

Different Mistakes in the Law and the Difference They Make

Clifton Perry*

* Hudson Professor, Department of Political Science, Auburn University, perrycb@auburn.edu

There are various sorts of mistakes one might make regarding the law. For instance, one might incorrectly believe that there is a law when there isn't one or that there is no law when there is. One might also know the law but incorrectly appraise the facts covered by the law. The former mistake is traditionally classified as a legal mistake while the latter is generally referred to as a factual mistake. Both those under the law and those charged with enforcing the law are capable of making both sorts of mistakes. As might well be expected, however, the consequences of a citizen's legal or factual mistake might be quite distinct from those of the executive officer. Perhaps contrary to common belief concerning the protections afforded the accused, it is more likely for the government to forgive empirical and legal mistakes made by governmental officers than it is for the government to forgive those same mistakes made by private parties in the role of the criminally accused. Mistakes made by the former group may have no effect upon their endeavors, if certain conditions obtain. Mistakes by the latter group, with two exceptions, will generally have significant legal effects. To investigate the varied ramifications in light of two recent United States Supreme Court cases shall be the goal of this paper.

To that end, the first section will discuss the nature of both factual and legal mistakes made by a private party. This section will endeavor to illustrate and explain the aforementioned mistakes through the hypothetical case against Lady Eldon. The second section will attempt to accurately relate recent holdings of the United States Supreme Court dealing with these various mistakes made by the enforcement section of the executive branch of government. The final section will be concerned with the effect of the various types of mistakes made by the respective parties upon the admissibility of other evidence discovered in the course of the executive mistake.

I.

A classic illustration of a private person's mistake of fact concerns the mythical travails of Lady Eldon. Lady Eldon, it seems, wishes to bring into England from France expensive French lace (Kadish and Schulhofer 1989). Not wishing to suffer the English duty on French lace, Lady Eldon endeavors to conceal the lace from Customs by smuggling the lace into England. Upon arriving in Dover, Customs discovers the clumsily hidden lace. However, upon further investigation it is discovered that it is Lady Eldon who has been deceived. Lady Eldon paid dearly for what she was given to

believe was French lace but which was, in fact, inexpensive English lace for which there is no duty owed.¹ Rather than simply laugh off Lady Eldon's factual mistake, a zealous customs officer reports Lady Eldon's action to the British authorities. Lady Eldon is initially charged with smuggling. However, acknowledging that Lady Eldon did not actually bring any item into the country for which a duty is owed, the Crown amends the complaint to attempted smuggling.

The crime of attempt requires that some, but not all, of the required steps toward the completed crime be intentionally engaged for the purpose of successfully accomplishing the finished act. With the crime of attempt, a necessary step toward completing the crime does not include mere preparation (Black's 2014). Moreover, the conviction of the crime precludes conviction for attempt. With few exceptions, conviction of attempt precludes conviction for the completed crime.² The noted preclusions are due, of course, to the constitutional guarantee of the Double Jeopardy Clause of the Fifth Amendment and its incorporation through the Fourteenth Amendment for state prosecutions.³

The satisfaction of all of the elements of a particular crime may fail for a variety of reasons. For instance, the commission might be frustrated by early detection and apprehension by the authorities. In the case of Lady Eldon, however, failure to complete the crime is based upon Lady Eldon's factually false impression about the national origin of the lace in her possession. The facts themselves render it empirically impossible for Lady Eldon to complete what she intended to complete.

Some factual mistakes that prevent the actual commission of an intended crime are recalcitrant to prosecution. This may even be the case where the prosecution is for attempt. Consider the difference between the party who, intending to kill, employs a gun that will not admit of fire and the party who, intending to kill, employs a doll representing the would-be victim and places pins in the doll. If the second case were treated like the first case, it would clearly be a candidate for prosecution for attempt. Like the case of Lady Eldon, the first case involves a factual mistake about the presence of a recognized, empirically necessary condition the satisfaction of which would generally result in the commission of the crime. The second case, quite differently, involves an unreasonable mistake about the presence of an unacknowledged, unrecognized fact or set of facts that even if followed to completion could not otherwise result in the commission of the crime. In other words, in the first case, if the gun could have fired, the party might well have brought about the intended death; not so in the second case. In the second case, the party's mistake is not about the presence or absence of a link within a particular casual chain but rather in holding that there is a casual chain and that it is empirically efficacious. Whereas the party in the first scenario falsely believes she possesses a gun with a firing pin, the party in the second scenario falsely believes that placing pins in a doll that resembles an intended victim will result in an affected state for that victim irrespective of the victim's knowledge.⁴ Thus, while the first case involves a party's mistake about the presence of a component in an empirically plausible and recognized casual chain the party's

mistake in the second case is in believing that the believed casual chain is as reputable as the one in the first case.

