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2011

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Wayne A. Logan

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### Recommended Citation

Wayne A. Logan, *Police Mistakes of Law*, 61 Emory L. Rev. 69 (2011).

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## POLICE MISTAKES OF LAW

Wayne A. Logan\*

*This Article addresses something that most Americans would consider a constitutional impossibility: police officers stopping or arresting individuals for lawful behavior and courts deeming such seizures reasonable for Fourth Amendment purposes, thereby precluding application of the exclusionary rule. Today, however, an increasing number of courts condone seizures based on what they consider “reasonable” police mistakes of law, typically concerning petty offenses, and permit evidence secured as a result to support prosecutions for unrelated, more serious offenses (usually relating to guns or drugs). The Article surveys the important rule-of-law, separation-of-powers, and legislative-accountability reasons supporting continued judicial adherence to the historic no-excuse position. In so doing, it illuminates the central role that police can play as interpreters—not merely enforcers—of the law, a role to date ignored by courts and commentators.*

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## INTRODUCTION

Police officers, like members of the public at large, can make mistakes, including relative to the scope and content of laws. Police mistakes of law, however, differ in kind and consequence. When police stop or arrest an individual based on a mistaken legal understanding, they not only violate their sworn duty to enforce the law but also effectuate an unlawful deprivation of physical liberty. Historically, as a result, police mistakes of law have been condemned by courts, triggering first tort liability,<sup>1</sup> and later application of the exclusionary rule, based on a finding that the seizure was unreasonable for Fourth Amendment purposes.<sup>2</sup>

Of late, however, courts have shown increasing willingness to excuse police mistakes of law, especially with respect to the myriad low-level offenses that play a staple role in modern policing. The Eighth Circuit, D.C. Circuit, and several state appellate courts now uphold police stops and arrests premised on

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<sup>1</sup> See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 323–24 (2002) (noting common law practice of imposing false-arrest and trespass liability for illegal arrests).

<sup>2</sup> See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5 (4th ed. 2004 & Supp. 2010) (surveying caselaw deeming seizures based on police mistakes of substantive law unreasonable and subject to the exclusionary rule).

what they deem objectively reasonable police mistakes of law.<sup>3</sup> As a consequence, police are permitted to seize an individual for conduct that does not violate positive law and, with the exclusionary rule not at play, use the seizure to secure evidence in support of a prosecution for an unrelated offense of a more serious nature (typically involving guns or drugs).

Lawless behavior by police is, of course, not unprecedented. During the first decades of the twentieth century, studies repeatedly highlighted the widespread incidence of illegal seizures,<sup>4</sup> backed by the Orwellian assertion that police needed to engage in “illegality . . . to preserve legality.”<sup>5</sup> The excesses, which over time inspired major public concern,<sup>6</sup> figured centrally in the Warren Court’s criminal procedure revolution, with *Mapp v. Ohio*, the watershed 1961 decision extending the Fourth Amendment’s exclusionary rule to the states, serving as a cornerstone.<sup>7</sup> In later years, the seizure authority of police was further limited by, inter alia, decisions striking down substantively vague laws on due process grounds,<sup>8</sup> casting into disfavor such time-honored tactics as rounding up individuals based on “suspicion.”<sup>9</sup>

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<sup>3</sup> See *infra* Part I.B.

<sup>4</sup> See, e.g., Caleb Foote, *Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 21–27 (1957) (discussing reports of illegal detentions occurring nationwide); Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 154 (1953) [hereinafter Hall, *Police and Law*] (stating that 3.5 million illegal arrests and imprisonments occurred in 1933—a number that increased as of 1950); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359–61 (1936) [hereinafter Hall, *The Law of Arrest*] (analyzing findings from Boston, Detroit, and Los Angeles showing common incidence of illegal arrest); Sam Bass Warner, *Investigating the Law of Arrest*, 26 A.B.A. J. 151, 153 (1940) (discussing frequent police resort to illegal frisks).

<sup>5</sup> ERNEST JEROME HOPKINS, OUR LAWLESS POLICE: A STUDY OF THE UNLAWFUL ENFORCEMENT OF THE LAW 64 (1931).

<sup>6</sup> See NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 14 (1931) (“Indiscriminate exercise of the power of arrest is one of the most reprehensible features of American criminal justice.”); NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-FIRST YEAR 274 (1952) (“At no time in history has public criticism of police services been as severe and as widespread as it is today.”).

<sup>7</sup> 367 U.S. 643, 655 (1961). The rule was imposed on federal agents several decades earlier in *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>8</sup> See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 51 (1999) (city antigang loitering ordinance); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (California loitering statute); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170–71 (1972) (city vagrancy ordinance). For a discussion of the troubling use of such laws to target African-Americans in particular for decades after the Civil War, see DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 107, 112 (2008).

<sup>9</sup> See generally HOPKINS, *supra* note 5, at 63–64, 70 (condemning the high prevalence of “on-suspicion” bookings in 1929 and 1930); Hall, *The Law of Arrest*, *supra* note 4, at 359 (identifying 3,500 “suspicious

Substantive law lawlessness has attracted less attention over time. But this too is ripe for change, given broader evolutionary developments. As law enforcement has become more proactive in recent years, relying less on citizen complaints<sup>10</sup> and more on police investigative initiative,<sup>11</sup> substantive law has assumed correspondingly greater significance. Modern-day strategies like order-maintenance policing and vigorous traffic patrol depend on the ever-expanding array of low-level offenses contained in state, local, and federal codes as tools to stop and arrest individuals,<sup>12</sup> providing bases to secure evidence or information allowing for more serious prosecutions.

This street-level shift has, in turn, been facilitated by Supreme Court decisions increasing the discretionary authority of police to seize individuals without warrants. In 1996, in *United States v. Whren*, the Court held that the legal basis offered by police to justify a traffic stop can merely be a pretext to investigate suspicions of unrelated criminal activity.<sup>13</sup> Five years later, in *Atwater v. City of Lago Vista*, the Court held that the menial nature of the offense justifying an arrest is constitutionally irrelevant, allowing police to allege violation of any law, however trivial in nature or consequence, as a

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person[]” arrests in Boston between 1928 and 1933, nearly all of which resulted in release without court appearance).

<sup>10</sup> See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 627–42 (1999) (discussing the reactive nature of early law enforcement); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1468–75 (2005) (surveying the limited responsibilities of late-eighteenth-century law enforcement).

<sup>11</sup> See Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1247–48 (2010) (discussing common police resort to minor offenses, especially concerning traffic, to secure evidence for more serious drug and weapons prosecutions). The practical importance of these many laws is magnified by the reality that police often enjoy authority to seize individuals for alleged violations of both their own jurisdiction’s laws and those of others. See, e.g., *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (noting that, absent “state or local law to the contrary,” state and local police enjoy power to arrest for violation of federal law).

<sup>12</sup> See Christine N. Famega, *Proactive Policing by Post and Community Officers*, 55 CRIME & DELINQ. 78 (2009) (examining various proactive policing methods now enjoying widespread use); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 422–40 (2000) (same).

<sup>13</sup> 517 U.S. 806, 813 (1996); *accord* *Arkansas v. Sullivan*, 532 U.S. 769, 771–72 (2001) (per curiam) (validating a pretextual arrest on the same basis). The *Whren* Court also refused to impose any substantive limit on police seizure authority, stating:

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard . . . we would decide . . . which particular provisions are sufficiently important to merit enforcement.

517 U.S. at 818–19.

constitutionally reasonable basis for arrest.<sup>14</sup> Most recently, in *Virginia v. Moore*, the Court freed police from control of state procedural limits on their seizure authority, refusing to attach Fourth Amendment importance to their violation.<sup>15</sup>

Today, as a result, state, local, and federal legal codes not only order society and serve as a basic job description for police.<sup>16</sup> They also, in the absence of meaningful judicial limits on police discretionary authority, serve as a chief basis to ensure that officers act with the reasonableness demanded by the Fourth Amendment.<sup>17</sup>

Despite this supremacy, legal scholars have failed to focus on the crucial role police play as interpreters (not merely enforcers) of substantive law.<sup>18</sup> While countless articles have considered the interpretive authority of judges,<sup>19</sup> prosecutors,<sup>20</sup> and even juries,<sup>21</sup> the latitude enjoyed by police—the lowest ranking, yet most visible, actors in the criminal justice system, who decide when the system is to come into play<sup>22</sup>—has received only fleeting attention.<sup>23</sup>

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<sup>14</sup> 532 U.S. 318, 354 (2001); *accord* Safford Unified Sch. Dist. # 1 v. Redding, 129 S. Ct. 2633, 2651 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (“[A] basic principle of the Fourth Amendment[is] that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules.”).

<sup>15</sup> 553 U.S. 164, 178 (2008).

<sup>16</sup> See Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1612 (2009) (“Without the substantive criminal law, . . . policing would be unintelligible.”); Wayne R. LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEX. L. REV. 434, 436 (1967) (“[T]he substantive criminal law is not merely a list of ‘thou-shall-nots’ directed to the citizenry; it is also in large measure a definition of the job of the several police agencies in the state.”).

<sup>17</sup> See U.S. CONST. amend. IV (“The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .”).

<sup>18</sup> See Coughlin, *supra* note 16, at 1612 n.35 (“It seems important, even crucial for us, to begin to consider how the police construe the substantive criminal law. What on earth do they make of the language of statutory prohibitions, and how exactly do they make it?”).

<sup>19</sup> See, e.g., John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

<sup>20</sup> See, e.g., Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

<sup>21</sup> See, e.g., Lawrence M. Solan, *Jurors as Statutory Interpreters*, 78 CHI.-KENT L. REV. 1281 (2003).

<sup>22</sup> See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 222 (1969) (“[T]he police are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.” (footnote omitted)); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 7 (1978) (“[D]iscretion increases as one moves down the [organizational] hierarchy.”).

<sup>23</sup> One exception is found in Wayne LaFave’s seminal 1965 work on police arrest practices. See WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 85 (Frank J. Remington ed., 1965) (“It is obviously important to determine how such criminal statutes should be interpreted by law enforcement personnel who must decide whether to arrest.”).

This Article seeks to fill this void, doing so through the lens of the increasing willingness of courts to forgive police mistakes of law. Part I sets the stage for the ensuing discussion, providing a typology of police mistakes, which fall into two broad categories: constitutional and substantive law errors. Focusing mainly on the latter, the Article surveys the growing number of decisions that condone as constitutionally reasonable seizures premised on police mistakes of substantive law. While police have long been forgiven their trespasses—in a literal sense—in the context of searches, freeing them from the dictates of tort and property law,<sup>24</sup> they are now being afforded freedom to deviate from criminal-code norms in the execution of their seizure authority.

Part II discusses why the position promises to enjoy increasing support in the near future. First, much as courts have been more amenable to forgiving layperson mistakes of law because of the difficulties presented by the often-technical nature of low-level offenses contained in codes,<sup>25</sup> courts are showing concern for the enforcement difficulties these same laws present police. Second, forgiving police for their reasonable mistakes of law aligns with the now-dominant purpose of the exclusionary rule, which is to deter “deliberate” and “culpable” police errors.<sup>26</sup> Finally, judicial inclination to forgive police mistakes of law allows for what might be thought an appealing symmetry with qualified immunity doctrine, which shields police from personal liability for their reasonable mistakes of substantive law.

The arguments, however, fail to persuade. Judicial forgiveness of police mistakes, on the rationale that the law is too voluminous and complex for them to master, rests on the unacceptable premise that those entrusted to enforce the law need not know and follow its actual prescriptions. Similarly, it is incorrect to assume that the exclusionary rule will lack influence. Rather than indulging “reasonable” police mistakes of law, the justice system should do its utmost to incentivize police knowledge of its actual requirements. Finally, the analogy to qualified immunity is off base. Qualified immunity is at issue when police face

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<sup>24</sup> See *Oliver v. United States*, 466 U.S. 170, 183–84 (1984) (refusing to invalidate police entry onto private property that violated state trespass law).

<sup>25</sup> See MODEL PENAL CODE § 2.02 cmt. 11 (Tentative Draft No. 4, 1955) (describing adherence to the traditional view that mistake of law is no excuse as “greatly overstated”); Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 343 (1998) (noting that the no-excuse principle “has been seriously eroded over the past century, and in recent years, this erosion has threatened to become a landslide” (footnote omitted)); Michael L. Travers, Comment, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1303–24 (1995) (discussing increasing eschewal of the no-excuse principle in response to concerns of lenity, moral culpability, and due process).

<sup>26</sup> *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

personal monetary liability, and its low expectation of police knowledge is consciously calibrated to avoid overdeterrence. Here, by contrast, lawless deprivations of physical liberty (and very often privacy) are in the balance, and the outcome is not a personalized remedy but rather a systemic sanction seeking institutional deterrence.

Part III surveys the broader negative consequences of allowing police to stop and arrest based on their mistaken legal understandings. Most important, when courts condone such seizures they undermine basic rule-of-law expectations. Police officers, the public face and embodiment of “the law,” are permitted to invoke their monopoly on the lawful use of coercive force without legal basis, and any evidence they secure can be used to justify prosecutions for unrelated yet more serious offenses. Second, when courts defer to mistaken police interpretations of law, separation of powers is violated: police are allowed to serve as lawmakers, not law enforcers, based on what they reasonably believe the law to require or prohibit (not what it actually does). Finally, affording police latitude to err, free of the exclusionary rule, removes a key institutional incentive for legislatures to craft laws with less legal and linguistic uncertainty.

