

HEIEN'S MISTAKE OF LAW

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ABSTRACT

The Supreme Court has been whittling away at the Fourth Amendment for decades. The Court's 2014 ruling in Heien v. North Carolina allowing the police to make a traffic stop based on a reasonable mistake of law generated little controversy among the Justices and escaped largely unnoticed by the press—perhaps because yet another Supreme Court decision reading the Fourth Amendment narrowly is not especially noteworthy or because the opinion's cursory and overly simplistic analysis equating law enforcement's reasonable mistakes of fact and law minimized the significance of the Court's decision. But the temptation to dismiss Heien as just another small chink in the Fourth Amendment's armor ought to be resisted. The Court's ruling substantially expands police officers' already broad discretion to make traffic stops, including pretextual ones, to now include circumstances where no violation of law even occurred.

Drawing on both criminal procedure jurisprudence and the criminal law literature discussing mistake of law, this Article begins with a critique of the Court's reasoning in Heien. The Article then addresses the potential reach of the Court's ruling. Examining the lower courts' application of Heien in the eighteen months after it was decided, the Article points out that the decision can be read broadly to forgive a wide variety of "reasonable" police mistakes of law. Even more problematic, the cumulative impact of Heien and some of the Supreme Court's other recent Fourth Amendment opinions could potentially lead courts to tolerate even unreasonable mistakes law enforcement officials make in interpreting the law. The Article concludes that, if the Fourth Amendment is construed to allow any mistakes of law, it should borrow from criminal law and ignore police officers' legal errors only when they relied on an official interpretation of the law made by an independent, authoritative third party. Affording the police broader leeway to act based on their own misunderstandings of law is unjustifiable and threatens to further fuel the growing tensions between law enforcement and communities of color.

INTRODUCTION

In its 2014 decision in *Heien v. North Carolina*, the Supreme Court concluded that a police officer's reasonable misinterpretation of state criminal law—in that case, the belief that a vehicle was required to have two functioning brake lights—does not undermine the reasonable suspicion required to conduct a traffic stop.¹ The eight Justices in the majority, in an opinion written by Chief Justice Roberts, found reasonable mistakes of law

1. *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

“no less compatible with the concept of reasonable suspicion” than comparable mistakes of fact.²

Rarely in recent years has a Fourth Amendment ruling from the Supreme Court rebuffed the great weight of lower court case law by such a one-sided margin.³ Although Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion in *Heien* to “elaborate briefly on [the] important limitations” in the Court’s ruling, Justice Sotomayor was the lone dissenter.⁴ Unlike her colleagues, Justice Sotomayor did see a distinction between mistakes of law and fact. She took the position that the reasonableness of a search or seizure “requires evaluating an officer’s understanding of the facts against the *actual* state of the law.”⁵

Not only did *Heien* create little controversy among the Justices themselves, it also largely escaped the attention of the popular press.⁶ Perhaps this is unsurprising; after all, the Fourth Amendment has been under siege for years. Instead of viewing the exclusionary rule as “an essential part of the right to privacy” and the Fourth Amendment’s “most important constitutional privilege,”⁷ recent Supreme Court opinions have disparaged it as a “last resort”⁸ and a “bitter pill” that “exact[s] a heavy toll.”⁹ And the Justices’ attack on the Fourth Amendment has not been merely rhetorical. According to the Court, the Fourth Amendment does not flinch when the police make a pretextual traffic stop (in violation of their own departmental regulations)¹⁰ and then—no matter how insignificant the offense—conduct a full custodial arrest¹¹ (even if forbidden by state law),¹²

2. *Id.* at 536.

3. For citations to representative lower court opinions discussing the issue addressed in *Heien*, see *id.* at 544 n.1 (Sotomayor, J., dissenting). By comparison, the holding in *Kyllo v. United States*, 533 U.S. 27 (2001), that using a thermal imager on a home constituted a Fourth Amendment search conflicted with the “overwhelming majority” of lower court decisions, but the Court split five to four in that case. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.2(e), at 653 (5th ed. 2012). Although the Justices relied on different reasoning, all nine agreed in *United States v. Jones*, 132 S. Ct. 945 (2012), that at least the long-term monitoring of a car’s movements via a GPS device qualified as a Fourth Amendment search, but it was disputed how significantly that holding departed from lower court case law. Compare Brief for the United States at 42–44, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259), 2011 WL 3561881 (arguing that the lower courts had generally found that installing a GPS device was neither a Fourth Amendment “search” nor a “seizure”), with Brief in Opposition at 19–22, *Jones*, 132 S. Ct. 945 (No. 10-1259), 2011 WL 2263361 (pointing to the absence of a conflict when the question was restricted to the long-term use—as opposed to the mere installation—of the device).

4. *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring).

5. *Id.* at 542 (Sotomayor, J., dissenting) (emphasis added).

6. See Wayne A. Logan, *Cutting Cops Too Much Slack*, 104 GEO. L.J. ONLINE 87, 88 (2015) (expressing surprise that “*Heien* was met with near silence by the nation’s editorial pages”).

7. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

8. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

9. *Davis v. United States*, 564 U.S. 229, 237 (2011).

10. See *Whren v. United States*, 517 U.S. 806, 814–15 (1996).

11. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

finishing up with a routine strip search if the unlucky motorist is placed in the general population of a local detention facility.¹³ Against this backdrop, a jaded audience might well view *Heien* as just the last in a long line of swipes at the Fourth Amendment. In the words of baseball legend Yogi Berra, “[i]t’s like déjà vu all over again.”¹⁴

The temptation to minimize *Heien*’s significance is fueled by the opinion’s deceptively simplistic rationale that law enforcement’s mistakes of law can be analogized to their mistakes of fact. But the cursory nature of the decision¹⁵ should not obscure *Heien*’s contribution to the Supreme Court’s gradual dismantling of Fourth Amendment rights. To crib once again from the famed Yankee, the Court has “made too many wrong mistakes” in its Fourth Amendment jurisprudence.¹⁶ *Heien* is not simply another “wrong mistake”; it is a serious one. The Court’s decision substantially, and unjustifiably, expands police officers’ discretion by allowing them to make traffic stops, including pretextual ones, where the driver did not even violate one of the myriad picky rules of the road. Given the racial disparity in the incidence of these stops,¹⁷ the decision is likely to exacerbate the growing tensions between law enforcement and communities of color.

In making these claims, this Article proceeds in three parts. Part I introduces the Court’s opinion in *Heien* and critiques its reasoning. Specifically, this part of the Article maintains that the Court’s decision cannot find support in Fourth Amendment precedent, offers no persuasive justification for equating police mistakes of fact and law, contravenes the maxim that ignorance of law affords no defense, and cannot be defended on the ground that the line between legal and factual errors is too difficult to draw. Part II then goes on to examine the potential reach of the Court’s ruling. Taking into account the lower court record on police mistakes of law both before and after the opinion in *Heien* was issued, this part of the Article predicts that the decision will continue to be extended to the more intrusive searches and seizures that require a finding of probable cause; that

12. See *Virginia v. Moore*, 553 U.S. 164, 175–76 (2008).

13. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1513–14 (2012); cf. *id.* at 1523 (leaving open a “narrow exception” for arrestees “whose detention has not yet been reviewed by a magistrate” and who are “removed from the general population”).

14. Nate Scott, *The 50 Greatest Yogi Berra Quotes*, USA TODAY (Sept. 23, 2015, 7:30 AM), <http://ftw.usatoday.com/2015/09/the-50-greatest-yogi-berra-quotes>.

15. The majority opinion consumes only seven pages of the Supreme Court Reporter, and the first two pages are devoted to the facts and decisions below.

16. Scott, *supra* note 14.

17. See, e.g., LYNN LANGTON & MATTHEW DUROSE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 3, 7, 9 (2013), <http://www.bjs.gov/content/pub/pdf/pbtss11.pdf> (reporting a racial disparity in the incidence of traffic stops, in the percentage of such stops that led to the issuance of tickets, and especially in the percentage that resulted in a search); see also *infra* notes 345–47 and accompanying text.

it will open the door to increasingly expansive conceptions of a “reasonable” mistake of law; and that, if linked with other recent Supreme Court opinions narrowing the Fourth Amendment, it will prove to be more generous to law enforcement, perhaps forgiving even unreasonable misinterpretations of law. Part III concludes, advocating that, if the Fourth Amendment is construed to permit any police mistakes of law, it should borrow from criminal law and excuse only those errors based on official interpretations of the law made by a neutral and authoritative third party.

I. HEIEN'S REASONING

The Ford Escort in which Nicholas Heien was riding initially attracted the attention of Sergeant Matt Darisse because the driver seemed “very stiff and nervous.”¹⁸ As a result, the officer decided to follow the vehicle, pulling it over after a few miles because the right brake light appeared to be broken.¹⁹ Darisse gave the driver a warning ticket for the alleged brake light violation, but then asked for consent to search the car after becoming “suspicious” because the driver appeared nervous, Heien had been lying down in the back seat during the entire stop, and the two men offered inconsistent responses when asked where they were going.²⁰ Heien, the owner of the Escort, consented to the search, and Darisse’s “thorough” inspection uncovered “a sandwich bag containing cocaine” in a compartment of a duffle bag.²¹

After losing his motion to suppress in the trial court,²² Heien pleaded guilty to attempted drug trafficking. The North Carolina Court of Appeals reversed his conviction, however, finding that the stop of the Escort was “objectively unreasonable.”²³ The court’s conclusion was based on its view that a state vehicle code provision mandating that cars be “equipped with a *stop lamp*,” which “may be incorporated into a unit with *one* or more other rear lamps,” required only one working brake light.²⁴

On appeal to the North Carolina Supreme Court, the State elected not to challenge the appellate court’s interpretation of the stop lamp statute and the state supreme court therefore assumed that no traffic violation had

18. Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).

19. See *id.*

20. *Id.*

21. *Id.*; see Brief for Petitioner at 4, Heien, 135 S. Ct. 530 (No. 13-604), 2014 WL 2601475 (noting that the search lasted forty minutes).

22. See Heien, 135 S. Ct. at 535.

23. Heien v. State, 714 S.E.2d 827, 831 (N.C. Ct. App. 2011), *rev'd*, 737 S.E.2d 351 (N.C. 2012), *aff'd sub nom.* Heien v. North Carolina, 135 S. Ct. 530 (2014).

24. *Id.* at 829 (quoting N.C. GEN. STAT. § 20-129(g) (2009)).

occurred.²⁵ Nevertheless, the court reversed by a vote of four to three, finding that Sergeant Darisse's mistake of law was reasonable given another vehicle code provision requiring that "all 'originally equipped rear lamps'" must be working.²⁶ Acknowledging that the question whether an officer's mistake of law forecloses a finding of reasonable suspicion had divided the lower courts, the North Carolina Supreme Court concluded that reasonable suspicion does not require "omniscien[ce]" on the part of law enforcement officials and that they can "make a mistake, including a mistake of law, yet still act reasonably."²⁷ The dissenters criticized the majority for opening the door to police misinterpretations of law that were "less innocuous" than Sergeant Darisse's misreading of the stop lamp provision and for introducing "the functional equivalent" of a good-faith exception to the exclusionary rule, which the North Carolina Supreme Court had previously rejected under the state constitution.²⁸

When the case reached the United States Supreme Court, Chief Justice Roberts's brief majority opinion opened with the proposition, familiar in the Court's recent Fourth Amendment case law, that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"²⁹ "To be reasonable is not to be perfect," the Chief Justice continued, noting that the Court had previously upheld searches and seizures based on reasonable mistakes of fact.³⁰ Observing that "[r]easonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law," the majority could find no justification for distinguishing between the two types of errors.³¹

The Court then had "little difficulty" in reaching the conclusion that Sergeant Darisse's mistake of law was a reasonable one and the stop of Heien's car was therefore supported by reasonable suspicion.³² The Chief Justice explained that the North Carolina vehicle code provisions used both

25. See *State v. Heien*, 737 S.E.2d 351, 354 (N.C. 2012), *aff'd sub nom.* *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

26. *Id.* at 358–59 (quoting N.C. GEN. STAT. § 20-129(d)).

27. *Id.* at 355–56, 358.

28. *Id.* at 360–61 (Hudson, J., dissenting).

29. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014)); see, e.g., *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013); *Kentucky v. King*, 563 U.S. 452, 459 (2011); *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *United States v. Knights*, 534 U.S. 112, 118–19 (2001). For further discussion of the "touchstone" refrain, see *infra* notes 94–98 and accompanying text.

30. *Heien*, 135 S. Ct. at 536.

31. *Id.*

32. *Id.* at 540. Although there is some conflict on this issue, most jurisdictions require only reasonable suspicion for a traffic stop, see 4 LAFAVE, *supra* note 3, § 9.3(a), at 474–75, and the Supreme Court seems to be in agreement, see *Heien*, 135 S. Ct. at 536 (noting that the parties acknowledged that the stop of Heien's car required only reasonable suspicion); see also *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014).

the singular and plural forms of the word “lamp,” that even the dissent in the court below found the appellate court’s construction of the statute “surprising,”³³ and that Heien’s case marked the first time the North Carolina appellate courts had interpreted the stop lamp provision.

In a short concurrence, Justices Kagan and Ginsburg agreed with the majority’s determination that Sergeant Darisse’s reasonable misreading of the state statute did not undermine the constitutionality of the traffic stop.³⁴ The concurring Justices wrote to emphasize the narrow reach of the Court’s decision, which in their view was limited to the “‘exceedingly rare’” case where a statutory provision was “genuinely ambiguous.”³⁵

Justice Sotomayor, in dissent, charged that the Court’s willingness to forgive police mistakes of law “[d]epart[ed] from . . . tradition” and “significantly expand[ed] th[eir] authority” to subject innocent persons to intrusive and pretextual traffic stops.³⁶ Unlike the majority, Justice Sotomayor viewed the “reasonableness as touchstone” mantra as “simply set[ting] the standard” to be used in assessing the constitutionality of a police intrusion, and not as determining whether an officer’s “understanding of the law” is a relevant “input into the reasonableness inquiry.”³⁷

In assessing Heien’s reasoning, the discussion below first examines the Court’s Fourth Amendment case law and then evaluates whether the Court’s decision to equate mistakes of fact and law makes sense even if it is not supported by precedent. The final two Subparts in this Part analyze the relevance of the maxim that ignorance of law affords no defense and consider whether the difficulties that arise in distinguishing mistakes of law and fact justify the Court’s decision.

A. Analyzing Fourth Amendment Precedent

In response to Justice Sotomayor’s accusation that “scarcely a peep” can be found in the Court’s Fourth Amendment precedents supporting a mistake of law defense,³⁸ the Heien majority asserted that “none of those cases involved a mistake of law.”³⁹ Admittedly, previous Supreme Court opinions had not squarely addressed the full import of a police officer’s legal error, but Heien was not the Court’s first encounter with this type of

33. Heien, 135 S. Ct. at 540 (quoting State v. Heien, 737 S.E.2d at 359 (Hudson, J., dissenting)).

34. See id. at 540–42 (Kagan, J., concurring).

35. Id. at 541 (quoting Brief for the Respondent at 17, Heien, 135 S. Ct. 530 (No. 13-604), 2014 WL 3660500; Transcript of Oral Argument at 48, Heien, 135 S. Ct. 530 (No. 13-604)).

36. Id. at 543–44 (Sotomayor, J., dissenting).

37. Id. at 542.

38. Id. at 543.

39. Id. at 536 (majority opinion).

mistake. *Devenpeck v. Alford*,⁴⁰ cited only in the dissent (albeit for a somewhat different point),⁴¹ featured a law enforcement official's misinterpretation of state law. The arresting officer in that case thought that the state's Privacy Act prohibited Alford from recording conversations with the police during a roadside stop, a belief that was "clearly" wrong under state appellate precedent.⁴² Nevertheless, the Supreme Court held the arrest was valid irrespective of the arresting officer's subjective motivations, so long as there was probable cause to believe Alford had committed *any* offense, even one completely unrelated to the alleged Privacy Act violation.⁴³ *Devenpeck* did not, however, sanction a Fourth Amendment seizure for completely innocent behavior that violated no state law. And notably, the Court's observation that probable cause turns on "the reasonable conclusion to be drawn from *the facts known*" to the police suggests the *Devenpeck* Court at least assumed that an officer's views about the law are irrelevant.⁴⁴

The statement in *Devenpeck* is not isolated; in fact, the Court's references to excusable police errors on other occasions have focused exclusively on mistakes concerning the facts of the particular case. In *Illinois v. Rodriguez*, for example, the Court observed that Fourth Amendment reasonableness requires "the many factual determinations that must regularly be made by agents of the government" to be "reasonable," but not necessarily "correct."⁴⁵ In addition, the Court has repeatedly suggested that police have a reasonable belief of criminal activity only when the facts it was reasonable for them to deduce actually constituted a violation of criminal law. *United States v. Cortez* is just one of many cases recognizing that reasonable suspicion arises when "trained law enforcement officers" use "objective facts, . . . combined with permissible deductions from such facts."⁴⁶ Similarly, *Ornelas v. United States*

40. 543 U.S. 146 (2004).

41. See *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (relying on *Devenpeck* for the proposition that probable cause determinations do not typically consider the individual police officer's subjective state of mind).

42. *Devenpeck*, 543 U.S. at 151.

43. See *id.* at 153 (concluding that the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide[d] probable cause").

44. *Id.* at 152 (emphasis added); see also *id.* at 155 (noting that an arrest is permissible when "the facts known to the arresting officers give probable cause to arrest").

45. 497 U.S. 177, 185 (1990); see also *id.* at 184 (observing that "'reasonableness' . . . does not demand that the government be factually correct" and that probable cause "demands no more than a proper 'assessment of probabilities in particular factual contexts'" (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983))).

46. 449 U.S. 411, 419 (1981); see also *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (noting that "due weight" must be accorded to "the factual inferences drawn by the law enforcement officer" in assessing reasonable suspicion); *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (observing that the Court has consistently defined probable cause by referring to the "facts and circumstances within the officer's knowledge"); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (pointing out that reasonable suspicion

described both reasonable suspicion and probable cause as raising the question whether the “historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.”⁴⁷ Although the Court described the latter part of this standard as “a mixed question of law and fact,” it was not referring to the police officer’s interpretation of the governing criminal statutes.⁴⁸ Rather, the Court made clear that “the issue is whether the facts satisfy the . . . statutory . . . standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.”⁴⁹

Given this extensive and one-sided record, the Court’s equivocal offhand comment in *Herring v. United States* that “a probable-cause determination . . . based on reasonable but mistaken assumptions” may not “necessarily” amount to a Fourth Amendment violation presumably was meant to refer to “mistaken assumptions” concerning the facts of the case.⁵⁰ After all, the error at issue in *Herring* was a factual one—a sheriff’s office computer database had not been updated to indicate that an outstanding arrest warrant had been recalled.⁵¹ Moreover, the statement was pure dictum as the Court, “[f]or purposes of deciding th[e] case, . . . accept[ed] the parties’ assumption that there was a Fourth Amendment violation” and focused instead on the exclusionary remedy.⁵² Although the *Heien* majority cited *Herring*’s caveat with an unexplained “cf.,” it is not obvious that police mistakes of law were within the Court’s contemplation at the time *Herring* was decided.⁵³

The fact that *Heien* represents an extension of Fourth Amendment precedent is not, of course, a fatal flaw, especially because, as the Chief Justice suggested, most of the Court’s prior case law involved factual errors on the part of the police.⁵⁴ The next Part therefore goes on to evaluate

requires that “the facts be judged against an objective standard”); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (making multiple references in defining probable cause to “the facts and circumstances” confronting the officer (quoting *Carroll v. United States*, 267 U.S. 132, 161–62 (1925))).

47. 517 U.S. 690, 696 (1996).

48. *Id.*

49. *Id.* at 696–97 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

50. 555 U.S. 135, 139 (2009).

51. *See id.* at 137–38.

52. *Id.* at 139; *see also id.* at 137 (noting that the parties agreed *Herring*’s arrest violated the Fourth Amendment but disagreed whether the exclusionary rule applied to evidence uncovered during the search incident to arrest). For further discussion of *Herring* and the Court’s rights-remedy distinction, see *infra* notes 121–22, 311–28 and accompanying text.

53. *See Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014). For further discussion of *Heien*’s reliance on *Herring*, see *infra* notes 319–23 and accompanying text.

54. For discussion of the *Heien* majority’s efforts to find support for its decision in other Supreme Court precedent, see *infra* notes 119–32, 210–11 and accompanying text.

whether the Court provided any other persuasive argument for comparing law enforcement's mistakes of law and fact.

