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Police Ignorance and Mistake of Law under the Fourth Amendment

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POLICE IGNORANCE AND MISTAKE OF LAW UNDER THE FOURTH AMENDMENT

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Ignorance of the law is ordinarily not an excuse for criminal law violations, except when a person makes a mistake of law because of a reasonable reliance upon an official interpretation of the law. Heien v. North Carolina *created a mistake of law defense based upon an officer's ignorance of the law, functionally carving out a new exception to the Fourth Amendment exclusionary rule. In* Heien, *an officer's ignorance of the law caused him to stop a car based on his mistaken belief that the defendant had violated the requirement for two working brake lights. Even though the officer was wrong about the law,* Heien *held that an officer's reasonable mistake of law may support reasonable articulable suspicion to justify an investigatory stop. Consequently, the evidence obtained as a result of the stop was admissible. By importing the mistake of law defense from criminal law to allow for police ignorance,* Heien *represents a significant departure from the Court's good faith exception jurisprudence, which was previously justified on reasonable reliance. Moreover, it contradicts criminal law's application of and policies underlying the mistake of law defense.*

This Article analyzes five ways in which the Court's mistake of law analogy in the Fourth Amendment context is incongruous with the criminal law mistake of law defense. First, the Court's excusal of the officer's ignorance of the law creates an asymmetry between officers and laypersons. Laypersons are not excused from their ignorance of the law, but the Court deviates from criminal law doctrine by allowing the officer, the very person's whose duty is to apply the law, to assert such a defense. Second, the Heien *Court's injection of reasonableness in deciding whether an officer's ignorance of the law or mistake of law should be excused contradicts criminal law, which does not take reasonableness into account. Third, criminal law permits a mistake of law defense only when the*

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defendant has relied on an official interpretation of an official statement of the law, whereas the Court accepted the mistake of law claim when the officer relied merely on his personal interpretation of the law. Fourth, the Court ignores the fundamental differences between an officer's assertion of the mistake of law defense to avoid exclusion and a defendant's assertion to avoid criminal liability. Defendants are afforded the mistake of law defense because a criminal conviction would jeopardize their liberty, property, and reputation and they would suffer additional collateral consequences, including loss of employment, benefits, and voting rights. In contrast, an officer merely risks evidence being excluded. Fifth, the Court upends the rule of lenity by failing to identify any ambiguity in the law before interpreting the law in the officer's favor. The rule of lenity ordinarily requires that ambiguous laws be interpreted in the defendant's favor.

This Article also argues that the policies underlying the criminal law mistake of law defense militate against extending that defense to officers in the exclusionary rule context because it would cause undesirable consequences for the advancement of legal knowledge, protection of individual rights, and scrutiny of police conduct. Officers will have no incentive to learn the law once they are afforded the mistake of law defense. Relatedly, officers can take advantage of this new defense by making false mistake of law claims, which could increase racial profiling and pretextual stops. Because the mistake of law defense allows officers to avoid exclusion of evidence, it could ultimately result in underdeterrence of police illegality.

INTRODUCTION

The exclusionary rule was envisioned as a means of giving life to the protections afforded by the Constitution by excluding evidence obtained through illegal means.[1] The rule functions as a remedy for illegally obtained evidence by excluding the evidence at trial.[2] Originally, the Court articulated exclusionary interests that centered on the maintenance of judicial integrity, reasoning that judicial involvement with police illegality through the admission of evidence obtained as fruits of the illegality would impugn the integrity of the courts.[3]

Over time, the Court shifted its interest in the exclusionary rule to the rule's deterrence benefits.[4] This new focus ushered in a balancing test,

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1. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)) (characterizing the exclusionary rule as a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words'"). Scholars disagree as to whether there is historical or textual support for the exclusionary rule. Professor Akhil Amar has argued that the exclusionary rule cannot be justified by the text of the Fourth Amendment or history. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785-86 (1994). Others, however, have found evidence that the exclusionary rule was contemplated by the Framers and used as a remedy during early American history. *See, e.g.*, Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 1 (2010) ("[E]xclusion is actually an ancient remedy, widely applied by courts in various contexts since the dawn of American history[,] . . . well established in the regular practices of Founding-era judges and lawyers.").

2. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 494 (9th ed. 2010).

3. *Mapp*, 367 U.S. at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)) ("[T]here is another consideration—the imperative of judicial integrity'. . . . Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."). The Supreme Court first implemented the exclusionary rule as a remedy for Fourth Amendment violations in *Weeks v. United States*, 232 U.S. 383, 398 (1914). The Court reasoned that suppressing the illegally obtained evidence was necessary to give effect to the Fourth Amendment and to prevent the judiciary from becoming a partner in and a conduit for constitutional violations. *Id.* at 393; *Elkins*, 364 U.S. at 223 ("[T]he federal courts should not be accomplices in the willful disobedience of a Constitution they are sworn to uphold."). After the protections of the Fourth Amendment were incorporated against the states, *Mapp v. Ohio* extended the exclusionary rule to all state prosecutions. *Mapp* reaffirmed the significance of the exclusionary rule, describing the remedy as "an essential ingredient of the Fourth Amendment" and "part and parcel of the Fourth Amendment's limitation[s]." 367 U.S. at 651. For a history of the evolution of the exclusionary rule's purpose, see Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47 (2010) (arguing that the preservation of judicial integrity is the primary purpose of the exclusionary rule).

4. *See, e.g.*, United States v. Janis, 428 U.S. 433, 454 (1976) ("If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted."). *Linkletter v. Walker*, 381 U.S. 618 (1965), was the first case in which the Supreme Court articulated deterrence as the rationale for the exclusionary rule. Bloom & Fentin, *supra* note 3, at 54. Later, in *United States v. Calandra*, the Court further retreated

weighing the deterrent effect of exclusion against the cost of letting the guilty go free.[5] This balancing test allowed the Court to carve out exceptions to the exclusionary rule because of the Court's reasoning that, in many circumstances, exclusion has little deterrent value compared with the high cost of freeing guilty defendants, invoking the oft-quoted concern that "[t]he criminal is to go free because the constable has blundered."[6] The exclusionary rule exceptions established by the Court have grown to include circumstances involving knock-and-announce violations;[7] good faith reliance on warrants,[8] judicial precedent,[9] statutes,[10] non-police personnel,[11] and law enforcement personnel;[12] inevitable discovery;[13] independent source;[14] and collateral use for impeachment,[15] civil

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from its earlier intimation in *Weeks* and *Mapp* that the exclusionary rule is a constitutional requirement by recharacterizing the remedy as prudential—a "judicially created remedy." 414 U.S. 338, 348 (1974).

5. *Calandra*, 414 U.S. at 347-348. *Contra*, Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1383 (1983) (quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) ("[I]t is less evil that some criminal should escape than that the Government should play an ignoble part.")).

6. People v. Defore, 150 N.E. 585, 587 (1926). One limit of the exclusionary rule, deriving from the Court's construction of standing, is that it provides no deterrence against unconstitutional actions of law enforcement taken against individuals who are not ultimately prosecuted. Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 609 (2011). The Court has similarly recognized the limits of the exclusionary rule: "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." Terry v. Ohio, 392 U.S. 1, 14 (1968).

7. Hudson v. Michigan, 547 U.S. 586, 599 (2006) (finding that when evidence is obtained from intentional violations of the knock-and-announce requirement for warrant executions, the costs of exclusion outweigh the benefits).

8. United States v. Leon, 468 U.S. 897, 920-21 (1984) (concluding that there would be no deterrence value in excluding evidence discovered through an officer's reliance on a facially valid warrant that is subsequently determined to be deficient).

9. Davis v. United States, 564 U.S. 229, 249 (2011) (declining to apply exclusionary rule when officer reasonably relied on binding circuit precedent).

10. Illinois v. Krull, 480 U.S. 340, 349 (1987) (applying good faith doctrine to allow an officer's reasonable reliance on a previously valid statute to justify officer's conduct and limit exclusion).

11. Arizona v. Evans, 514 U.S. 1, 14-15 (1995) (extending good faith doctrine to officer's reliance on court clerk who provided inaccurate information to the officer due to error in clerk's database).

12. Herring v. United States, 555 U.S. 135, 144-45 (2009) (declining to exclude evidence obtained through an officer's arrest and search of the defendant based on the officer's reasonable reliance on a neighboring county's sheriff's department's negligently maintained database).

13. Nix v. Williams, 467 U.S. 431, 448 (1984) (exempting from exclusion illegally obtained evidence if the government would have inevitably discovered the evidence through legitimate means).

14. Murray v. United States, 487 U.S. 533, 537 (1988) (establishing independent

proceedings,[16] and grand jury proceedings.[17]

Part I of this Article traces the Court's most recent expansion of exceptions to the exclusionary rule in *Heien*, where it extended the good-faith exception to allow for an officer's reasonable mistake of law.[18] In *Heien*, the officer stopped a car believing that the driver had violated a traffic law requiring two working brake lights and found drugs in the car following the defendant's consent to a search.[19] The law, however, actually required only one functioning brake light.[20] Rather than exclude the evidence of drugs found in the car because there had been no violation to justify stopping the car, the Court sustained the stop and upheld the admission of the evidence because it reasoned the officer had a good faith basis to rely on his own mistaken understanding of the law.[21]

As a preliminary matter, although some might argue that *Heien* is not per se an exclusionary rule case,[22] this Article argues that *Heien* essentially expands the good-faith exception to the exclusionary rule[23] without taking on

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source exception to allow admission of evidence found through illegal means if the government later obtains the same evidence through a legal alternative).

15. Walder v. United States, 347 U.S. 62, 65 (1954) (permitting introduction of illegally obtained evidence to impeach the defendant's testimony).

16. United States v. Janis, 428 U.S. 433, 454 (1976) (allowing admission in a federal civil tax proceeding of evidence obtained by a state criminal law enforcement officer in reliance on a warrant subsequently found to be defective).

17. *Calandra*, 414 U.S. 338, 350 (declining to apply the exclusionary rule in grand jury proceedings).

18. Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).

19. *Id.* at 539.

20. *Id.* at 535.

21. *Id.* at 540.

22. I thank my colleague Mark Summers for making this counterpoint, but other scholars agree that *Heien* can be interpreted as a new variant of the good-faith exception to the exclusionary rule.

23. As Justice Hudson of the North Carolina Supreme Court pointed out:

> Allowing an officer's "reasonable mistake of law" to support a warrantless stop is the functional equivalent of a "good faith exception" for stops conducted in contravention of the law—as long as the officer acted in good faith, that is, he is reasonably unaware that his actions are inconsistent with the law, the illegality of the stop will not require suppression of the obtained evidence.