Part IV considers how best to address the challenge of police mistakes of law. In keeping with the great faith the Supreme Court has placed in the efficacy of police training—so much so that it now sees less need for the exclusionary rule<sup>27</sup>—the Article urges increased emphasis on the quantity and quality of police substantive law training. Today, despite the integral role played by the substantive law in policing, departments dedicate surprisingly little time and attention to its instruction. Rather than indulging and encouraging police substantive law knowledge deficits, courts should refuse to condone police mistakes of law, and police departments should redouble their efforts to enhance and ensure police legal knowledge. What is needed, in short, is a substantive law counterpart to the Fourth Amendment procedural law mandate of *Mapp v. Ohio*, now fifty years old, incentivizing departments to teach, and rank-and-file police to learn, the scope and content of the laws that they are charged with enforcing.

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<sup>27</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006) (finding a lessened need for the exclusionary rule given “the increasing professionalism of police forces” and “wide-ranging reforms in the education, training, and supervision of police officers” (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 51 (1993)) (internal quotation marks omitted)).



## I. A TYPOLOGY OF POLICE MISTAKES OF LAW

Notwithstanding its epigrammatic status in exclusionary rule debates, Justice (then Judge) Cardozo's famous reference to "the constable [that] has blundered"<sup>28</sup> has never been self-defining. As this Part discusses, the nature of the legal mistake at issue—constitutional or substantive—can have dispositive effect.

### A. *Constitutional Law*

Police mistakes of constitutional law essentially assume two forms. The first concerns the constitutional validity of a statute invoked by police as the basis for a stop or arrest, as in *Michigan v. DeFillippo*.<sup>29</sup> In *DeFillippo*, the Court upheld admission of evidence secured as a result of a search incident to an arrest based on violation of an ordinance later invalidated on void-for-vagueness grounds.<sup>30</sup> The Court observed that "there was no controlling precedent that [the] ordinance was or was not constitutional"<sup>31</sup> and concluded that "[a] prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional."<sup>32</sup> "Society," the Court asserted, "would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."<sup>33</sup> Exclusion is proper only when a law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."<sup>34</sup>

*Illinois v. Krull*, which concerned police resort to a state law allowing officers to forgo a warrant before searching the premises of used auto part dealers,<sup>35</sup> provides another example. In *Krull*, a 5–4 majority held that the purpose of the exclusionary rule—to "safeguard Fourth Amendment rights

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<sup>28</sup> *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). According to Judge Posner, reference to the "slightly archaic" term *constable*, summoning imagery of law enforcement from Gilbert and Sullivan, was intended to make police errors "seem trivial, almost comical." RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 56 (1990).

<sup>29</sup> 443 U.S. 31 (1979).

<sup>30</sup> *Id.* at 40.

<sup>31</sup> *Id.* at 37.

<sup>32</sup> *Id.* at 37–38.

<sup>33</sup> *Id.* at 38; *accord id.* ("Police are charged to enforce the laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality . . .").

<sup>34</sup> *Id.*

<sup>35</sup> 480 U.S. 340, 342–43 (1987).

generally”<sup>36</sup>—would not be advanced by penalizing officers acting in good-faith, “objectively reasonable reliance” on an as-yet-constitutional law.<sup>37</sup> Just as *Leon* earlier held that deterrence is not appreciably served by penalizing police for objectively reasonable reliance on a judicial determination that sufficient probable cause exists to issue a warrant,<sup>38</sup> the *Krull* Court held that it is not served by reasonable police reliance on legislation.<sup>39</sup> “Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law.”<sup>40</sup> Echoing its prior holding in *DeFillippo*, the *Krull* Court held that exclusion was proper in only two circumstances: when “the legislature wholly abandoned its responsibility to enact constitutional laws” or when provisions of the statute in question “are such that a reasonable officer should have known that the statute was unconstitutional.”<sup>41</sup>

The second principal area for police mistakes in the constitutional law realm concerns Fourth Amendment procedural doctrine. Here, the constitutional reasonableness of police behavior, and potential application of the good-faith exception to the exclusionary rule, is measured by how the behavior sizes up against court-made standards. *Stoner v. California*,<sup>42</sup> decided three years after *Mapp v. Ohio*, provides a helpful illustration. In *Stoner*, police, without first securing a warrant or gaining consent from the petitioner, searched his hotel room on the basis of consent obtained from the hotel’s night desk clerk.<sup>43</sup> A unanimous Supreme Court,<sup>44</sup> citing two prior cases invalidating hotel searches by federal law enforcement agents,<sup>45</sup> held that the search was unlawful and thus subject to *Mapp*’s exclusionary sanction.<sup>46</sup>

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<sup>36</sup> *Id.* at 347 (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)).

<sup>37</sup> *Id.* at 349.

<sup>38</sup> *Id.* at 349–50 (citing *Leon*, 468 U.S. at 920–21).

<sup>39</sup> *Id.* at 350.

<sup>40</sup> *Id.* at 349–50.

<sup>41</sup> *Id.* at 355.

<sup>42</sup> 376 U.S. 483 (1964).

<sup>43</sup> *Id.* at 485.

<sup>44</sup> Justice Harlan concurred in part and dissented in part, “entirely agree[ing] with the Court’s opinion,” but voted to remand the case to California courts to assess whether admission of the evidence seized in the illegal hotel search amounted to harmless error. *Id.* at 490 (Harlan, J., concurring in part and dissenting in part).

<sup>45</sup> *Id.* at 489 (majority opinion) (citing *United States v. Jeffers*, 342 U.S. 48 (1951), and *Lustig v. United States*, 338 U.S. 74 (1949)).

<sup>46</sup> *Id.* at 490.

Since *Stoner*, judicially pronounced Fourth Amendment doctrinal expectations of police have proliferated, increasing the possibility of mistakes.<sup>47</sup> Courts have been most forgiving when police rely on settled doctrine permitting the behavior in question that is later reversed. Much like laypersons, whose mistakes of law based on official pronouncements of law are forgiven,<sup>48</sup> police are thought to act reasonably under such circumstances,<sup>49</sup> nullifying the need for the exclusionary rule.<sup>50</sup>

### B. Substantive Law

Traditionally, courts have been far less forgiving of police mistakes of substantive law.<sup>51</sup> As the Michigan Supreme Court observed in 1885: “An 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>52</sup> Police mistakes of law, even those based on what might be thought a reasonable misunderstanding, triggered tort liability.<sup>53</sup>

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<sup>47</sup> See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1 (1997) (referring to Fourth Amendment doctrine as “complex and contradictory”—“a vast jumble”); HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* ch. 2 (1996) (bemoaning the complex web of exceptions contained in exclusionary rule doctrine); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) (“The fourth amendment is . . . a mass of contradictions and obscurities . . .”).

<sup>48</sup> See Davies, *supra* note 25, at 357–58 & nn.70–71 (discussing doctrine of entrapment by estoppel and its acceptance in section 2.04(3)(b) of the Model Penal Code and many U.S. jurisdictions); John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1 (1997) (discussing theoretical underpinnings of the doctrine of entrapment by estoppel).

<sup>49</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) (“An officer who conducts a search in reliance on binding appellate precedent does no more than ‘ac[t] as a reasonable officer would and should act’ under the circumstances.” (alteration in original) (quoting *United States v. Leon*, 468 U.S. 897, 920 (1984)) (internal quotation marks omitted)).

<sup>50</sup> See *id.* at 2434 (holding that the exclusionary rule is inapplicable when “police conduct a search in objectively reasonable reliance on binding appellate precedent”); *id.* at 2429 (“About all that exclusion would deter . . . is conscientious police work. . . . [W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities.”).

<sup>51</sup> See LAFAVE, *supra* note 23, at 87 n.10 (“While the police officer must make no mistakes in statutory interpretation, his understanding of constitutional law need not be as great.”).

<sup>52</sup> *Malcomson v. Scott*, 23 N.W. 166, 168 (Mich. 1885).

<sup>53</sup> See RESTATEMENT (SECOND) OF TORTS § 121 cmt. i (1965) (“[N]o protection is given to a peace officer who, however reasonably, acts under a mistake of law other than a mistake as to the validity of a statute or ordinance.”); RESTATEMENT (FIRST) OF TORTS § 121 cmt. i (1934) (same).

More recently, police mistakes of law have been deemed unreasonable under the Fourth Amendment.<sup>54</sup> While police are forgiven for their reasonable mistakes of fact,<sup>55</sup> they are not forgiven for their mistakes of substantive law<sup>56</sup>—even if reasonable.<sup>57</sup> A seizure based on a “belief that a law has been broken,” as the Seventh Circuit has noted, “when no violation actually occurred, is not objectively reasonable,”<sup>58</sup> triggering application of the exclusionary rule.<sup>59</sup>

Today, however, this principled position is showing signs of weakening. In the Eighth Circuit, the vanguard of the shift, police can make “objectively reasonable” mistakes of law.<sup>60</sup> Even though an individual’s conduct violates no law, a seizure is reasonable under the Fourth Amendment if a reviewing court finds that the officer operated under an objectively reasonable legal misunderstanding.<sup>61</sup> Officers, the Eighth Circuit avers, need not interpret “laws with the subtlety and expertise of a criminal defense attorney.”<sup>62</sup>

In assessing the objective reasonableness of police mistakes of law, courts in the Eighth Circuit attach exculpatory importance to a wide array of

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<sup>54</sup> See, e.g., *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) (“Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional.”).

<sup>55</sup> See, e.g., *United States v. Chanthasouvat*, 342 F.3d 1271, 1277 (11th Cir. 2003) (“[A]n officer’s mistaken assessment of facts need not render his actions unreasonable because what is reasonable will be completely dependent on the specific and usually unique circumstances presented by each case.”).

<sup>56</sup> The distinction between mistakes of law and fact, while hugely important, is not always clear-cut. See, e.g., *United States v. Miguel*, 368 F.3d 1150, 1153–54 (9th Cir. 2004); *State v. Horton*, 246 P.3d 673, 676 (Idaho Ct. App. 2010).

<sup>57</sup> See, e.g., *United States v. Twilley*, 222 F.3d 1092, 1096 (9th Cir. 2000) (“[An officer’s] belief based on a mistaken understanding of the law cannot constitute the reasonable suspicion required for a constitutional traffic stop.”).

<sup>58</sup> *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006); accord *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.”); *People v. Cole*, 874 N.E.2d 81, 88 (Ill. App. Ct. 2007) (“[A] police officer who mistakenly believes a violation occurred when the acts in question are not prohibited by law is not acting reasonably.”); *State v. Anderson*, 683 N.W.2d 818, 824 (Minn. 2004) (“[A]n officer’s mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a traffic stop.”); *State v. Lacasella*, 60 P.3d 975, 981 (Mont. 2002) (“[O]bservations made by an officer who does not understand the law are not objectively grounded in the law and, therefore, cannot be the basis for particularized suspicion.”).

<sup>59</sup> See, e.g., *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (applying the exclusionary rule to bar evidence obtained by police as a result of a legally baseless seizure).

<sup>60</sup> *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005).

<sup>61</sup> See *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005) (“[T]he validity of a 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 of fact, was an objectively reasonable one.”).

<sup>62</sup> *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999).

circumstances, including the fact that officers received training on the erroneous legal understanding<sup>63</sup> or that the law was erroneously enforced by police in the past based on “common knowledge.”<sup>64</sup> Police also act reasonably (and hence constitutionally) if they mistakenly enforce a law lacking a requisite “level of clarity”<sup>65</sup> that has not yet been interpreted by the courts.<sup>66</sup>

According to the Eighth Circuit, assessment of whether a legal mistake is objectively reasonable “is not to be made with the vision of hindsight, but instead by looking to what the officer reasonably knew at the time.”<sup>67</sup> Even if a law “technically” does not forbid the behavior in question, a stop or arrest is nonetheless reasonable.<sup>68</sup> Applying the foregoing, the Eighth Circuit in *United States v. Martin*, for instance, upheld a traffic stop based on a law requiring that vehicles be equipped with “a stop light” when the officer misunderstood the law to require two functioning lights, leading to discovery of marijuana and a federal felony conviction.<sup>69</sup>

In addition to the Eighth Circuit, the D.C. Circuit<sup>70</sup> and state appellate courts in Georgia,<sup>71</sup> Mississippi,<sup>72</sup> Ohio,<sup>73</sup> and South Dakota<sup>74</sup> condone what

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<sup>63</sup> See *Martin*, 411 F.3d at 1001 (attaching importance, inter alia, to “the training of police concerning the requirements of the [Motor Vehicle] Code”); *United States v. Casey*, No. 08-0116-01-CR-W-SOW, 2008 WL 4288027, at \*5 (W.D. Mo. Sept. 16, 2008) (holding that a mistake of law was reasonable based on training wrongly suggesting that a local defective equipment ordinance covered auto windshields), *aff’d*, 365 F. App’x 725 (8th Cir. 2010); cf. *Giron v. City of Alexander*, 693 F. Supp. 2d 904, 949–50 (E.D. Ark. 2010) (deferring to Eighth Circuit position and denying a federal civil rights claim based on police stops predicated on mistaken training).

<sup>64</sup> *Martin*, 411 F.3d at 1001.

<sup>65</sup> *Id.* at 1002.

