

# **Some Mistakes are Greater than Others: Why a Categorical Exclusion is a Proper Response to a Police Officer’s Mistake of Law During a Traffic Stop**

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## INTRODUCTION

Our police officers are charged with keeping society safe. This task is continuous and comprehensive. In 2011, almost sixty-three million Americans age 16 or older had contact with police.<sup>1</sup> Of these individuals, nearly twenty-six and a half million were involved in involuntary traffic stops.<sup>2</sup> Mistakes are bound to happen with this many traffic stops, and of course, humans make mistakes, as legions of quotes evidence.<sup>3</sup> These mistakes range from the minor gaffe, i.e., forgetting car keys, to a major

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<sup>1</sup> LYNN LANGTON & MATTHEW DUROSE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 1 (2013), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4779> (last visited Oct. 15, 2014).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> See, e.g., *Quotes About Mistakes*, GOODREADS.COM, <http://www.goodreads.com/quotes/tag/mistakes> (last visited Sept. 29, 2014); *Mistakes Quotes*, BRAINYQUOTE, [www.brainyquote.com/quotes/keywords/mistakes.html](http://www.brainyquote.com/quotes/keywords/mistakes.html) (last visited Sept. 29, 2014); *Quotations about Mistakes*, THE QUOTE GARDEN, [www.quotegarden.com/mistakes.html](http://www.quotegarden.com/mistakes.html) (last visited Sept. 29, 2014).

transgression, i.e., accidentally discharging a gun that results in an injury or death.<sup>4</sup> Perhaps contrary to popular belief, our police officers are no different. This Comment focuses on the mistakes of law police officers commit during traffic stops.

Let us illustrate this point with two hypothetical situations. In scenario one, you are driving on the highway at night. Flashing lights suddenly appear in your rearview mirror. Not knowing if you are the target, you pull over to the side of the road. The police officer stops, gets out of the car, and walks over. The police officer says you were pulled over because one of your taillights was out, a violation of the local traffic law. Both taillights, however, do work. The officer mistakenly believed only one light worked, while both, in fact, function properly. Nevertheless, he asks you for your license and registration. As he waits, the police officer smells marijuana, and asks if he can search your vehicle. You oblige his request. The subsequent search reveals a small bag of marijuana. You are arrested and charged with possession and perhaps even intent to distribute.<sup>5</sup>

In scenario two, you are pulled over in the same manner and for the same reason – an allegedly faulty taillight. This time the taillight does not work. The police officer articulates that driving with only one taillight violates the law. In reality, this is not correct. It is not illegal to drive with a faulty taillight, but the same search takes place and the same marijuana is found. You are arrested and charged with possession and intent to distribute.

Although the two hypotheticals contain several small differences, the fundamental difference is the police officer's mistake in the initial traffic stop. In scenario one, the police officer initiated a traffic stop while operating under a *mistake of fact* – a mistake of a circumstance or detail.<sup>6</sup> In this situation, the mistake of fact was that one taillight was broken, when it was not. These types of mistakes result in consistent outcomes in federal and state courts alike. In scenario two, however, the police officer committed a *mistake of law* – believing specific conduct violates a law

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<sup>4</sup> See, e.g., *Burrell Tells Giants He Shot Himself in Leg by Accident*, ESPN (Nov. 30, 2008, 9:18 PM), <http://sports.espn.go.com/nfl/news/story?id=3733021>; Tina Kelley, *Gun Owned by Ex-Athlete Killed Driver of Limousine*, THE NEW YORK TIMES (Feb. 16, 2002), <http://http://www.nytimes.com/2002/02/16/nyregion/gun-owned-by-ex-athlete-killed-driver-of-limousine.html>.

<sup>5</sup> Forget for a moment that a number of states have legalized marijuana. For this introduction, assume marijuana is still completely illegal everywhere.

<sup>6</sup> BLACK'S LAW DICTIONARY 1092 (9th ed. 2009) (“A mistake about a fact that is material to a transaction; any mistake other than a mistake of law.”).

when it really does not.<sup>7</sup> Mistakes of law, by contrast, result in varying outcomes in federal and state courts alike.

Courts generally give deference to a police officer's mistake of fact. The Supreme Court has articulated that a reasonable mistake of fact does not negate probable cause.<sup>8</sup> In traffic stops, courts often look at the reasonableness of the factual mistake.<sup>9</sup> Courts have had little difficulty asserting that a mistake of fact, if reasonable, does not constitutionally invalidate a traffic stop.<sup>10</sup>

Identifying the proper discourse for a mistake of law has not been so easy, as mistakes of law for traffic stops have spurred confusion and inconsistency among the courts. The federal courts of appeals in particular are in disagreement on the issue.<sup>11</sup> The minority view permits admission of evidence under an objectively reasonable examination of the circumstances, such as whether the actual mistake of law was reasonable. The majority view, with which this Comment agrees, holds that a traffic stop premised on a mistake of law is an automatic violation of the Fourth Amendment, and should therefore result in a categorical exclusion of any evidence subsequent to the initial stop.<sup>12</sup>

This Comment takes the position that a categorical exclusion is the correct response to a police officer's traffic stop when conducted on a mistake of law. Part II of this Comment provides background on the issue, first by reviewing the difference between reasonable suspicion and probable cause within the context of a traffic stop. The section then provides a brief overview of the Fourth Amendment, its exclusionary rule, and the good faith exception doctrine. Next, the section offers a thorough examination of the split that is currently plaguing circuit courts, reviewing the majority view's categorical exclusion, examining the minority view's

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<sup>7</sup> *Id.* (“A mistake about the legal effect of a known fact or situation.”).

<sup>8</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (“It is apparent that in order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made . . . is not that they always be correct, but that they always be reasonable.”).

<sup>9</sup> *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006) (“When an officer makes a stop based on a mistake of *fact*, we ask only whether the mistake was reasonable.”).

<sup>10</sup> *United States v. Mariscal*, 285 F.3d 1127, 1131 (9th Cir. 2002) (“[A] mere mistake of fact will not render a stop illegal, if the objective facts known to the officer gave rise to a reasonable suspicion . . . .”); *see also*, *United States v. Gonzalez*, 969 F.2d 999, 1006 (11th Cir. 1992) (“A policeman’s mistaken belief of fact can properly contribute to a probable cause determination and can count just as much as a correct belief as long as the mistaken belief was reasonable in the light of all the circumstances.”).

<sup>11</sup> *See* discussion *infra* Part II (C).

<sup>12</sup> *See* discussion *infra* Part II (C).

objective reasonableness approach, and concluding with a clarifying – perhaps middle ground – standard from the Tenth Circuit.

Part III of this Comment analyzes why the categorical exclusion approach is preferable to the minority’s view, and how the latter method falls short. This part then evaluates why the Tenth Circuit’s view also fails. Next, Part III distinguishes the issue of this Comment from other mistakes of law, notably those in *Devenpeck v. Alford*.<sup>13</sup> Finally, this section argues why the good faith doctrine should not extend to a police officer’s mistake of law in traffic stops.

Part IV anticipates and applies the qualified immunity argument. This part articulates the central purpose of qualified immunity, and responds to the argument by demonstrating how qualified immunity can coexist with the categorical exclusion approach. Part V provides an overview and analysis of *Heien v. North Carolina*<sup>14</sup>, a case that explicitly raises the issue discussed in this Comment. Part VI concludes this Comment.

## II. BACKGROUND

### A. *Determining Reasonable Suspicion for Traffic Stops*

In *Terry v. Ohio*, the Supreme Court upheld an officer’s “stop-and-frisk” of two individuals, who were later convicted for carrying concealed weapons.<sup>15</sup> The Court employed a dual inquiry as to whether the search and seizure was reasonable, asking “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>16</sup> The *Terry* Court found the search was constitutional under the Fourth Amendment because the officer had reasonable suspicion.<sup>17</sup>

Articulating the plain definitions of reasonable suspicion and probable cause is a daunting task.<sup>18</sup> Both concepts are “fluid . . . turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.”<sup>19</sup> Probable cause exists when “a fair probability that contraband or evidence of a

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<sup>13</sup> 543 U.S. 146 (2004).

<sup>14</sup> 134 S. Ct. 1872 (2014) (pending currently before the Court).

<sup>15</sup> *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.* at 30.

<sup>18</sup> *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (“Articulating precisely what ‘reasonable suspicion’ . . . mean[s] is not possible.”).

