HEIEN V. NORTH CAROLINA AND THE UNREASONABLE "REASONABLE MISTAKE" OF LAW

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"The Common Law of England has been laboriously built about a mythical figure—the figure of 'The Reasonable Man.'"[1]

"They were reasonable people, and no one was to be hurt, not even with words."[2]

I. INTRODUCTION

In *Heien v. North Carolina*,[3] the United States Supreme Court, by an 8-1 vote, held that a police officer's so-called reasonable mistake of law can provide the individualized suspicion required by the Fourth Amendment to the United States Constitution[4] to justify a traffic stop.[5] Although some commentators expressed support for the *Heien* decision,[6]

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1. A. P. HERBERT, UNCOMMON LAW (1935), *reprinted in* OXFORD DICTIONARY OF QUOTATIONS 383 (Elizabeth Knowles ed., 6th ed., 2004).

2. ANITA BROOKNER, HOTEL DU LAC (1984), *reprinted in* OXFORD DICTIONARY OF QUOTATIONS 153 (Elizabeth Knowles ed., 6th ed., 2004).

3. 574 U.S. 54 (2014).

4. U.S. CONST. amend. IV, cl. 1.

5. *Heien*, 574 U.S. at 67.

6. *E.g.*, Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 VA. L. REV. 347 (2021) (explaining that *Heien* provides the ideal analytical structure for successful vagueness attacks on searches and seizures in the context of a motion to suppress); John B. Lyman, Comment, *Goldilocks and the Fourth Amendment: Why the Supreme Court of North Carolina Missed an Opportunity to Get Officer Mistakes of Law "Just Right in* State v. Heien*,"* 92 N.C. L. REV. 1012, 1029-30 (2014) (arguing that a police stop is lawful despite a mistake of law if there exists an objectively valid basis for the stop and the officer's mistake was reasonable and made in good faith); Lael

most were critical of the holding for a variety of reasons.[7] The popular media was especially disapproving, contending that *Heien* disincentivized police from knowing the law[8] and predicting the decision would likely lead to more police misconduct involving stops and frisks.[9]

While some of these critiques of *Heien* are well-grounded, the negative commentary about the decision largely ignored that the Court's reasoning conflicted with its well-established jurisprudence regarding stops and frisks.[10] Further, the commentary generally overlooked that the Court's reasoning in *Heien* failed to address adequately or, in some cases, even mention several venerable doctrines of constitutional and statutory interpretation and application that should have informed its reasoning.[11] Finally, the commentary about *Heien* was all but silent in

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Weinberger, *Making Mistakes About the Law: Police Mistakes of Law Between Qualified Immunity and Lenity*, 84 U. CHI. L. REV. 1561 (2017) (arguing that requiring statutory ambiguity as a precondition to a claim of reasonable mistake is the optimal method in which to implement *Heien*); Mark Jia, Note, *Search and Seizure—Reasonable Mistake of Law—Heien v. North Carolina*, 129 HARV. L. REV. 251 (2015) (arguing that the *Heien* test is less restrictive than what first meets the eye).

7. *See, e.g.*, Nadia Banteka, *Police Ignorance and (Un) Reasonable Fourth Amendment Exclusion*, 75 VAND. L. REV. 365, 385-86 (2015) (explaining how the reasonableness analysis established by *Heien* effectively replaces the arbitrariness of the exclusion doctrine and its application); Rob Shumaker, *For Traffic Stops, Police Ignorance of the Law Can Be an Excuse*, 103 ILL. B.J. 38, 41 (2015) (explaining how a police officer's mistake of law, like a mistake of fact, should not be found to have violated the Fourth Amendment if it was objectively reasonable); Kit Kinports, Heien*'s Mistake of Law*, 68 ALA. L. REV. 121, 168 (2016) (arguing that *Heien* could eventually lead courts to tolerate even unreasonable mistakes of law—something that would further complicate the growing tension between law enforcement and marginalized communities); Mallory Meads, *The War Against Ourselves:* Heien v. North Carolina*, The War on Drugs, and Police Militarization*, 70 U. MIAMI L. REV. 615, 645-46 (2016) (arguing that the Supreme Court must take accountability for its role in creating a system in which law enforcement frequently oversteps its constitutional limitations, in order to restore the rights guaranteed to citizens); Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 167 (2017) (arguing that a mistake of law doctrine for police officers would contradict the essential requisites of a legal system).

8. *See, e.g.*, Orin Kerr, *A Few Thoughts on* Heien v. North Carolina, WASH. POST (Sept. 29, 2014, 2:27 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/29/a-few-thoughts-on-heien-v-north-carolina [https://perma.cc/Q7JQ-9W5X] (arguing that a mistake of law by a police officer is not protected by the Fourth Amendment with respect to a search or seizure and that the defense should have prevailed).

9. *See, e.g.*, German Lopez, *Why Police Aren't Expected to Know the Law Even as They Arrest You for Breaking It*, VOX (Aug. 4, 2015, 12:30 PM), https://www.vox.com/2015/8/4/9095213/police-stops-heien-v-north-carolina [https://perma.cc/6JKY-WYSJ] (arguing that the *Heien* decision clearly expanded police powers, such that officers are not expected to know the law even as they arrest people for breaking it).

10. *See* Terry v. Ohio, 392 U.S. 1, 15 (1968). For example, the requirement that police act with objective reasonableness, as that term is properly understood, when evaluating whether their actions satisfy the reasonable suspicion standard. *See id.*

11. *See, e.g.*, Banteka, *supra* note 7, at 385, 387 (explaining how the reasonableness analysis established by *Heien* effectively replaces the arbitrariness of the exclusionary doctrine and its application; but failing to address how several venerable doctrines of constitutional and statutory interpretation and application should have informed the Court's reasoning).

considering the application of the Fourth Amendment exclusionary rule to the circumstances of that case.[12]

This Article explores whether the *Heien* decision is consistent with the Court's venerable Fourth Amendment doctrine and broader interpretive principles that ought to inform this evaluation.[13] The Article concludes that mistakes of law by police, however benign and understandable, are per se objectively unreasonable. Further, it concludes that, although such objectively unreasonable conduct by the police violates the Fourth Amendment, this does not require that the evidence thereby obtained must always be suppressed.

In particular, Part II of this Article discusses the facts of the *Heien* case, including the local law in question, and sets forth the Court's holding and rationale.[14] Part III considers whether the ordinance at issue in *Heien* was actually misleading or indefinite, and thus whether officers would likely misapply it in the field.[15] Part IV briefly reviews the Court's present Fourth Amendment jurisprudence relating to mistakes of fact by officers who perform searches and seizures, including stops and frisks, in the context of objective reasonableness.[16] Next, Part V considers decisional authority regarding officers' mistakes as to the law in relation to objective reasonableness.[17] Part VI then consults several doctrines and rules of construction that should inform the judgment about whether mistakes of law can and should be deemed objectively reasonable.[18] Part VII concludes that although *Heien* incorrectly determined that mistakes of law can be objectively reasonable in the context of probable cause and reasonable suspicion determinations, the evidence thereby obtained in violation of the Fourth Amendment need not be excluded at a defendant's criminal trial.[19]

II. THE FACTS, STATUTE, AND HOLDING IN *HEIEN*

The facts in *Heien* are straightforward: While following a suspicious vehicle, Sergeant Matt Darisse noticed that only one of the car's

12. *See, e.g.*, Meads, *supra* note 7, at 639-46 (arguing that, in light of its decision in *Heien*, the Supreme Court must take accountability for its role in creating a system in which law enforcement frequently oversteps its constitutional limitations in order to restore the rights guaranteed to citizens, but remaining silent as to the application of the Fourth Amendment exclusionary rule to the circumstances of that case).

13. *See infra* Part VI.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* Part VI.

19. *See infra* Part VII.

brake lights was working and pulled the driver over.[20] As Darisse was issuing a warning ticket for the broken brake light, he became suspicious of the actions of the two occupants and their answers to his questions.[21] Nicholas Heien, the car's owner, gave Darisse consent to search the vehicle.[22] Darisse found cocaine, and Heien was thereafter arrested and charged with attempted drug trafficking.[23] The trial court denied Heien's motion to suppress the seized evidence on Fourth Amendment grounds, concluding that the vehicle's faulty brake light gave Darisse reasonable suspicion to initiate the stop.[24] The North Carolina Court of Appeals reversed, holding that the relevant code provision, which requires that a car be "equipped with a stop lamp,"[25] requires only a single lamp, which Heien's vehicle had, and thus the justification for the stop was objectively unreasonable.[26] The State Supreme Court later reversed, holding that, even assuming that Darisse acted in violation of the ordinance, his mistaken understanding of the law was reasonable, and thus the stop was valid.[27]

The United States Supreme Court thereafter granted certiorari.[28] The Court held, by an 8-1 vote per Chief Justice Roberts,[29] that because Darisse's mistake of law was objectively reasonable, he satisfied the reasonable suspicion standard that was needed to justify the stop of Heien's vehicle under the Fourth Amendment.[30] The Court began by explaining that the Fourth Amendment requires government officials to act reasonably, not perfectly, and it gives those officials "fair leeway for enforcing the law."[31] Relying on *Michigan v. DiFillippo*,[32] and several nineteenth-century custom cases,[33] the Court contended that searches and

20. Heien v. North Carolina, 574 U.S. 54, 57 (2014).
21. *Id.* at 58.
22. *Id.*
23. *Id.*
24. *Id.*
25. State v. Heien, 714 S.E.2d 827, 831 (N.C. Ct. App. 2011) (emphasis omitted).
26. *Id.* at 831.
27. State v. Heien, 737 S.E.2d 351, 359 (N.C. 2012).
28. *Heien*, 574 U.S. at 60.
29. *Id.* at 57. Justice Sotomayor was the lone dissenter. *Id.* at 71.
30. *Id.* at 67.
31. *Id.* (citing Brinegar v. United States, 228 U.S. 160, 176 (1949)).
32. 433 U.S. 31 (1979).
33. In support of its holding, the Court cited to several nineteenth-century customs case decisions for the proposition "that reasonable mistakes of law, like those of fact, would justify certificates of probable cause." The Friendship, 9 F. Cas. 825, 826 (Cir. Ct. D. Mass. 1812); The La Manche, 14 F. Cas. 965, 972 (Mass. Dist. Ct. 1863); Locke v. United States, 11 U.S. 339, 348 (1813). The majority in *Heien* conceded, however, that these customs cases "are not directly on point [as they were] . . . not construing the Fourth Amendment, and a certificate of probable cause functioned much like a modern-day finding of qualified immunity, which depends on an inquiry distinct from whether an officer has committed a constitutional violation." *Heien*, 574 U.S. at 63.

seizures based on mistakes of fact may be objectively reasonable,[34] thereby essentially equating two different kinds of mistakes—mistake of law and mistake of fact—for purposes of evaluating whether the reasonable suspicion standard has been satisfied.[35] According to the Court:

> [R]easonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: The facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.[36]

Later, the Court explicitly rejected Heien's contention that the Fourth Amendment's allowance for reasonable mistakes of fact does not extend to reasonable mistakes of law.[37] Heien had argued that while "[o]fficers in the field must make factual assessments on the fly . . . and so deserve a margin of error, . . . no such margin is appropriate for questions of law,"[38] as the law is knowable by the officer before he ever encounters a suspect. The Court responded that "Heien's point does not consider the reality that an officer may 'suddenly confront' a situation in the field as to which the application of a statute is unclear—however clear it may later become."[39]

Heien also argued that if evidence obtained based on an officer's mistake of law is not suppressed, this would disincentivize police from knowing the law.[40] The Court responded:

> Contrary to the suggestion of Heien and *amici*, our decision does not discourage officers from learning the law. The Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable . . . . Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is dutybound to enforce.[41]

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34. *Heien*, 574 U.S. at 61 (referring to Illinois v. Rodriguez, 497 U.S. 177, 183-86 (1990)).
35. *Heien*, 574 U.S. at 61.
36. *Id.*
37. *Id.*
38. *Id.* at 66.
39. *Id.*
40. *Id.*
41. *Id.* at 66-67 (emphasis omitted).

Lastly, the Court rejected Heien's reliance on what it called the "well-known maxim, 'Ignorance of the law is no excuse,' and [his contention] that it is fundamentally unfair to let police officers get away with mistakes of law when the citizenry is accorded no such leeway."[42] The Court explained:

> Though this argument has a certain rhetorical appeal, it misconceives the implication of the maxim. The true symmetry is this: Just as an individual generally cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. If the law required two working brake lights, Heien could not escape a ticket by claiming he reasonably thought he needed only one; if the law required only one, Sergeant Darisse could not issue a valid ticket by claiming he reasonably thought drivers needed two. But just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop. And Heien is not appealing a brake-light ticket; he is appealing a cocaine-trafficking conviction as to which there is no asserted mistake of fact or law.[43]

The Court ultimately concluded that "[i]t was thus objectively reasonable for an officer in Sergeant Darisse's position to think that Heien's faulty right brake light was a violation of North Carolina law. And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop."[44]

III. WAS THE ORDINANCE IN *HEIEN* SUSCEPTIBLE TO A "REASONABLE" MISINTERPRETATION?

Black's Law Dictionary defines the term "reasonable" to mean "fair, proper, or moderate under the circumstances."[45] Reasonableness, in the context of the Fourth Amendment standards of probable cause and reasonable suspicion, is thus an objective concept.[46] Webster's Dictionary defines the reasonable person as "a fictional person with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circum-

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42. *Id.* at 67.

