THE LIMITS OF GOOD FAITH: HEIEN V. NORTH CAROLINA AND OTHER FOURTH AMENDMENT CASES THROUGH THE LENS OF STATE V. CARTER AND THE NORTH CAROLINA CONSTITUTION

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I. INTRODUCTION

As police misconduct roils the country, a growing number of people are calling for extensive changes to the ways police operate in their communities and for more oversight of police departments.

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Policies like stop and frisk have come under fire for allowing police to disregard individual Fourth Amendment rights in the name of public safety.[1] For several decades, though, the trend in decisions from the Supreme Court of the United States ("SCOTUS") has been to pare down one important judicial tool used to vindicate those rights: the exclusionary rule.[2] According to this rule,[3] evidence that is obtained as a result of unreasonable searches and seizures is subject to exclusion, meaning that a defendant may move to have the evidence excluded from presentation during the prosecution's case-in-chief.[4]

SCOTUS has carved out more and more exceptions to the exclusionary rule in a string of decisions since it was created.[5] One notable exception is the good faith exception, which provides that evidence obtained by good faith reliance upon a defective search warrant is not subject to exclusion, and may be presented in the prosecution's case-in-chief.[6] Another recent exception is the doctrine of reasonable mistake of law, which holds that an officer's misinterpretation of a law can nonetheless provide a constitutionally sufficient basis for a stop or arrest that leads to a Fourth Amendment search and seizure.[7] This expansion of the good faith exception was established in a case from North Carolina,[8] despite the fact that the Supreme Court of North Carolina has ruled that the State Constitution—unlike the Federal Constitution—does not contain a good faith exception.[9] This Note will make the case that the broad Fourth Amendment protections found in the North Carolina Constitution should be extended to the doctrine of mistake of law, as both

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[1] Lee Fang, *Mike Bloomberg Claims He Cut Stop-and-Frisk by 95 Percent—After Increasing It Sevenfold*, INTERCEPT (Feb. 11, 2020, 7:23 PM), https://theintercept.com/2020/02/11/bloomberg-stop-and-frisk/.

[2] 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, 1389 (1983).

[3] Weeks v. United States, 232 U.S. 383, 398 (1914).

[4] Though it is still available for other purposes, such as impeachment during the trial or sentencing.

[5] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (discussing the good faith doctrine); Murray v. United States, 487 U.S. 533 (1988) (discussing the independent source doctrine); Nix v. Williams, 467 U.S. 431 (1984) (discussing the inevitable discovery doctrine).

[6] *Leon*, 468 U.S. at 922.

[7] Heien v. North Carolina, 574 U.S. 54 (2014).

[8] *Id.*

[9] State v. Carter, 370 S.E.2d 553 (N.C. 1988).

doctrines implicate the same interests of deterring police misconduct and ensuring judicial integrity.

Part I of this Note will explain the development of the exclusionary rule and the good faith exception to the exclusionary rule. Part II will explore the status of the good faith exception in North Carolina after *State v. Carter*.[10] Part III will examine the doctrine of reasonable mistake of law through the lens of *Carter*.

II. THE FOURTH AMENDMENT EXCLUSIONARY RULE AND THE GOOD FAITH EXCEPTION

A. The Development of The Exclusionary Rule

The Fourth Amendment of the United States Constitution provides the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."[11] A search conducted without a warrant is presumed to be unreasonable, with several exceptions.[12] The exceptions are generally broken into six categories, such as searches conducted during a lawful arrest or searches conducted where exigent circumstances require police to take immediate action to avoid harm to the public or the destruction of evidence.[13] A search conducted with a warrant, on the other hand, is presumed reasonable, as long as it fulfills a few basic requirements: the warrant must be issued by a neutral magistrate, must be supported by probable cause,[14] and must specifically list the location to be searched and the people or things to be seized.[15] If any of these requirements are lacking in a particular warrant, any evidence seized during a search pursuant to that warrant may be subject to the exclusionary rule.[16]

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[10] *Id.*

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

[12] Jeremy J. Calsyn et al., *Investigation and Police Practices: Warrantless Searches and Seizures*, 86 GEO. L.J. 1214, 1214 (1998).

[13] *See Exceptions to the Warrant Requirement*, LAWSHELF, https://lawshelf.com/coursewarecontentview/exceptions-to-the-warrant-requirement/ (last visited Dec. 2, 2020).

[14] United States v. Leon, 468 U.S. 897, 913–14 (1984).

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

[16] *Leon*, 468 U.S at 923.

Courts in the United Kingdom applied a sort of predecessor to the exclusionary rule (which was akin to the Fifth Amendment's prohibition of compulsory self-incrimination) before the American Revolution.[17] English courts would not require parties to produce evidence that may have been self-incriminating.[18] In the United States, the Fourth Amendment was passed at least in part as a response to British abuse of the writ of assistance, which allowed customs officials to enter homes, businesses, or any other places without probable cause.[19] The founders strongly opposed these writs along with general warrants, which were often issued without probable cause, did not specifically name any person suspected of a crime, and were valid for as long as the issuing monarch was alive.[20]

In 1886, in one of the earliest cases linked to the development of the exclusionary rule, the Supreme Court employed what some scholars consider a predecessor to the rule[21] in a civil case, *Boyd v. United States*.[22] In *Boyd*, the government sought to compel two businessmen to produce invoices for plate glass that the men had illegally imported.[23] Though there was no direct search and seizure, in his opinion, Justice Bradley found a Fourth Amendment issue because the government sought to compel the production of private papers, which "effects the sole object and purpose of search and seizure."[24] Admission of these papers into evidence would, Justice Bradley wrote, constitute a violation of the Fifth Amendment right against self-incrimination.[25]

In 1914, the Supreme Court issued a decision that solidified a strong, fairly broad federal exclusionary rule in *Weeks v. United*

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[17] *See Self-Incrimination*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-5/self-incrimination (last visited Dec. 2, 2020).