<sup>19</sup> *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

crime will be found.”<sup>20</sup> At its core, reasonable suspicion requires less.<sup>21</sup> Reasonable suspicion requires “a particularized and objective basis for suspecting the particular person . . . .”<sup>22</sup> This objective basis must contain “specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person . . . is engaged in criminal activity.”<sup>23</sup>

Courts generally employ *Terry*’s lesser standard when examining a case dealing with a traffic stop.<sup>24</sup> Thus, police officers are afforded broad latitude when conducting searches and seizures. The protection and “flip-side of [this] leeway,” though, requires objective legal justifications.<sup>25</sup>

### *B. Evolution of the Fourth Amendment’s Exclusionary Rule*

The Fourth Amendment provides persons the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.”<sup>26</sup> This language has afforded citizens an expectation of privacy, whether in the streets or in the comforts of home, from unjustified police intrusions.<sup>27</sup> Courts have

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<sup>20</sup> *Id.* at 238.; Wayne R. LaFave, *The ‘Routine Traffic Stop’ From Start to Finish: Too Much ‘Routine,’ Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1859-60 (2004) (discussing how *Whren*’s holding is wrong under *Terry*’s analysis); see *infra* Part II (C)(1) (Some scholars and courts, even courts cited later in this paper, discuss *Whren v. United States*, 517 U.S. 806 (1996) to a large extent. The discussions and citations to *Whren* may be misplaced. The central purpose of *Whren* was the discussion on subjective intent of arresting officers, specifically pretext. However, the *Whren* court did touch upon traffic stops and hint at requiring probable cause – “An automobile stop is . . . subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred,” at 810 – which, if anything, provides additional support for a categorical exclusion of evidence during an illegitimate traffic stop since probable cause is required but not present.).

<sup>21</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (“Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest.”)

<sup>22</sup> *United States v. Cortez*, 449 U.S. 411, 417 (1981).

<sup>23</sup> *United States v. Garcia-Camacho*, 53 F.3d 244, 246 (9th Cir. 1995).

<sup>24</sup> See LaFave, *supra* note 20, at 1848 (“Most courts have assumed . . . that traffic stops as a class are permissible without probable cause if there exists reasonable suspicion . . . .”); see also Daniel N. Haas, Comment, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact During Traffic Stops*, 62 DEPAUL L. REV. 1035, 1037 (2013).

<sup>25</sup> *United States v. Lopez-Valdez*, 178 F.3d 282, 288 (5th Cir. 1999) (citing *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998)).

<sup>26</sup> U.S. CONST. amend. IV.

<sup>27</sup> *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (“This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in

routinely recognized that this Fourth Amendment protection applies to motorists and stops of a vehicle.<sup>28</sup>

The Court developed the concept of an exclusionary rule to deter police misconduct and further safeguard this expectation of privacy.<sup>29</sup> The rule renders inadmissible any evidence gained by Fourth Amendment violations. However, this general concept has evolved over time, and has its own limits.

The Supreme Court recognized in 1886, that the Fourth Amendment “appl[ies] to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.”<sup>30</sup> The Court stated that it is the “invasion of [a man’s] indefeasible right of personal security, personal liberty and private property” that constitutes the essence of this offense.<sup>31</sup> Accordingly, the use of evidence seized in violation of a man’s Fourth Amendment right was deemed unconstitutional.<sup>32</sup> In reaching this conclusion, the Court stated “it is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon.”<sup>33</sup>

These reasonable expectations of privacy are a cornerstone of citizens’ liberties. However, it was not until 1914, in *Weeks v. United States*,<sup>34</sup> that the Supreme Court fashioned a remedy for such egregious liberty infringement – the exclusionary rule.<sup>35</sup> The Court held in *Weeks* “for the first time [that] in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.”<sup>36</sup> This meant that “conviction by means of unlawful seizures . . . should

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his study to dispose of his secret affairs.”); *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (“[A] person has a constitutionally protected reasonable expectation of privacy.”); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

<sup>28</sup> See *United States v. Cortez*, 449 U.S. 411, 417 (“The Fourth Amendment applies to . . . brief investigatory stops such as the stop of the vehicle here.”); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969) (“The Fourth Amendment applies to all seizures . . . including seizures that involve only a brief detention short of a traditional arrest.”)).

<sup>29</sup> See *infra* notes 17–38 and accompanying text.

<sup>30</sup> *Boyd v. United States*, 116 U.S. 616, 630 (1886).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 638.

<sup>33</sup> *Id.* at 635.

<sup>34</sup> 232 U.S. 383 (1914).

<sup>35</sup> *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011) (citations omitted) (“That rule . . . is a ‘prudential’ doctrine, created . . . to ‘compel respect for the constitutional guaranty.’”).

<sup>36</sup> *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

find no sanction in the judgments of the [federal] courts,”<sup>37</sup> and that such evidence “shall not be used at all.”<sup>38</sup> In *Mapp v. Ohio*, the Court extended the applicability of the exclusionary rule to the states.<sup>39</sup> The *Mapp* Court stated that, absent application to states, the Fourth Amendment’s assurances would simply “be ‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties . . . as not to merit . . . high regard as a freedom ‘implicit in ‘the concept of ordered liberty.’”<sup>40</sup>

The Court provided the general analytical framework used in applying the exclusionary rule in *Hudson v. Michigan*.<sup>41</sup> In *Hudson*, the Court, faced with the issue of a potential violation of the Fourth Amendment’s “knock-and-announce rule,” discussed the exclusionary rule and the requisite balancing of deterrence and social cost. The Court stated that reasonableness is not part of the inquiry into whether evidence is excluded or not.<sup>42</sup> The inquiry of exclusion is actually “an issue separate from the question whether the Fourth Amendment rights . . . were violated.”<sup>43</sup> The exclusionary rule inquiry focuses solely on the balance of deterrence benefits against the social costs.<sup>44</sup> When the deterrence benefits, i.e., curtailing knock-and-announce violations by police, outweigh the social costs, i.e., “police officers’ refraining from timely entry after knocking and announcing,” the evidence should be excluded.<sup>45</sup>

The primary purpose of the exclusionary rule is “to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.”<sup>46</sup> In *United States v. Calandra*, the Court acknowledged that defendants, in typical

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<sup>37</sup> *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (citing *Weeks*, 232 U.S. at 392).

<sup>38</sup> *Id.* at 648 (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

<sup>39</sup> *Id.* at 643. See generally David Gray, *A Spectacular Non Sequitur: The Supreme Court’s Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1 (2013) (providing an in-depth examination of the exclusionary rule and its history).

<sup>40</sup> *Mapp*, 367 U.S. at 655 (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

<sup>41</sup> 547 U.S. 586 (2006).

<sup>42</sup> *Id.* at 591–92.

<sup>43</sup> *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 222 (1983)).

<sup>44</sup> *Id.* at 594–96.

<sup>45</sup> *Hudson*, 547 U.S. at 595–96.

<sup>46</sup> *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“The wrong condemned is the unjustified governmental intrusion . . . That wrong, committed in this case, is fully accomplished by the original search *without probable cause*.” (emphasis added)); see also 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 (1983).

criminal trials, are “entitled to suppression of, not only the evidence obtained through an unlawful search and seizure, but also any derivative use of that evidence.”<sup>47</sup>

In *United States v. Leon*, the Court curtailed this broad reading, holding the exclusionary rule did not apply when police acted “in objectively reasonable reliance” on a subsequently invalidated search warrant.<sup>48</sup> In doing so the Court created the good faith exception to the exclusionary rule.<sup>49</sup> The Court found that where a “police officer’s conduct is objectively reasonable, ‘excluding the evidence will not further the exclusionary rule in any appreciable way.’”<sup>50</sup> Here, the Court employed a costs-and-benefits factor test,<sup>51</sup> admitting the evidence after finding that suppressing the evidence would not “justify the substantial costs of exclusion.”<sup>52</sup> At least one scholar has summarized *Leon* as precluding exclusion in the face of an officer’s reasonable mistake of law.<sup>53</sup> The *Leon* test seemingly weakened the exclusionary rule, introducing an ordinary standard that ended the strict liability rule applied to the general public: “Ignorance of the law is no excuse.”<sup>54</sup>

The Supreme Court limited the exclusionary rule again in *United States v. Herring*, which dealt with a negligent (not reasonable) mistake.<sup>55</sup> The Court held that, despite being a Fourth Amendment violation, an arrest based on a mistake in a police database that indicated an active warrant for an individual, does not trigger the exclusionary rule.<sup>56</sup> Thus, police conduct that is “sufficiently deliberate . . . and sufficiently culpable” to warrant exclusion and deterrence triggers the exclusionary rule, because the rule itself “serves to deter deliberate, reckless, or grossly negligent

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<sup>47</sup> *Calandra*, 414 U.S. at 354.

<sup>48</sup> *United States v. Leon*, 468 U.S. 897, 922 (1984).

