2022

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VANDERBILT LAW REVIEW

VOLUME 75 MARCH 2022 NUMBER 2

ARTICLES

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The Fourth Amendment exclusion doctrine is as baffling as it is ubiquitous. Although courts rely on it every day to decide Fourth Amendment violations as well as defendants' motions to suppress evidence obtained through these violations, virtually every aspect of the doctrine is a subject of fundamental disagreement and confusion. When defendants file motions to suppress unlawfully obtained evidence, the government often argues that even if a violation of the Fourth Amendment has transpired, the remedy of evidence suppression is barred because the police acted in "good faith," meaning the officer reasonably, albeit mistakenly, believed the search or seizure was lawful. Judges and commentators sharply disagree about whether and which police mistakes of law are, in fact, reasonable so as to deny the application of the exclusionary rule remedy. They also disagree on the nature and scope of the

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reasonableness standard and its impact on the very existence of the exclusionary rule as a remedy against police misconduct.

This Article offers a new approach to the "good faith" exception doctrine based on a revisionist reading stemming from the Supreme Court's recent decision in Heien v. North Carolina. *There is widespread consensus that the good faith exception to the exclusionary rule doctrine determines the application of the evidence suppression remedy to acknowledged violations of the Fourth Amendment. But I argue that the exception is, in fact, better understood as an inquiry into the substance of Fourth Amendment rights and not into the application of the remedy. After the Supreme Court holding in* Heien *that the reasonableness of a police mistake of law is relevant in the evaluation of conduct under the Fourth Amendment, there is no need for a "good faith" reasonableness exception to the exclusionary rule remedy when that rule kicks in only after a violation of the Fourth Amendment. This approach renders the "good faith exception" to the exclusionary rule doctrine redundant. Instead of ruling that the exclusionary rule does or does not apply, courts in these cases can simply hold that an unreasonable search did or did not take place. This approach bears a significant practical payoff: courts will no longer be able to declare broadly that the police have violated the Fourth Amendment while in the same breath undercutting the value of remedying this violation based on two different questions on what constitutes one reasonable police officer.*

INTRODUCTION

The "good faith exception" to the exclusionary rule is one of the most frequently invoked doctrines in criminal cases.[1] When a defendant asks the trial court to suppress evidence collected by the police through a violation of the defendant's Fourth Amendment rights, courts ask whether the violation occurred and if so, whether suppressing the evidence will further what the U.S. Supreme Court has held to be the sole purpose of exclusion: deterrence of future police misconduct.[2] In such cases, the government will often argue that even if an officer violated the defendant's constitutional rights, the defendant has no remedy through evidence suppression because the police officer reasonably believed the search or seizure aligned with the law.[3] In other words, the police officer acted in "good faith" reliance on what she

1. *See, e.g.*, United States v. Bateman, 945 F.3d 997, 1006 (6th Cir. 2019) (holding good faith exception applied since it was reasonable for FBI officers to not know warrant was invalid); United States v. Taylor, 935 F.3d 1279, 1282 (11th Cir. 2019) (deciding officer's reasonable reliance on void warrant provides basis for good faith exception); United States v. Eldred, 933 F.3d 110, 119 (2d Cir. 2019) (deciding exclusionary rule seeks to deter deliberate, reckless, or grossly negligent conduct); United States v. Cookson, 922 F.3d 1079, 1089–90 (10th Cir. 2019) (holding software was utilized in good faith); United States v. Ganzer, 922 F.3d 579, 590 (5th Cir. 2019) (concluding law enforcement officials acted with objectively reasonable good faith belief conduct was lawful); United States v. Henderson, 906 F.3d 1109, 1119 (9th Cir. 2018) (ruling good faith exception may apply to warrants void ab initio); United States v. Kienast, 907 F.3d 522, 528 (7th Cir. 2018) (determining officers reasonably relied on magistrate's determination that warrant was valid); United States v. Werdene, 883 F.3d 204, 210 (3d Cir. 2018) (holding good faith exception applies to warrant used, precluding suppression); United States v. Levin, 874 F.3d 316, 323–24 (1st Cir. 2017) (finding law enforcement cannot be held accountable for magistrate's mistake); United States v. Horton, 863 F.3d 1041, 1052 (8th Cir. 2017) (finding no bad faith by law enforcement and balancing test applies); United States v. Stephens, 764 F.3d 327, 336 (4th Cir. 2014) (holding good faith exception applied to police officer reasonably relying on judicial precedent); United States v. Spencer, 530 F.3d 1003, 1006–07 (D.C. Cir. 2008) (holding good faith exception applied when police relied on mistake of magistrate).

2. *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 (2009) (reiterating exclusionary rule should only be used to deter and is not a guaranteed individual right); United States v. Leon, 468 U.S. 897, 910 (1984) (noting deterrent purpose of exclusionary rule); Stone v. Powell, 428 U.S. 465, 486 (1976) (indicating deterrence as primary justification for exclusion of evidence); United States v. Spann, 409 F. Supp. 3d 619, 625 (N.D. Ill. 2019) (ruling punishment of good faith actions will not help deter police mistake of law).

3. *See* United States v. Hawkins, 426 F. Supp. 3d 447, 455 (E.D. Mich. 2019) (denying defendant's motion to suppress evidence); United States v. Chalas-Felix, 424 F. Supp. 3d 316, 330 (D. Del. 2019) (deciding good faith exception applies to government conduct); United States v. Chavez, 423 F. Supp. 3d 194, 208 (W.D.N.C. 2019) (holding police acted with objectively good faith reliance on warrant).

thought was a lawful basis for the search or seizure, which does not warrant evidence suppression.

Despite its procedural frequency, the good faith exception to the exclusionary rule remains surprisingly convoluted in doctrine. The case law reflects deep uncertainty and disagreement about fundamental questions, such as which mistakes of law are made in reasonable "good faith," what standard of reasonableness to apply, and how this inquiry impacts the exclusionary rule as a remedy for Fourth Amendment violations.[4] This rift has only deepened as scholars identify incongruities in the doctrine. Some question the legal basis on which reasonable good faith police mistakes of law bar the suppression of unlawfully obtained evidence.[5] Others accept the premise but contend it gives courts too much discretion to sanction police misconduct.[6] And while scholars have offered critiques on the doctrine, there is currently no clear path forward that can make the law of Fourth Amendment exclusion more determinate than it is now.

Most approaches originate from the premise that the good faith exception involves a question of remedy: When is a mistake of law in searches or seizures sufficiently reasonable to bar the application of the exclusionary rule remedy?[7] I argue instead that after the Court's decision in *Heien v. North Carolina*,[8] mistakes of law in searches or seizures are inexorably tied up in the process of determining Fourth Amendment questions. Under this revisionist approach, when courts ask whether the police acted in good faith reasonable reliance on law, they do not necessarily ask whether a violation of the defendant's rights is sufficiently excusable, or not sufficiently egregious, for the deterrent effect of the exclusionary rule to apply. Rather, courts ask whether the police officer's reasonable mistake of law means there was a violation of the defendant's Fourth Amendment rights in the first place. That is,

4. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(f) (5th ed. 2012) (analyzing fundamental concerns in light of *Leon*).

5. *See, e.g.*, Edwin Meesee III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 738 (2012) (noting that mistake of law defense should fail because all people are assumed to know the law); Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?* 72 U. COLO. L. REV. 507, 509–10 (2001) (analyzing arguments for abolishing mistake of law doctrine).

6. *See, e.g.*, LAFAVE, *supra* note 4, § 1.3(3) (noting that the good faith exception should not apply to cases with no initial Fourth Amendment violation); Andrew Z. Lipson, Note, *The Good Faith Exception as Applied to Illegal Predicate Searches: A Free Pass to Institutional Ignorance*, 60 HASTINGS L.J. 1147, 1167 (2009) (arguing that extending good faith exception to illegal predicate searches could result in dramatic departure from precedent).

7. *See* Paul J. Larkin, Jr., *Mistakes and Justice—Using the Pardon Power to Remedy a Mistake of Law,* 15 GEO. J.L. & PUB. POL'Y 651, 658 (2017) (arguing that Congress should pass a statute creating a mistake of law defense).

8. 574 U.S. 54 (2014).

whether the mistake of law renders the search or seizure reasonable under the Fourth Amendment.

This approach may appear redundant at first. As it stands, when a trial court engages in the good faith exception analysis, the court has often already found the police violated a defendant's Fourth Amendment rights due to an unreasonable search or seizure. For the purposes of assessing whether to grant a defendant the exclusionary rule remedy, the court then looks at whether, despite the violation, the police acted under a reasonable mistake of law. But there is good reason to resist this approach entailing two separate and distinct reasonableness inquiries after the Court's recent holding in *Heien*. The inquiry into a police mistake of law is, in certain cases, best understood as an inquiry into the Fourth Amendment itself and not the exclusionary rule—that is, into the violation of the right and not the application of the remedy.[9] This claim proceeds into three parts.

First, since the Court accepted in *Heien* that the reasonableness of a mistaken belief that triggers constitutionally questionable conduct is relevant to the evaluation of whether police conduct is constitutional under the Fourth Amendment,[10] courts do not need to make a second assessment regarding the reasonableness of this same mistake at the exclusionary rule remedy stage. There is no need for a good faith "reasonableness" exception to the exclusionary rule when that rule kicks in only after a violation of the Fourth Amendment's "reasonableness" requirement, since this requirement now acknowledges instances of reasonable mistakes of law. If we revisit the "good faith exception" strand of exclusionary rule doctrine in light of *Heien*'s reasonableness analysis, it becomes redundant in most cases.

Second, and as a result of this revisionist reading, the good faith exclusionary rule cases can now be best understood not as decisions that involve the exclusionary rule but rather as displaced Fourth Amendment holdings. This means that instead of ruling that the exclusionary rule does or does not apply in one instance or another, courts in these good faith exclusionary rule cases could simply have held that a search was or was not unreasonable. Third, since the question of "good faith" mistakes of law now forms part of the constitutional inquiry, once courts answer the constitutional question in these cases, the actual remedies question is easy: if the police mistake of law was

9. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1942–43 (2014) (analyzing the exclusionary rule under the Fourth Amendment and Due Process Clause).

10. *See Heien*, 574 U.S. at 66 ("The Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable." (emphasis omitted)).

reasonable, there is no need for the exclusionary rule remedy; if the defendant's Fourth Amendment rights have been violated because the police mistake of law was not reasonable, the evidence must be suppressed.

This way of thinking about Fourth Amendment exclusion has immediate and significant implications. First, it analytically clarifies the doctrine surrounding the good faith exception to the exclusionary rule. The Court's earlier insistence on following two separate inquiries in assessing the reasonableness of a police mistake of law through categorical or case-by-case standards of analysis is hard to reconcile with the fact that searches and seizures can be reasonable or unreasonable but not both at once.[11] This problem disappears, though, once the reasonableness analysis of the mistake of law moves to the inquiry into the potential violation of the Fourth Amendment. Second, this approach will provide the space for constitutional evolution through criminal proceedings and further the Court's intention of creating more bright-line rules to better train and guide police officers.[12] Finally, courts will now have to directly confront difficult constitutional questions instead of sweeping them under the rug of remedial assessment. And while one cannot predict exactly how doctrine will evolve, this approach, at the very least, will require courts to be clearer about how police mistakes of law weigh into the balance between individual privacy and government interests in policing. Courts will no longer be able to declare broadly that the police have violated the Fourth Amendment while in the same breath undercutting the value of remedying this violation based on two different assessments of what constitutes one reasonable police officer.

This Article explains and elaborates on this thesis in three parts. Part I critically analyzes the two distinct developments in the reasonableness and good faith exception doctrine within the Fourth Amendment right and the exclusionary rule remedy. Part II lays out my proposed revisionist approach on the nature and effect of police officer mistakes of law on the Fourth Amendment right and the good faith exception to the exclusionary rule remedy. I explain the approach, and, in Part III, show why it can solve the problems described in the previous Parts and defend the approach against potential objections.

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11. *See* Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIA. L. REV. 589, 619 (2014) (questioning the Court's *Herring* analysis finding a search to be both reasonable and unreasonable).

12. *See generally* Whiteley v. Warden, 401 U.S. 560, 564 n.6 (1971) (treating the exclusionary rule as part of the Fourth Amendment); Mapp v. Ohio, 367 U.S. 643, 657 (1961) (finding the exclusionary rule to be a critical component of the Fourth and Fourteenth Amendments).