It makes sense that the common law would treat the two forms of factual mistake made by individuals endeavoring to create states not entirely in conformity with the law quite differently. Lady Eldon may be prosecuted for attempt but not so the would-be killer armed with specific intent and only a doll and pins.

Another relevant sort of mistake is a non-factual or legal mistake. With a legal mistake one would be mistaken not about the presence or absence of some fact empirically necessary for a crime but about the presence or absence of some law. For instance, Lady Eldon might have simply been unaware of the duty upon the French lace and failed to declare her French lace upon entering England. In such a case Lady Eldon would have made a legal mistake. There is, of course, the well-known legal maxim announcing "*ignorantia legis non exusat*" or "ignorance of the law is no excuse". If legally proscribed behavior is engaged, albeit through complete ignorance of the law, the party is usually not afforded a legally recognized excuse.⁵ Of course, were Lady Eldon unaware of any duty owed on French lace, she could not so easily be described as attempting to smuggle French lace as she did not know that bringing French lace into Great Britain would incur a duty and therefore could not have introduced the lace with the purpose of evading the duty. Lady Eldon fails to have the specific intent to take those purposeful steps necessary to realize the proscribed result. Nevertheless, where Lady Eldon breaks the law due to ignorance of the law she may be prosecuted for the completed crime. That is, where Lady Eldon brings to England French lace without knowing of the law imposing a duty upon such lace, she may well escape being prosecuted for attempt but may be, given the proper findings, prosecuted for smuggling.

A much happier sort of legal mistake Lady Eldon might make is in believing that there is a legal duty owed on French lace when, in fact, there is no duty owed. With such a mistake Lady Eldon will be subject to jeopardy for neither the completed crime nor for attempt. This would be true even if she took pains to conceal the French lace from Customs. In such a case, notwithstanding Lady Eldon's intention and action, she has done nothing wrong nor could she do something wrong given the law.⁶

These observations are not of little moment to Lady Eldon as now she could be prosecuted for attempt where she brings English lace into England mistakenly believing the lace of French origin but not prosecuted for attempt were she to bring English lace into England mistakenly believing that bringing French lace into England without paying a duty is illegal. In both cases Lady Eldon brings English lace into Great Britain mistakenly believing it to be of French origin. In both cases she intentionally endeavors to conceal the lace so as to escape a duty. In the first case there is a duty owed on French lace but since the introduced lace is not French, Lady Eldon may be prosecuted for attempt. In the second, factually identical, case, there is no duty owed on French lace. Thus, notwithstanding Lady Eldon's identical intentions and endeavors, she will escape prosecution altogether in the second case. But this might well issue an odd appraisal where Lady Eldon and Lord Eldon engage in the same lawful act of

introducing duty-free Dutch lace into Great Britain but where Lady Eldon secretes the Dutch lace into England believing it to be French lace for which a duty is actually owed, Lord Eldon smuggles Dutch lace into England believing a duty is owed on Dutch lace. The Eldons commit the same lawful act but only Lady Eldon might suffer prosecution for attempt.

Irrespective of how the Eldons are differently treated with respect to the Dutch lace, they are likely to be treated identically if the customs officials serendipitously discover the fruit of other criminal activity during the course of lawfully searching their luggage. That is, irrespective of the possible posture the Crown assumes toward Lord Eldon, he along with Lady Eldon may be prosecuted for the criminal acts sufficiently evidenced and lawfully discovered within the luggage of the Eldons.

II.