B. *Equating Mistakes of Fact and Mistakes of Law*

In the few paragraphs of the majority opinion in *Heien* offering an affirmative justification for the Court's decision, the Chief Justice reasoned that the rationales advanced to excuse law enforcement's reasonable mistakes of fact call for equivalent treatment of their reasonable mistakes of law: that police "deserve a margin of error" because, just as they "must make factual assessments on the fly," they must similarly "make a quick decision" when "the application of a statute is unclear."⁵⁵ Admittedly, law enforcement officials may be called upon to act quickly at times, but there are nevertheless important differences between their assessments of the facts and the law. While there are a potentially infinite variety and combination of facts an officer could conceivably face, there are a perhaps large, but finite, number of laws. Even though some criminal statutes may be ambiguously worded or of uncertain scope, the law is certain, or at least knowable, in a way that facts are not.⁵⁶

Thus, the reason that probable cause and reasonable suspicion are, in the Court's words, "fluid concepts," rather than "'finely-tuned standards'" that are "'readily . . . reduced to a neat set of legal rules,'" is not because of imprecisions in the criminal code.⁵⁷ Rather, probable cause and reasonable suspicion are "elusive" because it is impossible to clearly and exhaustively delineate how they apply to "the myriad factual situations" confronting law enforcement officials.⁵⁸

Moreover, the Court's usual rationale for cautioning that the police "deserve deference" in making probable cause and reasonable suspicion determinations is that they "view[] the facts through the lens of [their] police experience and expertise."⁵⁹ In *United States v. Cortez*, for example, the Court noted that "a trained officer draws inferences and makes

55. *Heien*, 135 S. Ct. at 539 (offering as an example the question whether a ban on vehicles in a particular location applies to Segways). *But cf.* Logan, *supra* note 6, at 90 n.30 (pointing out that Sergeant Darisse was not required to make a hasty decision on the facts of *Heien*).

56. *See, e.g., Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (noting that this concept "sits at the foundation of our legal system"); *cf.* Richard H. McAdams, *Close Enough for Government Work? Heien's Less-than-Reasonable Mistake of the Rule of Law*, 2015 SUP. CT. REV. 147, 203 (2015) (criticizing *Heien* for "focusing its analysis entirely on police officers" and arguing that, "[v]iewing a government as a whole, . . . mistakes of law are never reasonable because a reasonable legislature writes criminal statutes clearly enough to allow reasonable police officers to know what the law is").

57. *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 235, 232 (1983)).

58. *United States v. Cortez*, 449 U.S. 411, 417 (1981).

59. *Ornelas*, 517 U.S. at 699; *see also* *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (requiring that "due weight" be given to "the factual inferences drawn" by police).

deductions . . . that might well elude an untrained person.”⁶⁰ Deferring to law enforcement officials’ assessments of the facts is sensible because of that training and expertise—especially when they are firsthand witnesses on the scene. But the same cannot be said of their legal judgments. As Justice Sotomayor pointed out in her *Heien* dissent, the police may well be “in a superior position, relative to courts, to evaluate [the] facts and their significance as they unfold,” but judges are “in the best position to interpret the laws.”⁶¹

Ironically, one of the justifications offered by the lone federal appellate court that forgave reasonable police mistakes of law before the Supreme Court’s decision in *Heien* was that the police are *not* particularly expert when it comes to statutory construction.⁶² Specifically, the Eighth Circuit concluded that it could not “expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney.”⁶³ In their briefs to the Supreme Court, both the State and the Solicitor General agreed with that sentiment.⁶⁴ And it is for that very reason that the rationale for deferring to police officers’ evaluations of the facts does not dictate similar deference to their legal interpretations.

In addition to finding little support in either precedent or policy for equating law enforcement’s mistakes of law and fact, the *Heien* Court’s decision to overlook reasonable police misinterpretations of the law seems to be in conflict with criminal law’s traditional approach to mistakes of law. The Part that follows explores this tension.

C. Comparing the Ignorance of Law Maxim

Since the mid-nineteenth century, the Supreme Court has endorsed the principle, traced back to Blackstone, that “[e]very one is presumed to know

60. *Cortez*, 449 U.S. at 418; *see id.* at 419 (observing that, “when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion”); *see also Arvizu*, 534 U.S. at 273, 276 (reasoning that police “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them,” and that the agent there “was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area’s inhabitants”); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (noting that police are “expected to apply their judgment” to “recurring factual question[s]”); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (discussing the “reasonable inferences” an officer “is entitled to draw from the facts in light of his experience”).

61. *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).

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

63. *Id.*

64. *See* Brief for the Respondent, *supra* note 35, at 15 (quoting *Sanders* and noting that “officers in the field should not be expected to be ‘legal technicians’” (quoting *Ornelas*, 517 U.S. at 695)); Brief for the United States as Amicus Curiae Supporting Respondent at 25, *Heien*, 135 S. Ct. 530 (No. 13-604), 2014 WL 3735672 (agreeing that “judges, rather than officers, are best suited to resolve legal questions”).

the law.”⁶⁵ A number of the lower courts that took the view ultimately rejected by the Court in *Heien* relied in part on the perceived injustice of excusing only mistakes of law made by law enforcement officials. In *United States v. Chanthasouxat*, for example, the Eleventh Circuit was struck by “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.”⁶⁶

Nevertheless, the Supreme Court in *Heien* dismissed the analogy to the venerable adage as having only “a certain rhetorical appeal” that “misconceives the implication of the maxim.”⁶⁷ Rather, the Court continued, the “true symmetry” is that mistakes of law enable neither a defendant to “escape criminal liability” nor the state to “impose criminal liability.”⁶⁸

But the Court was drawing a comparison there between two criminal defendants, not between the police and the general population.⁶⁹ The point that criminal punishment may not be imposed or avoided based on a mistake of law may be equitable from the perspective of different defendants. While producing “symmetry” between various defendants, however, it ignores the police. The ruling in *Heien* still creates a distinction, one the Court failed to justify, between what police and ordinary citizens are expected to know about the criminal laws.

Several justifications have been articulated for presuming that everyone knows the law and therefore for refusing to permit criminal defendants to raise their misunderstanding or ignorance of criminal statutes as a defense to criminal charges.⁷⁰ These policies underlying the famous maxim that

65. *United States v. Hodson*, 77 U.S. (1 Wall.) 395, 409 (1870); *see also* *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (reciting the “common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally”); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (Univ. Chi. Press 1979) (1769) (“[E]very person of discretion . . . is bound and presumed to know” the law.).

66. 342 F.3d 1271, 1280 (11th Cir. 2003) (quoting *Bryan v. United States*, 524 U.S. 184, 196 (1998)); *see, e.g.*, *United States v. Nicholson*, 721 F.3d 1236, 1242 (10th Cir. 2013); *In re T.L.*, 996 A.2d 805, 817 n.39 (D.C. 2010); *State v. Louwrens*, 792 N.W.2d 649, 653 (Iowa 2010); *Martin v. Kan. Dep’t of Revenue*, 176 P.3d 938, 948 (Kan. 2008); Logan, *supra* note 6, at 91 (criticizing *Heien*’s “troubling asymmetry”); McAdams, *supra* note 56, at 196 (arguing that *Heien* creates “an ugly double standard” by envisioning that “a statute can be sufficiently clear to give constitutionally adequate notice to citizens, but also sufficiently ambiguous to excuse police searches and seizures based on errors about its meaning”); John W. Whitehead, *Is Ignorance of the Law an Excuse for the Police to Violate the Fourth Amendment?*, 9 N.Y.U. J.L. & LIBERTY 108, 118 (2015) (objecting to this “dangerous double standard”).

67. *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014).

68. *Id.* The Court’s additional comparison here between “criminal liability” and “investigatory stops” is discussed *infra* at note 214 and accompanying text.

69. *See Heien*, 135 S. Ct. at 540.

70. *See* Stephen P. Garvey, *When Should a Mistake of Fact Excuse?*, 42 TEX. TECH L. REV. 359, 366 (2009) (observing that “any . . . distinction” between ignorance and mistake of law is “one without

ignorance of the law is no excuse apply with equal or even greater force to mistakes of law made by the police.

Perhaps most fundamentally, the maxim is premised on the idea that “the law is definite and knowable,”⁷¹ and everyone it governs has “the opportunity . . . to find out” what conduct is prohibited.⁷² These assumptions are considered particularly valid for those who act under “circumstances that should alert [them] to the consequences of [their] deed.”⁷³ As Dan Kahan put it, “we expect ‘repeat players’ to be attentive to the rules of the game.”⁷⁴ Second, the maxim serves the utilitarian function of providing an incentive to become familiar with the dictates of the law. Allowing a mistake of law defense, the argument goes, would “encourage ignorance . . . and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.”⁷⁵ Finally, the adage is based on the concern that knowledge of the law is not readily susceptible to proof and fraudulent mistake of law claims are not easily disproven.⁷⁶

To be sure, the maxim has long had its detractors. Some critics have pointed out, quite persuasively, that its presumption is “far-fetched” and an “obvious fiction” because contemporary laws are so numerous, complex, and intricate that the average citizen cannot realistically be expected to be familiar with all of them.⁷⁷ Dan Kahan has argued that, if encouraging

a difference”); *cf.* 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 5.6(d), at 407 (2d ed. 2003) (equating the two concepts).

71. *Cheek v. United States*, 498 U.S. 192, 199 (1991); *see* 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 497 (Robert Campbell ed., London, John Murray, 4th ed. 1873) (making the same point).

72. *United States v. Balint*, 258 U.S. 250, 254 (1922).

73. *United States v. Freed*, 401 U.S. 601, 608 (1971) (quoting *Lambert v. California*, 355 U.S. 225, 228 (1957)); *see also* *Liparota v. United States*, 471 U.S. 419, 433 (1985) (noting that the Court is less likely to read a mens rea requirement into criminal statutes aimed at “conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community’s health or safety”); *United States v. Dotterweich*, 320 U.S. 277, 284–85 (1943) (finding less “[h]ardship” in imposing strict liability on those who “have at least the opportunity of informing themselves of the [law’s] existence”).

74. Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 150–51 (1997).

75. OLIVER WENDELL HOLMES, *THE COMMON LAW* 48 (Am. Bar Ass’n ed., ABA Publ’g 2009) (1881); *cf.* Kahan, *supra* note 74, at 140, 137 (arguing that the real goal of the maxim is to “discourage loopholing” by the “imprudently inquisitive”). For pre-*Heien* opinions making this point in refusing to overlook reasonable police mistakes of law, *see*, for example, *United States v. Nicholson*, 721 F.3d 1236, 1242 (10th Cir. 2013); *United States v. Chanthasouvat*, 342 F.3d 1271, 1280 (11th Cir. 2003); *In re T.L.*, 996 A.2d 805, 817 (D.C. 2010).

76. *See, e.g.*, AUSTIN, *supra* note 71, at 498–99; *Livingston Hall & Selig J. Seligman, Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 651 (1941); *cf.* *Staples v. United States*, 511 U.S. 600, 615 n.11 (1994) (noting that difficulties surrounding proof of mens rea are a relevant factor in evaluating whether a statute was meant to impose strict liability).

77. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 378, 376 (2d ed. 1960); *see also, e.g.*, GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 9.3.4, at 731–32 (1978) (observing that the presumption was “more plausible” when criminal law prohibited “obvious moral wrongs,” and that today “[t]he tight moral consensus that once supported the criminal law has obviously disappeared”);

awareness of the law is the overarching goal, a negligence standard is “unambiguously superior” to strict liability because “the value of learning the law is always higher when the law excuses reasonable mistakes.”⁷⁸ Relatedly, some have advocated for a reasonable mistake of law defense, at least under certain circumstances.⁷⁹ And Justice Holmes discounted the difficulty of proof rationale, questioning whether “a man’s knowledge of the law is any harder to investigate” than other issues courts are routinely asked to resolve.⁸⁰

Despite these objections, the courts in this country rarely allow criminal defendants to argue they made a mistake in interpreting the criminal statute they allegedly violated.⁸¹ And whatever the merits of the criticisms as applied to the general population, they afford no justification for affording greater leeway to the police. First, law enforcement officials are the classic repeat players when it comes to the criminal laws. They receive legal training, have an opportunity to seek advice from prosecutors, and may well have access to technology that can immediately provide them with the information they need.⁸² If, even with these resources, the law is

John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC’Y REV. 165, 181 (2001) (reporting results of empirical research finding that people have “no particular knowledge of the laws of their states”); Hall & Seligman, *supra* note 76, at 646 (positing that “no one can know the law, and of course no one does know the law on all points” (emphasis omitted)).

78. Kahan, *supra* note 74, at 133; see also Richard S. Murphy & Erin A. O’Hara, *Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information*, 5 SUP. CT. ECON. REV. 217, 231–32 (1997) (making a similar point).

79. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 774 (2012) (arguing that defendants who can prove they made a reasonable mistake of law ought to be afforded a defense at least for regulatory crimes); Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487, 523 (2012) (advocating a defense at least for reasonable mistakes of law); cf. Garvey, *supra* note 70, at 368–69 (supporting a broader defense for even unreasonable mistakes of law so long as they do not reflect the defendant’s “defiance of the law’s demands”); Richard G. Singer, *The Proposed Duty to Inquire as Affected by Recent Criminal Law Decisions in the United States Supreme Court*, 3 BUFF. CRIM. L. REV. 701, 706–07 (2000) (calling for a defense, or at least a reduced sentence, for defendants who did not actually know their conduct violated the criminal laws).

80. HOLMES, *supra* note 75, at 48.

81. See MODEL PENAL CODE § 2.02 cmt. at 250 (AM. LAW INST. 1985) (describing as “the conventional position” the view that “knowledge of . . . the law determining the elements of an offense is not an element of that offense”); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.02[B][1], at 171 (6th ed. 2012) (noting that “[o]ne is never excused for relying on a personal — even reasonable — misreading of a statute”); LAFAVE, *supra* note 70, § 5.6, at 394.

82. See Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 84 (2011); Whitehead, *supra* note 66, at 116–17; cf. Murphy & O’Hara, *supra* note 78, at 234 (pointing out that reducing the cost of information alleviates the risk of overdeterrence). *But cf.* Logan, *supra*, at 103–08 (advocating that police receive more training, especially on substantive criminal law); Daniel N. Haas, Comment, *Must Officers Be Perfect?: Mistakes of Law and Mistakes of Fact During Traffic Stops*, 62 DEPAUL L. REV. 1035, 1047–48 (2013) (arguing that police cannot realistically be expected to have dashboard computers).

“simply too difficult for an officer to understand or learn, why should we expect those without legal training to fare any better?”⁸³

Second, while the majority in *Heien* denied that its ruling would “discourage officers from learning the law”—on the grounds that “[t]he Fourth Amendment tolerates only . . . objectively reasonable” errors on the part of the police—criminal law does not excuse any mistake of law, no matter how reasonable.⁸⁴ And, finally, the argument that a mistake of law defense raises intractable difficulties of proof militates against the Court’s decision to equate mistakes of fact and law.⁸⁵

At a minimum, then, the justifications for presuming familiarity with the law apply equally to law enforcement officials and ordinary citizens. But a criminal defendant’s mistake of law does afford a defense in two distinct contexts: where the error negates the mens rea required to commit the crime, and where the misunderstanding is based on an erroneous official interpretation of the law.⁸⁶ The following two Subparts analyze whether either of these exceptions to the maxim supports the result in *Heien*.

1. Mistakes of Law That Negate Mens Rea

A mistake of law, like a mistake of fact, is recognized as a defense in the relatively unusual case where it negates the state of mind required by a criminal statute.⁸⁷ In *Cheek v. United States*, for example, the Supreme Court ruled that a defendant charged with willfully failing to file a tax return could not be convicted if he honestly thought he was exempt from the income tax laws, even if that belief was unreasonable.⁸⁸ Although acknowledging the “deeply rooted” maxim, the Court reasoned that the inclusion of the word “willfully” in the tax statute signaled that Congress meant to require proof that the defendant “voluntarily and intentionally violated” a known legal duty.⁸⁹ In the Court’s view, “the complexity of the

83. *People v. Guthrie*, 30 N.E.3d 880, 891 n.1 (N.Y. 2015) (Rivera, J., dissenting).

84. *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014) (emphasis omitted).

85. See 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2(b), at 7 (5th ed. Supp. 2015) (criticizing *Heien* for “unnecessarily introduc[ing] into the Fourth Amendment adjudication process” a question “far more challenging and more subject to erroneous resolution . . . than the extant reasonable-mistake-of-fact rule”).

86. See MODEL PENAL CODE § 2.04 (AM. LAW INST. 1985); DRESSLER, *supra* note 81, § 13.02[A], at 170.

87. See MODEL PENAL CODE § 2.04(1); LAFAVE, *supra* note 70, § 5.6, at 394. These cases “almost always” involve criminal statutes that incorporate a legal element from some other body of law and therefore do not excuse a mistake concerning the criminal law the defendant allegedly violated. DRESSLER, *supra* note 81, § 13.02[A], at 170. For discussion of these different-law mistakes, see *infra* notes 176–87 and accompanying text.

88. 498 U.S. 192, 201–02 (1991).

89. *Id.* at 199, 201.

tax laws” explained Congress’s decision to “carv[e] out an exception” to the usual mistake of law rule for tax cases.⁹⁰

Assuming the Court’s search and seizure jurisprudence could properly be characterized as similarly complicated and difficult for law enforcement officials to understand,⁹¹ the Fourth Amendment, unlike, for example, the federal statute criminalizing state officials’ willful violations of constitutional rights,⁹² does not require proof of willfulness. Even the Court’s decision in *Herring v. United States* concerning the scope of the exclusionary remedy drew the line far short of willfulness, refusing to apply the exclusionary rule only in cases of “isolated” negligence.⁹³

The familiar “reasonableness as touchstone” refrain recited in *Heien* as well as other recent Fourth Amendment rulings⁹⁴ could arguably be viewed as incorporating a type of mens rea requirement into the Amendment. The Court’s interpretation of the constitutional language banning “unreasonable” searches and seizures has fluctuated over time and from case to case. Historically, the notion of reasonableness served as a shorthand description of the Fourth Amendment’s warrant and probable cause requirements, such that a police intrusion unsupported by probable cause and a warrant was considered unreasonable unless it fell within one of the many exceptions to those requirements.⁹⁵ In a few recent opinions, however, the Court has construed the concept more broadly to trigger a balancing test that deems a search reasonable so long as the government interests it furthers outweigh the intrusion on the defendant’s privacy interests.⁹⁶ Neither of these usages of the term unreasonable resembles a state of mind requirement, however, and, even if they did, the negligence mens rea implicit in the word “unreasonable,” unlike willfulness, typically

90. *Id.* at 200.

91. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–59 (1994) (calling Fourth Amendment case law “an embarrassment” and a “doctrinal mess”); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 375 (comparing the exclusionary rule to “swiss cheese”).

92. *See* 18 U.S.C. § 242 (2012); *Screws v. United States*, 325 U.S. 91, 104 (1945) (interpreting the statute to require proof of “an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution . . . or by decisions interpreting them”).

93. 555 U.S. 135, 144 (2009). For a critique of *Herring*’s focus on police culpability in determining the reach of the exclusionary rule, see, for example, Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 838–43 (2013). For further discussion of *Herring*, see *infra* notes 311–28 and accompanying text.

94. *See supra* note 29 and accompanying text.

95. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *Kentucky v. King*, 563 U.S. 452, 459 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

96. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013); *Samson v. California*, 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

does not create a mistake of law defense.⁹⁷ Moreover, *Heien's* insistence that a mistake on Sergeant Darisse's part about the contours of the Fourth Amendment would have been irrelevant "no matter how reasonable" implies an unwillingness to read a mens rea requirement into the Fourth Amendment itself.⁹⁸

Relevant to this discussion as well are the factors the Supreme Court considers in determining whether a particular criminal statute was intended to require proof of some sort of culpable mens rea that a mistake of law could conceivably negate. In addition to the considerations outlined above, the Court is more likely to find that a federal statute was meant to impose strict liability when doing so will not criminalize a wide variety of innocent conduct,⁹⁹ when the law is a public-safety measure intended to encourage care in performing some dangerous activity,¹⁰⁰ and when the statute subjects defendants to only minor penalties.¹⁰¹ These factors, too, militate against the Court's conclusion in *Heien*.