I. FOURTH AMENDMENT REASONABLENESS AND EXCLUSION

This Part charts the origins and development of the Court's Fourth Amendment reasonableness and exclusion doctrine throughout criminal procedure case law. Section A embeds the doctrine within the text of the Fourth Amendment. Section B surveys the development of the exclusionary rule and its corollary good faith exception doctrine from their first judicial recognition by the Court through to the present day. Section C traces and critiques the exclusionary rule's doctrinal shift from its original constitutional foundation to a distinct analysis detached from it.

A. Reasonableness Under the Fourth Amendment

The Fourth Amendment guarantees the right of individuals to be secure against unreasonable searches and seizures and establishes a specificity requirement that the issuance of warrants be supported by probable cause.[13] The language of the Fourth Amendment is both terse and ambiguous, leaving key terms, including the standard of reasonableness, and their relationship to the dual clauses of the Amendment itself open to interpretation.[14] The Court has consistently emphasized that reasonableness represents the "touchstone" of the Fourth Amendment and the measure of both the permissibility of the decision to search or seize as well as the scope of the intrusive actions on the part of the government that follow this decision.[15] Attempts to

13. U.S. CONST. amend. IV:

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

14. *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42–43 (1966) (noting a lack of clarity in the Fourth Amendment and three possible interpretations of the term "unreasonable"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–81 (1994) (analyzing historical interpretations of the Warrant Clause); Ronald J. Bacigal, *Dodging a Bullet, but Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597, 603–10 (1986) (addressing the Framers' intents in composing the Fourth Amendment); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1721–31 (1996) (supporting a conjunctive theory interpretation of the Warrant Clause and the Reasonableness Clause); Martin Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107, 114–19 (1987) (exploring contemporary grammar and interpretation of the Warrant Clause at time of framing); Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1394–96 (1989) (questioning how courts should interpret the Fourth Amendment as founders intended in the modern era).

15. Maryland v. King, 569 U.S. 435, 448 (2013) (quoting Samson v. California, 547 U.S. 843, 855 n.4 (2006)) (supporting the notion that reasonableness rather than individual suspicion is the

interpret and apply the Fourth Amendment in the frequently litigated cases of searches and seizures have generated a voluminous body of legal doctrine.[16]

The Court's doctrinal development of the Fourth Amendment reasonableness standard started from the text of the Fourth Amendment and has relied heavily on the structural idiosyncrasy of its two clauses. The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[17]

The interpretation of these two grammatically independent but connected clauses[18] was the emphasis of the Court's initial Fourth Amendment cases.[19] The first clause, also known as the Reasonableness Clause, stipulates that all searches and seizures must be reasonable. The second clause, known commonly as the Warrant Clause, requires

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touchstone of the Fourth Amendment); *see, e.g.*, United States v. Knights, 534 U.S. 112, 118 (2001) (reaffirming reasonableness as the touchstone of the Fourth Amendment); United States v. Ramirez, 523 U.S. 65, 71 (1998) (recognizing reasonableness as the touchstone in Fourth Amendment analysis as well as warrant execution); Illinois v. Rodriguez, 497 U.S. 177, 184–86 (1990) (discussing reasonableness required by the Fourth Amendment in each stage of a search and seizure); Maryland v. Garrison, 480 U.S. 79, 87 (1987) (questioning reasonableness standards in mistake-of-identity arrests); New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985) (noting that reasonableness is the "fundamental command" of the Fourth Amendment); Terry v. Ohio, 392 U.S. 1, 19–20 (1968) (emphasizing that reasonableness remains central to Fourth Amendment analysis and applies in stop-and-frisk cases).

16. *See* Gretchan R. Diffendal, Note, *Application of the Good-Faith Exception in Instances of a Predicate Illegal Search: "Reasonable" Means Around the Exclusionary Rule?*, 68 ST. JOHN'S L. REV. 217, 220–23 (1994) (exploring the historical origins of the confusion and interpretation differences).

17. U.S. CONST. amend. IV.

18. For a summary of the principal views on the relationship of the two clauses, see Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 517–25 (1995); and James J. Tomkovicz, California v. Acevedo: *The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1123–36 (1992). *See also* Wasserstrom, *supra* note 14, at 1389 (noting ambiguity in the relationship between the clauses of the Fourth Amendment); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 927 (1997) (analyzing the Court's contrasting analytical models, which view the clauses as both independent and interdependent).

19. *See* Nathanson v. United States, 290 U.S. 41, 47 (1933) (holding probable cause, not merely oath of belief, is necessary for issuance of a search warrant); Grau v. United States, 287 U.S. 124, 128–29 (1932) (finding affidavit contained an insufficient statement of probable cause under the Fourth Amendment, and therefore the search warrant was invalid); Taylor v. United States, 286 U.S. 1, 6 (1932) (holding failure to obtain a warrant before searching a garage, despite opportunity to search, necessitated suppression of evidence); Agnello v. United States, 269 U.S. 20, 31 (1925) (noting warrantless seizure of the home was firmly held unconstitutional); Amos v. United States, 255 U.S. 313, 317 (1921) (holding when under "implied coercion," police cannot search a house without a warrant); Weeks v. United States, 232 U.S. 383, 393, 399 (1914) (holding that the Fourth Amendment Warrant Clause applies to search of letter in mail).

that the government have a warrant supported by probable cause and of sufficient specificity before a search or seizure can occur.

The Court's first take on the Reasonableness Clause during the early Fourth Amendment cases construed the clause as contingent on the Warrant Clause: a search is reasonable if it is in line with the guarantees set out in the Warrant Clause.[20] Generally, searches and seizures are presumed unreasonable and thus unconstitutional in the absence of a warrant supported by probable cause.[21] A police officer who enters a home without a warrant performs an unreasonable search in violation of the Fourth Amendment.[22] Since the Court articulated this initial framework, it has used different models at different times to assess the reasonableness of a search or seizure under the Fourth Amendment. Thomas Clancy identifies at least five such models:[23] the warrant presumption model,[24] the individualized suspicion model,[25] the

20. *See* LANDYNSKI, *supra* note 14, at 43 (highlighting the ambiguity of the Fourth Amendment's text); *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (clarifying the requirement for the Reasonableness Clause and the Warrant Clause to be analyzed as a pair); Wong Sun v. United States, 371 U.S. 471, 479 (1963) ("It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion."); Richard M. Leagre, *The Fourth Amendment and the Law of Arrest,* 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 393, 401 (1963) (noting a reasonable search under the Reasonableness Clause complies with the requirements of the Warrant Clause); BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 12 (1986) (suggesting that the Founders intended the Warrant Clause as rubric for legal seizure under the Reasonableness Clause).

21. Katz v. United States, 389 U.S. 347, 357 (1967) (holding that searches outside judicial process are per se unreasonable, subject to few exceptions).

22. *See* Heien v. North Carolina, 574 U.S. 54, 61 (2014) (noting that vehicle seizures require "reasonable suspicion" of a crime as justification); Herring v. United States, 555 U.S. 135, 136 (2009) (explaining that the Fourth Amendment justification requirement to be in form of warrant or probable cause).

23. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978.

24. *See, e.g.*, Mitchell v. Wisconsin, 139 S. Ct. 2525, 2533–34 (2019) (holding that a warrantless search was allowed with compelling need for official action and no time to secure warrant, in context of securing additional BAC testing); City of Los Angeles v. Patel, 576 U.S. 409, 419 (2015) (finding that warrantless seizures are per se unreasonable); Fernandez v. California, 571 U.S. 292, 298 (2014) (noting that a warrant is usually necessary for constitutional seizure despite exceptions); California v. Acevedo, 500 U.S. 565, 580 (1991) (supporting warrant requirement for search to be reasonable); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971) (recognizing that slight deviations from the warrant requirement open the floodgates to unconstitutional searches); *Katz*, 389 U.S. at 357 (upholding the need for judicial involvement in the search process).

25. *See* Brinegar v. United States, 338 U.S. 160, 177 (1949) (finding that officers who have substantial ground to believe a crime has occurred can stop an individual without a warrant); *see also* Carroll v. United States, 267 U.S. 132, 154 (1925) (recognizing that a warrantless search may be justified when an officer has met the objective suspicion criteria).

totality of the circumstances test,[26] the balancing test,[27] and a hybrid model based on common law originalism.[28]

Courts now largely approach the reasonableness standard through an objective assessment of factors like the degree of intrusion by the search or seizure and the manner in which a search or seizure is conducted, examining the totality of the circumstances to determine whether the search or seizure was constitutional.[29] Largely, the reasonableness of a *search* turns on an individual's reasonable expectation of privacy against government intrusion.[30] The reasonableness of a *seizure* turns on whether there was a basis to seize a person outweighing the interest of privacy.[31] The reasonableness of a *stop and frisk* requires reasonable suspicion that the person is engaging in criminal activity and/or is armed and dangerous for the police to justify the intrusion into privacy.[32] The reasonableness of *probable cause* turns on a sufficient belief that the police will find evidence of

26. *See* United States v. Drayton, 536 U.S. 194, 201–02 (2002) (noting that the "proper inquiry" necessitates consideration of "all the circumstances surrounding the encounter" (quoting Florida v. Bostick, 501 U.S. 429, 439 (1991))); Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Tennessee v. Garner, 471 U.S. 1, 9 (1985)) (discussing that proper application of the Fourth Amendment requires an analysis of the specific circumstances of the case); Illinois v. Gates, 462 U.S. 213, 238 (1983) (requiring that judges use a "totality-of-the-circumstances analysis" in assessing probable cause); United States v. Rabinowitz, 339 U.S. 56, 63 (1950), *overruled in part by* Chimel v. California, 395 U.S. 752, 768 (1969) (stating that there is no fixed test for reasonableness and the totality of circumstances must be analyzed to determine reasonableness).

27. *See* United States v. Knights, 534 U.S. 112, 118–19 (2001) (quoting Wyoming v. Houghton, 526 U.S. 295 (1999)) (utilizing a balancing approach to determine reasonableness under Fourth Amendment analysis); Camara v. Mun. Ct. of S.F., 387 U.S. 523, 539 (1967) (affirming the need for reasonableness in balancing of interests); *see also* Frank v. Maryland, 359 U.S. 360, 373 (1959) (recognizing the need to balance state and individual interests); Wolf v. Colorado, 338 U.S. 25, 27–33 (1949) (recognizing the need to weigh an individual's right to privacy with the risk of the exclusionary rule).

28. *See Houghton*, 526 U.S. at 299–301 (utilizing a reasonableness balancing standard while incorporating the intention of the Framers); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1760 (2000) (describing *Houghton* as adopting "new Fourth Amendment originalism").

29. *See* Kansas v. Glover, 140 S. Ct. 1183, 1191 (2020) (noting that the Fourth Amendment analysis requires a view of totality of the circumstances); Samson v. California, 547 U.S. 843, 848 (2006) (quoting *Knights*, 534 U.S. at 118–19) (discussing the balancing of the "individual's privacy" with "legitimate governmental interests"). Earlier cases have cleared the way for this understanding of special need cases. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (analyzing whether the Warrant Clause applies to public school officials).

30. *See* Katz v. United States, 389 U.S. 347, 359 (1967) (noting that reasonableness is the proper inquiry whether the search took place in "a home, an office, or a hotel").

31. *See Bostick*, 501 U.S. at 434–35 (recognizing that a conversation initiated by a police officer does not constitute a seizure); United States v. Mendenhall, 446 U.S. 544, 559–60 (1980) (holding that an individual's consent for search negates possible Fourth Amendment violation).

32. Terry v. Ohio, 392 U.S. 1, 29–30 (1968); Sibron v. New York, 392 U.S. 40, 72–73 (1968) (Harlan, J., concurring) (articulating reasonable suspicion standard).

criminal activity through a search.[33] Courts endeavor to balance the degree of intrusion upon individuals' rights to privacy against government interests, taking into account any special needs and exigent circumstances.[34]

The doctrinal development of these overlapping and yet distinct reasonableness models, however, has created confusion and favored selective application of whichever model courts find most fits to assess the constitutionality of a search or seizure. This uncertainty, in turn, has bred contempt for Fourth Amendment doctrine.[35] The Court has not only done little to establish some sort of coherence that could guide lower courts but has seemed to favor this type of fragmented and haphazard doctrinal development.[36] In the face of these challenges, Brandon Garrett has viewed reasonableness as a fragmented concept that addresses three areas relating to Fourth Amendment doctrine: (1) the nature of the mental element under notions of subjective or objective reasonableness; (2) the object of the reasonableness inquiry such as that of an average person or a person in the same situation as the one in question; and finally (3) the identification of distinct categories of circumstances, each of which carries an individualized reasonableness assessment with its own limits or exceptions to the general rule.[37] Akhil Amar, on the other hand, has argued reasonableness is, in fact, a unifying force that can bring coherence to the Fourth Amendment and resolve the fragmented nature of existing doctrine.[38]

33. Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)) (explaining that probable cause relies on suspicion of guilt); *see also* Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 660 (2009) (opining that the Court risks conflating probable cause and reasonable suspicion standards in its reasonableness analysis).

34. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring) (stating that the privacy afforded to a person depends on whether the person exhibited an actual expectation of privacy and whether that expectation is one that society deems reasonable); *see also* Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Harlan's formulation from *Katz*).

35. *See* Kamin & Marceau, *supra* note 11, at 618 (critiquing the doctrine for confusing the Fourth Amendment right with a remedy).

36. *See id.* (noting how two reasonableness standards risk constraining the Fourth Amendment and infringing upon individual liberty).

37. Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 99–100 (2017).

38. *See* Amar, *supra* note 14, at 759 (arguing that the Fourth Amendment generally requires reasonableness).

B. Reasonableness Within the Exclusionary Rule

The language of the Fourth Amendment does not directly prescribe a remedy for instances where the government violates the rights it guarantees. In establishing a remedy, the Court has adopted the exclusionary rule, a remedy that provides for suppression of evidence obtained in violation of the Fourth Amendment.[39] Despite its long-standing existence, this doctrine remains one of the most controversial and fragmented in criminal and constitutional jurisprudence.[40]

For most of its history, the exclusionary rule served as an automatic remedy to Fourth Amendment violations, irrespective of any assessment of police officers' reasonableness based on the officers' beliefs regarding the legality of their actions.[41] In *Weeks v. United States* and *Mapp v. Ohio*, the Court required the suppression of unlawfully obtained evidence because admission of such evidence would undermine the rights guaranteed under the Fourth Amendment and would reduce it to a "form of words"[42] of "no value."[43] Nevertheless, in subsequent decades, the Court has steadily constricted the exclusionary rule remedy both in terms of its scope and its manner of application[44] in what has often been described as a sustained "legal assault" against the doctrine.[45] The Court shifted away from the reflexive approach of

39. *See* Mapp v. Ohio, 367 U.S. 643, 659–60 (1961) (adopting the federal exclusionary rule).

40. Sabina Veneziano, *Examining the Modern Use of the Exclusionary Rule and the Danger of Its Expansion*, 55 GONZ. L. REV. 73, 75 (2020).

41. For the most significant case, see *Mapp*, 367 U.S. at 656–57, where the court applies the exclusionary rule to state violations of the Fourth Amendment. *See also* Kamin & Marceau, *supra* note 11, at 627 (criticizing the Court's reliance on precedent in Fourth Amendment cases); Whiteley v. Warden, 401 U.S. 560, 568–69 (1971) (applying the exclusionary rule in a case with an insufficient warrant); Katz v. United States, 389 U.S. 347, 359 (1967) (applying the exclusionary rule to a telephone conversation listened to without a warrant).

42. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); *see Mapp*, 367 U.S. at 657 (suppressing a forced confession for fear of convicting an innocent man).

43. Weeks v. United States, 232 U.S. 383, 393 (1914).

44. *See* Davis v. United States, 564 U.S. 229, 249–50 (2011) (holding the exclusionary rule does not apply when searches are conducted in objectively reasonable reliance on binding precedent); Herring v. United States, 555 U.S. 135, 137 (2009) (noting that suppression is not an automatic consequence of a Fourth Amendment violation); Hudson v. Michigan, 547 U.S. 586, 591 (2006) (declaring that the Court has rejected broad application of the exclusionary rule); United States v. Leon, 468 U.S. 897, 907–08 (1984) (limiting the application of the exclusionary rule to situations where its use is appropriate in terms of a cost-benefit analysis); United States v. Calandra, 414 U.S. 338, 354 (1974) (holding the exclusionary rule should only be applied when exclusion will deter misconduct).

45. Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 624 (2014); *see* Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 85–93 (1984) (providing an overview of cases narrowing the exclusionary rule); Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 229 (2010)

prior cases where they treated Fourth Amendment violations as synonymous with evidence suppression.[46] Ultimately, this resulted in the Court significantly altering their understanding of the relationship between substantive Fourth Amendment violations and the exclusionary rule remedy. The Court separated the question of substantive Fourth Amendment violation from the question of evidence suppression and grounded the exclusionary rule on the policy of deterring future police misconduct.[47] In other words, a constitutional violation is a necessary but not a sole or sufficient condition for the application of the exclusionary rule.[48]

As a result of these developments, the Court now consistently understands the exclusionary rule not as an individual remedy stemming directly from Fourth Amendment protections but as a prophylactic remedy created to deter future Fourth Amendment violations.[49] The Court has repeatedly affirmed that the Fourth Amendment only prohibits unconstitutional searches and not the admission of unconstitutionally seized evidence at trial.[50] The

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[hereinafter Bradley, *Reconceiving the Fourth Amendment*] (suggesting that the Court intends to reconsider exclusionary rule). Scholars have systematically critiqued the Court's reasoning behind this line of decisions. *See, e.g.*, Albert W. Alschuler, Herring v. United States: *A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 501–07, 510–11 (2009) (describing the history of the exclusionary rule, beginning before the Revolutionary War); Jeffrey Fagan, Terry*'s Original Sin*, 2016 U. CHI. LEGAL F. 43, 66 (2016) (noting the Court's decision to excise reasonableness from *Terry* test); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758 (2009) (critiquing the Court's decision in *Herring* for complicating Fourth Amendment analyses); David Alan Sklansky, Lecture, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 578–79 (2008) (discussing the ongoing informal reforms in police departments); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 848 (1994) (arguing for modernized interpretation of what constitutes reasonableness under Fourth Amendment); James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1832–33, 1848–49, 1880–81 (2008) (describing a variety of interpretations lower courts can make in response to the Court's ruling in *Hudson*); Craig M. Bradley, *Red* Herring *or the Death of the Exclusionary Rule?*, TRIAL, Apr. 2009, at 53 (noting the difficulty in applying *Herring* to a broad collection of cases).

46. Whiteley v. Warden, 401 U.S. 560, 568–69 (1971); *see Davis*, 564 U.S. at 242–43 (rejecting the argument that the exclusionary rule is a retroactivity issue and not a good faith issue).

47. *Herring*, 555 U.S. at 137; *Leon*, 468 U.S. at 906; Illinois v. Gates, 462 U.S. 213, 223 (1983); Stone v. Powell, 428 U.S. 465, 466–67 (1976); *Calandra*, 414 U.S. at 347–48; *see* Hudson v. Michigan, 547 U.S. 586, 592 (2006) (noting that courts cannot apply the exclusionary rule to a Fourth Amendment violation solely because the violation is a "but-for" cause of evidence collection); *Davis*, 564 U.S. at 236–37 (holding the sole purpose of exclusion is to deter misconduct).

48. *Hudson*, 547 U.S. at 591–92.

49. *Stone*, 428 U.S. at 486; *Calandra*, 414 U.S. at 348; *see* 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, 1394–97 (1983).

50. *See, e.g.*, *Leon*, 468 U.S. at 906 (emphasizing that the Fourth Amendment is distinct from the exclusionary rule); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1774 (1991) ("Because any

exclusionary rule no longer enjoys blanket application.[51] Rather, it is based on a series of categorical or case-by-case exceptions,[52] reflecting the Court's goal of balancing the costs and benefits of evidence suppression—the cost of setting potentially guilty people free without punishment, and the benefit of deterring future constitutional violations.[53] By introducing these various exceptions, the Court has aimed to delineate the types of circumstances or cases where suppression of evidence obtained in violation of the Fourth Amendment will help deter other police officers from violating the Fourth Amendment in future cases.[54]

This deterrence rationale generated a line of doctrine where the Court introduced circumstances that bar the application of the exclusionary rule by treating police culpability as a proxy for anticipating deterrent effect. In one of these lines of doctrine, the Court looks at whether the actions of the police officer were in sufficiently reasonable "good faith" reliance on the law, introducing a standard of reasonableness that controls the application of the exclusionary rule distinct from the standard of reasonableness under the Fourth Amendment.[55] The Court has ruled, in ample variations of this

violation of the Constitution occurred in the past, outside of court, admission of the evidence is not an independent violation.").

51. *See Calandra*, 414 U.S. at 348–49 (noting the exclusionary rule should only be utilized if exclusion meets a balancing test).

52. *See, e.g.*, *Leon*, 468 U.S. at 920–21 (noting that the good faith exception does not interfere with the deterrence goal); Nix v. Williams, 467 U.S. 431, 444 (1984) (recognizing the inevitable discovery doctrine); Wong Sun v. United States, 371 U.S. 471, 491 (1963) (utilizing the attenuation or causation exception); *see also* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 656 (2011) (suggesting the difficulty in applying various standards of exclusionary rule has caused its erosion).

53. *See Leon*, 468 U.S. at 897–98, 906–08 (holding the exclusionary rule should be utilized only when benefits of exclusion outweigh costs of exclusion); *Calandra*, 414 U.S. at 347–48 (discussing the need to balance the deterrent effects of exclusion with the potential impediment of the jury); United States v. Janis, 428 U.S. 433, 454 (1976) (finding that evidence seized illegally by state officials admitted in federal civil proceedings was allowable because likelihood of deterring police misconduct did not outweigh substantial social costs); *see also* Davis v. United States, 564 U.S. 229, 237–38 (2011) (noting that exclusion should be utilized where deterrent purpose is served); Katz v. United States, 389 U.S. 347, 359 (1967) (finding the exclusionary rule applied in cases where its remedial function outweighs potential costs). *Contra* Stewart, *supra* note 49, at 1383 (quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)) (suggesting that government overintervention harms society more than free criminals).

54. *See Davis*, 564 U.S. at 236–37 (finding the exclusionary rule is intended to compel respect for Fourth Amendment rights); *Calandra*, 414 U.S. at 347 (noting the primary purpose of exclusionary rule is to deter misconduct); *see also* Terry v. Ohio, 392 U.S. 1, 29 (1968) (citing United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930)) (detailing that the deterrent purpose of the exclusionary rule implies inherent limits to searches).

55. *See* Herring v. United States, 555 U.S. 135, 144 (2009) (holding that police misconduct must be deliberate and systemic to justify cost of exclusionary rule); *Davis*, 564 U.S. at 238–39 (holding that the exclusionary rule does not apply when there is reasonable police reliance on warrant).

standard, that the deterrent value of evidence suppression outweighs its costs at times when a police officer exhibits "deliberate, reckless, or grossly negligent" disregard for Fourth Amendment rights.[56] But, when the police act with an "objectively reasonable good-faith belief" in the legality of their conduct,[57] or when their conduct "involves only simple, isolated negligence,"[58] the deterrence rationale carries less weight, and exclusion "cannot pay its way."[59] In essence, the Court has established a series of micro-standards intended to define and elaborate on what the Court meant when they spoke of an "objectively reasonable good faith belief" that obviates the need for exclusion. But even the Court has come to identify "good faith" as a misnomer that has engendered several problems.[60]

In *United States v. Leon*, the case in which the Court established this "good faith exception" to the exclusionary rule,[61] the Court found that evidence seized on the basis of a mistakenly issued search warrant does not need to be excluded at trial.[62] The Court reasoned that if a police officer mistakenly relied on what the officer thought was a valid arrest warrant approved by a magistrate, exclusion will not serve any deterrent function for other police officers' reliance on similar warrants.[63] The Court after *Leon* went on to apply this good faith exception to the exclusionary rule in a series of other circumstances. In

56. *Herring*, 555 U.S. at 144.

57. *See, e.g.*, *Leon*, 468 U.S. at 901–02; *Herring*, 555 U.S. at 137–38.

58. *Herring*, 555 U.S. at 137.

59. *Id.*; *Davis*, 564 U.S. at 238 (2011).

60. *See Herring*, 555 U.S. at 142–43 (noting that in *Leon*, the Court conflated reasonable reliance with good faith); Re, *supra* note 9, at 1942–44 (discussing the good faith exception's ability to allow a constitutional infringement of liberty); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1103 (2011) (analyzing how good faith conflates a subjective standard with an objective standard of cost benefit analysis).

61. 468 U.S. at 922–23.

62. *Id.* at 925–26.