When the constabulary makes a factual mistake it would appear that the ramifications are much less disruptive than such mistakes are to private parties, so long as the mistakes are made in good-faith and are reasonable. In Maryland v. Garrison state police obtained a search warrant to search Mr. McWebb's third-floor apartment. Probable cause was partially satisfied through the information disclosed to police by a reliable informer. When the police arrived at the third floor they were surprised to discover that the third floor apartment had been divided into two separate apartments, one belonging to Mr. McWebb and the other to the respondent. The police, having no reason to suspect the respondent, nevertheless mistakenly searched his apartment by miscalculation and discovered contraband. The respondent argued that the evidence should not be admitted as it was the result of a warrantless search not otherwise allowed under a finding of probable cause or under urgent circumstances. The respondent concluded that the seizing of contraband was accomplished through the violation of the respondent's Fourth Amendment right against unreasonable search and seizure.

The United States Supreme Court agreed that the search was contrary to the particular requirements of the Fourth Amendment. However, the particular search was founded upon a good-faith and reasonable factual mistake. The search was held not to be invalidated under such conditions.

Justice Blackmun, in dissent, noted that a good-faith and reasonable factual mistake by the officer might yield admissible evidence if the state already enjoyed probable cause to suspect the party but not where there existed no reason to suspect the individual initially. The dissent also noted that there was reason to believe that the police did not make a good-faith factual error or that they discovered the error but continued the search until they uncovered evidence.

The government's treatment of executive branch legal mistakes committed in the enforcement of the law appears no less tolerant if reasonable and made in good-faith. In 2014 the United States Supreme Court decided Heien v. North Carolina.⁷ The case

involved an April 2009 event where a member of Surry County, North Carolina Sheriff's Department followed the defendant's Ford-Escort. The driver looked as drivers are wont to look at 0800, "very stiff and nervous." When the Escort needed to brake, the officer noticed that only one brake light functioned. Upon pulling the Escort to the side of the road, the officer discovered that the driver was not the owner of the vehicle. The owner lay upon the rear seat. The officer intended to issue only a warning conditioned upon the driver's license and the owner's registration proving trouble free. Both conditions were satisfied. The officer issued a warning but because of the driver's continued or newly manifested nervous behavior, the officer inquired if the Escort might be escorting contraband. The driver denied the presence of illegal drugs. The officer then requested if he might search the auto. The driver gave consent but recommended the officer make the same inquiry of the owner. The owner consented upon being asked. The officer, with the assistance of another officer, conducted a detailed search of the Escort. The officers discovered cocaine in the side compartment of a duffle bag. Upon the discovery, both men were arrested and charged with attempted trafficking.

At trial the defendant moved to suppress the evidence.⁸ The court held that the faulty brake light gave the officers reasonable cause to stop the vehicle. The lawful stop rendered the defendant's subsequent and voluntary consent legitimate. The state appellate court, however, reversed. The court held that the stop was not based upon reasonable cause and was not justified. If the stop was not justified, then the consent is vitiated. That is, if the stop was unreasonable, it contaminates the consent predicated upon the stop. The North Carolina Appellate Court noted that the relevant North Carolina statute proscribed only driving without any brake light. The exact language of the statute under which the stop and the criminal charge were based specifies that a car must be "equipped with a stop lamp on the rear of the vehicle. The stop lamp may be incorporated into a unit with one or more other rear lamps." Thus, having only one functioning brake light is not to operate a vehicle illegally under the antediluvian North Carolina statute.

The North Carolina Supreme Court reversed the intermediate appellate court not by contesting the appellate court's reading of the statute but rather by noting that another relevant statutory provision requires that "all originally equipped rear lamps be functional."⁹ Given that the statute is so worded, the officer's misread was reasonable and, therefore, so was the stop. The North Carolina Supreme Court remanded and the intermediate appellate court now affirmed the trial court's denial of suppression. The North Carolina Supreme Court then affirmed the appellate court's holding. The defendant sought certiorari review from the United States Supreme Court. Said review was granted.

The United States Supreme Court decision was written by Chief Justice Roberts and was joined by Justices Scalia, Kennedy, Ginsburg, Thomas, Breyer, Alito and Kagan. Justices Kagan and Ginsburg also wrote a concurring opinion. Only Justice Sotomayor dissented.