Refusing to validate stops based on law enforcement officials' mistaken views of the law does not pose any great danger to the public. The police are presumably well-versed in the statutes that prohibit more serious breaches of criminal law.¹⁰² The cases in which they are wrong about the law tend to involve traffic stops for relatively innocuous behavior such as failing to use a turn signal when two lanes merge into one,¹⁰³ hanging an item like an air freshener from the rearview mirror,¹⁰⁴ or attaching a trailer

97. See *Bryan v. United States*, 524 U.S. 184, 192–93 (1998) (pointing out that "the background presumption" underlying the maxim applies even to statutes imposing the stricter mens rea burden of "knowledge" and that "[m]ore is required" only when the crime requires proof of "willfulness").

98. *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014); see also Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 64, at 27 (pointing out that because a police officer's "subjective awareness of the law" is not relevant in applying "objective" Fourth Amendment analyses such as probable cause and reasonable suspicion, "ignorance remains no excuse"). For further discussion of police mistakes of law surrounding the dictates of the Fourth Amendment, see *infra* notes 326–38 and accompanying text.

99. See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2009–10 (2015); *Staples v. United States*, 511 U.S. 600, 610–11 (1994); *Liparota v. United States*, 471 U.S. 419, 426–27 (1985).

100. See, e.g., *United States v. Freed*, 401 U.S. 601, 609–10 (1971); *Morissette v. United States*, 342 U.S. 246, 254–56 (1952); *United States v. Balint*, 258 U.S. 250, 252–53 (1922).

101. See, e.g., *Staples*, 511 U.S. at 615; *Morissette*, 342 U.S. at 260.

102. See Brief for the Respondent, *supra* note 35, at 34 (pointing out that mistake of law questions "most often arise[] in the context of traffic stops"). *But cf.* *Logan*, *supra* note 6, at 92 (observing that *Heien* applies to more serious crimes as well and thus has "a troublesome capacity to expand").

103. See, e.g., *United States v. Stanbridge*, 813 F.3d 1032, 1033 (7th Cir. 2016); *United States v. Morales*, 115 F. Supp. 3d 1291, 1293 (D. Kan. 2015); *Robinson v. State*, 377 S.W.3d 712, 715 (Tex. Crim. App. 2012).

104. See, e.g., *United States v. Sanders*, 95 F. Supp. 3d 1274, 1276 (D. Nev. 2015); *State v. Houghton*, 868 N.W.2d 143, 146 (Wis. 2015).

hitch or license plate cover that slightly obstructs the license plate.¹⁰⁵ In many situations, these traffic stops are pretextual and merely an excuse to investigate some other offense.¹⁰⁶ While that other criminal activity may create a greater public danger, one cost exacted by the Fourth Amendment is that the police must rely on some other investigative tool if they lack reasonable suspicion to conduct a stop not only for the more serious charge but even for some trivial traffic violation.¹⁰⁷

Additionally, the Fourth Amendment does not impose even a minor penalty on a law enforcement official who makes a reasonable mistake.¹⁰⁸ In fact, the interest in safeguarding innocent conduct suggests that police errors of law should not be permitted to give rise to reasonable suspicion because in those circumstances it is the individual subjected to the stop who was acting in complete compliance with the law. Thus, considering both the handful of criminal cases excusing a defendant's mistake of law and the Supreme Court's strict liability jurisprudence, the decision in *Heien* cannot be defended by relying on the maxim's first exception for mistakes of law that negate mens rea.

105. See, e.g., *United States v. Flores*, 798 F.3d 645, 646 (7th Cir. 2015) (per curiam); *People v. Gaytan*, 32 N.E.3d 641, 644 (Ill. 2015); *State v. Hurley*, 117 A.3d 433, 435 (Vt. 2015).

106. For just a sample of blatant illustrations, see *United States v. McDonald*, 453 F.3d 958, 959 (7th Cir. 2006) (police stopped car matching the description of a vehicle that an anonymous informant claimed was carrying drugs and a handgun); *United States v. Rodriguez-Lopez*, 444 F.3d 1020, 1021 (8th Cir. 2006) (defendant was stopped after exiting before decoy drug checkpoint); *United States v. Tibbetts*, 396 F.3d 1132, 1134 (10th Cir. 2005) (narcotics officers stopped car suspected of drug trafficking); *United States v. Lopez-Valdez*, 178 F.3d 282, 284 (5th Cir. 1999) (border patrol agent stopped car suspected of immigration violations); *United States v. Miller*, 146 F.3d 274, 276 (5th Cir. 1998) (drug task force "sought to interdict illegal drugs by stopping motorists under the pretext of enforcing traffic laws"); *United States v. Morales*, 115 F. Supp. 3d 1291, 1293–94 (D. Kan. 2015) (state highway trooper was asked to stop vehicle federal drug officials suspected of carrying narcotics); *United States v. \$167,070.00 in U.S. Currency*, 112 F. Supp. 3d 1108, 1113 (D. Nev. 2015) (deputy sheriff was told he "might be interested in stopping" a vehicle suspected of carrying a large amount of money); *State v. Williams*, 934 A.2d 38, 44 (Md. 2007) (deputy sheriff stopped vehicle suspected of carrying narcotics); *Robinson v. State*, 377 S.W.3d 712, 715 (Tex. Crim. App. 2012) (drug officers stopped defendant after receiving anonymous tip he would be carrying cocaine). See generally *Whren v. United States*, 517 U.S. 806, 813 (1996) (allowing pretextual stops).

107. See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (observing that an officer may "follow[] up his suspicions . . . by means other than a search," but if "no effective means short of a search exist," "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all"). For discussion of how easily police can find a reason to stop a car, however, see *infra* notes 341–44 and accompanying text.

108. See, e.g., *Heien v. North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting) (observing that qualified immunity will "likely" be available in such cases); Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 528–30 (1986) (viewing the exclusionary rule as an "institutional remedy").

2. Mistakes of Law Based on Official Interpretations

Although the law typically does not forgive those who misread criminal statutes, a second exception to the maxim is recognized if the mistake was based on an official statement of the law.¹⁰⁹ Criminal law allows a defendant to rely on such pronouncements even though they later turn out to be incorrect on the grounds that the community should be encouraged to comply with and not to second-guess official interpretations of the law¹¹⁰ and that punishing the defendant in such circumstances would be tantamount to “entrapment by estoppel”¹¹¹ because the source of the defendant’s error was “misleading conduct for which the state should fairly be held responsible.”¹¹²

The contours of the entrapment-by-estoppel doctrine align with the good-faith exception to the exclusionary rule recognized in *United States v. Leon*¹¹³ and its progeny. In *Leon*, the Supreme Court refused to apply the exclusionary rule where law enforcement officials reasonably relied on a defective search warrant that was not supported by probable cause.¹¹⁴ The good-faith exception was then extended to cases where police relied on an unconstitutional statute that authorized warrantless searches,¹¹⁵ a court clerk’s computer arrest records that were out-of-date,¹¹⁶ and “binding appellate precedent” that was later overturned.¹¹⁷ On each occasion, the Court reasoned that the remedy’s deterrent focus is on law enforcement officials and not other state actors, that the police “cannot be expected to question” these official sources of information, that “objectively reasonable law enforcement activity” cannot be deterred, and therefore that “[p]enalizing the officer for [another public employee’s] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”¹¹⁸

109. See, e.g., MODEL PENAL CODE §§ 2.04(3)–(4) (AM. LAW INST. 1985) (recognizing such a defense, but putting the burden of proof on the defendant). *But cf.* Misner, *supra* note 108, at 523–24 (noting that this provision of the Model Penal Code is not followed in some jurisdictions).

110. See, e.g., LAFAVE, *supra* note 70, § 5.6(e)(2), at 413.

111. DRESSLER, *supra* note 81, § 13.02[B][3], at 172.

112. Hall & Seligman, *supra* note 76, at 683.

113. 468 U.S. 897, 922–23 (1984). *But cf.* Misner, *supra* note 108, at 528–30 (rejecting this analogy as a justification for the good-faith exception because the exclusionary rule does not punish the individual police officer who acted in violation of the Fourth Amendment).

114. See *Leon*, 468 U.S. at 922–23.

115. See *Illinois v. Krull*, 480 U.S. 340, 349–50 (1987).

116. See *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995).

117. *Davis v. United States*, 564 U.S. 229, 232 (2011). *But cf.* Note, *Toward a General Good Faith Exception*, 127 HARV. L. REV. 773, 779 n.63 (2013) (citing cases disagreeing whether *Davis* applies when the precedent was merely persuasive rather than binding).

118. *Leon*, 468 U.S. at 918, 921; see also *Davis*, 564 U.S. at 239–41; *Evans*, 514 U.S. at 11–12, 14–16; *Krull*, 480 U.S. at 349–53. For a discussion of the good-faith exception and criticism of the

The Supreme Court's ruling in *Michigan v. DeFillippo* is also in line with the narrow entrapment-by-estoppel exception to the usual mistake of law rule.¹¹⁹ In *DeFillippo*, the Court found that probable cause existed to support an arrest "made in good-faith reliance on an ordinance" later struck down as unconstitutionally vague.¹²⁰ The Court in *Heien* pointed out that *DeFillippo*—like *Heien*—involved "the antecedent question" whether there was a "violation of the Fourth Amendment in the first place," rather than "the separate matter" of what remedy ought to be available for Fourth Amendment wrongs.¹²¹ Although *DeFillippo* therefore turned on substantive Fourth Amendment doctrine, rather than the distinct remedial question at issue in the good-faith exception context, that is not surprising given that *DeFillippo* predated *Leon*'s creation of the good-faith exception.¹²² In any event, the analysis in *DeFillippo* mirrored the rationale underlying both the good-faith exception and the "narrowly drawn" estoppel exception to the maxim.¹²³ Explaining that *DeFillippo* had acted in violation of a "presumptively valid ordinance," the Court was reluctant to ask "[a] prudent officer . . . to anticipate that a court would later hold the ordinance unconstitutional."¹²⁴ "Society would be ill-served," the *DeFillippo* Court concluded, if the police "took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."¹²⁵ In language that could have come from one of the good-faith exception cases, the Court noted that "deter[ring] unlawful police

inconsistent deterrence analysis relied on in this line of cases, see *Kinports*, *supra* note 93, at 824–28, 835–43.

119. 443 U.S. 31 (1979).

120. *Id.* at 33.

121. *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014); *see also* *Herring v. United States*, 555 U.S. 135, 140 (2009) (admonishing that "[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies"); *Leon*, 468 U.S. at 906 (noting that "[w]hether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated'" (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983))).

122. This rights–remedy distinction has led some state courts that reject the good-faith exception under their own state constitutions to nevertheless adopt the Court's substantive Fourth Amendment ruling in *Heien*. *See* *People v. Gaytan*, 32 N.E.3d 641, 653–54 (Ill. 2015); *State v. Sutherland*, 138 A.3d 551, 558 (N.J. Super. Ct. App. Div. 2016); *People v. Guthrie*, 30 N.E.3d 880, 884 n.2 (N.Y. 2015); *see also* *State v. Simpson*, No. 03-15-00499-CR, 2016 WL 1317964, at *4 (Tex. App. Mar. 31, 2016) (reaching a similar conclusion where state's good-faith exception did not protect reliance on unconstitutional statutes). *But cf.* *State v. Scriven*, No. A-5680-13T3, 2015 N.J. Super. Unpub. LEXIS 374, at *10–11 (N.J. Super. Ct. App. Div. Feb. 25, 2015) (per curiam) (in addition to finding officer's mistake of law unreasonable, the court also distinguished *Heien* on the grounds that New Jersey does not recognize the good-faith exception and therefore "act[ing] in good faith does not justify [an] illegal stop"), *aff'd on other grounds*, 140 A.3d 535 (N.J. 2016).

123. *See* MODEL PENAL CODE § 2.04 explanatory note at 268 (AM. LAW INST. 1985).

124. *DeFillippo*, 443 U.S. at 37–38.

125. *Id.* at 38. *DeFillippo*, like *Illinois v. Krull*, recognized an exception for statutes that were "so grossly and flagrantly unconstitutional" that a reasonable person would realize they were invalid. *Id.*; *see* *Illinois v. Krull*, 480 U.S. 340, 355 (1987).

action” is the aim of the exclusionary remedy and “[n]o conceivable purpose of deterrence would be served by suppressing evidence” where the police were “enforcing a presumptively valid statute.”¹²⁶

Despite the *Heien* majority’s reliance on *DeFillippo*,¹²⁷ that precedent provides no greater support for the Court’s holding than does either the good-faith exception to the exclusionary rule or the entrapment-by-estoppel exception to the maxim. *Heien* endorses a broader mistake of law exception than that recognized in any of these other contexts because it encompasses cases where officers rely, not on an ordinance on the books or a warrant issued by a judge, but instead on *their own* misinterpretation of the governing laws.¹²⁸ It may well be, as the Chief Justice asserted in *Heien*, that “DeFillippo’s conduct was lawful when the officers observed it”¹²⁹ in the theoretical sense that the court ruling striking down the ordinance, like any new constitutional decision, did not “creat[e] the law” but merely “declar[ed] what the law already [was].”¹³⁰ But that observation, while perhaps important when determining whether a new rule applies retroactively or what remedies should be available for violating it,¹³¹ does not change the fact that the officers who initially arrested DeFillippo were “correctly applying the law that was then in existence” and therefore did not make a “‘mistake’ at all.”¹³² Police are expected, in fact are generally required, to enforce the laws on the books. What they are not supposed to do is stop—or arrest—someone driving with only one license plate or brake light who is acting in full compliance with the traffic laws.

In line with these various doctrines, a finding of reasonable suspicion could be justified if police acted in reliance on a judicial interpretation of a criminal statute, at least from an appellate court, that was subsequently overturned.¹³³ Whether a law enforcement official who consulted a local

126. *DeFillippo*, 443 U.S. at 38 n.3.

127. *See Heien v. North Carolina*, 135 S. Ct. 530, 538 (2014).

128. *See Note, supra* note 117, at 777 (advocating expansion of the good-faith exception to excuse any reasonable police mistake, though recognizing that the courts have not gone this far). For discussion of the prospect that the combined impact of *Heien* and other recent Supreme Court opinions could lead to this result, *see infra* notes 329–38 and accompanying text.

129. *Heien*, 135 S. Ct. at 538 (citing *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008)).

130. *Danforth*, 552 U.S. at 271 n.5 (emphasis omitted) (quoting *Am. Trucking Ass’ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment)).

131. *See id.*

132. *Heien*, 135 S. Ct. at 546 (Sotomayor, J., dissenting); *see LAFAVE, supra* note 85, § 3.2(b), at 7 (arguing that the *Heien* dissent featured the “more faithful reading” of *DeFillippo*); *see also* *People v. Ellis*, No. 1-14-0613, 2016 WL 1221730, at *11 (Ill. App. Ct. Mar. 28, 2016) (refusing to apply *Heien* where officers reasonably believed the defendant had violated a weapons statute “considered valid at the time,” but later declared unconstitutional, because the case was not “premised on any officer’s mistake of the law”). *But cf. McAdams, supra* note 56, at 155 n.38 (contending that “[i]t is a legal mistake to enforce a legally invalid ordinance, even if the mistake is excusable”).

133. *See LAFAVE, supra* note 70, § 5.6(e)(2), at 415 (noting that reliance on lower court case law may not be reasonable and that some states limit the official statement of the law exception to appellate

prosecutor, and was incorrectly informed that certain acts violated state law, had the reasonable suspicion required to conduct a stop is a closer question. Although prosecutorial advice might give rise to a defense in the typical criminal case,¹³⁴ in this context the prosecutor is part of “the law enforcement team” rather than a “neutral” third party with “no stake in the outcome.”¹³⁵ In any event, each of these situations, like *DeFillippo* and the good-faith exception cases, involves officers who were relying on a third party’s official interpretation of the law rather than, as in *Heien*, their own misreading of the statute.

As a result, Justice Sotomayor was wrong to suggest that the good-faith exception would apply on the facts of *Heien* in a jurisdiction that, unlike North Carolina, had not rejected the exception under its own state constitution.¹³⁶ Although the dissent cited *Davis v. United States* in support of that view, the good-faith exception was available in that case because the officer was relying on “binding appellate precedent” and not his own mistaken interpretation of the law.¹³⁷ Neither the good-faith exception to the exclusionary rule nor the entrapment-by-estoppel exception to the maxim is applicable when the error arises solely from the officer’s own mistake of law. And *DeFillippo*, which was based on similar reasoning, should not have been extended to that situation either.

Thus, whether one considers *DeFillippo*, the *Leon* good-faith exception line of cases, or criminal law’s entrapment-by-estoppel doctrine, a mistake of law ought to be forgiven only when the police reasonably rely on a neutral and authoritative third party. None of these precedents or doctrines excuse an erroneous reading of the criminal statutes made by the officer

decisions); *cf.* *Davis v. United States*, 564 U.S. 229, 232 (2011) (recognizing a good-faith exception where police relied on “binding appellate precedent”).

134. See *LAFAVE*, *supra* note 70, § 5.6(e)(3), at 416 (advocating that the official statement of the law exception should include prosecutors). For a qualified immunity case with these facts, see *J Mack L.L.C. v. Leonard*, No. 2:13-cv-808, 2015 WL 519412, at *2–3 (S.D. Ohio Feb. 9, 2015) (prosecutor mistakenly told officer that a state law banned hallucinogenic substances).

135. *United States v. Leon*, 468 U.S. 897, 917 (1984); see *Misner*, *supra* note 108, at 537–38 (arguing in the context of the good-faith exception that prosecutors, unlike judges, are not sufficiently neutral); *cf.* Transcript of Oral Argument, *supra* note 35, at 32 (attorney for the State suggests that advice even from a judge or attorney general would not necessarily render a police officer’s mistake of law reasonable for Fourth Amendment purposes, though it might support granting her qualified immunity).

136. See *Heien*, 135 S. Ct. at 544–45 & n.2 (Sotomayor, J., dissenting) (listing fourteen states that have rejected *Leon*); see also Orin Kerr, *A Few Thoughts on Heien v. North Carolina*, WASH. POST: VOLOKH CONSPIRACY (Sept. 29, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/29/a-few-thoughts-on-heien-v-north-carolina/> (likewise taking the position that *Heien* may not “make any difference as a matter of Fourth Amendment law” except in states that do not recognize the good-faith exception). *But cf.* Madison Coburn, *The Supreme Court’s Mistake on Law Enforcement Mistake of Law: Why States Should Not Adopt Heien v. North Carolina*, 6 WAKE FOREST J.L. & POL’Y 503, 543 (2016) (arguing that the good-faith exception does not apply to “police-only mistake of law cases”).

137. *Davis*, 564 U.S. at 232.

herself,¹³⁸ and therefore the decision in *Heien* cannot be reconciled with the famous maxim and cannot be justified by analogizing to either of its two exceptions.

D. Distinguishing Mistakes of Fact and Law

Although *Heien* can be faulted for its use of precedent and for its attempt to sidestep the usual mistake of law doctrine, support for the Supreme Court's decision can conceivably be found elsewhere in a rationale not mentioned by the Court itself—that the line between mistakes of fact and mistakes of law is too amorphous to be administrable. The difficulties that arise in differentiating between the two, the argument goes, justify giving them comparable treatment, such that no reasonable mistake an officer makes is fatal to a finding of reasonable suspicion.

The North Carolina Supreme Court made this point in *Heien*,¹³⁹ and some criminal law scholars likewise maintain that the distinction between mistake of fact and mistake of law is entirely “illusory.”¹⁴⁰ Others disagree, taking the position that there is an “important and coherent” difference between the two types of mistake.¹⁴¹ Although on some level what the law provides is itself a question of fact,¹⁴² “nonlegal ‘facts’” differ from “legal ‘facts.’”¹⁴³ Articulating at least the basic distinction between the two is relatively straightforward. As George Fletcher has written, mistakes of fact involve “misperceptions of the world,” whereas mistakes of law arise from “false belief[s] about the enactment or abolition of a legal norm.”¹⁴⁴ Or, in the words of Peter Westen, the difference turns on whether one needs “the services of a good lawyer” or “a good private investigator.”¹⁴⁵

138. The one outlier here, *Herring v. United States*, 555 U.S. 135 (2009), is discussed *infra* at notes 311–28 and accompanying text.

139. See *State v. Heien*, 737 S.E.2d 351, 358 (N.C. 2012), *aff'd sub nom. Heien v. North Carolina*, 135 S. Ct. 530 (2014); see also *State v. Louwrens*, 792 N.W.2d 649, 655 (Iowa 2010) (Cady, J., concurring in the judgment); *People v. Guthrie*, 30 N.E.3d 880, 887 (N.Y. 2015).