43. *Id.*

44. *Id.* at 68.

45. *Reasonable*, BLACK'S LAW DICTIONARY (11th ed. 2019).

46. JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE: VOL. 1: INVESTIGATION § 8.02[B] (8th ed. 2021) (stating that "probable cause is an objective concept," and that "in determining what a so-called 'person of reasonable caution' would believe, a court will take into account the expertise of the officer whose actions are under scrutiny").

stance or fact is used as an objective standard by which to measure or determine something."[47] When assessing the "particular circumstances or facts" in the context of objective reasonableness, this generic objective standard has, on occasion, been modified to include a limited number of subjective characteristics, such as a person's age,[48] gender,[49] and disability.[50] Traditionally, subjective modifiers, like those just mentioned above, are limited to immutable or objectively ascertainable traits and characteristics,[51] and thus they do not include the personal experiences or character traits of the person in question.[52]

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47. *Reasonable Person*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/reasonable%20person [https://perma.cc/NTZ8-3JM7] (last visited Aug. 12, 2023).

48. *See, e.g.*, J.B.D. v. North Carolina, 564 U.S. 261, 276-77 (2011) (holding that a suspect's age (i.e., that he was a child) was relevant for purposes of determining whether a reasonable person in the suspect's position would believe he was in custody, with respect to the requirement to give Miranda warnings); Robert v. Ring, 173 N.W. 437, 438 (Minn. 1919) (holding a seven-year-old boy to the standard of an objective seven-year-old boy, and not to that of an adult).

49. *See, e.g.*, State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (holding that because the defendant was a diminutive woman with a cast on her leg and the victim was a large, intoxicated man, due consideration must be given to the difficulty a reasonable person in her position would have had in repelling him without the use of weapons in her defense).

50. *See, e.g.*, McGarvey v. Seattle, 384 P.2d 127, 132 (Wash. 1963) (holding that, in applying the standard of objective reasonableness, an elderly man with glaucoma should be assessed by the standard of a reasonable person suffering from impaired eyesight); Fletcher v. Aberdeen, 338 P.2d 743, 745-46 (Wash. 1959) (holding that it was relevant that the plaintiff, who fell into an excavation dug by the city, was blind in determining whether the city was negligent in maintaining its parking strips in a reasonably safe condition; a blind person should be held to the objective standard of a reasonable blind person and not that of a reasonable sighted person).

51. Characteristics such as education, sophistication, and cultural norms are generally not allowed to modify the reasonable person standard. *See* Eugene R. Milhizer, *Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience?*, 71 MO. L. REV. 547, 619 (2006) (stating that "[s]ome group-related characteristics, such as age and gender, can be pertinent to the question of whether the defendant behaved like a reasonable person," but "[a] hyper-subjective conception of the reasonable person . . . would presumably incorporate a virtually unlimited range of characteristics and experiences pertaining to the defendant, many of which are logically unrelated to or even in conflict with the idea of an objective evaluation").

52. *See* V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1727-28 (2003) (reflecting on "liberal philosophy of the 1970s" where "a large portion of the literature on negligence, self-defense, and provocation was devoted to the question of how 'individualized' the reasonable person should be . . . [b]y the end of the century . . . [a]lthough individualization remained a central background norm in theoretical debates, there was growing concern that this approach could lead to abuse"; relative height and weight can be accurately measured and verified, but one's state of mind cannot be assessed with equal confidence); Milhizer, *supra* note 51, at 616 n.342 ("The reasonable person cannot be divined by statistical calculation. His or her measure of fortitude, for example, cannot be derived by quantifying the amount of fortitude possessed by each person in a jurisdiction, adding this up, and then dividing by the number of persons."). However, the Model Penal Code does permit the consideration of some subjective characteristics, as it recognizes that:

> The standard is not, however, wholly external in its reference; account is taken of the actor's "situation," a term that should here be given the same scope it is accorded in ap-

The Court has long applied an objective approach in evaluating whether a police officer has acted reasonably under the Fourth Amendment when performing his duties given the particular "facts and circumstances."[53] *Graham v. Connors*[54] is instructive in this regard. In *Graham*, a diabetic patient began to experience an insulin reaction.[55] He asked a friend to drive him to a convenience store to buy orange juice.[56] When they arrived at the store and saw that it was crowded, the patient believed it would take too long to get the juice, and so he asked his friend to drive him to another person's house.[57] A police officer noticed the patient leaving the store soon after he entered it and followed the friend's car.[58] The officer eventually stopped the vehicle and ordered the patient and the friend to wait while he investigated what happened in the store.[59] Other officers, after arriving at the scene, handcuffed the patient and failed to investigate or address his medical condition.[60] The patient was injured during these events, and the original officer eventually released the patient after determining that no crime had occurred in the store.[61]

The Supreme Court granted certiorari on the issue of whether the officers used excessive force toward the patient.[62] In addressing whether the officers' conduct violated the Fourth Amendment, the Court applied an objective reasonableness standard and instructed:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard

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praising recklessness and negligence. Stark, tangible facts that differentiate the actor from another, like his size, strength, age, or health, would be considered in making the exculpatory judgment. Matters of temperament would not.

MODEL PENAL CODE § 2.09 cmt. 3, at 375. *See, e.g.*, Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 639-40 (1980) (with respect to Battered Women Syndrome, advocating a more individualized approach to the reasonable man standard in self-defense doctrine).

53. *See, e.g.*, Scott v. United States, 436 U.S. 128, 137 (1978) (instructing that "the proper approach for evaluating compliance with the minimization requirement," like evaluation of all alleged violations of the Fourth Amendment, "is an objective assessment of an [agent's or] officer's actions in light of the facts and circumstances" confronting him at the time, without regard to his underlying intent or motive).

54. 490 U.S. 386 (1989).

55. *Id.* at 388.

56. *Id.*

57. *Id.* at 388-89.

58. *Id.* at 389.

59. *Id.*

60. *Id.*

61. *Id.* at 389-90.

62. *Id.* at 388, 399.

> to their underlying intent or motivation . . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.[63]

Unlike *Graham*, *Heien* involved a less intrusive traffic stop.[64] In *Terry v. Ohio*[65]—the landmark stop and frisk case discussed in greater detail later in this Article—the Supreme Court made clear that in analyzing the reasonableness of any particular search or seizure, including stops and frisks, "it is imperative that the facts be judged against an objective standard."[66] In applying this objective standard in *Terry*, the Court went beyond a generic abstraction of the reasonable person or police officer.[67] Rather, when assessing whether the actions of Detective McFadden were objectively reasonable, the *Terry* Court explicitly recognized that he was "an experienced, prudent policeman."[68] Thus, in *Terry*, as in *Graham*, an officer's training and experience may be considered when evaluating whether he acted in an objectively reasonable fashion under the Fourth Amendment.[69]

But the relevant, subjective "fact and circumstance" at issue in *Heien* did not involve an officer's experience or training,[70] which may provide useful insight when evaluating his actions retroactively. Nor, for that matter, did it concern an officer's age, gender, disability, or some other immutable characteristic.[71] Rather, the relevant "facts and circumstances" in *Heien* concerned the officer's mistake about the scope of a presumably confusing law, which directly led to the suspect's seizure under the Fourth Amendment.[72] Nevertheless, the Court in *Heien* concluded that the officer's mistake about the very law he was enforcing was objectively reasonable under the facts and circumstances.[73] Leaving aside for now whether an officer's mistake of law can ever be deemed to be reasonable[74]—and whether the police should be held to a higher

63. *Id.* at 397 (citations omitted).

64. Heien v. North Carolina, 574 U.S. 54 (2014).

65. 392 U.S. 1 (1968).

66. *Id.* at 21; *see id.* at 21-22 (examining whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate[]").

67. *Id.* at 23.

68. *Id.* at 33 (Harlan, J., concurring); *see also id.* at 8, 23 (majority opinion).

69. *Id.* at 27.

70. Heien v. North Carolina, 574 U.S. 54, 55 (2014).

71. *See id.* at 73 (Sotomayor, J., dissenting).

72. *Id.* at 77.

73. *Id.* at 67-68 (majority opinion).

74. *See id.* at 57 (majority opinion); *see also id.* at 60-61 (majority opinion) (determining "whether such a mistake of law can nonetheless give rise to the reasonable suspicion necessary to

standard when enforcing the law than lay persons who are required to obey the law—the Court's conclusion in *Heien* is predicated on its characterization of the taillight ordinance at issue as being ambiguous and susceptible to "reasonable" misinterpretation.[75] The purported ambiguity and inscrutability of the taillight statute will be briefly considered next[76] before addressing the broader issues relating to objective reasonableness.

Under North Carolina law, motor vehicles must adhere to the lighting equipment requirements set forth in N.C. Gen. Stat. Ann. § 20-129.[77] Within the statutory requirements, in pertinent part, subsections (d) and (g) address "rear lamps" and "stop lamps" on motor vehicles.

Rear lamps in subsection (d) provides:

> Every motor vehicle . . . shall have all originally equipped rear lamps or the equivalent in good working order . . . [o]ne rear lamp or a separate lamp shall be so constructed and placed that the number plate carried on the rear of such vehicle shall under [normal atmospheric] conditions be illuminated by a white light as to be read from a distance of 50 feet to the rear of such vehicle.[78]

Stop lamps in subsection (g) requires:

> No person shall sell or operate on the highways of the State any motor vehicle manufactured after December 31, 1955, and on or before December 31, 1970, unless it shall be equipped with a stop lamp on the rear of the vehicle . . . [n]o person shall sell or operate on the highways of the State any motor vehicle, manufactured after December 31, 1970, unless it shall be equipped with stop lamps, one on each side of the rear of the vehicle . . . [t]he stop lamps shall emit, reflect, or display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake . . . [t]he stop lamps may be incorporated into a unit with one or more other rear lamps.[79]

In 1965, the Supreme Court of North Carolina identified two related safety purposes served by the statute: "first, to enable the operator of

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uphold the seizure under the Fourth Amendment," the Court reasoned that "to justify this type of seizure, officers need only 'reasonable suspicion' . . . [b]ut reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion").

75. *Id.* at 61, 67-68 (majority opinion).

76. *See infra* Part III.

77. N.C. GEN. STAT. ANN. § 20-129(d) (2016).

78. *Id.* at 27 (instructing that "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience").

79. *See* State v. Ford, 703 S.E.2d 768, 770 (N.C. Ct. App. 2010) (quoting N.C. GEN. STAT. ANN. § 20-129(d) (2016)).

the automobile to see what is ahead of him; second, to inform others of the approach of the automobile."[80] The current statute references a prior version that was in effect until September 30, 2015.[81] Proceeding this prior version, the statutory language of subsection (g) was amended to include the words, "unless it shall be equipped with a stop lamp on the rear of the vehicle."[82] The additional words are retained in the current version of the Code.[83] Accordingly, the statute requires only that "vehicles . . . have at least one working brake light," and thus there is no violation if a vehicle also has "one faulty brake light."[84]

The Supreme Court in *Heien* relied on what it identified as the "reality that an officer may 'suddenly confront' a situation in the field as to which the application of a statute is unclear—however clear it may later become."[85] Even assuming the truth of this assertion in certain situations, it strains credulity to believe that a police officer would be unaware of the relevant law when encountering a vehicle that had one rather than two operable taillights. Unlike the practically infinite nature of factual variables that might be conceivably present in any particular set of circumstances,[86] the legal question at issue in *Heien*—whether the law triggering the stop required one or two operable taillights—was likely anticipated, commonly encountered, and essentially binary.[87] Thus, any claim by Sergeant Darisse that his mistake about the law was under-

80. N.C. GEN. STAT. ANN. § 20-129(g) (2016).

81. *See* State v. Heien, 714 S.E.2d 827, 830 (N.C. Ct. App. 2011); *see also* § 20-129(g).

82. § 20-129(g).

83. *Id.*

84. State v. Eldridge, 790 S.E.2d 740, 743 (N.C. Ct. App. 2016) (being in effect from October 1, 2015, to November 30, 2016). This Article takes no position on whether requiring two operable taillights, rather than one operable taillight, is preferable.

85. Heien v. North Carolina, 574 U.S. 54, 66 (2014).

86. *See, e.g.*, California v. Hodari D, 499 U.S. 621, 625, 628 (1991) (explaining that the "[fleeing suspect's] defense relies . . . upon the proposition that a seizure occurs 'when the officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a person;'" however, "the test for existence of a 'show of authority,' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person") (emphasis in original); *see also* Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (abandoning "any rigid demand that specific 'tests' be satisfied by everyday informant's tips" and adopting "a 'totality-of-the-circumstances' approach" in its place as it is "far more consistent with [the Court's] prior treatment of probable cause" . . . dealing with "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act").