The majority read the issue to be resolved as whether a mistake of law made by the police necessarily militates against the legitimacy of any evidence found pursuant to a search founded upon the mistake. The resolution, according to the Court, rests upon whether the officer's mistake was a reasonable one or not. In the instant case, the officer's mistake of law resulted in the officer's stop of the auto and that stop led to the owner's consent which yielded discovery of contraband. The Court noted that if the initial mistake were unreasonable, the officer would not enjoy reasonable cause to stop the vehicle. If the officer could not have stopped the vehicle, he could not have secured consent to search the vehicle. Without consent, no evidence would have been obtained as the officer did not have independent probable cause to search the vehicle.

If the officer's mistake were a factual one, there would be no doubt that the mistake could be either reasonable or not. By analogy, the majority argued that if an officer reasonably believed that the party giving consent to the search of a dwelling actually possessed legal authority to give consent to such a search, the search would not thereby be an unreasonable search, albeit factually mistaken. Likewise, the evaluation of the reasonableness of a mistake of law by the constable is not to be determined a-priori but appraised in a manner identical to that of evaluating the reasonableness of a factual mistake.

According to the Court, the North Carolina statute, taken as a whole, is ambiguous. The statute refers to the singular "lamp". The statute also notes that the lamp may be incorporated into a unit with one or more lamps and that all originally equipped rear lamps must be in good working order. It would not be unreasonable to hold that since the Ford-Escort came with two rear brake lights, both lights must be functioning according to the statute taken as a whole. It would not be unreasonable to read the statutory provision referring to the "incorporation into a unit" as modifying the provision referring to "lamp". If that interpretation of the law be mistaken, the mistake of law is surely a reasonable one.

The Court acknowledged that the purpose of suppressing evidence is simply to fulfill the utilitarian goal of deterring intentional or reckless officer action in violation of constitutional rights.¹⁰ In the instant case, given that the officer's mistake was reasonable, the suppression of the evidence would deter reasonable action based upon a reasonable reading of an ambiguous law. This would be counter-productive. The Court noted that the exclusion of this evidence would deter police action that society does not wish to deter.

The majority concluded that the holding did not gainsay the principle that ignorance of the law is no excuse.¹¹ The defendant was not protesting the issuance of a ticket for a faulty brake light as no ticket was, nor could have been, issued. As the public cannot escape the law through ignorance of the law, the government cannot create law where none previously and lawfully existed. Nevertheless, where a reasonable and good-faith legal mistake by the government yields actual secondary evidence of criminal behavior, that evidence will not necessarily suffer suppression simply because the initial seizure was not justified. In all, the Court might well not countenance the exclusion of

subsequently discovered evidence obtained by virtue of the constable's good-faith and reasonable factual or legal mistake which results in a violation of the defendant's constitutional right against unreasonable searches and seizures.

On the other hand, if the constable made a reasonable factual mistake believing the English lace Lady Eldon possessed was actually French and conducted a search and found other contraband, the contraband might also escape suppression. Here Lady Eldon commits no initial wrong and will be prosecuted for neither smuggling nor attempted smuggling. She may, however, suffer prosecution for the secondary wrong of possessing contraband if the initial arrest was reasonable albeit based upon a factual mistake made by the constable.

Again, were Lady Eldon, rather than the constable, simply ignorant of the law imposing a duty on the French lace and simply failed to declare it, all initial and secondary evidence of wrongdoing could be raised against her. But if the duty upon the French lace were rescinded a few hours prior to Lady Eldon's arrival in England with French lace and if Customs were simply unaware of the duty's demise until after Lady Eldon arrived, then upon Lady Eldon's denial that she had anything to declare, it would be discovered that Lady Eldon had French lace. If in the process of conducting that search other contraband were also discovered, Lady Eldon would not be prosecuted for smuggling or attempt, but she will not be able to suppress the discovered evidence nor escape prosecution based upon that evidence.

Lest it be thought that such a situation might only occur at the border where arguably the government has more authority to conduct warrantless inspections and searches,¹² posit that Lady Eldon's travails occur some distance from the border. Suppose that Lady Eldon is factually mistaken about the origins of her lace and that she and the local police mistakenly believed that possession of said lace violates the law. Assume also that the police, acting in good faith, mistakenly but reasonably assess available evidence as yielding probable cause and stop Lady Eldon thereby.¹³ If the police conduct a search incident to the arrest and discover the lace and also the fruit of other actual criminal activity, then although Lady Eldon could not be prosecuted for possession of lace or the attempted possession of the lace, she could be prosecuted for the illegal activity associated with the other evidence discovered.

