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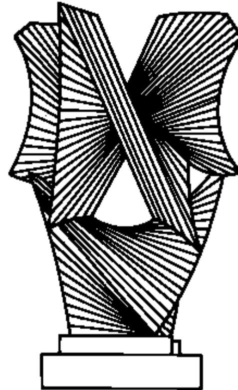

CLOSE ENOUGH FOR GOVERNMENT WORK? *HEIEN*'S LESS-THAN-REASONABLE MISTAKE OF THE RULE OF LAW

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Close Enough for Government Work?
***Heien*'s Less-Than-Reasonable Mistake of the Rule of Law**

Richard H. McAdams*

In *Heien v North Carolina,*[1] the Supreme Court held 8-1 that a search or seizure can be lawful under the Fourth Amendment despite its being founded on a government agent's mistake of law, as long as the mistake was "reasonable." The Court did not hold merely that a police officer's reasonable mistake of criminal law excused the state from the remedy Heien sought – the exclusion of evidence from his criminal trial – but that there was no Fourth Amendment violation, i.e., that "the people" have no federal right to be secure against such searches or seizures.[2] The gist of the opinion was the simple virtue of symmetry: Just as probable cause and reasonable suspicion do not require the police to be correct about the facts, but merely to have the right level of justified factual suspicion, these objective standards do not require the police to be correct about the law, but only to have a reasonable belief about what the law forbids.[3] In either case, the suspect's ex post innocence does not disprove the ex ante probable cause or reasonable suspicion of guilt (as the particular doctrine requires) that renders the search constitutional.

Plausible sounding as it may be, *Heien* is a riches of embarrassment. The symmetry reasoning is superficial, as it ignores or fails to grasp the power of obvious counterarguments, including: (1) A search or seizure based on a mistake of law is the joint result of executive *and* legislative action; viewing 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. (2) Indeed, a state legislature can hardly be said to provide citizens with constitutionally sufficient "fair notice" of criminal prohibitions if the meaning of a criminal statute is so ambiguous that we cannot even expect law enforcement officers to get the law right. (3) Just as reasonable "ignorance of the

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[1] 135 S Ct 530 (2014).

[2] Although the Court did not word its holding this way, that formulation tracks the text of the Fourth Amendment, which declares: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

[3] *Heien*, 135 S Ct at 534. Although the case focuses on reasonable suspicion, I assume the same rule applies to probable cause, where that is the relevant standard, because *Heien* cites as authority 19th century cases involving "reasonable cause," which the Court says is the same as probable cause. Id at 536–37. Subsequent cases have made the extension with no hesitation. See, for example, *United States v Diaz*, -- F Supp 3d --, 2015 WL 4879191, n.6 (2015) (saying that the contrary argument "borders on frivolous").

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criminal law is no excuse" for citizens, it should not excuse or empower government officials, especially not for mistakes about the law they are tasked with enforcing. (4) The issue in *Heien* arises almost entirely in the context of traffic enforcement, which is the very last place in criminal law where the Court should grant the police an extra dose of discretion. We might summarize these four points with the simple proposition that government, being the creator of law, is always limited in power by the law it actually creates, a principle which distinguishes government mistakes of law from governmental mistakes of fact. On reflection, *Heien* is a misstep for the weighty matter of the rule of law.

For the most part, *Heien* does not even acknowledge the existence of these counter-arguments, much less refute them. The Court does, however, engage the possible parallel to the ancient maxim *ignorance of law is no excuse*, admitting that the analogy "has a certain rhetorical appeal."[4] As the Court describes the point: "it is fundamentally unfair to let police officers get away with mistakes of law when the citizenry is accorded no such leeway."[5] But the Court's brief conceptual response to this point, described below, is deeply flawed and incomplete. For many reasons, we should expect professional law enforcement officers to know the criminal law it is their job to enforce. And if we must impose a different rule for police and citizens, it should be more demanding for the police, not less.

Beyond the maxim, *Heien* is difficult to square with other principles of American criminal law including basic precepts of the rule of law. One standard feature of our law that is conventionally described as implementing the principle of legality is the vagueness doctrine, the rule that excessively vague statutes are a violation of the Due Process Clause.[6] Herbert Packer once described the doctrine as "an injunction to take care in the framing of criminal statutes that no more power be given to call conduct into question as criminal, with all the destruction of human autonomy that this power necessarily imports, than is reasonably needed to deal with the conduct the lawmakers seek to prevent."[7] The twin rationales of the vagueness doctrine, and of legality in general, are to provide citizens with fair notice of the criteria of law enforcement coercion[8] and to

