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IS IGNORANCE OF THE LAW AN EXCUSE FOR THE POLICE TO VIOLATE THE FOURTH AMENDMENT?

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"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."[1]

The old saying "Ignorance of the law is no excuse," is not merely a tired cliché, but is an ensconced principle of criminal law. As Justice Oliver Wendell Holmes put it, "To admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey."[2] In modern times, the United States Supreme Court has recognized that the principle is "deeply

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[1] U.S. CONST. amend. IV.

[2] OLIVER W. HOLMES, JR., THE COMMON LAW 48 (1881).

rooted in the American legal system" and has rejected citizens' claims of ignorance of the law as a defense to criminal prosecutions.[3] While it is clear that citizen errors regarding the demands of the criminal law will not excuse criminal liability, what is not so clear is whether law enforcement are held to the same standard. If a police officer, invades the rights of a citizen due to a reasonable misapprehension of the law, should the officer be excused from the consequences of that error?

This is the fundamental question raised in *Heien v. North Carolina*, which is before the U.S. Supreme Court. The *Heien* verdict will reveal much about how the Court believes the balance should be struck between citizens' rights under the Fourth Amendment to be free from unreasonable searches and seizures, and the government's interest in effective law enforcement. As stated in the petition for certiorari, the formal issue before the Court is whether a police officer's mistake of law regarding whether a person has committed an offense, however reasonable, can provide the individualized suspicion necessary to support a traffic stop under the Fourth Amendment. Police can stop a vehicle operating on the public highways if they have "reasonable suspicion" that the driver has committed a traffic violation or other offense,[4] and the Court has previously held that an officer may have cause to conduct a search or seizure even if the officer is operating under a reasonably held mistake of fact.[5] In *Heien*, the police allegedly correctly under-

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[3] Cheek v. United States, 498 U.S. 192, 199 (1991). However, the *Cheek* decision also recognized that Congress can change the effect of such ignorance by defining a crime to include knowledge of the obligation of the law as an element of the offense and ruled that in a prosecution under a tax evasion statute the government must prove that the defendant knew he was violating the law.

[4] Delaware v. Prouse, 440 U.S. 648, 663 (1979).

[5] In Illinois v. Rodriguez, 497 U.S. 177, 185-86 (1990), the Court held that police did not violate the Fourth Amendment when they entered and searched an apartment on the consent of a third party who represented she had authority to do so,

stood the facts, but were mistaken in their belief that those facts constituted a traffic offense that justified stopping the vehicle. Thus, whether the government can avoid the "ignorance of the law" maxim, as well as the amount of leeway the Court believes should be given to law enforcement at the expense of individual freedom and privacy, are at issue in *Heien*.

THE FACTS AND DECISION BELOW

The *Heien* case began on Interstate 77, where Sergeant Matt Darisse of the Surry County Sheriff's Department was observing traffic for "criminal indicators of drivers [and] passengers."[6] Darisse supposedly noticed a car pass and the driver appeared "stiff and nervous," so he pulled onto the highway and began following the car. When Darisse saw that one of the car's brake lights failed to illuminate, he activated his blue lights and initiated a stop of the vehicle. Darisse learned that the driver was Maynor Vasquez, but the car belonged to Nicholas Brady Heien, who was riding with Vasquez. The officer informed the two passengers about the non-functioning brake light and began questioning the pair about their destination and purpose, but allegedly received conflicting answers. After issuing a citation for the brake light, Darisse asked if he could search the car for weapons and drugs. Heien allegedly stated that he didn't care, and Darisse began a 40-minute search, which disclosed a baggie containing cocaine and resulted in drug trafficking charges against Heien.

However, the non-functioning taillight was *not* actually a violation of law. As confirmed by the North Carolina Court of Appeals on review of Heien's conviction, state law only requires a single

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even though the third party did not in fact have sufficient control over the property to give consent to enter.