Again, the Court's stated purpose in excluding evidence is not to vindicate a personal right of privacy, notwithstanding that the scope of protection of the Fourth and Fifth Amendments is partially delineated in terms of the individual right of privacy. The government's stated interest in excluding evidence is simply to deter intentional and deliberate wrongful governmental action.¹⁴ The government has no inclination to deter good faith, reasonable mistakes about the law yielding a legally unjustified search.¹⁵ Given the Court's holding in Heien, the constable may entertain a false belief about the illegality of possessing the noted lace. But if that belief is reasonable and in good-faith, any secondary evidence found in a search not found illegal for reasons apart from the officer's reasonable mistake, will be admissible against Lady Eldon. Although the

derived evidence arises from a mistaken and an unjustified stop, the evidence will not likely be suppressed.¹⁶

It would, thus, appear that were Lady Eldon ignorant of the true nature of her lace and took steps to circumvent the law notwithstanding that what she accomplished was not illegal, she could be prosecuted for attempt and also prosecuted for other illegal acts the evidence for which was discovered during the initial search of Lady Eldon. Of course, if Lady Eldon's mistake were one of ignorance of the law proscribing what she intended to do, then she might well be prosecuted for the completed crime plus for the other crimes the evidence for which was discovered during the search incident to either the arrest or the initial search.

A different and more insouciant situation obtains where Lady Eldon mistakenly believes that her endeavor is proscribed by law. While she may have the specific intent to violate the law, she will fail in her attempt and she will be prosecuted for neither attempt nor the completed act. Nonetheless, if the constable were somehow under the spell of the same misbelief, then although Lady Eldon will escape all prosecution for the non-existent crime, she may well be held responsible for any illegal activity supported by evidence discovered through the initial search given that the constable's legal mistake was a reasonable one. This is similar but not identical to the constable's factual mistake. There, Lady Eldon would be held liable for the attempt and the derivative crime so long as the constable's factual mistake were deemed reasonable.

It might be said that the law of Garrison and Heien simply enlarge or embellish the scope of criminal liability for Lady Eldon. Whereas prior to Garrison and Heien, mistakes by governmental officials might well have vitiated the admissibility of evidence of other illegal activities by the accused, now those mistakes will raise no such response so long as the mistakes were reasonable and in good faith. Applied to the case of Lady Eldon's original factual mistake, it seems very likely, indeed, that the prosecution would be able to introduce evidence of other discovered illegal contraband against Lady Eldon. But even in a case where Lady Eldon's initial wrong of attempting to smuggle French lace is based only upon the constable's good-faith legal mistake that a duty is owed, the discovery of other illegal contraband will also be admissible against Lady Eldon. The result will be no different where the police make a good-faith, reasonable factual mistake in determining probable cause or by reasonably following a defective warrant in good-faith and search Lady Eldon's belongings and serendipitously discover evidence of illegal activity different from and immaterial to that which was mistakenly believed to justify the search.¹⁷

In effect, only acting in violation of a nonexistent law or employing an empirical means to commit a crime that has no empirical relationship to the actualization of the crime will allow a person to escape the governmental change of attitude from investigation to prosecution. But that governmental forgiveness will not apply to evidence of actual criminal activity reasonably discovered in the investigation of the above two prosecutorial culdesacs. The government's forgiving disposition is very much more embracing of governmental legal and empirical mistakes, so long as they are

reasonable and made in good-faith. Thus, while criminal justice may require the government to suffer a substantial burden of persuasion allowing the accused to simply rebut the evidence, how the government obtains the evidence necessary for its case is not in all cases so protective of the accused. Thus, while constitutional criminal procedure requires the government to ensure protections intended for the benefit of the accused, e.g., searches based upon probable cause, warrants, suppression of evidence secured in violation of constitutional protections, etc., these safeguards will not prevent evidence found in “good-faith but under a reasonable factual or legal mistake,” from being used against the accused. The evidence that might normally be excluded were the governmental action otherwise caused, motivated, or calculated may now be countenanced.¹⁸ These unintended yet reasonable, governmental mistakes are essentially visited upon the criminally accused; not the government. With the two exceptions of violating a law falsely believed to exist or employing a completely immaterial and irrelevant means to achieve the criminally sought end, the factual and legal mistakes made by the criminally accused will haunt only the accused. Even with the two aforementioned exceptions, the criminally accused will also likely suffer prosecution for all other crimes the evidence for which was derivatively discovered through the fog of either or both parties’ mistakes.