<sup>66</sup> See *United States v. Henderson*, No. 8:06CR283, 2007 WL 672920, at \*2 (D. Neb. Feb. 28, 2007).

<sup>67</sup> *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005) (quoting *Sanders*, 196 F.3d at 915) (internal quotation mark omitted). A similar sentiment was expressed by a federal trial court in Ohio, which, after noting that the Sixth Circuit had not expressly addressed the issue, stated:

A purely objective standard—under which the stop is invalid and the evidence suppressed if a judge later disagrees with the officer’s interpretation of the law—injects too much hindsight into the process. There is no good reason to require a traffic officer to have guessed correctly in advance whether a judge will later find the officer’s interpretation to have been correct . . . It is enough to require the officer’s interpretation to have been objectively reasonable.

*United States v. Washabaugh*, No. 3:07-po-253, 2008 WL 203012, at \*2 (S.D. Ohio Jan. 22, 2008).

<sup>68</sup> *Martin*, 411 F.3d at 1001.

<sup>69</sup> *Id.* at 1000–02 (quoting OGLALA SIOUX TRIBE CRIMINAL OFFENSES CODE ch. 6, § 621(a)(3) (2010)).

<sup>70</sup> See *United States v. Southerland*, 486 F.3d 1355, 1359 (D.C. Cir. 2007) (“[I]t [was] objectively reasonable for the officers to suspect that [the] dashboard plate was in violation of Maryland law, even assuming they were mistaken that the law required display of the front plate of the bumper.”).

they consider reasonable police mistakes of law. In Ohio, for instance, an officer's mistake of law is a "minor transgression,"<sup>75</sup> and in Georgia, a seizure is permitted when "the defendant's actions [are] not a crime according to a technical legal definition or distinction determined to exist in the penal statute."<sup>76</sup> An officer need not "determine on the spot such matters as . . . the legal niceties in definition of a certain crime, for these are matters for the courts."<sup>77</sup> Applying its standard of objective reasonableness, the Mississippi Supreme Court has, for instance, upheld a stop for a speeding violation even though the relevant law was not applicable because no workers were present in the construction zone at the time (1:30 a.m.).<sup>78</sup>

Courts have also forgiven mistakes when police invoke other jurisdictions' laws as justifications for seizures; *Travis v. State*<sup>79</sup> affords an example. In *Travis*, an Arkansas deputy county sheriff stopped defendant's Texas-registered truck because it failed to display an expiration date sticker on its license plate, based on the deputy's incorrect belief that Texas (like Arkansas) required such stickers.<sup>80</sup> The Arkansas Supreme Court condoned the stop and refused to exclude an illegal firearm discovered in an ensuing search, finding that the deputy "reasonably, albeit erroneously" interpreted the Texas law upon which the stop was based.<sup>81</sup> The First District of the California Court of

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<sup>71</sup> See *Andrews v. State*, 658 S.E.2d 126, 128 (Ga. Ct. App. 2008) ("If an officer, acting in good faith, has reason to believe that an unlawful act has been committed, his subsequent actions are not automatically rendered improper by a later finding that no criminal act has occurred.").

<sup>72</sup> See *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008) (holding that the totality of the circumstances created sufficient probable cause for a seizure, even though the belief occasioning the seizure was based on a mistake of law).

<sup>73</sup> See *City of Wilmington v. Conner*, 761 N.E.2d 663, 667 (Ohio Ct. App. 2001) ("[T]he exclusionary rule may be avoided with respect to evidence obtained in an investigative stop based on conduct that a police officer reasonably, but mistakenly, believes is a violation of the law."); *State v. Greer*, 683 N.E.2d 82, 83 (Ohio Ct. App. 1996) (same).

<sup>74</sup> See *State v. Wright*, 791 N.W.2d 791, 799 (S.D. 2010) ("Any mistake of law that results in a search or seizure . . . must be *objectively* reasonable to avoid running afoul of the Fourth Amendment." (quoting *Martin*, 411 F.3d at 1001) (internal quotation marks omitted)).

<sup>75</sup> *Greer*, 683 N.E.2d at 86 (internal quotation marks omitted) (citing *United States v. Leon*, 468 U.S. 897, 908 (1984)).

<sup>76</sup> *Jackson v. State*, 677 S.E.2d 782, 784 (Ga. Ct. App. 2009) (quoting *State v. Rheinlander*, 649 S.E.2d 828, 830 (Ga. Ct. App. 2007)).

<sup>77</sup> *McConnell v. State*, 374 S.E.2d 111, 113 (Ga. Ct. App. 1988).

<sup>78</sup> *Harrison v. State*, 800 So. 2d 1134, 1139 (Miss. 2001).

<sup>79</sup> 959 S.W.2d 32 (Ark. 1998).

<sup>80</sup> *Id.* at 33. Under Arkansas law, a vehicle registered out of state can be lawfully driven in Arkansas if the vehicle is in compliance with the other state's applicable registration laws. See *id.* at 34 (citing ARK. CODE ANN. § 27-14-704 (1994)).

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

Appeal has adopted a similar approach, forgiving police mistakes of other states' vehicle registration laws, deeming such mistakes reasonable when the vehicle is from a state not geographically contiguous to California or when the foreign state's motorists do not routinely drive on California roads.<sup>82</sup>

Finally, signs of weakening judicial resolve are evident in other contexts. The caselaw provides numerous examples of courts expressing uncertainty over whether the traditional view should be followed.<sup>83</sup> Likewise, courts regularly forgive admitted police mistakes of law when an alternative legal basis exists to support a seizure, even if not identified by police, on the reasoning that police need not "have a precise appreciation of the niceties of the law."<sup>84</sup>

## II. FORCES DRIVING JUDICIAL FORGIVENESS OF POLICE MISTAKES OF LAW

Viewed in historic terms, judicial willingness to forgive police mistakes of law can be viewed as aligning with a broader shift that dates back to *Leon*.<sup>85</sup> This Part examines the chief catalysts behind what is likely to be increasing momentum among courts to forgive police mistakes of substantive law and then argues why each should be resisted.

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<sup>82</sup> See *People v. Glick*, 250 Cal. Rptr. 315, 319 (Ct. App. 1988) (upholding stop based on an officer's reasonable misunderstanding of New Jersey motor vehicle requirements). In a depublished opinion, the same court has also condoned reasonable mistakes of law by police more generally. See *People v. Catuto*, 265 Cal. Rptr. 895, 901 (Ct. App. 1990) (depublished) (upholding a stop when the officer was "not aware of certain obscure exceptions in the Vehicle Code").

<sup>83</sup> See, e.g., *United States v. McHugh*, 349 F. App'x 824, 828 n.3 (4th Cir. 2009) ("We assume, without deciding, that an officer's reasonable mistake of law may not provide the objective grounds for reasonable suspicion to justify a traffic stop."); *United States v. Davis*, 692 F. Supp. 2d 594, 600 (E.D. Va. 2010) (following the traditional rule but noting that "[t]here is considerable appeal in the Eighth Circuit's approach"); *People v. Lopez*, 242 Cal. Rptr. 668, 673 (Ct. App. 1987) (suggesting that there may be "exceptional circumstances" when a mistake of law might be reasonable); *State v. McCarthy*, 982 P.2d 954, 960 (Idaho Ct. App. 1999) (noting, but avoiding determination of, the issue). For more subtle examples suggestive of equivocation, see *United States v. Hughes*, 606 F.3d 311, 316 (6th Cir. 2010); *United States v. Williams*, No. 03-30384, 2004 U.S. App. LEXIS 3876, at \*2-3 (5th Cir. Feb. 27, 2004) (per curiam); and *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999).

<sup>84</sup> *United States v. Marsical*, 285 F.3d 1127, 1130 (9th Cir. 2002); accord *United States v. Delfin-Colina*, 464 F.3d 392, 400-01 (3d Cir. 2006) (holding that an officer can make a "significant mistake of law" so long as conduct potentially violates some law); *United States v. Wallace*, 213 F.3d 1216, 1220 (9th Cir. 2000) ("[The officer] was not taking the bar exam. The issue is not how well [he] understood California's window tinting laws, but whether he had objective, probable cause to believe that these windows were, in fact, in violation.").

<sup>85</sup> See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 488-89 (2009) ("Earlier, a familiar rule of strict liability applied to the police, just as it does to the rest of us: Ignorance of the law is no excuse. *Leon* held that, when an officer relied reasonably on a subsequently invalidated warrant, his reasonable mistake of law precluded exclusion.").

### A. *Volume and Complexity of Laws*

A prime justification for forgiving police mistakes of law lies in the enormous number and often-technical nature of low-level offenses that commonly serve as bases to stop and arrest individuals. The expectation that the law is “definite and knowable”<sup>86</sup> is no more tenable for police today than it is for the lay public.<sup>87</sup> State, local, and federal codes overflow with provisions—often of a *malum prohibitum* or regulatory nature—prescribing what individuals must or must not do.<sup>88</sup> For police, as noted at the outset, the profusion has coalesced with decisional law, which, in broadening the gamut of positive law justifying seizures, has had the ancillary effect of increasing the substantive knowledge demands imposed on police.<sup>89</sup>

This discretionary freedom has not, however, been met with a corresponding expectation from courts that police can rise to the challenge. For instance, in *Atwater v. City of Lago Vista*, the Court’s landmark opinion affording police power to arrest for fine-only minor offenses, the Court worried about the ability of police to grasp “frequently complex penalty schemes,”<sup>90</sup> especially because decisions must often be made “on the spur (and in the heat) of the moment.”<sup>91</sup> Likewise, in *Devenpeck v. Alford*, the Court forgave an outright mistake of law by an officer (when an alternative legal basis existed),<sup>92</sup> and in *Virginia v. Moore*, after acknowledging that state laws

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<sup>86</sup> 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 497 (Robert Campbell ed., London, John Murray 4th ed. 1879).

<sup>87</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 168 (5th ed. 2009) (noting historic common law expectation and recognizing its modern-day implausibility).

<sup>88</sup> See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1443–45 (2001) (surveying the proliferation of state, local, and federal criminal provisions). While especially evident in recent years, the proliferation itself is not unprecedented. See ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 23 (Transaction Publishers 1998) (1930) (“[O]f one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before . . .”).

<sup>89</sup> See *supra* notes 13–17 and accompanying text.

<sup>90</sup> 532 U.S. 318, 348 (2001); *accord* Berkemer v. McCarty, 468 U.S. 420, 431 n.13 (1984) (“[O]fficers in the field frequently ‘have neither the time nor the competence to determine’ the severity of the offense for which they are considering arresting a person . . .” (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 761 (1984) (White, J., dissenting))).

<sup>91</sup> *Atwater*, 532 U.S. at 347.

<sup>92</sup> 543 U.S. 146, 156 (2004). Remarkably, the officer was informed of the misunderstanding by Alford, the arrestee, who related that his audio taping of the encounter did not violate the Washington State Privacy Act, adding that he had a copy of the state appellate opinion confirming this in his glove compartment. See *Alford v. Haner*, 333 F.3d 972, 975 (9th Cir. 2003), *rev’d sub. nom.* *Devenpeck v. Alford*, 543 U.S. 146 (2004).



limiting police arrest authority “can be complicated indeed,”<sup>93</sup> the Court excused police from the need to know and follow them.<sup>94</sup>

One sees the same tendency in the context of probable cause and reasonable suspicion assessments.<sup>95</sup> There, the Court has emphasized that officers are not “legal technicians”<sup>96</sup> who utilize “[r]igid legal rules”<sup>97</sup> or can be expected to provide anything like “library analysis by scholars.”<sup>98</sup> Rather, such assessments are “nontechnical, common-sense judgments of laymen.”<sup>99</sup> When expressing these sentiments, the Court has cautioned that imposing too high an expectation risks creation of a “systematic disincentive to arrest,” which is to be avoided.<sup>100</sup>

The volume-and-complexity argument, however, collapses under its own weight. In a perverse twist reminiscent of Kafka,<sup>101</sup> lawless seizures are thought justified because the corpus of laws at the potential disposal of police has exceeded perceived bounds of reasonable comprehensibility and practical application. 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<sup>102</sup> and ready access to substantive law, including via dashboard computers.<sup>103</sup>

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<sup>93</sup> 553 U.S. 164, 175 (2008).

<sup>94</sup> See *id.* at 178 (“[The Fourth] Amendment does not require the exclusion of evidence obtained from a constitutionally permissible arrest.”). Indeed, the officer arrested Moore with full knowledge that the arrest was illegal. See Joint Appendix at 15, *Virginia v. Moore*, 553 U.S. 164 (2008) (No. 06-1082) (indicating that the arresting officer proclaimed the right to arrest as his “prerogative”).

<sup>95</sup> See *City of Chicago v. Morales*, 527 U.S. 41, 109–10 (1999) (Thomas, J., dissenting) (“[W]e trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as ‘probable cause’ and ‘reasonable suspicion’ . . .”).

<sup>96</sup> *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

<sup>97</sup> *Id.* at 232.

<sup>98</sup> *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

<sup>99</sup> *Id.* at 235–36.

<sup>100</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001).

<sup>101</sup> See *FRANZ KAFKA, THE TRIAL 3* (Willa & Edwin Muir trans., Alfred A. Knopf, Inc. 1956) (1925) (referring to protagonist Josef K. who “without having done anything wrong . . . was arrested one fine morning”).