<sup>49</sup> *Id.* at 920–21; *see infra* text accompanying notes 131–141. *See generally* Note, *Toward A General Good Faith Exception*, 127 HARV. L. REV. 773 (2013) (arguing for a good faith exception in all reasonable mistakes).

<sup>50</sup> *Leon*, 468 U.S. at 919–20 (citing *Stone v. Powell*, 428 U.S. 465, 539–40 (1976) (White, J., dissenting)).

<sup>51</sup> *Id.* at 906–07; *see also* *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987) (“[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.”) (internal quotation marks omitted).

<sup>52</sup> *Leon*, 468 U.S. at 922.

<sup>53</sup> Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 488–89 (2009).

<sup>54</sup> *Id.*

<sup>55</sup> 555 U.S. 135 (2009).

<sup>56</sup> *Id.* at 137–41.

conduct.”<sup>57</sup> Police mistakes in the case were the “result of [simple] negligence . . . rather than systemic error or reckless disregard of constitutional requirements,” and as such, the “marginal deterrence [did] not ‘pay its way.’”<sup>58</sup>

In *Davis v. United States*, the Court was again faced with the question of whether or not to apply the exclusionary rule.<sup>59</sup> The Court found that the police officers lacked culpability approaching the levels as outlined in *Herring*: “The officers who conducted the search did not violate Davis’ Fourth Amendment rights deliberately, recklessly, or with gross negligence.”<sup>60</sup> The Court reasoned that the exclusionary rule would only deter “conscientious police work,” something that would contradict its holding in *Herring*, and the Court was not ready to make the exclusionary rule “become a strict-liability regime.”<sup>61</sup>

To be sure, the exclusionary rule is a judicially-created remedy, *not* an express constitutional requirement.<sup>62</sup> The rule advances limitations on the admissibility of evidence when the benefits of deterring the actions invoking a Fourth Amendment violation outweigh the substantial social costs of withholding the evidence. An unreasonable search or seizure, or other Fourth Amendment violation may trigger the exclusionary rule, but if evidence is the result of *reasonable* procedures, processes, or mistakes, the evidence is once again admissible.

### C. Federal Circuit Split on Police Officer’s Mistake of Law During a Traffic Stop

The federal circuits, as well as state courts,<sup>63</sup> are split on the result of a police officer’s mistake of law during a traffic stop. This section

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<sup>57</sup> *Id.* at 145; see *Franks v. Delaware*, 438 U.S. 154 (1978) (holding police negligence did not violate the Fourth Amendment or trigger the exclusionary rule).

<sup>58</sup> *Herring*, 555 U.S. at 147–48 (quoting *Leon*, 468 U.S. at 907–08, n. 6).

<sup>59</sup> *Davis v. United States*, 131 S.Ct. 2419, 2428 (2011) (discussing whether police can conduct searches while reasonably relying on binding judicial precedent).

<sup>60</sup> *Id.* at 2428.

<sup>61</sup> *Id.* at 2429.

<sup>62</sup> See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

<sup>63</sup> Compare *People v. Reyes*, 196 Cal. Rptr. 3d 856 (Cal. App. Dep’t Super. Ct. 2011) (holding “a pure mistake of law like that the officer apparently made here cannot provide objectively reasonable suspicion for a traffic stop”); *Langello v. State*, 970 So. 2d 491 (Fla. Dist. Ct. App. 2007) (finding the officer’s lacked probable cause on mistaken belief that law was violated by equipment); *People v. Cole*, 874 N.E.2d 81 (Ill. App. Ct. 2007); *State v. Louwrens*, 792 N.W.2d 649, 654 (Iowa 2010) (finding that the record could not “provide the necessary probable cause to justify the traffic stop at issue in this case[.]” and declining

examines the notable cases from the circuits that have weighed in on this issue. First, this section describes the cases demonstrating the majority's approach of categorical exclusion. Then, the section discusses the cases exemplifying the minority view of objective reasonableness. Finally, this section discusses *United States v. Nicholson*, a case that aligns with the majority view that mistakes of law are objectively unreasonable, but also employs an objective analysis to account for an officer's subjective misunderstanding of the law.<sup>64</sup>

### 1. Categorical Exclusion

The majority of federal circuit courts that have weighed in – the Fifth, Seventh, Ninth, and Eleventh – have explicitly held a police officer's mistake of law for a traffic stop is an automatic violation of the Fourth Amendment, rendering inadmissible any evidence resulting from that stop.<sup>65</sup>

In *United States v. Miller*, the Fifth Circuit held that because the defendant was not in violation of Texas law, there was no probable cause for the stop and therefore anything seized was inadmissible in court.<sup>66</sup> The officer had stopped the defendant for having the left turn signal on for the period of time in which the vehicle proceeded through an intersection, but did not turn or change lanes to the left.<sup>67</sup> The officer pulled defendant over and issued him a warning citation for improper use of a left turn signal. The officer then told the defendant he was looking for illegal contraband, and asked for consent to search his motor home. The defendant consented.<sup>68</sup> The police found approximately eighty kilograms of marijuana.<sup>69</sup> Defendant was arrested and indicted for possession with intent to distribute marijuana.<sup>70</sup> The defendant filed a motion to suppress

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to choose an actual side, but went away from the Eighth Circuit's decision – an objectively reasonable approach.); *State v. Anderson*, 683 N.W.2d 818 (Minn. 2004); *with Moore v. State*, 986 So.2d 928 (Miss. 2008); *State v. Heien*, 737 S.E.2d 351 (N.C. 2012); *City of Wilmington v. Conner*, 761 N.E.2d 663 (Ohio Ct. App. 2001); *State v. Wright*, 791 N.W.2d 791 (S.D. 2010).

<sup>64</sup> *United States v. Nicholson*, 721 F.3d 1236, 1242 (10th Cir. 2013).

<sup>65</sup> *See United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006); *United States v. Tibbetts*, 396 F.3d 1132 (10th Cir. 2005); *United States v. Chanthasouvat*, 342 F.3d 1271 (11th Cir. 2003); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000); *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998); *see also United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) (identifying the circuit split on mistakes of law, seemingly taking the majority view).

<sup>66</sup> *Miller*, 146 F.3d at 276.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

the marijuana, on the grounds that it was obtained as the result of an unconstitutional stop. The defendant argued there is no violation under Texas law for flashing a turn signal without turning or changing lanes. As such, there was no probable cause or reasonable suspicion to stop him.<sup>71</sup> The district court denied the motion.<sup>72</sup>

On appeal, the Fifth Circuit held that there was no objective basis for probable cause to justify the stop of the defendant, because having a turn signal on does not violate Texas law.<sup>73</sup> The court found that the plain reading of the statute does not support the interpretation advanced by the prosecution.<sup>74</sup> In reaching its holding the court acknowledged *Whren's* rule, which affords “officers broad leeway to conduct searches and seizures,” but that “the legal justification must [still] be objectively grounded.”<sup>75</sup> The court stated that, “no objective basis for probable cause” existed here, because the defendant’s actions did not violate Texas law.<sup>76</sup>

The Ninth Circuit agreed with the Fifth Circuit’s rationale in *United States v. Lopez-Soto*.<sup>77</sup> The Ninth Circuit held that the officer’s actions were wrong because he incorrectly believed that driving with a broken taillight violated the law. Thus, the officer had no objective basis to justify a stop under the Fourth Amendment.<sup>78</sup> The Eleventh Circuit weighed in on the issue in *United States v. Chanthasouxat*,<sup>79</sup> articulating the issue as “whether a mistake of law, no matter how reasonable or understandable, can provide the objectively reasonable suspicion (under *Terry*) or probable cause (under *Whren*).”<sup>80</sup> The court reasoned that a mistake of law could not provide reasonable suspicion or probable cause to justify a traffic stop.<sup>81</sup>

In *United States v. McDonald*, the Seventh Circuit similarly held that “an officer cannot have a reasonable belief that a violation of the law occurred when the acts to which an officer points as supporting probable

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<sup>71</sup> *Id.* at 277.

<sup>72</sup> *Miller*, 146 F.3d at 276.

<sup>73</sup> *Id.* at 279.

<sup>74</sup> *Id.* at 278–79.

<sup>75</sup> *Id.* at 279 (citing *Whren*, 517 U.S. 806, 812–14 (1996)).

<sup>76</sup> *Id.*; see also *United States v. Raney*, 633 F.3d 385, 393 (5th Cir. 2011) (“Because the government did not establish that [defendant] committed a traffic violation . . . we find that as a matter of law there was no objective basis justifying the traffic stop.”); *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999) (finding unconstitutional a trooper’s actions of pulling defendant over for wrongfully thinking a violation occurred).