The above noted considerations only note the increased perplexity of Lady Eldon’s plight. If correct, the problems for Lady Eldon’s return to England under the cloud of her original factual mistake are compounded if she were also to possess evidence of other illegal conduct not discoverable by the constable but for the constable’s good-faith, reasonable mistake. Lady Eldon’s previous reliance upon an exclusionary protection against the other discovered evidence will arguably be lost to her. With the relevant criminal law, a few mistaken beliefs about the law and/or the facts held by either or both parties, mixed with presently established United States Supreme Court precedent, Lady Eldon’s return to Great Britain may well be of greater moment for her.

References

Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

Amar, Akhil Reed. 1997. *The Constitution and Criminal Procedure*, Yale University Press.

Benton v. Maryland, 395 U.S. 784 (1969).

Black’s Law Dictionary (10th edition). 2014. West Publishing.

Boyd v. United States, 116 U.S. 616 (1886).

Davenpeck v. Alford, 543 U.S. 146 (2004).

Davis v. United States, 564 U.S. – (2011).

Diaz v. United States, 223 U.S. 442 (1912).

Franks v. Delaware, 438 U.S. 154 (1978).

Garrett v. United States, 417 U.S. 733 (1985).

Groh v. Ramirez, 540 U.S. 551 (2004).

Hamling v. United States, 418 U.S. 87 (1974).

Heien v. North Carolina, 574 U.S. - (2014).

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

Maryland v. Garrison, 480 U.S. 79 (1987).

Michigan v. Tucker, 417 U.S. 433 (1974).

Nix v. Whiteside, 467 U.S. 431 (1984).

North Carolina v. Heien, 737 S.E. 2d 351 (2013).

Palko v. Connecticut, 302 U.S. 319 (1967).

Pennsylvania v. Scott, 524 U.S. 357 (1998).

Sanford, Kadish and Schulhofer, Stephen. "The Case of Lady Eldon's French Lace: A Hypothetical Decision on a Hypothetical State of Facts." 1989 Criminal Law and Its Processes, Little and Brown.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

United States v. Calandra, 414 U.S. 388 (1974).

United States v. Leon, 468 U.S. 897 (1984).

United States v. Mead, 533 U.S. 218 (2001).

United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

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

Whren v. United States, 517 U.S. 806 (1996).

¹ If in 2000 one falsely believed that the importation of day planners would incur a duty because said items were notebooks rather than not, one would have duplicated the present hypothetical. See U.S. v. Mead, 533 U.S. 218 (2001).

² There are a few exceptions to this rule. The most significant perhaps is where an event subsequent to the conviction for the lesser included offense occurs and now satisfies the elements of the including offense. For example, where the defendant is tried and convicted of assault and battery and subsequently the victim dies within a specified period from the battery. See Diaz v. United States, 223 U.S. 442 (1912) and Garrett v. United States, 471 U.S. 733 (1985).

³ The United States Supreme Court initially refused to apply the Double Jeopardy Clause to the states, Palko v. Connecticut, 302 U.S. 319 (1967) but overruled that refusal in Benton v. Maryland, 395 U.S. 784 (1969).

⁴ This is not to deny the reality of the placebo effect.

⁵ In Hamling v. United States, 418 U.S. 87 (1974) the Court noted that if knowledge of the law were part of the prosecutor's case-in-chief, the defendant could "avoid prosecution by simply claiming that he had not brushed up on the law."

⁶ Allegedly, this sort of mistake was made by many individuals facing a sugar shortage in Great Britain in 1974. People came to believe that bringing sugar into England was legally proscribed. Based upon that false belief about the law, people "smuggled" sugar into Dover, England. Kadish and Schulhofer, see note 1.