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[4] *Heien*, 135 S Ct at 540.
[5] Id.
[6] See John Calvin Jeffries, Jr, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 196 (1985) (explaining why "the vagueness doctrine is the operational arm of legality"); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U Pa L Rev 335, 357–63 (2005). See also Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (UBC 2004).
[7] Herbert Packer, *The Limits of the Criminal Sanction* 94–95 (Stanford 1968).
[8] See, for example, *United States v Cardiff*, 344 US 174, 176 (1952) ("The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."); *Connally v General Constr Co*, 269 US 385, 391 (1926)("[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on

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constrain discretion to prevent arbitrary and discriminatory enforcement.[9] Yet *Heien* damages both values, particularly by compromising the most important constraint on enforcement discretion, central to the rule of law – the requirement that government use coercion only to enforce actual law.

Another doctrine instantiating legality is the interpretive canon known as the rule of lenity.[10] For judging the meaning of ambiguous criminal statutes, and thus when government may criminally punish an individual, the rule of lenity favors the narrower over the broader interpretation, i.e., the one more favorable to the defendant. By contrast, for deciding when government may search or seize individuals or their property, *Heien* creates what we might call a "rule of severity": when a criminal statute is ambiguous, as they frequently are, citizens are subject to search and seizure based on the broadest reasonable interpretation of the statute until a court says otherwise.

As a result, *Heien* damages incentives underlying the rule of law. *Heien* indulges and condones carelessness in legislative drafting by ensuring that the police can be excused for misunderstanding the law, despite the fact that citizens are not. *Heien* also diminishes incentives (1) for municipalities to rigorously train police in the limits of the traffic law they enforce, (2) for alleged traffic violators to challenge the erroneous police interpretations of state law, and (3) for courts to clarify the meaning of ambiguous traffic statutes.

Heien is therefore an occasion to reconsider the Supreme Court's vision of legality in criminal law, or more generally, the rule of law. The Court often characterizes these values – fair notice and constrained police discretion – as

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their part will render them liable to its penalties . . . ; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

[9] See *Kolender v Lawson*, 461 US 352, 357–58 (1983) ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'"). See also *Papachristou v City of Jacksonville*, 405 US 156, 170 (1972) ("Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law."); *Shuttlesworth v Birmingham*, 382 US 87, 90-91 (1965) ("Literally read . . . the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. . . . It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.'"); *Smith v Goguen*, 415 US 566 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. . . . [W]e share [Justice Black's] concern [with] . . . entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' . . . Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.").

[10] See, for example, Lawrence M. Solan, *Law, Language, and Lenity*, 40 Wm & Mary L Rev 57 (1998).

central to Due Process and therefore as animating the decision to strike down a vague statute. And, yet, like many constitutional values, the concern for citizen notice and limited discretion is honored only inconsistently.[11] In some ways, there is never any surprise about a decision in which the Court rejects (here, implicitly) the citizen's claim to "fair notice" or the demand for limits on police discretion. What is surprising, however, is that in the same term as the Court decided *Heien*, it decided a vagueness case, *Johnson v. United States*,[12] that struck down a Congressional sentencing statute in which neither concern – fair notice or limited discretion – was present by any but the most extravagant standards. The pair of *Heien* and *Johnson* shows that something is seriously amiss in the Court's vision of the rule of law.

There is much to say about each point.[13] Part I describes the holding and reasoning of *Heien*, and an important dictum. Part II examines how *Heien* undermines the legality value of constraining enforcement discretion. This Part also explains how *Heien* is inconsistent with the centuries-old maxim about ignorance of criminal law. Part III examines how *Heien* disserves the legality value of fair notice, producing the rule of severity described above.

I. The Alluring Symmetry of *Heien*

As with much constitutional law, *Heien* begins with a traffic stop. A sheriff's officer assigned to drug interdiction sat in his car on the side of an interstate highway and observed a driver pass by shortly before 8 a.m. The officer entered traffic and followed the car. The Fourth Amendment does not require a justification for this particular decision because the simple act of following a car is not a search or seizure. But for the broader context it is worth noting that the officer offered an explanation anyway, which was his perception that the driver was "very stiff and nervous."[14] When asked at a hearing to explain the manner in which the suspect was "stiff and nervous," judged in the brief interval as the car lawfully passed his position at 60 mph, the officer's entire reply was: "He was gripping the steering wheel at a 10 and 2 position, looking straight ahead."[15] Such is the suspicious nature of American law enforcement.