<sup>77</sup> 205 F.3d 1101, 1105 (9th Cir. 2000) (noting that Baja California requires that registration stickers be on the upper right hand corner of the windshield).

<sup>78</sup> *Id.* at 1106.

<sup>79</sup> 342 F.3d 1271, 1279 (11th Cir. 2003).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

cause are not prohibited by law.”<sup>82</sup> Simply, “subjective belief that a law has been broken, when no violation actually occurred, is not objectively reasonable.”<sup>83</sup>

## 2. Objective Reasonableness

The minority approach, championed by the Eighth Circuit, is an objective reasonableness test, which takes a totality-of-the-circumstances view of the police officer’s mistake during a traffic stop.<sup>84</sup> The Eighth Circuit is joined by a dissent in *United States v. Nicholson*,<sup>85</sup> which makes a compelling argument for the objective reasonableness approach.

In *United States v. Sanders*,<sup>86</sup> the Eighth Circuit held that, regardless of a violation of the local law, an officer is “justified in making the stop if he ‘objectively ha[d] a reasonable basis for believing that the driver has breached a traffic law.’”<sup>87</sup> The court reaffirmed this view in *United States v. Smart*, stating that a distinction between mistake of fact and mistake of law is irrelevant to a Fourth Amendment’s inquiry.<sup>88</sup> In *Smart*, the Eighth Circuit focused on the sole issue of “whether [the officer] had an objectively reasonable basis for stopping [defendant’s] vehicle.”<sup>89</sup> The court reasoned that an officer, “whose observations lead him or her reasonably to suspect that a particular person has been or is about to be engaged in criminal activity,” possesses the power to stop and investigate.<sup>90</sup> Applying this principle to the facts in *Smart*, the officer possessed an objectively reasonable basis to stop the vehicle “if he reasonably suspected that Smart was operating a vehicle that did not comply with Iowa traffic laws.”<sup>91</sup> The court ruled the stop was constitutional because “[t]he possibility that there was no violation, and the subsequent determination that there was not, does not mean that the initial suspicion was unreasonable. That would be so even if we assume that the stop was premised on a *mistake of law*.”<sup>92</sup>

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<sup>82</sup> *United States v. McDonald*, 453 F.3d 958, 960–61 (7th Cir. 2006).

<sup>83</sup> *Id.* at 962.

<sup>84</sup> *See infra* Part II(C)(2).

<sup>85</sup> 721 F.3d 1236, 1242 (10th Cir. 2013).

<sup>86</sup> 196 F.3d 910 (8th Cir. 1999).

<sup>87</sup> *Id.* at 913.

<sup>88</sup> *Smart*, 393 F.3d 767, 770 (8th Cir. 2005).

<sup>89</sup> *Id.*

<sup>90</sup> *Smart*, 393 F.3d at 770; *see also* *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Johnson v. Crooks*, 326 F.3d 995, 998 (8th Cir. 2003).

<sup>91</sup> *Id.*

<sup>92</sup> *Smart*, 393 F.3d at 771 (emphasis added).

Following *Sanders* and *Smart*, the Eighth Circuit again held that a mistake of law would not invalidate a traffic stop if the mistake was objectively reasonable.<sup>93</sup> In *United States v. Martin*, the court articulated the issue as whether an objectively reasonable police officer could have formed a reasonable suspicion that the defendant was committing a violation.<sup>94</sup> The court noted “[a]ny mistake of law that results in a search or seizure . . . must be *objectively* reasonable to avoid running afoul of the fourth amendment.”<sup>95</sup> In *Martin*, the stop was reasonable because “the level of clarity [fell] short of that required to declare [the officer’s] belief and actions objectively unreasonable under the circumstances.”<sup>96</sup> This holding was consistent with the recognized principles that “a misunderstanding of traffic laws, if reasonable, need not invalidate a stop made on that basis.”<sup>97</sup>

The Eighth Circuit clarified the objective standard from *Martin* in a later case, *United States v. Washington*.<sup>98</sup> The court noted that the officer in *Martin* faced “counterintuitive and confusing” motor statutes.<sup>99</sup> In *Washington*, however, the statute “clearly [did] not prohibit the conduct,” which formed the basis of the conviction.<sup>100</sup> The court softened this holding, reasoning that *Washington* was “an unusual case” because the government conceded no other applicable statute or proffered any other evidence – police or training manuals, legislative history, etc. – that could “create some objectively reasonable basis for the traffic stop.”<sup>101</sup>

### 3. Expanding Upon the Objective Reasonableness Approach

Although the Tenth Circuit initially adopted a categorical exclusion rule, consistent with the majority view and its circuit precedent,<sup>102</sup> it added

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<sup>93</sup> *United States v. Martin*, 411 F.3d 998 (8th Cir. 2005).

<sup>94</sup> *Id.* at 1001 (citing *Smart*, 393 F.3d at 770 (“[T]he validity of the stop depends on whether the officer’s actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or fact, was an objectively reasonable one.”)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1002.

<sup>97</sup> *Id.*; see also *United States v. Geelan*, 509 F.2d 737, 744 n. 9 (8th Cir. 1974) (finding that an Iowa officer’s traffic stop for a failure to display two license plates, although the state required only one plate, was constitutional because it was “irrelevant” because the officer “did not know Indiana required only one plate.”).

<sup>98</sup> 455 F.3d 824 (8th Cir. 2006).

<sup>99</sup> *Id.* at 827. (quoting *Martin*, 411 F.3d at 1001.).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 827–28.

<sup>102</sup> See *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) (“[F]ailure to understand the law by the very person charged with enforcing it is not objectively reasonable.”); *United States v. DeGasso*, 369 F.3d 1139, 1144–45 (10th Cir. 2004) (holding

an important modification in *United States v. Nicholson*.<sup>103</sup> In *Nicholson*, the officer pulled Nicholson over after concluding that the defendant made an illegal turn in violation of Roswell ordinance 12-6-5.1.<sup>104</sup> The turn, however, was not illegal.<sup>105</sup> When he approached the car, the officer smelled marijuana and asked Nicholson to step out of the car.<sup>106</sup> The officer then identified glass pipes and a police scanner in Nicholson's vehicle<sup>107</sup> though Nicholson declined to consent to a search when asked. The car was subsequently towed and subjected to a search warrant, which yielded contraband.<sup>108</sup> The lower court determined the stop was legal because the ordinance prohibited the left turn that Nicholson made, and eventually Nicholson agreed to a conditional plea agreement, but reserved right to appeal denial of his motion to suppress.<sup>109</sup>

The Tenth Circuit analyzed its previous precedent, and aligned with the majority's categorical exclusion approach, "excus[ing] reasonable mistakes of fact, but not 'reasonable' mistakes of law."<sup>110</sup> The Tenth Circuit further held that traffic stops are upheld "as long as the law enforcement officer cites particularized facts that show he could have had a reasonable suspicion that *any* law was being violated."<sup>111</sup> Noting that "mistakes of law made by an officer are objectively unreasonable,"<sup>112</sup> the court, however, retained "an objective, totality of the circumstances analysis," in some situations, for an officer's actions that are "taken . . . on a subjective misunderstanding of the law . . ."<sup>113</sup> The court reasoned that an objectively reasonable test, instead of an automatic violation, would not have been "too restrictive" in this situation.<sup>114</sup> In this capacity, officers "can argue they had reasonable suspicion to stop a defendant based on *any* . . . law[]—even if the officer was mistaken about the specific law . . . the defendant was violating. A single mistake by a law enforcement officer will not necessarily invalidate the stop and any

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the officer's belief that the use of fog lamps violated the law when it did not could not provide an objectively justifiable basis for the stop).

<sup>103</sup> *United States v. Nicholson*, 721 F.3d 1236 (10th Cir. 2013).

<sup>104</sup> *Id.* at 1237.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Nicholson*, 721 F.3d at 1237.

<sup>109</sup> *Id.* at 1238.

<sup>110</sup> *Id.* at 1242.

<sup>111</sup> *Id.* at 1245.

<sup>112</sup> *Id.* at 1241–42.

<sup>113</sup> *Nicholson*, 721 F.3d at 1242.