63. *See id.* at 899, 904, 916–17, 923 (holding the exclusionary rule would not have general deterrent effect on individuals). The Court in *Leon* went on to sketch at least four instances in which evidence suppression is not inappropriate when police have obtained a warrant and acted in accordance with it, including (1) when a warrant issued is based upon an affidavit containing information that an officer knows or should know is false, (2) when an affidavit includes so little indicia of probable cause that official belief in it is unreasonable, (3) when the warrant is so facially deficient that the executing officer cannot reasonably believe it to be valid, and (4) when the issuing judge has completely abandoned her objective judicial role in issuing the warrant. *Id.*; Franks v. Delaware, 438 U.S. 154, 155 (1978) (holding false statements included in affidavit to find probable cause warranted hearing); Brown v. Illinois, 422 U.S. 590, 610–11 (1970) (Powell, J., concurring in part). *But see Leon*, 468 U.S. at 934–35 (Marshall, J., dissenting) (expressing concern over the holding's threat to fundamental rights); Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967, 982 (2018) (suggesting support for limiting exclusionary rule in cases of ambiguous deterrent effect).

Illinois v. Krull, the Court held a police officer's actions after relying on a statute that was later declared to be unconstitutional did not warrant the application of the exclusionary rule.[64] The Court found that law enforcement officials cannot be expected to question the legislature responsible for passing the law, and suppression of evidence in this type of police activity would have little deterrent effect.[65] In *Arizona v. Evans*, the police made a warrantless search relying on a computer record that erroneously showed an outstanding warrant due to a court clerk's failure to update the database to reflect that the warrant had been quashed.[66] The Court held the exclusionary rule was not warranted, as there was no reason for the arresting officer to know the warrant was no longer valid.[67]

In *Herring v. United States,* a police officer performed a search on the basis of a warrant from the neighboring county's police department database that had been recalled, but the recall was never entered into the system due to a clerical mistake.[68] The Court reiterated the language used in *Leon* regarding the necessary balancing between suppression of evidence on the one hand and deterrent effect on police misconduct on the other.[69] However, the Court added a new threshold to this balancing test in order to determine the extent to which deterrence justifies the exclusionary rule, by assessing the police officer's culpability.[70] According to the Court, exclusion supports the goal of deterrence when the police conduct is "deliberate, reckless, or grossly negligent [ ] or in some circumstances recurring or systemic negligence."[71] Thus, the culpability of the officer becomes a proxy for establishing the rule's potential deterrent impact on police.[72] In other words, for the application of the exclusionary rule, the police's action

64. 480 U.S. 340, 355 (1987).

65. *Id.* at 349.

66. 514 U.S. 1, 5 (1995).

67. *Id.* at 15–16.

68. 555 U.S. 135, 137–38 (2009).

69. *Id.* at 147.

70. *Id.* at 143. In the wake of *Herring*, one leading commentator published an article straightforwardly entitled: "Is the Exclusionary Rule Dead?" Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L & CRIMINOLOGY 1 (2012). Another prominent title states: "No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule." Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1186 (2012). Meanwhile, a leading Fourth Amendment treatise writer called *Herring* "a complete disaster" and "scary." LaFave, *supra* note 45, at 770, 787; *see also* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 346–47 (2012) (arguing that *Hudson* and *Herring* contributed to "[a]brogation of the exclusionary rule" during the Roberts Court); Alschuler, *supra* note 45, at 501–07, 510–11 (warning of *Herring*'s threat to the exclusionary rule).

71. *Herring*, 555 U.S. at 144.

72. *Id.* at 143.

must meet a certain standard of deliberate conduct so that exclusion can meaningfully deter it, and it must also be sufficiently culpable to justify the price of suppressing potentially inculpatory evidence.[73] And because the clerical error in the police database appeared to be an isolated negligent mistake, there was no need to suppress the evidence found on Herring.[74]

The Court broadened the categories of cases in which it has applied the "good faith exception" in *Davis v. United States*. In *Davis*, the police had searched Davis's car based on precedent permitting searches of the passenger compartment when arresting a person in a vehicle.[75] Davis's case was on appeal when the Court overturned this precedent.[76] However, the Court found the police officer had acted with an objectively reasonable good faith belief that his conduct was lawful under the original precedent.[77] As this was simply a situation of an isolated mistake, evidence suppression would have no meaningful deterrent effect, according to the Court.[78]

Reasonableness as a standard for police reliance on the law in the context of evidence suppression has turned into an assessment of objective police culpability. In the series of "good faith exception" cases, when dealing with police mistakes of law, the reasonableness assessment only tips against the police conduct when it is "deliberate, reckless, or grossly negligent," or is due to "recurring or systematic negligence," for the purpose of excluding evidence.[79] This culpability standard has repeatedly confused lower courts, which engage in an assessment of the subjective mental state of police officers, even though the Court has declared that the test is one of objective culpability.[80]

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73. *Id.* at 143–46.

74. *Id.* at 134–47.

75. Davis v. United States, 564 U.S. 229, 235 (2011).

76. *Id.* at 249–50; *see* Arizona v. Gant, 556 U.S. 332, 352 (2009) (holding that police may only search a car incident to arrest if arrestee is unsecured and within reaching distance of car at the time of the search); Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that a change of rule in criminal proceedings must apply retroactively to all federal and states cases pending review or not closed).

77. *Davis*, 564 U.S. at 241.

78. *Id.* at 240–41.

79. *Herring*, 555 U.S. at 144; *see* United States v. Leon, 468 U.S. 897, 921–22 (1984) (recognizing that a warrant obtained in good faith and followed in its scope leaves little for a court to deter); *Davis*, 564 U.S at 249–50 (holding that reasonable reliance on precedent is insufficient to activate the exclusionary rule).

80. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (stating that subjective intent is irrelevant in Fourth Amendment analysis); Jennifer E. Laurin, *Trawling For* Herring: *Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 727 (2011) (exploring the Court's choice to elevate culpability to a critical question in *Herring* when it is usually rooted in tort law); Alschuler, *supra* note 45, at 483–84 (explaining the Court's shift for qualified immunity

C. The Critique of the Current Doctrine

Taken together, the "good faith exception" doctrine represents not just a fundamental shift in the Court's construction of the exclusionary rule but also an ideological stance on the Fourth Amendment's doctrinal development. The Court's compulsion to overcorrect a low threshold for exclusion of evidence by emphasizing the nature of the exclusionary rule as a remedy distinct from the letter of the Fourth Amendment has caused judges to be rather hesitant in drawing any meaningful connections between the Court's Fourth Amendment doctrine and the exclusionary rule.[81] The Court has moved from the obvious and automatic exclusionary remedy to a much more restricted remedy reserved for egregious police culpability under a new reasonableness standard disconnected from the Fourth Amendment reasonableness standard.[82] The Court has repeatedly affirmed that the ultimate touchstone of the Fourth Amendment is "reasonableness"[83] but has not established a solid framework on how reasonableness factors into Fourth Amendment exclusion. Instead, the Court's reasonableness analysis both as a matter of right and also as a matter of remedy has continuously changed with each new case, generating a disjointed parade of positions on what constitutes an unreasonable search or seizure worthy of evidence suppression.[84]

From *Leon* up to *Davis*, the Court largely engaged in a two-part inquiry. First, was the search or seizure unreasonable under the Fourth Amendment? Second, did the level of police culpability render the search or seizure nonetheless sufficiently reasonable, grounded on the policy goal of police misconduct deterrence?[85] This approach has

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from a partly subjective to a purely objective standard over time); LaFave, *supra* note 45, at 784 (arguing that the Court conflated gross negligence with recklessness in *Herring*); Ferguson, *supra* note 45, at 639 (expressing concern over how criminal courts will interpret traditionally civil standards in exclusionary rule analysis); Eang L. Ngov, *Police Ignorance and Mistake of Law Under the Fourth Amendment*, 14 STAN. J. C.R. & C.L. 165, 170–71 (2018) (discussing the nature of mistake of law under criminal law and its incompatibility with the holding in *Heien*).

81. Leading constitutional law scholarship as well as jurisprudence seek to sharply separate what they consider to be the superior realm of constitutional rights from the inferior realm of remedies. This right/remedy distinction in constitutional law serves to maintain the purity of constitutional rights from the more pragmatic, policy-oriented goals of remedies. This Article indirectly engages with this debate in Part III, *infra*.

82. *See* Katz v. United States, 389 U.S. 347, 356–57 (1967) (holding that searches committed without judicial review are per se unreasonable).

83. Heien v. North Carolina, 574 U.S. 54, 60 (2014); *Davis*, 564 U.S. at 238–39; Kansas v. Glover, 140 S. Ct. 1183, 1191 (2020); Riley v. California, 573 U.S. 373, 381–82 (2014).

84. *See* Clancy, *supra* note 23, at 978 (suggesting that the Court chooses from judicially created models to apply on case-by-case basis).

85. *See Davis*, 564 U.S. at 238–39 (noting the importance of determining reasonableness and ensuring deterrence from future Fourth Amendment violations); Herring v. United States, 555

employed two different analytical frameworks for reasonableness: one that evaluates the balance between individuals' expectations of privacy versus the government's interests in security to assess the reasonableness of a search or seizure under the Fourth Amendment, and a second that balances the general deterrence costs and benefits of applying the exclusionary rule from the standpoint of police culpability.[86] The outcomes indicate that the Court considers the costs of exclusion to be so great that it is only justifiable in cases where the corresponding general deterrence benefit of police misconduct is even greater, even when the first part of the inquiry finds an unreasonable and therefore unconstitutional search or seizure.[87]

In so doing, the Court has established two distinct standards of reasonableness: one for more *substantive* Fourth Amendment questions and another for more *procedural* exclusionary rule questions. Under these two standards, a search can be sufficiently unreasonable to trigger a Fourth Amendment violation but not unreasonable enough to trigger the exclusionary rule.[88] As a consequence, interpretations of reasonableness have migrated from questions of substantive Fourth Amendment rights—whether the search and seizure was reasonable under constitutional standards—to an additional separate question of remedy—whether the violation was reasonable enough to bar application of the exclusionary rule at trial.[89] This shift has occurred without analysis or elaboration on the distinct elements of each reasonableness standard, or attention to whether these two inquiries are always bound to be distinct.[90]

U.S. 135, 139 (2009) (indicating that there are two parts: determining if the Fourth Amendment was violated and then determining if the exclusionary rule applies); United States v. Leon, 468 U.S. 897, 924 (1984) (holding that courts may leave flexibility in the factors used in the two-step inquiry).

86. *See* Kamin & Marceau, *supra* note 11, at 601–02 (noting inequality between the two reasonableness tests); Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 626–27 (2016) (analyzing the uncertainty two reasonableness tests create and suggesting that the Court seeks a cost effective method to achieve greatest enforcement of law); LaFave, *supra* note 45, at 761 (examining the Court's varying approaches to cost benefit analysis).

87. *See* Kerr, *supra* note 86, at 629–30 (examining the economic balancing approach the Court utilizes in exclusionary rule cases).

88. *See* Anderson v. Creighton, 483 U.S. 635, 659 (1987) (Stevens, J., dissenting) (objecting to a "double standard of reasonableness" in the Fourth Amendment qualified-immunity context).

89. *See* Kamin & Marceau, *supra* note 11, at 590–91 (highlighting double reasonableness as a cause of the Fourth Amendment's remedial focus); Garrett, *supra* note 37, at 81 (highlighting reasonableness as a constitutional remedy rather than element of criminal procedure).

90. *See* Re, *supra* note 9, at 1942 (suggesting that good faith cases are displaced Fourth Amendment holdings rather than exclusionary rule cases).

II. THE GOOD FAITH EXCEPTION CASES ARE DISPLACED FOURTH AMENDMENT HOLDINGS

As the previous Part made clear, the Fourth Amendment exclusion doctrine is a confusing morass that includes two strands of analogous but distinct sets of reasonableness standards. But I argue that after the Court's decision in *Heien v. North Carolina*, the boundaries between these two doctrinal strands have blurred so much that some good faith exceptions may, in fact, be decided as Fourth Amendment cases, rendering the good faith exception to the exclusionary rule redundant in cases of alleged mistakes of law.

A. The Good Faith Exception to the Exclusionary Rule Is Redundant

The latest relevant Fourth Amendment decision from the Court in *Heien* alters the way we can approach questions that courts have traditionally viewed as relating to the good faith exception to the exclusionary rule.[91] *Heien* is similar to the strand of "good faith exception" cases, but it is different in one important respect: in those cases, the Court had already assumed that a Fourth Amendment violation had taken place.[92] Thus, the Court's inquiry was restricted to the remedy of evidence suppression.[93] In *Heien*, the question of a Fourth Amendment violation was on the table. A police officer mistakenly believed North Carolina law required two working brake lights and stopped the car in which Heien was a passenger because one brake light was out.[94] The officer searched the vehicle and discovered contraband.[95] At trial, Heien filed a motion to suppress the evidence discovered during the search, which the trial court denied.[96] The North Carolina Court of Appeals reversed this decision, finding the traffic stop was not reasonable and violated the Fourth Amendment because no traffic violation occurred under state law.[97] The North Carolina Supreme

91. *See* Heien v. North Carolina, 574 U.S. 54, 68 (2014) (holding that officer's mistake of law was reasonable).