<sup>102</sup> See Roy Roberg & Scott Bonn, *Higher Education and Policing: Where Are We Now?*, 27 *POLICING: INT’L J. POLICE STRATEGIES & MGMT.* 469, 472–73 (2004) (surveying studies showing an increasing number of officers with college degrees).

<sup>103</sup> See, e.g., Michelle Perin, *Big Stuff in a Small Package*, *LAW ENFORCEMENT TECH.*, Apr. 2010, at 26 (discussing the use of mobile computers by police on street patrol); Michael Rubin, *Mobile Data in Action*, *LAW ENFORCEMENT TECH.*, Oct. 2009, at 82 (same).

### B. *Deterrence and the Exclusionary Rule*

A related argument favoring indulgence of police mistakes of law is the now-dominant view that the exclusionary rule applies only if the threat of evidence exclusion will deter the misconduct in question. While for decades the rule was justified both by the goal of deterring police misconduct and by a desire to avoid tainting the judicial process with illegally obtained evidence,<sup>104</sup> analysis today centers solely on whether the threat of evidence exclusion will deter culpable police misconduct.<sup>105</sup> This orientation was especially evident in *Herring v. United States*, where the Court addressed whether an admitted police mistake (there, an arrest and search of an individual based on an invalid arrest-warrant record) should trigger the exclusionary rule.<sup>106</sup>

A five-member majority, with Chief Justice Roberts writing for the Court, concluded that police mistakes resulting from negligence and not involving broader systemic errors do not trigger the exclusionary rule.<sup>107</sup> While acknowledging that police negligence was susceptible of deterrence,<sup>108</sup> the majority reasoned that any such deterrence did not appreciably outweigh the social costs of evidence exclusion (i.e., freeing the possibly guilty and impairing truth seeking).<sup>109</sup> The threat of exclusion is warranted only in instances of “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”<sup>110</sup>

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<sup>104</sup> See *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) (“The exclusionary rule . . . accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior . . .”); see also *Terry v. Ohio*, 392 U.S. 1, 12–13 (1968) (identifying maintenance of judicial integrity as a “vital function” of the exclusionary rule and stating that “[a]dmitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur”).

<sup>105</sup> See *Herring v. United States*, 129 S. Ct. 695, 700 n.2 (2009) (“Justice Ginsburg’s dissent champions what she describes as “a more majestic conception” of . . . the exclusionary rule,” which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception . . .” (citation omitted) (quoting *id.* at 707 (Ginsburg, J., dissenting))).

<sup>106</sup> *Id.* at 699. *Leon* itself, as noted by Justice Blackmun in his concurrence, “narrowed the scope of the exclusionary rule because of an empirical judgment that the rule has little appreciable effect in cases where officers act in objectively reasonable reliance on search warrants.” *United States v. Leon*, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring).

<sup>107</sup> *Herring*, 129 S. Ct. at 704.

<sup>108</sup> *Id.* at 702 n.4.

<sup>109</sup> *Id.* at 701–02.

<sup>110</sup> *Id.* at 702.

While *Herring* did not involve a mistake of law, its rationale aligns with judicial inclination to forgive police mistakes of law.<sup>111</sup> Early expression of the view is found in the Fifth Circuit's en banc decision in *United States v. Williams*,<sup>112</sup> cited by the *Leon* majority.<sup>113</sup> After emphasizing that "[f]ield officers are seldom trained as legal technicians,"<sup>114</sup> the *Williams* court worried that sanctioning police for their "'technical violations' made in good faith"—such as "reasonable interpretation of a statute that is later construed differently"<sup>115</sup>—might have deleterious effects.<sup>116</sup> The court stated:

[I]t may . . . mak[e] the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. . . . It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was *legal* by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all.<sup>117</sup>

Deterrence, however, most definitely figures here. A legal text, especially a facially unambiguous law or a judicial opinion interpreting an ambiguous one, unlike the case-by-case factual possibilities entailed in probable cause and reasonable suspicion assessments,<sup>118</sup> has an ex ante epistemic baseline. In such circumstances, as the Ninth Circuit has noted, threatened application of the

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<sup>111</sup> *Herring*'s applicability could be questioned on at least two bases. First, it arose (as did *Leon*, for that matter) in a context in which police possessed a warrant. *Id.* at 696. Courts, however, have often applied the good-faith exception to redeem warrantless seizures by police. *See* *United States v. Grote*, 629 F. Supp. 2d 1201, 1206 (E.D. Wash. 2009) (citing cases), *aff'd*, 408 F. App'x 90 (9th Cir. 2010); *State v. Greer*, 683 N.E.2d 82, 85 (Ohio Ct. App. 1996) (invoking the good-faith exception to forgive an illegal stop based on what the court deemed an officer's objectively reasonable mistake regarding a law prohibiting U-turns). A second basis might lie in the *Herring* majority's recognition that its holding covered negligence that is "attenuated" from the challenged police search or seizure—there, presumably the negligence of a neighboring county police agency that failed to update its arrest-warrant database. *Herring*, 129 S. Ct. at 698. With police mistakes of law, misconduct is direct—that of an officer who, while perhaps acting upon an erroneous legal view generated by fellow officers or her department, alone is responsible for the mistake. For reasons identified by Professor LaFave, however, the attenuation consideration will likely be short-lived. *See* Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 770–83 (2009).

<sup>112</sup> 622 F.2d 830 (5th Cir. 1980) (en banc) (per curiam).

<sup>113</sup> *United States v. Leon*, 468 U.S. 897, 913 n.11 (1984).

<sup>114</sup> *Williams*, 622 F.2d at 842.

<sup>115</sup> *Id.* at 843.

<sup>116</sup> *Id.* at 842.

<sup>117</sup> *Id.* (quoting *United States v. Williams*, 594 F.2d 86, 97–98 (5th Cir. 1979) (Clark, J., dissenting), *rev'd en banc per curiam*, 622 F.2d 830 (5th Cir. 1980)).

<sup>118</sup> *See* *United States v. Song Ja Cha*, 597 F.3d 995, 1005 (9th Cir. 2010) ("Our precedent distinguishes between mistakes of fact and mistakes of law because mistakes of law can be deterred more readily than mistakes of fact.").

exclusionary rule provides police with an incentive to learn and “properly understand the law that they are entrusted to enforce and obey.”<sup>119</sup> While laws invoked by police can at times be indeterminate in scope or meaning,<sup>120</sup> when police act on mistaken legal understandings in the face of such uncertainty, they are, in *Herring’s* terms “culpable,”<sup>121</sup> much as laypersons are.<sup>122</sup> By the same token, when departments fail to adequately train officers in the substantive law that they are charged with enforcing,<sup>123</sup> *Herring’s* concern for “systemic negligence” is at play.<sup>124</sup> Rather than assessing police mistakes in terms of “reasonableness”—a standard that always expands and never contracts coverage—courts should do their utmost to encourage restrictive interpretation and application of laws by police.<sup>125</sup> They should not, as the Eleventh Circuit put it, “help the government’s case” and “use the alleged ambiguity of a statute *against* a defendant.”<sup>126</sup>

The deterrence calculus shifts, however, as in the Fourth Amendment doctrinal context,<sup>127</sup> when police act in reliance on settled judicial interpretation of a law’s meaning or scope that is later reversed.<sup>128</sup> In such an

<sup>119</sup> *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *accord* *People v. Teresinski*, 640 P.2d 753, 758 (Cal. 1982) (in bank) (stating that excusing reasonable mistakes of law “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 opinions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct”).

<sup>120</sup> On indeterminacy more generally, in both its linguistic and legal forms, see TIMOTHY A. O. ENDICOTT, *VAGUENESS IN LAW* 9 (2000).

<sup>121</sup> *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

<sup>122</sup> See Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 CRIM. L. & PHIL. 213, 218 (2009) (“[A]n actor who is aware that the law exists should make absolutely certain that he gets its content right.”).

<sup>123</sup> This failure may be due to either mistaken or nonexistent substantive law instruction. On the latter in particular, see *infra* Part IV.

<sup>124</sup> *Herring*, 129 S. Ct. at 702.

<sup>125</sup> See LAFAVE, *supra* note 23, at 86 (noting the traditional view that police should “employ a very strict construction [of statutes], particularly in doubtful cases”); Hall, *Police and Law*, *supra* note 4, at 171 (“In those cases [of uncertainty] the law that must be enforced is the narrow, strict interpretation of the relevant statutes and decisions.”).

<sup>126</sup> *United States v. Chanthasouvat*, 342 F.3d 1271, 1278 (11th Cir. 2003); *accord* *People v. Reyes*, 127 Cal. Rptr. 3d 167, 173 (Ct. App. 2011) (“[A law’s coverage] is a legal question. If the law enforcement officer does not know the answer, he or she is not authorized to make the stop anyway.”).

<sup>127</sup> See *supra* notes 48–50 and accompanying text.

<sup>128</sup> Of course, whether a construction is “settled” itself can be difficult to determine. As noted by one federal court in the context of Fourth Amendment doctrine more generally, extension of good-faith allowance carries risks:

[I]t would encourage officers to test the limits of what case law would possibly permit. Today we may be looking at “well-established circuit law.” But is one panel decision well established? What if the opinion is entered two-to-one over a dissent: Is it still well established? Suppose the

instance, police are neither culpable nor susceptible of deterrence because they rely on authority from the judicial branch indicating that their legal understanding is sound.<sup>129</sup>

Finally, full consideration of the deterrence calculus requires that due recognition be given to the tendency of police, engaged in the “competitive enterprise of ferreting out crime,”<sup>130</sup> to take maximum advantage of any interpretive latitude provided.<sup>131</sup> Officers, even if not Holmesian bad men,<sup>132</sup> know that their greater power to stop or arrest individuals carries with it greater authority to deploy an array of powerful investigative tools, such as frisks or full-blown searches, allowing them to secure evidence of unrelated yet more serious wrongdoing.<sup>133</sup> Application of the exclusionary rule will temper this natural competitive ardor.

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circuit has a series of unpublished decisions on point? What about an issue the circuit has not yet addressed in any form, but that has received a unanimous decision from other circuits permitting the search? This brand of line drawing is the natural responsibility and task of the judicial branch, not of officers in the field.

United States v. Peoples, 668 F. Supp. 2d 1042, 1050 (W.D. Mich. 2009). When statutory scope and meaning, not broader doctrinal outcomes, are at issue, such uncertainty perhaps should be less common. Still, ultimately, decisions fall to the courts, and officers in the field should be discouraged from taking interpretive liberty with statutory text.

<sup>129</sup> See United States v. Davis, 598 F.3d 1259, 1267–68 (11th Cir. 2010) (distinguishing proper application of the exclusionary rule when an officer “personally misinterpret[s] the law” from instances when an officer acts on settled circuit caselaw, later reversed, allowing challenged search-and-seizure practice), *aff’d*, 131 S. Ct. 2419 (2011).

<sup>130</sup> Johnson v. United States, 333 U.S. 10, 14 (1948).

<sup>131</sup> See Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (“[T]he extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.”). The tendency was recently manifest in police efforts to evade *Miranda*’s procedural strictures, which the Court has since condemned. See Missouri v. Seibert, 542 U.S. 600, 617 (2004) (plurality opinion) (“Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what . . . Congress could not do by statute.”); see also *id.* at 610 n.2 (discussing training materials used to encourage police avoidance of *Miranda* requirements); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 132–37 (1998) (same).

<sup>132</sup> O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

<sup>133</sup> See THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* §§ 8.1–6, 10.4 (2008) (discussing the many investigative rights arising out of constitutionally valid seizures). Police can also use seizures to obtain information with longer term investigative utility, including DNA. See Al Baker, *City Minorities More Likely to Be Frisked*, N.Y. TIMES, May 13, 2010, at A1 (noting police reliance on stop-and-frisk policies “to bank thousands of names in a database for detectives to mine in fighting future crimes”). Of late, the strategy has been expanded to locate potential relatives of the source from which the biological material was collected. See Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 297–303 (2010).

### C. *Qualified Immunity Doctrine*

Momentum favoring judicial forgiveness of police mistakes could also stem from qualified immunity doctrine. Police have long been shielded from personal monetary liability in federal civil rights suits when they commit “reasonable mistakes as to the legality of their actions.”<sup>134</sup> Just as the exclusionary rule turns on the objective reasonableness of officer mistakes, so too does the application of immunity,<sup>135</sup> broadly encompassing “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.”<sup>136</sup> As Barbara Armacost has noted with regard to qualified immunity, “[I]gnorance of the law—at least reasonable ignorance—is excused.”<sup>137</sup> Forgiving what are seen as reasonable police mistakes of substantive law in criminal prosecutions could make for an appealing symmetry.<sup>138</sup>

Qualified immunity, however, serves policy goals and functions that differ from the exclusionary rule. Because qualified immunity is at issue when police face personal liability, its generous standard is consciously calibrated to avoid overdeterrence. The standard protects “all but the plainly incompetent [officer] or those who knowingly violate the law,”<sup>139</sup> seeking to shield police from “undue interference with their duties and from potentially disabling threats of liability.”<sup>140</sup> Here, with motions to suppress, the physical liberty of individuals,<sup>141</sup> and not the monetary well-being of officers, is at issue,<sup>142</sup> along

<sup>134</sup> *Saucier v. Katz*, 533 U.S. 194, 206 (2001), *overruled in part by Pearson v. Callahan*, 129 S. Ct. 808 (2009).