[6] Brief for Petitioner at 2, Heien v. North Carolina, 741 S.E.2d 1 (2013) (No. 13-604).

working brake light on a car.[7] Thus, the officer was not justified in stopping the car for committing a traffic offense. The Court of Appeals ruled that "an officer's mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable justification for a traffic stop,"[8] and reversed the order denying Heien's motion to suppress.

On the State's appeal to the Supreme Court of North Carolina, the court noted the split among federal circuit courts and state appellate courts over whether a seizure based on a reasonable mistake of law violates the Fourth Amendment.[9] The court then found that the ultimate command of the Fourth Amendment is that police act "reasonably," and so long as the officer's mistake of law is objectively reasonable, the Fourth Amendment would not be violated.[10] From a policy standpoint, the court opined that "because we are particularly concerned for maintaining safe roadways, we do not want to discourage our police officers from conducting stops for perceived traffic violations."[11]

In his brief on the merits before the U.S. Supreme Court, Heien stressed the "ignorance is no excuse" maxim in support of reversal and argued for the adoption of a rule that mistakes of law are not sufficient to establish reasonable suspicion. Pointing out that the Court has established an objective test for reasonable suspicion, Heien argued that judging a police officer's actions against a correct interpretation of the law is the only way to constrain police discretion and safeguard individuals against arbitrary invasions of priva-

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[7] State v. Heien, 214 N.C. App. 515, 518, 714 S.E.2d 827, 829 (2011).
[8] *Id.*
[9] State v. Heien, 366 N.C. 271, 276, 737 S.E.2d 351, 355 (2012).
[10] *Id.*, at 279, 737 S.E.2d at 356.
[11] *Id.*, at 279, 737 S.E.2d at 357.

cy and security.[12] Heien also argued that at common law, police were not privileged to make arrests based upon mistakes of law, even if those mistakes were reasonable.[13] And while mistakes of fact do not render a seizure illegal, Heien asserted that an officer's need to make quick, ad hoc decisions about ambiguous circumstances justifies treating errors of fact differently from mistakes of law.[14]

The State, supported by the U.S. Solicitor General, replied that mistakes of law should not be treated differently from mistakes of fact and that, ultimately, all the Fourth Amendment requires is that law enforcement officers act "reasonably."[15] According to the State, police are not "legal technicians" and cannot be expected to understand the intricacies of statutes such as the brake light requirement, which formed the basis of Heien's stop. Toleration of seizures, based on mistakes of law or fact, is needed, the State contended, because "officers must be given some leeway if they are to do their jobs effectively."[16]

A "MISTAKE OF LAW" EXCEPTION?

Law enforcement, however, already enjoys broad leeway in the performance of their duties,[17] and introducing a "mistake of law" exception to the Fourth Amendment would further imperil the right of citizens to be free from unwarranted seizures by the government.

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[12] Brief for Petitioner, *supra* note 6, at 13-14 (citing Delaware v. Prouse, 440 U.S. 648, 653-54 (1979)).

[13] *Id.* at 15 (citing RESTATEMENT OF TORTS § 121, cmt. i (1934)).

[14] *Id.* at 20.

[15] Brief for the Respondent, at 33, Heien v. North Carolina, 741 S.E.2d 1 (2013) (No. 13-604).

[16] *Id.* at 22.

[17] In Whren v. United States, 517 U.S. 806, 813 (1996), the Court held that an objectively reasonable traffic stop does not violate the Fourth Amendment even if the real reason police effected the stop was not a traffic offense.

First, it must be acknowledged that "a traffic stop significantly curtails the freedom of action of the driver and the passenger[.]"[18] Indeed, with the advent of the "war on drugs" and enhanced state and local participation in the "war on terrorism," traffic stops have become police officers' passport for conducting intense, invasive investigations of motorists who they deem suspicious:

> Perhaps because the offenses are often so insignificant, the driver may be told at the outset that he will merely be given a warning. But then things get ugly. As a part of the "routine," a criminal history and outstanding warrants records check is run on the driver and passengers; they are closely questioned about their identities, the reason for their travels, their intended destinations, and the like, and may be quizzed as to whether they have drugs on their persons or in the vehicle. The driver may be induced to submit to a full search of the vehicle, or a drug-sniffing dog may appear on the scene and "do his thing."[19]

This precise scenario was played out in the stop of Heien. Indeed, while the North Carolina Supreme Court professed a need to maintain "safe roadways" as a justification for excusing Sergeant Darisse's mistake,[20] the stop had little, if anything, to do with roadway safety. Rather, the officer deemed the occupants of the vehicle "suspicious" and began following them in an attempt to develop grounds for stopping the car and investigating them further.[21]

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[18] Berkemer v. McCarty, 468 U.S. 420, 436 (1984).