87. *Heien*, 574 U.S. at 67. In contrast, innumerable factual variations relating to a vehicle's taillights might be imagined. For example, suppose one of two taillights flickers or operates intermittently in a jurisdiction that requires two operable taillights. This scenario would present a mixed question of fact and law rather than an issue of "pure law," i.e., was the particular flickering or intermittent taillight in a particular case so compromised in its effectiveness such that it is considered to be inoperable?

standable based on unexpected and confusing circumstances, let alone constituted an objectively reasonable misinterpretation of the law under the circumstances, seems dubious at best.

Based on the foregoing, one might certainly argue that the officer's mistake of law in *Heien* was not predicated on an unexpected set of circumstances involving an inscrutable ordinance that is susceptible to a "reasonable" misinterpretation.[88] But assuming, for the sake of argument, that Sergeant Darisse was understandably caught off guard when he encountered a vehicle with only one operable taillight, and that the ordinance he acted upon was objectively indefinite or ambiguous, the broader question still remains: Can an officer's mistake about the very law he is enforcing, which forms the basis for and directly leads to a Fourth Amendment stop, ever be deemed to be objectively reasonable?[89]

IV. OBJECTIVE REASONABLENESS AND MISTAKES OF FACT UNDER THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution explicitly includes the term "probable cause." The Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[90]

Prior to *Terry v. Ohio*,[91] the Court adhered to the position that the Fourth Amendment[92] required a probable cause basis for all reasonable searches[93] or seizures.[94] The only variation to this standard was an-

88. *See Eldridge*, 709 S.E.2d at 743 (contending that "'a stop lamp' suggest[s] the need for only a single working brake light" pursuant to the North Carolina Vehicle Code).

89. *See id.* (citing United States v. Stanbridge, 813 F.3d 1032, 1037 (7th Cir. 2016) ("The statute isn't ambiguous, and *Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute.")); *see also* Hannah Dunn, Comment, *Ignorance of the Law Is No Excuse—Unless You're a Cop*, 49 LOY. L.A. L. REV. 551, 555-56 (2016) (contending that "vehicle[s] . . . equipped with 'a stop lamp'" comply with the statute—"not stop lamps, but a singular, functional stop lamp . . . [the Court's] interpretation that the statute also could mean all brake lights must work does not reconcile with the wording of '*a*' brake light").

90. U.S. CONST. amend. IV (emphasis added).

91. 392 U.S. 1 (1968).

92. U.S. CONST. amend. IV.

93. Brinegar v. United States, 338 U.S. 160, 176 (1949) (holding that probable cause affords "the best compromise" with respect to the often-opposing interests associated with inferences made by police officers); Katz v. United States, 389 U.S. 347, 358 (1967) (holding that besides several narrow exceptions, the Court could not agree with the exemption of "advance authorization by a

nounced a year prior to *Terry* in *Camara v. Municipal Court*,[95] in which the Court held that administrative searches did not require individualized suspicion of criminal wrongdoing, but rather could be based on a form of probable cause resting on the general Fourth Amendment standard of reasonableness.[96]

Long before *Camara* and unaltered by that decision, the probable cause standard for searching and seizing has always been predicated on the requirement that the police act with objective reasonableness.[97] Accordingly, an officer's subjective belief that the probable cause standard has been satisfied, no matter how honest and genuine this may be, is inadequate under the Fourth Amendment unless his belief is also objectively reasonable.[98] Similarly, an officer's lack of a subjective belief about the existence of probable cause does not preclude a determination that probable cause actually exists.[99] Further, if probable cause is objectively established, then the officer's subjective motivations for searching or seizing, even if they are pretextual or malicious, are irrelevant to the objective determination of probable cause.[100] Put another way, probable cause is not to be judged retroactively with the benefit of hindsight.[101] As the Court explained in *Graham v. Connor*[102]:

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magistrate upon a showing of probable cause[,]" as "[o]mission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause[]'").

94. Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891). The Court did not conclude, however, that a warrant, like probable cause, was always required for Fourth Amendment compliance with respect to arrests and the seizure of evidence. *Compare* United States v. Johnson, 333 U.S. 10, 16-17 (1948) (holding that the warrantless search of a hotel room was unreasonable even though it was based on probable cause), *with* United States v. Watson, 423 U.S. 411, 417 (1975) (holding that the warrantless public felony arrest of a suspect was reasonable because it was based on probable cause), *and* Horton v. California, 496 U.S. 128, 144-45 (1990) (holding that items in plain view may be seized without a warrant).

95. 387 U.S. 523 (1967).

96. *See id.* at 534.

97. Graham v. Connor, 490 U.S. 386, 397 (1989) (reversing the lower court's decision and holding that the excessive force claim arises under the Fourth Amendment analysis).

98. Beck v. Ohio, 379 U.S. 89, 95-97 (1964) (holding that probable cause does not exist when facts and circumstances are insufficient for officers to believe the individual had or was committing a crime).

99. Florida v. Royer, 460 U.S. 491, 504 (1983) (holding that a seizure becomes unlawful when it is "more intrusive than necessary"); *see id.* at 505-07.

100. Whren v. United States, 517 U.S. 806, 813 (1996) (holding that the Fourth Amendment analysis does not consider an officer's subjective belief).

101. *See* Hill v. California, 401 U.S. 797, 804-05 (1971) (holding that an arrest based on probable cause was reasonable even when the wrong person is arrested); Maryland v. Garrison, 480 U.S. 79, 85, 88 (1987) (holding that a search based on probable cause was reasonable even when the wrong premises was searched).

102. 490 U.S. 386 (1989).

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises.[103]

Whether an officer's probable cause determination was objectively reasonable is, of course, evaluated based on the totality of the circumstances. In *Illinois v. Gates*,[104] the Court rejected the idea that any "rigid demand[s]" or "specific 'tests'" be employed to evaluate whether probable cause was established.[105] Instead, the Court reiterated that a "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause."[106] As the Court observed in *Gates*:

> [W]e reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common[-]sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.[107]

In *Terry v. Ohio*,[108] the Court announced a newly minted, second Fourth Amendment norm for criminal searches and seizures—reasonable suspicion.[109] Although less demanding than probable cause with respect to likelihood of the factual correctness, the reasonable suspicion standard otherwise parallels the probable cause standard in all other important respects.[110] In particular, the Court repeatedly instructed that reasonable suspicion, like probable cause, is an objective concept

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103. *Id.* at 396.
104. 462 U.S. 213 (1983).
105. *Id.* at 230-31.
106. *Id.* at 231.
107. *Id.* at 238-39 (citations omitted).
108. 392 U.S. 1 (1968).
109. *Id.* at 27.
110. *See* Dunaway v. New York, 442 U.S. 200, 208-09 (1979) (explaining that probable cause requires a greater degree of likelihood than reasonable suspicion); Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (holding that reasonable suspicion still requires "at least a minimal level of objective justification for making the stop"); Alabama v. White, 496 U.S. 325, 330-32 (1990) (recognizing that reasonable suspicion may exist when a tip, corroborated by independent police work, contains "sufficient indicia of reliability" to provide reasonable suspicion to make the stop).

that is to be evaluated based on "the totality of the circumstances."[111] As the Court explained in *Ornelas v. United States*[112]: "Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[113]

The Court in *Ornelas* instructed further that an analysis of the probable cause and reasonable suspicion standards involves "a determination of historical facts . . . [and] mixed question[s] of law and fact."[114] Thus, by implication, the Court excluded what might be referred to as "pure law" from the totality of the circumstances that should be evaluated. In this regard, the Court instructed in *Ornelas*, quoting *Pullman-Standard v. Swint*,[115] that when

> the historical facts are admitted or established, [and] the rule of law is undisputed, . . . the issue is whether the *facts* satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established *facts* is or is not violated.[116]

Accordingly, *Ornelas* instructs that while mixed questions of law and fact are to be evaluated in determining whether the probable cause or reasonable suspicion standard is satisfied in a particular case, questions of pure law are not included in this totality of the circumstances to be considered.[117]

In the stop and frisk context, this new reasonable suspicion norm was applied to police activities that were less intrusive than traditional searches and seizures requiring a probable cause basis.[118] *Terry v. Ohio*[119] instead concerned a warrantless stop (a less intrusive seizure of a person than an arrest),[120] and a frisk (a less intrusive search of a person

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111. United States v. Cortez, 449 U.S. 411, 417-18 (1981) (holding that the totality of the circumstances must be assessed in determining whether an officer had reasonable suspicion, and that a reasonable suspicion is "a particularized and objective basis" for suspecting the person stopped of criminal activity); *see* Richards v. Wisconsin, 520 U.S. 385, 394-95 (1997) (rejecting bright-line rules in favor of a totality-of-the-circumstances approach when evaluating whether the reasonable suspicion standard is satisfied in connection with the knock-and-announce requirement).

112. 517 U.S. 690 (1996).

113. *Id.* at 695; Illinois v. Gates, 462 U.S. 213, 231 (1983) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)); *see* United States v. Sokolow, 490 U.S. 1, 7-8 (1989).

114. *Ornelas*, 517 U.S. at 696.

115. 456 U.S. 273 (1982).

116. *Ornelas*, 517 U.S. at 696-97 (quoting *Pullman-Standard*, 456 U.S. at 289 n.19) (emphasis added).

117. *See id.*

118. *See id.* at 693; *see also* Terry v. Ohio, 392 U.S. 1, 26 (1968).

119. 392 U.S. 1 (1968).

120. *Id.* at 29.

than a search incident to arrest) of a criminal suspect.[121] The Court held in *Terry* that a warrantless stop and frisk of a criminal suspect did not require a probable cause basis.[122] Rather, these activities complied with the Fourth Amendment if they were premised on a reasonable and articulable suspicion that criminal activity was afoot and the suspect was armed and dangerous.[123] While the Court elaborated in *Terry* and later cases that the reasonable suspicion standard is less demanding than probable cause,[124] it has always reaffirmed that it is no less objective.[125] As the Court instructed in *Terry*, "in determining whether the officer acted reasonably in such circumstances, due weight must be given not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."[126] Put another way, a "reasonable and articulable suspicion" is one that is objectively supported by all of the facts then known to the officer, which are capable of later being described and explained.[127]

The Court has applied the Fourth Amendment requirement that an officer act with objective reasonableness in a variety of contexts.[128] In *Graham v. Connor*,[129] mentioned earlier, the Court held that "[a]ll claims that law enforcement officials have used excessive force—deadly or

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121. *Id.* at 7.

122. *Id.* at 20, 31.

123. *Id.* at 30. In the Court's words:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.

124. Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (holding that reasonable suspicion still requires "at least a minimal level of objective justification for making the stop"); Alabama v. White, 496 U.S. 325, 331-32 (1990) (recognizing that reasonable suspicion may exist when a tip, corroborated by independent police work, contains "sufficient indicia of reliability" to provide reasonable suspicion to make the stop); Florida v. J.L., 529 U.S. 266, 274 (2000) (holding that reasonable suspicion did not exist because the officers' unverified anonymous tip was insufficient indicia of reliability to make an investigatory stop).

125. *See* United States v. Sokolow, 490 U.S. 1, 7 (1969) (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)) (holding that probable cause is a "fluid" concept and not reduced to a "neat set of legal rules").

126. Terry v. Ohio, 392 U.S. 1, 27 (1968).

127. *Id.* at 20-22.

128. Daniel N. Haas, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact During Traffic Stops*, 62 DEPAUL L. REV. 1035, 1038-40 (2013).

129. 490 U.S. 386 (1989).

not—in the course of an arrest, investigatory stop, or other seizure of a free citizen are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard."[130] Elsewhere, the Court has required objective reasonableness when applying the reasonable suspicion standard to the knock and announce requirement,[131] and protective sweeps.[132]

But what about the Court's willingness in *Terry* to credit an officer's subjective characteristic—in that case, Detective McFadden's many years of experience as a police officer—when evaluating whether he acted in an objectively reasonable manner?[133] The response should be categorical: crediting Detective McFadden's experience in assessing factual reasonableness of his actions in *Terry* is inapposite to crediting Sergeant Darisse's mistaken interpretation of the law when evaluating the legal reasonableness of his actions in *Heien*.

In *Terry*, the officer's subjective characteristic (experience) was considered in evaluating the objective reasonableness of his actions because doing so helps elucidate why an otherwise seemingly insufficient factual basis for a Fourth Amendment stop does, in fact, objectively satisfy the reasonable suspicion standard.[134] When weighing the objective reasonableness of an officer's actions, a court may legitimately consider the enhanced situational awareness he acquired over time.[135] But it is quite another thing to credit as objectively reasonable, as the Court did in *Heien*,[136] an officer's failure to follow the law based on his lack of experience or for some other reason. When it comes to the objective reasonableness standard, it should make no difference whether the officer's mistake about the law was genuine and unintended, as opposed to being deliberate or malicious.[137] In either case, an officer's misapplication of the law should be deemed to be objectively unreasonable because it is objectively unreasonable, irrespective of the subjective sincerity of his mistake.

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130. *Id.* at 395.

131. Richards v. Wisconsin, 520 U.S. 385, 395 (1997) (holding that officers executing a search warrant did not have to "knock and announce" when risk of evidence being destroyed was present).