State v. Heien, 737 S.E.2d 351, 361 (N.C. 2012) (Hudson, J., dissenting), *aff'd*, 135 S. Ct. 530 (2014). *See also* Craig Hemmens, Andrea Walker & John Turner, *(Not) Working on the Highway: The Supreme Court Makes a Mistake of Law in* Heien v. North Carolina, 52 CRIM. L. BULL., no. 3, Summer 2016 ("In *Heien v. North Carolina,* the United States Supreme Court effectively carved out another exception to the exclusionary rule when it held that evidence seized by a police offer after the police officer initiated a traffic stop based upon a mistaken belief that he had observed a traffic violation justifying the stop could nonetheless be admitted."); Aziz Z. Huq, *The Difficulties of Democratic Mercy,* 103 CAL. L. REV. 1679, 1695 (2015) ("It is in the deepening shadow of the 'good faith' exception to the exclusionary rule, most recently exemplified by the Court's willingness in *Heien v. North Carolina* to permit a Fourth Amendment violation to go without remedy because a police officer's failure even to know what the law he was enforcing required was 'reasonable' if 'not . . . perfect.'"); Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 52 (2015) (referring to *Heien* as "the Court's most recent

the exclusion issue directly.[24] Because the *Heien* majority framed the case as whether a reasonable mistake of law can support an officer's reasonable suspicion to make an investigatory stop, it was able to avoid imposing the exclusionary rule, even though the defendant had not violated the law requiring a working brake light.[25] The Petitioner, supported by Justice Sotomayor, argued that mistake of law cases should be evaluated under the good-faith exception to the exclusionary rule, rather than as an antecedent question of whether an officer violated the Fourth Amendment.[26] Prior to *Heien*, Justice Sotomayor's approach had been the prevailing approach among a majority of the circuit courts and in thirteen states.[27]

Naturally, *Heien* prompted critical commentary. But none of that commentary has directly articulated the legal failings of *Heien* in a way that brings to light the incongruity of transplanting the criminal law mistake of law defense to the Fourth Amendment context. This Article seeks to provide a novel critique of *Heien* by identifying the legal and policy contradictions between *Heien*'s adoption of the mistake of law exception to the exclusionary rule and the common law and Model Penal Code's mistake of law defense. It argues that the Court has afforded officers a mistake of law defense that is not ordinarily available to criminal defendants under the circumstances present in *Heien*, and thereby undermined the foundation for the Court's new exception.

Part II analyzes how *Heien*'s mistake of law defense is unmoored to any criminal law theory, policy, or doctrine. The Court attempts to analogize a Fourth Amendment mistake of law defense to criminal law's mistake of law defense, but that analogy is incongruous because of several fundamental differences between the Court's application and the doctrinal requirements and policies found in common law and the Model Penal Code. First, the Court fails to acknowledge that criminal law does not recognize reasonableness to excuse a person's ignorance of the law. Second, the mistake of law defense in criminal law only excuses a person's reasonable reliance on an official interpretation of the law—not his own interpretation, as is the case in *Heien*. Third, the policy

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extension of *Leon*"); Tonja Jacobi, *The Future of* Terry *in the Car Context*, 15 OHIO ST. J. CRIM. L. 89, 104 n. 89 (2017) (referring to *Heien* as "expanding the good faith exception to the exclusionary rule to include an officer's reasonable mistake of law").

24. Karen McDonald Henning, *"Reasonable" Police Mistakes: Fourth Amendment Claims and the "Good Faith" Exception after* Heien, 90 ST. JOHN'S L. REV. 271, 273 (2016) ("Notably absent from the majority and concurring opinions was any discussion of the relationship between reasonable mistakes under the Fourth Amendment and mistakes that are reasonable for purposes of the good faith exception to the exclusionary rule.").

25. *Heien*, 135 S. Ct. at 539 (recasting the issue by stating that "the mistake of law relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal").

26. Brief for Petitioner-Appellant at 23-34, *Heien*, 135 S. Ct. 350 (No. 13-604); Transcript of Oral Argument at 222-25, *Heien*, 135 S. Ct. 350 (No. 13-604); *Heien*, 135 S. Ct. at 545 (Sotomayor, J., dissenting); Henning, *supra* note 24, at 313-14.

27. *See infra* Part I, notes 61-62 and accompanying text.

reasons underlying a mistake of law defense for a criminal defendant are inapplicable to an officer under the exclusionary context because the officer suffers no personal punishment. Fourth, when a law is ambiguous, the rule of lenity dictates that ambiguities be resolved in the defendant's favor—not the government's favor, as is the case in *Heien*. Fifth, the policy rationales that counsel against allowing a person's ignorance of the law as an excuse (e.g., the concern about false claims of mistake of law) offer an even stronger case against allowing the excuse for law enforcement officers, who are charged with knowing and enforcing the law. Sixth, policy justifications for rejecting the ignorance of the law excuse (e.g., encouraging individuals to learn the law) militate against extending the mistake of law defense in the exclusionary rule context. Thus, *Heien* contradicts the policies that underlie the mistake of law defense and produces the opposite effect by providing a greater incentive for officers not to know the law in order to avoid the exclusionary rule.

Part III argues that transplanting the criminal law mistake of law defense will precipitate undesirable consequences that society ordinarily does not have to bear when a defendant asserts the defense in the criminal law context. A Fourth Amendment defense for mistakes of law founded on police ignorance will shroud police conduct under a cloak of invisibility, hiding police actions from scrutiny. As a result, *Heien* will provide a constitutional mechanism for officers to engage in pretextual stops and racial profiling with impunity.

I. VARIANTS OF MISTAKE OF LAW

Under Fourth Amendment jurisprudence, there are three possible ways an officer might be mistaken about the law.[28] The first variant occurs when an officer relies on established law that is subsequently invalidated. *Illinois v. Krull* presented the question of how courts should treat a search that was validly conducted under a state law that is later found unconstitutional.[29] In *Krull*, an officer searched a defendant's automobile wrecking yard and records of vehicle purchases pursuant to an Illinois statute allowing warrantless administrative searches.[30] Based on the search, the officer determined that several of the cars were stolen; the defendant was charged with violations of state motor vehicle laws.[31] Later, the state supreme court declared that the Illinois statute as it existed at the time of the search was unconstitutional because it vested officials with too much discretion.[32]

28. *See* Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 744 (2011) (describing the various forms of mistake of law as settled law misinterpretations, mistakes as to unsettled or novel questions, and changing-settled-law mistakes).

29. 480 U.S. 340, 342 (1987).

30. *Id.* at 342-43.

31. *Id.* at 343.

32. *Id.* at 345-46.

In deciding *Krull*'s exclusion issue, the U.S. Supreme Court relied on the good faith doctrine established in *United States v. Leon*, which carved out an exception to the exclusionary rule.[33] *Leon* raised the question whether evidence of a search conducted pursuant to a facially valid search warrant authorized by a magistrate should be excluded when the warrant is later determined to be deficient for lack of probable cause.[34] The *Leon* Court recognized that the search was invalid but declined to exclude the evidence resulting from the illegal search because doing so, the Court reasoned, would punish the officer for a magistrate's mistake.[35] Thus, the Court created the good faith doctrine in *Leon* to exempt from the exclusionary rule evidence obtained by an officer who has a good faith basis, relying on a facially valid warrant, to believe that his actions comport with the Constitution.[36]

In *Krull*, the officer's reliance was determined to be reasonable because "officer[s] cannot be expected to question the judgment of the legislature that passed the law," unless it is obvious that the statute is unconstitutional.[37] The Court in *Krull* rationalized that because the primary focus of the exclusionary rule is to deter unconstitutional police behavior, no deterrence value can be gained from excluding evidence that was obtained in reasonable reliance on a statute.[38] Moreover, because legislators and judges are not "adjuncts to the law enforcement team," the Court was not convinced that exclusion would deter legislators and judicial officers.[39]

The second mistake of law variant occurs when an officer relies on unsettled law, but the courts later resolve the ambiguity and conclude that the police conduct constitutes a violation.[40] In *Davis v. United States*, the Court was confronted with the problem of whether evidence obtained in a search that was conducted in accordance with then-binding circuit precedent should be

33. United States v. Leon, 468 U.S. 897, 905 (1984).

34. *Id.* at 900. The Court limited a reasonable reliance defense in circumstances where "no reasonably well trained officer should rely on the warrant." *Id.* at 923. Courts have insisted that officers should know when a warrant is so deficient that a claim of good faith reliance on a magistrate's approval will not be sustained. *See, e.g.*, United States v. Doyle, 650 F.3d 460, 476 (4th Cir. 2011) ("[W]here a reasonable officer would know that a probable cause determination could not be rendered without information conspicuously absent from his application for a warrant, reliance on the resulting warrant is not objectively reasonable. . . . [A] magistrate's signature cannot render reasonable an objectively unreasonable failure to support a warrant with evidence necessary to demonstrate probable cause.").

35. *Leon*, 468 U.S. at 916.

36. *Id.* at 908-09. For a persuasive argument that *Leon* rests faultily on an incomplete analogy to the mistake of law doctrine applied in the criminal law context, see Robert L. Misner, *Limiting* Leon*: A Mistake of Law Analogy*, 77 J. CRIM. J. & CRIMINOLOGY 507 (1986).

37. Illinois v. Krull, 480 U.S. 340, 349-50 (1987).

38. *Id.* at 348-51.

39. *Id.* at 350-51 (quoting *Leon*, 468 U.S. at 917).

40. Marceau, *supra* note 28, at 744.

excluded when the search would be invalid under subsequently developed case law.[41] The ambiguity in the law at issue in *Davis* arose from the lower courts' application of the Court's ruling in *New York v. Belton*,[42] where the Court upheld the search of a defendant's jacket found in the passenger compartment of a car as a lawful search incident to an arrest.[43] The officer in *Belton* conducted his search after he had ordered the occupants out of the car and arrested them, but he left them unhandcuffed, standing along the side of a thruway.[44] Lower courts applied *Belton* as a broad authorization for automobile searches incident to an arrest without consideration of whether the defendant was within reach of the car.[45] Later, in *Arizona v. Gant*, the Court clarified *Belton*'s ambiguity by establishing a new rule: an officer may search an automobile incident to an arrest only if the defendant is within reaching distance of the car, or if the officer reasonably believes the car contains evidence of the crime for which the defendant was arrested.[46] In *Davis*, the officer's search occurred two years before *Gant*, which was decided while Petitioner Davis's case was pending appeal.[47] The Court applied *Gant* retroactively to allow Davis a substantive basis for relief, but on the question of remedy, it declined to exclude the evidence.[48]

To decide if the evidence should be excluded in *Davis*, the Court conducted its customary cost-benefit analysis by weighing the cost of letting criminals go free against the benefit of deterring constitutional violations.[49] It reasoned that because the officer "was in strict compliance with then-binding Circuit law and was not culpable in any way," exclusion would only deter "conscientious police work."[50]

Although some criticisms articulated in this Article apply equally to the first two variants of mistake of law, this Article's primary focus concerns the last variant, where an officer misinterprets or is unaware of established law. A mistake resulting from an officer's misinterpretation or unawareness of the law can be more appropriately characterized as police ignorance of the law than the first two types of mistakes. *Heien v. North Carolina* adds to the exclusionary rule jurisprudence by expanding the good-faith exception into the realm of ignorance of the law.[51]

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41. 564 U.S. 229, 231-32 (2011).

42. *Id.* at 239-40.

43. 453 U.S. 454, 462-63 (1981).

44. *Id.* at 456.

45. *Davis*, 564 U.S. at 233 (citing Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J., concurring)).

46. 556 U.S. 332, 351 (2009).

47. *Davis*, 564 U.S. at 235-36.

48. *Id.* at 244, 249-50. In essence, the Court provided a right without a remedy, contrary to its edict in *Marbury v. Madison*. *See* 5 U.S. 137, 147 (1803).

49. *Davis*, 564 U.S. at 240-41.

50. *Id.*

51. 135 S. Ct. 530, at 540 (2014).