<sup>135</sup> *See Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004) (noting that “the same standard of objective reasonableness” applies in suppression hearings and qualified immunity determinations (quoting *Malley v. Briggs*, 475 U.S. 335, 344 (1986)) (internal quotation mark omitted)).

<sup>136</sup> *Pearson*, 129 S. Ct. at 815 (quoting *Groh*, 540 U.S. at 567 (Kennedy, J., dissenting)) (internal quotation marks omitted); *accord Butz v. Economou*, 438 U.S. 478, 507 (1978) (“Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.”); *Solis v. Oules*, 378 F. App’x 642, 644 (9th Cir. 2010) (forgiving an officer’s wrongful stop of a driver because his mistaken understanding of Washington traffic law was reasonable).

<sup>137</sup> Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 584 (1998).

<sup>138</sup> *See, e.g., Harrison v. State*, 800 So. 2d 1134, 1138–39 (Miss. 2001) (citing qualified immunity caselaw forgiving a police mistake of law in support of its decision forgiving a police mistake in the Fourth Amendment exclusionary rule context).

<sup>139</sup> *Malley*, 475 U.S. at 341.

<sup>140</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

<sup>141</sup> *See People v. Arthur J.*, 238 Cal. Rptr. 523, 527 (Ct. App. 1987) (“One of our most cherished freedoms is the right to go about our lives without unjustified interference. We safeguard that right by requiring that the police know what the law is in order to arrest someone for a violation of it.”).

<sup>142</sup> *See Pierson v. Ray*, 386 U.S. 547, 555 (1967) (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”).

with their interests in remaining free of the trauma<sup>143</sup> and the privacy intrusions that typically attend a police seizure.<sup>144</sup>

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*. Police can be protected from personal liability in civil court and yet have their actions subject to the exclusionary rule in criminal court.<sup>145</sup> Recognition of this distinction is especially important if, as Professor Pam Karlan contends, the Supreme Court is now engaged in a “shell game,” exalting civil suits as an adequate substitute for motions to suppress evidence yet acting to make such suits more difficult to sustain.<sup>146</sup>

### III. HOLDING THE LINE: WHY THE INCLINATION MUST BE RESISTED

While plausible arguments exist to support judicial forgiveness of police mistakes of law, each, as just discussed, fails to persuade. As this Part establishes, inclination to forgive such mistakes should also be resisted for an array of broader, quite important institutional reasons.

#### A. *Rule of Law*

First and foremost, forgiving police mistakes of law—even those thought reasonable—should be rejected because it disserves basic rule-of-law values. As noted by Jerome Skolnick, “[P]olice in a democracy are not merely bureaucrats. They are also . . . legal officials, that is, people belonging to an institution charged with strengthening the rule of law in society.”<sup>147</sup> Lawless

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<sup>143</sup> See *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (“An arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained.”); *Terry v. Ohio*, 392 U.S. 1, 25 (1968) (acknowledging that police stops can be “annoying, frightening, and . . . humiliating”); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995) (“The real harm . . . arises from the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers.”).

<sup>144</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“[E]ven a limited search of the person is a substantial invasion of privacy.” (citing *Terry*, 392 U.S. at 24–25)).

<sup>145</sup> Cf. *Michigan v. DeFillippo*, 443 U.S. 31, 42 n.1 (1979) (Brennan, J., dissenting) (noting distinct litigation contexts of motions to suppress and private civil suits against police). On the distinct legal and policy concerns operative in the constitutional tort and criminal realms more generally, see Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1022–29 (2010).

<sup>146</sup> Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882 (2010).

<sup>147</sup> JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 233 (Macmillan Coll. Publ’g Co. 3d ed. 1994) (1966).

seizures by police violate the basic tenet that ours is “a government of laws, and not of men,”<sup>148</sup> lacking the basic legitimizing aegis of governmental authority.<sup>149</sup> Reciprocal expectations of law-abidingness between government and citizens<sup>150</sup> can scarcely be expected to endure if one party—the government—need not uphold its end of the bargain.<sup>151</sup>

Betrayal of the norm is especially problematic in the context at issue here—low-level offenses often of a *malum prohibitum* nature, the codification of which can be morally contestable,<sup>152</sup> and where enforcement is already marked by a “kind of lawlessness.”<sup>153</sup> When the wrongfulness of behavior is not self-evident, the only recourse for citizens is to generally familiarize themselves

<sup>148</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *accord* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (“The rule of law . . . is the great mucilage that holds society together.”); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously.”).

<sup>149</sup> As at common law, a government agent is clothed with governmental authority only when acting with lawful authority; otherwise, the agent acts as an unlawful trespasser. Davies, *supra* note 10, at 634.

<sup>150</sup> See LON L. FULLER, *THE MORALITY OF LAW* 40 (1964) (“These are the rules we expect [the citizen] to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.” (internal quotation marks omitted)); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 138–39 (1997) (“A consistent strain of our constitutional politics asserts that legitimacy flows from the ‘rule of law.’ By that is meant a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority.”).

<sup>151</sup> See *United States v. Chanthasouvat*, 342 F.3d 1271, 1280 (11th Cir. 2003) (noting “the fundamental unfairness of holding citizens to ‘the traditional rule that ignorance of the law is no excuse,’ . . . while allowing those ‘entrusted to enforce’ the law to be ignorant of it” (citation omitted)); see also *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (“Nothing can destroy a government more quickly than its failure to observe its own laws . . . .”); *Spano v. New York*, 360 U.S. 315, 320 (1959) (recognizing the “deep-rooted feeling that the police must obey the law while enforcing the law”); Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 *VAND. L. REV.* 1497, 1506 (2007) (noting that the rule of law “requires that officials exercise governmental power pursuant to previously defined instructions that flow from collective agreement by the body politic . . . rather than pursuant to the idiosyncratic predilections or the whims of the officials”).

<sup>152</sup> See generally Janice Nadler, *Flouting the Law*, 83 *TEX. L. REV.* 1399 (2005) (discussing diminished general compliance with laws that citizens perceive as normatively questionable or unjust); Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 *NW. U. L. REV.* 1, 14–18 (2000) (stating that an effective criminal code must contain appropriate criminalization decisions, liability rules, and defenses); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 *S. CAL. L. REV.* 1, 22–28 (2007) (noting the ways in which laws may fall short of achieving moral credibility and, as a result, encourage noncompliance).

<sup>153</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 597 (2001). The concern is further aggravated in the traffic-law-enforcement context, where police authority to search incident to arrest for minor offenses has afforded power akin to the widely condemned general warrants of the colonial era. See Barbara C. Salkin, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 *TEMP. L. REV.* 221 (1989).



with the broad array of laws contained in codes to avoid being ensnared by justice system insiders.<sup>154</sup> Allowing police to use such laws to stop and arrest when the behavior in question does not actually come within their prohibitory scope, however, neutralizes even this basic planning possibility.<sup>155</sup> When this occurs, the Fourth Amendment's basic guarantee of the "people to be secure"<sup>156</sup> is imperiled,<sup>157</sup> along with the rights and expectations contingent upon its availability.<sup>158</sup>

The concern here is thus unlike that at work in other contexts, such as when criminal law rules are inaccessible.<sup>159</sup> Affording police authority to make reasonable mistakes of law allows an individual to suffer a Fourth Amendment-protected intrusion when the substantive law advanced in support of the intrusion does not proscribe the conduct in question. Borrowing from Meir Dan-Cohen's classic construct, the lay public becomes subject to a "selective transmission" rule,<sup>160</sup> with the conduct rule (expectations contained in code books) being trumped by a decision rule (ex post reasonableness determinations by reviewing courts). While, as Dan-Cohen notes, the disconnect associated with selective transmission can often have a benign

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<sup>154</sup> Cf. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 932–33 (2006) ("[C]riminal laws do not create binding obligations but rather [merely] a menu of options for [professional] insiders.").

<sup>155</sup> See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944) ("Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."). On the role and function of laws as bases to enable human planning more generally, see SCOTT J. SHAPIRO, *LEGALITY* (2011).

<sup>156</sup> U.S. CONST. amend. IV.

<sup>157</sup> See *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) (noting that the Fourth Amendment's protection of the "inestimable right of personal security" is "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law" (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)) (internal quotation mark omitted)). On the importance of the security guarantee more generally, as opposed to privacy concerns, see Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 126–31 (2008). As Professor Rubenfeld notes, "To have personal security is to have a justified belief that if we do not break the law, our personal lives will remain our own." *Id.* at 129.

<sup>158</sup> See, e.g., Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, in *POLICE POWER AND INDIVIDUAL FREEDOM* 87, 97 (Claude R. Sowle ed., 1962) ("All the other freedoms, freedom of speech, of assembly, of religion, of political action, presuppose that arbitrary and capricious police action has been restrained.").

<sup>159</sup> See, e.g., *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion) (condemning a law that merely referred the public "to a comprehensive law library in order to ascertain what acts were prohibited" and drawing a critical parallel to Caligula, who published laws in such a manner that no one could copy them).

<sup>160</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

effect, functioning to limit official discretion and arbitrariness,<sup>161</sup> and mitigate unwarranted harsh effects of the law,<sup>162</sup> the opposite outcome obtains here. The public is not freed from the grip of state control but rather is subjected to it, based on a standard divorced from the substantive requirements of democratically enacted positive law.<sup>163</sup>

Judicial approval of police mistakes of law can also have major practical importance. With law enforcement, as research has shown, public perceptions of procedural justice can influence citizen willingness to comply with the law and assist police.<sup>164</sup> 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,<sup>165</sup> already strained by reports of police fabrications<sup>166</sup> and racial bias.<sup>167</sup> In such

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<sup>161</sup> *Id.* at 668.

<sup>162</sup> Professor Dan-Cohen offers the ignorance-of-the-law defense as a prime example of the benefits of a “rift” between conduct and decision rules, serving to soften application of the traditional no-defense rule. *See id.* at 645–48. An optimal outcome is thus reached: the public learns of its “firm duty to know the law,” and decision makers know of their capacity to “excuse violations in ignorance of the law if fairness so require[s].” *Id.* at 648.

<sup>163</sup> *See id.* at 665 n.110 (discussing a “clearly illegitimate” instance of selective transmission as one allowing for punishment for conduct not prohibited by law, using punishment of intoxication as an example). For a similar discussion, in the context of criminal procedure rules more generally, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2540–51 (1996).

<sup>164</sup> *See, e.g.*, TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002); Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 272–75 (2010) (finding that community perception of undue police behaviors negatively affects views of police legitimacy); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 253–65 (2008) (finding that citizens view police as more legitimate and cooperate with them if they treat people fairly).

<sup>165</sup> *See Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.”); *see also* ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 175 (1971) (“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.”).

<sup>166</sup> *See, e.g.*, Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341 (1996) (discussing negative effects of police testimonial mistruths); Jennifer R. Wynn, *Can Zero Tolerance Last? Voices from Inside the Precinct*, in *ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY* 107, 118–19 (Andrea McArdle & Tanya Erzen eds., 2001) (discussing instances of admitted police arrests of suspected drug dealers for minor offenses in the absence of probable cause to raise arrest statistics and disrupt drug sales). More within the bounds of legality, yet still contributing to overall public suspicion, is the acknowledged capacity of police to engage in trickery and deceit in their investigative work. *See* Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009) (discussing the phenomenon of “authorized criminality”); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997).

circumstances, application of the exclusionary rule, rather than “generating disrespect for the law and administration of justice,”<sup>168</sup> as its critics often contend, will have the positive effect of reinforcing faith in government law-abidingness,<sup>169</sup> a key aspect of what Tracey Meares has called “public-regarding justice” and “fairness.”<sup>170</sup>

Justice Holmes, when rationalizing the traditional refusal to excuse layperson mistakes of law, noted the “larger interests on the other side of the scales.”<sup>171</sup> Today, as noted at the outset, this resolve is showing signs of attrition.<sup>172</sup> Whatever the merit of modern-day arguments favoring allowance for citizen mistakes of law,<sup>173</sup> resulting in avoidance of liberty deprivation

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<sup>167</sup> See, e.g., DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002) (surveying research documenting racial profiling by police and noting its negative effects); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 574–76 (2003) (surveying studies documenting disparate police targeting of minorities); I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009) (same).

<sup>168</sup> *Stone v. Powell*, 428 U.S. 465, 491 (1976).

<sup>169</sup> Cf. Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule* (Northwestern Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 10-28, 2010), available at <http://ssrn.com/abstract=1629375> (discussing experimental results showing significant support for application of the exclusionary rule, based on a judicial-integrity rationale, when a deterrence rationale would not compel invocation of the rule).

<sup>170</sup> Tracey L. Meares, *The Progressive Past*, in THE CONSTITUTION IN 2020, at 209, 216 (Jack M. Balkin & Reva B. Siegel eds., 2009). The imperative of perceived justice and fairness “includes the interests of the whole public, not just defendants.” *Id.* This trust deficit, it should be noted, is exacerbated by the divergent views taken on police mistakes of law by state and federal courts. Iowa, see *State v. Louwrens*, 792 N.W.2d 649, 652–53 (Iowa 2010), and Minnesota, see *State v. Anderson*, 683 N.W.2d 818, 822–24 (Minn. 2004) (en banc), for instance, unlike the Eighth Circuit—of which they are a federal jurisdictional part—categorically refuse to excuse police mistakes of law. As a result, evidence secured from a legally invalid seizure can be used to convict an Iowan or Minnesotan in federal court, yet it cannot be so used in state court. Of course, asymmetry also obtains with state court prosecutions in Georgia, which condones reasonable police mistakes of law, yet is encompassed within a federal circuit that does not. See *supra* note 71 and accompanying text (discussing caselaw in the state).

