-to-county state warrants, and the assessment of warrant overbreadth. In both of these contexts, the courts have been attentive to the identity of the agency in fashioning the proper scope of deterrent remedies.

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

The Supreme Court established a firm Fourth Amendment exclusionary rule in 1914,\textsuperscript{151} but later held that the rule did not apply to States.\textsuperscript{152} The Court reversed course in 1961

\textsuperscript{149}19 Howell’s State Trials 1029 (1765).
\textsuperscript{150}Petite.
\textsuperscript{151}Weeks v. United States, 232 U.S. 383 (1914). Within four years the Court expanded the rule to include indirect evidence. Silverthorne Lumber v. United States, 251 U.S. 385 (1920).
\textsuperscript{152}Wolf v. Colorado, 338 U.S. 25 (1949)
and incorporated the exclusionary rule against the States in *Mapp v. Ohio*.\(^{153}\) 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. 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.\(^{154}\) However, the judge must order law enforcement from his own county to conduct the search the county where the evidence is to be found.\(^{155}\) The limitation emerged in *People v. Fleming* after dicta from two previous decisions compelled a definitive answer to the question.\(^{156}\) In *People v. Grant*, the First District Court of Appeal published that, “We 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.”\(^{157}\) They upheld the search on hot pursuit.\(^{158}\) In *People v. Ruster*, a defendant challenged a Santa Clara County judge’s decision to issue a warrant to search his apartment in San Mateo County. The California Supreme Court published a similar


\(^{154}\) *People v. Fleming*, 29 Cal.3d 698, 707 (1981); see also *People v. Galvan*, 5 Cal.App.4th 866, 870 (1992). However, California judges may not issue a warrant to search out of state. *Galpin v. Page*, 18 Wall. 350, 367 (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 officers 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.


\(^{156}\) *People v. Fleming*, 29 Cal.3d 698, 707 (1981).


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.” 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.

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. 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. 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.”

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159 People v. Ruster, 16 Cal. 3d 690, 702 (1976).
160 People v. Ruster, 16 Cal. 3d 690, 702 (1976).
161 He also asserted generally that the warrant lacked probable cause.
However, *Fleming* is not a federal constitutional principle and it did not survive California’s ban on independent state grounds for the exclusion of evidence. 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.” Accordingly, they passed a law that was later interpreted to eliminate all independent state grounds for the exclusion of evidence. 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. The Attorney General accepted the error and relied exclusively on the good faith rule to justify the search. The Court of Appeal agreed and after an extensive discussion of jurisdiction, the Court ultimately concluded that,

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164 *In re Lance W.*, 37 Cal. 3d 873, 896 (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 p. 909 (Mosk, J., dissenting). He explained that interpreting the requirement to admit all relevant evidence would remove many safeguards to victims. *Id.* at p. 909 (Mosk, J., dissenting). However, the principle is now well settled in California law. (FIND RECENT CITE)


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[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.  

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. 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.

California courts looked to 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 used to determine the remedy for common

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errors between agency interactions prior to the good faith exception and thereafter.\textsuperscript{172}

Thereafter, the court concluded that Leon’s good faith test subsumed the test for dealing with these types of problems.\textsuperscript{173}

The legal change that Ruiz noted took some time. One year after the Supreme Court decided United States v. Leon in 1984,\textsuperscript{174} the Ninth Circuit confronted good faith reliance on Rule of Criminal Procedure in United States v. Ritter.\textsuperscript{175} The Rule 41 cases took reasonable mistakes of agency identity and moved toward an application of the Leon rule.

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.\textsuperscript{176} 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.”\textsuperscript{177} However, the Court of Appeals explained that the Rule did not allow State magistrates to dispense with formalities and issue federal warrants by telephone.\textsuperscript{178} 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 is

\begin{itemize}
  \item \textsuperscript{172} See United States v. Stefanson (9th Cir. 1981) 648 F.2d 1231, 1235; United States v. Johnson (9th Cir. 1981) 660 F.2d 749, 753; United States v. Loyd (11th Cir. 1983) 721 F.2d 331, 332-333; United States v. Ritter (9th Cir. 1985) 752 F.2d 435, 440-441; United States v. Comstock (5th Cir. 1986) 805 F.2d 1194, 1205-1206; U.S. v. Luk (9th Cir. 1988) 859 F.2d 667, 671-672.
  \item \textsuperscript{173} People v. Ruiz, 217 Cal.App.3d at 585.
  \item \textsuperscript{174} United States v. Leon, 468 U.S. 897 (1984).
  \item \textsuperscript{175} United States v. Ritter, 752 F.2d 435 (9th Cir. 1985).
  \item \textsuperscript{176} United States v. Ritter, 752 F.2d 435, 440-441 (9th Cir. 1985). The relevant rule of criminal procedure has been materially changed since this case.
  \item \textsuperscript{177} United States v. Ritter, 752 F.2d 435, 440 (9th Cir. 1985) quoting Fed. R. Crim. Proc. 41.
  \item \textsuperscript{178} United States v. Ritter, 752 F.2d 435, 441 (9th Cir. 1985).
\end{itemize}
prejudice or deliberate disregard of the rule.\textsuperscript{179} Thus, \textit{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.\textsuperscript{180} The Ninth Circuit did not explicitly discuss the constitutional good faith standard of \textit{Leon} in the decision.