[18] Rex v. Worsenham (1701) 91 Eng. Rep. 1370, 1370 (K.B.); Roe v. Harvey (1769) 98 Eng. Rep. 302, 305 (K.B.).

[19] Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 75–77 (1996); Stewart, *supra* note 2, at 1369 (citing the general warrant and writ of assistance as major motivators for the Fourth Amendment).

[20] Stewart, *supra* note 2, at 1369.

[21] *See id.* at 1372.

[22] 116 U.S. 616 (1886).

[23] *Id.* at 618–19.

[24] *Id.* at 622.

[25] *Id.* at 638.

States.[26] In *Weeks*, a Federal Marshal entered the defendant's house—while they were not at home and without a warrant—and seized some of the defendant's letters along with some other property.[27] Before trial, the defendant moved for the district court to order the district attorney to return all of his property.[28] The court ordered some of the defendant's property returned, but allowed the prosecution to keep any evidence that was "pertinent to the charge against the defendant,"[29] who was ultimately convicted. The Supreme Court ruled that the defendant's papers should have been excluded from evidence, because if such evidence was not excluded, the Fourth Amendment "is of no value, and . . . might as well be stricken from the Constitution."[30]

In 1920, the Court significantly bolstered the exclusionary rule with the "fruit of the poisonous tree" doctrine in *Silverthorne Lumber Co. v. United States*.[31] Under this doctrine, any evidence gathered as a result of a constitutional violation is subject to exclusion, even if the violation did not lead directly to its discovery.[32] The Court ruled that the Fourth Amendment prohibits not only physical possession of evidence obtained unlawfully, but also the use of any knowledge gained by the possession of tainted evidence before the government is forced to return any such evidence.[33] Ruling otherwise, the Court held, would reduce the Fourth Amendment to merely "a form of words."[34]

B. The Incorporation of the Exclusionary Rule to the States and Subsequent Narrowing of the Rule

The exclusionary rule did not initially apply to the states, a fact that the Court made explicit in 1949 through *Wolf v. Colorado*.[35] States were, of course, free to adopt it of their own accord, and

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[26] 232 U.S. 383 (1914).

[27] *Id.* at 386.

[28] *Id.* at 387–88.

[29] *Id.* at 388.

[30] *Id.* at 393.

[31] 251 U.S. 385 (1920).

[32] *Id.* at 392. Although there are exceptions, including a good faith exception. *See infra* Part I.C.

[33] *Silverthorne Lumber Co.*, 251 U.S. at 391–92.

[34] *Id.* at 392.

[35] 338 U.S. 25 (1949).

many did so.[36] Just twelve years after *Wolf*, in 1961, the Court held that the rule did apply to the states in *Mapp v. Ohio*, a case involving none other than a young Don King.[37] In *Mapp*, Cleveland police received an anonymous tip that a man who was wanted in connection with an illegal gambling ring, as well as for bombing King's house, could be found in the defendant's home.[38] Officers arrived at the defendant's home without a warrant, and she denied them permission to search her house.[39] The officers returned hours later, still without a warrant, forced open the defendant's door, searched the house, and found, among other things, pornographic books.[40] The defendant was tried for and ultimately convicted of possession of obscene materials,[41] and appealed her conviction all the way to the Supreme Court.[42]

The defendant based her appeal on the constitutionality of the jury instructions, her sentence, the vagueness of the Ohio obscenity statute, and the conduct of the police.[43] Initially, the issue of the exclusionary rule was barely on the Court's radar, as it had only been raised in one amicus brief filed by the American Civil Liberties Union.[44] In fact, at oral argument, the attorney for the defendant admitted that he had never heard of *Wolf*, the case that was ultimately overturned by *Mapp*.[45] Nonetheless, the Court ruled that it was obliged to "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right [to privacy], reserved to all persons as a specific guarantee against that very same unlawful conduct."[46] Justice Potter Stewart, who concurred in the *Mapp* decision, would later write that the decision is best understood as the final step in "a three-stage evolutionary process" that began with the adoption of the Fourth Amendment, then continued with the "annexation of the exclusionary rule

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[36] *See, e.g.*, People v. Cahan, 282 P.2d 905 (Cal. 1955) (adopting the rule in California).

[37] 367 U.S. 643 (1961).

[38] *Id.* at 644.

[39] *Id.*

[40] *Id.* at 645.

[41] *Id.*

[42] *See* Stewart, *supra* note 2, at 1367.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Mapp*, 367 U.S. at 654–55.

to the [F]ourth [A]mendment," and concluded with the incorporation of the amendment to the states in *Mapp*.[47]

There is nothing in the text of the Fourth Amendment itself that necessarily points toward exclusion of evidence as a result of Fourth Amendment violations. The rule is therefore "a judicially created remedy designed to safeguard Fourth Amendment rights generally . . . rather than a personal constitutional right of the party aggrieved."[48] The Supreme Court in *Terry v. Ohio* summed up the dual purposes of the exclusionary rule as deterring police misconduct and helping ensure judicial integrity by keeping courts from becoming party to such misconduct.[49] The rule has been criticized by originalists for its lack of explicit constitutional basis, and by others for its supposed favorability to criminal defendants.[50] Other scholars point to early American legal works and dicta in cases to prove its originalist bona fides.[51]

In effect, the exclusionary rule reinforces the Fourth Amendment by giving defendants a means of recourse more effective than others. In his dissent in *Wolf*, Justice Murphy discussed the inefficacy of other means of recourse, using reasoning that was reiterated in Justice Douglas's concurrence in *Mapp*.[52] Self-discipline on the part of the police, Justice Murphy wrote, is "a lofty ideal," but it is folly to "expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid" ordered by the prosecutor's office.[53] Another avenue of recourse would be an action for trespass against the officer, but such actions were rife with problems as "a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment."[54] The damages for trespass varied from state to state, but were frequently limited to nominal damages, and in some states included a requirement of malice to obtain punitive damages.[55] Even if punitive damages were obtained,

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[47] Stewart, *supra* note 2, at 1368.