<sup>114</sup> *Id.*

resulting search.”<sup>115</sup> The Tenth Circuit, thus, elevated its analysis, dictating a different level of legal analysis:

Against what interpretation of the law should we assess the facts when deciding whether there was a reasonable suspicion or probable cause to make a traffic stop? Like most of our sister circuits, we judge the facts against the correct interpretation of the law, as opposed to any other interpretation, even if arguably a reasonable one.<sup>116</sup>

With this question, the court hoped that borderline cases would become clearer, particularly when a local ordinance conflicted with a state law.<sup>117</sup>

The dissent in *Nicholson*, however, argued for an objectively reasonable test.<sup>118</sup> It argued the Framers intended a totality of the circumstances analysis, since they forbade “all ‘unreasonable searches and seizures.’”<sup>119</sup> They posited that by asking what is *reasonable*, “the whole picture” should be examined.<sup>120</sup> The officer’s actions should be weighed with “commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”<sup>121</sup> The dissent did note that many mistakes of law, especially ones dealing with plain and unambiguous laws, should result in unreasonable searches and seizures and therefore be unconstitutional.<sup>122</sup> Ultimately, the dissent asks whether it is reasonable to hold that “*every* mistake of law” violate the fourth amendment.<sup>123</sup>

### III. ANALYSIS

This Comment argues for the categorical exclusion of evidence that results from a police officer’s mistake of law traffic stop. This Comment further argues that *any* police officer’s mistake of law as a basis to a traffic stop, regardless of reasonableness, is an automatic violation of the Fourth

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<sup>115</sup> *Nicholson*, 721 F.3d at 1243.

<sup>116</sup> *Id.* at 1244.

<sup>117</sup> *Id.* at 1244–45. (In a situation when a local ordinance conflicted with state law, the court stated “an officer would more likely be reasonably justified in relying on the local ordinance based on the reliance principles set forth in the Supreme Court’s cases analyzing mistakes regarding the constitutionality of the law.”).

<sup>118</sup> *Id.* at 1246 (Gorsuch, J., dissenting).

<sup>119</sup> *Id.* at 1248.

<sup>120</sup> *Nicholson*, 721 F.3d at 1249 (Gorsuch, J., dissenting) (citing *United States v. Sokolow*, 490 U.S. 1, 8 (1989)).

<sup>121</sup> *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1254.

Amendment. This Part examines the failure of the middle ground advocated for in *Nicholson*. Finally, this Part discusses the arguments for a categorical exclusion and analyzes why the position should withstand scrutiny.

A. *Why the Categorical Exclusion is Preferred*<sup>124</sup>

1. Rule of Law – Knowing the Law, Inherently and through Training (“Ignorance is no excuse”)

Police officers should know the law. If this expectation exists for ordinary citizens, police officers should be held to the same standard. The objective reasonable approach minimizes an officer’s need to know the very laws they are charged with enforcing. The categorical exclusion, however, necessitates as much. If officers know that the fruits of any searches and seizures based on illegitimate stops are subjected to a categorical exclusion, then officers are incentivized to know the law.

In 1885, the Michigan Supreme Court stated as much, positing that “[a]n officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify action under the law, he is a wrong-doer.”<sup>125</sup> Subsequently, the Supreme Court has similarly recognized that the traditional maxim of “ignorance of the law or a mistake of law is no defense,” continues to be “deeply rooted in the American legal system.”<sup>126</sup> *United States v. Chanthasoux* recognized this well-known mantra, further noting that a “fundamental unfairness” persists when citizens are barred from using the ignorance-defense but police officers –

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<sup>124</sup> *Contra* Daniel N. Haas, Comment, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact During Traffic Stops*, 62 DEPAUL L. REV. 1035 (2013); John B. Lyman, Comment, *Goldilocks and the Fourth Amendment: Why the Supreme Court of North Carolina Missed an Opportunity to Get Officer Mistakes of Law “Just Right” in State v. Heien*, 92 N.C. L. REV. 1012 (2014); Brittanee Friedman, Case 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 (2014). *See generally* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69 (2011).

<sup>125</sup> *Malcomson v. Scott*, 23 N.W. 166, 168 (Mich. 1885).

<sup>126</sup> *Cheek v. United States*, 498 U.S. 192, 199, (1991); *cf.* *Bryan v. United States*, 524 U.S. 184, 196 (1998) (“[T]he traditional rule that ignorance of the law is no excuse.”); *Staples v. United States*, 511 U.S. 600, 622 n. 3 (1994); *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring in judgment) (“If the ancient maxim that ‘ignorance of the law is no excuse’ has any residual validity, it indicates that the ordinary intent requirement . . . of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy.”).

those “‘entrusted to enforce’ the law” – are afforded the leniency to make mistakes and not understand or know their own laws.<sup>127</sup>

These contrasting levels of expectancy are hypocritical because police officer’s mistake of law is the failure to recognize, understand, or know the laws of their very own jurisdictions. This failure is contrary to the foundations of law and society.<sup>128</sup> Thomas Jefferson aptly recognized this disturbing consequence when he noted, “ignorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can always be pretended.”<sup>129</sup> If courts uphold convictions and evidence premised on mistakes of law, then police officers are enabling governing laws to be “pretended.”<sup>130</sup>

Although the Supreme Court, in *Atwater v. City of Lago Vista*, has held police officers cannot and should not be expected to know every “complex penalty scheme[],” police officers should know the law they are tasked with enforcing.<sup>131</sup> The Court refers to *factual* complexities of a situation or offense, not whether the law was violated.<sup>132</sup> Such *facts* include whether this is the suspect’s first offense or repeat; whether the weight of the bag of drug is above or below a fine-only line; or what is the severity of the future charge by the district attorney.<sup>133</sup> But these *factual* questions refer to a situation’s complexities and details, not to the basic question of whether or not the law was violated. In addition, *Atwater*, which afforded officers leniency for their lack of knowledge of lawful

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<sup>127</sup> United States v. Chanthasouvat, 342 F.3d 1271, 1280 (11th Cir. 2003).

<sup>128</sup> Accord ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 175 (Yale Univ. Press, 5th ed. 1975) (“The legal exercise of police authority reinforces the right of police to use it, while its illegal exercise undermines the broader acceptance of the authority as legitimate.”); see, e.g., Logan, *supra* note 124 at 93 (“Branding lawless seizures as constitutionally reasonable, and as a consequence allowing incident searches and other intrusions, can only lessen confidence in the perceived fairness and legitimacy of police, already strained by reports of police fabrications and racial bias.”).

<sup>129</sup> Letter from Thomas Jefferson to Andre Limozin (Dec. 22, 1787), in 12 PAPERS OF THOMAS JEFFERSON 451 (Boyd ed. 1955).

<sup>130</sup> *Id.*

<sup>131</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 348 (2001) (“It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes . . .”).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 348–49 (“[B]ut that penalties for ostensibly identical conduct can vary on account of *facts* difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on.” (emphasis added) (citations omitted)).

schemes, has been attacked as “collaps[ing] under its own weight.”<sup>134</sup> Thus, the expectation to know whether a violation of law occurred persists.

## 2. An Officer Cannot Have Reasonable Suspicion without an Actual Violation of Law

A basic requirement for a traffic stop is reasonable suspicion.<sup>135</sup> Reasonable suspicion is justified if circumstances show “that criminal activity may be afoot.”<sup>136</sup> The key here is that criminal activity, or the immediate potential for criminal activity, must be present.<sup>137</sup> It follows that, without an objective basis of criminal activity, a legitimate stop is impossible because a violation of law must occur.<sup>138</sup> If no violation occurs, then no criminal activity has taken place. The suspicion, then, is baseless.

But the minority’s objective reasonableness approach reasons otherwise. By using totality of the circumstances, reasonable suspicion can be found *even* though a violation never took place, or so reasons the minority of circuits. This approach is inappropriate. Allowing police officers to conduct investigatory traffic stops when no violation has actually taken place would allow free rein of the very “standardless and unconstrained discretion . . . [and] evil the Court” has insisted needs to “be circumscribed . . . .”<sup>139</sup> The lack of a violation of law, or even “at least [an] articulable and reasonable suspicion” of breaking the law, is “unreasonable under the Fourth Amendment.”<sup>140</sup>

The mistake of law must be objectively grounded and viewed. If done properly, the sole issue should be whether the law was or was not violated. In these situations, the law was not violated. The minority approach, however, contends that although a law has not actually been broken, a police officer’s mistake should be forgiven. This approach fails

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<sup>134</sup> Logan, *supra* note 124, at 84 (“The volume-and-complexity argument, however, collapses under its own weight. . . . Such a view, even if not rejected on democratic-governance concerns alone, would appear especially unjustified given unprecedented improvements in the educational backgrounds of police and ready access to substantive law, including via dashboard computers.” (footnotes omitted)).

<sup>135</sup> See, *supra* notes 15–25 and accompanying text.

<sup>136</sup> Terry v. Ohio, 392 U.S. 1, 30 (1968).