140. I.H.E. Patient, *Mistake of Law—A Mistake?*, 51 J. CRIM. L. 326, 326 (1987); see also Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 631 (1981) (describing the distinction as “nonsensical without considerable interpretive construction”).

141. Simons, *supra* note 79, at 494.

142. See, e.g., Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles*, 12 LAW & PHIL. 33, 52 (1993) (taking the position that “all mistakes of law are mistakes regarding facts—those facts that are facts about the existence and meaning of law”); Garvey, *supra* note 70, at 362 n.5 (making the same point).

143. Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 CRIM. L. & PHIL. 213, 221 (2009).

144. FLETCHER, *supra* note 77, § 9.1.1, at 686; see also Simons, *supra* note 79, at 494–95 (defining a mistake of law as a “mistake about what the state prohibits” and a mistake of fact as “a mistake about the instantiation of that prohibitory norm in a particular case”).

145. Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 535 (2008).

Some academics advocate recognition of an intermediate category for the mixed questions of law and fact that arise in applying a criminal prohibition to the facts of a particular case. Without this third classification, they argue, application questions are “forced into one inapt category or the other.”¹⁴⁶ Others reject this intermediate group: instead, they treat it as “a subcategory of questions of law”¹⁴⁷ on the grounds that “[l]egal meaning . . . lie[s] in concrete applications,”¹⁴⁸ or they maintain that application issues “can readily be unmix[ed] into law and fact.”¹⁴⁹

The academic divide is reflected in the Supreme Court’s jurisprudence on mens rea and strict liability, which has not been entirely consistent in its characterization of these terms. Some cases, however, are relatively clear-cut. In *Cheek v. United States*, for example, the Court acknowledged that it was carving out an exception to the maxim and recognizing a mistake of law defense when it held that defendants charged with willfully failing to file a tax return have a defense so long as they honestly thought they were exempt from the income tax laws, even if that belief was unreasonable.¹⁵⁰

On the other hand, *Staples v. United States* established a mistake of fact defense by requiring prosecutors to prove that a defendant charged with possessing an unregistered machinegun in violation of the National Firearms Act was aware that his semiautomatic weapon had been internally modified so that it was capable of firing more than one shot with a single pull of the trigger and thus “had the characteristics that brought it within the statutory definition of a machinegun.”¹⁵¹ In recognizing this defense, the Court repeatedly stated that a defendant “must know *the facts* that make his conduct illegal.”¹⁵²

An earlier opinion involving the same weapons offense, however, illustrates the confusion that characterizes some of the Supreme Court’s decisions in this area. In that case, *United States v. Freed*, the Court held that defendants charged with possessing unregistered hand grenades had to be aware that the items in their possession were weapons but need not

146. FLETCHER, *supra* note 77, § 9.1.1, at 686.

147. Simons, *supra* note 79, at 495 n.23.

148. Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?*, 72 U. COLO. L. REV. 507, 592 (2001) (arguing that any distinction between “the abstract legal ‘meaning’ of a term” and “factfinders’ applications of that statutory term” is “too evanescent to be helpful”).

149. Simons, *supra* note 79, at 495 n.23; *see also* Simons, *supra* note 143, at 222 (arguing that errors in applying the law to a set of facts “can readily be sorted into cases where that mistaken application is based on a mistake of nonlegal fact [or] . . . on misunderstanding of the legal norm”).

150. 498 U.S. 192, 201–02 (1991); *see also id.* at 208–09 (Scalia, J., concurring in the judgment). For further discussion of *Cheek*, *see supra* notes 88–90 and accompanying text.

151. 511 U.S. 600, 602 (1994).

152. *Id.* at 619 (emphasis added); *see also id.* at 605, 607 n.3.; *cf. id.* at 622 n.3 (Ginsburg, J., concurring in the judgment) (expressly contrasting “the related presumption” that mistakes of law afford no defense).

know that they were unregistered.¹⁵³ Although the majority opinion did not address the mistake of fact versus law dichotomy, Justice Brennan's separate opinion took the position that the registration requirement related to "a legal element" involving "some other legal rule" rather than "the law defining the offense."¹⁵⁴ When the mens rea issues surrounding this statute returned to the Court in *Staples*, the Justices disagreed on the proper characterization of the mistake involved in *Freed*. Justices Ginsburg and O'Connor explained *Freed*'s holding on the grounds that awareness of a weapon's registered status is "so closely related to knowledge of the registration requirement" as to be tantamount to "knowledge of the law."¹⁵⁵ Justices Stevens and Blackmun, by contrast, viewed *Freed* as a mistake of fact case.¹⁵⁶

These varying accounts of *Freed* do not demonstrate the absence of a bright line between mistakes of law and fact; instead, they reflect the need to dig deeper to ascertain the specific source of a mistaken belief. Given that the National Firearms Act assigns responsibility for registering a firearm to the person who transfers it,¹⁵⁷ the transferee would make a mistake of fact if she was duped by a counterfeit registration certificate or the transferor's misrepresentation that the registration process had been completed. On the other hand, her error would be a mistake of law if she was completely unaware of the registration requirement or did not realize the weapon could not legally be registered to her because of her criminal record.¹⁵⁸

Morissette v. United States provides another illustration. The defendant there was charged with stealing federal property when he went onto government land used as an Air Force bombing range (but also "extensively hunted" by the neighbors) and took three tons of bomb casings that had been "dumped in heaps" and left, "rusting away," for years.¹⁵⁹ *Morissette*'s defense was that he lacked the requisite intent to steal because he assumed the bomb casings were "abandoned, unwanted and considered of no value to the Government."¹⁶⁰ The Court held that the prosecution was

153. 401 U.S. 601, 607 (1971).

154. *Id.* at 615 (Brennan, J., concurring in the judgment) (quoting MODEL PENAL CODE § 2.02 cmt. at 131 (Tentative Draft No. 4, 1955)); cf. Murphy & O'Hara, *supra* note 78, at 258 n.93 (noting that the *Freed* majority did not "clarify whether the mistake was one of fact or law").

155. *Staples*, 511 U.S. at 622 n.3 (Ginsburg, J., concurring in the judgment).

156. *Id.* at 631 n.14 (Stevens, J., dissenting) (arguing that *Freed*'s refusal to require the prosecution to establish that the defendant knew "the fact that the firearm . . . was unregistered" was "squarely at odds" with the holding in *Staples* that a defendant "must know the facts that make his conduct illegal" (quoting *id.* at 619 (majority opinion))).

157. *See Freed*, 401 U.S. at 605.

158. *See id.* at 606; *see also* Simons, *supra* note 79, at 527 (suggesting similar hypotheticals to make this point).

159. *Morissette v. United States*, 342 U.S. 246, 247 (1952).

160. *Id.* at 248.

required to establish that Morissette had “knowledge of the facts, though not necessarily the law, that made the taking a conversion,” thus seemingly rejecting a mistake of law defense.¹⁶¹ The Court then created some doubt, however, when it went on to wonder how Morissette could have “knowingly or intentionally converted property that he did not know *could be converted*, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property.”¹⁶² *Morissette* came up in the Court’s recent opinion in *Elonis v. United States*, where it was cited as an example of a case requiring knowledge of the relevant facts but not awareness that “those facts give rise to a crime.”¹⁶³ But, the Court continued in *Elonis*, Morissette was entitled to an acquittal unless he knew that “someone else still had property rights” in the bomb casings, which sounds like a mistake involving property law.¹⁶⁴

The apparent confusion surrounding the mistake at issue in *Morissette* does not stem from the inherent impossibility of differentiating between mistakes of fact and law, but again points to the need for further information about the basis of the defendant’s misconception. If Morissette’s mistake was that he erroneously concluded the bomb casings were “unwanted” and “of no value” to the Government, then he made a mistake of fact concerning how the Government planned to use the property or assessed its value. Alternatively, if he thought the items “could [not] be converted” because they had been left in an area accessible to the public and therefore were abandoned in the eyes of the law, his mistake related to the law governing property rights.¹⁶⁵

For a final example, consider a defendant charged with knowing possession of a controlled substance. The defendant makes a mistake of fact if she does not realize the white powder in her possession is heroin; she makes a mistake of law if she does not understand that heroin is included on the federal schedules of controlled substances. In last year’s decision in *McFadden v. United States*, the Court observed that a defendant could be convicted of knowingly possessing a controlled substance if she knew the item in her possession was heroin, even if she did not realize heroin was classified as a controlled substance, because “ignorance of *the law* is typically no defense.”¹⁶⁶ But the majority then went on to suggest that both

161. *Id.* at 271.

162. *Id.* (emphasis added).

163. 135 S. Ct. 2001, 2009 (2015).

164. *Id.*

165. See Leonard, *supra* note 148, at 538–39; cf. Simons, *supra* note 79, at 489–90 (noting that the Court “seemed not to care what kind of mistake [Morissette] made”). *But cf.* Dan M. Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123, 2124 & n.8 (1998) (describing *Morissette* as a mistake of fact case).

166. 135 S. Ct. 2298, 2304 (2015) (emphasis added) (observing that the prosecution’s mens rea burden could be satisfied by establishing the defendant knew either that the item in her possession was

“the physical characteristics” of the item in the defendant’s possession and the item’s inclusion on the list of controlled substances are “facts.”¹⁶⁷ As discussed above, what drugs appear on the federal schedules of controlled substances (like all questions about what the law provides) is in some sense a matter of fact,¹⁶⁸ but whether or not a substance is “controlled” is, as the Chief Justice pointed out, “a legal element” that depends on the federal drug laws.¹⁶⁹

In addition to failing to delve into the specific reasons behind a particular misunderstanding and therefore characterizing mistakes in misleading ways, the Court has at times contributed to the confusion surrounding mistake of fact and law by making seemingly disingenuous statements denying that it is recognizing a mistake of law defense. In *Bryan v. United States*, for example, the Court held that the crime of “willfully” dealing in firearms without a license required the prosecution to establish that the defendant “acted with knowledge that his conduct was unlawful.”¹⁷⁰ The Court distinguished statutes that are satisfied with proof of “knowledge” on the grounds that that mens rea term “merely requires proof of knowledge of the facts that constitute the offense” and “does not necessarily have any reference to a culpable state of mind or to knowledge of the law.”¹⁷¹ But then, in what seems like an oxymoron, the Court claimed that it was not “carv[ing] out an exception to the traditional rule that ignorance of the law is no excuse; knowledge that the conduct is unlawful is all that is required.”¹⁷²

heroin or that, whatever it was, it was included on the list of controlled substances); *see also* *Staples v. United States*, 511 U.S. 600, 606 (1994) (interpreting *United States v. Balint*, 258 U.S. 250 (1922), an earlier controlled substances case that surprisingly was not cited anywhere in *McFadden*, as requiring proof the defendant was aware “that he was selling drugs, not that he knew the specific items he had sold were ‘narcotics’ within the ambit of the statute”).

167. *McFadden*, 135 S. Ct. at 2306 (distinguishing *Staples* because the weapons statute at issue there “defined ‘a firearm’ by its physical features,” whereas “the feature of a substance” that leads to its inclusion in the federal drug laws is “the fact that it is ‘controlled,’” and “[k]nowledge of *that fact* can be established . . . either by knowledge that a substance is listed . . . or by knowledge of [its] physical characteristics” (emphasis added)).

168. *See supra* note 142 and accompanying text.

169. *McFadden*, 135 S. Ct. at 2308 (Roberts, C.J., concurring in part and concurring in the judgment) (arguing that ignorance of the law therefore should afford a defense if a defendant did not know the item in her possession was listed as a controlled substance, even if she was aware of its identity); *see also* *Leonard*, *supra* note 148, at 522 (positing that “every lawyer would agree” that whether a particular drug is a controlled substance is “a question of law”); *cf.* *Simons*, *supra* note 79, at 514 (concluding that it is “more plausible” to categorize this as a mistake of law, despite the fact that “the criminal law incorporates a schedule of prohibited items,” because a “primary function” of that schedule is to “provide content to the criminal prohibition” and determining what substances are included on the list is not “burdensome or complex”).

170. 524 U.S. 184, 192 (1998) (quoting *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)).

171. *Id.* at 192–93.

172. *Id.* at 196; *cf. id.* at 201 (Scalia, J., dissenting) (pointing out that the majority’s “concession [that knowledge of unlawfulness is required] takes this case beyond any useful application of the maxim

Another example is *Liparota v. United States*, which concluded that a conviction for knowingly using food stamps “in any manner not authorized by [the statute] or the regulations” required proof that “the defendant knew his conduct to be unauthorized by statute or regulations.”¹⁷³ Although the Court acknowledged that the statute’s “authorized” clause incorporated a “legal element,” it denied that it was creating a mistake of law defense.¹⁷⁴ Not surprisingly, in hindsight *Liparota* is widely seen as a mistake of law case, though that view is not universally shared.¹⁷⁵

Opinions like *Bryan* and *Liparota* are arguably open to criticism on the ground that they reflect the Justices’ willingness to “smuggl[e]” a mistake of law defense “in the name of criminal intent” in cases where “it happen[s] to fit their sense of justice,” while at the same time “announcing the continuing integrity” of the maxim.¹⁷⁶ But another explanation is that the Court sees the maxim as applicable only in the “very rare” circumstance when criminal law requires proof the defendant was familiar with the law defining the particular offense with which she is charged.¹⁷⁷ Under this approach, the maxim is not implicated in the more common case where “the definition of [an] offense include[s] a legal element” related to some other area of the law—the food stamp regulations in *Liparota*, the weapons licensing requirements in *Bryan*—and the defendant’s mistake can give rise to a defense by negating that mens rea requirement.¹⁷⁸

Providing some support for this reading, the *Bryan* majority distinguished *Cheek* as a case that did recognize a mistake of law defense by requiring a defendant charged with willfully failing to file a tax return to have knowledge of “the specific provision of the tax code that he was charged with violating,” whereas *Bryan* could be convicted even if he was

that ignorance of the law is no excuse”); see also Leonard, *supra* note 148, at 562 (observing that, “[o]f course, [*Bryan*] really does” recognize an exception to the maxim).

173. 471 U.S. 419, 420, 425 (1985) (alteration in original) (quoting 7 U.S.C. § 2024(b)(1)).

174. *Id.* at 425 n.9; cf. *id.* at 441 (White, J., dissenting) (accusing the majority of “ignor[ing] the . . . well founded assumption that ignorance of the law is no excuse”).

175. See *Bryan*, 524 U.S. at 193 n.15 (interpreting *Liparota* as holding that the mens rea term “knowingly” “literally referred to knowledge of the law as well as knowledge of the relevant facts”); *Staples v. United States*, 511 U.S. 600, 631 n.15 (1994) (Stevens, J., dissenting) (observing that *Liparota* read the word “knowingly” to “connote[] knowledge of illegality”); Murphy & O’Hara, *supra* note 78, at 264 (describing *Liparota* as “com[ing] as close as feasible to incorporating a reasonable mistake of law excuse”). But cf. *Elonis v. United States*, 135 S. Ct. 2001, 2009–10 (2015) (viewing *Liparota* as “requir[ing] knowledge of the facts that made the use of the food stamps unauthorized”).

176. Leonard, *supra* note 148, at 590, 592.

177. DRESSLER, *supra* note 81, § 13.02[D][1], at 175; see also MODEL PENAL CODE § 2.02 cmt. at 250 (AM. LAW INST. 1985) (calling this situation “unusual”).

178. See MODEL PENAL CODE § 2.02 cmt. at 250 (noting that here “[t]he law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense”). For discussion of mistakes of law that negate mens rea, see *supra* notes 87–108 and accompanying text.

not familiar with the federal law “that required a license.”¹⁷⁹ Likewise, the Court’s explanation for why it was not recognizing a mistake of law defense in *Liparota* was that it would not excuse a defendant who knew she was not authorized to accept food stamps but “did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal.”¹⁸⁰

Admittedly, the line between the criminal law and other bodies of law is not always obvious. Although the Supreme Court viewed its ruling in *Cheek* as creating an exception to the maxim,¹⁸¹ the statutory provisions that characterize wages as “income” and require individual wage earners to file tax returns are found in the federal tax code, not the criminal code.¹⁸² And *Cheek* provides no support for excusing a defendant who recognized that she was required to pay taxes on her wage income but did not know it was illegal to fail to file a tax return.

Criminal law scholars therefore disagree whether different-law mistakes make up a justifiable and conceptually distinct category. Some defend the distinction on the grounds that society can reasonably expect us to be familiar with criminal norms, but not necessarily with every provision of civil law.¹⁸³ Others, however, point out that criminal statutes are also numerous and complex, and argue that the same duty to know the criminal code ought to be triggered when criminal statutes incorporate some other aspect of the law.¹⁸⁴ Still others maintain that the distinction between the two types of mistakes of law is a difference “without substance and function,”¹⁸⁵ and that the connection between them “may be far more intimate . . . if one interprets the legal system as something of a seamless web rather than a separate series of pronouncements.”¹⁸⁶ And some deny

179. *Bryan*, 524 U.S. at 194–95, 199. *But cf.* Leonard, *supra* note 148, at 562 (criticizing the Court’s distinction for assuming that an exception to the maxim requires that the defendant “know[] the citation to the statute or its precise wording”).

180. *Liparota v. United States*, 471 U.S. 419, 425 n.9 (1985); *see also id.* at 434 (noting that the prosecution “need not show that [the defendant] had knowledge of specific regulations governing food stamp acquisition or possession”); *United States v. Freed*, 401 U.S. 601, 612, 615 (1971) (Brennan, J., concurring in the judgment) (denying that the maxim was implicated in that case despite the fact that the firearms statute incorporated a “legal element” because it did not require “‘consciousness of wrongdoing’ in the sense of knowledge that one’s actions were prohibited or illegal”).

181. *See supra* notes 89–90, 150 and accompanying text.

182. *See* DRESSLER, *supra* note 81, § 13.02[D][2], at 177 (describing *Cheek* as a case involving a “different-law mistake”). *But cf.* Simons, *supra* note 79, at 515–16 (though acknowledging that this characterization is “plausible,” finding tax law distinguishable from other bodies of law, such as property law, that are “the source of a wide range of legal obligations and remedies”).

183. *See, e.g.,* FLETCHER, *supra* note 77, § 9.4.1, at 740; GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 334 (2d ed. 1961).

184. *See, e.g.,* Leonard, *supra* note 148, at 553–59; Simons, *supra* note 79, at 505–08.

185. Patient, *supra* note 140, at 329.

186. Kelman, *supra* note 140, at 631 (emphasis omitted); *see also* Leonard, *supra* note 148, at 547–51 (discussing the hazy border between the law defining the offense and other laws).

that errors involving noncriminal laws can be equated to mistakes of law at all.¹⁸⁷

Fortunately, despite the academic debates and the waffling found in some Supreme Court opinions, the lower courts have had a relatively easy time in Fourth Amendment cases distinguishing between law enforcement's mistakes of law and mistakes of fact. *United States v. Miguel*, the opinion the North Carolina Supreme Court cited in *Heien* to support its contention that the line between the two types of mistake is fuzzy, presented no serious challenge to the Ninth Circuit.¹⁸⁸ The Ninth Circuit seemed to have no difficulty reaching the correct conclusion that the officers made a mistake of fact in *Miguel* when they relied on a computer database that erroneously indicated the defendant's car registration had expired.¹⁸⁹

A more complicated case is *United States v. Cashman*, where the defendant was stopped for driving with an "excessively cracked or damaged" windshield.¹⁹⁰ If the Wisconsin statute at issue there had required law enforcement officials to make a judgment call as to what constitutes "excessive" cracking, the distinction between mistakes of law and fact might have been problematic. For that hypothetical statute, one could argue that an officer whose assessment was found to be incorrect had made a mistake of fact, a mistake of law, or a mistake in applying the legal term "excessive" to the facts of the case. But the Wisconsin statute specified that an excessive crack was one extending more than eight inches from the frame or into the windshield's "critical area," a term that was itself defined as the part of the windshield a driver "normally used" to see in front of the car, including the area covered by the windshield wipers.¹⁹¹ *Cashman*'s windshield featured a "substantial" crack seven to ten inches long that "extended above the bottom" of one windshield wiper.¹⁹² "Given the evident length of the crack and its proximity to the portion of the windshield swept by the wipers," the Seventh Circuit found that the officer reasonably could have believed *Cashman* was driving in violation of the statute even if "[c]areful measurement after the fact might reveal that the crack stopped just shy of the threshold for 'excessive' cracking."¹⁹³ Probable cause depends on "a reasonable assessment of the facts, not a

187. See FLETCHER, *supra* note 77, § 9.4.1, at 739 (describing these mistakes as raising "a mixed question, partly of fact and partly of private law"); Simons, *supra* note 79, at 501 & n.39 (observing that courts recognizing such mistakes as a defense often consider them mistakes of fact).