[48] United States v. Calandra, 414 U.S. 338, 348 (1974).

[49] 392 U.S. 1, 12–13 (1968).

[50] Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 11–13 (2010).

[51] *See id.*

[52] Mapp v. Ohio, 367 U.S. 643, 669–70 (1961) (Douglas, J., concurring).

[53] Wolf v. Colorado, 338 U.S. 25, 42 (1949) (Murphy, J., dissenting).

[54] *Id.* at 42–43.

[55] *Id.* at 43.

individual officers may not have had deep enough pockets to satisfy the judgment. Furthermore, the officer could mitigate damages by showing that they reasonably believed the home searched contained evidence, and if the evidence were actually used in the subsequent trial, that in itself could be an absolute defense to the underlying trespass.[56] Trespass actions against individual officers were, as a deterrent to misconduct, "illusory."[57]

C. The Good Faith Exception to the Exclusionary Rule

After it incorporated the rule to the states,[58] the Supreme Court subsequently narrowed the exclusionary rule's scope. In the 1980's, the Court carved from the exclusionary rule one of its more expansive exceptions. The good faith exception to the exclusionary rule was established in two Supreme Court cases from 1984: *United States v. Leon*[59] and *Massachusetts v. Shephard*.[60] As the Court stated in *Leon*, the issue was whether the "exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[61] The Court held that the rule should allow such use.[62]

In *Leon*, police relied on information from "a confidential informant of unproven reliability" who told police he had observed the defendant selling drugs.[63] After an extensive investigation, the officers applied for and received a warrant to search several residences, vehicles, and suspects.[64] Following an evidentiary hearing, the district court found that the warrant was not supported by probable cause and granted in part the motions to suppress.[65] The court of appeals similarly found probable cause was absent as the informant's credibility

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[56] *Id.* at 43–44.

[57] *Id.* at 42–43.

[58] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[59] 468 U.S. 897 (1984) (establishing the rule).

[60] 468 U.S. 981 (1984).

[61] *Leon*, 468 U.S. at 900.

[62] *Id.* at 922–25.

[63] *Id.* at 901.

[64] *Id.* at 902.

[65] *Id.* at 903.

had not been adequately established and the information given by the informant was stale.[66]

The U.S. Supreme Court granted certiorari and, instead of reconsidering the question of probable cause in the affidavit used to obtain the warrant, ruled that the exclusionary rule could be modified "without jeopardizing its intended functions."[67] The Court noted that the rule came burdened with "substantial . . . costs . . . for the vindication of Fourth Amendment rights[,]" costs that "have long been a source of concern."[68] According to the Court, the exclusionary rule interferes with the truth-finding function of the criminal justice system and ensures that some guilty defendants are not brought to justice, or at least face reduced sentences.[69] The Court emphasized the deterrent effect that the rule had on police misconduct over the effect of punishing issuers of warrants, and said that there was "no evidence that judges and magistrates . . . subvert the Fourth Amendment."[70]

In the balance of police deterrence, judicial integrity, and vindication of Fourth Amendment rights weighed against an efficient and thorough criminal justice system, the Court no longer fell on the same side as Justice Murphy. On the contrary, the Court labeled the rule an "extreme sanction"[71] which conferred benefits on guilty defendants that "offend[] basic concepts of the criminal justice system."[72] Where an officer relies on a facially valid warrant, the Court found that the deterrent effect was slight, and thus the rule's detriment outweighed its utility.[73]

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[66] *Id.* at 904–05.

[67] *Id.* at 905.

[68] *Id.* at 907.

[69] *Id.*

[70] *Id.* at 916.

[71] *Id.*

[72] *Id.* at 908 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).

[73] *See id.* at 916–17.

III. THE EXCLUSIONARY RULE IN NORTH CAROLINA

A. The North Carolina Constitution and State v. Carter

In North Carolina, the state Supreme Court came to a different conclusion with regards to the balance of the right to privacy and the efficacy of the criminal justice system. Article I, Section 20 of the North Carolina Constitution prohibits general warrants, which it defines as warrants that allows an officer "to search suspected places without evidence of the act committed, or to seize any persons not named, whose offense is not particularly described and supported by evidence."[74] The current state constitution is North Carolina's third, and was ratified in 1971.[75] North Carolina's original 1776 constitution had a section almost identical to the current constitution's prohibition on general warrants.[76]

In *State v. Carter*, the defendant (a prisoner) was convicted of rape, kidnap, and assault of a seventy-eight-year-old woman while at a work-release job at a sawmill.[77] At the end of the work day, the defendant did not report back to the transportation van to return to the prison.[78] Shortly before he was due to return, he was seen walking into the woods nearby.[79] The defendant was found early that evening close to where the victim was discovered unconscious a few hours later.[80] The victim's glasses were found under the defendant's hat, and she was able to describe her assailant as wearing an outfit that comported with what the defendant was wearing on the day of the attack.[81] An agent of the State Bureau of Investigation ("SBI") applied for a non-testimonial identification order that included a request for a blood sample from the defendant, which was granted.[82] At trial,

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[74] N.C. CONST. art. I, § 20.

[75] *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1759–60 (1992).

[76] N.C. CONST. of 1776, DECLARATION OF RIGHTS, art. XI.