In *Heien*, the officer stopped a car for a broken brake light based on the officer's mistaken belief that state law required two working brake lights, when in actuality, the law only required one.[52] The stop provided the officer the opportunity to ask for consent to search the car.[53] The officer found drugs in the car and arrested Petitioner Heien.[54] However, the lower state courts concluded that there was no brake light violation because state law required only one working brake light, as evidenced by the statutory language, "*a* stop lamp" and "*the* stop lamp."[55]

The U.S. Supreme Court accepted as a foundational matter that the defendant had not violated the brake light law because it was bound by the state court's statutory analysis, which the government did not challenge.[56] However, the Court concluded that the drugs were admissible because the officer made a reasonable mistake of law concerning how many working brake lights were required.[57] Pointing to another statute that required "all originally equipped rear lamps" to be in working order, the Court concluded that the officer could reasonably misunderstand state law to require two functioning brake lights,[58] despite the state court of appeals' prior determination that "rear lamps" and "stop lamp" were not synonymous.[59]

The *Heien* Court broke with the consensus that had developed among a majority of circuit courts, with the exception of the Eighth Circuit,[60] that a mistake of law is never relevant in considering reasonableness.[61] Additionally,

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52. *Id.* at 534-35.

53. *Id.* at 534.

54. *Id.*

55. *Id.* at 535 (emphasis added).

56. State v. Heien, 737 S.E.2d 351, 359 (N.C. 2012) (Hudson, J., dissenting), *aff'd*, 135 S. Ct. 530 (2014).

57. United States v. Heien, 135 S. Ct. at 540. Interestingly, under similar facts, the Fifth Circuit held that "no well-trained Texas police officer could reasonably believe that white light appearing with red light through a cracked red taillight lens constituted a violation of traffic law." United States v. Lopez-Valdez, 178 F.3d 282, 289 (5th Cir. 1999).

58. *Heien*, 135 S. Ct. at 535.

59. The "rear lamps" referred to the red lights that light up when the front headlights are on, which are distinct from brake lights. State v. Heien, 714 S.E.2d 827, 830 (N.C. Ct. App. 2011), *rev'd*, 737 S.E.2d 351 (N.C. 2012) ("It is clear from the language of subsections (a) and (d) that the 'rear lamps' provided for therein are separate and distinct from the 'stop lamp' provided for in subsection (g). . . . From these statutory requirements, it is apparent that the purpose of rear lamps is to make a vehicle more visible to other drivers and pedestrians during times when visibility is otherwise reduced due to nighttime, inclement weather, or similar conditions.").

60. Among the federal courts of appeals, only the Eighth Circuit has held that a mistake of law can be considered in determining reasonableness. *See, e.g.*, United States v. Rodriguez-Lopez, 444 F.3d 1020, 1022-23 (8th Cir. 2006); United States v. Martin, 411 F.3d 998, 1001-02 (8th Cir. 2005); United States v. Sanders, 196 F.3d 910, 913 (8th Cir. 1999).

61. *See* United States v. Nicholson, 721 F.3d 1236, 1241 (10th Cir. 2013); United States v. Coplin, 463 F.3d 96, 101 (1st Cir. 2006); United States v. Mosley, 454 F.3d 249, 260 n.16 (3d Cir. 2006); United States v. McDonald, 453 F.3d 736 (7th Cir. 2006); United

thirteen states have declined to provide a good-faith exception for mistakes of law.[62] Equally significant, in transposing the mistake of law defense to the exclusionary rule context, the Court departs significantly from the approach taken in the common law and the Model Penal Code, ignoring the established requirements and policy rationales of the defense.

II. THE INCONGRUITIES OF THE FOURTH AMENDMENT MISTAKE OF LAW DEFENSE

Although the Court does not directly state it, its application of the mistake of law exception in *Heien* appears to rely on concepts borrowed from criminal law. However, *Heien*'s analogy to the mistake of law doctrine in criminal law is incongruous because it contradicts the policies against excusing ignorance and the doctrinal requirements for asserting a mistake of law defense.

A. Asymmetrical Application of the Ignorance of the Law Excuse

The most obvious objection against extending the mistake of law defense from criminal law to the Fourth Amendment context is the asymmetry that results between the standard applied to the average citizenry and that applied to law enforcement. The maxim "ignorance of the law is no excuse" captures the zero-tolerance approach of criminal law in imposing criminal liability regardless of a reasonable and honest lack of knowledge or misunderstanding of the law.[63] For example, in *Williams v. North Carolina,* two residents of

States v. Tibbets, 396 F.3d 1132, 1138 (10th Cir. 2005); United States v. Chanthasouxat, 342 F.3d 1271, 1278-79 (11th Cir. 2003); United States v. King, 244 F.3d 736, 741-42 (9th Cir. 2001); United States v. Lopez-Soto, 205 F.3d 1101, 1106 (9th Cir. 2000); United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998).

62. *See* State v. Marsala, 579 A.2d 58, 59 (Conn. 1990); Dorsey v. State, 761 A.2d 807, 814, 821 (Del. 2000); Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992); State v. Guzman, 842 P.2d 660, 677 (Idaho 1992); State v. Cline, 617 N.W.2d 277, 292-93 (Iowa 2000), *abrogated on other grounds by* State v. Turner, 630 N.W.2d 601 (Iowa 2001); Commonwealth v. Upton, 476 N.E.2d 548, 554, n.5 (Mass. 1985); State v. Canelo, 653 A.2d 1097, 1102 (N.H. 1995); State v. Johnson, 775 A.2d 1273, 1281-82 (N.J. 2001); State v. Gutierrez, 863 P.2d 1052, 1053 (N.M. 1993); People v. Bigelow, 488 N.E.2d 451, 457-58 (N.Y. 1985); Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991); State v. Oakes, 598 A.2d 119, 121 (Vt. 1991); State v. Afana, 233 P.3d 879, 886 (Wash. 2010); *see also* People v. Krueger, 675 N.E.2d 604, 612 (Ill. 1996).

63. *See, e.g.*, United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558, 563 (1971) (refusing to excuse the defendant's ignorance of the fact that the Interstate Commerce Commission regulations applied to his shipment of sulfuric and hydrofluosilicic acids); United States v. Baliant, 258 U.S. 250, 252 (1922) (applying the maxim to a defendant charged with violation of the Anti-Narcotic Act); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411-12 (1833) (refusing to recognize ignorance of the law excuse for violation of customs-duties law for refined sugar). *See also* Liparota v. United States, 471 U.S. 419, 441 (1985) (White, J., dissenting); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); Reynolds v. United States, 98 U.S. 145, 167 (1879); Snell v. Allantio F. & M. Ins. Co. 98 U.S. 85, 92 (1878); Lamborn v. Dickinson Cty., 97 U.S. 181, 181-185 (1877); United States

North Carolina filed for divorce in Nevada from their respective spouses, who were also North Carolina residents.[64] After their divorces, the couple married in Nevada and then returned to North Carolina to live together.[65] The two were convicted of bigamous cohabitation because North Carolina concluded they had not been properly domiciled in Nevada, and therefore, the Full Faith and Credit Clause would not apply to give legal effect to their prior divorces and subsequent marriage to each other.[66] Although the case implicated a fundamental right—marriage—the Court did not hesitate to apply the ignorance of the law maxim to uphold the convictions.[67]

Scholars have offered several rationales for the unforgiving common law doctrine.[68] One explanation centers on the need for criminal law to "represent[] an objective code of ethics which must prevail over individual convictions."[69] Jerome Hall espoused this normative explanation for the common law's denial of the mistake of law defense:

> Now comes a defendant who truthfully pleads that he did not know that his conduct was criminal, implying that he thought it was legal. This may be because he did not know that any relevant legal prohibition existed (ignorance) or, if he did know any potentially relevant rule, that he decided it did not include his intended situation or conduct (mistake). In either case, such defenses always imply that the defendant thought he was acting legally. If that plea were valid, the consequences 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. But such a doctrine would contradict the essential requisites of a legal system, the implications of the principle of legality.[70]

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v. Hodson, 77 U.S. (10 Wall.) 395, 409 (1870); Bank of United States v. Daniel, 37 U.S. (12 Pet.) 32, 55-56 (1838); Hunt v. Rousmaniere (*Hunt v. Rhodes*) 26 U.S. (1 Pet..) 1, 1-15 (1828).

Professor Ken Levy argues that honest and reasonable normative ignorance—that is, honest and reasonable ignorance of either a particular criminal law or the moral basis of a particular criminal law—should generally be recognized as exculpatory. Ken Levy, *Normative Ignorance: Where the Insanity Defense Meets the Mistake of Law Defense* (unpublished manuscript) (on file with author).

64. 325 U.S. 226, 235 (1945).

65. *Id.*

66. *Id.* at 238.

67. *Id.*

68. For a history of the doctrine, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 350-61 (1998).

69. Misner, *supra* note 36, at 519 (citing J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 54-55 (3d ed. 1973)). *See also* Davies, *supra* note 68, at 356-57 (citing United States v. Barker, 546 F.2d 940, 972 (D.C. Cir. 1976) (Leventhal, J., dissenting).

70. Misner, *supra* note 36, at 519 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 382-83 (2d ed. 1960)). *See also* WAYNE R. LAFAVE, SEARCH AND SEIZURE 282 (Supp. 1986); Davies, *supra* note 68, at 355 (citing Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 16-19 (1957).

Allowing a private individual's understanding of the law to supplant the collective judgment of the officials who considered and devised it would undermine the law's efficacy[71]; "to reward an individual for being ignorant of the law would be counterproductive."[72] It is even more appropriate to reject ignorance as an excuse in situations involving law enforcement officers and other officials, rather than average citizens. "At common law, it is said that 'every one [sic] is conclusively presumed to know the law.'"[73] Critics of the mistake of law doctrine have pointed out that during the early days of common law, the laws reflected contemporary morals and thus were more intuitive and knowable.[74] As society grew more sophisticated, so did its laws, culminating in the promulgation of regulations and statutes by local, state, and federal governments. It is unrealistic to expect an individual to know every law and understand its complexities.[75] Yet, the reluctance to allow ignorance of the law as a viable excuse persists, and individuals are still held to a high standard of

71. Misner, *supra* note 36, at 519 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 364 (1972)). *See also* State v. Boyett, 32 N.C. (10 Ired.) 336, 346 (1849) ("[T]he rule '*ignorantia legis*,' [is] a rule which has always been acted upon in our law, and in the laws of every nation, of which we have any knowledge, and without which, in fact, the law cannot be administered.").

72. Misner, *supra* note 36, at 519.

73. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 174 (6th ed. 2012) (quoting State v. Woods, 179 A. 1, 2 (Vt. 1935)). *See also* Bryan v. U.S., 524 U.S. 184 (1998) (alluding to the "background presumption that every citizen knows the law").

74. *See* DRESSLER, *supra* note 73, at 168.

75. The notion that the "law is definite and knowable" was widely held by courts. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 119-124 (1974). Commentators have noted the unrealistic preconception that modern laws lend themselves to be as easily understood and ascertainable as those in place during the early common law period. *See, e.g.*, DRESSLER, *supra* note 73, at 168 ("Whatever its plausibility centuries ago, the 'definite and knowable' claim cannot withstand modern analysis."). Professor Larkin has estimated that

> there are more than 4,000 federal statutes alone that potentially create criminal liability, and that number turns out to be a paltry sum. Empowering administrative agencies to define the criminal law has resulted in more than 300,000 potentially relevant implementing federal regulations. Perhaps, that number might not be so overwhelming if the criminal code was patterned after principles of contemporary morality—assuming, of course, that those principles were widely understood..