188. See *State v. Heien*, 737 S.E.2d 351, 358 (N.C. 2012) (citing *United States v. Miguel*, 368 F.3d 1150 (9th Cir. 2004)), *aff'd sub nom.* *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

189. See *Miguel*, 368 F.3d at 1153–54.

190. 216 F.3d 582, 584 (7th Cir. 2000).

191. *Id.* at 586 (citing WIS. ADMIN. CODE TRANS. §§ 305.34(3)(a)–(b), 305.05(43) (1997)).

192. *Id.* at 587.

193. *Id.*

perfectly accurate one,” the court concluded, correctly viewing the case as turning on a factual determination about the length and placement of the crack on Cashman’s windshield.¹⁹⁴

Here, as in the Supreme Court’s mens rea opinions discussed above, difficulties in determining what kind of mistake is involved in a particular case can often be resolved by ascertaining the basis of the officer’s beliefs. In *City of Atwood v. Pianalto*, for example, the defendant was driving in excess of the 20 mph speed limit for that stretch of road but within the 30 mph limit set by state law for roads without a posted speed limit.¹⁹⁵ Although the Kansas Supreme Court characterized the case as a “close” one, with “a flavor” of both mistake of fact and mistake of law, the court properly found that the case involved the former.¹⁹⁶ Had the officer not known that state law specified a speed limit of 30 mph for areas where no limit was posted, he would have made a legal error. But the officer was familiar with the law and instead made a mistake of fact by failing to realize that the speed limit sign had fallen down.¹⁹⁷ As the Iowa Supreme Court pointed out in another case involving a missing traffic sign, “in the majority of cases the type of mistake can be easily identified with the officer’s frank testimony as to what he or she thought the law was and what facts led him or her to believe the law was being violated.”¹⁹⁸

This is not to say that the courts always make the right call in placing a case on the law–fact divide. In *State v. McCarthy*, for example, an officer who was incorrect about the location of a speed limit sign stopped the defendant for speeding.¹⁹⁹ Clearly, the officer was mistaken as to a fact about the physical state of the world. The Idaho Supreme Court, however, characterized the mistake as “one of both fact and law” on the grounds that the officer was “mistaken about the fact of the speed limit sign’s location and about the law regarding the speed limit applicable . . . at the

194. *Id.*; see also *United States v. Chanthasouxat*, 342 F.3d 1271, 1277 (11th Cir. 2003) (agreeing with this interpretation of *Cashman*).

195. 350 P.3d 1048, 1049–50 (Kan. 2015).

196. *Id.* at 1053.

197. See *id.*

198. *State v. Louwrens*, 792 N.W.2d 649, 654 (Iowa 2010); see also *People v. Guthrie*, 30 N.E.3d 880, 892 (N.Y. 2015) (Rivera, J., dissenting) (noting that “any lack of clarity” in that case was attributable to the parties’ “fail[ure] to address what the officer believed” and not to “the inherent difficulty of distinguishing a mistake of law from fact”). For other illustrations, see *United States v. Pena-Montes*, 589 F.3d 1048, 1050–51, 1053–54 (10th Cir. 2009) (concluding, after resolving a “factual ambiguity” and finding the defendant was using dealer license plates rather than demonstration permits, that the officer made a mistake of law in believing dealer plates could be used only during particular times of day and for particular purposes); *State v. Houghton*, 868 N.W.2d 143, 159 (Wis. 2015) (recognizing that the mistaken belief that a vehicle was required to display both front and back license plates could be based on a mistake of fact if the officer did not know the vehicle’s state of origin, or a mistake of law if the officer was unfamiliar with that state’s license plate rules).

199. 982 P.2d 954, 956 (Idaho 1999).

intersection.”²⁰⁰ The court thought that the two mistakes were “inextricably connected, for the placement of the stop sign determined the applicable speed limit.”²⁰¹ But the court failed to recognize that the officer was perfectly familiar with how the laws establishing speed limits worked. The only basis for his mistake about the governing speed limit was a simple factual error as to where the sign was located.

Conversely, courts do not always correctly identify mistakes of law. In *United States v. Tibbetts*, for example, the defendant was stopped because the tires he had installed on his vehicle were wider than the car’s mudguards (but not wider than the fenders or bumpers).²⁰² The Tenth Circuit, following its pre-*Heien* position that reasonable suspicion could not be based on a mistake of law, characterized the case as one involving “a mixed question of fact and law,” and remanded for the district court to evaluate whether the officer’s belief that the mudguard law was violated was “correct, a reasonable mistake of fact, or an impermissible mistake of law.”²⁰³ But the officer was aware of the relevant physical facts—the relative length of the tires, mudguards, and fenders on Tibbetts’s vehicle. Rather, as the partial dissent noted, the officer made a pure mistake of law in “ignor[ing]” the part of the state code providing that mudguards were not mandatory “when the purpose of the statute is accomplished by means of fenders.”²⁰⁴

As a general rule, however, the lower courts have not encountered much difficulty differentiating between law enforcement’s legal and factual mistakes in ruling on motions to suppress. At the margin, tricky cases may occasionally arise,²⁰⁵ but the rare situations where the distinction is

200. *Id.* at 959 (emphasis omitted).

201. *Id.*

202. 396 F.3d 1132, 1138 n.4 (10th Cir. 2005).

203. *Id.* at 1138–39.

204. *Id.* at 1140 (Kelly, J., concurring in part and dissenting in part). For other Fourth Amendment cases where courts have incorrectly identified mistakes of fact and law, see *United States v. Sanders*, 196 F.3d 910, 912–13 (8th Cir. 1999) (suggesting that the erroneous belief that the defendant’s vehicle was manufactured after 1973 and therefore subject to a taillight statute was a mistake of law); *O’Callaghan v. City of Portland*, No. 3:12-CV-00201-BR, 2015 WL 7734012, at *5–6 (D. Or. Nov. 30, 2015) (wrongly describing as a “mistake of fact and law” the officers’ lack of awareness of the fact that the defendant had filed an appeal); *Cf. Sinclair v. Lauderdale Cty.*, No. 15-6134, 2016 WL 3402594, at *4 (6th Cir. Aug. 24, 2016) (characterizing the belief that one who was on probation could be charged with “escaping” from a rehab facility as an “arguably mistaken application of the [state’s] unambiguous ‘escape’ statute [that] may fairly be characterized as a mistake of fact regarding Mr. Sinclair’s probation status,” and granting qualified immunity on the grounds that the mistake was reasonable) (amending the court’s prior opinion, *Sinclair v. Lauderdale Cty.*, No. 15-6134, 2016 U.S. App. LEXIS 11403, at *12–13 (6th Cir. June 21, 2016), which had identified the mistake as a legal error).

205. *Compare People v. Guthrie*, 30 N.E.3d 880, 887 n.5 (N.Y. 2015) (observing that an officer’s traffic stop for failure to comply with a stop sign, which had not been properly registered and therefore was invalid, could involve either a mistake of law or fact “even if the officer knew of the legal requirement that stop signs . . . must be formally registered . . . , but was mistaken about whether this

elusive—such as the hypothetical “excessive cracking” statute discussed above—do not justify the outcome in *Heien*. Moreover, any ambiguity can often be resolved by ascertaining the precise source of the officer’s misunderstanding, and asking courts to do so is not particularly onerous.

In sum, there is much to criticize in *Heien’s* reasoning. The ruling has no real support in Supreme Court precedent, and the majority failed to provide more than a cursory justification for equating mistakes of law and fact. In addition, the decision to forgive police officers who misinterpret a criminal statute cannot be reconciled with the maxim that ignorance of the law is no excuse, at least when the officers are relying on their own misreading of statutory language rather than official advice received from an independent and authoritative third party. This critique might simply be academic if extending the reasonable mistake doctrine to police officers’ legal errors advanced the goals of law enforcement without damaging the interests protected by the Fourth Amendment. Unfortunately, however, while the eight Justices in the majority suggested that *Heien* will have only a limited impact, their optimism may well prove to be unfounded. The damage the Court’s ruling is likely to do is the subject of the following Part.

II. *HEIEN’S* REACH

The majority in *Heien* indicated that it meant for its holding to be narrow, admonishing that the Constitution “tolerates only . . . [objectively] reasonable” mistakes on the part of the police, that “sloppy” errors are not reasonable, and that the Fourth Amendment’s standard of reasonableness is “not as forgiving” as that applied in the context of qualified immunity.²⁰⁶ In their concurring opinion, Justices Kagan and Ginsburg took greater pains to emphasize the “important limitations” on the Court’s ruling, which the concurrence predicted would prove to be consequential only in unusual circumstances.²⁰⁷ In assessing *Heien’s* potential impact, this part of the Article analyzes in turn the realistic likelihood that the decision can be restricted to traffic stops and other reasonable suspicion inquiries, the elasticity of the concept of a reasonable mistake of law on the part of the police, and the cumulative impact of *Heien* coupled with some of the Court’s other recent Fourth Amendment rulings. In all three areas, the Article finds ample room for *Heien’s* influence to expand; most troubling is

particular stop sign was on the list of registered signs” contained in the Village Code), *with id.* at 892 (Rivera, J., dissenting) (commenting that the lower courts “easily” viewed this as a mistake of law case).

206. *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014) (emphasis omitted). For further discussion of the qualified immunity inquiry, see *infra* notes 238–40, 298–301 and accompanying text.

207. *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring).

the possibility that the decision, when combined with several other Supreme Court opinions, will excuse even unreasonable law enforcement mistakes.

A. *Applying Heien to Probable Cause Determinations*

One obvious extension of *Heien*'s reach is to apply it to searches and seizures requiring probable cause. Although the Court was careful to limit its description of the question presented in *Heien* to mistakes of law giving rise to reasonable suspicion,²⁰⁸ the majority opinion referred to probable cause as well as reasonable suspicion.²⁰⁹ In fact, the Court even relied for support on nineteenth-century precedents “explaining the concept of probable cause” in the context of federal statutes that protected customs officers from damages suits so long as any unlawful seizure was based on probable cause.²¹⁰ The Chief Justice acknowledged that these decisions were not interpreting the Fourth Amendment and therefore were “not directly on point,” and in fact compared them to the “distinct” qualified immunity analysis described elsewhere in the opinion as a more “forgiving” standard.²¹¹ Nevertheless, the multiple references to probable cause in *Heien* were made without any acknowledgment that a standard other than reasonable suspicion was involved.

Moreover, despite the Court's practice of resolving some Fourth Amendment cases by balancing the intrusiveness of a police action against the governmental interests it furthers,²¹² noticeably absent from the majority's opinion in *Heien* is any explicit endorsement of the argument made by the North Carolina Supreme Court and Solicitor General that stops impose only insignificant burdens, which might then create room to distinguish the more serious intrusions probable cause allows.²¹³ In rejecting the relevance of the venerable maxim, the majority did make the somewhat cryptic comment that “just because mistakes of law cannot

208. *See id.* at 534, 536 (majority opinion).

209. *See id.* at 536, 538–39; *see also id.* at 545–46 (Sotomayor, J., dissenting) (likewise discussing probable cause precedents).

210. *Id.* at 536–37 (majority opinion).

211. *Id.* at 537, 539. *See* LAFAVE, *supra* note 85, § 3.2(b), at 6 (calling these cases “a slender reed” on which to base *Heien*).

212. *See, e.g.,* *Maryland v. King*, 133 S. Ct. 1958, 1969–70 (2013); *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *United States v. Knights*, 534 U.S. 112, 118–19 (2001); *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968). For a categorization of the situations in which the Court directly balances Fourth Amendment interests, see David H. Kaye, *Why So Contrived? DNA Databases After Maryland v. King*, 104 J. CRIM. L. & CRIMINOLOGY 535, 555 fig. 1 (2014).

213. *See State v. Heien*, 737 S.E.2d 351, 357 (N.C. 2012), *aff'd sub nom. Heien v. North Carolina*, 135 S. Ct. 530 (2014); Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 64, at 22–23; *cf. Berkemer v. McCarty*, 468 U.S. 420, 437, 440 (1984) (describing traffic stops as “temporary and brief” intrusions of “comparatively nonthreatening character”).

justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.”²¹⁴ While this statement may suggest the view that stops occasion a relatively minor intrusion,²¹⁵ only Justice Sotomayor’s dissent spoke expressly in balancing-test terms, calling stops “invasive, frightening, and humiliating encounters.”²¹⁶

Not surprisingly, the lower courts have virtually unanimously²¹⁷ extended *Heien* to cases requiring probable cause, with one federal district judge deriding the defendant’s call to limit *Heien* to reasonable suspicion as “border[ing] on frivolous.”²¹⁸ Lower courts have therefore concluded that police who made reasonable mistakes of law nevertheless had probable cause not only to conduct a traffic stop²¹⁹ but also to arrest²²⁰ and to search.²²¹ In fact, the Fourth Circuit simply cited *Heien* for this proposition without acknowledging that the Supreme Court’s opinion was not directly on point.²²²

To be fair to these courts, it does seem fanciful to suppose that this Supreme Court will object to extending *Heien* to Fourth Amendment intrusions that require probable cause.²²³ After all, the two concepts are closely related, and the Court often lumps them together, describing both in

214. *Heien*, 135 S. Ct. at 540. *But cf.* McAdams, *supra* note 56, at 184 (pointing out that the Court “fail[ed] to follow through on its own logic” because “[i]f . . . the relevant and distinct context is criminal investigation, then we should compare police and citizen mistakes of law specifically *in the context of criminal investigation*”).

215. *Cf.* Logan, *supra* note 6, at 92 (suggesting that *Heien* may have been “motivated in part by the view that being detained by police is a trivial event”).

216. *Heien*, 135 S. Ct. at 544 (Sotomayor, J., dissenting).

217. *But cf.* Flint v. City of Milwaukee, 91 F. Supp. 3d 1032, 1058 (E.D. Wis. 2015) (expressing “qualms” about applying *Heien* to an arrest, but engaging in an analysis of *Heien* “for the sake of clarity”); State v. Shannon, 120 A.3d 924, 933 n.2 (N.J. 2015) (LaVecchia, J., concurring) (responding to the State’s supplemental brief citing *Heien* by noting that the Supreme Court’s opinion involved reasonable suspicion and “did not find justification for an arrest absent probable cause or a valid warrant”); State v. Tercero, 467 S.W.3d 1, 10 (Tex. App. 2015) (refusing to apply *Heien*, in part because it “dealt with the formation of reasonable suspicion” and thus was “distinguishable on its facts” from a case involving “a warrantless, nonconsensual search of a person”).

218. *See* United States v. Diaz, 122 F. Supp. 3d 165, 175 n.6 (S.D.N.Y. 2015).

219. *See* People v. Guthrie, 30 N.E.3d 880, 883–84 (N.Y. 2015); Commonwealth v. White, No. 276 EDA 2015, 2015 WL 6690134, at *1–2 (Pa. Super. Ct. Nov. 2, 2015). For pre-*Heien* case law to this effect, see United States v. Smart, 393 F.3d 767, 770 (8th Cir. 2005); Travis v. State, 959 S.W.2d 32, 34–35 (Ark. 1998); Moore v. State, 986 So. 2d 928, 934–35 (Miss. 2008). As noted above, *see supra* note 32, most courts do not require probable cause for a traffic stop.

220. *See* Cahaly v. Larosa, 796 F.3d 399, 408 (4th Cir. 2015); Diaz, 122 F. Supp. 3d at 175 n.6; Guinto v. Nestorowicz, No. 14-C-09940, 2015 WL 3421456, at *2 (N.D. Ill. May 28, 2015). For pre-*Heien* case law to this effect, see DeChene v. Smallwood, 311 S.E.2d 749, 751 (Va. 1984).

221. *See* J Mack L.L.C. v. Leonard, No. 2:13-cv-808, 2015 WL 519412, at *9 (S.D. Ohio Feb. 9, 2015).

222. *See* Cahaly, 796 F.3d at 408; *see also* Guinto, 2015 WL 3421456, at *2.

223. *See* LAFAVE, *supra* note 85, § 3.2(b), at 5 (taking the position that *Heien* “leaves no doubt” on this question).

the same terms—as “commonsense, nontechnical conceptions” that depend on a totality of circumstances that cannot “‘readily, or even usefully, [be] reduced to a neat set of legal rules.’”²²⁴ Reasonable suspicion, the Court has said, is “obviously” a “less demanding” standard²²⁵ than probable cause, not only in terms of the “quantity or content” of information necessary, but also the “quality” or “reliability” of that information.²²⁶ Perhaps that leaves some room to argue that the higher quality of evidence demanded by the more rigorous concept of probable cause calls for a more accurate assessment of the law on the part of the police. But reasonable mistakes of fact are not fatal to a finding of probable cause,²²⁷ and *Heien* seemed committed to equating mistake of fact and law.²²⁸ Therefore, it appears sensible to assume that *Heien* will continue to be extended to probable cause determinations and thus, so long as an officer’s erroneous interpretation of the law is reasonable, will allow perfectly innocent behavior to trigger a custodial arrest,²²⁹ a search incident to arrest of the person²³⁰ and often of her car,²³¹ and possibly even a strip search.²³²

B. *Defining Reasonable Mistakes of Law*

In applying its holding to the facts before it, the *Heien* majority had “little difficulty” in characterizing Sergeant Darisse’s erroneous belief that North Carolina cars must have two functional brake lights as a reasonable mistake of law.²³³ The Court acknowledged that the state statutes refer to a

224. *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)); see Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649, 651, 653–54 (2009) (pointing out that the Court has used terms like “reasonable belief” and “suspicion” to refer to both probable cause and reasonable suspicion, and has relied on its reasonable suspicion precedents in analyzing probable cause and vice versa).

225. *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

226. *Alabama v. White*, 496 U.S. 325, 330 (1990).

227. See *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Hill v. California*, 401 U.S. 797, 802–05 (1971)).

228. See *id.*

229. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (interpreting the Fourth Amendment to permit a custodial arrest for even minor offenses).

230. See *Chimel v. California*, 395 U.S. 752, 763 (1969) (allowing a warrantless search incident to arrest of “the arrestee’s person and the area ‘within his immediate control’”).

231. See *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (permitting the search of a vehicle incident to the arrest of a “recent” occupant of the car, so long as either “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” or it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle”) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)).

232. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1513–14 (2012) (allowing the routine strip search of arrestees placed in the general jail population); see also Logan, *supra* note 6, at 92 (pointing out that a traffic stop can lead to an order to exit the vehicle, a frisk, “a barrage of unrelated questions,” and a request for consent to search).

233. *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014).

singular “stop lamp” but noted that elsewhere they mandate that “all originally equipped rear lamps” be operational.²³⁴ In response to the state appellate court’s conclusion that the term “rear lamps” does not encompass brake lights, the Chief Justice replied that “the everyday reader of English” would interpret the word “other” in the state statute providing that “[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps” to imply that “a ‘stop lamp’ is a type of ‘rear lamp.’”²³⁵ In addition, the Supreme Court pointed out that the state appellate courts had not previously interpreted the stop lamp provision and that even the dissenters in the state supreme court had characterized the appellate court’s reading of the statute as “surprising.”²³⁶

Beyond the clues that can be gleaned from the Court’s disposition of this specific statutory interpretation issue, the majority provided little content to its definition of a reasonable mistake of law. In response to the concern that the Court’s holding would create an incentive for police to remain ignorant about the law, Chief Justice Roberts cautioned that any error must be “objectively reasonable” and that “the subjective understanding of the particular officer involved” is irrelevant.²³⁷ The Chief Justice went on to add that the Fourth Amendment “inquiry is not as forgiving” as the standard of objective reasonableness used in “the distinct context” of qualified immunity, and “[t]hus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws.”²³⁸ Otherwise, the Court offered little guidance as to what constitutes a reasonable mistake of law, leading Justice Sotomayor to criticize the majority’s insistence on leaving “undefined” the objective reasonableness standard it was endorsing.²³⁹ The dissent likewise objected to the Court’s failure to “elaborat[e]” on the distinction between the Fourth Amendment standard

234. *Id.* (quoting N.C. GEN. STAT. § 20-129(g), (d) (2009)); *see also id.* at 542 (Kagan, J., concurring) (making the same point).

235. *Id.* at 540 (majority opinion) (quoting N.C. GEN. STAT. § 20-129(g) (emphasis added)); *see also id.* at 541–42 (Kagan, J., concurring) (making the same point). *But cf.* Kerr, *supra* note 136 (arguing that the term rear lamps refers not to the brake lights, but to “the red lights that go on when the front headlights or parking lights are on”).