The pertinent legal issue concerns the officer's subsequent decision to stop the car. "A few miles later," which presumably means a few minutes later, the officer observed that only one of the vehicle's two brake lights was working. For this apparent infraction, the officer pulled over the driver, who turned out to

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[11] See Jeffries, 71 Va L Rev at 207–212 (cited in note 6).
[12] 135 S Ct 2551 (2015).
[13] And much has been said. For the best pre-*Heien* treatment of these issues, see Wayne A. Logan, *Police Mistakes of Law*, 61 Emory LJ 69 (2011).
[14] *Heien*, 135 S Ct at 534.
[15] *Heien*, Joint Appendix, at 15 (transcript of motion to suppress hearing held in the General Court of Justice, Superior Court Division, in Surry County, Dobson, North Carolina, on March 18, 2010, Criminal Session, before the Honorable V. Brad Long, Judge Presiding).

be Maynor Javier Vasquez.[16] Almost like a parable, the facts match the common claim that an officer can always find some reason to stop an automobile by following it for a few minutes. It also presents the standard concern that police engage in racial profiling, as the race or national origin of Vasquez might resolve the mystery of why an officer claimed to be suspicious that Vasquez drove in textbook form and watched the road ahead.[17] In any event, for the non-functioning brake light, the officer issued Vasquez a warning ticket.

Commonly enough, the officer used this opportunity to ask for consent to search the vehicle, though this request was directed at the second man in the car, Nicholas Brady Heien, who turned out to be the actual owner.[18] Commonly enough, he agreed. The officer discovered cocaine in the car and arrested Heien. Before trial in state court, Heien argued that the stop that revealed the cocaine violated his Fourth Amendment rights and that the cocaine should be excluded. The trial court denied the motion, finding that the faulty break light gave the officer reasonable suspicion for the stop.[19]

Everything unfolded in the most ordinary manner until the first appellate court gave the case a twist by holding that the North Carolina vehicle code did *not* actually require a vehicle to have more than one working brake light, so that Heien's vehicle was not operating in violation of law.[20] The court reasoned that the officer did not have reasonable suspicion for the stop, i.e., that having reasonable factual grounds for believing the suspect was engaged in conduct that, in actuality, violates no law does not constitute reasonable suspicion. The stop was therefore unreasonable under the Fourth Amendment. The court held that the evidence had to be excluded and reversed the conviction.[21]

The state appealed the Fourth Amendment issue without appealing the ruling on the meaning of the traffic code. The Supreme Court of North Carolina held that police could have reasonable suspicion despite an error about the law and that the stop in question was reasonable because the officer's interpretation of the ambiguous vehicle code was reasonable, despite being (it assumed) erroneous. The court therefore reversed and reinstated the conviction.[22] The North Carolina Supreme Court's decision contributed to a split among state and

[16] *Heien*, 135 S Ct at 534.
[17] Of course, if the stop were based on race or national origin, the only constitutional violation is under the Equal Protection Clause; the Fourth Amendment judges the stop based on the objective facts, not the officer's actual motivation. See *Whren v United States,* 517 US 806, 813 (1996).
[18] *Heien*, 135 S Ct at 534.
[19] Id at 535.
[20] Id. See *State v. Heien*, 714 SE 2d 827 (NC Ct App 2011) (interpreting N.C.G.S. § 20–129(g), N.C.G.S. § 20–129(d), and N.C.G.S. § 20–183.3).
[21] *Heien*, 135 S Ct at 535.
[22] Id at 535. See *State v. Heien*, 737 S.E.2d 351 (NC 2012).

federal courts on the issue – whether police mistakes of criminal law could be consistent with probable cause or reasonable suspicion.[23]

The United States Supreme Court affirmed.[24] The Court said that the reasonableness of the officer's mistaken belief that the law required all brake lights to be operational, combined with a correct and justified factual belief that one brake light was inoperative, meant that the traffic stop was based on sufficient reasonable suspicion and, therefore, complied with the Fourth Amendment. It is well understood that a police search or seizure can be reasonable (based on either probable cause or reasonable suspicion, as the law requires) despite the fact that the police officer acts on the basis of *factual* errors, if the factual beliefs were sufficiently reasonable.[25] If the police stopped Heien because he and his car tightly matched the description of a fleeing felon, for example, the stop would be lawful even if it turned out that Heien was not the fleeing felon but someone who looked like him. In an opinion joined by all the justices except Justice Sotomayor, who dissented, Chief Justice Roberts explicitly framed the case as asking whether a parallel "mistake of law can nonetheless give rise to the reasonable suspicion necessary to uphold the seizure."[26] He continues: "We hold that it can."[27]