132. Maryland v. Bouie, 494 U.S. 325, 333-34 (1990) (holding that an officer may conduct a limited protective sweep of areas in which he reasonably suspects a dangerous person may be hiding).

133. Terry v. Ohio, 392 U.S. 1, 8, 23, 33 (1968).

134. *Id.* at 21-23.

135. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13-14 (1948) (finding that an officer's specialized knowledge of the appearance or odor of a narcotic is relevant in determining whether an officer has probable cause to make an arrest or drug search).

136. Heien v. North Carolina, 574 U.S. 54, 60 (2014).

137. The officer's state of mind may be relevant to the issue of whether the improperly obtained evidence should be suppressed under the Fourth Amendment exclusionary rule, which is discussed in Part VII, *infra*.

Atwater v. Lago Vista[138] and *Virginia v. Moore*[139] help distinguish between state procedural limitations, which have no bearing on Fourth Amendment reasonableness, and substantive state law, which does.[140] In *Atwater*, a motorist was arrested for a minor seat belt violation.[141] Under the jurisdiction's applicable law, the officer had discretion whether to arrest the motorist or instead issue a citation.[142] The Court found that the arrest, under the circumstances, was "humiliating" and "a pointless indignity" that outweighed any countervailing interest the city could claim.[143] Nevertheless, the Court concluded that the arrest was reasonable under the Fourth Amendment because the officer had probable cause to arrest the motorist for a crime committed in his presence.[144] In *Moore*, instead of issuing a summons required by state law, an officer arrested a suspect for the misdemeanor of driving on a suspended license.[145] A search incident to that arrest yielded crack cocaine, and the suspect was tried on drug charges.[146] The Court held in *Moore* that the police did not violate the Fourth Amendment when they searched the suspect incident to his arrest, even though state law limited the police to issue a citation, because the suspect's arrest was objectively reasonable, i.e., it was based upon a proper probable cause determination that the suspect had violated the law.[147] In *Heien*, and in contrast to *Atwater* and *Moore*, the suspect

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138. 532 U.S. 318, 323 (2001) (considering "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine").

139. 553 U.S. 164, 166, 176 (2008) (considering "whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law").

140. *Atwater*, 532 U.S. at 352; *Moore*, 553 U.S. at 166, 172.

141. *Atwater*, 532 U.S. at 323-24 (charging a motorist "with driving without her seatbelt fastened [and] failing to secure her children in seatbelts"—"a misdemeanor seatbelt violation punishable only by a fine").

142. *See id.* at 323 ("Texas law expressly authorizes 'any peace officer to arrest without warrant a person found committing a violation' of these seatbelt laws . . . although it permits police to issue citations in lieu of arrest.").

143. *Id.* at 321, 347, 354.

144. *See id.* at 354 (confirming that "the standard of probable cause 'applies to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.' . . . [Therefore], [i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

145. *See Moore*, 553 U.S. at 167 (explaining that pursuant to state law, "[d]riving on a suspended license . . . is not an arrestable offense except as to those who 'fail or refuse to discontinue' the violation, and those whom the officer reasonably believes to be likely to disregard a summons, or likely to harm themselves or others").

146. *See id.*

147. *See id.* at 174-76, 178 (contending that "it is not the province of the Fourth Amendment to enforce state law" and thus holding that "[e]ven if [the Court] thought that state law changed the nature of the Commonwealth's interests for purposes of the Fourth Amendment, [it] would adhere to the probable-cause standard. . . . [W]arrantless arrests for crimes committed in the presence of an

was arrested for conduct that did not violate state law.[148] Accordingly, Heien's arrest was not objectively reasonable because the arresting officer mistakenly concluded that Heien's conduct violated state law. Put another way, a probable cause belief that a person is engaged in conduct that is actually permitted under the law cannot afford an objectively reasonable basis to arrest that person for their lawful conduct.

The Court in *Heien* reached an erroneous conclusion about objective reasonableness because it equated factual mistakes and legal mistakes for purposes of objective reasonableness under the Fourth Amendment. The Court has long held that an officer may act with objective reasonableness even when he is mistaken about the facts.[149] In *Brinegar v. United States*,[150] the Court explained, "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes [on their part]. But the mistakes must be those of reasonable men."[151] For example, in *Illinois v. Rodriguez*,[152] police searched the defendant's residence and seized drugs based on their mistaken belief that the defendant's girlfriend, who consented to the search, had common authority over the residence and thus the authority to consent.[153] The Court held that based on the totality of the facts and circumstances then known to the officers, their mistake of fact was reasonable, and thus the evidence was allowed at trial.[154] The Court instructed:

> It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many *factual determinations* that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.[155]

The Seventh Circuit Court has expressly applied the reasonable mistake of fact standard to traffic stops. In *United States v. Cashman*,[156]

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arresting officer are reasonable under the Constitution . . . state restrictions do not alter the Fourth Amendment's protections . . . [and the] Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest").

148. Heien v. North Carolina, 574 U.S. 54, 57 (2014) (explaining that "[i]n this case, an officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all the law required").

149. *See, e.g.*, *id.* at 60-61.

150. 338 U.S. 160 (1949).

151. *Id.* at 176.

152. 497 U.S. 177 (1990).

153. *Id.* at 179.

154. *Id.* at 186.

155. *Id.* at 185-86 (emphasis added).

156. 216 F.3d 582 (7th Cir. 2000).

an officer stopped a vehicle after observing what he believed to be an "excessive" crack in the windshield.[157] The officer received consent to search the vehicle during the stop, which led to the discovery of illegal drugs and drug paraphernalia.[158] On appeal, the Seventh Circuit Court rejected the defendant's argument that the officer lacked probable cause to search his automobile because the windshield crack was not excessive, observing that the excessiveness of the crack was not at issue.[159] The court explained that the "pertinent question instead is whether it was reasonable for [the officer] to *believe* that the windshield was cracked to an impermissible degree."[160] Because the officer "could readily and reasonably think that the crack met the administrative criteria for excessive cracking," the fruits of the derivative search were not obtained in violation of the Fourth Amendment.[161] In other words, an officer's reasonable mistake of fact is fully compatible with the Fourth Amendment's requirement for objective reasonableness.[162]

While the objective reasonableness standard for stops and frisks allows for an officer's reasonable mistake of fact, before *Heien* the Supreme Court never similarly endorsed that an officer's mistake about the operative law could be consistent with the requirement for objective reasonableness under the Fourth Amendment. As discussed in the next section, the lower courts have been divided on this issue.[163]

V. OBJECTIVE REASONABLENESS AND MISTAKES OF LAW

The lower courts have differed on whether a mistake of law in the context of a traffic stop and seizure can ever be reasonable.[164] Most courts that have considered the issue have concluded that an of-

157. *Id.* at 584.

158. *Id.*

159. *Id.* at 587.

160. *Id.* (citations omitted).

161. *Id.*

162. *See id.* In applying *Cashman* to the circumstances of *Heien*, an officer's mistake about whether a flickering or intermittently working taillight is operable under the law would constitute a mixed question of law and fact, and thus the officer might act with objective reasonableness even if mistaken. *See id.* On the other hand, whether the law being acted upon requires one or two operable taillights is purely a legal question, and thus, a mistake in this regard would not be objectively reasonable. *See id.*

163. *See infra* Part V.

164. *Compare* State v. Louwrens, 792 N.W.2d 649, 652 (Iowa 2010) (holding that mistake of law cannot support probable cause finding), *with* United States v. Delfin-Colina, 464 F.3d 392, 397-98 (3d Cir. 2006) (applying a reasonableness standard to determine whether officers can show probable cause despite a mistake of law).

ficer's mistake about the law cannot be squared with the requirement for objective reasonableness under the Fourth Amendment.[165] Put another way, mistakes of law are deemed to be per se objectively unreasonable. A few courts, however, hold the opposite view provided the officer's mistake can be deemed "reasonable." Both approaches will be briefly surveyed next.[166]

The majority position is that mistake of law cannot support a probable cause determination because such mistakes are per se objectively unreasonable.[167] As a consequence, the Fourth Amendment exclusionary rule[168] is triggered and the evidence thereby obtained must be sup-

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165. *See Louwrens*, 792 N.W.2d at 652-53 (holding "[a] majority of courts that have considered the issue have concluded a mistake of law cannot provide probable cause to justify a traffic stop . . . [and] is not 'objectively grounded'"); *see also* United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000).

166. The author is grateful to Daniel N. Haas for his article, which was an invaluable source of authority bearing on the issues considered in Part V of this Article. Daniel N. Haas, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact during Traffic Stops*, 62 DEPAUL L. REV. 1035 (2013).

167. *See id.* at 1040 n.45 (citing Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 79 (2011)); *see also* United States v. Gross, 550 F.3d 578, 584 n.2 (6th Cir. 2008) (noting that "the vast majority of our sister circuits to decide this issue have concluded that an officer's mistake of law, even if made in good faith, cannot provide grounds for reasonable suspicion or probable cause, because an officer's mistake of law can never be objectively reasonable"); United States v. McDonald, 453 F.3d 958, 962 (7th Cir. 2006) (holding that "[e]ven though [the officer] may have acted in good faith, there is no good faith exception to the exclusionary rule when, as here, an officer makes a stop based on a mistake of law and the defendant is not violating the law"); United States v. Coplin, 463 F.3d 96, 101 (1st Cir. 2006) (observing that "[s]tops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional"); United States v. DeGasso, 369 F.3d 1139, 1144 (10th Cir. 2004) (explaining that "[a]n officer's reasonable mistake of fact, as distinguished from a mistake of law, may support the probable cause or reasonable suspicion necessary to justify a traffic stop"); United States v. Chanthasouxat, 342 F.3d 1271, 1276 (11th Cir. 2003) (holding that "an officer's reasonable mistake of fact may provide the objective grounds for reasonable suspicion or probable cause required to justify a traffic stop, but an officer's mistake of law may not"); United States v. King, 244 F.3d 736, 741 (9th Cir. 2001) (holding that "[a]n officer's mistake of law cannot form the basis for reasonable suspicion to initiate a traffic stop"); United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998) (holding that "[g]iven that having a turn signal on is not a violation of Texas law, no objective basis for probable cause justified the stop"); Gordon v. State, 901 So.2d 399, 405 (Fla. Dist. Ct. App. 2005) (holding that the "[d]eputies' misapprehension of the law did not establish the existence of probable cause"); People v. Cole, 874 N.E.2d 81, 88 (Ill. App. Ct. 2007) (commenting that "[w]e agree with the majority of federal courts of appeal that a traffic stop based on a mistake of law is generally unconstitutional, even if the mistake is reasonable and made in good faith"); *Louwrens*, 792 N.W.2d at 652 (concluding that "[w]e are ultimately persuaded that the approach acknowledging a fundamental distinction between an officer's mistake of fact and mistake of law is better-reasoned"); People v. Smith, 767 N.Y.S.2d 327, 328 (App. Div. 2003) (explaining that "[a] mistake of fact, but not a mistake of law, may be used to justify a search and seizure") (citations omitted).

168. *See* United States v. Calandra, 414 U.S. 338, 347 (1974); Mapp v. Ohio, 367 U.S. 643, 655-60 (1961). The Fourth Amendment exclusionary rule is discussed in greater detail in Part VII, *infra*.

pressed.[169] Daniel Haas has observed that the reasoning in support of the majority position may be categorized as follows:

> (1) officers should know the law, therefore not knowing the law is unreasonable; (2) the court should apply the exclusionary rule so that officers will have an incentive to actually learn the law; (3) allowing officers to make stops based on a mistake of law will provide them with wide latitude to abuse their authority; and (4) allowing officers to make mistakes of law violates the separation of powers.[170]

The first of these bases holds that the police, who are empowered to enforce the law, must concomitantly be charged with knowing the law.[171] This reasoning echoes the law's nearly categorical rejection of a mistake of law defense, which is discussed in greater length in Part VI.[172] For now, it is sufficient to note that allowing the police to claim a mistake of law to justify their actions, when this same privilege is denied to laypersons more generally, seems especially objectionable given the expectation that officers should be held to a higher standard of legal compliance given their training and responsibilities concerning the law.[173] By analogy, one should expect and require that umpires and referees have a better understanding of the rulebooks they enforce than do the players who must abide by the rules of the game. As the Tenth Circuit succinctly put it in *United States v. Tibbetts*,[174] "failure to understand the law by the very person charged with enforcing it is not objectively reasonable."[175]

The second and third bases set forth above are closely related to the pragmatic objective of deterring future police misconduct, which has become the *raison d'etre* of the contemporary Fourth Amendment exclusionary rule.[176] The reasoning is that if courts allow the police to benefit from their mistakes about the law, they will have no deterrent incentive

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169. *See Calandra*, 414 U.S. at 347; *Mapp*, 367 U.S. at 655-60.

170. Haas, *supra* note 166, at 1041-42.

171. *See id.*

172. *See infra* Part VI.

173. *See* United States v. Chanthasouxat, 342 F.3d 1271, 1280 (11th Cir. 2003).

174. 396 F.3d 1132 (10th Cir. 2005).