[77] 370 S.E.2d 553, 554 (N.C. 1988).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

that sample was used to rule out the defendant's blood as the source of a blood smear found on the defendant's underwear.[83]

Before trial, the defendant unsuccessfully moved to suppress any evidence obtained via the blood test,[84] as the SBI officer had not obtained a warrant for the test, and it therefore violated both the Federal Constitution and the North Carolina Constitution.[85] The defendant also argued that the blood test violated Article 14 of Chapter 15A of the North Carolina General Statutes[86]—which governs non-testimonial identification orders, such as fingerprints and blood draws—because the SBI agent failed to get a warrant before obtaining the order.[87]

In an opinion authored by Justice Martin, the court decided that Chapter 15A was not applicable to an in-custody suspect.[88] The court also found that the state constitutional grounds were an adequate and independent basis to the decision, rendering the federal constitutional question unnecessary.[89] The court made clear that the Federal Constitution created a minimum for the rights of state citizens, but that the court was free to construe the state constitution so as to provide greater rights than the Federal Constitution.[90] The court briefly traced the history of the exclusionary rule, noting that the North Carolina General Assembly enacted a statutory rule in 1937 requiring the exclusion of evidence obtained under a faulty warrant, which was amended in 1951 to include unlawful warrantless searches.[91] Thus, North Carolina has had express public policy in place since 1937 that evidence obtained by unreasonable searches and seizures should be excluded.[92] Justice Martin noted that the taking of a blood sample qualifies as a search subject to the state constitution, and that it must therefore be conducted under the auspices of a search warrant, absent probable cause and exigent circumstances "that would justify a

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[83] *Id.* at 555.

[84] *Id.* at 554–55.

[85] U.S. CONST. amend. IV; N.C. CONST. art. I, § 20.

[86] N.C. GEN. STAT. ANN. §§ 15A-271 to 15A-282 (West 2020).

[87] *Carter*, 370 S.E.2d at 554–55.

[88] *Id.* at 555.

[89] *See id.*

[90] *See id.*

[91] *Id.* at 559. This law was repealed and replaced in 1975. *Id.*

[92] *Id.*

warrantless search."[93] There were no exigent circumstances present in *Carter*, as the defendant's blood type would remain the same had the officer taken the time to apply for a warrant.[94] Therefore, the evidence should have been suppressed.

In considering whether the court should adopt a good faith exception, Justice Martin noted that since the *Mapp* decision in 1961, SCOTUS "has limited the scope of application of the exclusionary rule in several cases."[95] In each of these cases, the "Court has weighed the costs of the more expansive application of the rule—which it has identified as that of a quantum of deterrence of police misconduct foregone—against the costs of lost probative evidence."[96] SCOTUS "has determined that the costs are too slight to outweigh the benefits of admissibility."[97]

The Supreme Court of North Carolina balanced the same factors as SCOTUS yet came to a different result. Justice Martin called the exclusionary rule "the only effective bulwark against" improper governmental intrusions into citizens' privacy. [98] The Justice also emphasized the rule's integral role in maintaining judicial integrity, noting precedent from the state itself as well as separate dissents authored by SCOTUS Justices Holmes and Brandeis in *Olmstead v. United States*.[99] Justice Martin noted that "[o]ne of the great purposes of the exclusionary rule is to impose the template of the constitution on police training and practices[,]" and that the rule had been effective in achieving deterrence and forcing police departments to conduct thorough training on search and seizure law.[100] Further, in the time between when the exclusionary rule was announced in *Weeks* and incorporated to the states in *Mapp*, no alternative way to achieve the goals of the exclusionary rule had been developed and actions for damages had proven ineffective, leaving the rule as the only viable method.[101] Justice Martin noted that there were potentially serious implications that could result from the failure of prosecutors

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[93] *Id.* at 556.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 556–57.

[97] *Id.* at 557.

[98] *Id.* at 559.

[99] *Id.* at 560.

[100] *Id.*

[101] *Id.*

to convict guilty defendants, but that such potentialities were acceptable because of the "precious" nature of the constitutional rights protected[102]—rights that are protected by the rule not only for the accused, but for all residents of the state.[103]

While *Carter* is a sweeping statement of support for the exclusionary rule, it is perhaps not as broad as it has been made out to be. There is limiting language used nearly from the beginning of the opinion.[104] Justice Martin distinguished *Carter* from a SCOTUS exclusionary rule case involving an administrative search by noting that a blood draw is not a minimally intrusive search, but rather "the *most* intrusive search, the invasion of defendant's body . . . ."[105] Furthermore, the Justice referred repeatedly to the public policy of the state that had been expressed since 1937, and wrote that "if a good faith exception is to be applied to this public policy, let it be done by the legislature."[106] In 2011, the legislature did just that, importing a good faith exception into the statutory exclusionary rule in Chapter 15A[107] and requesting that the North Carolina Supreme Court reconsider and overrule *Carter*, which it has so far declined to do.[108]

B. Post-Carter Search and Seizure Cases in North Carolina

Though *Carter* has not been overruled in subsequent cases, state courts have issued decisions calling into question some of its reasoning and the results thereof. In *State v. Garner*, the defendant was convicted of first-degree murder and armed robbery.[109] The defendant appealed his conviction in part on the grounds that the state constitution did not contain an inevitable discovery exception to the exclusionary rule.[110] While North Carolina had not yet incorporated such

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[102] *Id.*

[103] *Id.*

[104] *Id.* at 554 ("We hold that there is no good faith exception . . . *as applied to the facts of this case* . . . .) (emphasis added).

[105] *Id.* at 561.

[106] *Id.* at 562.

[107] N.C. GEN. STAT. ANN. § 15A-974 (West 2020).