Paul J. Larkin, Jr., *Taking Mistakes Seriously*, 28 BYU J. PUB. L. 71, 101–02 (2013) (citing Touby v. United States, 500 U.S. 160, 167 (1991); Yakus v. United States, 321 U.S. 414, 447-48 (1944); United States v. Grimaud, 220 U.S. 506, 522 (1911); Edwin Meese III & Paul J. Larkin Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 739-40 (2012)). Over time, the Court has recognized the expansiveness of laws and regulations. For example, the complexity of tax regulations have not gone unnoticed: "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." Cheek v. United States, 498 U.S. 192, 199–200 (1991). Thus, Professor Ken Levy argues that "ignorance of the law can be an excuse when the ignorance is honest and reasonable. And it is reasonable generally if, and only if, the law was either so ambiguous or so complicated that a reasonable person could have misinterpreted it." Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 243 (2014).

legal awareness.

But law enforcement officers, through their training and continual job experience, are in a better position to know the law than a layperson. As the Court has explained:

> Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it. If their knowledge is not comprehensive, state officials know or should know when they pass the limits of their authority, so far at any rate that their action exceeds honest error of judgment and amounts to abuse of their office and its function. When they enter such a domain in dealing with the citizen's rights, they should do so at their peril, whether that be created by state or federal law.[76]

Thus, there is no justification for allowing officers to claim ignorance of the law, especially when laypersons are not entitled to such an excuse.

B. Irrelevancy of Reasonableness

Another incongruity between *Heien* and criminal law centers on its consideration of reasonableness in the determination of whether an officer's misunderstanding of the law should be excused. Under the criminal law stricture, reasonableness is irrelevant to a claim of mistake of law because "neither knowledge nor recklessness nor negligence as to whether the conduct constitutes the offense, or as to its meaning, ordinarily is an element of the offense."[77] In considering a litigant's claim that he was unaware of a probate law that applied to him, the Court has stated:

> We know of no case where mere ignorance of the law, standing alone, constitutes any excuse or defense against its enforcement. It would be impossible to administer the law if ignorance of its provisions were a defense thereto. There are cases, undoubtedly where ignorance of the law, united with fraudulent conduct on the part of others, or mistakes of fact relating thereto, will be regarded as a defense, but there must be some element, other than a mere mistake of law, which will afford an excuse. In addition, there ought to be no negligence in attempting to discover the facts.[78]

Contrary to criminal law, the Court's Fourth Amendment good faith doctrine—which now includes mistake of law based on ignorance—excuses mistakes resulting from negligent conduct.[79] In *Herring v. United States*, a law enforcement officer relied on another county's sheriff's office's negligently-kept records that indicated the defendant had an outstanding arrest warrant,

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76. Screws v. United States, 325 U.S. 91, 129–30 (1945).

77. DRESSLER, *supra* note 73, at 167.

78. Utermehle v. Norment, 197 U.S. 40, 55–56 (1905) (emphasis added).

79. Herring v. United States, 555 U.S. 135, 140 (2009).

which led to the defendant's arrest, as well as discovery of contraband.[80] In actuality, there was no warrant for the defendant's arrest, and thus no basis to arrest him.[81] The Court, nonetheless, admitted the evidence because the incident involved only "isolated negligence."[82]

In the Court's view, the officer's negligence in *Herring* did not justify exclusion because it was not sufficiently egregious. In other words, an officer's negligent actions can still be considered reasonable under the Court's good faith doctrine. When *Heien* is combined with *Herring*, the outcome will be that officers are entitled to a mistake of law exception even when they are negligent in misunderstanding the law.

C. Reasonable Reliance on an Official Interpretation of Law

Heien is contradictory because it misapplies the mistake of law defense by allowing an officer to rely on his personal interpretation of the law, rather than requiring that the reliance be upon an official statement of the law. Criminal law affords one exception to incurring liability for mistakes of law: reasonable reliance on an official interpretation or statement of law.[83] The reasonable reliance exception—or entrapment by estoppel—provides that if an official assures an individual that a particular course of conduct is legal and the individual engages in that conduct, fairness dictates that the individual cannot be held criminally liable.[84] A mistake of law defense is recognized under

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80. *Id.* at 137-38.

81. *Id.*

82. *Id.* at 137.

83. For a defense of the reasonable reliance exception to the mistake of law doctrine, see John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997).

84. Raley v. Ohio, 360 U.S. 423 (1959). *See also* Cox v. Louisiana, 379 U.S. 559, 571 (1965) ("As in *Raley*, under all the circumstances of this case, after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him. The Due Process Clause does not permit convictions to be obtained under such circumstances.") (internal citations omitted); United States v. Batterjee, 361 F.3d 1210, 1216 (9th Cir. 2004) ("In order to establish entrapment by estoppel, a defendant must show that (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable.") (internal quotations and citations omitted); United States v. Gil, 297 F.3d 93, 107 (2d Cir. 2002) (entrapment by estoppell "defense arises where a government agent authorizes a defendant "to engage in otherwise criminal conduct . . . and the defendant, relying thereon, commits forbidden acts in the mistaken but reasonable, good faith belief that he has in fact been authorized to do so.") (internal quotations and citations omitted); United States v. Parker, 267 F.3d 839, 844 (8th Cir. 2001); United States v. Thompson, 25 F.3d 1558, 1564 (11th Cir. 1994); Commonwealth v. Twitchell, 617 N.E.2d 609, 619 (1993).

common law and the Model Penal Code[85] if a defendant reasonably relies on an official statement of the law in a statute that is later invalidated;[86] an opinion from the highest court that is later overruled or abrogated;[87] or an official, but erroneous, interpretation by a public official who is charged with the statute's interpretation, administration, or enforcement, such as the state or U.S. Attorney General.[88]

However, reliance on advice from a mere official or a subordinate officer who is not the chief enforcement officer is insufficient to invoke the mistake of law defense to avoid criminal liability. Numerous courts have rejected reliance on an official's advice to validate a mistake of law defense when that official is not the chief enforcement officer,[89] even when there is no reason to question

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85. MODEL PENAL CODE § 2.04(3)(b) (AM. LAW. INST. 1962) ("A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when . . . [the actor] acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.")

86. LaFave and Scott have reasoned that

> [a]n individual should be able reasonably to rely upon a statute or other enactment under which his conduct would not be criminal, so that he need not fear conviction if subsequent to his conduct the statute is declared invalid. A contrary rule would be inconsistent with the sound policy that the community is to be encouraged to act in compliance with legislation. Thus, just as it is no defense that the defendant mistakenly believed the statute under which he was prosecuted to be unconstitutional, it is a defense that he reasonably relied upon a statute permitting his conduct though it turned out to be an unconstitutional enactment.

W. LAFAVE & A. SCOTT, CRIMINAL LAW § 47, at 366-67 (1972); Ostrosky v. State, 704 P.2d 786, 789 (Alaska Ct. App. 1985).

87. In *Ostrosky*, the defendant relied on a lower court ruling in his favor that a fishing statute he challenged was unconstitutional. 704 P.2d at 789; *see also* Misner, *supra* note 36, at 526-27. Subsequently, the Alaska Supreme Court upheld the statute's constitutionality and the defendant was convicted for violating the statute. *Ostrosky*, 704 P.2d at 788-89. The state appellate court analogized the defendant's reliance on the lower's court opinion to reliance on a statute: if a defendant acted in accordance with a statute under which he would not incur criminal liability and that statute is subsequently invalidated, then the failure to allow the defense of reasonable reliance on the prior statute would be akin to instituting an ex post facto law. *Id.* at 789-90 (citing LAFAVE & SCOTT, *supra* note 86, 366-67).

88. DRESSLER, *supra* note 73, at 172-73 (citing *Twitchell*, 617 N.E.2d at 619).

89. In *State v. Simmons*, for example, the defendant, a game warden, claimed reliance on a court clerk's advice that because he was a game warden, he acted as a constable and was authorized to carry a weapon. 56 S.E. 701, 702 (1907). The court nonetheless affirmed his conviction for carrying a concealed weapon when he was not acting in his official capacity as warden: "If he would take advice as to the criminality of a contemplated act, he must be sure that it is correct, for otherwise he will be as guilty, if he does the act, as if he had not taken it." *Id.*

In *Haggren v. Alaska*, for example, the court rejected the defendant's mistake of law defense, which relied on the state trooper dispatcher's and Fish and Wildlife Protection officer's mistaken interpretation of laws regulating commercial drift gill nets. 829 P.2d 842, 844 (Alaska Ct. App. 1992), *overruled on other grounds*, Allen v. Municipality of

whether the official has such authority.[90]

The mistake of law defense is available only if a defendant relies on an "official interpretation" given by "the public officer or body charged by law with . . . enforcement of the law defining the offense,"[91] or "formal interpretation of the law issued by the chief enforcement officer or agency; it does not encompass extemporaneous legal advice or interpretations given by a subordinate officer."[92]

When courts have accepted the mistake of law defense, they have done so only in situations where the official giving the advice was arguably charged with the responsibility of administering or enforcing the law.[93] The U.S. Supreme Court first applied the reasonable reliance or estoppel by entrapment defense in *Raley v. Ohio*.[94] In that case, Ohio's Un-American Activities Committee informed the defendant that he was entitled to invoke the privilege

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Anchorage, 168 P.3d 890 (Alaska Ct. App. 2007).

Likewise, in *Jones v. State*, the court succinctly ruled that a defendant could not avail himself of the mistake of law defense against a criminal charge for operating a saloon on election day based on his reliance upon an officer's assurance that there would be no violation for him to open his saloon after the closure of the election that same day. 25 S.W. 124 (Tex. Crim. App. 1894); Misner, *supra* note 36, at 520. *Hopkins v. State* similarly refused to recognize a mistake of law defense raised by a reverend who relied on the State Attorney's advice that his signs soliciting the performance of marriage ceremonies would not violate state law. 829 P.2d 842, 844 (Alaska Ct. App. 1992), overruled on other grounds, Allen v. Municipality of Anchorage, 168 P.3d 890 (Alaska Ct. App. 2007). *See also* State v. Boyett, 32 N.C. (10 Ired.) 336, 344-45 (1849) (rejecting defendant's defense that he relied on the poll holders' advice that he was eligible to vote).

90. In *People v. Settles*, defendant asserted a defense claiming that he reasonably relied on the city's license to operate his particular game, thus, signifying that the game did not violate lottery laws. 78 P.2d 274, 275-76 (Cal. App. Dep't Super. Ct. 1938). Because the city was not authorized to resolve matters outside of its jurisdiction, here the state regulation of lotteries, the court refused to allow a mistake of law defense. *Id.* at 276. "In other words, the court held that reliance on an interpretation by an official who lacks actual authority to provide the interpretation is unreasonable as a matter of law, even when there was no reason to suspect the lack of such authority." Parry, *supra* note 83, at 11-12.

91. *Haggren*, 829 P.2d at 844.

92. *Id.*

93. Misner, *supra* note 36, at 520. *See, e.g.*, United States v. Penn. Indus. Chem. Corp., 411 U.S. 655, 674-75 (1973) (allowing a company to assert a defense of reliance upon the Army Corps of Engineers that a particular law did not apply).