236. *Heien*, 135 S. Ct. at 540 (quoting *State v. Heien*, 737 S.E.2d 351, 359 (N.C. 2012) (Hudson, J., dissenting)).

237. *Id.* at 539 (emphasis omitted).

238. *Id.* at 539–40; *see also id.* at 541 (Kagan, J., concurring) (agreeing that *Heien*’s standard is “more demanding” than the qualified immunity inquiry); *cf.* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (defining qualified immunity to protect executive-branch officials in § 1983 litigation so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”). *But see* Kit Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 72–78 (2016) (arguing that the Court has not justified applying different standards of objective reasonableness in the two contexts).

239. *Heien*, 135 S. Ct. at 547 (Sotomayor, J., dissenting).

and the qualified immunity inquiry, predicting that the difference “will prove murky in application.”²⁴⁰

But Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion that expanded on these points. Agreeing with the majority that a police officer’s subjective views are “irrelevant,” the two concurring Justices read that to mean that law enforcement officials who are “unaware of or untrained in the law” or who act in “reliance on ‘an incorrect memo or training program’” have not made a reasonable mistake.²⁴¹ “Those considerations pertain to the officer’s subjective understanding of the law,” Justice Kagan maintained.²⁴²

The concurrence went on to forecast that law enforcement officials’ mistakes of law will be deemed reasonable only in “exceedingly rare” circumstances.²⁴³ The law in question must be “genuinely ambiguous,” Justice Kagan elaborated, “‘so doubtful in construction’ that a reasonable judge could agree with the officer’s view.”²⁴⁴ Apparently hoping that judges and law enforcement would get the message, the concurrence reiterated that the criminal statute “must pose a ‘really difficult’ or ‘very hard question of statutory interpretation’” and that rejecting the officer’s construction of the statutory language must “require[] hard interpretive work.”²⁴⁵ Turning to the North Carolina laws at issue in *Heien*, the concurring Justices agreed with the points made by the majority.²⁴⁶ Justice Kagan observed that the state’s various code provisions sent “conflicting signals” and created “a quite difficult question” of statutory construction.²⁴⁷ Sergeant Darisse’s interpretation “had much to recommend it” and a court “could easily take [his] view,” the concurrence noted.²⁴⁸

240. *Id.* For further discussion of qualified immunity, see *infra* notes 298–301 and accompanying text.

241. *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) (quoting *State v. Heien*, 737 S.E.2d at 360 (Hudson, J., dissenting)).

242. *Id.*

243. *Id.* (quoting Brief for the Respondent, *supra* note 35, at 17; Transcript of Oral Argument, *supra* note 35, at 48).

244. *Id.* (quoting *The Friendship*, 9 F. Cas. 825, 826 (C.C.D. Mass. 1812) (No. 5125)). See Orin Kerr, *Reasonable Mistakes of Law Can Generate Reasonable Suspicion, Supreme Court Holds*, WASH. POST: VOLOKH CONSPIRACY (Dec. 15, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/15/reasonable-mistake-of-law-can-generate-reasonable-suspicion-supreme-court-holds/> (noting that this seems “a much narrower test than a reasonable officer” standard).

245. *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) (quoting Transcript of Oral Argument, *supra* note 35, at 50). *But cf.* Leading Case, *Search and Seizure—Reasonable Mistake of Law—Heien v. North Carolina*, 129 HARV. L. REV. 251, 259 (2015) (observing that the concurrence’s “superlative terms” might be “reassuring on the surface,” but they “offered little guidance as to what ‘very hard’ or ‘really difficult’ actually mean,” and pointing out that “the difficulty of resolving a question of statutory interpretation can often depend entirely on one’s preferred interpretive approach”).

246. See *supra* notes 234–35 and accompanying text.

247. *Heien*, 135 S. Ct. at 542 (Kagan, J., concurring).

248. *Id.*

Heien is not yet two years old, and it remains to be seen whether the concurring Justices' views are shared by their colleagues or whether the concurrence was overly optimistic in predicting that the Court's ruling will open a relatively small window.²⁴⁹ The record in the eighteen months after the opinion was issued is decidedly mixed.²⁵⁰ Some courts have apparently taken Justice Kagan's admonitions seriously and have been relatively restrained in applying *Heien*, justifying their finding that a police error was reasonable on the grounds that the case law interpreting the criminal provision at issue was in conflict,²⁵¹ the statutory language featured some genuine ambiguity,²⁵² or other courts had upheld stops in similar circumstances.²⁵³

249. See Leading Case, *supra* note 245, at 258 (noting that "a lower court might justifiably question why [the concurring opinion's] reasoning attracted only two votes"); Richard Re, *Can Justice Kagan Narrow Heien v. North Carolina?*, RE'S JUDICATA (Dec. 16, 2014, 11:09 AM), <https://richardresjudicata.wordpress.com/2014/12/16/can-justice-kagan-narrow-heien-v-north-carolina/> (hypothesizing that Justice Kagan may have joined the majority opinion in order to engage in "aspirational narrowing" and "put her own spin on the decision").

250. The discussion that follows is based on a Lexis/Shepard's search of cases decided through the end of June 2016. I looked at every federal court of appeals and state supreme court opinion that mentioned *Heien*, as well as any federal district or state appellate court ruling that Shepard's indicated did more than just cite the Supreme Court's opinion.

251. See *United States v. Harris*, No. 15-13972, 2016 WL 3522174, at *2 n.3 (11th Cir. June 28, 2016) (Florida appellate court interpretations of license plate statute were "factually inapplicable and also in conflict with each other"); *United States v. Cunningham*, 630 F. App'x 873, 877-78 (10th Cir. 2015) (Colorado district judges differed on whether a signal must be used when turning onto a public road from private property); *United States v. Lawrence*, No. 13-cr-10245-MLW, 2016 U.S. Dist. LEXIS 24514, at *7-9 (D. Mass. Feb. 25, 2016) (Massachusetts case law conflicted on the question whether crossing the fog line is a traffic violation); *United States v. Diaz*, 122 F. Supp. 3d 165, 173-75 (S.D.N.Y. 2015) (New York courts disagreed whether drinking alcohol in a "public place" included the common areas of apartment buildings); *State v. Hurley*, 117 A.3d 433, 435, 441 (Vt. 2015) (Vermont trial courts did not agree whether statute banning "hang[ing] any object, other than a rear view mirror, in back of the windshield" covered items like air fresheners (quoting 23 VT. STAT. ANN. § 1125(a))). *But cf.* *Davis v. United States*, 564 U.S. 229, 250-51 (2011) (Sotomayor, J., concurring in the judgment) (arguing that extending the exclusionary rule's good-faith exception to cases where police relied on "unsettled," as opposed to "binding," law might diminish their "incentive to err on the side of constitutional behavior" in "close cases" (quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982))).

252. See *United States v. Morales*, 115 F. Supp. 3d 1291, 1295 (D. Kan. 2015) (concluding that language was unclear, despite being "skeptical" that a statute requiring drivers to signal before "turn[ing] a vehicle or mov[ing] right or left upon a roadway" applied where two lanes merged into one); *People v. Gaytan*, 32 N.E.3d 641, 647, 652 (Ill. 2015) (finding reasonable the mistaken belief that a trailer hitch mounted on the rear of a car violated a statute requiring that license plates be "clearly visible" and "legible, free from any materials that would obstruct the visibility of the plate," where the legislative history was silent and the court ultimately relied on the rule of lenity in construing the provision narrowly (quoting 625 ILL. COMP. STAT. ANN. 5/3-413(b) (West 2010))); *Williams v. State*, 28 N.E.3d 293, 294 (Ind. Ct. App. 2015) (explaining that while a statute requiring cars to have two taillights that "emit[] a red light," when "read closely," does not bar "other colors of light from also being emitted, it certainly implies as much" (alteration in original) (quoting IND. CODE § 9-19-6-4)); *State v. Sutherland*, 138 A.3d 551, 557 (N.J. Super. Ct. App. Div. 2016) (reasoning that "there was no authoritative judicial interpretation of [a] statute" that could be interpreted "to apply only to non-working, required [vehicle] lamps" or to "any non-functioning lights"); *State v. Dopslaf*, 356 P.3d 559, 563 (N.M. Ct. App. 2015) (explaining that statute that prohibited crossing over a divided highway did

Moreover, in other cases, courts have found that an officer unreasonably misinterpreted an unambiguous statute and therefore made a stop unsupported by reasonable suspicion. In *United States v. Flores*, for example, the Seventh Circuit concluded that it was unreasonable to believe a standard license plate frame violated an Illinois statute requiring license plates to be “clearly visible” and “legible.”²⁵⁴ The court reasoned that the officer admitted he could see “Baja California” once he got closer to the vehicle and that it was “unrealistic” to assume the state legislature “expect[ed] a wide segment of the driving population to remove these conventional plate frames.”²⁵⁵ Likewise, the Iowa Court of Appeals considered unreasonable the judgment that an open container of alcohol in a car parked in a private parking lot violated a statute governing vehicles “upon a public street or highway,” where street and highway were defined as places “any part [of which] is open to the use of the public, as a matter of right, for purposes of vehicular traffic,” and the state supreme court had found another criminal statute using the same definition of “public highway” inapplicable to a drive-in restaurant’s private parking lot.²⁵⁶

not “provide guidance as to the types of pavement markings required to establish an intervening space or divided section”); *People v. Abrucci-Kohan*, 2016 WL 1174766, at *1 (N.Y. Just. Ct. Mar. 17, 2016) (observing that one statute required “at least two” rear lamps, “one on each side,” whereas another suggested that all “lamps” must be “in good working condition,” and the legality of driving with only three of four taillights functioning was an issue of first impression in the state (quoting N.Y. VEH. & TRAF. LAW §§ 375(2)(a)(3), 376(1)(a))); *State v. Hirschhorn*, 881 N.W.2d 244, 246, 249 (N.D. 2016) (noting that the court “had not interpreted the extent and interplay of the various statutory provisions,” and “[a] plain reading” of one required drivers to “signal prior to moving or turning on roadways,” even though another simply required them to “stop at statutorily prescribed distances prior to exiting alleys”). For cases citing *Heien* in granting qualified immunity on the ground that statutory language was ambiguous, see *Dunlap v. Anchorage Police Dep’t*, No. 3:10-CV-00242-SLG, 2016 WL 900625, at *5 (D. Alaska Mar. 8, 2016) (citing “tension” between two state statutes, one prohibiting a driver from possessing concealed knives and the other allowing “any type of weapon[s] . . . so long as they were not on his person,” if the driver was “legally authorized to possess a firearm”); *J Mack L.L.C. v. Leonard*, No. 2:13-cv-808, 2015 WL 519412, at *10 (S.D. Ohio Feb. 9, 2015) (reasoning that references to “gas” and “vapors” in statute banning harmful intoxicants could include smoke created by synthetic marijuana and that no state court had previously considered whether the statute banned synthetic marijuana).

253. See *Morales*, 115 F. Supp. 3d at 1295 & n.7; *Commonwealth v. White*, No. 276 EDA 2015, 2015 WL 6690134, at *3–5 (Pa. Super. Ct. Nov. 2, 2015).

254. 798 F.3d 645, 649–50 (7th Cir. 2015) (per curiam).

255. *Id.* at 649.

256. *State v. Brown*, No. 13-2054, 2015 WL 4468841, at *2–3 & n.5 (Iowa Ct. App. July 22, 2015) (emphasis omitted) (quoting IOWA CODE § 321.1(78) (2013)). For additional examples, see *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016) (explaining that turn signal statute clearly applied only when “a driver intends ‘to turn right or left’” and not when pulling over to the curb); *United States v. Alvarado-Zarza*, 782 F.3d 246, 249–50 (5th Cir. 2015) (reasoning that statute was “unambiguous” and had been construed by Texas appellate court seven months before the stop); *United States v. Mota*, 155 F. Supp. 3d 461, 474 (S.D.N.Y. 2016) (rejecting prosecution’s attempt to “read ambiguity into [a] statute” that “clearly” required only two brake lights); *United States v. Sanders*, 95 F. Supp. 3d 1274, 1285 (D. Nev. 2015) (finding unreasonable the belief that two air fresheners hanging from rearview mirror violated a Nevada statute prohibiting driving with materials “upon” the windshield, given thirteen-year-old Ninth Circuit precedent interpreting a “nearly identical” Alaska

On other occasions, however, courts have been more generous in their application of *Heien*, concluding that mistakes of law were reasonable without any real analysis or explanation. In *State v. Stadler*, for example, a car driving through a city park after hours was stopped based on the officer's belief, "[f]rom [his] training," that "if you're inside the park after city hours, it constitutes trespassing."²⁵⁷ The Kansas Court of Appeals upheld the stop, concluding that, even if the officer was wrong in thinking the defendant was trespassing, the mistake was reasonable.²⁵⁸ The court offered only a cursory justification for its holding: "[b]ased on [the officer's] training and experience, an individual's presence in the park at 1:30 a.m. constitutes a trespass."²⁵⁹ Not only does this reasoning directly contravene the *Heien* concurrence's warning about shoddy police training, it also provides no explanation why the officer's interpretation of the trespass statute was a reasonable one.²⁶⁰

Similarly, in *United States v. Severns*, the district judge's entire explanation for rejecting the defendant's mistake of law argument was that, even if the officers were wrong in thinking the state's concealed weapon statute prohibited wearing in addition to concealing the knife the defendant was carrying, their mistake "about what kind of conduct the statute covered . . . was not unreasonable, especially in light of the dearth of case law

provision); *State v. Stoll*, 370 P.3d 1130, 1135 (Ariz. Ct. App. 2016) (characterizing license plate light statute as unambiguous); *People v. Jones*, No. B255728, 2015 WL 1873269, at *7 (Cal. Ct. App. Apr. 23, 2015) (pointing out that the law had been settled for more than fifty years); *Darringer v. State*, 46 N.E.3d 464, 474 (Ind. Ct. App. 2015) (explaining that the law had been changed almost a year earlier); *State v. Scriven*, 140 A.3d 535, 538 (N.J. 2016) (concluding it was unreasonable to believe that driver who passed a police car that was double-parked on the side of the road violated an "unambiguous" high-beam statute that "required [drivers] to dim their high beams only when approaching an oncoming vehicle"). For cases citing *Heien* in denying qualified immunity on the ground that statutory language was clear, see *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (6th Cir. 2015) (holding that "inducing panic" statute could not reasonably be interpreted to prohibit visible possession of a firearm in an open-carry state that did not require gun owner to carry a license); *Guinto v. Nestorowicz*, No. 14-C-09940, 2015 WL 3421456, at *2 (N.D. Ill. May 28, 2015) (finding it unreasonable to believe that stopping in a no-parking zone was a parking violation where city code defined parking to require an "unoccupied vehicle"); *Flint v. City of Milwaukee*, 91 F. Supp. 3d 1032, 1059 (E.D. Wis. 2015) (rejecting the contention that the fact that three unambiguous statutes had to be read together made the mistake reasonable because "[s]tatutes frequently cross-reference each other and require some effort to connect the dots"); *J Mack L.L.C.*, 2015 WL 519412, at *9 (concluding that mistake was unreasonable despite the fact that prosecutor told officer state law prohibited hallucinogenic substances because no such statute existed and the controlled substance analog ban did not go into effect until two months later).

257. *State v. Stadler*, No. 112,173, 2015 WL 4487059, at *2 (Kan. Ct. App. July 17, 2015) (per curiam) (alteration in original).

258. *Id.* at *5.

259. *Id.*

260. *Cf. Stoll*, 370 P.3d at 1135 (noting that "[t]he state provides no authority for [its] reading other than the deputies' own interpretation," and citing the *Heien* concurrence in reasoning that "the fact that the department had trained its officers in a way that permitted a misreading of [the statute] does not make that misreading objectively reasonable").

discussing . . . the statute.”²⁶¹ In response to the defendant’s reliance on a state supreme court decision that had interpreted the weapons statute, the district court replied that it did not “read the [opinion] . . . to have definitively made . . . a determination.”²⁶²

In addition, other courts have found mistakes of law reasonable in the face of seemingly unambiguous statutory language. In *State v. Houghton*, for example, the Wisconsin Supreme Court deemed reasonable the mistaken view that a statute prohibiting driving with “any . . . material upon the front windshield” was an absolute ban on items like air fresheners, even if they were not “upon” the windshield and did not obstruct the driver’s view.²⁶³ The court reasoned that its conclusion to the contrary was a “close call” and the provision had not previously been interpreted.²⁶⁴ It is not apparent, however, why the court considered the question difficult given its acknowledgment that the statute “appear[ed] to be a strict prohibition on a narrow group of items” actually affixed to the front windshield.²⁶⁵ Another statute “applie[d] to all items,” but only if they “obstruct[ed] the driver’s clear view,”²⁶⁶ and the court concluded that the “common, ordinary, and accepted meaning” of the term “obstruct” required “more than a de minimus effect on the driver’s vision.”²⁶⁷

Likewise, in *People v. Campuzano*, the California Court of Appeal upheld the stop of a bicyclist for violating a city ordinance banning bicycle riding on “any sidewalk fronting any commercial business” even though the businesses in question were on the other side of the street.²⁶⁸ The court described the ordinance as “clear and unambiguous . . . when read in context” and concluded that the provision, by its “plain meaning,” applied “only on that portion of the sidewalk fronting commercial business establishments.”²⁶⁹ Nevertheless, the court found the officer’s mistake reasonable, explaining that this was a case of first impression and the trial judge had sided with the officer.²⁷⁰ “It is axiomatic,” the appellate court

261. No. 15-119-M-PAS, 2016 WL 3227667, at *2 (D.R.I. June 9, 2016).

262. *Id.* at *2 n.2 (emphasis added).

263. 868 N.W.2d 143, 155, 158–59 (Wis. 2015) (quoting WIS. STAT. § 346.88(3)(a) (2011–2012)).

264. *Id.*

265. *Id.* at 156.

266. *Id.* (quoting WIS. STAT. § 346.88(3)(b)).

267. *Id.* at 157 (quoting *State ex rel. Kalal v. Circuit Court*, 681 N.W.2d 110, 124 (Wis. 2004)).

268. 188 Cal. Rptr. 3d 587, 589 n.1 (Cal. App. Dep’t Super. Ct. 2015) (emphasis omitted) (quoting SAN DIEGO, CAL., MUNICIPAL CODE § 84.09(a)).

269. *Id.* at 591 (footnotes omitted).

270. *See id.* at 592 & n.8.

asserted, that the officer must have been reasonable given that “an experienced judge” misinterpreted the ordinance in the same way.²⁷¹

Questions of first impression—like those before the courts in *Houghton* and *Campuzano*—do not automatically generate “really difficult” interpretive problems. Perhaps the reason a statutory issue has not previously reached the courts is because, as in those two cases, the legislation’s language is unambiguous. As the Supreme Court pointed out in *Safford Unified School District No. 1 v. Redding*, quoting Judge Posner, “[t]he easiest cases don’t even arise.”²⁷² Moreover, the fact that one or more judges in the courts below agreed with the police should not automatically brand the officer’s mistake as reasonable. Obviously, the officer was not relying on the views of those judges in misinterpreting the reach of the statute.²⁷³ And as Justice Brennan observed in dissent in *Butler v. McKellar*, multiple “egregiously wrong decisions can be no more reasonable than [one].”²⁷⁴ Notably, some of the post-*Heien* decisions that

271. *Id.* at 592 n.8; *see also* *United States v. Cunningham*, 630 F. App’x 873, 877 (10th Cir. 2015) (listing the district court’s belief that the officers had correctly interpreted the statute as the first of several rationales for deeming their mistake of law reasonable, explaining that, “[e]ven if the district judge . . . was wrong in her analysis it was, beyond debate, reasonable”); *cf.* *United States v. Leon*, 468 U.S. 897, 926 (1984) (finding officer’s reliance on a search warrant reasonable for purposes of the good-faith exception to the exclusionary rule, in part because “the divided panel of the Court of Appeals” reflected “disagreement among thoughtful and competent judges as to the existence of probable cause”); *Sinclair v. Lauderdale Cty.*, No. 15-6134, 2016 U.S. App. LEXIS 15855, at *13–14 (6th Cir. Aug. 24, 2016) (noting, in granting qualified immunity, that even if Sinclair was on probation and therefore ineligible for prosecution under the clear terms of the Tennessee escape statute, the officer’s mistake was reasonable because he relied on the trial judge’s order warning Sinclair he could be charged with escape and the prosecutor’s belief that the statute applied to these circumstances); *Aleynikov v. McSwain*, No. 15-1170 (KM), 2016 WL 3398581, at *13 (D.N.J. June 15, 2016) (likewise concluding that mistake was reasonable and granting qualified immunity, explaining that “[t]rained prosecutors accepted the theory of prosecution [and] [m]ore to the point, a federal district judge twice analyzed and accepted it”).