[108] Bob Farb, *New North Carolina Legislation on Good Faith Exception to Exclusionary Rules*, N.C. CRIM. L. (Mar. 21, 2011, 8:43 AM), https://nccriminallaw.sog.unc.edu/new-north-carolina-legislation-on-good-faith-exception-to-exclusionary-rules/.

[109] 417 S.E.2d 502, 503 (N.C. 1992).

[110] *Id.* at 506.

an exception, it did so in *Garner*.[111] In his opinion, Justice Lake acknowledged the deterrent purpose of the exclusionary rule but, much like the majority in *Leon*, he emphasized the rule's detriment, citing "the drastic social cost of letting the obviously guilty go free . . . ."[112] Furthermore, in the decision and while referring directly to *Carter*, Justice Lake contradicted the idea that the North Carolina Constitution intrinsically provides any greater search and seizure protections than the Federal Constitution, saying "there is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment . . . ."[113]

Justice Lake noted that the section in question refers to "[g]eneral warrants" and stated that the subject of the article was thus only those particular instruments, and that it "should not be viewed as a vehicle for any inventive expansion of our law."[114] The founders did not explicitly mention general warrants in the Fourth Amendment, but the requirement that warrants shall not issue without a particular description of the place and object of the search seems like—and has generally been agreed to be—a clear proscription by exclusion.[115] In this way, it makes some sense that Article I, Section 20 of the North Carolina Constitution, in explicitly banning the same instrument that the founders inexplicitly banned in the Fourth Amendment, would be no more expansive than the Federal Constitution, in that both seek to prohibit the general warrants that plagued American colonists.[116]

Justice Lake was explicit in *Garner* that the North Carolina Constitution should be considered no more expansive than the Federal Constitution.[117] Had the court agreed with Justice Martin that the North Carolina Constitution should be considered more expansive,[118] it still may have found that, on balance, the effects of deterrence, of police misbehavior, and supporting judicial integrity were outweighed by the potential harm to the truth-finding process of the criminal

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[111] *Id.* at 507.

[112] *Id.*

[113] *Id.* at 510.

[114] *Id.*

[115] *Id.* at 509–10.

[116] *Id.* at 510.

[117] *Id.*

[118] State v. Carter, 370 S.E.2d 553, 555–60 (N.C. 1988).

justice system. It seems quite possible, however, that the "precious" nature of privacy rights would properly prevail, and by the same logic, the "inevitable discovery" doctrine would fail under the North Carolina Constitution.

In a slightly later case, the North Carolina Court of Appeals appeared to ignore *Carter* altogether, although the good faith exception was not the basis of the opinion.[119] In *State v. Witherspoon*,[120] the court faced facts similar to those in *Leon*. The defendant plead guilty to manufacture and possession with the intent to sell a controlled substance.[121] Before doing so, the defendant moved to suppress some evidence on the grounds that the warrant was not supported by probable cause.[122] The warrant was based in part on information obtained from an informant, information that the defendant contended was stale or unreliable.[123] The informant claimed to have seen a marijuana growing operation in the defendant's crawl space, and gave details about the defendant's arrest history and personal vehicle that proved accurate—as did the marijuana allegation.[124] Judge Eagles, writing for the court, applied the totality of the circumstances test to determine whether the warrant was based on probable cause.[125] The Judge found that the warrant was supported by probable cause in part because the informant had shown his reliability by admitting to drug use in the past, which constituted a statement against penal interest that, in its own right, carried "indicia of credibility sufficient to support a finding of probable cause to search."[126]

While the potential contradiction of using an admission of drug use as its own indicator of reliability is troubling (especially where the crime admitted to is one that, like possession, carries little risk of a successful future prosecution), what is more troubling is the court's handling of the potential applicability of the good faith exception to the exclusionary rule in the case. In a brief section at the end of the opinion, Judge Eagles stated that even if probable cause were absent, "the good faith exception to the exclusionary rule is applicable

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[119] State v. Witherspoon, 429 S.E.2d 783 (N.C. Ct. App. 1993).

[120] *Id.*

[121] *Id.* at 784.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* at 786 (quoting State v. Beam, 381 S.E.2d 327, 330 (N.C. 1989)).

here."[127] Making no reference to *Carter*, Judge Eagles instead based that conclusion on *State v. Welch*,[128] a decision predating *Carter* that largely relied on the then-newly-issued *Leon*.[129] The officers in *Witherspoon* reasonably relied on a warrant issued by a neutral magistrate and took "every reasonable step to comport with the [F]ourth [A]mendment requirements."[130] Therefore, they could have relied on the good faith exception, though it seems apparent how reliance on an unconstitutional doctrine would have fared on appeal.

C. SCOTUS Narrows the Application of the Exclusionary Rule

Since the late 1980's, SCOTUS has chipped away at the exclusionary rule and increased the number of cases in which the good faith exception applies.[131] In a string of cases, the Court continued to weigh the factors of deterrence of police misconduct and judicial integrity on one side of the scale, and efficiency of the criminal justice system on the other.[132] Unlike in previous cases, however, recent decisions have found that deterrence and judicial integrity weigh less and less, and efficiency tips the scales lower and lower.[133] In 1987, the Court used the exclusionary rule in a case where police relied on a statute that was later found to be unconstitutional.[134] In 1995, the Court applied the rule in a case where police made an arrest based on a warrant that had been quashed, but that the clerk of court had failed to indicate as such.[135] In 2004, the Court distinguished between errors made by the police themselves, as opposed to judges or magistrates, and indicated that the latter could potentially be covered by the exclusionary rule if the mistake were reasonable.[136]

In 2006, in *Michigan v. Hudson*, the Court, for the first time, applied the good faith exception to a constitutional violation caused

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[127] *Id.* at 787.