In *State v. Davis*, the defendant was charged with holding a public office while having a private interest in a public contract, but his conviction was reversed because he relied on advice from the county corporation attorney and an assistant district attorney that his conduct would not violate any state laws. 216 N.W.2d 31, 33-34 (Wis. 1974). Because the county corporate counsel and the assistant district attorney had the official responsibility of advising the board to which the defendant belonged, the court held that the defendant could rely in good faith on their advice. *Id.* at 34. Professor Robert Misner contends that the Model Penal Code would not apply to cases like *Jones v. State*, 25 S.W. 124 (Tex. Crim. App. 1894), but would apply to cases like *Davis*. Misner, *supra* note 36, at 524.

94. "The Supreme Court first addressed the defense of entrapment by estoppel, though it has never used that terminology, in Raley v. Ohio, 360 U.S. 423, 79 S. Ct. 1257, 3 L.Ed.2d 1344 (1959)." United States v. Gutierrez-Gonzalez, 184 F.3d 1160, 1166 (10th Cir. 1999).

against self-incrimination in response to the Committee's questions regarding the defendant's alleged subversive activities.[95] The Court reversed the state's conviction on the basis of estoppel by entrapment: "[T]o sustain the judgment of the Ohio Supreme Court on such a basis as the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the state—convicting a citizen for exercising a privilege which the state clearly told him was available to him."[96]

In order to satisfy the requirements of the mistake of law defense, a defendant must also show that the interpretation of law he relied on was obtained through official means.[97] An "informal interpretation of the law will not do."[98] An opinion letter from the state or federal Attorney General, for example, satisfies this requirement,[99] but "a quick interpretation of a fishing regulation, provided by a Fish and Wildlife Patrol Officer at the scene" does not.[100] Even reliance on legal advice from an attorney is insufficient to invoke the defense.[101]

Although a police officer is a law enforcement official, the mistake of law analysis in *Heien* is not justifiable because a police officer is not an "officer charged with the law's enforcement" as contemplated by the common law mistake of law defense. If a citizen violates the law in reliance on a police officer's interpretation of the law, that individual could not make a successful mistake of law claim. Similarly, the officer in *Heien* should not be allowed to rely on his or another officer's interpretation. Moreover, in *Heien*, not only did the officer fail to obtain the official interpretation of the law from a proper source, but he also failed to obtain it in an official manner. The officer in *Heien* did not receive a formal interpretation, but rather, made his own on-the-spot interpretation of the brake light statute.

Under common law, "[a] person is *not* excused for committing a crime if she relies on her own erroneous reading of the law, even if a reasonable person—or a reasonable person with a law degree—would have similarly

95. 360 U.S. 423, 438 (1959). *See also* Misner, *supra* note 36, at 520-21.

96. *Raley*, 360 U.S. at 438. Similarly, in *Cox v. Louisiana*, the Court recognized the mistake of law defense asserted by demonstrators who were told "by the highest police officials of the city, in the presence of the Sheriff and Mayor" that they were permitted near the courthouse as long as they remained 101 feet from the courthouse steps. 379 U.S. 559, 571 (1965). The Court relied on *Raley* to reverse the demonstrators' convictions for violating a statute that prohibited demonstrations near a courthouse. *Id.* at 571-72.

97. DRESSLER, *supra* note 73, at 173.

98. *Id.*

99. *Id.*

100. *Id.* (citing Haggren v. State, 829 P.2d 842 (Alaska Ct. App. 1992), *overruled on other grounds*, Allen v. Municipality of Anchorage, 168 P.3d 890 (Alaska Ct. App. 2007)).

101. *See e.g.*, Miller v. United States, 277 F. 721 (4th Cir. 1921); Forwood v. State, 49 Md. 531, 537 (1878); State v. Western Union Telegraph Co., 97 A.2d 480, 492-93 (N.J. 1953), *appeal dismissed*, 346 U.S. 869 (1953); State v. Downs, 21 S.E. 689 (N.C. 1895); Crichton v. Victorian Dairies [1965] V.R. 49, 52.

misunderstood the law."[102] In *People v. Marrero*, a state law prohibited individuals, except for peace officers, from carrying a handgun without a permit.[103] The statute defined peace officer as any official or guard of "any state correction facility or *of any penal correctional institution*."[104] As a federal corrections officer, Marrero believed that he fell within the exemption.[105] His interpretation, or mistake of law, was arguably reasonable because the trial court agreed, along with two appellate court judges.[106] However, the appellate court determined that Marrero was not a "peace officer" and, consequently, not exempted. Marrero could not avail himself of the mistake of law defense because he relied upon his own interpretations of the law.[107] The court emphasized that "[o]ne is never excused for relying on a personal—even reasonable—misreading of a statute."[108]

Therefore, the *Heien* Court's application of the mistake of law defense to excuse the officer's mistake of law resulting from his own interpretation contradicts the requirements imposed by common law and the Model Penal Code and results in disparate treatment between officers and laypersons.

D. Rationales for Mistake of Law Defense

Additionally, *Heien*'s mistake of law analogy is incongruous because the rationales for allowing the mistake of law defense are not applicable to officers in the exclusionary rule context. The rationales for recognizing a mistake of law defense based on reliance on an official interpretation include "1) the lack of culpability of the actor; 2) the 'entrapment' of the actor by the state; and 3) the need to encourage actors to seek official guidance."[109] The culpability rationale rests on the belief that a defendant who has taken steps "to assure himself" that his conduct will not violate the law, and reasonably relies on that information, is not blameworthy because he has done all he can to comply with

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102. DRESSLER, *supra* note 73, at 171.

103. 507 N.E.2d 1068 (N.Y. 1987).

104. *Id.* at 397 n.7 (Hancock, J., dissenting) (emphasis added).

105. *Id.* at 397 (Hancock, J., dissenting).

106. *Id.* at 396–97 (Hancock, J., dissenting). The vote of the appellate court was 3-2. *Id.* at 397 (Hancock, J., dissenting).

107. *Id.* at 390.

108. DRESSLER, *supra* note 73, at 171.

109. Misner, *supra* note 36, at 524. Professor Misner explains:

> The Model Penal Code defense excludes total ignorance of the law and reliance upon unofficial advice as defenses even though the reliance may be as reasonable, in some circumstances, as reliance upon an official interpretation. . . . [T]he Model Penal Code is more accurately premised on a notion resembling the defense of reliance upon superior orders. By ignoring many sources of mistaken information justifying a defendant's actions, the Model Penal Code introduces a concept of "reasonableness" and thereby negates a rationale which relies solely on the personal culpability of the actor.

Id. at 526.

the law.[110] Therefore, under these circumstances, punishment would be both unjust and an ineffective deterrent. The entrapment rationale, which is premised on a "criminal law analogue of estoppel," excuses the conduct of a defendant who has been entrapped by official advice.[111] The last rationale focuses on the public policy interest in advancing the citizenry's knowledge of the law.[112]

Professor Robert Misner has argued that the rationales underlying the mistake of law defense do not translate into a general mistake of law exception to the exclusionary rule in *Leon.*[113] His criticisms are equally applicable to the mistake of law variant in *Heien.*

The *Leon* Court's conception of the mistake of law defense for law enforcement officers ignores the ultimate difference between defendants and law enforcement officers: the exclusionary rule imposes no personable liability on the officer.[114] Because a criminal defendant risks loss of life, liberty, and property, considerations of his culpability and notions of fairness might justify a mistake of law defense in criminal law. On the other hand, in the case of the exclusionary rule, the only loss that might result is the exclusion of evidence.

In *Leon* and its progeny, the Court focused its cost-benefit analysis on "the flagrancy of the police misconduct" being challenged[115] and weighed the deterrence benefits with the "vary[ing] culpability of the law enforcement conduct."[116] But because law enforcement officers do not face the consequence of personal criminal punishment, there are no countervailing concerns about fairness or their lack of culpability. Officers rarely suffer personal civil financial liability for their violations of citizens' constitutional rights because the Court has set such a high bar for plaintiffs to win a claim under 42 U.S.C.

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110. *Id.* at 525 (citing U.S. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 52-53 (1971)).

111. *Id.* at 526. *See, e.g.*, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384, (1947); United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992); United States v. Smith, 940 F.2d 710, 714-15 (1st Cir. 1991); United States v. Austin, 915 F.2d 363, 365-66 (8th Cir. 1990), *cert. denied*, 499 U.S. 977, 111 S. Ct. 1626 (1991); United States v. Tallmadge, 829 F.2d 767, 773-74 (9th Cir. 1987); Free Enter. Canoe Renters Ass'n of Mo. v. Watt, 711 F.2d 852, 857 (8th Cir. 1983); Abbott v. Harris, 610 F.2d 563, 564–65 (8th Cir. 1979) (per curiam); Leimbach v. Califano, 596 F.2d 300, 305 (8th Cir. 1979); Goldberg v. Weinberger, 546 F.2d 477, 480-81 (2d Cir. 1976), *cert. denied,* 431 U.S. 937 (1977); Byrne Organization, Inc. v. United States, 287 F.2d 582, 587, 152 Ct. Cl. 578 (1961); Brown v. Richardson, 395 F.Supp. 185, 189-90 (W.D. Pa. 1975).

Professor Parry argues that reasonable reliance exception satisfies utilitarian concerns as well as "process-based and substantive conceptions of the rule of law." Parry, *supra* note 83, at 6.

112. Misner, *supra* note 36, at 526-27.

113. *Id.* at 528-32.

114. *Id.* at 529-30.

115. *Davis v. United States,* 564 U.S. 229, 238(2011) (quoting *United States v. Leon*, 468 U.S. 897, 909, 911 (1984)).

116. *Id.* (quoting *Herring v. United States*, 555 U.S. 135 143 (2009)).

§1983 or *Bivens*.[117] Moreover, internal consequences within the police department for Fourth Amendment misconduct is infrequent.[118]

As Professor Misner writes, "The 'punishment' associated with the exclusionary rule is directed against the state and the state is 'punished' for actions of its agents. Only in an incidental way can it be said that the officer is personally punished."[119] Thus, the Court's characterization of officers being punished for their reasonable reliance is contrived because officers suffer no personal harm. As a result, there are no justifications for extending the mistake of law defense to officers.

E. Rule of Lenity

A final way in which *Heien* contradicts existing criminal law doctrine is its failure to apply the rule of lenity in the correct manner. "The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants."[120] Not only does the *Heien* Court misapply the rule of lenity by failing to identify an ambiguity in the law but also by construing the law in the officer's favor.

First, a statute must be ambiguous before a defendant may assert a mistake of law claim. Justice Kagan's concurrence in *Heien* echoes the criminal law understanding of mistake, insisting that the law relied on must be "genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work."[121]

In *Flint v. Milwaukee*, a homeowner sued the police department when officers shot and killed her dogs during the execution of a search warrant to investigate violations of endangered and threatened species laws. The officers detained the homeowner on two felony charges.[122] The homeowner argued that she was unlawfully detained because she ultimately was only subject to

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117. Officers—both state and federal—enjoy the protections of qualified immunity, and plaintiffs must prove that an officer has violated clearly established law. Anderson v. Creighton, 483 U.S. 635 (1987); Bivens v. Six Unknown Unnamed Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Pierson v. Ray, 386 U.S. 547 (1967). Moreover, juries are reluctant to render a civil verdict against an officer when confronted with the prospect of finding in favor of someone who has been accused or convicted of a crime. *See* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, CRIME, LAW & JUSTICE—ANNUAL 254 (1972) ("An improper search and seizure is likewise a common law tort, but tort liability enforced by the aggrieved plaintiff is not thought to be an effective control because juries will be unwilling to find significant damages against police officers, especially in favor of a plaintiff who was an accused or convicted criminal.")