⁷ Heien v. North Carolina, 574 U.S. __ (2014). It is not that legal mistakes have not previously occurred. In Davenport v. Alford, 543 U.S. 146 (2004) Washington State police officers stopped Alford's auto under the reasonable suspicion that he was impersonating a police officer. This is a crime. Mr. Alford was not impersonating an officer of the law but as such an officer might be wont to do, he taped the conversation with the investigating authorities. When the taping was discovered by the officers, Mr. Alford was arrested for violating privacy. It so happens that there is no such criminal law. Reasoning that he did not commit a crime for which he could be detained, Mr. Alford sued the officers in civil court. The jury found for the officers on the grounds that sufficient cause obtained to justify the seizure and said cause does not guarantee that what the officers reasonably believed on the merits was, in fact, true. The difference between Heien and Alford is that there was no legal mistake in the initial stop of Alford and it was due to this fact that the jury refused to find for Alford in his civil suit. The legal mistake in Heien occurred at the initial stop and posed a quite different issue from that raised by Alford for the jury, be it civil or criminal.

⁸ The exclusionary rule would eliminate evidence secured through the violation of the constitutional rights of the party against whom the evidence is to be used. The rule was initially based upon two grounds. First, the suppression would simply place the government in a place the government would enjoy if only the government had respected the citizen's constitutional right rather than violate it. Given that the government is restricted by the relevant constitutional right and is charged with the protection of the right, it would seem hardly fair, proper, or cricket to allow the government to advantage itself by way of violating the right the government is charged with protecting. See Boyd v. United States, 116 U.S. 616 (1886), Weeks v. United States, 232 U.S. 383 (1914), Nix v. Whiteside, 467 U.S. 431 (1984). Second, suppression of evidence obtained through the violation of a constitutional right will deter such governmental activity. See United States v. Calandra, 414 U.S. 388 (1974). Over the years the United States Supreme Court has come to completely deemphasize if not abandon the former, personal rights based justification, in favor of the latter, utilitarian justification. For example, see Pennsylvania v. Scott, 524 U.S. 357 (1998).

⁹ North Carolina v. Heien, 737 S.E. 2d 351 (2013).

¹⁰ See Davis v. United States, 564 U.S. __ (2011). An example where the Court acknowledged that the defendant's Fourth Amendment right had been violated but the evidence was not to be suppressed because suppression would have no socially beneficial deterrent effect.

¹¹ United States Supreme Court's Concurring opinions noted that the very tolerant test for reasonableness exhibited in the instant case would not be forthcoming were the legal mistake about the Fourth Amendment itself. The Dissent questioned the Court's need to address the Fourth Amendment at all given that the officer would have clearly enjoyed qualified immunity. Further, the dissent questioned the analogical force of cases where the officer made no mistake and evidence was allowed admission with a case where the officer made a mistake to the same result.

¹² United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (search upon entry into U.S. does not require reasonable suspicion, probable cause or a warrant).

¹³ Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (probable cause required under the automobile search) and United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (reasonable suspicion required for seizure).

¹⁴ Michigan v. Tucker, 417 U.S. 433 (1974); Franks v. Delaware, 438 U.S. 154 (1978); Herring v. U.S., 555 U.S. 135 (2009) (the government's deliberate or reckless violations of the Fourth and Fifth Amendments are acts to which the exclusionary rule applies).

¹⁵ United States v. Leon, 468 U.S. 897 (1984) (search pursuant to a warrant issued without satisfying probable cause).

¹⁶ There are other ways to circumvent the so called "Poisonous Tree Doctrine", e.g., discovery of the derived evidence through an independent source or the inevitable discovery of the derived evidence.

¹⁷ Professor Akhil Reed Amar has presented a brilliant explanation of the likely motivation for the distinction in the Fourth Amendment between reasonable cause and probable cause and how the United States Supreme Court uses the ambiguous phrase "reasonable cause". See Akhil Reed Amar, The Constitution and Criminal Procedure, Yale University Press, 1997, Chapter 1. See also Groh v. Ramirez, 540 U.S. 551 (2004) Justice Thomas in dissent. Justice Thomas, in line with Professor Amar, argues that a search of a home with a defective warrant failing of probable cause may not be constitutionally infirmed as the search may still be reasonable.

¹⁸ In Whren v. United States, 517 U.S. 806 (1996) Justice Scalia, for the Court, noted that where police enjoy objective and legitimate cause to stop an individual, the officer's motives matters not at all to the legitimacy of the stop.