[128] 342 S.E.2d 789 (N.C. 1986).

[129] *Witherspoon*, 429 S.E.2d at 787–88 (citing *Welch*, 342 S.E.2d at 794–95).

[130] *Id.* at 788 (citing *Welch*, 342 S.E.2d at 795).

[131] ANNA C. HENNING, CONG. RESEARCH SERV., R40189, HERRING V. UNITED STATES: EXTENSION OF THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN FOURTH AMENDMENT CASES 3–6 (2009).

[132] *See id.*

[133] *See id.*

[134] Illinois v. Krull, 480 U.S. 340 (1987).

[135] Arizona v. Evans, 514 U.S. 1 (1995).

[136] HENNING, *supra* note 131, at 4–5.

by the police themselves.[137] While the decision was limited to violations of the knock and announce rule, the Court expanded the exception to police error involving a warrant just a few years later.[138] In *Herring v. United States*, the Court did not apply the exclusionary rule to evidence gained from an arrest based on a warrant that was no longer active.[139] The Court laid out a fairly permissive test to determine whether police conduct triggered the exclusionary rule; police conduct must be "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[140]

In 2016, in *Utah v. Streiff*, the Court held that even though a defendant was unlawfully stopped, a subsequently discovered, valid warrant justified the introduction of evidence discovered during a search incident to arrest.[141] In his opinion, Justice Thomas noted that even where police violate the Fourth Amendment, the "exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits."[142]

The *Streiff* decision was 6-3, but in her dissent, Justice Sotomayor argued powerfully for the exclusionary rule's necessity in protecting citizens' rights from police abuses, saying that condoning such misconduct gives police incentive to target pedestrians arbitrarily and risks that they will be treated as "second-class citizens."[143] The Justice made it clear that her dissent was primarily based on the new avenues of police misconduct condoned by the ruling, writing that, though couched in soothing technical language, the decision allows officers to stop anyone and demand identification.[144] As Justice Sotomayor tells it, the effect is strikingly similar to that of the general warrants and writs of assistance that elicited the Fourth Amendment in the first place. While it is tempting to forgive the Fourth Amendment trespass where the officer's instincts happened to be correct, "[t]wo wrongs don't make a right."[145]

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[137] *Id.* at 5 (citing Michigan v. Hudson, 547 U.S. 586 (2006)).

[138] *Id.*

[139] 555 U.S. 135, 144–45 (2009).

[140] *Id.* at 144.

[141] 136 S. Ct. 2056, 2059 (2016).

[142] *Id.*

[143] *Id.* at 2069 (Sotomayor, J., dissenting).

[144] *Id.* at 2064.

[145] *Id.* at 2065 (citing Weeks v. United States, 232 U.S. 383, 392 (1914)).

IV. THE DOCTRINE OF REASONABLE MISTAKE OF LAW

A. Heien v. North Carolina

The Supreme Court recently granted certiorari in another North Carolina case related to the good faith exception. In 2014, the Court decided *Heien v. North Carolina*.[146] In *Heien*, while following a vehicle that he considered suspicious, an officer noticed that the vehicle only had one functional brake light.[147] The officer thought that North Carolina traffic law necessitated that vehicles have two functioning brake lights and pulled the defendant over based on that believed infraction.[148] During the stop, the driver and the vehicle's owner—who remained laying down in the back seat—acted suspiciously, so the officer asked to search the vehicle.[149] The owner consented, and the officer found cocaine.[150] The defendant moved to suppress the cocaine on the grounds that the relevant traffic code provision required only one working brake light, and the stop was therefore unconstitutional.[151] The trial court denied the motion, and the defendant pleaded guilty but reserved his right to appeal the suppression decision.[152]

The North Carolina Court of Appeals reversed the trial court.[153] In its decision, the court found that the malfunction of one brake light, so long as there was at least one still functioning, did not violate the traffic statute.[154] Therefore, the justification for the officer's initial stop was unreasonable, and the evidence should have been suppressed.[155] While the law was "antiquated," it was the role of the legislature, not the courts, to update the law to reflect modern safety standards, and a mistaken understanding of an antiquated law was not a proper justification for a traffic stop.[156] The Supreme Court of

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[146] 574 U.S. 54 (2014).

[147] *Id.* at 57.

[148] *Id.*

[149] *Id.* at 57–58.

[150] *Id.* at 58.

[151] *Id.* at 58–59 (citing N.C. GEN. STAT. ANN. § 20-129(g) (West 2020)).

[152] *Id.*

[153] State v. Heien, 714 S.E.2d 827, 830 (N.C. Ct. App. 2011).

[154] *Id.*

[155] *Id.*

[156] *Id.*

North Carolina reversed the Court of Appeals, finding that the officer's mistaken interpretation of the law was reasonable and that there was therefore no Fourth Amendment violation.[157]

SCOTUS disagreed as to the justification for a stop, though it made no determination as to the lower courts' interpretations of the traffic code.[158] In his opinion for the eight-to-one majority, Chief Justice Roberts wrote that, because the officer's mistake was reasonable, the stop was not a violation of the Fourth Amendment.[159] A traffic stop is a seizure that must be "conducted in accordance with the Fourth Amendment."[160] Such a stop must be conducted on the basis of reasonable suspicion, "a particularized and objective basis for suspecting the particular person stopped."[161] Because reasonableness is the touchstone, the Fourth Amendment allows for some mistakes. SCOTUS has recognized that several types of reasonable mistakes of fact do not invalidate a stop on Fourth Amendment grounds.[162] "But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion," wrote the Chief Justice.[163]

Reasonable men make mistakes, and thus it is reasonable to base an arrest on such a mistake, and reasonable to allow evidence obtained from such an arrest in the prosecutor's case. "There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law."[164] In justifying this result, the Chief Justice conceded that recent cases did not address such mistakes of law.[165] But there were older cases that did just that. Justice Roberts

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[157] State v. Heien, 737 S.E.2d 351, 356 (N.C. 2012).