175. *Id.* at 1138; *see* Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 743 (2011) ("It is a hallmark of substantive criminal law that ignorance of the law is no defense. The rationale most commonly advanced for this seemingly harsh result is that the refusal to reward ignorance is necessary 'so that the proper standard of conduct will be learned and respected by others.'"); *see also Chanthasouxat*, 342 F.3d at 1280 (noting "the fundamental unfairness of holding citizens to 'the traditional rule that ignorance of the law is no excuse,' while allowing those 'entrusted to enforce' the law to be ignorant of it" (quoting Bryan v. United States, 524 U.S. 184, 196 (1998)).

176. *See* United States v. Calandra, 414 U.S. 338, 347 (1974).

to learn the law.[177] Or, proverbially, "What you don't know can't hurt you."[178]

A corollary concern is that if mistakes of law by the police are permitted or tolerated, this will encourage pretextual searches and seizures.[179] The potential for this type of abuse is especially concerning in the context of vehicle stops, as "police have a wide array of laws to justify automobile stops based on admittedly ambiguous behavior."[180] A major concern is that this will lead to arbitrary and discriminatory enforcement by police.[181]

The fourth basis for the majority position is related to the doctrine of legality, discussed in Part VI.B of this Article.[182] This argument asserts that crediting as reasonable an officer's mistaken application of the law, and thereby enforcing an officer's incorrect interpretation of the law, intrudes upon the authority of the legislative branch to make laws, and the judicial branch to interpret and apply them.[183] As Professor Wayne A. Logan has observed,

> When courts forgive mistaken police constructions of laws, a problem akin to that attending judicial approval of vague laws arises . . . . [A]llowing police to make reasonable mistakes of law, as the Eleventh Circuit has observed, serves to "sweep behavior into [a] statute which the authors of the statute may have had in mind but failed to put into the plain language of the statute."[184]

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177. *See* United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000) ("To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.").

178. OXFORD DICTIONARY OF QUOTATIONS 634 (Elizabeth Knowles ed., 6th ed. 2004).

179. *See* United States v. Lopez-Valdez, 178 F.3d 282, 289 (5th Cir. 1999); *see also* Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O'Connor's Dissent in* Atwater v. City of Lago Vista, 79 MISS. L.J. 115, 146 (2009) (observing that allowing mistake of law would confer upon police "the concomitant power to detain individuals for behavior never even legislatively proscribed").

180. Keith S. Hampton, *Stranded in the Wasteland of Unregulated Roadway Police Powers: Can "Reasonable Officers" Ever Rescue Us?*, 35 ST. MARY'S L.J. 499, 504 (2004).

181. *See* Logan, *supra* note 167, at 101 n.217 (2011) ("[C]ondemning a vagrancy ordinance on vagueness grounds because 'it permits and encourages an arbitrary and discriminatory enforcement of the law.'") (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).

182. *See infra* Part VI.B.

183. *See* Logan, *supra* note 167, at 95.

184. *Id.* at 95 (quoting United States v. Chanthasouxat, 342 F.3d 1271, 1278 (11th Cir. 2003)); *see* Marbury v. Madison, 5 U.S. 137, 179-80 (1803) (establishing the principle of judicial review in the United States, meaning the American courts have the power to strike down laws and statutes that they find to violate the Constitution of the United States); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952) (instructing that the separation of powers among three branches of government is a central principle of the United States Constitution; this decision limits the power of the President to seize private property); Baker v. Carr, 369 U.S. 186, 232-37 (1962)

The principle of legality is closely related to the preemption doctrine, which recognizes that the law enacted by a higher authority will supersede the law of a lower authority when the two conflict.[185] The same principle of preemption applies when agents of the executive and legislative branches interpret the law in a manner that conflicts with what the lawmaker(s) enacted.[186] In circumstances such as those in *Heien*, this doctrine would hold that the lawmakers who drafted the vehicle ordinance at issue have thereby preempted a conflicting interpretation and implementation of it by a police officer, who is an agent of the executive branch.[187] This same idea of preemption has been incorporated, for example, into the justification defense of necessity.[188]

In contrast, the minority position among the lower courts would draw no distinction between mistakes of fact and mistakes of law with respect to evaluating objective reasonableness for purposes of the probable cause and reasonable suspicion standards.[189] The best developed jurisprudence in support of this view is found in decisions by the Court of Appeals for the Eighth Circuit.[190] In *United States v. Smart*,[191] that court broadly declared that "the distinction between a mis-

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(holding that redistricting qualifies as a justiciable question under the Fourteenth Amendment, thus enabling federal courts to hear Fourteenth Amendment-based redistricting cases).

185. *See Preemption*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption [https://perma.cc/9GWP-EQB4] (last visited Aug. 12, 2023).

186. *See id.*

187. *See generally* Virginia Uranium, Inc. v. Warren, 587 U.S. 1 (2019) (addressing whether the Atomic Energy Act preempts a Virginia law that bans uranium mining in the state); Wyeth v. Levine, 555 U.S. 555 (2009) (addressing whether Vermont tort law, which imposed a duty on a drug manufacturer to strengthen a drug's warning label, was preempted because the Food and Drug Administration approved the exact text of the original label); Cuomo v. Clearing House Association, 557 U.S. 519 (2009) (addressing whether a regulation issued by the Comptroller of the Currency validly preempted New York's efforts to enforce its fair lending laws against national banks).

188. *See* Milhizer, *supra* note 51, at 614 ("Preemption can be expressed through criminal statutes specifying crimes and disallowing defenses via general necessity or lesser evils defenses and by any number of discrete defenses premised on justification."). A statutory necessity or lesser evils defense provides general requirements for criminal justification, which can be applied to situations that the legislature has not preempted or otherwise explicitly addressed. *See id.*

189. *See* United States v. Delfin-Colina, 464 F.3d 392, 397 (3d Cir. 2006) (concluding the seizing officers mistake of law is not necessarily inconsistent with the reasonable suspicion standard); United States v. Smart, 393 F.3d 767, 770 (8th Cir. 2005) ("[T]he distinction between a mistake of law and a mistake of fact is irrelevant to the [F]ourth [A]mendment inquiry."); Hinojosa v. State, 319 S.W.3d 258, 262-64 (Ark. 2009); Moore v. State, 986 So.2d 928, 935 (Miss. 2008) (concluding that the officer "had sufficient probable cause to pull [defendant] over although, as it turns out [the officer] based his belief of a traffic violation on a mistake of law"); State v. Barnard, 658 S.E.2d 643, 645 (N.C. 2008) ("It is irrelevant that part of [the officer's] motivation for stopping defendant may have been a perceived, though apparently non-existent, statutory violation.").

190. *See, e.g.*, *Smart*, 393 F.3d at 767.

191. *Id.*

take of law and a mistake of fact is irrelevant to the [F]ourth [A]mendment inquiry."[192] But in a later decision that court explained only certain types of mistakes of law would be consistent with objective reasonableness.[193] In *United States v. Washington*,[194] the court limited the concept of an objectively reasonable mistake of law to circumstances in which there was "a basis in state law for an officer's action and some ambiguity or state custom that caused the officer to make the mistake."[195]

In summary, the majority position is both more widely held and better supported.[196] While the minority position is largely conclusory and superficial, the majority position is premised on a venerable albeit sometimes unspoken distinction between mistakes of law and fact with respect to objective reasonableness,[197] as well as pragmatic considerations and an appreciation for the role played in our system's separation of powers. As discussed in the next Part, the majority view is also consistent with several venerable doctrines and principles of statutory construction which, although not binding in the context of assessing Fourth Amendment reasonableness, are nevertheless instructive when considering whether an officer's mistake of law can ever be deemed to be objectively reasonable.[198]

VI. RELEVANT ANALOGOUS DOCTRINES AND PRINCIPLES PERTAINING TO OBJECTIVE REASONABLENESS

Several widely accepted and broadly applied principles of law, statutory construction, and judicial interpretation and application of criminal laws, help inform an evaluation of whether an officer's mistake of law ought to be considered objectively reasonable.[199] Although these doc-

192. *Id.* at 770.

193. United States v. Washington, 455 F.3d 824 (8th Cir. 2006).

194. *Id.* at 828.

195. *Id.*; *see also* United States v. Martin, 411 F.3d 998, 1001 (8th Cir. 2005) (holding that considering several factors—the ambiguity of the statute, prior interpretations, previous judicial rulings and common usage in adjoining states—the officer acted reasonably and the search was legal, though it was based on a mistake of law regarding the required number of brake lights on a vehicle).

196. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396 (1989) (contending for the majority position).

197. *See, e.g.*, *id.* ("The test of reasonableness under the Fourth Amendment . . . requires careful *attention to the facts and circumstances of each particular case*.") (emphasis added) (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

198. *See infra* Part VI.

199. *See generally* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998) (discussing the *ignorantia legis neminem excusat* maxim); *Separation of Powers*, CORNELL L. SCH.: LEGAL INFO. INST.,

trines do not control an evaluation of Fourth Amendment reasonableness, they are nonetheless relevant and instructive, and thus, worthy of consideration.

A. Mistake of Law and Constructive Notice

Aside from comparatively rare strict liability offenses,[200] all criminal offenses require a mens rea, i.e., an evil state of mind.[201] Even when a mens rea is not expressly set out in the statute, each jurisdiction has a default mens rea—generally recklessness or culpable negligence—that is to be applied.[202] In North Carolina, where the *Heien* case originated, the default mens rea is culpable negligence.[203]

Constructive notice is a legal fiction that charges all persons within a jurisdiction with receiving notice of all laws and other binding authorities pertaining to that jurisdiction, even if they lack actual notice.[204] If certain procedures are followed, such as publishing the law or case decision in a specified manner, constructive notice will be imputed to everyone in the jurisdiction, including, presumably, and most especially, police officers.[205] Because constructive notice of the law is assumed, any

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https://www.law.cornell.edu/wex/separation_of_powers [https://perma.cc/VW9P-QVYH] (last visited Aug. 12, 2023) (discussing the separation of powers doctrine); *Preemption*, *supra* note 185 (discussing the preemption doctrine); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985) (discussing the doctrines of legality, lenity, and strict construction).

200. Strict liability offenses come in two forms. The first are public welfare offenses, which typically include offenses such as traffic regulations, liquor laws, pure food laws, and sanitation laws, or what the Model Penal Code calls ordinances. *See* MODEL PENAL CODE § 2.05(2)(a) (stating that "when absolute liability is imposed with respect to any material element of an offense defined by a statute . . . and a conviction is based upon such liability, the offense constitutes a violation"); *see also* State v. Watterson, 679 S.E.2d 897, 901-02 (N.C. Ct. App. 2009). Their purpose is to regulate an increasingly complex social order, irrespective of an offender's guilt, rather than to punish. *See* MODEL PENAL CODE § 2.05(2)(a); *see also Watterson*, 679 S.E.2d at 901-02. These are minor wrongs having only light punishment, such as a small fine, and they do not authorize imprisonment. *See* MODEL PENAL CODE § 2.05(1). The second type of strict liability offense is what is sometimes referred to as a single element strict liability offense. *See, e.g.*, Monica Steiner, *What Are Some Common "Strict Liability" Crimes?*, NOLO, https://www.nolo.com/legal-encyclopedia/what-common-strict-liability-crimes.html [https://perma.cc/TS2H-Q4WU] (last visited Aug. 12, 2023). For these crimes, a mens rea must be proven for all elements except a single "strict liability element," which is generally an attendant circumstance. *See id.* Perhaps the most common of these offenses is statutory rape, in which the age of the victim is strict liability, while all other elements have general intent mens rea. *See, e.g.*, *id.*; *see also* MODEL PENAL CODE § 213.6(1); FLA. STAT. § 794.05 (1995); N.C. GEN. STAT. § 14-27.24 (2015); CAL. PENAL CODE § 261.5 (West 2012).

201. *See* MODEL PENAL CODE § 2.02(1).

202. *See id.* § 2.02(3).

203. State v. Jones, 538 S.E.2d 917, 924 (N.C. 2000).

204. *See* Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1, 33-34 (2007).

205. *See* 44 U.S.C. § 1507 (2005) (specifying federal publication and notice requirements).

actions that violate the law, even if predicated on an actual misunderstanding of the law, are considered to be intentional under the law.[206] Put simply, because the law is deemed to be definite and knowable, mistakes about the law are deemed to be per se unreasonable[207] absent special circumstances.[208]

This is the reasoning that undergirds the maxim *ignorantia legis neminem excusat*.[209] This is a venerable doctrine that was recognized under the common law,[210] and which can trace its origins at least as far back as Aristotle.[211] The maxim provides that a person who does not know the law or is mistaken about the law will not be excused from his actions.[212] This underlying principle has many normative and pragmatic benefits, the foremost being that it encourages people to know the law, both for their own self-interest and because this benefits the common good.[213] As Professor Frank Schmalleger notes, "the failure to exercise

206. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (holding that publications of regulations in the *Federal Register* provides the public with constructive notice of their rights).