<sup>171</sup> See OLIVER WENDELL HOLMES, THE COMMON LAW 41 (Mark DeWolfe Howe ed., Belknap Press of Harvard Univ. Press 1963) (1881) (“Public policy sacrifices the individual to the general good. . . . It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.”).

<sup>172</sup> See *supra* note 25 and accompanying text.

<sup>173</sup> Dan Kahan, for instance, has argued that a negligence standard is “unambiguously superior” to the strict liability approach that has traditionally barred the mistake-of-law defense for laypersons, reasoning that individuals will know that an excuse will be available to them if they take reasonable steps to learn the law, even if ultimately mistaken. Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 133, 152 (1997). To Professor Kahan, moreover, strict adherence to the no-defense rule risks overdeterrence, having a “chilling effect on marginally legal behavior.” *Id.* at 142.

when the law actually authorizes it,<sup>174</sup> fealty to the rule of law compels that police mistakes of law resulting in affirmative deprivations of liberty should not be tolerated.

### B. *Separation of Powers*

Judicial validation of police mistakes of law also undermines separation of powers. Since at least the mid-twentieth century, criminal law norms, especially regarding less serious and *malum prohibitum* behaviors, have been codified by American legislatures,<sup>175</sup> with courts providing secondary yet authoritative interpretive input.<sup>176</sup> Allowing police, executive branch actors, to not only enforce but also interpret and expand upon such laws, based on use of an amorphous standard-like rule<sup>177</sup> that is difficult for courts themselves to apply,<sup>178</sup> represents a significant departure from this institutional arrangement.<sup>179</sup>

When courts forgive mistaken police constructions of laws, a problem akin to that attending judicial approval of vague laws arises; a “potent message” is broadcast to law enforcement that “the limits of official coercion are not fixed; the suggestion box is always open.”<sup>180</sup> Allowing police to make reasonable mistakes of law, as the Eleventh Circuit has observed, serves to “sweep behavior into [a] statute which the authors of the statute may have had in mind but failed to put into the plain language of the statute.”<sup>181</sup>

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<sup>174</sup> See Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 626 (2011) (“Mistake of law doctrines deal with actors who violate the letter of the law but nonetheless assert as a reason for mitigating sanction that they either did not think about the law or tried to think responsibly about the law and got it wrong.”).

<sup>175</sup> See Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 337–53 (2005) (tracing the evolution from judge-made to statutorily codified laws).

<sup>176</sup> See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* chs. 1, 2 (2010) (discussing judicial interpretive discretion when a law is unclear); see also *THE FEDERALIST* NO. 37, at 245 (James Madison) (Isaac Krannick ed., 1987) (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be . . . ascertained by a series of particular discussions and adjudications.”).

<sup>177</sup> As Anthony Amsterdam long ago observed, use of a standard for enforcement can be “splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility and general oozeiness.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 415 (1974).

<sup>178</sup> See John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974).

<sup>179</sup> See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 456–61 (2010) (discussing the “disposing power” of a government’s legislative branch—its authority to identify and codify criminal law norms); Robinson, *supra* note 175, at 340–41 (discussing structural and political reasons supporting legislative exclusivity in criminal law making).

<sup>180</sup> Jeffries, *supra* note 19, at 223.

<sup>181</sup> *United States v. Chanthasouvat*, 342 F.3d 1271, 1278 (11th Cir. 2003).

The allowance, however, does more than augment executive power and undercut legislative primacy; it functions as an abdication of judicial authority. Courts find it “unnecessary” to interpret statutory language<sup>182</sup> or content themselves with generalized assessments of whether an officer’s interpretation was reasonable.<sup>183</sup> When this occurs, the law is left unelucidated and police are left without enforcement direction,<sup>184</sup> aggravating deficits resulting from judicial failures to clarify Fourth Amendment norms more generally.<sup>185</sup>

This failure assumes added significance when one considers the absence of other potentially operative, substantive-law-related limits. Vagueness doctrine could play a role, but it only rarely applies, creating what Debra Livingston has fairly termed an “illusory sense of formal accountability.”<sup>186</sup> At the same time, the rule of lenity, invoked when laws are ambiguous, is of no help. Not only is the rule sparingly applied,<sup>187</sup> but it also can have no effect here because a prosecution is not actually brought under the law about which an officer is mistaken.

One reaction to the preceding admittedly formalistic view might lie in use of ex ante legal clarifications of uncertain laws. In this vein, Dan Kahan has urged that the Supreme Court’s landmark *Chevron* decision, requiring judicial

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<sup>182</sup> See, e.g., *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999) (“[I]t [is] unnecessary to parse the words of the South Dakota statute [serving as a basis for the challenged stop].”).

<sup>183</sup> See, e.g., *United States v. Robledo*, 185 F. App’x 556, 557 (8th Cir. 2006) (per curiam) (“It is unnecessary for this court to decide whether Nebraska law [was violated by the conduct in question] . . . . The question before us is merely whether [the officer] had an objectively reasonable basis for believing Robledo breached a traffic law.”); *United States v. Rodriguez-Lopez*, 444 F.3d 1020, 1022–23 (8th Cir. 2006) (“Fortunately, we need not decide [the statutory interpretation] issue because the resolution of the case turns upon whether [the officer’s] belief that the statute was violated was objectively reasonable . . . .”).

<sup>184</sup> See ENDICOTT, *supra* note 120, at 198 (“[Judges] resolv[e] unresolved disputes about the requirements of the law. . . . [They] have a duty to give (in fact, to *impose*) resolution. Resolution is a basic requirement of the rule of law.”).

<sup>185</sup> See Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, 2 FED. CTS. L. REV. 87, 88–90 (2007) (noting how the good-faith exception has impeded development of Fourth Amendment doctrine); Zack Bray, Comment, *Appellate Review and the Exclusionary Rule*, 113 YALE L.J. 1143, 1144 (2004) (noting that appellate courts “duck” the underlying issue of whether probable cause was present by invoking the *Leon* standard). The constitutional deficit will likely increase with the Court’s recent decision in *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009), allowing courts faced with qualified immunity claims to avoid deciding whether police violated a constitutional norm and instead resolve cases based on whether the norm was “clearly established.” For more on the likely effect of *Pearson*, see Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139.

<sup>186</sup> Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 193.

<sup>187</sup> See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 901–06 (2004) (noting that a majority of U.S. jurisdictions have either abolished the rule or narrowed its application).

deference to reasonable agency interpretations of indeterminate laws,<sup>188</sup> should extend to the substantive law interpretations of the Justice Department in Washington, D.C. (Main Justice).<sup>189</sup> Main Justice, Professor Kahan asserts, should be “treated as an authoritative law-expositor, and not merely an authoritative law-enforcer.”<sup>190</sup> To Kahan, judicial deference to reasoned, prelitigation statutory interpretative judgments of Main Justice would hold promise of *Chevron*-like benefits, including enhanced criminal law expertise (relative to courts), uniformity (inasmuch as interpretation would emanate from a single agency), and parsimony (compared to individual U.S. Attorney offices, which can be vulnerable to pro-enforcement political interests).<sup>191</sup>

Whatever the merits of Professor Kahan’s proposal in the context of federal prosecutors, the *Chevronization* of policing is problematic. To understand why this is so one need only consider how the rationales of *Chevron* fail to align with deference to police departmental legal interpretations.

Delegation, while perhaps the leading rationale for agency deference in the federal regulatory realm,<sup>192</sup> has considerably less appeal here. Whereas regulatory laws are thought to often contain purposeful uncertainty as a result of political compromise or complexity, justifying a finding of implied delegation,<sup>193</sup> uncertain aspects of the low-level offenses mainly at issue here typically derive from the imprecision common to legislative creation of criminal laws.<sup>194</sup>

The second *Chevron* rationale—agency expertise—affords a somewhat more compelling basis for deference to police interpretive authority.<sup>195</sup> Police

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<sup>188</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>189</sup> Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

<sup>190</sup> *Id.* at 469.

<sup>191</sup> *Id.* at 489.

<sup>192</sup> See Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008) (“Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration.”).

<sup>193</sup> See Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 553 (2009) (discussing how under such circumstances “Congress does not always delegate expressly but often leaves interpretive questions for agencies to resolve”).

<sup>194</sup> See, e.g., Frank J. Remington & Victor G. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 488 (“Even the most careful of legislative draftsmanship is not likely to achieve a completely unambiguous definition of criminal conduct.”).

<sup>195</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that agencies have expertise in accommodating “manifestly competing interests,” especially when “the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies” (footnotes omitted)).

officers possess unequaled experience with the range of behaviors that the laws implicate, and the Supreme Court has regularly deferred to police judgment and expertise.<sup>196</sup> This background, however, does not necessarily translate into the legal and policy wherewithal often thought to justify deference to agency staff decisions.<sup>197</sup> The interpretive issues that such laws raise are not, as *Chevron* expects, especially “technical and complex.”<sup>198</sup> Rather, uncertainties are usually resolved by application of statutory construction tools, a mainstay of the judicial enterprise.<sup>199</sup> Nor is it commonplace for officers or their superiors to “have had a hand in drafting” the laws in question or be in close contact with legislators or their staffs, which in the federal context is thought to enhance executive branch legal understanding.<sup>200</sup>

Even more important, police interpretations unavoidably risk being colored by the reality that police departments are not neutral and detached arbiters.<sup>201</sup> For police, crime control is a highly salient and ever-present goal. They need never fear too much success; what they need fear is appearing soft on the criminal element—a threat embodied in narrow interpretation of a statute.<sup>202</sup> Deployed on the streets, broadened interpretive authority raises particular worry, given both the acknowledged low-visibility nature of police

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<sup>196</sup> See, e.g., *United States v. Sokolow*, 490 U.S. 1, 10 & n.6 (1989) (deferring to use of “drug courier” profile, consisting of officers’ posited accumulated knowledge of drug traffickers’ behaviors); *Brown v. Texas*, 443 U.S. 47, 52 n.2 (1979) (noting deference to “the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer”).

<sup>197</sup> See Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1574–78 (2007) (surveying frequent deference by federal appellate courts to agency expertise).

<sup>198</sup> *Chevron*, 467 U.S. at 865.

<sup>199</sup> See *supra* notes 175–76 and accompanying text (discussing the common-law-making power of courts vis-à-vis criminal laws).

<sup>200</sup> See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986) (discussing why agencies may have insight into the intent of Congress and therefore may be more adept than courts at interpreting laws).

<sup>201</sup> See, e.g., Al Baker & Ray Rivera, *5 Officers Face Charges in Fudging of Statistics*, N.Y. TIMES, Oct. 16, 2010, at A13 (discussing reports of quotas being used to encourage police seizures).

<sup>202</sup> In this respect, the job of police administrators can be distinguished from that of regulators in areas such as environmental policy, where the metric of job performance is perhaps less clear-cut. Even more reason thus exists to be concerned that police administrators might advance views that are at variance with their own better judgment and experience, as evidenced in the regulatory agency realm. See Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 814 (1991) (“The very idea that an administrative agency reflects majoritarian values is at odds with prevalent conceptions of agency action.”).

discretionary behavior<sup>203</sup> and the relative lack of resource constraints on officers' power to stop and arrest.<sup>204</sup>

Finally, it is hard to imagine what might be entailed in the administrative process rendering such interpretations. Decentralization is one of the hallmarks of American policing, with the vast majority of law enforcement being undertaken by state and local officers enforcing state and local laws.<sup>205</sup> Moreover, officers are usually employed by county, local, or municipal governments, not states,<sup>206</sup> which often lack direct oversight power and responsibility as to them.<sup>207</sup>

Allowing legal interpretations to emanate from multiple police departments would obviously create a host of problems. While the pluralization of policing surely has its virtues, including its potential legitimizing effect among local populations most directly affected,<sup>208</sup> the sheer volume of police agencies (including 771 nationwide with only one officer<sup>209</sup>) makes high-quality deliberations and outcomes unlikely. In addition, pluralization would pose difficulties of Babel-like proportion for reviewing courts, requiring them to assess and adjudge interpretations (itself a politically dicey enterprise).

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<sup>203</sup> See SKOLNICK, *supra* note 147, at 13 (“Police work constitutes the most secluded part of an already secluded system [of criminal justice] and therefore offers the greatest opportunity for arbitrary behavior.”); Foote, *supra* note 4, at 20–21 (discussing the absence of meaningful factual information regarding police practices); Hall, *The Law of Arrest*, *supra* note 4, at 359–62 (noting the shrouded nature of day-to-day policing).

<sup>204</sup> Prosecutors, for instance, especially in high-volume jurisdictions, have neither the time nor resources to charge and fully prosecute every minor offense brought to their attention. See generally Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010). By contrast, police stops and arrests for minor offenses are low-resource undertakings, with major potential payoff in the form of discovery of information leading to more serious (and career-enhancing) criminal prosecutions.

<sup>205</sup> See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 786–87 (2006) (noting the severalfold greater number of state and local law enforcement officers than federal agents).

<sup>206</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 42 tbl.1.27 (Kathleen Maguire & Ann L. Pastore eds., 2004) (noting that nationwide there are 700,000 sworn local and municipal police and 56,000 sworn state troopers), available at <http://www.albany.edu/sourcebook/pdf/t127.pdf>.