272. 557 U.S. 364, 377 (2009) (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

273. Such reliance could, however, trigger the good-faith exception to the exclusionary rule, which is discussed *supra* at notes 113–18 and accompanying text.

274. 494 U.S. 407, 421 n.2 (1990) (Brennan, J., dissenting); *see also* *Sawyer v. Smith*, 497 U.S. 227, 249 (1990) (Marshall, J., dissenting) (pointing out that “[s]ome courts will misconstrue . . . precedents notwithstanding their clarity”). *But cf.* *Re*, *supra* note 249 (wondering whether the concurrence’s “‘reasonable judge’ standard [is] satisfied whenever a case involves jurisdictional splits or even dissenting opinions”). For analysis of the comparable issues that have arisen in other contexts, *see* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 144–45, 160, 187 (1991) (discussing the Supreme Court’s treatment of qualified immunity, procedural defaults by habeas petitioners, and retroactive application of new constitutional rules); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224–29 (2015) (addressing the Court’s AEDPA jurisprudence).

have found police mistakes of law unreasonable reversed lower court rulings that had endorsed the officers' interpretations.²⁷⁵

Given that the Eighth Circuit was the only federal appellate court that took the position ultimately adopted in *Heien* and numerous state (as well as federal) courts refused to tolerate stops based on mistakes of law, it is plausible that courts for which the decision in *Heien* marks a change in approach might move slowly in excusing legal errors made by law enforcement. Some of the lower court opinions cited above that have seemingly taken the *Heien* concurrence's admonitions seriously have in fact been issued by courts that previously took the view that reasonable suspicion cannot be based on a misinterpretation of state law.²⁷⁶ But the pattern does not hold for all cases, as some of the courts that have interpreted *Heien* more generously have done so even though the Supreme Court's ruling represented a "stark contrast" from their precedent.²⁷⁷ And, interestingly, some state supreme courts that had sided with defendants on this issue prior to *Heien* have even adopted the Supreme Court's decision as a matter of state law, declining to interpret their own state constitutions to require a different result.²⁷⁸

To date, none of the opinions that have narrowly construed *Heien*'s notion of a reasonable mistake of law have come from jurisdictions that chose the position eventually endorsed by the Supreme Court.²⁷⁹ Unless those courts deviate from past practice and feel constrained by the *Heien* concurrence, however, some of their pre-*Heien* case law suggests they can

275. See *United States v. Stanbridge*, 813 F.3d 1032, 1033 (7th Cir. 2016); *United States v. Flores*, 798 F.3d 645, 646–47 (7th Cir. 2015) (per curiam); *United States v. Alvarado-Zarza*, 782 F.3d 246, 248 (5th Cir. 2015); *State v. Stoll*, 370 P.3d 1130, 1131–32 (Ariz. Ct. App. 2016); *State v. Brown*, No. 13-2054, 2015 WL 4468841, at *1, *3 (Iowa Ct. App. July 22, 2015).

276. See, e.g., *United States v. Sanders*, 95 F. Supp. 3d 1274, 1277 (D. Nev. 2015); *People v. Gaytan*, 32 N.E.3d 641, 651 (Ill. 2015); *Williams v. State*, 28 N.E.3d 293, 294–95 (Ind. Ct. App. 2015); *State v. Scriven*, 140 A.3d 535, 544–45 (N.J. 2016).

277. *State v. Houghton*, 868 N.W.2d 143, 154 (Wis. 2015); see also *id.* at 152, 156, 158–59 (noting that *Heien* was "at odds" with that court's prior rulings, but nonetheless finding mistake reasonable in the face of unambiguous statutory language). For other illustrations, compare *People v. Campuzano*, 188 Cal. Rptr. 3d 587, 591–92 & n.8 (Cal. App. Dep't Super. Ct. 2015) (concluding that mistake was reasonable despite clear statutory language), and *State v. Stadler*, No. 112,173, 2015 WL 4487059, at *5 (Kan. Ct. App. July 17, 2015) (finding mistake reasonable, without any real analysis, based on officer's training and experience), with *People v. Ramirez*, 44 Cal. Rptr. 3d 813, 816 (Cal. Ct. App. 2006) (holding that mistakes of law cannot give rise to reasonable suspicion), and *Martin v. Kan. Dep't of Revenue*, 176 P.3d 938, 948 (Kan. 2008) (same).

278. See *Gaytan*, 32 N.E.3d at 653–54; *People v. Guthrie*, 30 N.E.3d 880, 886–87 (N.Y. 2015); *Houghton*, 868 N.W.2d at 152–55. *But cf.* *Coburn*, *supra* note 136, at 541–42 (urging state courts not to follow *Heien*).

279. *Cf.* *State v. Eldridge*, No. COA16-173, 2016 WL 5030401, at *5 (N.C. Ct. App. Sept. 20, 2016) (concluding that officer's mistake was unreasonable because the statute requiring an exterior mirror plainly applied only to vehicles "registered in this State" (quoting N.C. GEN. STAT. § 20-126(b) (2009))); *State v. Lerma*, No. 27450, 2016 WL 4396161, at *2–3 (S.D. Aug. 17, 2016) (finding mistake reasonable in a case similar to *Heien* where the statute used both the singular and plural forms of the term "stop lamp").

be expected to characterize a wide variety of police mistakes of law as reasonable.

In a case similar to *Heien*, for example, the Mississippi Supreme Court found an officer's mistaken belief that state law required two functioning taillights to be reasonable despite the fact that the governing statute in that state unambiguously required only one.²⁸⁰ In justifying its decision, the court made the conclusory and circular statement that the officer had probable cause to stop the defendant's car "based on the totality of the circumstances with which [he] was confronted, including a valid, reasonable belief that [the defendant] was violating a traffic law."²⁸¹ As the dissenting justices charitably put it, the majority was willing to assume, "with absolutely no proof in the record," that the error was reasonable simply based on the officer's subjective representation, "I thought it was against the law."²⁸² In an earlier ruling, the same court likewise upheld a traffic stop for speeding in a construction zone despite acknowledging that the relevant statute had "a clear and definite meaning" and applied only when construction workers were present.²⁸³ Nevertheless, the court reasoned that the defendant was exceeding the posted speed limit and the trial judge and half of the appellate judges who had ruled on the defendant's case erroneously thought he was violating the law even though no workers were in the vicinity when he was stopped at 1:30 a.m.²⁸⁴

Prior to the Supreme Court's decision in *Heien*, a number of other courts upheld traffic stops of out-of-state drivers whose cars were in full compliance with the vehicular requirements in their home states. Even though the applicable state rules were unambiguous, the courts reasoned that their law enforcement officials could not reasonably be expected to be familiar with laws in other jurisdictions.²⁸⁵ But none of these opinions explained why, assuming the officers realized the vehicles were from another state, it was not more plausible to presume the drivers were following the law, given that it is common knowledge state rules vary on, for example, front license plates.²⁸⁶

280. See MISS. CODE ANN. § 63-7-13(3) (2013) ("Every motor vehicle . . . shall be equipped with at least one (1) rear lamp . . .").

281. Moore v. State, 986 So. 2d 928, 935 (Miss. 2008).

282. *Id.* at 937, 939 (Dickinson, J., dissenting).

283. Harrison v. State, 800 So. 2d 1134, 1137 (Miss. 2001).

284. See *id.* at 1139.

285. See Travis v. State, 959 S.W.2d 32, 34–35 (Ark. 1998) (expiration sticker on license plate); People v. Glick, 250 Cal. Rptr. 315, 319 (Cal. Ct. App. 1988) (registration tags on license plate); People v. Estrella, 893 N.E.2d 134, 135 (N.Y. 2008) (excessive tinting of windows).

286. See State v. Houghton, 868 N.W.2d 143, 159 (Wis. 2015) (reasoning that such a mistake was unreasonable because "Wisconsin borders four other states, and residents from those and many other states pass through Wisconsin on a regular basis"); cf. Hall & Seligman, *supra* note 76, at 656 (noting that mistakes of law afford no defense even to criminal defendants who are new to a community and come from a culture with different rules). *But cf.* McAdams, *supra* note 56, at 193 (arguing that

When a case involving an out-of-state vehicle reached the Eighth Circuit in *United States v. Smart*, the court denied that the police officer had even made a mistake of law.²⁸⁷ The officer would have been mistaken about the law, the court reasoned, had he believed that “all states required two [license] plates or that Georgia required two plates.”²⁸⁸ But because the officer was aware the defendant’s vehicle was from Georgia and “knew . . . he was unfamiliar with Georgia’s requirements,” the court thought that he had made neither a mistake of fact nor a mistake of law.²⁸⁹ In fact, however, the defendant’s car was in full compliance with Georgia’s requirement of a single back license plate, and the courts generally do not draw a distinction between ignorance and mistake of law.²⁹⁰

The Eighth Circuit went on in *Smart* to conclude that the officer’s belief, even if based on a mistake of law, was reasonable—despite the fact that the court acknowledged the officer “likely” could have verified the validity of his suspicions at the time of the stop.²⁹¹ In *United States v. Washington*, the same court subsequently found a mistake of law unreasonable, but left room for prosecutors to introduce evidence of law enforcement “manuals or training materials,” as well as “state custom or practice,” to support the reasonableness of an officer’s misinterpretation of the law.²⁹²

Neither *Smart* nor *Washington* is consistent with the limited conception of *Heien*’s reach endorsed in the concurrence. Justice Kagan specifically denied that a mistake could be justified simply because the officer was “unaware of or untrained in the law.”²⁹³ She likewise took the position that the police could not defend the reasonableness of a mistake by relying on improper training.²⁹⁴ And taking into account local police customs is

these police errors should be excused because “[i]t is less important to motivate the police to know the law of another jurisdiction”).

287. 393 F.3d 767, 769–70 (8th Cir. 2005).

288. *Id.*

289. *Id.* at 770.

290. *See supra* note 70.

291. *Smart*, 393 F.3d at 769–71.

292. 455 F.3d 824, 828 (8th Cir. 2006).

293. *Heien v. North Carolina*, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring); *see also* *Flint v. City of Milwaukee*, 91 F. Supp. 3d 1032, 1058, 1059 (E.D. Wis. 2015) (citing the *Heien* concurrence in a qualified immunity case for the proposition that police “cannot make a reasonable mistake about the law or the facts if [they have] no knowledge of either” and therefore “cannot shore up their lack of knowledge by proposing that if they had properly reviewed the law they would have been nonetheless confused”). *But cf.* *Coburn*, *supra* note 136, at 523 (maintaining that *Heien* did not specify whether an officer can be reasonably mistaken about “the very existence” of a criminal statute or a “recently overturned” statute).

294. *See Heien*, 135 S. Ct. at 541 (Kagan, J., concurring). *But cf.* 4 LAFAVE, *supra* note 3, § 9.5(a), at 648–52 (pointing out that courts consider a police officer’s training and experience relevant in assessing reasonable suspicion despite the fact that it is an objective standard); *Re*, *supra* note 249 (noting that the majority opinion in *Heien* is silent on this point, and finding Justice Kagan’s view

contrary to the Supreme Court's admonition that Fourth Amendment rights do not "vary from place to place and from time to time" and therefore do not "turn upon . . . trivialities" such as local "police enforcement practices."²⁹⁵ It is certainly possible that the Eighth Circuit and the state courts that previously were generous in characterizing mistakes as reasonable will take the concurrence's warnings seriously. But if the past is prologue, these courts may well stay the course and *Heien* may open the door to stops based on misreadings of relatively clear statutory language.

After all, the concurring opinion in *Heien* represented the views of only two Justices, and the majority was conspicuously silent concerning what types of mistakes, other than "sloppy" ones, it considered unreasonable.²⁹⁶ Moreover, as Justice Sotomayor pointed out in dissent, quoting Justice Story, "[t]here is scarcely any law which does not admit of some ingenious doubt."²⁹⁷ The more leeway judges give law enforcement officials who misinterpret state law, and the more frequently they follow the more tolerant lower court opinions described above, the closer the Fourth Amendment inquiry will begin to resemble the analysis applied in qualified immunity cases. Despite the *Heien* Court's assurances that its reasonable mistake standard is "more demanding"²⁹⁸ and "not as forgiving,"²⁹⁹ as qualified immunity, excusing police officers' misinterpretations of state law in cases of first impression, where the courts below were divided, or because of the officers' training, experience, beliefs, or past practices will narrow the gap between *Heien* and qualified immunity. In that event, *Heien* can be expected to follow the path cleared by the Court's qualified immunity jurisprudence, shielding the police unless they were "plainly incompetent" or "knowingly" misread the law,³⁰⁰ or "existing precedent . . . placed the . . . question beyond debate" such that "every reasonable" law enforcement official would have known the officer in question was mistaken about the criminal statute.³⁰¹

"questionable" given that "[o]bjective inquiries often incorporate relevant facts . . . like training and advice").

295. *Whren v. United States*, 517 U.S. 806, 815 (1996).

296. *Heien*, 135 S. Ct. at 539. See Kerr, *supra* note 244 (observing that "[s]loppiness is a relative term," and the Court did not clarify whether an officer is expected to know "the text of the law," "the major cases interpreting the law," or "just . . . what is taught at the police academy").

297. *Heien*, 135 S. Ct. at 544 (Sotomayor, J., dissenting) (quoting *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833)).

298. *Id.* at 541 (Kagan, J., concurring).

299. *Id.* at 539 (majority opinion).

300. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). For discussion of the Supreme Court's tendency in recent opinions to covertly broaden the qualified immunity defense, see, e.g., Kinports, *supra* note 238.

301. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Compare Transcript of Oral Argument, *supra* note 35, at 31 (attorney for the State offering as examples of unreasonable police mistakes of law situations where the statute contained "plain language" such that "no one could reach a different

C. Reaching Even Further

The likelihood that the lower courts will continue to extend *Heien* beyond traffic stops and into the realm of arrests and searches requiring probable cause, and the prospect that they will endorse generous definitions of a reasonable mistake of law, are just two factors that will determine the ultimate impact of the Court's decision. Perhaps even more troubling is the possibility that *Heien*'s mistake of law rule may be combined with other recent Supreme Court decisions that have read the Fourth Amendment narrowly, thereby sanctioning even unreasonable police errors.

First, consider *Devenpeck v. Alford*, which, as described above, allows an arrest so long as "the facts known to the arresting officer[]" created probable cause to believe the defendant committed *some* crime, even one completely unrelated to the charge that actually motivated the arrest.³⁰² According to the Court, *Devenpeck* followed from the principle that "the Fourth Amendment's concern with 'reasonableness'" permits certain law enforcement actions "whatever the subjective intent" of the individual police officers involved.³⁰³ On the facts before it, the Court found state appellate court case law that "clearly established" Alford was not guilty of the Privacy Act charge for which he was arrested.³⁰⁴ Nevertheless, under the Court's reasoning, Alford's arrest was permissible if there was probable cause to believe he committed some other offense, such as impersonating a police officer.³⁰⁵

Presumably, Sergeant Devenpeck's interpretation of the Privacy Act contrary to settled precedent would be deemed unreasonable today under *Heien*. Suppose as well that Alford did not commit the crime of impersonating a police officer simply by activating the flashing "wig-wag" headlights on his car.³⁰⁶ Could his arrest nonetheless be justified if the meaning of the impersonation statute was less certain such that some other police officer might have wrongly, but reasonably, believed it banned civilians' use of wig-wag lights? After all, like *Devenpeck*, the inquiry

interpretation" and where "there was a definite decision by an appellate court"), with *United States v. Longoria*, No. 4:16CR16-MW, 2016 WL 1642654, at *11 (N.D. Fla. Apr. 23, 2016) (relying on *Heien* in finding that officer "was acting in good faith, was not 'plainly incompetent' by any stretch of the imagination, and yet also made an 'unreasonable' mistake [of fact] within the meaning of the Fourth Amendment").

302. 543 U.S. 146, 155 (2004); see *supra* notes 40–44 and accompanying text.

303. *Whren v. United States*, 517 U.S. 806, 814 (1996) (emphasis omitted); see *Devenpeck*, 543 U.S. at 153. *But cf.* Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 77–95 (2007) (discussing the fluctuations between objective and subjective standards characterizing the Court's Fourth Amendment jurisprudence).

304. *Devenpeck*, 543 U.S. at 151.

305. See *id.* at 155–56.

306. See *id.* at 148 (defining these headlights as ones which "flash the left and right lights alternately").

mandated by *Heien* is meant to be a purely objective one that “do[es] not examine the subjective understanding of the particular officer involved.”³⁰⁷

At least one district court has already linked *Devenpeck* and *Heien* in granting qualified immunity.³⁰⁸ In that case, the judge rejected law enforcement officials' claim that they made a reasonable mistake of law in believing they had probable cause to seize synthetic marijuana based on a statute prohibiting “hallucinogenic substances” that did not actually exist and a provision criminalizing “controlled substance analogs” that had not yet gone into effect.³⁰⁹ Nevertheless, the court concluded that their mistake of law was reasonable because the officers could reasonably have thought the ban on “harmful intoxicants” covered synthetic marijuana, even though the officers did not testify they based the seizure on that statute.³¹⁰ If this reasoning is extended beyond the confines of qualified immunity, the cumulative effect of *Devenpeck* and *Heien* would allow stops even in cases where a police officer's interpretation of a state criminal statute was unreasonable.

Second, consider *Herring v. United States*, which involved a wrongful arrest stemming from an out-of-date computer database.³¹¹ Unlike *Arizona v. Evans*, the similar good-faith exception case, the error in *Herring* was attributable to a neighboring sheriff's office and not a court employee.³¹² Although the Court observed that the officer who actually arrested Herring “did nothing improper,” it appropriately did not rely on the *Leon* good-faith exception because the failure to update the computer records was the result of law enforcement negligence and thus could not be blamed on an independent third party.³¹³

Nevertheless, the Chief Justice's opinion for the majority refused to exclude the evidence uncovered following Herring's arrest, pronouncing broadly that the case involved “isolated negligence attenuated from the arrest” and that the exclusionary rule does not apply to “[a]n error that

307. *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014).

308. *See J Mack L.L.C. v. Leonard*, No. 2:13-cv-808, 2015 WL 519412, at *9–11 (S.D. Ohio Feb. 9, 2015); *see also Dunlap v. Anchorage Police Dep't*, No. 3:10-cv-00242-SLG, 2016 WL 900625, at *6 (D. Alaska Mar. 8, 2016) (recognizing the potential link, but characterizing the issue as “unsettled”).

309. *See J Mack L.L.C.*, 2015 WL 519412, at *9–10.

310. *See id.* at *9–11.

311. 555 U.S. 135, 137–38 (2009).

312. *See id.*; *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995).

313. *Herring*, 555 U.S. at 140 (admitting that “[i]n analyzing the applicability of the [exclusionary] rule, *Leon* admonished that we must consider the actions of all the police officers involved”). This acknowledgment has not, however, stopped either the Court itself or others from mistakenly aligning *Herring* with the good-faith exception line of cases. *See Davis v. United States*, 564 U.S. 229, 239 (2011) (implying that *Herring* is the “[m]ost recent[.]” application of *Leon*); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1105 (2011).

arises from nonrecurring and attenuated negligence.”³¹⁴ “To trigger the exclusionary rule,” *Herring* explained, “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”³¹⁵ The Court then concluded that the exclusionary rule operates as a deterrent sufficient to justify the costs of suppression in cases involving “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”³¹⁶

Can *Herring* be combined with *Heien* to uphold the constitutionality of searches and seizures based on unreasonable mistakes of law, so long as the officer’s error can be characterized as an “isolated” and “nonrecurring” one? To be sure, *Herring* differs from *Heien* in several respects. First, *Herring* involved a mistake of fact rather than a mistake of law, and therefore might be distinguishable on that ground.³¹⁷ But *Heien* has now equated the two types of mistakes, and the cumulative impact of *Heien* and *Herring* might therefore justify allowing the prosecution to introduce evidence discovered after an officer made a negligent mistake of law. Second, it is more difficult to characterize the officer’s legal error in a case like *Heien* as “attenuated,” but *Herring* did not define that term and the Court’s later descriptions of *Herring* have noticeably omitted any mention of that limitation.³¹⁸

Third, and most important, *Herring* involved a remedial issue—whether the exclusionary rule was available to the defendant in that case—and therefore, according to the Court’s dichotomy between substantive Fourth Amendment rights and remedies, ought to be irrelevant to *Heien*.³¹⁹ Nevertheless, during the oral argument in *Heien*, the Chief Justice mentioned *Herring* when suggesting that the argument for considering “the

314. *Herring*, 555 U.S. at 137, 144.