92. *See* Davis v. United States, 564 U.S. 229, 239 (2011) (noting the presence of exclusionary rule); Illinois v. Krull, 480 U.S. 340, 359–360 (1987) (highlighting the presence of exclusionary rule).

93. *See Heien*, 574 U.S. at 65–66 (noting that prior Fourth Amendment cases confirmed violations and were limited to remedial actions). Many have criticized the Court's reluctance to take on the substantive questions of Fourth Amendment rights and tendency to resort instead to the narrower question of exclusionary rule remedy. *See* Kamin & Marceau, *supra* note 11, at 619 (questioning the Court's focus on exclusion as remedy).

94. *Heien*, 574 U.S. at 58.

95. *Id.*

96. State v. Heien, 714 S.E.2d 827, 828 (N.C. Ct. App. 2011).

97. *Id.* at 829–31.

Court reversed and held that a police officer's reasonable mistake of law can give rise to the reasonable suspicion required for a traffic stop complying with the demands of the Fourth Amendment.[98] The U.S. Supreme Court affirmed.[99]

Heien presented the question of whether it was reasonable for a police officer to suspect the defendant's conduct was illegal on the basis of a mistaken understanding of a statute, or, in other words, whether the requisite reasonable suspicion to conduct an investigatory traffic stop can rest on a mistake of law,[100] rendering the search reasonable under the Fourth Amendment.[101] The Court found exactly that by explicitly stating the Fourth Amendment standard requires reasonableness, but "[t]o be reasonable is not to be perfect."[102] Therefore, searches based on mistakes of law can be reasonable because it is possible for reasonable police officers to make reasonable mistakes of law.[103] The Court undertook this analysis by setting *Heien* apart from its earlier "good faith exception," which it categorized as dealing specifically with mistakes of law in the context of the exclusionary rule.[104] Interestingly, the Court in *Heien* was inadvertently forced to undertake this approach because North Carolina does not recognize the good faith exception to the exclusionary rule.[105] This analysis was

98. State v. Heien, 737 S.E.2d 351, 352 (N.C. 2012).

99. *Heien*, 574 U.S. at 76.

100. *Id.* at 65–66.

101. *See* Lael Weinberger, *Making Mistakes About the Law: Police Mistakes of Law Between Qualified Immunity and Lenity*, 84 U. CHI. L. REV. 1561, 1568 (2017) (noting the *Heien* majority's reliance on Michigan v. DeFillippo, 443 U.S. 31 (1979)).

102. *Heien*, 574 U.S. at 60 (explaining that the core of Fourth Amendment includes reasonableness).

103. *Id.* at 61.

104. *Id.* at 66.

105. Thirteen states have declined to provide a good faith exception for mistakes of law. *See* State v. Marsala, 579 A.2d 58, 59 (Conn. 1990) (declining to adopt the *Leon* holding on the state level); Dorsey v. State, 761 A.2d 807, 814, 821 (Del. 2000) (refusing to lower Delaware Constitution's probable cause standard); Gary v. State, 422 S.E.2d 426, 430 (Ga. 1992), *abrogated by* Mobley v. State, 834 S.E.2d 785 (Ga. 2019) (leaving decision to adopt *Leon*'s standard to state legislature); State v. Guzman, 842 P.2d 660, 677 (Idaho 1992) (expressing concerns over adopting good faith exception articulated in *Leon*); 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) (disagreeing with the Court's cost-benefit analysis in *Leon*); Commonwealth v. Upton, 476 N.E.2d 548, 554 n.5 (Mass. 1985) (upholding state statute that prevented courts from assessing whether to admit evidence discovered without probable cause); State v. Canelo, 653 A.2d 1097, 1102 (N.H. 1995) (finding the good faith exception is inconsistent with state constitutional provisions); State v. Johnson, 775 A.2d 1273, 1281–82 (N.J. 2001) (refusing to adopt good faith exception); State v. Gutierrez, 863 P.2d 1052, 1053 (N.M. 1993) (finding the good faith exception incompatible with Constitution of New Mexico); People v. Bigelow, 488 N.E.2d 451, 457–58 (N.Y. 1985) (declining to adopt good faith exception from *Leon*); Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991) (declining to adopt good faith exception); State v. Oakes, 598 A.2d 119, 121 (Vt. 1991) (declining to adopt good faith

unlike past cases where the Court framed its holdings in terms of the good faith exception to the exclusionary rule because the parties had already conceded the existence of a Fourth Amendment violation, a concession that muddied the Court's approach.[106]

But since the Court has now accepted that the reasonableness of a mistaken belief that triggers constitutionally questionable conduct is relevant to the evaluation of conduct under the Fourth Amendment, why does the Court have to make a second assessment for the reasonableness of that same mistake at the exclusionary rule stage? There is no need for a "reasonableness" exception to the exclusionary rule when that rule kicks in only after the Court determines the conduct violates the Fourth Amendment's "reasonableness" requirement.[107] If we consider the "good faith exception" strand of exclusionary rule doctrine in the light of *Heien*, it becomes redundant in many categories of cases. If an officer's reliance on a statute is sufficiently reasonable to establish reasonable suspicion, it is now compliant with the Fourth Amendment even if this reliance ultimately turns out to be in error. This reasonable mistake triggers no question of evidence suppression. If, however, the police's mistake of law is unreasonable so that the search or seizure violates the Fourth Amendment, this original assessment that the mistaken reliance on the law was constitutionally unreasonable also answers the question of reasonableness for the purposes of the exclusionary rule. This is so especially since the two standards for what constitutes a reasonable mistake of law—as a matter of Fourth Amendment right and exclusion remedy—are objective and thus overlap. Instead of ruling that the exclusionary rule does or does not apply in one instance or another, courts in these good faith exclusionary rule cases can simply hold that an unreasonable search did or did not take place at all. Thus, certain good faith exclusionary rule categories of cases can now be best understood not as decisions that involve the exclusionary rule but rather as Fourth Amendment holdings.

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exception established in *Leon*); State v. Afana, 233 P.3d 879, 886 (Wash. 2010) (holding good faith exception inconsistent with state constitution); People v. Krueger, 675 N.E.2d 604, 612 (Ill. 1996) (declining to adopt Court's good faith exception as articulated in Illinois v. Krull, 480 U.S. 340 (1987)).

106. *See, e.g.*, Herring v. United States, 555 U.S. 135, 139 (2009) (noting the presence of a Fourth Amendment violation before proceeding to the exclusionary rule analysis); Davis v. United States, 564 U.S. 229, 239 (2011) (same).

107. Richard Re first raised this point in "The Due Process Exclusionary Rule." *See* Re, *supra* note 9, at 1943 (observing that there is no need for "a 'reasonableness' exception to the exclusionary rule, when that rule comes into play only after a violation of the Fourth Amendment's 'reasonableness' requirement").

After *Heien*, it is difficult to understand the rationale behind reassessing reasonableness in the context of evidence suppression after the constitutional assessment when the "ultimate touchstone" of the Fourth Amendment *is*, according to the Court, reasonableness.[108] In practice, an inquiry stemming from a questionable search or seizure begins by first assessing the reasonableness of this search or seizure under the Fourth Amendment through establishing the balance between government interests and individual privacy interests.[109] In the instances where the police have acted under mistaken beliefs about the law, if the mistake of law is reasonable, then it weighs on the side of the government's interests. This does not mean that individuals have less of a right to privacy where there is a reasonable mistake of law but rather that the government retains its interest in the search or seizure to the extent the officer's mistaken belief about the legality of the search or seizure is reasonable. But, if the police officer's mistake of law is unreasonable, the government does not retain the same interest in law enforcement. In these circumstances, the weight tips towards the individual's privacy interests. The officer acting on an unreasonable mistake of law violates the individual's Fourth Amendment rights, which triggers the question of whether the exclusionary rule remedy applies.

Stated differently, when a court engages in questions of the Fourth Amendment in instances where the police have been mistaken about the law, the court is asking whether a police officer engaged in activity that implicates the Fourth Amendment and, if so, whether the officer's actions comply with the dictates of the constitutional

108. *See Heien*, 574 U.S. at 66 (holding that reasonableness is the conclusive barometer of the Fourth Amendment); *Davis*, 564 U.S. at 237–38 (evaluating Fourth Amendment claim under a reasonableness standard); Kansas v. Glover, 140 S. Ct. 1183, 1188–89 (2020) (basing analysis of Fourth Amendment violation on reasonableness); Riley v. California, 573 U.S. 373, 381–82 (2014) (centering Fourth Amendment violation analysis around reasonableness); Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (holding that "the ultimate touchstone of the Fourth Amendment is 'reasonableness' "); Kentucky v. King, 563 U.S. 452, 459 (2011) (reaffirming the base Fourth Amendment reasonableness principle); Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016) (finding that the Fourth Amendment's foundation is based on reasonableness); Karen McDonald Henning, *"Reasonable" Police Mistakes: Fourth Amendment Claims and the "Good Faith" Exception After* Heien, 90 ST. JOHN'S L. REV. 271, 321–22 (2016) (explaining that Fourth Amendment "reasonableness" encompasses mistakes of law and mistakes of fact for officers).

109. *See* Maryland v. King, 569 U.S. 435, 461 (2013) (noting that DNA collection in course of legitimate government interest is not an invasion of individual privacy under the balancing test); Samson v. California, 547 U.S. 843, 848 (2006) (quoting United States v. Knights, 534 U.S. 112, 118 (2001)) (holding that reasonableness is determined by balancing need for individual privacy and investigation of government interests); *Knights*, 534 U.S. at 118–19 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)) (determining that reasonableness depends on a balancing test); Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (finding that traditional standards of reasonableness depend upon a balancing test of individual privacy and government interests).

reasonableness requirement, including a determination on the objective reasonableness of the police mistake of law. If, in the question of remedies, as the Court tells us, the only reason we exclude evidence from criminal trials is to deter police from egregious misconduct, and deterrence requires a certain level of knowledge, deliberation, or high level of assumption of risk, it is hard to imagine how cases of objective mistakes of law in assessing the applicability of the exclusionary rule would be any different to those assessing the constitutionality of the search or seizure.[110]

The majority and concurring opinions in *Heien* help canvass the threshold for instances when police officers are reasonable in mistakenly believing the law covers their conduct; in other words, when a mistake of law is reasonable for the purposes of the Fourth Amendment.[111] Justice Roberts, writing for the majority, emphasized the ambiguity in the statutory language that used both the singular and plural forms for "stop lamp" and the fact that this case was the first time appellate courts had interpreted the ambiguous provision for brake lights.[112] Justices Kagan and Ginsburg, in their concurring opinion, elaborated further on the requirement that mistakes of law be "objectively reasonable" and the "important limitations" of *Heien*,[113] stipulating police mistakes of law are reasonable in "exceedingly rare" circumstances.[114] These "exceedingly rare" circumstances occur when the question of law is considered "genuinely ambiguous" and "so doubtful in construction"[115] that courts and reasonable judges disagree with one another or agree with the officer's statutory interpretation

110. *See* Massachusetts v. Sheppard, 468 U.S. 981, 991 (1984) (emphasizing the deterrent purpose of the rule); Arizona v. Evans, 514 U.S. 1, 14–15 (1995) (noting historical roots of the deterrent purpose); *Herring*, 555 U.S. at 140–41 (clarifying that exclusionary rule applies when there is an appreciable deterrent effect); United States v. Janis, 428 U.S. 433, 454 (1976) (finding that the exclusionary rule is not a right and applies only where it "result[s] in appreciable deterrence").

111. *Heien*, 574 U.S. at 68 (Kagan, J., concurring).

112. *Id.* at 67–68 (majority opinion).

113. *Id.* at 68–69 (Kagan, J., concurring) (highlighting the inability to rely on a police officer's subjective understanding of law and the rigorous analysis the Court undertakes).

114. *Id.* at 70.