[158] Heien v. North Carolina, 574 U.S. 54, 68–69 (2014). In her concurrence, Justice Kagan conceded that the statute posed a difficult question of interpretation. *Id.* at 71 (Kagan, J., concurring).

[159] *Id.* at 57 (majority opinion).

[160] *Id.* at 60.

[161] *Id.* (quoting Prado Navarette v. California, 572 U.S. 393, 396 (2014)).

[162] *Id.* at 61 (citing Illinois v. Rodriguez, 497 U.S. 177, 183–86 (1990) (holding a warrantless search of a home was reasonable when undertaken with the consent of a person who reasonably appeared to be a resident but in actuality was not)).

[163] *Id.*

[164] *Id.*

[165] *Id.* at 62.

reached back two centuries to cases involving "[c]ustoms statutes enacted by Congress not long after the founding" which "support treating legal and factual errors alike."[166] These statutes allowed courts to indemnify customs officers against suits for illegal seizures.[167] The issuance of such indemnification orders were to be granted on a showing that the officer had reasonable cause for the contested seizure, which, Justice Roberts wrote, was a synonym for probable cause and could be based on a mistake of law.[168]

The Chief Justice also relied on *Michigan v. DeFillippo*, in which the defendant was arrested under a Detroit ordinance that made it illegal for a person suspected of criminal activity to refuse to identify themselves (and produce evidence of their identity) to the officer questioning them.[169] The defendant was approached by a police officer who was responding to a report of public intoxication.[170] The defendant failed to provide identification and was arrested.[171] A search incident to his arrest uncovered marijuana, and the defendant was charged with possession of a controlled substance.[172] The law requiring individuals to identify themselves was later found unconstitutional, but the arrest was nonetheless upheld because the law was, at the time of the arrest, presumptively valid.[173] The Court admitted that the case may have been different had the ordinance been obviously, blatantly unconstitutional, which would have implicated the reasonableness of the decision to enforce it.[174] However, in this specific instance, even if the ordinance had not been in effect, there would likely have been at least one other valid basis to arrest the defendant, who falsely identified himself as a police officer.[175] Therefore, the decision to uphold the arrest as a reasonable mistake of law was unnecessary, and it allowed police and prosecutors to benefit from an

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[166] *Id.*

[167] *Id.*

[168] *Id.* (citing Stacey v. Emery, 97 U.S. 642, 646 (1878); United States v. Riddle, 9 U.S. (5 Cranch) 311 (1809)).

[169] *Id.* at 63–64 (citing Michigan v. DeFillippo, 443 U.S. 31, 33 (1979)).

[170] *Id.* at 64.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] Michigan v. DeFillippo, 443 U.S. 31, 33 (1979).

unreasonable search and seizure. In any case, two constitutional wrongs do not make a right.[176]

Even if the officer's actions in *DeFillippo* were reasonable, there is a marked difference between validating an arrest based on a law which appears to be clear on its face, but that is later found to be unconstitutional, and a law that is facially unclear and could be construed any number of ways. In the case of an unconstitutional law, it is more appropriately the judiciary's role to construe the law. The legislature could not simply overrule the judiciary if they disagreed with the judiciary's construction. In the case of a constitutional statute, on the other hand, the legislature could do just that (or clarify the old statute), and the judiciary is more closely bound to the legislature's intent in construing the law in the first place. Allowing arrests based on any reasonable interpretation of the law disincentivizes legislatures from making the intent behind their criminal statutes as clear as possible, as a relatively vague law allows from more interpretations that could potentially form the basis for a lawful arrest.

Even more important than disincentivizing the legislature, allowing police to benefit from such vagueness discourages them from forming a consensus on a given law, as doing so would narrow the grounds under which they could make lawful arrests. Indeed, such a system does not disincentivize ignorance of the law, it actively encourages it. Chief Justice Roberts discounts the unfairness of allowing police to benefit from an officer's ignorance of the law by reminding the reader that the mistakes must be objectively reasonable, and thus that an officer cannot get ahead by "sloppy study of the laws he is duty-bound to enforce."[177] The measure is the reasonable officer.[178] But any student of the law knows how murky even the most seemingly simple law can be when applied to real world facts, not examined in a hypothetical vacuum.

Furthermore, the Chief Justice said that the "ignorance of the law" argument, while appealing, mischaracterizes the situation.[179] There is no unfairness because, just as a private person cannot escape

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[176] *See* Utah v. Streiff, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting) (citing Weeks v. United States, 232 U.S. 383, 392 (1914)).

[177] *Heien*, 574 U.S. at 66–67.

[178] *Id.* at 66.

[179] *Id.* at 67.

liability based on ignorance or misunderstanding of the law, the government cannot impose criminal liability based on a mistake of law.[180] Here, the government could not validly prosecute Heien for having only one brake light when the law did not require two.[181] Heien's prosecution was for drug trafficking, not a faulty brake light.[182] But the drug trafficking conviction would not have come to pass without the traffic stop. Viewed through the lens of Justice Martin's reasoning in *Carter*, the stop could easily be construed as a violation of precious Fourth Amendment rights. In that light, the conviction was the fruit of the poisonous tree.