[19] WAYNE R. LAFAVE, SEARCHES AND SEIZURES: A TREATISE ON THE FOURTH AMENDMENT § 9.3 (5th ed. 2013) (footnotes omitted).

[20] 737 S.E.2d at 357.

[21] 714 S.E.2d at 828.

Recognition of a mistake of law exception to the Fourth Amendment would vest police with an intolerable amount of discretion in a system that already is subject to abuse and rife with discrimination. For example, a 1999 report on discretionary traffic stops in New Jersey found that 77.2% of subjects were African-American or Hispanic.[22] This is, at the very least, unfair and discriminatory towards minority communities. A ruling in favor of North Carolina would effectively allow law enforcement discretion to supplant the procedures of criminal law, which we may imagine would mirror their unfair and discriminatory biases. This is problematic because the execution of criminal law should not and cannot be subject solely to the discretion of law enforcement. In fact, the Supreme Court has declared that when the choice of which automobiles to stop is "at the unbridled discretion of law enforcement officials,"[23] the discomfort caused by the stop is greater, and thus the stop is unconstitutional. Allowing law enforcement discretion in *creating* legal procedures would certainly be more discomforting than allowing law enforcement discretion in *executing* legal procedures, which is already an unconstitutional invasion of privacy.

The problem of officer discretion is exacerbated by the numerous laws, regulations, and ordinances that govern the operation of motor vehicles on public highways. These run the gamut from equipment standards of the kind that were used to stop Heien, to "rules of the road," regulating the manner of driving. Although the State of North Carolina argues that the complexity of these laws justify excusing "reasonable" police mistakes,[24] that complexity could easily result in granting police nearly limitless discretion in

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[22] N.J. ATT'Y GEN., INTERIM REPORT OF THE STATE REVIEW TEAM REGARDING ALLEGATION OF RACIAL PROFILING (1999).

[23] Delaware v. Prouse, 440 U.S. 648, 661 (1979).

[24] Brief of Respondent at 15, Heien v. North Carolina, 741 S.E.2d 1 (2013) (No. 13-604), 2014 WL 4101230.

conducting traffic stops. If police are not expected to follow the law because of its complexity, nearly any stop could be upheld if it is related to some conceivable public purpose. Contrary to the State's claim that instances where mistakes of law are deemed reasonable will be rare,[25] courts will be leery to rule a mistake of law unreasonable if doing so would deprive prosecutors of evidence of criminal activity.

Ultimately, if the Supreme Court upholds the ruling below in *Heien*, it will provide police with every incentive to embark on a "seize now, ask questions later" form of law enforcement that is wholly inimical to the concept of freedom and liberty enshrined in the Fourth Amendment. The suggestion that it is a bad thing for officers to be "timid" in their decisions to stop motorists on the highway[26] is wrong-headed and turns the Constitution on its head, particularly when pretextual stops for the purpose of conducting non-traffic related investigations are considered constitutionally acceptable.[27] The exclusionary rule is not merely an obstacle to efficient law enforcement; it also protects a fundamental right and provides incentives to police to know and follow the law. The Court, in creating this rule, could not have been blind to the fact that it would sometimes exclude information that would prove to be the only difference between conviction and acquittal of a criminal. Even in these cases, law enforcement cannot be justified in an invasion of privacy so central to the protections of the Bill of Rights, for "[t]o sanction such proceedings would be to affirm by judicial

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[25] *Id.* at 17.

[26] *Id.* at 42.