115. *Id.* Several courts have adopted an "ambiguity" test as a requirement for applying *Heien*, though it is not clear Justice Kagan intended for this ambiguity test to be a definitive requirement. *See, e.g.*, Flint v. City of Milwaukee, 91 F. Supp. 3d 1032, 1057 (E.D. Wis. 2015) (holding that determining whether a mistake of law was reasonable requires first determining that the statute is ambiguous); United States v. Lawrence, 675 Fed. App'x 1, 4–5 (1st Cir. 2017) (conducting mistake of law analysis by evaluating whether statute was ambiguous); United States v. Diaz, 854 F.3d 197, 203–04 (2d Cir. 2017) (noting that a mistake of law is reasonable only when the law at issue is ambiguous); United States v. Stanbridge, 813 F.3d 1032, 1037 (7th Cir. 2016) (citing United States v. Flores, 798 F.3d 645, 649–50 (7th Cir. 2015)) ("*Heien* does not support the proposition that a police officer acts in an objectively reasonable manner by misinterpreting an *unambiguous* statute.").

after "really difficult" and "very hard" interpretative work.[116] The natural question follows: Are there any instances in which a mistake of law will be unreasonable under the "objective reasonableness" test of the Fourth Amendment but reasonable under the "objective reasonableness" test of the exclusionary rule? The short answer is no, and this is what makes the good faith exception to the exclusionary rule redundant in cases where mistakes can control for both the constitutional right as well as the exclusionary rule remedy.

To see this point, it is helpful to revisit some of the good faith exception cases the Court has decided and examine them to see if they can be framed as Fourth Amendment questions. Doing so under a categorical examination will help assess which categories of "good faith exception" cases beyond those falling directly under *Heien* qualify for my proposed revisionist approach, which do not, and why.

1. Probable Cause Cases

As I mentioned above, some of the good faith exception cases were not decided as Fourth Amendment cases because the parties conceded the constitutional question, thus limiting the Court's analysis to the question of remedy. *Herring* was one such case where the police relied on an erroneous data entry that a warrant was outstanding for the defendant. The parties agreed that the arrest was a violation of the Fourth Amendment but disputed whether contraband found during the search must be excluded.[117] If the parties had not come to this concession, the critical question would have been whether the officer's reliance on the computer system erroneously indicating a warrant as a basis for probable cause to perform a seizure was objectively reasonable under the Fourth Amendment.[118] Justice Roberts, writing for the majority, hinted to this issue, writing that a reasonable but mistaken belief that the officer had probable cause for a search or seizure does not necessarily mean that the person seized or searched has been the victim of a constitutional violation since probable cause "does not demand all possible precision."[119]

According to the Court, the good faith inquiry to the exclusionary rule "is confined to the objectively ascertainable question whether a

116. *Heien*, 574 U.S. at 68–70 (Kagan, J., concurring).

117. Herring v. United States, 555 U.S. 135, 137 (2009).

118. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (recognizing a warrant exception for arrest of an individual who commits a crime in an officer's presence, as long as the arrest is supported by probable cause).

119. *Herring*, 555 U.S. at 139.

reasonably well trained officer would have known that the search was illegal" under a totality of circumstances test.[120] This standard appears no different from the Fourth Amendment objective reasonable mistake of law standard under *Heien* had the Court been given the chance to ask the constitutional question of whether the officer's reliance on an erroneous computer record was "reasonable" within the meaning of the Fourth Amendment. The Court even suggested that searches in reliance on warrants are unreasonable when no valid warrant has actually issued and "systemic" data-entry errors have previously taken place.[121] The Court considered these same points in deciding the matter of exclusion, suggesting that "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation."[122] The overlapping inquiries speak to the misplaced nature of the reasonable mistake question, which courts under my revisionist approach can now assess under the Fourth Amendment, rendering any secondary inquiry under the exclusionary rule redundant. Of course, this does not foreclose the fact that courts can take into account other reasons that would render a search or seizure unconstitutional beyond the issue of mistake of law in their Fourth Amendment assessment.

Consider also Justice Ginsburg's dissent in *Herring*, which identified as the main problem with the majority's treatment of the reasonableness of an officer's mistake of law to be its focus on police culpability demonstrated by systemic error or flagrant intent.[123] The inquiry into the circumstances of the mistake makes more sense as a misplaced inquiry into whether the search or seizure was unreasonable under the Fourth Amendment to begin with. Reasonable and well-trained police officers are bound to be aware, or at least suspicious, of instances of systemic and recurring record-keeping negligence in their police departments, as they are the ones who are performing daily investigations. Reasonable, well-trained officers are bound to identify systemic inaccuracies on collections of electronic information. This awareness manifests in an officer's belief that a search or seizure is unreasonable and therefore unconstitutional because information under these circumstances would not be immediately relied upon to provide the police with probable cause or reasonable suspicion for a

120. *Id.* at 145 (quoting United States v. Leon, 468 U.S. 897, 922 n.23 (1984)).

121. *Id.* at 146.

122. *Id.*

123. *See id.* at 148–49 (2009) (Ginsburg, J., dissenting).

search or seizure. Thus, the police would not act reasonably under the Fourth Amendment if they relied on what they knew or suspected to be inaccurate information to pursue a search or seizure. In turn, isolated incidents would not put police officers on notice to suspect systemic misconduct and be more careful in processing information as it comes in. Therefore, relying on information that officers would reasonably believe to be correct in order to assess their actions under the Fourth Amendment would be, well, reasonable.

Lower courts have already extended the reasonable mistake of law standard of *Heien* to cases requiring probable cause to conclude that police officers who made a reasonable mistake of law had probable cause to search or seize. The majority opinion in *Heien* had, in dicta, referred to reasonable suspicion as well as probable cause, so it is unsurprising that lower courts undertook this extension.[124] For instance, the U.S. Court of Appeals for the Second Circuit, citing directly to *Heien*, found that an officer had probable cause to arrest under a reasonable belief that an apartment-building stairwell is a public place for purposes of open-container law.[125] The U.S. Courts of Appeal for the Fourth and Sixth Circuits have also cited to *Heien* for the proposition that police who made objective mistakes of law nevertheless had probable cause.[126] Taken together, it is safe to suggest that the revisionist approach this Article proposes can apply similarly to cases of probable cause as it does to cases of reasonable suspicion.

2. Binding Law Cases

In *Davis*, the police searched a car based on appellate precedent permitting searches of the passenger compartment when one is arrested in a vehicle.[127] Davis's case was on appeal when the Court overturned this precedent, rendering the manner in which the vehicle's search took place in *Davis* newly unconstitutional.[128] Despite this development, the U.S. Court of Appeals for the Eleventh Circuit

124. *See* Heien v. North Carolina, 574 U.S. 62–63, 66–68 (2014) (discussing probable cause and reasonable suspicion); *id.* at 72–74 (Sotomayor, J., dissenting) (likewise discussing probable cause precedents).

125. United States v. Diaz, 854 F.3d 197, 203–04 (2d Cir. 2017).

126. Cahaly v. Larosa, 796 F.3d 399, 408 (4th Cir. 2015); Beckham v. City of Euclid, 689 Fed. App'x 409, 416 (6th Cir. 2017).

127. New York v. Belton, 453 U.S. 454, 462–63 (1981).

128. Arizona v. Gant, 556 U.S. 332, 343 (2009) (rejecting a broad reading of *Belton* and ruling that police may only search a car incident to arrest if arrestee is unsecured and within reaching distance of the car at time of the search); *see* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that a change of rule in criminal proceedings must apply retroactively to all federal and state cases pending review or not closed).

declined to suppress the contraband discovered in the vehicle and affirmed Davis' conviction.[129] The Supreme Court affirmed, finding that searches conducted in objectively reasonable reliance on binding appellate precedent, while unconstitutional, are not subject to the exclusionary rule.[130] In *Illinois v. Krull*, the police, pursuant to an existing statute that permitted certain warrantless searches, examined stolen motor vehicles in a junkyard.[131] The next day, the Illinois Supreme Court struck down this statute as unconstitutional.[132] The U.S. Supreme Court held that the officer's reliance on the existing statute at the time of the search was reasonable, and therefore the exclusionary rule did not apply due to the good faith exception.[133]

In cases like *Davis* and *Illinois v. Krull*, the question of constitutionality of police conduct will always hinge on the new law that overturns precedent or renders existing statutes unconstitutional. Courts no longer assess the reasonableness of the police conduct in these cases under what was constitutional at the time of the search or seizure, but rather under the new standard that is applied retroactively.[134] Thus, these police mistakes of law are largely artificial. The issue is not really a matter of a mistaken reliance on the law but instead one of nonmistaken reliance on what was good law but is no longer controlling after the fact, provided that the case is pending in the courts. Thus, any new change in the law will always control the Fourth Amendment inquiry under retroactivity rules, and police conduct will always be deemed unreasonable. As a result, the only step at which courts can actually assess the reasonableness of the police mistake of law based on what controlled at the time of the search or seizure is at the exclusionary rule remedy, through the good faith exception. In this category of cases, where police rely on later invalidated law as the case is pending in the courts, the good faith exception to the exclusionary rule does not become redundant despite my proposed revisionist approach.

B. The Case for Constitutional Innovation and Erosion

Some might argue there is more value in the status quo of having two distinct moments of assessing the reasonableness of a police mistake of law in a search or seizure and that, if we reduce them into

129. United States v. Davis, 598 F.3d 1259, 1268 (11th Cir. 2010).
130. Davis v. United States, 564 U.S. 229, 249–50 (2011).
131. 480 U.S. 340, 343 (1987).
132. *Id.* at 344.
133. *Id.* at 360.
134. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

one assessment under the proposed revisionist approach, courts may lose the benefit of saying some searches are unreasonable, and thus unconstitutional, but just not unreasonable enough to apply the exclusionary rule. They might also argue that the proposed approach would erode the Fourth Amendment, as courts may give too much of the benefit of the doubt to police officers when assessing their mistake or be tempted to find mistakes of law reasonable and therefore find searches or seizures constitutional—even when courts really think they are unconstitutional—to avoid the exclusionary remedy that would result.[135]

First, courts arguably already do this whether they accept my revisionist approach or not. Consider the highly publicized O.J. Simpson criminal case. The court had to decide on the existence of exigent circumstances in discussing potential Fourth Amendment violations and the exclusionary rule remedy after the police performed a warrantless search in the defendant's residence.[136] The presence of what appeared to be particularly important evidence, such as a bloody glove, arguably pushed the court to find that the warrantless search was justified by exigent circumstances despite the absence of a victim or offender in the premises searched and to deny the defense's motion to suppress the evidence.[137] While this case differs in part from our cases here, it speaks to the point that courts already take into account the potential outcome of remedies when they ascertain rights.

Second, this critique resembles a line of thinking emphasizing that curtailments of remedies may encourage courts to be more liberal

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135. *See, e.g.*, *Search and Seizure—Reasonable Mistake of Law*—Heien v. North Carolina, 129 HARV. L. REV. 251, 259 (2015) (discussing *Heien* and observing that the concurrence's framework used unworkable terms); Richard H. McAdams, *Close Enough for Government Work?* Heien*'s Less-Than-Reasonable Mistake of the Rule of Law*, 2015 SUP. CT. REV. 147, 148–49, 178 (criticizing *Heien* for granting police more discretion and for its inconsistency with the vagueness doctrine). *But see* Orin Kerr, *Reasonable Mistake of Law Can Generate Reasonable Suspicion, Supreme Court Holds*, WASH. POST: VOLOKH CONSPIRACY (Dec. 15, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/15/reasonable-mistake-of-law-can-generate-reasonable-suspicion-supreme-court-holds [https://perma.cc/6J42-B77J] (arguing that the Court in *Heien* went far in describing "a much narrower test than a reasonable officer" to emphasize its exceptional applicability).

136. *See Simpson Murder Case: Transcript of Ruling Denying Motion to Suppress Evidence*, L.A. TIMES (July 8, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-07-08-mn-13294-story.html [https://perma.cc/9DJC-3J99].

137. *See id.*:

> Contrary to the suggestions in defense argument [sic] that this ruling . . . would mean the end of the 4th Amendment . . . , I disagree. And I think one only needs to look as far as the fact that a short time after the glove was discovered, that the officers did in fact obtain a search warrant . . . .

in facilitating constitutional change.[138] Assuming that constitutional rights are dynamic through interpretation, this could suggest that curtailment of the exclusionary rule remedy may in fact result in the positive effect of courts developing Fourth Amendment doctrine more liberally. This idea is most associated with damages-producing remedies. John Jeffries argues that when remedies for constitutional violations are limited, courts may foster constitutional law development.[139] "The doctrines that deny full individual remediation reduce the cost of innovation, thereby advancing the growth and development of constitutional law."[140] Jeffries uses the example of the structural reform litigation cases, particularly *Brown v. Board of Education*.[141] At the time when the Court decided *Brown*, class action lawsuits did not permit "mass tort" litigation,[142] and courts had not rediscovered § 1983 damages actions.[143] Jeffries argues that if *Brown* had been decided today, the potential damages to be paid by local school districts would have been astronomically high due to the expansion of available remedies,[144] so that the Court may have come out differently on the case or delayed the decision further.[145] In other words, a stronger remedy may cause the stagnation of the right.