The reasoning was based partly on precedent, though precedent did not control the case. The Court cited a line of 19th century cases interpreting a statute that indemnified customs officials for damages suits for unlawful seizures when those seizures were based on "reasonable cause," which the Court said was a synonym for probable cause.[28] A number of cases decided under the statute recognized "reasonable cause" to exist even when it was premised on the official's reasonable mistake of law. The majority conceded that these cases were "not directly on point. Chief Justice Marshall was not construing the Fourth Amendment, and a certificate of probable cause functioned much like a modern-day finding of qualified immunity, which depends on an inquiry distinct from whether an officer has committed a constitutional violation."[29] Still, the cases are suggestive because they refer in dicta to the Fourth Amendment idea of probable cause, which the Court says has not fundamentally changed over time.[30] The

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[23] See *Heien*, 135 S Ct at 544 & n 1 (Sotomayor, J, dissenting) (listing one circuit that agreed with the North Carolina Supreme Court and five federal circuit and five state courts that disagreed).
[24] Id at 540.
[25] Id at 536.
[26] Id at 534.
[27] Id.
[28] Id at 536–37 (citing *United States v Riddle*, 5 Cranch 311, 3 L Ed 110 (1809); *Locke v United States*, 7 Cranch 339, 348, 3 L Ed 364 (1813); *Stacey v Emery*, 97 US 642, 646 (1878); *The Friendship*, 9 F Cas 825, 826 (CCD Mass 1812); *United States v The Reindeer*, 27 F Cas 758, 768 (CCDRI 1848); *United States v The Recorder*, 27 F Cas 723 (CCSDNY 1849); *The La Manche*, 14 F Cas 965, 972 (D Mass 1863)).
[29] *Heien*, 135 S Ct at 537.
[30] Id.

bottom line, however, is that the issue *Heien* presents – whether a search or seizure can be reasonable under the Fourth Amendment despite being predicated on a mistake of law – had not been previously decided by the Court.

The majority and dissent also discussed one modern precedent – *Michigan v. DeFillippo*[31] – but it too is not controlling. In *DeFillippo* police officers arrested a man for violating a Detroit ordinance that, in certain circumstances, required suspects to prove their identity to police.[32] After the arrest, a state court declared the ordinance to be unconstitutional under the Due Process Clause on the grounds that it was excessively vague.[33] The Supreme Court held that there was nonetheless probable cause for the arrest, and no violation of the Fourth Amendment, when police relied on an ordinance only later ruled unconstitutional.[34] Here is how the majority in *Heien* uses the case to support its holding: "The officers were wrong in concluding that DeFillippo was guilty of a criminal offense when he declined to identify himself. That a court only *later* declared the ordinance unconstitutional does not change the fact that DeFillippo's conduct was lawful when the officers observed it."[35]

Yet this analysis is too quick. Just after discussing *DeFillippo*, the Court introduced a distinction between mistakes of *criminal* law and mistakes of *Fourth Amendment* law. The Court said: "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. . . . Here, by contrast, the mistake of law relates to the antecedent question of whether it was reasonable for an officer to suspect that the defendant's conduct was illegal."[36] Justice Kagan's concurrence emphasized her agreement on this point: "an error about the contours of the Fourth Amendment itself can never support a search or seizure."[37] The Court thus distinguishes police mistakes of statutory criminal law from police mistakes of the Fourth Amendment itself.

The combination of *DeFillippo* and this *Heien* dictum demonstrates that one cannot generalize across different categories of mistake of law. Police reliance on a reasonable mistake of Due Process law does not violate the Fourth Amendment, but police reliance on a reasonable mistake of Fourth Amendment law does violate the Fourth Amendment. If we cannot even generalize across police mistakes of constitutional law, then surely the separate issue in *Heien* – whether police reliance on a reasonable mistake of statutory criminal law violates

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[31] 443 US 31 (1979).
[32] Id.
[33] See *People v DeFillippo*, 262 NW 2d 921 (Mich App 1977).
[34] *DeFillippo,* 443 US at 40.
[35] *Heien,* 135 S Ct at 538.
[36] Id at 539.
[37] Id at 541, n 1 (Kagan, J, concurring).

the Fourth Amendment – must stand on its own footing.[38] *DeFillippo* no more controlled the issue of police mistakes of traffic law than the *Heien* dictum controlled the issue in the opposite direction.[39]

In response, one might defend the Court's reliance on *DeFillippo* by saying that it and *Heien* both address the police officer's mistakes of law about the legality of the suspect's conduct, where the *Heien* dictum addresses the police officer's independent mistakes of law about the legality of his or her own conduct. Arguably, a reasonable mistake is pertinent in the former but not the latter case. But there was no hint of this classification before *Heien* and therefore no reason to view *DeFillippo* as controlling. One could instead have read *DeFillippo* as ensuring strong incentives for police to treat statutes as presumptively constitutional (by excusing constitutional mistakes) and view the *Heien* situation as calling for strong incentives for police to learn the law they enforce (therefore, giving no excuse for mistakes). Notably, the lower courts, most of which held that searches and seizures could not be based on reasonable mistakes of law, had not treated *DeFillippo* as dispositive.