207. Cheek v. United States, 498 U.S. 192, 199 (1991) (holding that ignorance of the law is no defense to criminal prosecution). In contrast, knowledge of the pertinent facts is not presumed, absent a specific legal duty. Accordingly, mistakes of fact that are honest and reasonable are exculpatory for offenses in which the mens rea is recklessness or negligence. *See* Hawkins v. United States, 103 A.3d 199, 201 (D.C. 2014) (explaining that its "decisions imposing a reasonableness requirement have all concerned crimes of general intent"; thus, when asserting the defense of mistake of fact, the mistake must be both honest and reasonable); *see also* People v. Mayberry, 542 P.2d 1337, 1346 (Cal. 1975) (recognizing that a defendant's mistake of fact must be both honest and reasonable to provide a defense for the general intent crimes of rape and kidnapping). Mistakes of fact that are honest but unreasonable are exculpatory for offenses in which the mens rea is specific intent or knowledge. *See* United States v. Langley, 33 M.J. 278, 281-82 (C.M.A. 1991) (holding that an honest but unreasonable mistake of fact as to consent is exculpatory for the specific intent offense of assault with intent to commit rape); *see also* People v. Navarro, 99 Cal. App. 3d Supp. 1, 2 (App. Dep't Super. Ct. 1979) (holding that an honest but unreasonable mistake of fact is exculpatory for the specific intent offense of larceny).

208. *See Cheek*, 498 U.S. at 202 (explaining that a defendant's actual knowledge of the law must be proven if knowledge is a component of the offense); *see also* People v. Marrero, 507 N.E.2d 1068, 1070 (N.Y. 1987) (holding that a mistake of law is a valid defense when the defendant relies on an authoritative interpretation of the law that is later declared to be erroneous).

209. Bryan A. Garner, BLACK'S LAW DICTIONARY 815 (9th ed. 2009) (explaining that "*Ignorantia juris non excusat*" is Latin for "ignorance of the law excuses no one").

210. Ellsworth v. United States, 14 Ct. Cl. 382, 395 (1878) (explaining the origins of the maxim *Ignorantia juris non excusat* under the civil law).

211. *See Ignorantia Juris Non Excusant*, KHALID ZAFAR & ASSOCS., https://khalidzafar.com/ignorantia-juris-non-excusant [https://perma.cc/ZH5V-NJXT] (last visited Aug. 12, 2023).

212. MATTHEW ROSS LIPPMAN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES 275-76 (4th ed. 2016).

213. *See* FRANK SCHMALLEGER, CRIMINAL LAW TODAY, 46, 48-49 (6th ed. 2000) (overviewing general legal principles, including common law concepts of a crime and the principle of legality); Gabriel J. Chin, *The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code*, 93 N.C. L. REV. 139, 159 (2014) (listing rationales for rejecting a mistake of law defense, including lawlessness would otherwise be fostered; exceptions would swallow the rule; nu-

ordinary care to acquire knowledge of the law . . . may result in criminal liability."[214] Further, people are expected to know the law in order to ensure social stability and prevent the creation of subjective legal codes.[215] Finally, allowing a mistake of law defense would encourage suspects to fabricate after-the-fact claims of ignorance to excuse their crimes, and thus make it more difficult to prosecute and convict deserving persons.[216]

Police officers, because of their authority under the law and training about the law, should be held to as high, if not higher, a standard regarding knowledge of the law as compared to laypersons.[217] The Court in *Heien* distinguished the officer's actions there from ordinary mistake of law claims, contending that "just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop."[218] But in granting that the mistake of law defense is not directly applicable to the circumstances in *Heien*,[219] at least insofar as the manner is discussed by the Court, the principle nevertheless supports the broader conclusion that a mistake of law is never objectively reasonable.

As a general matter, mistake of law has been allowed as a defense in only two narrowly prescribed situations.[220] The first is where the statute requires knowledge of the law as an element of the offense.[221] There is no such provision in the ordinance at issue in *Heien*. The second is where an actor relies on an authoritative interpretation of the law that is later declared to be mistaken or is overruled.[222] Analogizing to the circumstances in *Heien*, this argument would have some traction if the officer had relied on an interpretation of the statute that was later overruled.[223] But as mentioned in Part III, *supra*, this was not the case in *Heien*.[224] Rather, the officer there relied on his own misinterpretation of

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merous mistake of law defenses would be raised based on the language of statutes; and mistake of law defenses could readily be contrived in bad faith and after the fact).

214. SCHMALLEGER, *supra* note 213, at 163.

215. *See* LIPPMAN, *supra* note 212, at 275.

216. *See id.*

217. *See* United States v. Tibbetts, 396 F.3d 1132, 1138 (10th Cir. 2005); *see also* Bowers, *supra* note 7, at 166-67.

218. Heien v. North Carolina, 574 U.S. 54, 67 (2014).

219. *See* Kinports, *supra* note 7, at 138.

220. *See id.* at 135.

221. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199 (1991) (holding that "ignorance of the law or a mistake of law is no defense to criminal prosecution").

222. *See, e.g.*, United States v. Barker, 546 F.2d 940, 949 (D.C. Cir. 1976) (concluding that a defendant must be given the opportunity to present a defense that his conduct was based on a reasonable, good faith reliance on the apparent authority of a government official).

223. *See* Kinports, *supra* note 7, at 141.

224. *See supra* Part III.

the statute, which has, in the context of a criminal defense, never qualified as the basis for an exculpatory or objectively reasonable mistake of law.[225]

B. The Doctrine of Legality

The doctrine of legality can be summarized as follows: A person may not be prosecuted under a criminal law that has not been previously published.[226] Although the defendant in *Heien* was not prosecuted for violating the taillight ordinance, the arresting officer's mistake of law about the ordinance proximately resulted in the defendant's arrest, prosecution, and conviction for other offenses.[227] Accordingly, the doctrine of legality has a direct connection to the circumstances in *Heien*.[228] As Professor Josh Bowers observed when commenting on the *Heien* decision:

> [A] doctrine [of mistake of law] would contradict the essential requisites of a legal system, the implications of the principle of legality. To permit an individual to plead successfully that he had a different . . . interpretation of the law would contradict the . . . postulates of a legal order . . . [T]he consequence would be: Whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, i.e., *the law actually is thus and so*.[229]

As noted previously, the principle of legality is closely related to the constitutional principles of separation of powers and the preemption doctrine.[230] "Separation of powers" divides governmental responsibilities and authority into distinct branches, thereby preventing any one branch from exercising the core functions of another.[231] The doctrine is intended to provide checks and balances that prevent the unwarranted concentration of power in any one branch.[232] The related "preemption

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225. *See, e.g.*, People v. Marrero, 507 N.E.2d 1068, 1071-72 (N.Y. 1987) (holding that the statute only applied when the statement of law relied upon was itself erroneous).

226. United States v. Lanier, 520 U.S. 259, 265 n.5 (1997).

227. *See* Heien v. North Carolina, 574 U.S. 54, 57-58 (2014) (describing the events of the officer pulling over the defendant due to a mistake of vehicular law, which then resulted in the defendant's arrest, prosecution, and conviction for drug-related offenses).

228. *See* Bowers, *supra* note 7, at 186.

229. Bowers, *supra* note 7, at 167 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 380-83 (2d ed. 1960)).

230. *See supra* Part V.

231. Clinton v. Jones, 520 U.S. 681, 699 (1997) (explaining the separation of powers doctrine, and how it concerns itself with the allocation of power among the three "coequal" branches of the U.S. government).

232. *See id.* at 703.

doctrine" refers to the principle that a higher authority of law will supersede the law of a lower authority of law when the two authorities come into conflict.[233]

As applied to *Heien*, the idea of the separation of powers would hold that the officer's misapplication of the law, which amounted to the creation of a new law requiring two operable taillights, constituted an improper intrusion by the executive branch into the authority properly exercised by the legislative branch.[234] Applying the doctrine of preemption, the misinterpretation and application of the taillight ordinance by a police officer, who is an agent of the executive branch, is preempted by the ordinance itself, which is a product of the legislative branch.[235]

Viewed in this light, the officer's mistake about the law, and the Court's characterization of that mistake in *Heien*,[236] involve much more than the simple misapplication of a comparatively minor traffic ordinance. Rather, the decision implicates fundamental principles under which our system of government and the law is organized and operates, and it invites a slippery slope approach to more serious matters of constitutional interpretation in the future.

C. The Doctrines of Strict Construction and Lenity

The doctrine of strict construction holds that criminal statutes should be narrowly construed.[237] If the meaning of the statute is plain, this should be given effect.[238] If the statutory language is instead ambiguous or unclear, a court may properly consult other authorities—such as legislative history, dictionary definitions, and persuasive authority—for the purpose of giving effect to legislative meaning and intent.[239] The closely related rule of lenity holds that where there are two or more

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233. Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982) (holding that "state law is nullified to the extent that it actually conflicts with federal law").

234. *Clinton*, 520 U.S. at 691.

235. *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019) (addressing whether the Atomic Energy Act preempts a Virginia law that bans uranium mining in the state); Wyeth v. Levine, 555 U.S. 555, 555 (2009) (addressing whether Vermont tort law, which imposed a duty on a drug manufacturer to strengthen a drug's warning label, was preempted because the Food and Drug Administration approved the exact text of the original label); Cuomo v. Clearing House Ass'n, 557 U.S. 519, 519 (2009) (addressing whether a regulation issued by the Comptroller of the Currency validly preempted New York's efforts to enforce its fair lending laws against national banks).

236. Heien v. North Carolina, 574 U.S. 54, 67 (2014) (holding that the officer's mistake was "reasonable").

237. United States v. Lanier, 520 U.S. 259, 266 (1997).

238. *See* United States v. Choice, 201 F.3d 837, 840 (6th Cir. 2000) (instructing that "[t]he language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of the language is clear").

239. *See id.*

equally reasonable interpretations of a statute, the defendant should be given the benefit of the most favorable.[240]

The rationale for strict construction and lenity rests largely on a recognition of the nature of the criminal law and the consequences of a criminal conviction.[241] First is the idea that the criminal law sets the bar low, punishing only "*the more grievous vices, from which it is possible for the majority to abstain*[,]" which harms discrete victims and the common good.[242] Second is the realization that a criminal conviction is stigmatizing and incurs a formal and solemn pronouncement of the moral condemnation of the community.[243] Because the stakes are so high and the consequences are so great, criminal laws are to be applied only when they are clearly and unambiguously violated.[244]

Although *Heien* involved a stop and frisk and not a criminal conviction, the issues at stake remain serious: The defendant in *Heien* was seized and his vehicle was searched.[245] Such intrusive activities by the police that must comply with the Fourth Amendment's requirement for reasonableness,[246] would seem to require, in turn, that they also comply with the applicable law. Further, the search and seizure of the defendant in *Heien* directly led to his criminal conviction—which no doubt resulted in the stigmatization and condemnation mentioned earlier—and which would not have otherwise occurred.[247] Accordingly, although the doctrines of strict construction and lenity do not directly apply in *Heien*, they illuminate the principle that when police perform a search or seizure, they should be expected to act with objective reasonableness in order to comply with the Fourth Amendment.

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240. *See* Fowler v. United States, 563 U.S. 668, 682 (2011) (Scalia, J., concurring) (instructing that "in light of the rule of lenity . . . we must construe ambiguous criminal statutes in favor of the defendant"); *see also* United States v. Bass, 404 U.S. 336, 347 (1971) (holding that a court should rely on the doctrine of lenity and avoid the punishment of criminal defendants when resolving statutory ambiguity); Jeffries, Jr., *supra* note 199, at 198 (criticizing the rule of lenity for its inconsistent use and for taking the form of a "makeweight for results that seem right on other grounds").

241. *See* J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S TREATISE ON LAW 364-66, 414 (2014).

242. *Id.* at 365; 2 WILLIAM BLACKSTONE, COMMENTARIES *532 (explaining how this understanding of the criminal law has long been held under the common law and the Western intellectual tradition).

243. MARK TUNICK, PUNISHMENT: THEORY AND PRACTICE 90, 92 (Univ. Cal. Press 1992) (ebook).

244. *See* United States v. Bass, 404 U.S. 336, 347-48 (1971).

245. Heien v. North Carolina, 574 U.S. 54, 58 (2014).

246. *See id.* at 60.

247. *See id.* at 67-68.

VII. MISTAKES OF LAW AND THE FOURTH AMENDMENT EXCLUSIONARY RULE

Parts V and VI contend that mistakes of law by police performing stops and frisks are objectively unreasonable and inconsistent with widely applied doctrines of statutory construction and application.[248] Part VII contends that even though an officer's mistake about the law is objectively unreasonable, suppression of the evidence derived from that mistake is not categorically required under the Fourth Amendment exclusionary rule.[249]

In its most basic terms, the Fourth Amendment exclusionary rule presumptively excludes[250] evidence from criminal trials that is obtained as a direct result of an illegal search or seizure by police in violation of the Fourth Amendment,[251] as well as any evidence that is proximately derived from the initial illegality.[252]

In earlier Court decisions, most notably *Mapp v. Ohio*,[253] the Court held that the rule applied to state as well as federal courts, it was part and parcel of the Fourth Amendment, and it served the important objective of preserving judicial integrity.[254] The Court has since adopted a far

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248. *See supra* Parts V–VI.

249. *See infra* Part VII.