To the degree this argument holds, it does so mostly in the context of remedies that entail multiparty actions and compensation rather than prophylactic remedies like the exclusionary rule. The remedial doctrine for unconstitutional searches has moved away from the pecuniary damages system before *Mapp*,[146] in part to remove the counterincentives of damages but also to allow remediation by depriving the police of their ill-gotten gains.[147] Even if the argument

138. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 113 (1999) (noting the cost incentive for constitutional change and shift towards substantive constitutional reform when there is a gap between rights and remedies).

139. *Id.* at 90.

140. *Id.* at 98.

141. *Id.* at 101–03; Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954). For the history of *Brown*, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); and Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

142. *See* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 945 (1995) (noting that the term "mass tort" was not yet coined as late as 1969).

143. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) (holding that the city of Chicago was not liable for a Fourth Amendment violation by city police officers because § 1983 did not extend to municipal governments).

144. Jeffries, *supra* note 138, at 101–02.

145. *Id.*

146. *See* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 449 (1997) (noting a decrease in damages claims as remedy).

147. *See id.* (finding that a damages system highlights extreme police misconduct such as police brutality and illegal arrests).

were applicable to the exclusionary rule type of remedy, while it is impossible to predict how courts would transfigure constitutional rights, assessing police mistakes of law as part of the inquiry into Fourth Amendment rights could push Fourth Amendment doctrine towards a more rule-like standard with clearer and more precise permutations, engendering constitutional innovation instead of perpetuating existing stagnation.

III. THE IMPLICATIONS OF VIEWING GOOD FAITH EXCEPTION CASES AS FOURTH AMENDMENT CASES

Seeing the good faith exception cases of the exclusionary rule as Fourth Amendment cases that involve an inquiry into the potential constitutional violation has a number of important implications. In this Part, I discuss how this approach fits within the larger debate about constitutional rights and remedies and existing doctrine on Fourth Amendment exclusion; how it benefits the evolution of Fourth Amendment doctrine through criminal courts, the establishment of bright-line rules for police misconduct, and the preservation of a meaningful exclusionary rule, while not negatively impacting defendants' prospects for 42 U.S.C. § 1983 civil rights claims.

A. Fourth Amendment Remedial Equilibration

The cause and effect relationship that the Court established in the good faith exception strand of cases between the culpability of the police on the one hand and the deterrence value of evidence suppression on the other has prompted several commentators to side with Justice Breyer's dissent in *Davis*, maintaining the Court treats the exclusionary rule more like a punitive sanction rather than a remedy to Fourth Amendment violations.[148] They argue the Court has severed right from remedy, leaving individuals with a Fourth Amendment right but no effective remedy in criminal trials.[149] Seeing the good faith

148. *See* Davis v. United States, 564 U.S. 229, 254 (2011) (Breyer, J., dissenting) (finding that retroactively applying a new rule implies the existence of a remedy); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 825 (2000) (noting the Court's use of exclusion as remedy only after cost-benefit analysis); David Gray, Meagan Cooper & David McAloon, *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 11 (2012) (analyzing the use of the exclusionary rule as the only remedy for a Fourth Amendment violation after *Weeks*).

149. *See* Thomas K. Clancy, *The Fourth Amendment's Constitutional Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 378 (2013) (analyzing Justice Alito's decision to interpret the exclusionary rule as a judicially created remedy, rather than a Fourth Amendment right).

exception cases as Fourth Amendment cases that determine when the remedy is triggered can alleviate this tension.

The Court, in keeping the exclusionary rule separate from the Fourth Amendment, has consistently shied away from drawing any meaningful connection between Fourth Amendment constitutional rights and the exclusionary rule remedy. This approach reflects the broader constitutional legal theory and jurisprudential view of a distinction between constitutional law and ordinary law,[150] as well as the principle of separation of powers between the legislature and judiciary.[151] Owen Fiss describes rights as "the true meaning of . . . constitutional values such as equality, liberty, [and] due process"[152] while remedies are a "subsidiary" and "instrumental" means to "actualize" these values, not corollaries to rights.[153] This "rights-essentialist"[154] approach anticipates that courts will corrupt and distort the meaning of constitutional rights by tailoring them to fit available remedies.[155]

As the Fourth Amendment exclusion doctrine stood before *Heien*, courts had no opportunity to examine how a reasonable mistake of law impacted the constitutionality of a search or seizure under the Fourth Amendment. If an officer acted under a mistaken reliance on a law, however reasonable, courts would find that a constitutional violation had taken place and defendants would likely move to suppress evidence. In the assessment of the remedy, courts would examine whether the mistake of law was reasonable, which meant that evidence would not be suppressed, or if the mistake of law was unreasonable, which meant that evidence would be suppressed. In other words, the Court reserved the exclusionary rule remedy for mistakes of law that were so unreasonable that courts deemed them necessary to deter in

150. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (explaining this distinction as means to protect the purity of constitutional rights rather than dilute those rights with real-world application).

151. Brittanee Friedman, Comment, *Constitutional Law—Evidence Seized Based on Reasonable Police Mistake of Law Held Admissible in North Carolina Court*—State v. Heien*, 737 S.E.2d 351 (N.C. 2012)*, 47 SUFFOLK U. L. REV. 249, 256 (2014) (noting the expected separation of powers responsibilities between legislature and judiciary).

152. Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 51 (1979). *But see* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 677–80 (1983) (disagreeing with Fiss's bifurcation of constitutional right and remedy).

153. Fiss, *supra* note 152, at 51–52.

154. *See* Levinson, *supra* note 150, at 858 (naming the theory of rights as separate from remedy as "rights essentialism").

155. *See* Fiss, *supra* note 152, at 54–55 (warning that judges may narrow rights to better match remedies); PETER SCHUCK, SUING GOVERNMENT 26–28 (1983) (highlighting the distinct differences between rights and remedies and flaws when one mistakenly compares them—rights are present focused and encourage conversation and transformation; remedies are future oriented, rational, and technical).

the future. However, other unreasonable searches that were also unconstitutional did not require the application of the exclusionary rule because courts considered them less worthy of deterrence.

After *Heien*, however, courts have the opportunity to examine the officer's mistake of law at the step of assessing the constitutionality of a search or seizure. If an officer's mistake of law is reasonable, this means that no constitutional violation has taken place and therefore no remedy is triggered. If, however, an officer's mistake of law is unreasonable, courts will find that a constitutional violation has taken place, triggering the question of evidence suppression as a remedy. Under the proposed revisionist approach in the cases to which it applies, if courts find a constitutional violation, they will also find that evidence suppression applies directly. This approach ties the Fourth Amendment right more directly to the remedy, as exclusion of evidence will now flow directly from a constitutional violation. Does this suggest that the Fourth Amendment exclusion analysis is directly derived from the Constitution? Yes and no. Yes, in the sense that when the Court articulates the appropriate standard for Fourth Amendment reasonableness, it is, in fact, making constitutional law. At the same time, I do not claim the exclusionary rule itself forms part of the Fourth Amendment. This claim would be difficult, perhaps impossible, to defend persuasively under existing doctrine,[156] though some have tried.[157] Instead, reasonableness in the context of Fourth Amendment exclusion represents the constitutional standard that helps implement the criminal procedure rights and remedies to which it applies.

In judicial practice, "constitutional rights are inevitably shaped by, and incorporate, remedial concerns."[158] This idea, which Daryl Levinson coined as "remedial equilibration,"[159] reflects the way I

156. *See* Davis v. United States, 564 U.S. 229, 238 (2011) (stating the exclusionary rule is a judicially created doctrine); Herring v. United States, 555 U.S. 135, 139 (2009) (noting the Fourth Amendment does not contain the exclusionary rule).

157. *See* Bradley, *Reconceiving the Fourth Amendment*, *supra* note 45, at 231 (arguing that a new approach to the exclusionary rule will be found in old words of the Fourth Amendment); *see also* LAFAVE, *supra* note 4, § 1.3(c) (explaining that courts previously held the exclusionary rule was part of the Fourth Amendment).

158. Levinson, *supra* note 150, at 873; PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES 811–14 (2d ed. 1994) (discussing the use of remedies to structurally redefine rights in reform cases); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 683–88 (1982) (analyzing the Court's tendency to limit the ability of federal judges to determine remedy); *cf.* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (noting various results that can occur when a court determines an entitlement).

159. Levinson, *supra* note 150, at 858.

understand the relationship between the Fourth Amendment and the exclusionary rule and provides an additional reason why the proposed revisionist approach will not result in the reduction of Fourth Amendment protections but rather in their enhancement. According to remedial equilibration, rights themselves are shaped by the remedy that follows their violation. The value of the right is also a function of the nature of consequences the remedy brings,[160] that is, having a "right with less remedy is worth *less* and a right with more remedy is worth *more*."[161] The relationship between rights and remedies is thus reciprocal. Unlike rights-essentialist approaches that identify causation running only from rights to remedies and emphasizing remedies as a product of rights, rights equilibration identifies causation also running from remedies to rights, where remedies also shape and affect rights through judicial decisions.[162] Any expansion or contraction of the remedy can cause constitutional rights to be enlarged, compressed, or eviscerated.[163]

In the context of Fourth Amendment exclusion, if we accept that some of the shape and value of the Fourth Amendment right is tied to what the courts will do if the police violate it, the erosion of the exclusionary rule remedy through its series of exceptions equals the erosion of the Fourth Amendment right.[164] And indeed, the current erosion of the exclusionary rule remedy through the doctrine is, in fact, responsible for the shrinking of Fourth Amendment protections. Carol Steiker has, in fact, documented how the proliferating exceptions to Fourth and Fifth Amendment remedies have eroded the substance of these constitutional rights.[165]

In the pre-*Heien* doctrine, the balancing of individual privacy against governmental intrusion as a measure of Fourth Amendment reasonableness is undermined by the differently motivated balancing of individual privacy versus police deterrence under the remedial analysis of the good faith exception's reasonableness question. But if one accepts

160. *Id.* at 874.

161. *Id.* at 904 (emphasis added).

162. *Id.* at 884.

163. *Id.* at 887.

164. *See, e.g.*, KARL N. LLEWELLYN, THE BRAMBLE BUSH 88 (1960) ("Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the courts will do."); *see also* Wood & Selick v. Compagnie Generale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930) (Judge Learned Hand, writing for the court, noted that "a right without any remedy is a meaningless scholasticism").

165. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2485–2503, 2505–21 (1996) (showing how in the Fourth Amendment context both the right (i.e., where warrants are required) and the remedy of exclusion have been substantially scaled back).

that courts consider remedies when they discern rights under remedial equilibration, the revisionist approach of this Article would in fact lead to more expansive Fourth Amendment protections. By effectively tethering the application of the remedy to the violation of the constitutional right, the exclusionary rule becomes a clear and direct remedy, the enhancement of which bolsters the Fourth Amendment rights that it is tied to. If nothing else, courts will now be forced to move beyond principled or pragmatic divides between rights and remedies and instead focus on the substantive standards underpinning them. Shifting the courts' inquiries in this way will provide an opportunity to advance constitutional doctrine.

B. Fourth Amendment Evolution in Criminal Courts & Establishing Bright Lines for Police Misconduct

Viewing the good faith exception to the exclusionary rule cases as Fourth Amendment cases can create coherence and clear standards within the Fourth Amendment by forcing its evolution and norm articulation through criminal proceedings.[166] In the past, the Court has declared that most Fourth Amendment issues arise out of criminal cases.[167] But as it stands, oftentimes the inquiry centers not around whether there was a Fourth Amendment violation, but whether the "good faith" exception should bar suppression of the evidence. Without the problematic outcomes of the "good faith" exception strand of cases and by shifting courts' focus instead to the reasonableness inquiry under the Fourth Amendment in the cases of police mistakes of law, criminal cases can contribute more to the evolution of Fourth Amendment doctrine.[168]

Parties and courts will have to address all issues of mistake of law reasonableness on the merits of the constitutional violation instead of conceding such a violation with near certainty that they then can claim an exception to the application of the exclusionary rule on the basis of "good faith."[169] The erosion of the exclusionary rule as an effective remedy has bred cynicism towards the Fourth Amendment

166. *See* Kamin & Marceau, *supra* note 11, at 630 (emphasizing that the Court revisiting Fourth Amendment doctrine would be costless).

167. *See* Pearson v. Callahan, 555 U.S. 223, 242 (2009).

168. Most criminal cases take place in state court as *Stone* bars federal habeas review of Fourth Amendment issues, and the only other available federal review is discretionary certiorari review in the Court. *See* Stone v. Powell, 428 U.S. 465, 493–94 (1976).