<sup>207</sup> See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 14–16, 223 (2001) (discussing institutional checks designed to fragment and limit power); Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEGAL STUD. 323, 324 (2000) (describing “[t]he pluralization of policing”).

<sup>208</sup> See NAT’L RESEARCH COUNCIL, *FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE* 51 (Wesley Skogan & Kathleen Frydl eds., 2004) (“Local political control is a vital aspect of the legitimacy of the police.”).

<sup>209</sup> *Id.* at 49.



Conceivably, a state's chief law enforcement entity could do the job, deploying the state's equivalent of the Administrative Procedure Act.<sup>210</sup> The prospect, however, becomes less tenable in light of the recognized disinclination of states themselves to adopt *Chevron* deference, in significant part due to the perceived lack of institutional experience and wherewithal of state agencies.<sup>211</sup> A centralized interpretive outcome could come from the state attorney general's office, the most direct parallel to Main Justice. Opinions of state attorneys general, however, tracking separation- and delegation-of-powers concerns noted earlier,<sup>212</sup> are usually deemed advisory and nonlegally binding by state courts.<sup>213</sup> Moreover, as a practical matter, experience with other executive-generated, statewide criminal justice policies gives little reason to expect that any interpretive regime will be followed by state and local actors.<sup>214</sup>

*Chevron*'s third chief rationale, the posited superior political accountability of agencies relative to courts, is equally unpersuasive here. State judges, unlike their life-tenured federal counterparts, often face election.<sup>215</sup> Moreover, even if a state administrative entity were to issue an authoritative construction, the divided executive structure of many state governments could well undercut the promise of political accountability, with voters possibly experiencing confusion over which executive entity is responsible for a decision.<sup>216</sup>

Ultimately, *Chevron* deference is ill-advised for the basic separation-of-powers concern noted at the outset: according deference to ex ante department-

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<sup>210</sup> On state analogs of the Act generally, see Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551 (2001).

<sup>211</sup> See D. Zachary Hudson, Comment, *A Case for Varying Interpretive Deference at the State Level*, 119 YALE L.J. 373, 378–80 (2009) (arguing that the differences between federal and state agencies oblige that *Chevron* deference is unwarranted at the state level).

<sup>212</sup> See *supra* notes 175–81 and accompanying text.

<sup>213</sup> See NAT'L ASS'N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 61, 73–74 (Lynne M. Ross ed., 1990) (discussing the limited weight accorded attorney general opinions).

<sup>214</sup> See, e.g., Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC'Y REV. 893 (2005) (discussing varied implementation of statewide policy on hate-crime laws).

<sup>215</sup> See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077 app. 2 (2007) (noting that 89% of all state court judges (trial and appellate) are subject to election).

<sup>216</sup> In Florida, for instance, the Department of Law Enforcement is an executive agency under the authority of the governor, yet the Office of the Attorney General is an independent executive office whose head stands for independent election. On the institutional-clarity challenges presented in this regard more generally, see Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); and William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

or agency-level legal interpretations would merely replace one executive actor's interpretive handiwork with that of another. Fourth Amendment suppression hearings would not turn so much on whether an individual officer's interpretation of a given law was mistaken but rather on whether the facts, as observed by the officer, come within the department or agency's interpretation of codified law. If vague laws are thought to impermissibly relegate policy matters to police officers in their enforcement decisions, as the Supreme Court has held,<sup>217</sup> use of executive-entity-generated interpretive rules are even more problematic.

### C. *Legislative Accountability*

A final, yet closely related, reason to resist a reasonable-mistake exception lies in the democracy-forcing potential of the exclusionary rule itself. As Bill Stuntz has observed, the political economy of crime-control policy is such that legislators and executive branch actors (police and prosecutors) enjoy a natural alliance, ensuring enactment of more laws and thus more opportunities to exercise executive discretion to seize and prosecute,<sup>218</sup> a power upon which the Supreme Court has refused to impose substantive limits.<sup>219</sup>

In this environment, judicial condemnation of lawless seizures and application of the exclusionary rule can play a critical role. When courts indulge police legal misunderstandings, especially relative to textually uncertain laws, and withhold application of the exclusionary rule, legislators, likely politically sensitized to the "loss" of the more serious cases from which the seizures emanate,<sup>220</sup> have less incentive to avoid textual imprecision.<sup>221</sup> As

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<sup>217</sup> See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (condemning a vagrancy ordinance on vagueness grounds because it "permits and encourages an arbitrary and discriminatory enforcement of the law").

<sup>218</sup> See Stuntz, *supra* note 153, at 579 (noting a "tacit partnership" along these lines). As Professor Stuntz observes, the partnership is especially evident with low-level offenses, such as those mainly at issue here, the enforcement of which "make[s] policing cheaper[] because [such offences] permit searches and arrests with less investigative work," constituting a "boon to police and legislators alike." *Id.* at 539; cf. *Illinois v. Krull*, 480 U.S. 340, 365–66 (1987) (O'Connor, J., dissenting) (discussing institutional and political forces favoring legislators' desire to "facilitate law enforcement," possibly at the expense of Fourth Amendment values).

<sup>219</sup> See *supra* note 13. On the Court's reluctance to impose limits on the substantive criminal law more generally, see Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998); and Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 (1994).

<sup>220</sup> See, e.g., *Krull*, 480 U.S. at 365–66 (O'Connor, J., dissenting) (acknowledging the "political role" of legislators vis-à-vis law enforcement).

<sup>221</sup> Cf. *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting) (condemning "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation" and noting that the Court's "indulgence of

a result, police, the chief audience of legislators' handiwork,<sup>222</sup> have even less clarity in the substantive laws that delimit their otherwise virtually unfettered discretionary authority to stop and arrest.<sup>223</sup>

The structural importance of the foregoing assumes added significance when one considers the absence of broader political pressures that might otherwise be brought to bear. Low-level offenses, especially those involving motor vehicles, potentially affect significant numbers of individuals, including those enjoying political influence who might be expected to provide effective political pushback.<sup>224</sup> However, police pretextual resort to low-level offenses to stop and arrest is known to not fall uniformly on the polity.<sup>225</sup> And even if politically empowered individuals feel aggrieved, they will lack significant political (and litigation) motivation because they will not face actual conviction (presuming no evidence is found justifying an unrelated prosecution).<sup>226</sup> Meanwhile, those with the greatest personal stake, criminal defendants facing serious prison time based on evidence seized, will have the least influence over the political process.<sup>227</sup>

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imprecisions that violate the Constitution encourages imprecisions that violate the Constitution"); *Dunn v. United States*, 442 U.S. 100, 112–13 (1979) (“[T]o ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not ‘plainly and unmistakably’ proscribed.” (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917))); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 25 (1996) (noting that judicial enforcement of the vagueness doctrine can be “democracy-forcing” insofar as it “requires legislatures to speak with clarity”).

<sup>222</sup> See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) (“Notice who criminal law’s audience is: law enforcers, not ordinary citizens. Ordinary people do not have the time or training to learn the contents of criminal codes . . . . Criminal codes therefore do not and cannot speak to ordinary citizens directly. . . . For the most part, criminal law regulates actors in the legal system, while popular norms—morals—regulate the conduct of the citizenry.”); see also Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL’Y REV. 105 (2003) (discussing ways in which legal texts have state actors, not the lay public, as their chief audience).

<sup>223</sup> See *supra* notes 13–17 and accompanying text.

<sup>224</sup> See Stuntz, *supra* note 205, at 795 (noting common police resort to motor vehicle stops and consequent potential “latent popular demand for regulating policing”).

<sup>225</sup> See *supra* notes 165–67 and accompanying text; see also *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O’Connor, J., dissenting) (“[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.”).

<sup>226</sup> See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1482 (1996) (“The criminal defendant . . . functions as a private attorney general, ever-vigilant in preventing government misconduct that would otherwise . . . harm those the Fourth Amendment was intended to protect.” (footnote omitted)).

<sup>227</sup> See Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2046–49 (2006) (discussing the relative lack of political influence of criminal defendants).

The upshot of this failure in accountability ultimately will be felt on the streets. With police left free to reasonably err, there will be increases in the already alarmingly high number of legally baseless seizures,<sup>228</sup> invisible to the public at large,<sup>229</sup> with all the negative social consequences they carry.<sup>230</sup>

#### IV. RESPONDING TO THE CHALLENGE

As the preceding discussion makes clear, it is essential that courts condemn police mistakes of law as constitutionally unreasonable and back the conclusion with the exclusionary rule. Doing so, however, offers only a partial solution. Police, expected to enforce legal codes of ever-growing volume and complexity, must be given tools more commensurate to the task. As this Part develops, the most promising solution lies in improving both the amount and quality of substantive law police training, both pre- and in-service, to promote police legal knowledge and help ensure that mistakes are, if not eradicated, at least minimized in number.

Training of American law enforcement personnel has been regrettably slow in coming. While training efforts date back to at least the early 1900s,<sup>231</sup> for decades instruction was meager and piecemeal.<sup>232</sup> Meaningful change did not

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<sup>228</sup> See Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1490 n.161 (noting that only 4% of more than a half million individuals stopped, questioned, and frisked in 2006 were actually arrested (citing N.Y. CITY POLICE DEP'T, NEW YORK POLICE DEPARTMENT (NYPD) STOP, QUESTION, AND FRISK DATABASE, 2006, <http://dx.doi.org/10.3886/ICPSR21660>)). On the historic occurrence of the phenomenon more generally, see FLOYD FEENEY ET AL., U.S. DEP'T OF JUSTICE, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY (1983); and Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1 (2000).

<sup>229</sup> See *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (“[I]nvasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating . . .”); see also Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 332 (2004) (providing results of a field study indicating that only 3% of unconstitutional searches revealed evidence, obviating the likelihood of a motion to suppress in the balance (97%) of cases).

<sup>230</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 133 n.8 (2000) (Stevens, J., concurring in part and dissenting in part) (asserting that high rates of stops not resulting in arrest “indicate that society as a whole is paying a significant cost in infringement on liberty”). For a discussion of the negative effects such stops have on race relations in particular, see *supra* notes 165–67 and accompanying text.

<sup>231</sup> See George H. Brereton, *The Importance of Training and Education in the Professionalization of Law Enforcement*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 111, 112 (1961) (noting training school efforts in 1906 Pennsylvania, 1911 Detroit, and 1917 New York).

<sup>232</sup> See NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON POLICE 4 (1931) (“No pains are taken . . . to educate, train, and discipline for a year or two the prospective patrolmen and to eliminate from their number such as are shown to be incompetent for their prospective duties.”); Brereton, *supra* note 231, at 113–17 (noting that effective training was lacking as of 1961); Donald C. Stone, *Police Recruiting and*

come until 1961, when *Mapp v. Ohio* imposed the Fourth Amendment exclusionary rule on states and governments significantly ramped up efforts. In 1967, the federal government recommended that states establish commissions empowered to set mandatory minimum training requirements and provided funding to realize training goals.<sup>233</sup> By 1968, thirty-one states had training entities.<sup>234</sup> Five years later, however, morticians and cosmeticians still received far more training than police officers,<sup>235</sup> supporting the longstanding view that “[i]gnorance of police duties is no handicap to a successful career as a policeman.”<sup>236</sup>

Today, training is an accepted rite of passage for police cadets, and the Supreme Court has posited that training has evolved to the extent that the exclusionary rule is now less necessary.<sup>237</sup> Data on training actually afforded state and local police, however, belies this faith—especially relative to substantive law. The deficit was first evidenced in the influential 1973 report of the National Advisory Commission on Standards and Goals,<sup>238</sup> carried out under the auspices of the Law Enforcement Assistance Administration, which promulgated standards for police. Standard 16.3 recommended that a mere 10% of 400 training hours be dedicated to “Law”:

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*Training*, 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 996, 1001 (1934) (“Why should a man learn the criminal law of the State of Illinois through trial and error, if he can learn it through instruction?”).

<sup>233</sup> See PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) (recommending that each state create a Peace Officers Standards and Training (POST) Commission); see also Dennis Catlin & Larry T. Hoover, *Role of Law Enforcement Training Commissions in the United States*, 1 J. CRIM. JUST. 347 (1973) (discussing the evolution of the training-commission model).

<sup>234</sup> George A. Lankes, *How Should We Educate the Police?*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 587, 587 (1970).

<sup>235</sup> See NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, *POLICE* 380 (1973) [hereinafter *POLICE*].

<sup>236</sup> CHARLES REITH, *THE BLIND EYE OF HISTORY: A STUDY OF THE ORIGINS OF THE PRESENT POLICE ERA* 106 (Patterson Smith Publ’g Co. 1975) (1952). For a concise overview of the historic evolution toward more and better police training, see M. R. HABERFELD, *CRITICAL ISSUES IN POLICE TRAINING* 58–61 (2002).

<sup>237</sup> See *supra* note 27 and accompanying text.

<sup>238</sup> *POLICE*, *supra* note 235.