<sup>137</sup> United States v. Cortez, 449 U.S. 411, 417 (1981).

<sup>138</sup> Delaware v. Prouse, 440 U.S. 648, 661 (1979) (“Where there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations . . . we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.”).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 663.

because allowing the traffic stop and subsequent search completely ignores the falsified premise of the stop. False grounds cannot reasonably legitimize a traffic stop.

### 3. Judicial Consistency

Cases about Fourth Amendment violations should be analogously analyzed and yield consistent verdicts from jurisdiction-to-jurisdiction. A categorical exclusion would ensure consistent results. There would be no surprises or questionable verdicts. A categorical exclusion advances consistent Fourth Amendment analysis, fulfilling the very consistency that the Court has alluded to in the past.<sup>141</sup>

An objectively reasonable approach appends the element of subjectivity into the analysis. One court may view the entire record differently than another court, one judge may give more deference to the facts than another, or one police department may have different training manuals than another. This deference and inconsistency is problematic,<sup>142</sup> whereas a complete categorical exclusion avoids inconsistency – a standard completely accepted by some courts. An officer’s mistake of law is black and white, cut and dry; either the mistake did or did not happen; either a law was or was not violated. Accepting a categorical exclusion approach simply asks the question of whether a violation actually occurred to warrant the traffic stop. If the basis was due to an officer’s mistake of law, the answer will always be no. A categorical exclusion minimizes the potential for varying results.

#### *B. Why Nicholson’s Approach Cannot Work*

Flexibility with legal standards, remedies, and tests can be beneficial.<sup>143</sup> However, the flexibility alluded to in *Nicholson* – allowing

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<sup>141</sup> *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (“A policy of sweeping deference would permit, ‘[i]n the absence of any significant difference in the facts,’ ‘the Fourth Amendment’s incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.’ . . . Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.”) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)); *see also* Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner, *Heien v. North Carolina*, (No. 13-604), 2013 WL 6795047 (U.S.), at \*8.

<sup>142</sup> *Id.*; *see also* *Whren v. United States*, 517 U.S. 806, 815 (1996) (Because police officer training materials and manuals and practices can “vary from place to place and from time to time . . . [w]e cannot accept that the search and seizure protections of the Fourth Amendment are so variable.”) (citations omitted).

<sup>143</sup> *See* *Pearson v. Callahan*, 555 U.S. 223, 242 (2009) (“[F]lexibility properly reflects our respect for the lower federal courts that bear the brunt of adjudicating these cases.”).

a stop on a mistake of law if *any* basis for stop was legally justified – should not be employed.<sup>144</sup> The *Nicholson* court aligned with the majority of federal circuits’ categorical exclusion view,<sup>145</sup> while holding that in certain instances it would adopt an objectively reasonable approach.<sup>146</sup> The court did state that these situations would occur only when an “officer cites particularized facts that show he could have had a reasonable suspicion that *any* law was being violated.”<sup>147</sup> This language, however, is problematic, as exemplified in the hypothetical below.

An officer pulls Jack over on two grounds, one illegal infraction – Jack passed another car while in the right lane – and one which happens to be completely legal – driving with one broken taillight. If the officer only says Jack was pulled over because of the broken taillight – which happens to be legal – under *Nicholson*, the stop would still be constitutional, *even though a justifiable reason was never stated*. *Nicholson*’s own precedent, however, contradicts this finding. In *Tibbetts*, for example, the Tenth Circuit held that “when police completely ignore the purported reason justifying the initial traffic stop, a court may consider that failure when evaluating the *objective* reasonableness of the stop under the Fourth Amendment.”<sup>148</sup>

The reasoning in *Tibbetts* alludes to the fundamental problem with the *Nicholson* approach. A police officer’s ability to make a stop on completely lawful action, ignoring possible subsequent unlawful conduct, is invalid against even the Fourth Amendment’s most liberal readings. The stop’s basis would fail to rise to the proper levels for probable cause, or even reasonable suspicion. A traffic stop premised on a mistake of law can *never* meet adequate probable cause because the very basis of the stop is completely lawful, and *unreasonable*.

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*But cf.* *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 51 (2008) (Ginsburg, J., dissenting) (“Flexibility is a hallmark of equity jurisdiction.”).

<sup>144</sup> *United States v. Nicholson*, 721 F.3d 1236 (10th Cir. 2013). *But see* *Atwater v. City of Lago Vista*, 532 U.S. 318, 325 (2001) (citations omitted) (quoting *Whren*, 517 U.S. at 817) (“[A]lthough the Fourth Amendment generally requires a balancing of individual and governmental interests, where “an arrest is based on probable cause then ‘with rare exceptions . . . the result of that balancing is not in doubt.’”).

<sup>145</sup> *Id.*; *see also supra* Part III(A).

<sup>146</sup> *Nicholson*, 721 F.3d at 1245.

<sup>147</sup> *Id.*

<sup>148</sup> *United States v. Tibbetts*, 396 F.3d 1132, 1139 (10th Cir. 2005).

C. *Distinguishing the Mistake of Law in this Comment from Devenpeck v. Alford*

In 2004, the Supreme Court held in *Devenpeck v. Alford*<sup>149</sup> that an arrest is constitutional when there is probable cause to believe that the arrestee has committed *an* offense. This holding may seem, at first glance, problematic for this Comment. However, the holding in *Devenpeck* is readily distinguished from the issue of this Comment.

1. Facts and Procedural History of *Devenpeck*

In *Devenpeck*, the defendant was pulled over for impersonating a police officer.<sup>150</sup> The officer who initiated the stop observed that the defendant had stopped to help stranded motorists with a flat tire, while using “wig-wag” flashing lights.<sup>151</sup> The officer eventually stopped the defendant and observed that he was listening to a police scanner and a radio, had handcuffs, and “seemed untruthful and evasive.”<sup>152</sup> Another officer arrived on the scene a short time after the stop.<sup>153</sup> He observed a tape record with the play and record buttons pressed down on the defendant’s passenger’s seat.<sup>154</sup> After escorting the defendant out of the car, he played the recorded tape, which had recorded the officers.<sup>155</sup> The defendant was arrested for violating the State Privacy Act, and at booking, was subsequently issued a ticket for flashing lights.<sup>156</sup> The trial court dismissed both charges.<sup>157</sup>

The defendant sued the police officers in federal court for an arrest without probable cause.<sup>158</sup> A divided Ninth Circuit panel held that the arrest was unwarranted since, at the time of the arrest, the officers cited only to the State Privacy Act and not the flashing lights violation.<sup>159</sup> The Ninth Circuit, finding that taping the officers *did not* violate the Privacy Act, held that the offenses of impersonating an officer and obstructing an

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<sup>149</sup> *Devenpeck v. Alford*, 543 U.S. 146 (2004).

<sup>150</sup> *Id.* at 148–49.

<sup>151</sup> *Id.* at 148.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 149.

<sup>154</sup> *Devenpeck*, 543 U.S. at 149.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 150.

<sup>157</sup> *Id.* at 151.

<sup>158</sup> *Id.*

<sup>159</sup> *Devenpeck*, 543 U.S. at 152.

officer “were not ‘closely related’ to the offense invoked” at the time of arrest.<sup>160</sup> The Supreme Court granted certiorari.<sup>161</sup>

## 2. The Court’s Analysis

The Court held that a rule requiring an offense establishing probable cause and an offense identified by the arresting officer at the time of arrest need not be “closely related.”<sup>162</sup> Holding otherwise would be inconsistent with *Whren v. United States*, since subjective intent of an arresting officer is irrelevant during an arrest.<sup>163</sup> Adhering to the “closely related” rule would render any arrest constitutional under a set of known facts to “vary from place to place and from time to time.”<sup>164</sup> The Court exemplified the potential problems with the “closely related” rule. A veteran officer with vast experience would make a valid arrest by articulating all of the reasons for the arrest, while a rookie officer, under the same facts, would more than likely fail to enumerate the offenses.<sup>165</sup>

## 3. *Devenpeck*’s Analysis and Holding Distinguished

*Devenpeck* does not bear on the issue raised by this Comment. Although *Devenpeck* deals with a potential violation of the Fourth Amendment, the focus of this Comment are stops that do not give rise to any probable cause or even reasonable suspicion under *any known* set of facts. Situations in which a police officer initiates a traffic stop on a misunderstanding of the law, which the officer is supposed to uphold, and then, *after* the stop, finds evidence of illegal actions. In *Devenpeck*, the officer’s mistake was not articulating all of the bases of their stop, one of which was legitimate. However, this comment is solely concerned with instances when there is no legal basis for a stop on the basis of facts *known* to the officers at the time.

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 153–54.