250. Evidence is presumptively excluded, as the Court has recognized various exceptions to the Fourth Amendment exclusionary rule. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 491 (1963) (holding that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint") (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)); Brewer v. Williams, 430 U.S. 387, 406-07 n.12 (1977) (finding that even if the incriminating statements were not elicited from the defendant, the evidence could be admissible on the idea that the evidence would be inevitably discovered in any event); United States v. Leon, 468 U.S. 897, 919-20 (1984) (recognizing a deterrence-based good faith exception to the exclusionary rule).

251. Weeks v. United States, 232 U.S. 383, 398 (1914).

252. *See Wong Sun*, 371 U.S. at 471, 487-88 (discussing the so-called "fruit of the poisonous tree" doctrine).

253. 367 U.S. 643 (1961).

254. *Id.* at 660; *see* United States v. Elkins, 364 U.S. 206, 222-23 (1960) (invoking judicial integrity as a justification for the Fourth Amendment exclusionary rule). The dissents of Justices Brandeis and Holmes in *Olmstead v. United States*, 277 U.S. 438, 469, 471 (1928), are probably the most famous early discussions of judicial integrity in the exclusionary rule context. Arguing for the exclusion of illegally seized wiretap evidence, Brandeis cautioned:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

more pragmatic approach to Fourth Amendment exclusion, first and most notably in *United States v. Calandra*,[255] which holds that the Fourth Amendment exclusionary "rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[256] Citing *Elkins v. United States*,[257] the *Calandra* Court explained that "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[258] *Calandra* was explicit that the Fourth Amendment exclusionary rule is "premised on a recognition [of] the need for deterrence . . . ."[259] Later in the opinion, the Court set forth its cost-benefit calculus for determining whether deterrence justifies exclusion of the evidence:

> Any incremental deterrent effect which might be achieved by extending the [Fourth Amendment exclusionary] rule to grand jury proceedings is uncertain, at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained. We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.[260]

Id. at 485 (Brandeis, J., dissenting). Holmes agreed with Brandeis. *See id.* at 469-70 (Holmes, J., dissenting).

255. 414 U.S. 338 (1974).

256. *Id.* at 347.

257. 364 U.S. 206 (1960).

258. *Calandra*, 414 U.S. at 347 (citing *Elkins*, 364 U.S. at 217).

259. *Calandra*, 414 U.S. at 348.

260. *Id.* at 351-53. The Court acknowledged that:

> There is some disagreement as to the practical efficacy of the exclusionary rule, and as the Court noted in *Elkins v. United States*, 364 U.S. 206, 216 (1960), relevant "[e]mpirical statistics are not available." . . . We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials.

Id. at 348 n.5 (citations omitted).

The *Calandra* decision also diminished the jurisprudential underpinnings of the Fourth Amendment exclusionary rule.[261] There, the Court declared that the rule was devoid of a constitutional pedigree contrary to its conclusion in *Mapp*.[262] Rather, the Court instructed in *Calandra* that the Fourth Amendment exclusionary rule was "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[263] In one fell swoop, *Mapp*'s judicial-integrity justification for the rule was marked for extinction. Two years later, in *Stone v. Powell*,[264] the Court reiterated that judicial integrity has only a "limited role [to play] . . . in the determination whether to apply the rule in a particular context."[265] In *United States v. Janis*,[266] also decided in 1976, the Court instructed that deterrence is the "prime purpose of the rule, if not the sole one."[267]

Consistent with the overriding objective of deterring future police misconduct, the Court has crafted several exceptions to the Fourth Amendment exclusionary rule that are based on an evaluation of the comparative costs and benefits of suppressing illegally obtained evidence.[268] Most relevant to the issue in *Heien*—that is, whether illegally obtained evidence should be suppressed when the officer's intent and motive lacks malice and is otherwise benign—is the "good faith" exception to the Fourth Amendment exclusionary rule, which was first recognized by the Court in *United States v. Leon*.[269] In *Leon*, the Court held that "[t]he Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid."[270] The Court explained further, "[w]hether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated

261. *See id.* at 360 (Brennan, J., dissenting).

262. *See id.*; *see also id.* at 348 (majority opinion).

263. *Id.* at 348.

264. 428 U.S. 465 (1976).

265. *Id.* at 485.

266. 428 U.S. 433 (1976).

267. *Id.* at 446.

268. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 440-43, 446 (1984) (recognizing an inevitable discovery exception to the Fourth Amendment exclusionary rule); Wong Sun v. United States, 371 U.S. 471, 485, 487-88, 491 (1963) (recognizing an attenuation of the taint exception to the Fourth Amendment exclusionary rule).

269. 468 U.S. 897, 926 (1984).

270. *Id.* at 897.

by police conduct."[271] In other words, the evidence need not be suppressed when the officer acts in good faith, even though his conduct was objectively unreasonable.[272]

The Court has applied the good faith exception in several circumstances, consistent with the objective of deterring future police misconduct as balanced against the social costs of suppression.[273] In *Leon*, as noted, the exception was applied when police relied on a facially valid warrant.[274] In *Illinois v. Krull*,[275] also as noted, the Court applied the good faith exception when the police relied on a statute that was later declared to be unconstitutional.[276] Likewise, in *Massachusetts v. Sheppard*,[277] the Court applied the good faith exception when the police relied upon a warrant that was invalid because a judge forgot to make "clerical corrections."[278] Finally, in *Arizona v. Evans*,[279] the Court applied the good faith exception when the police relied on mistaken information in a database prepared by a court employee.[280]

Although these cases have some relevance to the issue in *Heien*, they are all distinguishable insofar as the predicate error in each circumstance—the poisonous tree, if you will—originated with an authority that was independent of the police and upon which the police should be encouraged to rely.[281] In *Heien*, on the other hand, the officer's actions under the Fourth Amendment were predicated on *his* misinterpretation of the law.[282] *Heien* thus begs the question whether the good faith exception to the exclusionary rule can be stretched to circumstances in which the source of the Fourth Amendment violation was an officer who executed the search or seizure.

While there is no case directly on point, *Herring v. United States*[283] is instructive. Bennie Herring traveled to the Coffee County, Alabama, Sheriff's Department to retrieve items from an impounded pickup truck.[284] Mark Anderson, an investigator with the Coffee County Sheriff's Department, asked the department's warrant clerk to check for any

271. *Id.* at 906 (citations omitted).
272. *See id.* at 907-08.
273. *See, e.g.*, Herring v. Illinois, 555 U.S. 135, 146-47 (2009).
274. *Leon*, 468 U.S. at 897.
275. 480 U.S. 340 (1987).
276. *Id.* at 349-50.
277. 468 U.S. 981 (1984).
278. *Id.* at 991.
279. 514 U.S. 1 (1995).
280. *Id.* at 15.
281. *Id.* at 14.
282. Heien v. North Carolina, 574 U.S. 54, 68 (2014).
283. 555 U.S. 135 (2009).
284. *Id.* at 137.

outstanding warrants on Herring.[285] The clerk contacted her counterpart at the neighboring Dale County Sheriff's Department, who informed her that Herring had an outstanding warrant.[286] Within fifteen minutes, the Dale County clerk called back to advise the Coffee County Sheriff's Department that there had been a clerical mistake and Herring's warrant had been recalled five months earlier.[287] But by then it was too late, as Anderson had already arrested Herring and searched his vehicle, finding and seizing firearms and methamphetamines that were discovered inside.[288]

Herring was indicted in the United States District Court for the Middle District of Alabama for the crimes of felon in possession of firearms[289] and possession of a controlled substance.[290] He invoked the exclusionary rule to suppress the evidence seized from his vehicle, claiming that his arrest (and derivatively the search of the vehicle) was unlawful because they were based on an invalid and recalled warrant issued by the neighboring county.[291] The motion was denied by the trial court and Herring was convicted.[292] The Court of Appeals affirmed, ruling that the evidence was admissible because the mistake relating to the warrant was made by police officials in a different county, the error was promptly corrected, and there was no evidence of a recurring problem or pattern of error.[293]

In a 5-4 decision, Chief Justice Roberts, writing for the Court, affirmed Herring's conviction, holding that the Fourth Amendment exclusionary rule does not apply because the mistakes by the police, that led to an unlawful search, were the result of isolated negligence that was attenuated from the search (rather than systemic errors or a reckless disregard of constitutional requirements).[294] Clearly, the officers in the neighboring jurisdiction acted unreasonably; but rather than treating all of the police officers involved in the case as one entity, the Court focused, instead, on the reasonableness of the officers who actually executed the arrest.[295] When focusing on these officers, the Court explicitly "empha-

285. *See id.*
286. *See id.*
287. *Id.* at 137-38.
288. *Id.* at 137.
289. 18 U.S.C. § 922(g)(1).
290. 21 U.S.C. § 844(a).
291. Herring v. United States, 555 U.S. 135, 146 (2009).
292. *Id.* at 138 (citing United States v. Herring, 451 F. Supp. 2d 1290, 1291 (M.D. Ala. 2005)).
293. *Id.* (citing United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007)). The Circuit Court relied heavily on *United States v. Leon*, 468 U.S. 897 (1984), which established the good faith exception to the exclusionary rule.
294. *Herring*, 555 U.S. at 136, 145, 147.
295. *See id.* at 140.

size[d] that the standard of reasonableness we adopt is an objective one."[296] In this regard, *Herring* warned that the good faith exception "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant."[297] Improperly executed warrants do not fall within the exception because the officer on the ground acted unreasonably.[298]

Herring is germane for several reasons.[299] First, it reaffirms that the sole surviving justification for applying the exclusionary rule is its capacity to deter future police misconduct as weighed against countervailing social costs.[300] The Court observed in *Herring* that "[w]e have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. . . . Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."[301] The Court further elaborated:

> Justice Ginsburg's dissent [in *Herring*] champions what she describes as "'a more majestic conception' of . . . the exclusionary rule," . . . which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, . . . and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis.[302]

Second, *Herring* responds to the criticism that the exclusionary rule is too blunt and crude in application by incorporating an evaluation of the type of police misconduct at issue, i.e., the harm to be deterred, rather than categorically limiting the rule's reach to situations where the source of the illegality does not originate with police.[303] This more nuanced assessment involves an evaluation of two factors: (1) what the Court calls the "nature" of the police misconduct, and (2) what it refers to as the "gravity" of the harm.[304] With regard to the nature of the mis-

296. United States v. Leon, 468 U.S. 897, 919 n.20 (1984).

297. *Id.* at 918 n.19.

298. *Id.* at 923.

299. Herring v. United States, 555 U.S. 135, 141-44 (2009). One caveat seems in order: *Herring* is a 5-4 decision. *Id.* at 135. Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito. *Id.* Justice Ginsburg wrote the dissenting opinion, joined by Justices Stevens, Souter, and Breyer. *Id.* at 148. Irrespective of the principle of *stare decisis*, it is possible that the Court's approach to the exclusionary rule could change, perhaps even dramatically, with a change in the composition of the Court.

300. *Id.* at 144 n.4.

301. *Id.* at 141 (citations omitted).

302. *Id.* at 141 n.2 (citations omitted).

303. *Id.* at 141-42.

304. *Id.* at 143-44.

conduct, *Herring* suggests that exclusion should be reserved for law enforcement illegality that is flagrant, intentional, or sufficiently deliberate.[305] The Court reasons that this selective application of the rule does not detract from its efficacy because "the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[306] According to the Court, police misconduct not rising to this level of egregiousness, such as an isolated occurrence or negligent misconduct, does not justify the costs of exclusion.[307]

With regard to the gravity of the harm, the Court explains that "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct."[308] In the Court's words, the police misconduct must be "sufficiently culpable that such deterrence is worth the price paid by the justice system."[309] Put another way, in order for the exclusion of evidence and its consequences to be a lesser evil in the Court's deterrence calculus, the misconduct to be deterred must be sufficiently weighty. Otherwise, the benefit of deterring minimally offensive misconduct is not worth the social cost of excluding an undifferentiated range of probative and reliable evidence of guilt.

Applying the rationale of *Herring* to the circumstances in *Heien*, a reasonable argument can be offered that the suppression of the illegally obtained evidence in that case would be unwarranted. First, as in *Herring*, the mistake in *Heien* was made by the police rather than some independent authority.[310] While acknowledging that the officer's error in *Herring* (unlike *Heien*) was once removed from the officer in question, *Herring* nevertheless establishes the precedent that the good faith excep-

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305. *Id.* at 144-45.

306. *Id.* at 144.

307. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem with Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 399 (1991) (arguing that most violations of the Fourth Amendment involve a good faith misunderstanding of the law or misinterpretation of the facts by the police).

308. *Herring*, 555 U.S. at 143.

309. *Id.* at 136. The exclusionary rule can be more easily countenanced by referring to the "price paid by the *justice system*," thereby suggesting that the only victim of the exclusionary rule is an impersonal, faceless, and monolithic bureaucracy or process. *Id.* (emphasis added). Of course, the justice system, and therefore the common good, suffers when guilty criminals are released without punishment. *See id.* at 141. People also suffer—widows, orphans, rape survivors, molestation victims, drug addicts, and others. *See id.* at 152 (Ginsburg, J., dissenting). The "justice system" language obscures the many real victims of the exclusionary rule and unfairly minimizes its costs. *Id.* at 136.