Though *Heien* does not itself modify the exclusionary rule, the decision does discuss it. Chief Justice Roberts says that "Heien struggles to recast *DeFillippo* as a case solely about the exclusionary rule, not the Fourth Amendment itself."[183] *DeFillippo* contains a footnote explaining that suppressing the evidence in question would serve "[n]o conceivable purpose of deterrence."[184] *Heien* is not an exclusionary rule case because the basis of the decision is a simpler but related Fourth Amendment issue. Like *DeFillippo* before it, *Heien* does not implicate the rule itself, but instead "up[holds] the validity of an arrest" before getting through the Fourth Amendment issues to the exclusionary rule.[185]

At least a few commentators have analyzed *Heien* in connection with the exclusionary rule, one going so far as to label *Heien* "the Court's most recent expansion of the good-faith exception in the context of police mistakes of law."[186] The Supreme Court of North Carolina in *Carter* dealt with essentially the same Fourth Amendment issues before coming to the exclusionary rule, and unlike SCOTUS, found "the crucial matter of the integrity of the judiciary and the maintenance of an effective institutional deterrence to police violation of the constitutional law of search and seizure to be the paramount considerations."[187] The Fourth Amendment concerns implicated in

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[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.* at 64.

[184] 443 U.S. 31, 38 n.3 (1979).

[185] *Heien*, 574 U.S. at 65 (quoting Illinois v. Gates, 462 U.S. 213 (1983)).

[186] Katherine Sanford, Comment, Heien v. North Carolina: *Mistaken Conclusions on Mistakes of Law*, 93 DENV. L. REV. 523, 523 (2016).

[187] 370 S.E.2d 553, 560 (N.C. 1988).

Carter are similar to those of *Heien*, except the officer in *Carter* had to go through more process before conducting a search.[188] The North Carolina Supreme Court nonetheless found that the officer violated the defendant's rights.[189]

On the other hand, the officer in *Heien* went through less process before searching and seizing the defendant.[190] In cases involving good faith exceptions to the exclusionary rule, generally, the law enforcement officer must have obtained a warrant, meaning that they must have necessarily involved a magistrate, a neutral third party. That means that there is by default more oversight in cases implicating the exclusionary rule, which the North Carolina Supreme Court nevertheless found to be insufficient to overcome the Fourth Amendment implications.[191] In cases of reasonable mistake of law, the mistake is usually made by only an officer or a small group of officers, who are likely to be less versed in the law than a judge or magistrate, and who have yet to involve a judge or magistrate in the case.[192]

There are, of course, different concerns when the decision is being made on the scene by a small group of officers. Officers tout the fact that they must make split-second decisions that may mean life or death for them or the people they stop.[193] But as cameras proliferate, it has become increasingly clear that such split-second decisions are often necessitated by escalation on the part of law enforcement, escalation that appears obviously unnecessary when

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[188] *Compare id.* at 554–55 (describing the process of applying for a non-testimonial identification order requesting that a blood sample be taken from an in-custody defendant), *with Heien*, 574 U.S. at 57–58 (describing the stop of a car with a broken brake light that led to a consented search of the vehicle based on reasonable suspicion, and the ultimate discovery of cocaine in the vehicle).

[189] *Carter*, 370 S.E.2d at 561–62.

[190] *Compare Heien*, 574 U.S. at 57–58 (describing a traffic stop predicated on a broken brake light), *with Carter*, 370 S.E.2d at 554–55 (describing the process of applying for a non-testimonial identification order requesting that a blood sample be taken from an in-custody defendant).

[191] *See* Sanford, *supra* note 186, at 530–34.

[192] *See id.* at 533–34.

[193] Damon Root, *These Judges Defend Qualified Immunity as 'a Deferential Rule' That Protects the Police*, REASON (June 11, 2020, 12:35 PM), https://reason.com/2020/06/11/these-judges-defend-qualified-immunity-as-a-deferential-rule-that-protects-the-police/.

viewed in retrospect.[194] This is especially true as it becomes easier and easier to track suspects that may have easily escaped in the past.[195]

Moreover, as the media has been forced to confront these situations, the role of increasing militarization of law enforcement agencies comes more and more into focus—militarization that is welcomed, encouraged, and taught to new members by the agencies themselves.[196] As militarization and learned escalation increases, Fourth Amendment rights continue to shrink into the background in favor of law enforcement efficacy, with tragic results. Such an outcome is not unavoidable, however, and North Carolina's own Fourth Amendment precedent shows a way to bring the privacy rights of its residents back to the fore.

V. CONCLUSION

Freedom from unreasonable search and seizures is a foundational tenet of the United States, a reaction to British misconduct enshrined in the Constitution. For a time, the Supreme Court strengthened and bolstered this protection through the exclusionary rule. More recently, the Court has carved several exceptions from the rule, eroding our Fourth Amendment rights in the interest of empowering police and prosecutors to make arrests and convictions. The public now has a clearer picture of the costs of that trade off, and they are roundly rejecting it. Fortunately, there are tools close at hand that can help reverse that trend in state constitutions, and the groundwork has already been laid in cases like *Carter*. In this one narrow way, it is time to look backward in order to move forward.

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[194] *See generally* Charles Ramsey & Laurie O. Robinson, *Adopt Minimum National Police Use-of-Force Standards and Train Cops for Interaction*, USA TODAY, https://www.usatoday.com/story/opinion/policing/2020/05/29/prevent-another-death-police-train-and-adopt-national-standards-george-floyd/5282895002/ (last updated May 29, 2020, 8:25 PM).

[195] *See generally 4 Police Technologies That Are Changing Policing*, KOVACORP (Oct. 14, 2016), http://www.kovacorp.com/4-police-technologies-changing-policing/.

[196] Kelly McLaughlin, *One of America's Most Popular Police Trainers Is Teaching Officers How to Kill*, INSIDER (June 2, 2020, 5:53 PM), https://www.insider.com/bulletproof-dave-grossman-police-trainer-teaching-officers-how-to-kill-2020-6.