Topic	Number of Hours	% Total Course
Introduction to the Criminal Justice System	32	8
Law	40	10
Human Values and Problems	88	22
Patrol and Investigation Procedures	132	33
Police Proficiency	72	18
Administration	36	9
Total	400	100 <sup>239</sup>

The forty-hour exposure to “Law,” moreover, extended well beyond substantive law. Specific subjects included: “[a]n introduction to the development, philosophy, and types of law; criminal law; criminal procedure and rules of evidence; discretionary justice; application of the U.S. Constitution; court systems and procedures; and related civil law.”<sup>240</sup>

Unfortunately, subsequent years have not witnessed much improvement. For instance, a 1993 survey of state agencies reported that while all exceeded the minimum overall hour requirement, with a mean of almost 805 hours, they on average dedicated only 13.5% of instructional time to “Law.”<sup>241</sup> Meanwhile, a 2006 survey reported that a median of 36 hours (8%) of instructional time was dedicated to criminal law, with categories denominated “Operations” (e.g., report writing, investigations) garnering 172 hours; “Weapons/self-defense” 123 hours; and “Self-improvement” (e.g., ethics and integrity, health and fitness, stress prevention/management, and basic foreign language) 75 hours.<sup>242</sup> In addition, “Community policing” (e.g., cultural diversity/human relations, mediation skills/conflict management) consumed 27 hours, and “Special topics” (e.g., domestic violence, juveniles, domestic preparedness, and hate/bias crimes) received 34 hours of classroom instruction.<sup>243</sup>

The content of police training curricula has long been debated, with no ideal reflecting and serving the real job demands of policing identified.<sup>244</sup>

<sup>239</sup> *Id.* standard 16.3, cmt. at 394.

<sup>240</sup> *Id.* The category “Police Proficiency” entailed instruction on such matters as permissible use of force, crowd control, physical conditioning, emergency medical services, and driver training. *Id.*

<sup>241</sup> Terry D. Edwards, *State Police Basic Training Programs: An Assessment of Course Content and Instructional Methodology*, AM. J. POLICE, 1993, at 23, 30, 32 tbl.3.

<sup>242</sup> BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006, at 6 & tbl.11 (2009).

<sup>243</sup> *Id.* at 6 tbl.11.

<sup>244</sup> *See, e.g.*, Nancy Marion, *Police Academy Training: Are We Teaching Recruits What They Need to Know?*, 21 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 54, 54 (1998) (“[T]here is disagreement over the appropriate curriculum, format and instructors that comprise effective police training.”).

Policing inevitably entails a multifaceted menu of tasks, with significant time and effort dedicated to social welfare, not law enforcement per se,<sup>245</sup> and curricula reflect this reality. Modern training also reflects the need for administrative competencies (e.g., report writing), as well as a variety of other skills thought necessary for effective policing, including human relations and use of force. As a result, substantive law training has received increasingly less attention.<sup>246</sup>

While empirical estimates of the exclusionary rule's impact have varied over the years,<sup>247</sup> there has been no mistaking that the specter of its application has prompted police departments to significantly fortify and improve their training efforts relative to Fourth Amendment expectations.<sup>248</sup> The same can be hoped for today with respect to the substantive law that now serves as the chief restraint on the otherwise-unfettered discretionary seizure authority of police.

Rather than excusing bad substantive law training and creating conditions conducive to a race to the bottom,<sup>249</sup> courts—consistent with *Leon*'s premise of a “reasonably well trained officer”<sup>250</sup>—should incentivize departments (complicit in what *Herring* would term culpable “systemic” error<sup>251</sup>) to expand and enhance the quality of training.<sup>252</sup> They will then, in turn, justifiably be

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<sup>245</sup> See DAVID E. BARLOW & MELISSA HICKMAN BARLOW, POLICE IN A MULTICULTURAL SOCIETY 14 (2000) (noting that police on patrol spend less than 15% of their time on average on crime control).

<sup>246</sup> For instance, in 1969, one unspecified county police academy dedicated 119 of its 339.5 recruit-training hours (35%) to legal education, as then (again) broadly defined. RICHARD N. HARRIS, THE POLICE ACADEMY: AN INSIDE VIEW 11, 18 (1973).

<sup>247</sup> See 1 LAFAYE, *supra* note 2, § 1.2(b) (surveying research over the years showing a varied deterrent effect but an overall salutary institutional influence of the rule); Albert W. Alschuler, Studying the Exclusionary Rule: *An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1372–74 (2008) (same).

<sup>248</sup> See *United States v. Leon*, 468 U.S. 897, 920 n.20 (1984) (lauding “the impetus [the rule] has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits” (quoting Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legend of the Warren Court*, 75 MICH. L. REV. 1319, 1412 (1977))). An even more striking educational success story is found in training designed to reduce unwarranted police resort to deadly force. See Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1711–12 (2009).

<sup>249</sup> See *supra* note 63 and accompanying text (discussing Eighth Circuit caselaw lending weight in the reasonableness assessment to the existence of erroneous academy training).

<sup>250</sup> *Leon*, 468 U.S. at 922 n.23.

<sup>251</sup> *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

<sup>252</sup> An additional incentive might lie in law enforcement license certification authorities recognizing departments for their exemplary substantive law training efforts. On the salutary effects of proactive institutional reform measures by police departments more generally, see Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009).

able to lend weight to the substantive law knowledge base of police, the consistency of which has been a source of judicial concern.<sup>253</sup>

The difficulty of the task at hand should not be underestimated. Police officers, typically lacking in formal legal education, cannot (as the Eighth Circuit and other courts have concluded) realistically be expected to interpret laws with the same competence and sophistication as trained lawyers and judges. However, this deficit should not be used as a basis to excuse their mistakes of law. While police perhaps cannot be expected to “know” all positive law,<sup>254</sup> they fairly can be expected to know the laws that they elect to invoke on street patrol and, in instances of substantive uncertainty, as discussed, should be deterred from expansive interpretations.<sup>255</sup>

Ironically, the very success of the educational mission advocated here could eventually call into question the deterrent utility of the exclusionary rule. There could come a time, as advocates of the Eighth Circuit position would likely assert, when departments are doing all they possibly can to ensure that their officers are “reasonably well trained” per *Leon*. Even assuming that a level of training optimality could be achieved and certified by a reviewing court, however, such an argument should be rejected. This is because only when officers and departments know that mistakes, even reasonable ones, will result in loss of evidence will they do their utmost to ensure that quality substantive law training is maintained.<sup>256</sup>

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<sup>253</sup> See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004) (expressing concern that a varied substantive law knowledge base among police would result in the permissibility of an arrest “vary[ing] from place to place and from time to time” (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996) (internal quotation marks omitted)). By the same token, the Court’s frequent ascription of weight to effective police training in reasonable suspicion and probable cause determinations, see, e.g., *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (per curiam), will warrant greater justification as such assessments themselves are inextricably tied to the substantive law. For more on the role of police training and experience as a key “circumstance” in the review of probable cause and reasonable suspicion determinations, see Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751 (2010).

<sup>254</sup> See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 159 (1935) (“No policeman can learn all [laws] and therefore he cannot know what to ‘enforce’ . . .”).

<sup>255</sup> See *supra* Part II.B.

<sup>256</sup> Training efforts logically would thus tend toward mastery of substantive law, rather than chicanery and avoidance, as too often has been the case with training relative to constitutional procedural expectations. See Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 238 (2010) (noting that such training is often “more concerned with admissibility than with legality”).



Police agencies, however, need not—indeed, should not—go it alone. Prosecutors, their fellow executive branch actors, can play a critical cooperative role in training, a position urged by the ABA Standards.<sup>257</sup> Equally important, consistent with the screening practices of many large-volume offices,<sup>258</sup> prosecutors should refuse to proceed with cases that are based on stops or arrests of questionable substantive legal justification.<sup>259</sup> Keeping such cases out of the system would, of course, come at the cost of the democracy-enforcing function of the exclusionary rule, discussed above.<sup>260</sup> However, it can safely be presumed that no prosecutor's office would relish seeing dismissal of the more serious cases arising out of such mistakes, heightening the likelihood that prosecutors will lobby for refinement of a particular law or, if this is not possible, abandonment of its codification altogether.

Ultimately, it is hoped, the reform advocated here will do more than merely help ensure police knowledge of substantive law. In the long term, it will help transform police organizational culture itself, which is known to exercise a potent influence on police behavior.<sup>261</sup> Consistent with exclusionary rule rationale and doctrine,<sup>262</sup> departments and rank-and-file officers alike will come to have a heightened appreciation of the need to know and follow the laws that they are charged with enforcing. No longer will “rules-of-thumb,” rather than legal specifics, be conceived as permissible bases to drive discretionary decisions to seize individuals.<sup>263</sup> As a consequence, the many illegal seizures ostensibly justified by substantive law of which we are aware—and the far more numerous unknown, invisible seizures never subject to court

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<sup>257</sup> See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-2.7(b) (3d ed. 1993) (recommending that prosecutor offices “cooperate with police in providing the services of the prosecutor’s staff to aid in training police in the performance of their function in accordance with law”).

<sup>258</sup> See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 58–84 (2002) (discussing how rigorous screening policies in New Orleans lessened the resort to pleas).

<sup>259</sup> For a similar institutional argument favoring greater restraint by prosecutors in charging low-level, yet legally actionable, offenses, see Bowers, *supra* note 204, at 1662–66.

<sup>260</sup> See *supra* Part III.C.

<sup>261</sup> See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 512–14 (2004) (surveying the effect police organizational culture has on shaping police behavior).

<sup>262</sup> See *Stone v. Powell*, 428 U.S. 465, 492 (1976) (noting that exclusion not only has the immediate effect of removing an officer’s incentive to violate the Fourth Amendment but also has the “[m]ore important[ . . . long[-]term . . . [goal of] encourag[ing] those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system”).

<sup>263</sup> See, e.g., Meghan Stroshine et al., *The Influence of “Working Rules” on Police Suspicion and Discretionary Decision Making*, 11 POLICE Q. 315, 320–35 (2008).

challenge<sup>264</sup>—will be reduced, along with the unjustified privacy invasions that typically attend.

## CONCLUSION

This Article has examined a phenomenon that most Americans would consider a constitutional impossibility: police officers, with the backing of courts, using their mistaken understandings of laws as bases to seize individuals. In 1965, the landscape was such that Wayne LaFave could confidently write that “[n]o one would assert that law enforcement agencies have a right to exercise discretion beyond the outer boundaries of the law defining criminal conduct, such as by arresting for conduct which the legislature has not declared to be a crime.”<sup>265</sup> As the Article establishes, such confidence, if warranted then, is no longer warranted today. Police in several jurisdictions can now seize individuals based on their mistaken legal understandings and use such seizures to secure evidence or information to justify independent, typically much more serious criminal prosecutions.

The willingness of courts to declare illegal seizures constitutionally reasonable, while surely troubling as a normative Fourth Amendment matter, is occurring at a critically important time. Today, police can invoke any and all laws to stop and arrest individuals, even if they do so as a pretext to investigate other wrongdoing<sup>266</sup> and in violation of attendant procedural limits.<sup>267</sup> Moreover, when they seize individuals, their assessments of wrongdoing are generously evaluated in terms of reasonable suspicion<sup>268</sup> and probable cause,<sup>269</sup> and their reasonable mistakes of fact in support thereof are forgiven.<sup>270</sup> Police also enjoy expansive substantive law authority to seize individuals based on already highly generalized assertions of misconduct<sup>271</sup> and indeterminate,

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<sup>264</sup> See *supra* notes 228–30 and accompanying text.

<sup>265</sup> LAFAVE, *supra* note 23, at 63–64.

<sup>266</sup> Since *Whren*, courts have upheld pretextual stops based on nonmoving violations, including those relating to parking. See *Herring v. State*, 16 A.3d 246, 254 (Md. Ct. Spec. App. 2011) (citing caselaw).

<sup>267</sup> See *supra* notes 13–15 and accompanying text.

<sup>268</sup> See, e.g., David A. Harris, *Frisking Every Subject: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 7–22 (1994) (discussing *Terry* and its progeny).

<sup>269</sup> See, e.g., Kit Kinports, Commentary, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 656–57 (2009) (surveying varied, context-driven definitions of probable cause).

<sup>270</sup> See *supra* note 55 and accompanying text.

<sup>271</sup> In 2006, for instance, the most common justification cited for stops by New York City police was presence in a “high crime area.” Reinert, *supra* note 228, at 1495. An additional 32% of stops were based on the time of the day, and 23% were stopped for an unspecified reason. *Id.*

standard-like legal rules.<sup>272</sup> They cannot now also be permitted to stop and arrest based on their mistaken understandings of the meaning and scope of laws regulating more particularized behavior.

In the final analysis, the threat posed by police mistakes of law goes to the very essence of what the governed can rightfully expect of their government's law enforcement agents. This expectation, as the Article shows, unavoidably entails an epistemic and interpretive component too long ignored. It is hoped that the discussion here will inspire greater recognition of the importance of this deficit and the peril associated with forgiving mistakes of law, leading to more and better substantive law training for police.

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<sup>272</sup> See *Eanes v. State*, 569 A.2d 604, 615 (Md. 1990) (concluding that a statute is not invalid "simply because it requires conformity to an imprecise normative standard"); see also, e.g., *United States v. Valdez*, 147 F. App'x 591, 594 (6th Cir. 2005) (upholding a stop based on a Tennessee law providing that one automobile cannot follow another "more closely than is reasonable and prudent"); *Hilton v. State*, 961 So. 2d 284, 295 (Fla. 2007) (upholding a stop based on a Florida law prohibiting a cracked automobile windshield when it is in "such unsafe condition as to endanger any person or property" (quoting FLA. STAT. § 316.610 (2001)) (internal quotation marks omitted)).