<sup>163</sup> *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813–15 (1996)).

<sup>164</sup> *Devenpeck*, 543 U.S. at 154 (quoting *Whren*, 517 U.S. at 815).

<sup>165</sup> *Id.* at 154 (remanding the case to the Ninth Circuit for the inquiry into whether the officers had the requisite probable cause for arresting the defendant on the actual illegal violation of impersonating and obstructing a police officer).

*D. Why the Good Faith Doctrine Should Not Extend to a Police Officer's Mistake of Law*

Announced in *United States v. Leon*, the good faith doctrine was originally intended as a modification to the exclusionary rule.<sup>166</sup> It sought to utilize “evidence obtained by officers acting in reasonable reliance” on a judicially-issued search warrant that is later “found to be unsupported by probable cause.”<sup>167</sup> Yet, the good faith exception evolved into something broader when it incorporated a balancing test that analyzed “the perceived deterrent effect against the harm to society when relevant information is excluded . . .”<sup>168</sup> The result of this balancing test analysis sends the wrong message to the community, a message that constitutional rights, specifically the Fourth Amendment, can be “limited by the knowledge of the police officer.”<sup>169</sup> Thus, the extension of the good faith doctrine for a police officer’s mistake of law should end.

The doctrine should not extend to police officers based on the reasonableness of their conduct:

[S]imple ‘good faith on the part of the arresting officer is not enough.’ . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers and effects,’ only [at] the discretion of the police.’<sup>170</sup>

Echoing these words, courts have been properly reluctant to extend the good faith doctrine to police officer mistakes of law.<sup>171</sup> The Fifth Circuit held that the good faith exception *should not* cover an officer’s *subjective belief* when a mistake of law occurs.<sup>172</sup>

Even the Eighth Circuit, which administers the objective reasonable test for police officers’ mistakes of law, posits that “*subjective* good faith is not sufficient to justify the stop, for officers have an obligation to

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<sup>166</sup> *United States v. Leon*, 468 U.S. 897, 900 (1984).

<sup>167</sup> *Id.*

<sup>168</sup> Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 517 (1986).

<sup>169</sup> *Id.* at 532.

<sup>170</sup> *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

<sup>171</sup> Those courts failing to extend the good faith doctrine to mistakes of law are the same courts that employ a categorical exclusion. *See United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *see also United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999).

<sup>172</sup> *Lopez-Valdez*, 178 F.3d at 289 (emphasis added)(“[I]f officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.”).

understand the laws that they are entrusted with enforcing, at least to a level that is objectively reasonable.<sup>173</sup> The Ninth Circuit further expanded these circuits' rejection of subjective good faith to objective good faith:

[T]here is no good faith exception to the exclusionary rule for police who do not act in accordance with governing law. To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.<sup>174</sup>

Ending both the subjective and objective good faith exception to a police officer's mistake may even have desirable consequences. Instead of "generating disrespect for the law and administration of justice," as its critics often contend,<sup>175</sup> applying the exclusionary rule could "have the positive effect of reinforcing faith in government law-abidingness, a key aspect . . . called 'public-regarding justice' and 'fairness.'"<sup>176</sup> The rule further encourages the citizen-friendly mantra that if you abide by the law, barring any reasonable suspicion or probable cause, you will be left alone.<sup>177</sup>

Confidence in our legal system is key, and the use of the *Leon* good faith doctrine shatters this confidence. The doctrine strips this confidence and fosters resentment and fragility, while failing to properly encourage our police officers to know and understand the laws they are charged with enforcing. If courts consistently uphold incriminating evidence, or any evidence unlawfully seized on the grounds of a police officer's mistake of law, officers could conceal any potentially wrong detentions and stops. Ending the good faith exception's application in such situations would provide citizens protection from an officer's potential abuses of power.

#### IV. RESPONSE TO A COUNTERARGUMENT AGAINST QUALIFIED IMMUNITY

Embracing this categorical exclusion approach may spur the question: If an officer's mistake of law in a traffic stop is *always* unreasonable, resulting in the exclusion of any evidence, should officers enjoy the protections of qualified immunity in any subsequent civil suit? The answer is yes. Although this answer may seem counterintuitive because officers' stops premised on a mistake of law are always

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<sup>173</sup> *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005).

<sup>174</sup> *Lopez-Soto*, 205 F.3d at 1106 (citation omitted).

<sup>175</sup> Logan, *supra* note 123, at 93–94 (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

<sup>176</sup> *Id.* at 94 (citations omitted) (quoting Tracey L. Meares, *The Progressive Past*, in *THE CONSTITUTION IN 2020*, 209, 216 (Jack M. Balkin & Reva B. Siegel eds., 2009)).

<sup>177</sup> Although this paragraph's arguments may be equally applicable to mistake of fact, this article focuses on good faith for mistakes of law.

objectively unreasonable, qualified immunity protection counterbalances the automatic exclusion of evidence by ensuring that police are not deterred from using their best judgment due to the fear of potentially crippling personal liability. While a citizen should not be deprived of his or her liberty by a police mistake of law, citizens also need the protection afforded by officers not practicing “defensive policing.”

After establishing that any officer’s mistake of law is an automatic violation of the Fourth Amendment and resultant categorical exclusion of evidence, unlawfully detained individuals may well seek damages. These individuals can bring civil actions under 42 U.S.C. § 1983, which affords wronged individuals an opportunity for justice in the form of monetary damages, among other remedies.<sup>178</sup> The Supreme Court expanded the scope of § 1983 to include unsanctioned acts by government officials, including police officers.<sup>179</sup> However, the Court has recognized that not every violation of the constitution is actionable in damages.<sup>180</sup>

In *Pierson v. Ray*, the Court afforded police officers with qualified immunity protections for an unconstitutional arrest.<sup>181</sup> The Court extended to officers a “defense of good faith and probable cause,” under § 1983 actions.<sup>182</sup> The doctrine, which provides protection for “mere mistakes in judgment, whether the mistake is one of fact or one of law,”<sup>183</sup> creates a balance between “two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>184</sup> Some lower courts have isolated exceptions to the immunity, including those “who otherwise act without objectively reasonable grounds to believe that probable cause exists . . . .”<sup>185</sup>

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<sup>178</sup> 42 U.S.C. § 1983 (2013).

<sup>179</sup> *Monroe v. Pape*, 365 U.S. 167 (1961); *see also* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 937 n. 25 (“The upshot of *Monroe v. Pape* was that an officer who acted outside the scope of his duties or who departed from state law could be sued under §1983. Had the dissent prevailed in *Monroe*, [§]1983 would have applied only to officers who violated federal rights while acting within the bounds of state law. Officers who violated federal rights while departing from state law would have been subject to suit only under state.”).

<sup>180</sup> *Pierson v. Ray*, 386 U.S. 547 (1967).

<sup>181</sup> *Id.* at 557.

<sup>182</sup> *Id.*

<sup>183</sup> *Butz v. Economou*, 438 U.S. 478, 507 (1978).

<sup>184</sup> *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citations omitted) (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)) (internal quotation marks omitted).

<sup>185</sup> Ivan E. Bodensteiner & Rosalie Berger Levinson, *STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 2:9 (2013).

In *Pearson v. Callahan*, the Court held that officers were afforded qualified immunity because the “clearly established law” failed to show a Fourth Amendment violation.<sup>186</sup> But the law is not always clearly established, nor is an officer’s conduct clearly within the confines of the Fourth Amendment. Thus, officers are also granted qualified immunity “when an officer reasonably believes that his or her conduct complies with the law.”<sup>187</sup> The question turns “on the objective legal reasonableness of the action,” when actually performed.<sup>188</sup>

Based on these principles, the easy answer may be that a police officer’s mistake of law should not invoke qualified immunity protections. Arguably qualified immunity, based on objective reasonableness, cannot exist when a mistake of law is always objectively *unreasonable*. However, the purposes of the two inquiries are different. Personal liability for what can be described as a reasonable, but mistaken view of the law would lead police to enforce only the clearest violations in the most obvious factual situations. The result would be an inevitable increase in crime.

At the same time, police officers *must* be accountable when committing a stop on the illegitimate grounds of a legal violation.<sup>189</sup> In fact, police officers’ actions *are* accountable on these grounds. The categorical exclusion approach provides the counterweight to qualified immunity for officers by excluding *all* of the evidence. Thus, the incentive for police officers to act with proper conduct and the balance between public safety and protection of individual rights are preserved.