118. *See infra* Part III. C, note 161 and accompanying text.

119. Misner, *supra* note 36, at 510.

120. Whitman v. United States, 135 S. Ct. 352, 353 (2014).

121. Heien v. North Carolina, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring).

122. 91 F. Supp. 3d 1032 (E.D. Wis. 2015), *appeal dismissed* (Jan. 11, 2016), *reconsideration denied in part*, No. 14-CV-333-JPS, 2015 WL 1523891 (E.D. Wis. Apr. 2, 2015).

misdemeanor charges and forfeiture.[123]

The officers asserted a mistake of law defense, claiming they had relied on advice they received from a warden at the Department of Natural Resources ("DNR") regarding an endangered alligator that the defendant was holding in her bathtub, which was the basis of the search warrant.[124] They argued that their mistaken arrest and detention of the homeowner relied upon the DNR warden's advice regarding whether a violation of the Endangered Species Act constituted a felony.[125]

After considering *Heien*, the federal district court flatly rejected the officers' claim of mistake of law, even under *Heien*'s more favorable standard.[126] Agreeing with Justice Kagan that "the government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware of . . . the law," the court concluded that the officers could not avail themselves of the mistake of law defense under *Heien* because they could not make a reasonable mistake of law if they had no knowledge of the law.[127] In other words, they could not misunderstand a law that they did not know.[128]

To clarify, the court further explained that "*Heien* does not stand for the proposition that lack of knowledge about or sloppy study of a statute can be transformed into a reasonable mistake of law by hypothesizing that the statute could be ambiguous or confusing."[129] In addressing the officers' suggestion that the complexity of the statute made it ambiguous, the court responded: "Statutes frequently cross-reference each other and require some effort to connect the dots. If reasonable mistakes of law were permitted on this basis alone (without showing concomitant ambiguity), virtually no mistakes of law would be unreasonable, given the often dense and inartful structure of such statutes, writ large."[130]

The *Heien* Court misapplied the rule of lenity by conflating a reasonable misunderstanding of the law with finding an *actual ambiguity* in the law. The Court conceded that because the brake light law requires "*a* stop lamp," it only requires a single brake light.[131] Additionally, it conceded that "rear lamps" discussed in another portion of the statute[132] did not mean brake lights.[133]

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123. *Id.* at 1055–56.

124. *Id.* at 1058.

125. *Id.*

126. *Id.* at 1057-59.

127. *Id.*

128. *Id.*

129. *Id.* at 1059.

130. *Id.*

131. Heien v. North Carolina, 135 S. Ct. 530, 540 (2014).

132. The provision required that "[e]very motor vehicle . . . have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle." State v. Heien, 737 S.E.2d 351, 353 (2012) (citing N.C.G.S. § 20–129(d) (2009)) (alterations original).

Therefore, the brake light law was clear. Yet, because the "rear lamps" provision was written using the plural, the Court insisted that it was reasonable for the officer to think that the brake light law required two working brake lights.[134] In other words, the Court concluded that it was reasonable for the officer to misunderstand the brake light law.[135] But the fact that it was reasonable for the officer to misunderstand the law does not equate to an actual ambiguity in the law. Nowhere did the Court state that the brake light law was ambiguous.

Second, when the law is in fact ambiguous, all reasonable interpretations must be resolved in the defendant's favor. In *People v. Gaytan*, the Illinois Supreme Court encountered a case of first impression about an officer's mistaken belief about whether a trailer hitch violated a statute prohibiting obstruction of the visibility of license plates.[136] The defendant challenged the constitutionality of the officer's stop of the defendant's car, which had led the officer to notice the smell of marijuana when the car windows were rolled down.[137] Because the Court concluded that the law was ambiguous, it applied the rule of lenity to resolve the ambiguity in the officer's favor to hold that officer had made a reasonable mistake of law and denied exclusion of the evidence.[138]

People v. Gaytan illustrates the contradictions between the exclusionary rule's mistake of law exception and the criminal law mistake of law defense. The application of the mistake of law defense in *Heien* and *Gaytan* contradicts the common law and the Model Penal Code because when there is an ambiguous law, courts must apply the rule of lenity to resolve ambiguities *in favor of the criminal defendant*.[139] In *Heien* and *Gaytan*, the courts failed to resolve ambiguities in the defendant's favor, which would have resulted in a conclusion that the officer did not make a reasonable mistake of law, and thus the evidence would have been excluded. Therefore, applying the rule of lenity in a manner that is detrimental to the defendant demonstrates yet another way that the mistake of analogy between the criminal law and exclusionary rule contexts are incongruous.

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133. *Heien*, 135 S. Ct. at 540.

134. *Id.*

135. *Id.*

136. 32 N.E. 3d 641, 644 (Ill. 2015).

137. *Id.* at 644.

138. *Id.* at 651.

139. United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978); Rewis v. United States, 401 U.S. 808, 812 (1971); Bell v. United States, 349 U.S. 81, 83 (1955).

III. CONSEQUENCES OF *HEIEN*'S INCONGRUOUS ANALOGY

A. Disincentives for Improvement Through Acquiring Knowledge

One consequence of *Heien*'s importation of the criminal law mistake of law doctrine into the Fourth Amendment exclusionary rule context is that it creates a disincentive for officers to learn the law. This will lead to more constitutional violations. The mistake of law doctrine has been justified as a means of encouraging public awareness and legal knowledge.[140] Justice Oliver Wendell Holmes articulated the pragmatic underpinning of the rule:

> The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. . . . It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance . . . and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.[141]

Heien's allowance of police ignorance to exempt evidence from exclusion provides no motivation for officers to know the law. As *Heien* illustrates, an officer need only have a vague notion of what a law means, for he can always fall back on the mistake of law defense to excuse his failure to actually learn the law.

B. Fraudulent Claims of Mistake

A second problem caused by *Heien*'s contorted analogy is that it will lead officers to make fraudulent claims of mistake. Another justification for the common law mistake of law doctrine rested on the concern over fraudulent claims of mistake as "[s]ome false claims would doubtlessly succeed because the truth of the allegations 'could scarcely be determined by any evidence accessible to others.'"[142] In its early cases, the Court raised the concern over false claims of ignorance of the law to explain the maxim:

> It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally; and it results from the extreme difficulty of ascertaining what is, *bonâ fide*, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. There is scarcely any law, which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the

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140. DRESSLER, *supra* note 73, at 170.

141. OLIVER WENDELL HOLMES, THE COMMON LAW 48 (1881).

142. DRESSLER, *supra* note 73, at 169 (quoting JOHN AUSTIN, LECTURES ON JURISPRUDENCE 498 (4th ed. 1879)).

laws, if men were not put upon extreme vigilance to avoid them.[143]

Heien's extension of the good faith doctrine to include an officer's ignorance of the law has not resolved the common law concern over false claims of ignorance. In fact, because studies have shown that officers are susceptible to dishonesty, *Heien* may exacerbate the potential for officers' fraudulent conduct by allowing an officer to simply claim that he made a mistake of law.

Several studies have confirmed suspicions that officers commit perjury in order to avoid exclusion of evidence.[144] In one study, researchers observed the decline of drug arrests in situations where the drugs were discovered on the defendant's body.[145] Simultaneously, there was an increase in drug arrests involving situations where officers found the drugs in the defendant's hand or dropped to the ground.[146] By deduction, researchers concluded that perjury was likely the explanation for the inconsistent statistical evidence.[147]

Evidence of a perceived culture of widespread perjury was also discovered when researchers interviewed Chicago judges, prosecutors, officers, and police chiefs. In that study, researchers found that ninety-five percent of police and ninety-seven percent of judges, public defenders, and prosecutors believed that police officers committed perjury to avoid the exclusion of evidence.[148] In another study, Chicago officers agreed that there was a perception of perjury even within the police department itself, conceding that officers "shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact."[149] Moreover, judges who believed the searches were illegal failed to suppress the evidence.[150]

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143. Barlow v. United States, 32 U.S. 404, 411 (1833).

144. Jacobi, *supra* note 6, at 608 (citing JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 215 (1966)).

145. Jacobi, *supra* note 6, at 608.

146. *Id.*

147. *Id.*

148. *Id.* (citing Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 95-96 (1968)). *See also* Oaks, *supra* note 117, at 283 (citing J. SKOLNICK, JUSTICE WITHOUT TRIAL 215 (1967)) ("[W]hen the police felt that the arrest and search and seizure rules constituted too great a hindrance to the apprehension and conviction of criminals, they would 'reconstruct a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to appellate court standards.' In this way, 'the policeman fabricates probable cause.'").

149. Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987) (reporting that seventy-six percent of officers surveyed believed that officers lie at suppression hearings).

150. Jacobi, *supra* note 6, at 609. Judge Guido Calabresi has noted that

> [I]n any close case, a judge case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. . . . [T]his situation has led police to lie in order to prevent certain evidence from being excluded. . . . [S]uch perjury is not infrequent in this kind of case. . . . If it is a close question and a judge finds that the police did not tell the truth, then—given the exclusionary rule—a murderer or

Given these accounts of officers committing perjury to avoid the exclusion of evidence, *Heien* intensifies the temptation for officers to make false mistake of law claims. Furthermore, just like in cases of perjury, it would be equally difficult to disprove a police officer's claim that he earnestly misunderstood the law.

C. Underdeterrence of Police Illegality

In addition to creating a disincentive for knowing the law and facilitating false mistake claims, *Heien* will cause underdeterrence of illegal police conduct. A recurring theme in the Court's mistake of law jurisprudence is the concern that exclusion of evidence will result in overdeterrence of conscientious police work.[151] In *Davis v. United States,* to justify its application of the good faith doctrine to cases involving officers' reliance on statutes, the Court analogized that "[p]enalizing the officer for the legislature's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations. The same should be true of [an] attempt here to '[p]enaliz[e] the officer for the [appellate judges'] error.'"[152] The Court concluded that "[a]bout all that exclusion would deter in this case is conscientious police work."[153]

On the other hand, expanding the good-faith exception to include a mistake of law defense due to an officer's ignorance of the law could likely lead to the opposite result—underdeterrence of illegal police conduct:

> Liability is desirable because it gives the agency an incentive to minimize the "good faith" unconstitutional errors of its police through more careful selection, training, and supervision. This, incidentally, is why attempting to calibrate the exclusionary rule by recognizing a good-faith exception would be the wrong approach: it would swing the pendulum of the exclusionary rule from overdeterrence to underdeterrence by removing the incentive of law-enforcement agencies to take measure to minimize good-faith violations of the Fourth Amendment.[154]

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rapist will be released. As a result, when in doubt a judge will say, "Maybe they [the police] are telling the truth."

Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112–113 (2001).

151. One scholar suggests that the exclusionary rule may cause overdeterrence through an officer's failure to arrest, changing charges, altering investigative plan, or shifting focus to investigations of crimes laden with fewer constitutional concerns. Jacobi, *supra* note 6, at 597.