[27] Brief for the Respondent, at 22, Heien v. North Carolina, 741 S.E.2d 1 (2013)(No. 13-604).

decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution."[28]

THE BALANCE

This returns us to the central question of the balance between conviction and privacy that underlies our criminal justice system. Undeniably, some additional criminals would be arrested and convicted if mistakes of law could contribute to reasonable individualized suspicion, but that is not in and of itself reason for its legitimacy. By that logic, anything that increased the conviction rate would be legitimate, including the British "general warrants" that incited the drafting of Fourth Amendment protections. Instead, as suggested above, the conviction rate must be balanced with the fundamental right to privacy enshrined in the First, Third, Fourth, Fifth, and Ninth Amendments and decades of Supreme Court jurisprudence. If the Supreme Court legitimizes convictions stemming from mistakes of law, it would tip the balance firmly away from this fundamental right. Principally, the Court would be saying that a small increase in the conviction rate is sufficient to abrogate, in part, a fundamental right. Furthermore, it would mean legitimizing any invasion of privacy for which a police officer wrongly believes could be a crime. This could very well eviscerate the right to privacy.

Rejecting the mistake of law exception would also incentivize police to become knowledgeable in the law. While it might be impractical for law enforcement to have perfect knowledge of legal precedent, it is still in principle their duty to *enforce* the law, which they cannot do without knowing what the law is. Alternatively, private citizens have traditionally been legitimately driven by public morality and social norms, which they expect to be enshrined in the laws without knowing the exact content of those laws. Since

[28] Weeks v. United States, 232 U.S. 383, 394 (1914).

law enforcement, charged with enforcing the law, is traditionally required to know what the law is, they should be the true audience of criminal law, rather than private citizens.[29]

Indeed, police have a range of available tools allowing them to avoid mistakes of law. Today it is common for law enforcement agents to have tools providing access to the pertinent law, including dashboard computers and direct communication with personnel versed in the law.[30] Such progress should not be undermined by providing officers an incentive to eschew best practices. As the California Supreme Court recognized over thirty years ago, doing so "would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce and of the teachings of judicial decisions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct."[31]

ELIMINATING A DOUBLE STANDARD

Finally, and perhaps most curiously, if the Supreme Court sides with North Carolina, it would entrench a strange dichotomy. The Court has consistently upheld a high standard of knowledge for the general public, namely "the traditional rule that ignorance of the law is no excuse."[32] Therefore, should a member of the general public commit any violation of law, *malum prohibitum* inclusive, without knowing that such a law exists, they are held accountable for that infraction. Meanwhile, the standard of knowledge required

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[29] William J. Struntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000).

[30] *See, e.g.*, Michelle Perin, *Big Stuff in a Small Package*, LAW ENFORCEMENT TECH., at 26 (2010) (discussing the use of mobile computers by police on street patrol). *See also* Reply Brief of Petitioner at 8, Heien v. State of North Carolina, 741 S.E.2d 1 (2013) (No. 13-604), 2014 WL 2601475.

[31] People v. Teresinski, 640 P.2d 753, 758 (Cal. 1982) (en banc).

[32] Bryan v. United States, 524 U.S. 184, 196 (1998).

of law enforcement officers has gradually fallen. For instance, law enforcement officers may claim qualified immunity during civil suits for violations of constitutional protections provided that the protection they violated is not clearly established. This reduces law enforcement's burden of knowledge from fully understanding constitutional protections to merely understanding those constitutional protections whose reaches have been clearly established. If the Supreme Court sides with North Carolina, it would further reduce standards of legal knowledge for law enforcement, as they would be able to act based only on what they "believe" could be a violation of law. This sets up a dangerous double standard: law enforcement may violate our Constitution, which they are sworn to defend, as long as there is some ambiguity as to the extent of its protections; however, should private citizens unknowingly violate a new and unpublicized ordinance, the full force of the law may be brought down on them.[33]

[33] JOHN W. WHITEHEAD, A GOVERNMENT OF WOLVES: THE EMERGING AMERICAN POLICE STATE 3-12 (2013).