#### V. A UNIQUE OPPORTUNITY IS PRESENTLY BEFORE THE COURT

The Supreme Court is presented with an opportunity to resolve this divide among the federal circuits. On April 21, 2014, the Court granted certiorari for *Heien v. North Carolina*<sup>190</sup>, and then heard oral arguments on October 6, 2014.<sup>191</sup> The question presently before the Court is simple: “Whether a police officer’s mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.”<sup>192</sup>

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<sup>186</sup> *Pearson*, 555 U.S. at 243–44.

<sup>187</sup> *Id.* at 244.

<sup>188</sup> *Id.*

<sup>189</sup> See Logan, *supra* note 124, at 90 (“Society should not shrink from demanding that police be deterred from wrongfully invoking the substantive law to seize individuals for putative offenses, *creatio ex nihilo*.”).

<sup>190</sup> 134 S. Ct. 1872 (2014) (pending currently before the Court).

<sup>191</sup> Oral argument, *Heien v. North Carolina*, No. 13-604, available at [http://www.oyez.org/cases/2010-2019/2014/2014\\_13\\_604](http://www.oyez.org/cases/2010-2019/2014/2014_13_604) (last visited October 20, 2014).

<sup>192</sup> Brief for Petitioner at i, *Heien v. North Carolina*, (No. 13-604), 2014 WL 2601475 (U.S.).

However, following oral arguments, several scholars noted an apparent disconnect between the Justices and the respective parties' attorneys, which yielded anything but a simple answer.<sup>193</sup> For much of the hour-long oral argument, the Justices quibbled with the attorneys regarding the *remedy* of the situation, which was not briefed by either party, rather than the potential Fourth Amendment *rights* violation that occurred.<sup>194</sup>

#### A. Relevant Facts

Two scholars have provided an in-depth recitation of the facts of *Heien*,<sup>195</sup> but in short, the defendant was pulled over because of a broken taillight.<sup>196</sup> The officer gave the defendant a warning ticket for the brake light.<sup>197</sup> During the stop, however, the officer "began to suspect" that the defendant possessed contraband.<sup>198</sup> The defendant consented to the officer's request to search the vehicle. The search revealed cocaine.<sup>199</sup> The defendant, charged with trafficking cocaine, attempted to suppress the evidence as an illegal seizure under the Fourth Amendment, arguing that the traffic stop itself was unconstitutional.<sup>200</sup> According to the defendant, North Carolina laws "require a vehicle neither to have all brake lights in good working order nor to be equipped with more than one brake light."<sup>201</sup>

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<sup>193</sup> See, e.g., Rory Little, *Argument analysis: A simple answer to a deceptively simple Fourth Amendment question?*, SCOTUSblog (Oct. 8, 2014, 12:26 PM), <http://www.scotusblog.com/2014/10/argument-analysis-a-simple-answer-to-a-deceptively-simple-fourth-amendment-question/>; Orin S. Kerr, *Oral Argument in Heien v. North Carolina, The Volokh Conspiracy* (October 6, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/06/oral-argument-in-heien-v-north-carolina/> (last visited October 20, 2014); Leslie Shoebottom, *Guest Blog: Leslie Shoebottom, Oral Argument in Heien v. North Carolina: The Road to Nowhere or the Road to Reasonableness?*, (October 7, 2014), <http://hamilton-griffin.com/guest-blog-leslie-shoebottom-oral-argument-in-heien-v-north-carolina-the-road-to-nowhere-or-the-road-to-reasonableness/> (last visited October 20, 2014).

<sup>194</sup> See generally Transcript of Oral Argument, *Heien v. North Carolina*, 134 S. Ct. 1872 (2014) (No. 13-604).

<sup>195</sup> See Brittanee Friedman, *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, 249-50 (2014); John B. Lyman, *Goldilocks and the Fourth Amendment: Why the Supreme Court of North Carolina Missed an Opportunity to Get Officer Mistakes of Law "Just Right" in State v. Heien*, 92 N.C. L. REV. 1012, 1018-19 (2014).

<sup>196</sup> *State v. Heien*, 737 S.E.2d 351, 352 (N.C. 2012).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 353.

<sup>201</sup> *Id.*

On appeal, the North Carolina Court of Appeals agreed with the defendant and held that a violation warranting a traffic stop did not, in fact, occur.<sup>202</sup> The North Carolina Supreme Court, however, reversed,<sup>203</sup> holding that a mistake of law is not *per se* unreasonable if, upon “considering the totality of the circumstances,” the mistake is objectively reasonable.<sup>204</sup> According to the court, the mistake was reasonable because the officer “could have reasonably believed that he witnessed a violation of [North Carolina’s] motor vehicle laws.”<sup>205</sup>

### *B. Possible Rulings and Analysis*

This case has important practical implications as the Supreme Court could hand down a decision that resolves the split that divides the federal circuits. The Court could also make an alternative ruling. One scholar succinctly notes three potential, on-the-merits “legal paths” available to the Court: 1) hold the stop to be lawful and thus admit the evidence; 2) hold the stop unlawful, but that the evidence is admissible since the exclusionary rule does not apply under the “good faith exception”; or 3) hold the stop unlawful and apply the exclusionary rule, thereby suppressing the evidence.<sup>206</sup>

Alternatively, the Court may hand down a decision that is not based on the merits of the case, such as simply dismissing *Heien* as improvidently granted,<sup>207</sup> given the Court’s focus on the exclusionary rule during the oral argument. The Court could also place deference on the defendant’s *consent* to the search following the traffic stop, and hold the *consent* mitigates the potential Fourth Amendment rights violation altogether.

Regardless of the Court’s potential ruling, however, *Heien* may be the wrong case to resolve this split. The split will persist unless the Court

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<sup>202</sup> *State v. Heien*, 214 N.C. App. 515, 517–18, 714 S.E.2d 827, 829 (2011) *review allowed, writ allowed*, 720 S.E.2d 389 (N.C. 2012) and *rev’d*, 366 N.C. 271, 737 S.E.2d 351 (2012) (“Based on the language of the statutes, we hold that the malfunction of a single brake light, where a vehicle has at least one functioning brake light, is not a violation of N.C.G.S. § 20–129(g), N.C.G.S. § 20–129(d), or N.C.G.S. § 20–183.3.”).

<sup>203</sup> *Heien*, 737 S.E.2d 351, 358–59.

<sup>204</sup> *Id.* at 359.

<sup>205</sup> *Id.*

<sup>206</sup> Orin S. Kerr, *A Few Thoughts on Heien v. North Carolina*, THE VOLOKH CONSPIRACY, (September 29, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/29/a-few-thoughts-on-heien-v-north-carolina/> (last visited October 21, 2014).

<sup>207</sup> Orin S. Kerr, *Oral Argument in Heien v. North Carolina*, THE VOLOKH CONSPIRACY, (October 6, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/06/oral-argument-in-heien-v-north-carolina/> (last visited October 22, 2014) (“Perhaps the Court will dismiss *Heien* as improvidently granted and later take a different case in which the exclusionary rule issue is presented? It’s a possibility.”).

either invalidates the traffic stop and renders a categorical rule that makes any police officer's mistake of law unreasonable, or upholds the traffic stop and allows a "reasonable" mistake of law. This Comment urges for a categorical rule because anything less will provide *too much* room for error.

## VI. CONCLUSION

The Supreme Court will eventually have to weigh in on the issue of what results when a police officer makes a traffic stop premised on a mistake of law. Perhaps this ruling will come sooner than expected in *Heien v. North Carolina*. Regardless, as this Comment shows, a number of circuit courts have drawn a line in the sand. The majority of federal courts of appeals weighing in have ruled for a categorical exclusion of evidence, while only the Eighth Circuit has ruled for an objective reasonableness approach.

This Comment argues that such a situation should result in the categorical exclusion of evidence. Any traffic stop premised on a mistake of law is objectively unreasonable. A traffic stop cannot be adequate absent a legitimate violation of law. Allowing officers to make stops without having the requisite probable cause or reasonable suspicion, or without an objective basis for an actual violation of law, expands the scope of law enforcement officers. This expansion can result in a law that is only fiction or "pretended."<sup>208</sup>

It is not too much to ask our police officers to know the law they are empowered to enforce.<sup>209</sup> Upholding decisions because law may be a bit complex or vast are excuses that should be dealt within the legislature, not the courts. These excuses should not be wholly rejected when sensitive individual liberties are at stake. The Supreme Court needs to weigh in and clarify this divisive issue. The Court should articulate the approach championed by the majority of federal courts of appeals that have considered the issue, a categorical exclusion.

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<sup>208</sup> Letter from Thomas Jefferson to Andre Limozin (Dec. 22, 1787), in 12 PAPERS OF THOMAS JEFFERSON 451 (Boyd ed. 1955).

<sup>209</sup> See *infra* Part III(A)(1).