152. Davis v. United States, 564 U.S. 229, 241 (2011) (citing Illinois v. Krull, 480 U.S. 340, 350 (1987)) (citation omitted).

153. *Id.*

154. Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 68 (1981) (arguing for a tort remedy for Fourth Amendment violations). *See also* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REF. 311, 312 (1991) (concluding "that the exclusionary rule is the least undesirable remedy for [non-egregious]

Research has not confirmed overdeterrence of police work, but there is substantiation of underdeterrence. A number of studies show that the "cost" of the exclusionary rule is relatively small, contrary to the Court's assumption.[155] One project that studied data from seven cities reported that courts only granted five percent of all motions to suppress in warrant cases, resulting in convictions for twelve of the seventeen warrants cases for which suppression motions were granted.[156] As a result, less than one percent of warrant cases and less than three percent of total cases were lost due to the exclusionary rule.[157]

Moreover, another study reports a high rate of underdeterrence, finding that officers engage in intentional unconstitutional Fourth Amendment intrusions of a significant nature fifteen percent of the time.[158] In another study, researchers

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violations of the [F]ourth [A]mendment and that a general good faith exception to the rule should not be adopted"). Professor Sharon L. Davies presents the exclusionary rule as either a price or sanction. Sharon L. Davies, *The Penalty of Exclusion—a Price or Sanction?*, 73 S. CAL. L. REV. 1275 (2000). She explains that a pricing scheme imposes no moral judgment and seeks only to deter inefficiencies. *Id.* at 1277-78. Therefore, a rationale that is concerned with the exclusionary rule overdeterring police investigations implies that the exclusionary rule is a price, rather than a sanction. A sanction, on the other hand, imposes moral condemnation and is a penalty that seeks to prevent the wrongful conduct, regardless of efficiency concerns. *Id.* at 1278-79. The conception of the exclusionary rule as essential to preserving the Fourth Amendment and judicial integrity suggests the remedy should be a sanction. *See also* Miriam H. Baer, *Pricing the Fourth Amendment,* 58 WM. & MARY L. REV. 1103 (2017) (proposing a corrective tax to police searches and the harms caused by Fourth Amendment violations).

155. Heffernan & Lovely, *supra* note 154, at 320-21. *See also* Baer, *supra* note 154, at 1117 (referring to studies showing weak deterrence of police violations); Davies, *supra* note 154, at n.7 (listing studies on the exclusionary rule's effect); Jennifer E. Laurin, *Trawling for* Herring: *Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, n.111, n.113, n.116, n.117 (2011) (listing studies on the impact of the exclusionary rule); Stewart, *supra* note 5, at 1394-96 (discussing evidence of the deterrent effect of the exclusionary rule): Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368-69 n.6 (1999) (cataloguing studies on deterrent effect of exclusionary rule on police behavior).

156. R. VAN DUIZEND, L. SUTTON & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES, AN EXECUTIVE SUMMARY 26 (1983).

157. Donald Dripps, *Living with Leon*, 95 YALE L. J. 906, 923-24 & n. 63 (1986) (citing Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 A.B.F. RES. J. 585, 598 (successful motions to suppress physical evidence occurred in 0.69 of 7,484 criminal cases sampled); Thomas Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 A.B.F. RES. J. 611, 617-22 (National Institute of Justice study indicates that California prosecutors decline fewer than one percent of felony arrests because of search and seizure problems; other studies indicate that exclusionary rule's combined effects at all stages of arrest processing "only results in the nonprosecution and/or nonconviction of in the range of 0.6 to 2.35 of felony arrests in the jurisdictions studied"); REPORT OF THE COMPTROLLER GENERAL, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (Rep. No. GGD-79-45) (1979) (suppression motions based on Fourth Amendment granted in 1.3 of sample of 2,804 federal cases; convictions obtained in half of the cases in which motions were granted)). *See also,* Heffernan & Lovely, *supra* note 154, at 320-21 (stating a three percent loss rate due to the exclusionary rule).

158. The research does not specify the nature of the Fourth Amendment violations:

observed that thirty percent of officers took part in directly illegal searches.[159] Some officers admitted that they engaged in aggressive tactics involving intentional illegality to seize the contraband for confiscation rather than because of a genuine misunderstanding of the law.[160] The evidence gathered also revealed that officers rarely suffered internal sanctions as a result of the constitutional violations.[161] The researchers' conclusion that the good-faith exception reduces the incentives for training[162] reflects upon the importance of the exclusionary rule:

> Exclusion provides officers with a day-to-day reminder of the importance of adherence to the law. Whenever an officer carries out an intrusion, he can expect questions from a prosecutor when the case reaches the intake stage and questions from a defense attorney if it is forwarded for trial. Such questions generate considerable pressure to comply with the law.[163]

Thus, these studies support apprehensions that *Heien's* expansion of the good-faith exception to include police ignorance of the law will further undermine the exclusionary rule's deterrent effect.

D. Potential for Abuse: Racial Profiling and Pretextual Stops

Related to underdeterrence, there is a concern that *Heien* has the potential to exacerbate racial profiling and pretextual stops. Because subjective intent is not considered when a court evaluates the reasonableness of police searches and seizures,[164] *Heien* provides another opportunity for police officers to engage in pretextual or racial profiling—through the guise of being mistaken about the law.

Research shows that officers avoid warrants and seek out other informal methods to further their investigation. Researchers for the National Center for State Courts studied the efficacy of warrant searches in obtaining evidence

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searches, *Terry* stops, or arrests. Heffernan & Lovely, *supra* note 154, at 367. In this study, the researchers asked police officers to complete a questionnaire to assess their knowledge and application of the law. *Id.* at 328. The purpose of the project was to ascertain the effect of the exclusionary rule on police behavior. *Id.*

159. Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 331 (2004).

160. Orfield, *supra* note 149, at 1041.

161. Heffernan & Lovely, *supra* note 154, at 329. In this study, the police department chiefs were presented with a variety of scenarios depicting intrusions (but they were not made aware of which ones were illegal) and were asked which situations would lead to a sanction within their departments. The chiefs "unanimously stated that they thought it unlikely that officers in their departments would be subjected to direct sanctions for engaging in any of the intrusions." *Id.* at 329-30.

162. *Id.* at 368.

163. *Id.* at 351.

164. Whren v. United States, 517 U.S. 806 (1996).

particularized in the warrant.[165] As part of the study, researchers interviewed law enforcement officers regarding their approaches and evaluations of warrants and the warrant process. The research noted that "[d]elay and inconvenience were widely cited as the principal basis for officers' reluctance to seek a search warrant."[166] For example, one detective remarked, "[Y]ou see, search warrants are double the time, sometimes triple the time that you take on arrest warrants, and arrest warrants are long enough. Arrest warrants, you figure a half a day.[167]

As a result, officers seek out informal avenues to conduct searches in order to obtain evidence. As one officer candidly admitted:

> Actually, there are a lot of warrants that are not sought because of the hassle. You just figure it's not worth the hassle . . . . I don't think you can forego a case because of the hassle of a search warrant, but you can . . . work some other method. If I can get consent [to search], I'm gonna do it.[168]

Similarly, another study reported a low rate for search warrants and the relative ease of officers obtaining consent.[169] The revelations about police preferences for informal processes—warrantless searches—might not be surprising, but they contribute to a troubling picture that may develop about the consequences of *Heien*. Since officers are already prone to resort to informal processes (i.e., through warrantless searches), *Heien* compounds the problem because it insulates ad hoc decisions that officers make on the scene, including those based on a mistake of law.

One disconcerting implication of *Heien*'s insulation of ad hoc decisions is that validating an officer's stop based on a mistaken understanding of the law will subject citizens to increased pretextual stops and racial profiling. Given past patterns of racial disparity in law enforcement contact with the public, the concerns are neither imaginary nor unfounded. Research on traffic stops reveals that a disproportionate number of non-white motorists are stopped and searched. The Bureau for Justice Statistics, through its Police-Public Contact Survey, made the following findings concerning traffic stops in 2011:

- "An estimated 26.4 million persons age 16 or older indicated that their most recent contact with the police in 2011 was as a driver pulled over in a traffic stop. These drivers represented 12% of the nation's 212 million drivers.
- A greater percentage of male drivers (12%) than female drivers (8%) were stopped by police during 2011. A higher percentage of black drivers (13%) than white (10%) and Hispanic (10%) drivers

165. Dripps, *supra* note 157, at 924-25.
166. *Id.* at 926.
167. *Id.* at 926-27.
168. *Id.* at 927.
169. VAN DUIZEND ET AL., *supra* note 156, at 13-14.

were stopped by police during 2011.

- Stopped drivers reported speeding as the most common reason for being pulled over in 2011.
- Approximately 80% of drivers pulled over by police in 2011 felt they had been stopped for a legitimate reason. In 2011, about 68% of black drivers believed police had a legitimate reason for stopping them compared to 84% of white and 74% of Hispanic drivers.
- In 2011, about 3% of traffic stops led to a search of the driver, the vehicle, or both. Police were more likely to search male drivers (4%) than female drivers (2%).
- A lower percentage of white drivers stopped by police in 2011 were searched (2%) than black (6%) or Hispanic (7%) drivers."[170]

Additionally, one report showed that among individuals who were subjected to traffic stops in New Jersey, 77.2 percent were African-American or Hispanic.[171] In another study, Stanford researchers analyzed "4.5 million traffic stops in 100 North Carolina cities" and found a higher prevalence of police searching black and Hispanic drivers than white or Asian drivers.[172] Although the study showed a correlation between the level of officers' suspicion and the driver's race—that officers used a lower threshold of suspicion to search black and Hispanic drivers—the researchers were cautious not to draw a causal connection.[173]

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170. BUREAU OF JUST. STATS., TRAFFIC STOPS, https://www.bjs.gov/index.cfm?ty=tp&tid=702 (last visited May 9, 2017). *See also* BUREAU OF JUST. STATS., POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, https://www.bjs.gov/content/pub/pdf/pbtss11.pdf (last visited May 9, 2017) (comparing citizen encounters on the street with traffic stops).

171. John W. Whitehead, *Is Ignorance of the Law an Excuse for the Police to Violate the Fourth Amendment?*, 9 N.Y.U. J. L. & LIBERTY 108, 114 (2015) (citing N.J. ATT'Y GEN., INTERIM REPORT OF THE STATE REVIEW TEAM REGARDING ALLEGATION OF RACIAL PROFILING (1999)).

172. Edmund Andrews, *Stanford Researchers Develop New Statistical Test That Shows Racial Profiling in Police Traffic Stops*, STANFORD NEWS, June 28, 2016, http://news.stanford.edu/2016/06/28/stanford-researchers-develop-new-statistical-test-shows-racial-profiling-police-traffic-stops/, (last visited May 9, 2017). "Had North Carolina's police applied the same standard of suspicion to blacks as whites, the researchers estimate that they would have searched 30 percent fewer black drivers – about 30,000 people over the six years they study. Hispanics would have experienced a 50 percent reduction in searches affecting 8,000 drivers." *Id.*

173. Andrews, *supra* note 172. The researchers recognized the possibility that lower level of suspicion may be based on other factors, such as socioeconomic status or other demographics that are highly correlative with race. *Id.* In another study, researchers found that differences in driving pattern, differences in offending, and differences in exposure to police might be contributing factors in the racial disparity between police and citizen traffic stops. OFFICE OF JUST. PROGRAMS, NAT'L INSTIT. OF JUST., RACIAL PROFILING AND TRAFFIC STOPS, https://www.nij.gov/topics/law-enforcement/legitimacy/pages/traffic-stops.aspx, (last visited May 9, 2017).