169. For a different opinion on basis of the *Heien* decision, compare McAdams, *supra* note 135, at 178.

reminiscent of the pre-*Boyd* era where,[170] due to lack of available remedy, the Court never addressed the meaning of the Fourth Amendment at all.[171] Because of the erosion of the exclusionary rule as a remedy, courts have thus far tended to only address the original Fourth Amendment issues in obiter dictum, or not at all,[172] effectively stilting the development of Fourth Amendment doctrine. Recognizing the redundancy of the good faith exception in certain categories of cases has the potential of advancing Fourth Amendment doctrine through criminal courts, as the Court always envisioned.[173]

The Court has also emphatically spoken about the importance of having bright-line rules regarding the Fourth Amendment in order to better guide police officers who need to make swift decisions.[174] Existing doctrine has shifted this much-needed task to a case-by-case analysis of remedial issues in the good faith exception cases.[175] By answering the question of reasonableness of police mistakes of law as part of the inquiry assessing the Fourth Amendment substantive right, courts will have the opportunity to establish bright-line rules that govern police (mis)conduct in cases of mistakes of law for the purpose of upholding constitutional rights. Such normative development of the Fourth Amendment will hopefully rid many of the impression that courts pick and choose how and when they uphold the constitutional right, which has made it increasingly difficult for individuals to know whether they have been subjected to an unlawful search or seizure and how to litigate this matter with regards to suppressing potentially unlawful evidence.[176]

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170. *See* Boyd v. United States, 116 U.S. 616, 641 (1886) (holding that unreasonable searches and seizures violate a person's Fourth Amendment rights).

171. *See, e.g.*, Albert W. Alschuler, *The Exclusionary Rule and Causation*: Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1751 (2008) (recognizing the rarity of judicial guidance to police prior to *Mapp v. Ohio*); *see also* Kerr, *supra* note 60, at 1092–93 (discussing Paul Mishkin's argument in *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965)).

172. *See* Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 732 (2011) (noting that finding a violation would be pointless without a remedy).

173. *See* Pearson v. Callahan, 555 U.S. 223, 241–42 (2009).

174. New York v. Belton, 453 U.S. 454, 458 (1981); United States v. Robinson, 414 U.S. 218, 225–26 (1973). For critiques of the Court's embrace of bright-line rules, see Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 342, 353 (2004); and Albert W. Alschuler, *Bright-Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 231 (1984).

175. *See* Ngov, *supra* note 80, at 188–91 (examining the lack of incentive for police to learn law); *see also* Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1856–59 (2004) (examining the confusion among police and judges over police practices during traffic stops, as seen in *Whren*).

176. Garrett, *supra* note 37, at 96; Kit Kinports, *The Origins and Legacy of the Fourth Amendment Reasonableness-Balancing Model*, 71 CASE W. RSRV. L. REV. 157, 214–18 (2020)

C. Preserving the Exclusionary Rule

The Court has treated the automatic application of the exclusionary rule to Fourth Amendment violations as the source of increased social costs of suppression, moving away from the reflexive nature of the remedy by grounding the exclusionary rule in policy arguments based on deterrence.[177] This move has caused valid concerns that the exclusionary rule is on the road to extinction as a remedy.[178] The proposed approach shifts the burden away from the exclusionary rule, having long been the center of judicial attack, and allows it to develop as a direct remedy to Fourth Amendment violations by alleviating the concerns of both those emphasizing the dangers of reflexive evidence suppression and those fearing the dissolution of the exclusionary rule.

Acknowledging the redundancy of the good faith exception to the exclusionary rule when mistakes of law are assessed in the first step of the constitutional assessment in searches and seizures allows courts to build a constitutional framework that does not depend on and is not affected by the application of the remedy. Rather, it operates deliberately on the basis of courts' comprehensive evaluation of potential claims under constitutional standards. This outcome will arguably also further the exclusionary rule goal of deterring future police misconduct as it ties deterrence directly with the conduct courts are aiming to deter under the Fourth Amendment. Finally, without the need for the good faith strand of exceptions, the exclusionary rule will less likely be the subject of poorly justified, proliferating exceptions that are a back door for judicial policymaking sometimes intending its extinction.

D. No Negative Impact for § 1983 Claims

Even though the revisionist approach I propose in this Article directly relates to procedures before criminal courts, decisions before these courts on potential Fourth Amendment violations can affect

(analyzing the divide among state and lower courts over balancing analysis and lack of clear rationale given by courts).

177. *See, e.g.*, Davis v. United States, 564 U.S. 229, 236–37 (2011) (explaining the exclusionary rule's purpose is to deter violations); Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388–89 (1964) (highlighting that the exclusionary rule functions to create obedience to the Fourth Amendment); Herring v. United States, 555 U.S. 135, 143 (2009) (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965)) (noting the exclusionary rule's sole purpose is deterrence).

178. Wasserstrom & Mertens, *supra* note 45, at 175–79.

constitutional tort claims.[179] Would adopting this revisionist proposal mean that a defendant may be worse off in the process of seeking compensatory, declaratory, or injunctive relief through a 42 U.S.C. § 1983 civil rights claim against the arresting officer or municipality? The short answer is no.

Federal law provides civil liability for anyone who, under the color of law, violates another's federal rights.[180] This is limited by the doctrine of qualified immunity,[181] which "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights.' "[182] The Court has said that a "clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' "[183] The threshold for a right being clearly established, such that liability can attach, is quite high: the Court has held that "precedent must have placed the statutory or constitutional question beyond debate."[184] "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' "[185]

While incorporating mistakes of law in the context of Fourth Amendment exclusion may appear to have parallels with the doctrine of qualified immunity,[186] they have important threshold differences that explain why I do not foresee any negative impact on constitutional tort claims. In *Heien*, the Court made clear that the reasonable police mistake of law threshold "is not as forgiving [to the officer]" as the one employed in "qualified immunity."[187] Justice Kagan, in her concurrence, went a step further to emphasize that the Fourth Amendment reasonable mistake of law assessment is "more demanding" on police officers than the assessment for qualified immunity, purposely drawing distinct lines between the two tests and their thresholds.[188] Despite the absence of clearer language in the Court's holding regarding how much *more* forgiving to the officer or demanding to the plaintiff the qualified

179. *See* Teressa Ravenell & Riley H. Ross III, *Policing Symmetry*, 99 N.C. L. REV. 379, 400–10 (2021) (arguing that issue preclusion and claim preclusion have the potential to impact § 1983 claims).

180. 42 U.S.C. § 1983.

181. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

182. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

183. *Id.* (quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)).

184. *Id.* at 12 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

185. *Id.* (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

186. *See* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 74 (2011) (suggesting that, pre-*Heien*, reasonable mistakes of law are not Fourth Amendment violations).

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

188. *Id.* at 69 (Kagan, J., concurring).

immunity test is, we do know that the Court has intended for this standard to set a higher threshold to establish liability for the constitutional violation when compared to the Fourth Amendment reasonableness standard.[189] If nothing else, what the Court made clear is that there are cases in which a police officer's mistake of law is unreasonable under the Fourth Amendment, but the same officer is entitled to qualified immunity barring civil liability for the Fourth Amendment violation.[190] This is the reason why the proposed approach would leave the outcome of § 1983 claims unaffected.

To illustrate this point, I lay out two potential scenarios that can arise in the same hypothetical case: (1) under the existing legal framework; and (2) under my proposed framework. Assume the following fictional scenario: The police have received a tip that illegal drugs can be found at John Doe's home. They go to a magistrate to get a warrant. The magistrate grants the warrant under a mistaken belief that she has jurisdiction over the place to be searched. John Doe is now at trial and argues in court that the police have violated his Fourth Amendment rights by conducting an unlawful search based on an invalid warrant.

Scenario 1—Existing Framework: At the state criminal court, the judge will have to ask whether the search was unreasonable under the Fourth Amendment in order to determine whether the police violated John Doe's Fourth Amendment rights. Under the *Leon* line of cases,[191] the judge will likely hold that there was a Fourth Amendment violation against John Doe because a search under an invalid warrant is an unreasonable search.[192] When John Doe moves to suppress the evidence collected through this unlawful search, the criminal court will likely dismiss the motion because they will find that the police's mistaken belief on the validity of the warrant was in "good faith" reasonable reliance on the law, which means that exclusion will not deter future police misconduct. If John Doe wishes to also file a § 1983 civil claim against the arresting officer, the federal court will, under *Allen*,[193] likely follow the state criminal court's Fourth Amendment

189. *Id.* at 66 (majority opinion).

190. *See* Weinberger, *supra* note 101, at 1582 (emphasizing the distinction between *Heien*'s holding and qualified immunity); *see also* United States v. Longoria, 183 F. Supp. 3d 1164, 1181 (N.D. Fla. 2016) (explaining that competent officers can still commit unreasonable mistakes).

191. Arizona v. Evans, 514 U.S. 1 (1995); Herring v. United States, 555 U.S. 135 (2009); Illinois v. Krull, 480 U.S. 340 (1987); United States v. Leon, 468 U.S. 897 (1984).

192. *Leon*, 468 U.S. at 905–25.

193. *See* Allen v. McCurry, 449 U.S. 90, 96 (1980) (noting that federal courts generally give preclusive effect to state court judgments).

finding that a constitutional violation has taken place.[194] When the court examines qualified immunity, they will have to assess whether the right violated was clearly established at the time that the police officer committed the act. Given the Court's existing threshold analysis under *Heien*, it is near impossible that an officer's mistake of law would be sufficiently reasonable to warrant no suppression in the criminal context while the defendant's right is simultaneously so well-established as to survive a qualified immunity defense.

Scenario 2—Revisionist Framework: The state criminal court holds that no Fourth Amendment violation took place because the police mistake of law was reasonable, which renders the search reasonable under the Fourth Amendment. On this basis, the criminal court denies the motion to suppress that John Doe's attorney has filed. If John Doe wishes to file a § 1983 civil claim against the arresting officer, he will likely be precluded from bringing this under *Allen*[195] since the criminal court has already found that no Fourth Amendment violation has taken place. Even if the state criminal court constitutional decision did not bar John Doe from bringing a § 1983 claim, the federal court would likely find either no Fourth Amendment violation or no clearly established right, if the court began with the qualified immunity analysis.[196] These equivalent end results in either scenario are because, given the Court's existing threshold analysis under *Heien*,[197] the standard for reasonable mistake of law under the Fourth Amendment is less forgiving to the officer than that for qualified immunity for the § 1983 claim.[198] This means that John Doe would never succeed on the § 1983 claim even if preclusion was not an issue.

While I am sympathetic to the concerns that developments in Fourth Amendment litigation could affect important civil rights claims under § 1983, for the reasons discussed above I argue that this is not plausible. Given the higher threshold for qualified immunity, any case that fails to survive the reasonable mistake of law standard under the Fourth Amendment would have otherwise lost under qualified immunity because the right would not have been sufficiently clearly established under the existing legal standard.

194. *See* Ravenell & Ross, *supra* note 179, at 401 (examining how § 1983 binds courts to prior probable cause precedent).

195. *Allen*, 449 U.S. at 96.

196. *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (holding that courts are not required to begin their analysis with the Fourth Amendment question).

197. Heien v. North Carolina, 574 U.S. 54, 65–66 (2014).

198. *Id.* at 67.

CONCLUSION

The good faith exception to the exclusionary rule has long been a source of profound confusion and critique. Yet perhaps the solution to the doctrine's problem has long been staring us in the face. After the Court's decision in *Heien*, police officers' reasonable mistakes of law can now form part of the inquiry into the Fourth Amendment constitutional right, subsuming the repeat, and, as I argue, redundant mistake of law inquiry into the exclusionary rule remedy. This allows courts to finally approach matters of police mistakes of law not as a distinct matter of remedy, but as part of one cohesive inquiry stemming from Fourth Amendment substance and resolving the question of exclusionary rule remedy. But why should we care about this revisionist approach to Fourth Amendment exclusion? First, there is value to a system's internal coherence. For too long our doctrine on Fourth Amendment exclusion has rested on fundamental problems and ambiguities. Courts have long approached the exclusionary rule as a medicine to discontinue before it turned to poison, and scholars have repeatedly treated the resulting Fourth Amendment exclusion doctrine as futile or hopeless. The revisionist approach of this Article can provide coherence in an area that requires definite rules and standards to delimit police discretion. Most importantly, this approach has one practical payoff: it requires courts to be clear about how police mistakes of law weigh into the balance between individual privacy and government interests in policing rather than using the "good faith" exception as an easy way to dismiss defendants' suppression motions. Courts will no longer be able to broadly declare that the police have violated the Fourth Amendment while in the same breath undercutting the value of remedying this violation by using two different assessments of what constitutes one reasonable police officer. That is just bad reasoning.