315. *Id.* at 144.

316. *Id.* The Court’s decision in *Herring* has justifiably inspired blistering critiques. *See, e.g.*, Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009); David H. Kaye, *Unraveling the Exclusionary Rule: From Leon to Herring to Robinson—and Back?*, 58 UCLA L. REV. DISCOURSE 207 (2011); Kinports, *supra* note 93, at 840–55; 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 (2009).

317. *See* *United States v. Song Ja Cha*, 597 F.3d 995, 1005–06 & n.8 (9th Cir. 2010) (suggesting that *Herring* can be distinguished for that reason).

318. *See* *Davis*, 564 U.S. at 236–41; *see also* Kaye, *supra* note 316, at 211 (criticizing the extension of *Herring* to non-attenuated circumstances); LaFave, *supra* note 316, at 771 (speculating that the reference to attenuation was added only to hold onto the majority in *Herring*); Note, *supra* note 117, at 779 & nn.67–68 (citing lower court decisions disagreeing on the meaning of the term attenuation and the extent to which it restricts the reach of *Herring*).

319. *See* *Herring*, 555 U.S. at 137 (pointing out that the parties agreed *Herring*’s arrest was unconstitutional but disagreed whether he could use the exclusionary rule to suppress evidence uncovered following the arrest). For discussion of the rights-remedies distinction, *see supra* notes 121–22 and accompanying text.

reasonableness of the officer's actions" in evaluating a mistake of law is even "stronger" when analyzing the substantive Fourth Amendment question than when considering the appropriate remedy "because that's what the Fourth Amendment says."³²⁰ The Chief Justice then went on to opine, "I thought we said exactly that in *Herring*, . . . where we said that even though we're going to look at it in terms of remedy, that was not to say that the reasonableness didn't go to whether there was a substantive violation of the Fourth Amendment."³²¹ The Chief Justice was referring to his own dictum in *Herring*—the caveat that "a probable-cause determination . . . based on reasonable but mistaken assumptions" may not "necessarily" amount to a Fourth Amendment violation³²²—which, not surprisingly, found its way into his opinion in *Heien*, although the quotation was hidden in a parenthetical to a "cf." citation.³²³

Even if *Herring* does not directly support extending *Heien* to uphold the constitutionality of seizures based on unreasonable police mistakes of law, *Heien* could be cited by way of analogy to support extending *Herring* to foreclose an exclusionary remedy in cases involving negligent mistakes of law and thereby effectively achieve the same result through the remedial back door.³²⁴ At least one court has made this link, though ultimately granting the defendant's motion to suppress after finding that the officers' lack of familiarity with "long-standing California law permitting pedestrians to walk in the middle of the road in a residential district" amounted to "more than simple negligence."³²⁵ But that court apparently saw no reason not to extend *Herring*'s remedial analysis to a mistake of law, and a less egregious misreading of a state statute might persuade

320. Transcript of Oral Argument, *supra* note 35, at 8.

321. *Id.* at 8–9.

322. *Herring*, 555 U.S. at 139.

323. See *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014). For further discussion of the *Herring* dictum and *Heien*'s citation to it, see *supra* notes 50–53 and accompanying text.

324. See Logan, *supra* note 82, at 86 (observing that *Herring*'s "rationale aligns with judicial inclination to forgive police mistakes of law"); Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 749 (2011) (noting that if *Herring* is "taken seriously," the exclusionary rule will be unavailable when police make a legal error "in cases of unsettled law"); Orin Kerr, *Can a Police Officer Lawfully Pull Over a Car for a Traffic Violation Based on an Erroneous Understanding of the Traffic Laws?*, VOLOKH CONSPIRACY (Dec. 21, 2012, 3:42 PM), <http://volokh.com/2012/12/21/can-a-police-officer-lawfully-pull-over-a-car-for-a-traffic-violation-based-on-an-erroneous-understanding-of-the-traffic-laws/> (describing *Heien* as raising "basically a remedies question under the guise of substantive Fourth Amendment law"); cf. Brief for the Respondent, *supra* note 35, at 37–39 (arguing that *Herring* called for denying an exclusionary remedy in *Heien*, though calling the mistake of law there reasonable).

325. *People v. Jones*, No. B255728, 2015 WL 1873269, at *7–8 (Cal. Ct. App. Apr. 23, 2015) (pointing out that the law had been settled for more than fifty years); see also *United States v. Nicholson*, 721 F.3d 1236, 1257 (10th Cir. 2013) (Gorsuch, J., dissenting) (urging the district court on remand to consider *Herring*'s "new culpability framework" in determining whether to apply the exclusionary rule in a pre-*Heien* case involving a police mistake of law).

another court to deny a motion to suppress on the grounds that the officer's error was merely negligent.

Finally, assuming *Herring* (backed by *Heien*'s support) justifies the refusal to exclude evidence in cases where an unreasonable mistake of law was based on the police officer's own misinterpretation of the applicable state statutes, rather than on some authoritative third party, is the next step to uphold the constitutionality of a search—or deny an exclusionary remedy—when that officer mistakenly believed, for example, that the Fourth Amendment authorized a warrantless search?³²⁶ Admittedly, the Court in *Heien* was careful to limit the reach of its ruling to mistakes of law involving the criminal statute an officer thought the suspect was violating. In fact, all nine Justices seemingly agreed that a mistake on Sergeant Darisse's part concerning Fourth Amendment doctrine would have been irrelevant in that case “no matter how reasonable.”³²⁷ And none of the Court's other precedents—neither *Herring* nor the good-faith exception line of cases—excuse a police officer who acted in violation of the Constitution based on her own mistaken interpretation of Fourth Amendment doctrine.³²⁸

326. Qualified immunity, of course, routinely shields police officers who are mistaken about the contours of the Fourth Amendment. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 243–45 (2009) (concluding that police reasonably believed that the “consent-once-removed” doctrine authorized their warrantless entry into a suspect's home); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (noting that law enforcement officials are entitled to qualified immunity if they “reasonably but mistakenly conclude[d]” that a warrantless search was justified by probable cause and exigent circumstances, so long as “a reasonable officer could have believed [the] warrantless search to be lawful”). Interestingly, despite language in some Supreme Court opinions, *see Pearson*, 555 U.S. at 231 (“The protection of qualified immunity applies regardless of whether the government official's error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting))), it is less clear that qualified immunity is available in cases involving mistakes of fact. *See Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633, 657 n.175 (2013).

327. *Heien*, 135 S. Ct. at 539 (“An officer's mistaken view that the conduct at issue did *not* give rise to [a Fourth Amendment] violation—no matter how reasonable—could not change that ultimate conclusion.”); *see id.* at 541 n.1 (Kagan, J., concurring) (agreeing with the majority that a constitutional search or seizure may “never” be based on “an error about the contours of the Fourth Amendment itself”); *id.* at 546 (Sotomayor, J., dissenting) (likewise citing the Court's “prior assumption” that police have no “leeway” when making mistakes about the Fourth Amendment); *see also* Brief for the Respondent, *supra* note 35, at 29–30, 31 & n.2 (making this concession as well); Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 64, at 30 n.3 (same); *cf. United States v. Keefauver*, 74 M.J. 230, 235–36 (C.A.A.F. 2015) (interpreting *Heien* as refusing to tolerate any mistakes about the Fourth Amendment); *Perez v. State*, No. 08-13-00024-CR, 2016 WL 323761, at *11 (Tex. App. Jan. 27, 2016) (likewise limiting *Heien* to “a mistake of substantive criminal law (what is a crime) and not a mistake of criminal procedure (i.e. how far may a search extend)”). *But cf. Re, supra* note 249 (arguing that the *Heien* majority was “distinguishing cases, not expressly establishing a bright-line rule for the future,” and therefore might excuse an officer's “novel” mistakes about Fourth Amendment norms).

328. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006), is the exception, but it is limited to denying an exclusionary remedy for violations of the knock-and-announce rule.

But if *Heien* is based on the premise that the Fourth Amendment requires only reasonableness on the part of law enforcement—after all, the “touchstone” of the Amendment is reasonableness³²⁹—why draw the line at mistakes about the dictates of the Fourth Amendment?³³⁰ Likewise, if the *Leon* good-faith exception cases justify limiting the reach of the exclusionary rule on the theory that the suppression remedy cannot hope to influence objectively reasonable police behavior,³³¹ should an officer’s reasonable mistake about Fourth Amendment requirements fare less well?³³² Adding *Herring* to the mix, if the Court correctly reasoned there that the exclusionary remedy ought to be restricted to sufficiently culpable police behavior, should even an officer’s unreasonable reading of Fourth Amendment doctrine be excused so long as it involved mere isolated and nonrecurring negligence?³³³

Dictum can already be found in the Court’s opinion in *Davis v. United States*, the most recent in the *Leon* line of cases, that arguably supports denying the exclusionary remedy when police are mistaken about Fourth Amendment doctrine.³³⁴ In describing its prior case law, the *Davis* majority observed broadly that the exclusionary rule is unavailable “when the police act with an objectively ‘reasonable good-faith belief’ that their conduct is lawful.”³³⁵ Channeling *Herring*, *Davis* then went further: “When the police exhibit ‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for *Fourth Amendment rights*, the deterrent value of exclusion is strong and tends to outweigh the resulting costs.”³³⁶ This last comment was completely unnecessary, of course, because *Davis* was a straightforward good-faith exception case where the police reasonably relied on precedent and

329. See *supra* note 29 and accompanying text.

330. Cf. Kerr, *supra* note 136 (commenting that “it’s not clear to me why [it] should make a difference” whether an officer’s reasonable mistake concerned “the substantive [criminal] law” as in *Heien* or “the operative Fourth Amendment rule”).

331. See *supra* note 118 and accompanying text.

332. See *Illinois v. Gates*, 462 U.S. 213, 246 (1983) (White, J., concurring in the judgment) (endorsing this position); Note, *supra* note 117, at 783–84 (same).

333. See Marceau, *supra* note 324, at 752–53 (observing that, if given a “broad reading,” *Herring* could be extended to police errors in assessing whether probable cause exists for a warrantless search, though calling these mistakes of fact); see also *United States v. LeClerc*, No. 14-CR-217-A, 2016 WL 2763787, at *7–9 (W.D.N.Y. May 13, 2016) (assuming without discussion that *Herring* applied to a Fourth Amendment error, but ultimately suppressing the evidence because the police were at least grossly negligent in believing the defendant’s wife had apparent authority to consent to search); *White v. Commonwealth*, 785 S.E.2d 239, 254–55 (Va. Ct. App. 2016) (citing both *Heien* and *Herring*, but applying exclusionary rule where police knew defendant owned the bag that was searched and, given five-year-old state supreme court precedent, could not reasonably have believed his girlfriend had authority to consent to search).

334. 564 U.S. 229, 232 (2011) (extending the good-faith exception to cases where police reasonably relied on precedent).

335. *Id.* at 238 (emphasis added) (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984)).

336. *Id.* (emphasis added) (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)).

therefore were not even negligent. Moreover, it is not clear what *Davis*'s vague references to "lawful" police behavior and "Fourth Amendment rights" were meant to encompass, but a prosecution-friendly court might well read that language to support the refusal to apply the exclusionary remedy where a law enforcement official made a reasonable (or even negligent) mistake about the Fourth Amendment rules governing searches and seizures.³³⁷ Given the caveats in the various opinions in *Heien* concerning police errors in interpreting the Fourth Amendment, denying that a police officer's misreading of the Fourth Amendment led to a violation of the defendant's constitutional rights would be more difficult.³³⁸ But here again those mistakes could prove inconsequential if the combined impact of *Heien* and *Herring* (as characterized in *Davis*) forecloses the defendant from using the exclusionary rule to suppress the evidence resulting from the Fourth Amendment violation.

In its own right, the Court's ruling in *Heien* potentially has an expansive reach. The extension of the Court's decision to probable cause determinations is likely to continue undisturbed, and some courts have already been fairly generous in characterizing law enforcement officials' legal errors as reasonable. But the cumulative impact of *Heien* and other recent Supreme Court decisions—notably *Devenpeck*, *Herring*, and *Davis*—may encourage judges to refuse to recognize a constitutional violation or to suppress evidence in cases involving even unreasonable police mistakes of law, possibly including mistakes about Fourth Amendment doctrine.

337. At least one pre-*Heien* opinion already has endorsed a "general good faith" exception. See *United States v. Katzin*, 769 F.3d 163, 173, 177 n.9 (3d Cir. 2014) (en banc) (concluding that the "general good faith test" applies whenever police had an "objectively reasonable" and "good faith belief in the lawfulness of their conduct," and observing that the Supreme Court has never required reliance on "some 'unequivocally binding' authority" as "a condition precedent to applying the good faith exception" (quoting *Davis*, 564 U.S. at 239; *United States v. Katzin*, No. 11-226, 2012 WL 1645458, at *9 (E.D. Pa. May 9, 2012))). *But cf.* *United States v. Mota*, 155 F. Supp. 3d 461, 475 (S.D.N.Y. 2016) (refusing to deny exclusionary remedy in case involving an unreasonable mistake of law on the grounds that "[t]he common thread uniting the[] exceptions [recognized in *Herring* and the *Leon* line of cases] is that it was not the officer conducting the search who erred, but another actor").

338. See *supra* note 327 and accompanying text; see also *Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979) (despite upholding the constitutionality of an arrest for violating an unconstitutionally vague ordinance, the Court distinguished prior precedents that found a Fourth Amendment violation where searches were based on statutes that "did not satisfy the traditional warrant and probable-cause requirements," reasoning that the vague ordinance there "did not directly authorize the arrest or search" and thus "bore a different relationship to the challenged searches"); *cf.* *Illinois v. Krull*, 480 U.S. 340, 355 n.12 (1987) (recognizing a good-faith exception to the exclusionary rule where police reasonably relied on an unconstitutional statute, but not challenging the distinction drawn in *DeFillippo* as a matter of substantive Fourth Amendment law).

III. CONCLUSION

Heien's ruling that the Fourth Amendment forgives reasonable police mistakes of law sparked little controversy either in the Court itself or in the media, perhaps because the opinion was so cursory and its overly simplistic analysis merely equated mistakes of fact and law. Citing Fourth Amendment precedent that focused exclusively on factual errors made by law enforcement officials, the *Heien* majority ignored the reasons it has instructed courts to defer to police officers, which carry much less weight when applied to their interpretations of the law.

In addition, the Court too quickly discounted the relevance of the maxim that ignorance of the law is no defense. The rationales underlying the traditional presumption that everyone knows the law, even if flawed, are at least as persuasive for law enforcement officials as for the general populace. Consistent with the maxim and its exceptions, the only police mistakes of law that ought to be excused are those based on an official interpretation of the law provided by an authoritative and independent third party. That approach mirrors not only criminal law and its venerable maxim, but also the good-faith exception to the exclusionary rule.

Under this view, officers who themselves made a pure mistake of law, erroneously believing that state statutes barred certain conduct, would not have the reasonable suspicion required to conduct a stop. Even though a reasonable mistake of fact would not undermine the validity of a stop, the Fourth Amendment would not permit even a reasonable mistake of law.

This is not to say, however, that a police officer's error in applying the law to a particular case could not justify a stop. Suppose, for example, that a state's vehicle laws prohibited "excessive" tinting of windows, or traveling at an "unsafe" rate of speed given the conditions, without providing any objective content to the terms "excessive" or "unsafe." A court that disagreed with a law enforcement official's conclusion that a car's window tinting was excessive or its rate of speed unsafe would not necessarily invalidate the traffic stop if the officer's mistake in applying the law to the facts of the case was a reasonable one. Although some scholars view these mixed questions of law and fact as essentially legal issues,³³⁹ the hypothetical officer here might be perfectly familiar with the language of the relevant statute, and her assessment that it was violated involves a judgment similar to the factual determinations that traditionally merit judicial deference.³⁴⁰

339. See *supra* notes 146–49 and accompanying text.

340. See *Robinson v. State*, 377 S.W.3d 712, 719 n.22 (Tex. Crim. App. 2012) (providing illustrations of similar application questions).

In allowing a broader range of police errors, *Heien*'s brief and deceptively simple reasoning should not lull Court watchers into minimizing the significance of the decision. Even before *Heien*, law enforcement officials already had powerful tools in their arsenal, and they used those tools to stop about one in ten drivers.³⁴¹ They could choose from a multitude of minor traffic violations to conduct what were admittedly purely pretextual traffic stops.³⁴² As Orin Kerr colorfully put it, "As a practical matter, if an officer [couldn't] find a traffic violation to stop a car, he [wasn't] trying very hard."³⁴³ Even if the officer made the wrong choice, the stop was nevertheless valid so long as there was reasonable suspicion to believe the suspect had committed some other, even completely unrelated, offense.³⁴⁴

Others have written forcefully about the disparate impact these various law enforcement practices have had on racial and ethnic minorities, and the growing tensions between the police and communities of color are all too familiar.³⁴⁵ Kevin Johnson, for example, has charged that the Supreme Court's validation of pretext stops is "in no small part responsible for the fact that race dominates much of modern U.S. law enforcement."³⁴⁶ In his prize-winning book, Ta-Nehisi Coates wrote to his son, "[T]he police departments of your country have been endowed with the authority to

341. See LANGTON & DUROSE, *supra* note 17, at 3 (reporting that approximately ten percent of the 212.3 million drivers in this country were stopped in 2011).

342. See *Whren v. United States*, 517 U.S. 806, 813 (1996). For illustrative cases, see *supra* note 106. For others criticizing *Heien* on this ground, see *Heien v. North Carolina*, 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting); LAFAVE, *supra* note 85, § 3.2(b), at 9–10; Logan, *supra* note 6, at 90–91.

343. Kerr, *supra* note 324; see also PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 24–25 (2009) (reporting that police were able to cite a traffic violation after following any vehicle for just three or four blocks); cf. Logan, *supra* note 6, at 89–90 (arguing that *Heien* gives legislatures "even less reason to avoid textual imprecision"); Kerr, *supra* note 324 (pointing out that legislatures are "likely to fix" any deficiency in the traffic laws "in the government's favor pronto").

344. See *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004). For further discussion of *Devenpeck*, see *supra* notes 40–44, 302–310 and accompanying text.

345. See, e.g., Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 946, 952, 966 (2002) (explaining that "[t]he very sight of the police in my rear view mirror is unnerving . . . [and] engenders feelings of vulnerability," and that experience with the police "affects the everyday lives of people of color," leading to, among other things, "internalized racial obedience toward, and fear of, the police"); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660, 681 (1994) (observing that the disproportionate number of stops directed at the poor and racial minorities "perpetuates a cycle of mistrust and suspicion," thereby "widening the racial divide in the United States"). See generally *supra* note 17 and accompanying text.

346. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1075 (2010); cf. Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 887–88 (2015) (arguing that while the decision to permit pretext stops was "not only defensible, but perhaps inevitable," the justification for "immunization of racial discrimination has collapsed" and a search or seizure motivated by race is "unreasonable" within the meaning of the Fourth Amendment).

destroy your body. . . . And destruction is merely the superlative form of a dominion whose prerogatives include friskings, detainings, beatings, and humiliations. All of this is common to black people.”³⁴⁷

Heien exacerbates these intractable problems by permitting stops of even completely law-abiding citizens so long as the police were “close enough” in thinking they were violating some traffic regulation.³⁴⁸ By tolerating reasonable mistakes of law and creating room for the reach of the opinion to expand—to the more intrusive searches and seizures requiring probable cause, to generous notions of what mistakes of law are considered reasonable, and potentially, in combination with other recent decisions, to the refusal to sanction even unreasonable mistakes of law—*Heien* can without hyperbole be viewed as another step in the Supreme Court’s “stealth” campaign to narrow the protections afforded by the Fourth Amendment.³⁴⁹

347. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 9 (2015).

348. Scott H. Greenfield, *Heien v. North Carolina: Close Enough*, SIMPLE JUSTICE (Dec. 16, 2014), <http://blog.simplejustice.us/2014/12/16/heien-v-north-carolina-close-enough/>.

349. Cf. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 5 (2010) (arguing that the Supreme Court has engaged in the “stealth overruling” of *Miranda*—by “disingenuous[ly] treat[ing] precedents in a manner that obscures fundamental change in the law” and thereby “avoid[s] public attention to the Court’s diminishing of its own precedents”).