The Court's refusal to consider an officer's subjective intent in evaluating the reasonableness of a stop further compounds the danger of police racial profiling that *Heien* presents. In *Whren v. United States*, the defendants argued that the officer made a pretextual stop based on the officer's perceived traffic violation.[174] While patrolling a "high drug area," the officer noticed two young black occupants in a dark Pathfinder truck.[175] The young men aroused the officer's suspicion simply because the driver was looking at the passenger's lap while waiting at a stop sign.[176] After the truck stopped at the stop sign for "an unusually long time—more than 20 seconds," the officer turned back to follow the truck.[177] At that time the truck turned without signaling.[178] After stopping

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Other studies have also demonstrated a high traffic stop rate for black drivers. *See, e.g.*, Jaeah Leejul, *We Crunched the Numbers on Race and Traffic Stops in the County Where Sandra Bland Died*, MOTHER JONES, Jul. 24, 2015, http://www.motherjones.com/politics/2015/07/traffic-stops-black-people-waller-county (studying traffic stop rates in Texas); Sharon Lafraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES, Oct. 24, 2015, https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?_r=0 ("And black motorists who were stopped were let go with no police action—not even a warning—more often than were whites. Criminal justice experts say that raises questions about why they were pulled over at all and can indicate racial profiling."); Frank R. Baumgartner, Derek Epp, & Kelsey Shoub, *Analysis of Black-White Differences in Traffic Stops and Searches in Roanoke Rapids, NC, 2002-2013*, https://www.unc.edu/~fbaum/TrafficStops/Reports2014/RoanokeRapidsTrafficStops-Baumgartner-4October2014.pdf (concluding that a thirteen-year study of traffic stops in North Carolina revealed disproportionate number of non-whites being stopped and search); Lauren Kirchner, *The Racial Imbalance In Traffic Stops Persists*, PACIFIC STANDARD, Apr. 16, 2015, https://psmag.com/news/the-racial-imbalance-in-traffic-stops-persists (reporting on results of study by Baumgartner *et. al*); University of Vermont, *Analysis of Traffic Stops and Outcomes in Vermont Shows Racial Disparities (*Jul. 1, 2006) (concluding after a five-year study that police disproportionately stop black drivers); David Montgomery, *Data Dive: Racial Disparities in Minnesota Traffic Stops*, PIONEER PRESS, Jul. 9, 2016, http://www.twincities.com/2016/07/08/data-dive-racial-disparities-in-minnesota-traffic-stops/ (reporting on racial disparity in 2003 in Minnesota traffic stops); Greensboro Police Department, Eleazer Hunt, Karen Jackson, Jan Rychtar, & Rahul Singh, *Analysis of Traffic Stop and Search Data*, http://www.greensboro-nc.gov/modules/showdocument.aspx?documentid=30373; RTI International, *Black Male Drivers Disproportionately Pulled Over in Traffic Stops by Durham Police Department, Study Finds,* https://durhamnc.gov/DocumentCenter/View/9593.

For an extensive guide on how to use and interpret data on race and police traffic stops, see LORIE A. FRIDELL, BY THE NUMBERS: A GUIDE FOR ANALYZING RACE DATA FROM VEHICLE STOPS (2004), http://www.policeforum.org/assets/docs/Free_Online_Documents/Racially-Biased_Policing/by%20the%20numbers%20-%20a%20guide%20for%20analyzing%20race%20data%20from%20vehicle%20stops%202004.pdf.

174. 517 U.S. 806, 810 (1996).

175. *Id.* at 808.

176. *Id.*

177. *Id.*

178. *Id.*

the truck, according to the officer, for the purpose of giving a warning about the traffic violations, the officer saw bags of drugs in the car.[179]

The Court rejected the defendant's argument that the reasonableness of the stop should be evaluated on the basis of whether a reasonable officer would have stopped the truck for the reasons given by the original officer.[180] Refusing to inject the consideration of ulterior motives into the analysis, the Court concluded that the stop was reasonable because the officer had probable cause to make the stop. In doing so, the Court relegated issues of selective racial enforcement for resolution under the Equal Protection Clause.[181]

Courts have recognized the potential for *Whren* and the good-faith exception to facilitate pretextual stops. As the Fifth Circuit has cautioned:

> Under the general rule established in Whren, a traffic infraction can justify a stop even where the police officer made the stop for a reason other than the occurrence of the traffic infraction. But if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.[182]

Moreover, the apprehensions over *Heien*'s effects are made worse by the police department's internal incentive system. Because police officers' performance is evaluated based on their arrest numbers, as opposed to their conviction rate, police officers have greater incentive to utilize illegal means to obtain the arrest.[183] *Heien* provides another means for officers to resort to illegality to increase their arrest rates: an officer may feign a "misunderstanding" of the law to make stops.

E. Procedural Fairness and Legitimacy

Finally, *Heien*'s application of the mistake of law defense in disregard of the doctrinal requirements and its inconsistent application of the exclusionary rule will diminish the public's regard for the criminal justice system's legitimacy and moral credibility. Scholars have identified legitimacy and moral

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179. *Id.* at 809.

180. *Id.* at 813-14.

181. *See id.* at 813-16. The Court's assignment of the issue to the Equal Protection Clause, however, does not provide an equivalent remedy for defendants subject to racial profiling as the exclusionary rule could provide—the exclusionary rule could ultimately affect a defendant's liberty. Additionally, the exclusionary rule could save a defendant from a reputational harm that would be incurred from a criminal conviction, as well as from the collateral consequences that result from a conviction: possible loss of job, ineligibility to vote in some states, suspension from some professions, etc.

182. United States v. Lopez-Valdez, 178 F.3d 282, 289 (5th Cir. 1999).

183. Jacobi, *supra* note 6, at 602–03 (citing Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970)).

credibility as two important goals of the criminal justice system.[184] The legitimacy of the criminal justice system is defined as a "belief that legal authorities are entitled to be obeyed and that the individual ought to defer to their judgments."[185] Legitimacy "derives from fair adjudication and professional enforcement" and is integral to facilitating public deference, which is needed for crime control.[186] Whether an individual perceives a process as procedurally fair is independent of the outcome of the individual's case.[187] Various theories can account for why individuals value fair procedures: 1) fair procedures are likely to lead to fair outcome; 2) self-esteem is fostered by legitimate practices that show respect for the individual; and 3) fair procedures reduce uncertainty and increase "systemic satisfaction."[188]

An implication of the research is that fair policing practices, through clear and consistent standards along with respectful treatment, enhance legitimacy.[189] One study found that "citizens who receive respectful treatment from authorities are almost twice as likely to comply, and those receiving disrespectful treatment are nearly twice as likely to rebel."[190] Other studies confirm that procedural fairness increases citizens' compliance and reduces citizens' complaints.[191]

The exclusionary rule is closely connected to procedural justice. In California, the state's "highest ranking law enforcement officer reported that adopting the exclusionary rule improved the professionalism of state law enforcement officers . . . ."[192] If the professionalism of law enforcement can improve, it follows that the police will have increased respectful interactions with the public, which then would enhance the public's perception of the police

184. *See, e.g.*, Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 212 (2012).

185. *Id.* at 213 (quoting TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW xiv (2002)).

186. *Id.* at 212.

187. *Id.* at 214. *See* Justice Tankebe, *Policing, Procedural Fairness and Public Behaviour: A Review and Critique*, 11 INT'L J. POLICE SCI. & MGMT. 8 (2009) (identifying models for accessing procedural fairness).

188. Bowers & Robinson, *supra* note 184, at 220.

189. *Id.* at 221.

190. David B. Rottman, *Adhere to Procedural Fairness in the Justice System*, 6 CRIM. & PUBLIC POL'Y 835, 836 (2007) (quoting JOHN D. MCCLOSKEY, POLICE REQUESTS FOR COMPLIANCE: COERCIVE AND PROCEDURALLY JUST TACTICS 91 (2003)).

191. *See* Rottman, *supra* note 190, at 837; Slobogin, *supra* note 155, at 382 (summarizing the conclusions of TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)) ("[P]erceptions of fairness hinge on . . . 'procedural justice,' . . . whether disputants feel they have been given a voice in the process and are treated with dignity, but is also closely related to whether people perceive outcomes as fair over time. Voluntary compliance with the law, even law that goes against a personal or group norm, is likely if the process of imposing the law is seen as legitimate in these ways.").

192. David Gray, Meagan Cooper & David McAloon, *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 14 (2012).

and generate greater public compliance with the law.[193]

Thus, the Court's exclusionary rule jurisprudence has profound potential to affect the public's view of the criminal justice system's legitimacy and moral credibility. "'[M]oral credibility' [that] derives from just results—as well as the occasional potential for conflict" can be enhanced by adjudications that align with community conceptions of justice.[194] *Heien*'s generous application of the mistake of law defense for police officers when the defense would otherwise not be available to a defendant raises legitimacy and moral credibility concerns. The Court's consideration of reasonableness to allow officers an excuse based on ignorance, resolution of statutory ambiguities in favor of the officer, and allowance of the officer to rely on his own interpretation of the law in the exclusionary rule context are benefits that would not be afforded to a defendant in the criminal law context. By making these allowances for officers in order to preclude exclusion of evidence, the Court resorts to indiscriminate application of the exclusionary rule. And as the Court has previously conceded, "Indiscriminate application of the exclusionary rule, therefore, may well generate disrespect for the law and administration of justice."[195] Furthermore, *Heien*'s potential to increase pretextual stops and racial profiling because of the Court's expansion of the mistake of law defense will raise doubts about the criminal justice system's legitimacy and moral credibility.

CONCLUSION

Heien's importation of the ignorance and mistake of law defense from criminal law into the exclusionary rule context creates contradictions with criminal law and policy. The Court's consideration of reasonableness as a justification for ignorance as an excuse contravenes criminal law's rejection of reasonableness in the mistake of law defense context. Permitting an officer to rely on his own mistaken interpretation of the law conflicts with the common law and Model Penal Code requirement that a mistake of law defense be based on an official interpretation provided by an official with actual authority. Because officers suffer no personal harm, the justifications for the mistake of law defense at common law are not applicable for officers seeking to avoid exclusion. For all these reasons, the Court's analogy to the mistake of law defense is incongruous and fails to justify its expansion of the exclusionary rule exceptions.

Through its tortured analogy to the criminal law mistake of law doctrine, the Court has created an exception in *Heien* that will have profound

193. OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, POLICE INTEGRITY, https://www.nij.gov/topics/law-enforcement/legitimacy/pages/integrity.aspx (last visited May 9, 2017) (observing that departmental management and culture affect police integrity).

194. Bowers & Robinson, *supra* note 184, at 212, 283.

195. United States v. Leon, 468 U.S. 897, 908 (1984).

consequences. Officers will not be motivated to seek out knowledge and to use formal processes for investigation, but rather they will be incentivized to make false mistake of law claims and use pretextual investigative strategies, such as racial profiling. As a result, *Heien*'s allowance of police ignorance of the law as a good faith exception will undermine the criminal justice system's legitimacy and moral credibility.