310. Heien v. North Carolina, 574 U.S. 54, 67 (2014).

tion can apply even when the police themselves may be blamed for the underlying misconduct.[311]

Second, as in *Herring*, the officer's misconduct in *Heien* was hardly flagrant, intentional, or deliberate. Quite to the contrary, and as supported by the appellate history of that case, the officer's mistake of law in *Heien* was not malicious and might even be considered in some sense understandable.[312] Moreover, as *Heien* observed, it seems unlikely that admitting the contested evidence under these types of circumstances would encourage the police to remain ignorant of the law or act in a blatantly unreasonable fashion.[313] *Herring* instructs that conduct which is flagrant, intentional, or deliberate is inconsistent with the idea of good faith.[314] Deterring mistaken but understandable misinterpretations of the law is not the type of serious police misconduct that would ordinarily outweigh the countervailing social costs of suppression.

Third, it seems doubtful that applying the good faith exception to arguably understandable but unreasonable interpretations of the law by police would be likely to deter them from making similar mistakes in the future. If, in hindsight, a mistaken interpretation of the law is judged to be benign and even predictable, suppressing the evidence thereby obtained would do little to deter similar misunderstandings of a law in the future. Indeed, suppressing the evidence in *Heien* could have the undesirable effect of deterring the police in the future from acting upon a common-sense but mistaken understanding of the law. This result would predictably lead to widespread underenforcement of the law by the police, at least at the margins, caused by a fear of being second-guessed in close cases.[315] While police ought to enforce the law with due circumspection, they should not be incentivized to avoid their important responsibilities because of vague or indefinite concerns about the legality of their actions as judged with the benefit of hindsight.

Fourth, even if some minimal, beneficial deterrence is achieved by suppressing the evidence in *Heien*, the benefit would likely be significantly outweighed by the countervailing social costs. If the evidence were suppressed in *Heien*, a manifestly guilty suspect would be set free

311. *Herring*, 555 U.S. at 146.

312. *Heien*, 574 U.S. at 59.

313. *Id.* at 66.

314. *Herring*, 555 U.S. at 143.

315. *See* Atwater v. Lago Vista, 532 U.S. 318, 321 (2001) (rejecting a rule prohibiting arrests for certain minor offenses because doing so would "come at the price of a systematic disincentive to arrest in situations where even [the defendant] concedes that arresting would serve an important societal interest"); United States v. Leon, 468 U.S. 897, 920 (1984) (explaining that without an objective good faith exception to the exclusionary rule, police officers will hesitate to enforce certain aspects of the law in order to avoid claims of illegality).

based on what many would consider to be no more than a mere technicality.[316] Although the violation of the law at issue in *Heien*—a taillight ordinance—is hardly the crime of the century, the suspect in *Heien* was ultimately convicted of more serious drug-related offenses.[317] Imagine how different the cost-benefit calculation would be if the crime at stake was instead a violent murder or rape, or some other crime that has a discrete victim and puts the community at risk. Further, the acquittal and release of guilty suspects because compelling evidence was suppressed, at least under what might be perceived as confusing circumstances in cases such as *Heien*,[318] would predictably lead to strong public criticism of the criminal justice system and a loss of confidence in its efficacy and legitimacy.

Two reasonable arguments can be offered against applying the good faith exception to the Fourth Amendment exclusionary rule to circumstances such as those in *Heien*. The first is that applying the exception in such circumstances invites a slippery slope that could cripple the exclusionary rule and render it ineffectual. One could contend that if contraband and other materials were received into evidence even when the officer who actually performed the search and seizure acts unreasonably, as in *Heien*,[319] this would perforce the demise of the objective good faith standard in favor of an essentially subjective standard. As a consequence, the deterrent objective of the Fourth Amendment exclusionary rule would be seriously undermined. In support of this argument, a critic could posit that consistent with this expanded reach of the good faith exception, evidence could be received, for example, when an officer makes an honest but unreasonable mistake about whether the area searched lies within an arrestee's immediate control in a search incident to arrest case,[320] or whether a conveyance that is searched was a vehicle for pur-

316. *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 488-89 (1972) (cautioning against expanding "currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries"). *But see* Paul Cassell, Miranda*'s Social Costs: An Empirical Reassessmen*t, 90 NW. L. REV. 387, 387 (2011) (assessing *Miranda*'s social costs and concluding that they are unacceptably high, particularly because alternatives such as videotaping police interrogations can more effectively prevent coercion while reducing *Miranda*'s harms to society).

317. *Heien*, 574 U.S. at 68.

318. *See id.* at 57-59.

319. *But cf. id.* at 54.

320. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969) (recognizing an exception to the warrant requirement for searches incident to arrest). *See generally* Eugene R. Milhizer, *Applying the Digital Search Incident to Arrest Doctrine to Predigital Content*, 61 ST. LOUIS UNIV. L.J. 165 (2017) (discussing the search incident to arrest exception to the warrant requirement in greater detail).

poses of the vehicle exception,[321] or whether a qualifying exigency actually existed when police claim the exigency exception to the warrant requirement.[322]

But this parade of horribles casts too broad a net and conflates mistake of law and mistake of fact. For example, if the officer invoking the vehicle exception to the warrant requirement was reasonably mistaken about whether an automobile was readily mobile[323]—such as where the vehicle lacked spark plugs or its transmission was inoperable—this factual mistake[324] should be allowed if it is judged to be objectively reasonable.[325] On the other hand, if this same officer mistakenly believes that the applicable law includes boats within the definition of vehicles, and so he searches a boat without a warrant while invoking the vehicle exception, this would constitute a mistake of law[326] and, therefore, the search should be deemed objectively unreasonable. The historical dichotomy between mistakes of fact and mistakes of law[327] will be preserved under a proper application of the two standards, and thus, the slippery slope may be avoided.

A second argument against applying the good faith exception to *Heien* and similar cases is that it has never been allowed in circumstances in which the officer who actually performed the search or seizure acted unreasonably. Instead, the exception historically had been applied only in circumstances where the officers relied in good faith upon an external authority that was unaffiliated with law enforcement.[328] But the

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321. Chambers v. Maroney, 399 U.S. 42, 52 (1970) (recognizing an exception to the warrant requirement for vehicle searches).

322. Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (recognizing that an exception to the warrant requirement for searches exists based on an exigency).

323. *Chambers*, 399 U.S. at 48 (identifying a "necessary difference between a search of a store [or] dwelling" where a warrant "readily may be obtained . . . and a search of . . . [an] automobile . . . where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought") (quoting Caroll v. United States, 267 U.S. 132, 153 (1925)).

324. *See* Kinports, *supra* note 7, at 143.

325. For example, if the vehicle lacked spark plugs or had an inoperable transmission or starter.

326. *See* Kinports, *supra* note 7, at 143.

327. *See id.*

328. *E.g.*, United States v. Leon, 468 U.S. 897, 897 (holding that "[t]he Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid"); Massachusetts v. Sheppard, 468 U.S. 981, 987-91 (1984) (holding that the good faith exception applies when the police relied upon a warrant that was invalid because a judge forgot to make "clerical corrections"); Illinois v. Krull, 480 U.S. 340, 349-50 (1987) (holding that the good faith exception applies when the police relied on a statute that was later declared to be unconstitutional); Arizona v. Evans, 514 U.S. 1, 15-16 (1995)

Court crossed the Rubicon in *Herring*,[329] when it allowed the good faith exception where the officers who performed the seizure relied upon an error made by the police.[330] Unlike *Herring*, however, the officer performing the stop in *Heien* is the one who actually erred.[331] One could posit that this factual difference is determinative, so the good faith exception does not apply in *Heien*. In support of this position, one would cite the Court's observation in *Leon* that it "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant."[332]

But a closer review of *Herring* reveals that the one-off separation between the officer who acted and the source of the error in that case, although an important factor, is not a categorical prerequisite for the good faith exception.[333] Rather than focusing primarily upon the source of the error, the Court in *Herring* examined whether the error by the police was negligent and isolated, rather than systemic and reckless.[334] Consistent with this approach, no evidence was presented in *Heien* that Sergeant Darisse acted recklessly or as part of a systemic disregard of the suspect's Fourth Amendment rights. Quite to the contrary, when the Court mischaracterized Darisse's mistake of law as being objectively reasonable, it necessarily concluded that this error amounted to nothing more than mere negligence.[335] Consistent with the Court's contemporary, deterrence-based approach to Fourth Amendment exclusion, a simply negligent mistake by the police would be inadequate to justify the countervailing social costs of suppression.[336]

VIII. CONCLUSION

The contemporary idea of objective reasonableness predates the common law.[337] It is embedded throughout the legal system and funda-

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(holding that the good faith exception applies when the police relied on mistaken information in a database prepared by a court employee).

329. Herring v. United States, 555 U.S. 135 (2009).

330. *See id.* at 145-46.

331. *See id.* at 136-37; Heien v. North Carolina, 574 U.S. 54, 57 (2014).

332. *Leon*, 468 U.S. at 918 n.19; *see Herring*, 555 U.S. at 140 (observing that the "officers did nothing improper" and that "the error was noticed so quickly").

333. *See Herring*, 555 U.S. at 144.

334. *See id.*

335. *See* Heien v. North Carolina, 574 U.S. 54, 57 (2014).

336. *See Herring*, 555 U.S. at 144.

337. *See* Vaughn v. Menlove, 3 Bing. (N.C.) 467, 468 (N.C. 1837) (holding that the standard for negligence is an objective one; one has behaved negligently if he has acted in a way contrary to how a reasonably prudent person would have acted under similar circumstances); Osborne v. Mont-

mental to the rule of law.[338] As discussed above, objective reasonableness is of special significance when police officers enforce and apply the laws based on their determination of the existence of probable cause[339] or a reasonable suspicion.[340]

An officer can, of course, be reasonably mistaken about the facts. The probable cause and reasonable suspicion standards, as noted, are not to be judged retroactively.[341] Reasonable factual mistakes are allowed, in part, because the factual circumstances of a given situation may not be completely and transparently knowable beforehand.[342] But the law, in contrast, is knowable by the police before they decide whether to act upon it by conducting a search or seizure.[343] Indeed, laypersons are charged with constructive notice of the same laws that the police are charged with enforcing.[344] Law enforcement personnel, in view of their training and the authority with which they are entrusted, should be held to no lesser standard than an ordinary citizen. Accordingly, a mistake of law, whether by a layperson or a police officer, is per se objectively unreasonable.

Evidence that is unreasonably obtained, however, need not be categorically suppressed.[345] In applying the Fourth Amendment exclusionary rule, the Court has, over time, recognized a variety of exceptions that permit the reception at trial of illegally obtained evidence.[346] The test for admissibility turns on weighing the benefits of future police deterrence, which is necessarily speculative and often attenuated, against the social costs of suppression, which may be immediate and substantial.[347] In cir-

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gomery, 234 N.W. 372, 377 (Wis. 1931) (relating the concept of foreseeability to negligence itself and the legal consequences that result).

338. *See Vaughn*, 3 Bing. (N.C.) at 468. Further, a standard of objective reasonableness is apparent in other applications of the law. *See id.* (holding that a person has a legal duty to act as a reasonable person with ordinary care); *see also* Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980) (holding that an objectively reasonable suspect is aware he is being questioned by police); Timpte Indus. v. Gish, 286 S.W.3d 306, 311, 314 (Tex. 2009) (holding that the focus of a design defect is whether an objectively reasonable alternative is available or not); Paratore v. Perry, 329 Cal. App. 2d 384, 388 (App. Div. 1966) (determining that adequate consideration is constituted in a contract dispute if the consideration is objectively reasonable and fair).

339. JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 1: INVESTIGATION § 8.02(B) (8th ed. 2021) (stating that probable cause "is an objective concept").

340. *See generally id.* (stating that "reasonable suspicion" is analyzed under an objective standard).

341. *See supra* Part IV.

342. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

343. *See, e.g.*, Heien v. North Carolina, 574 U.S. 54, 73 (2014).

344. *See, e.g.*, Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 UNIV. LOUISVILLE L. REV. 1, 31 (2007).

345. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 15-16 (1995).

346. *See, e.g.*, Massachusetts v. Sheppard, 468 U.S. 981, 987-88 (1984).

347. United States v. Calandra, 414 U.S. 338, 347 (1974).

cumstances such as those in *Heien*, in which a court has determined that a law lacks desirable clarity and has never been definitively interpreted,[348] suppression may be unwarranted.

To be clear, if the illegally obtained evidence is received at trial in these types of cases, it is not because the officer acted with objective reasonableness. Rather, the unreasonably obtained evidence should be admitted whenever it is determined that the deterrent benefits of suppression are outweighed by the countervailing costs. Such an approach preserves the venerable concept of Fourth Amendment reasonableness[349] while serving the pragmatic purpose of avoiding the acquittal of guilty defendants when suppression is unjustified. This is the proper approach to Fourth Amendment reasonableness, and it is the analysis that the *Heien* Court should have applied.

348. *Heien*, 574 U.S. at 66.
349. *Calandra*, 414 U.S. at 347-48.