However, one year later the Fifth Circuit also addressed a violation of Rule 41 by federal and State interaction and explicitly re-evaluated its rational for automatic suppression.\textsuperscript{181}

In \textit{United States v. Comstock}, the Fifth Circuit explained,

\begin{quote}
[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 appropriate 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
\end{quote}

\begin{footnotes}
\textsuperscript{179} \textit{United States v. Ritter}, 752 F.2d 435, 441 (9th Cir. 1985).
\textsuperscript{180} \textit{United States v. Ritter}, 752 F.2d 435, 441 (9th Cir. 1985).
\textsuperscript{181} \textit{United States v. Comstock}, 805 F.2d 1194, 1205 (5th Cir. 1986); see also \textit{United States v. Luk}, 859 F.2d 667, 672 (9th Cir. 1988) (discussing the Fifth Circuit’s adoption of the rule).
\end{footnotes}
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.  

In a footnote, the Tenth Circuit rejected appellant’s distinction between reliance on a State magistrate and reliance on State law enforcement officers for the basis of the violation. 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.  

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 the find suppression necessary under the fundamental/non-fundamental test.  

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.  

However, after finding that the error was not fundamental, did not occur in bad faith, and

182 United States v. Comstock, 805 F.2d 1194, 1207 (5th Cir. 1986).
183 United States v. Comstock, 805 F.2d 1194, 1210 n.18 (5th Cir. 1986).
184 United States v. Comstock, 805 F.2d 1194, 1210 n.18 (5th Cir. 1986).
185 United States v. Luk, 859 F.2d 667, 674 - 675 (9th Cir. 1988).
186 United States v. Luk, 859 F.2d 667, 669 (9th Cir. 1988).
187 United States v. Luk, 859 F.2d 667, 673 (9th Cir. 1988).
did not result in prejudice\textsuperscript{188} the Ninth Circuit did not end its inquiry. Rather, the Court went on to consider the good faith test under \textit{United State 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 nonfundamental violation, then the suppression sanction is still not required under \textit{Leon}.”\textsuperscript{189}

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. \textit{Whose Affidavit? Curing Overbreadth.}

Additionally, courts have also taken into account identity of officers to cure warrant overbreadth, forgiving more where the same officer executes a warrant than where another officer executes. The general rule is that a warrant must be served with sufficient particularity or it is unconstitutional.\textsuperscript{190} However, one important factor is the knowledge of the officer executing the warrant. In \textit{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.\textsuperscript{191}

\textsuperscript{188} \textit{United States v. Luk}, 859 F.2d 667, 674 (9\textsuperscript{th} Cir. 1988).
\textsuperscript{189} United States v. Luk, 859 F.2d 667, 674 (9\textsuperscript{th} Cir. 1988).
\textsuperscript{190} U.S. Const. Amdmt. IV.
\textsuperscript{191} \textit{United States v. Gitcho}, 601 F.2d 369, 371-72 (9\textsuperscript{th} Cir. 1979); see also \textit{Harman v. Pollock}, 446 F.3d 1069, 1079 (10\textsuperscript{th} Cir. 2006) (citing \textit{Gitcho} for this proposition).
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*, 797 F.2d 1461, 1473 n.16 (9th Cir. 1986), 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." *Leon*, 468 U.S. at 926. On the contrary, the affidavit was diligently prepared by Koplik with Rossbacher's assistance.192

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 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

192 *United States v. Luk*, 859 F.2d 667, 677 n.9 (9th Cir. 1988).
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.\textsuperscript{193}

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.

B. 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 and harm to the justice system”,\textsuperscript{194} it is important to remember that 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,\textsuperscript{195} inevitable discovery,\textsuperscript{196} and good faith\textsuperscript{197} 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.

\begin{flushright}
\textsuperscript{193} United States v. Luk, 859 F.2d 667, 677 (9th Cir. 1988).
\textsuperscript{194} [HERRING CITE]
\end{flushright}
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\(^ {198}\) while acknowledging an appellate decision in the same Circuit that can be read to suggest application to warrantless searches.\(^ {199}\) The *Herring* opinion seems to invite courts to read it broadly, but provides little guidance as to how to apply it to new facts.

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

\(^ {198}\) See e.g. *United States v. McCarty*, 2009 U.S. Dist. LEXIS 107387 [does not apply to warrantless TSA search].

\(^ {199}\) See e.g. *United States v. Monghur*, 576 F.3d 1008, 1013-14 (9th Cir. 2009) [remanding for a container search without a warrant]
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.200

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 apply could be argued, as

Justices fought over whether the justice system could be associated with the flagrancy of certain police conduct.\textsuperscript{201}

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.

Conclusions

\textsuperscript{201} Compare Regina v. Harrison (2009) 2009 SCC 34 ¶ 25-42 with Id. at ¶ 71 – 73 (Deschamps, J., dissenting).
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 is a declaration that, in cases where police obtain evidence pursuant to a warrant, the court is authorized to weigh a balancing test accounting for these questions. Creating the proper incentives for police departments to perform their individual and collaborative duties diligently and effectively is not merely a due process concern; it would generate professional, cost-effective policing, thus enhancing policing services for the community’s benefit as well as protecting citizens’ rights and freedoms.