Without controlling precedent, the primary rationale for the *Heien* opinion was symmetry. As the discovery, ex post, of factual errors does not rule out the possibility of ex ante reasonable suspicion or probable cause, the Court thought police mistakes of law should be treated in the same way. Indeed, the Court thought the issue obvious:

> [R]easonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. . . . There is *no reason* under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact,

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[38] In her *Heien* dissent, Justice Sotomayor attempted to distinguish *DeFillippo* on the grounds that the case "did not involve any police 'mistake' at all" because society wants police to rely on the presumed constitutionality of legislative enactments. See id at 546. I agree with the presumption, but that is the wrong way to distinguish the case. It *is* a legal mistake to enforce a legally invalid ordinance, even if the mistake is excusable because we want to encourage police to enforce the statutory law as written. The right distinction between *DeFillippo* and *Heien* is the source of the police error: criminal law in *Heien* and constitutional law in *DeFillippo*, specifically the Due Process Clause. But unlike the presumption of constitutionality, there is no reason to encourage police to enforce the broadest reasonable meaning of every statute.

[39] The Court blurs its own distinction when it says "DeFillippo's conduct was lawful when the officers observed it." *Heien*, 135 S Ct at 538. DeFillippo had actually violated the ordinance as written, but his behavior was lawful only because he had violated an *invalid* ordinance, given its unconstitutional vagueness. By contrast, Heien did *not* violate the brake light statute as written. Given the dictum, the ultimate source of the police mistake of law seems to matter, as it does in criminal law. See Parts II-D and II-E.

> but not when reached by way of a similarly reasonable mistake of law.[40]

"No reason" is a strong statement, excessively so, I claim below, because the Court's precedents on the ignorance of law maxim, the vagueness doctrine, and the rule of lenity favor a different outcome.

After *Heien*, a fundamental question is what legal mistakes count as "reasonable." The North Carolina statute at issue was poorly drafted and ambiguous, and there was at least a respectable argument for reading it to require all "stop lamps" to be functional, an interpretation embraced by the trial judge and an appellate dissent.[41] So the mistake at issue in *Heien* passed a high bar of objective reasonableness and the majority implied the bar is high when it said that "the inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity."[42] Justice Kagan's concurrence emphasized this point, stating that "the test is satisfied when the law at issue is 'so doubtful in construction' that a *reasonable judge* could agree with the officer's view," as was true in *Heien*.[43] A slight puzzle here is that this demanding level of reasonableness seems inconsistent with the rationale of symmetry because mistakes of fact are not judged by the standards of experts.[44] In any event, since *Heien*, the lower courts have taken the requirement of reasonableness seriously, rejecting a number of governmental mistakes of law as unreasonable.[45]

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[40] *Heien*, 135 S Ct at 536 (emphasis added).
[41] See 737 SE 2d, at 358–359 (Hudson, J, dissenting, joined by CJ Parker and J Timmons-Goodson) (calling the Court of Appeals' majority statutory interpretation "surprising").
[42] 135 S Ct at 540 (Roberts, CJ).
[43] Id at 540-1 (Kagan, J, concurring) (emphasis added).
[44] See, for example, *Ornelas v United States*, 517 US 690, 695 (1996) (stating that reasonable suspicion and probable cause "are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"). To illustrate, assume that a 20% probability is usually enough for reasonable suspicion and that an officer is 20% confident that a car she now observes has just made an illegal U-turn. Perfect parity between mistakes of fact and law would treat identically these cases: (1) where the officer is 20% confident that the car made a U-turn at a particular intersection and 100 per cent sure (and correct) that the law forbade U-turns at that intersection; and (2) where the officer were 100% sure in the fact of the U-turn and only 20% confident (and incorrect) that a legal rule prohibited such movement. Yet it seems that Justice Kagan's standard might reject case (2) as unreasonable.
[45] See, for example, *United States v Mota*, -- F.Supp.3d --, 2016 WL 110527 (SD NY 2016) (interpreting state statute to require only two working brake lights, not a third in the middle of the rear window, and holding that mistake of law was unreasonable); *Darringer v State*, -- NE 3d --, 2015 WL 7074714 (Ct App Ind 2015) (police error of law regarding placement of interim license plate was unreasonable); *United States v Sanders*, 95 F Supp 3d 1274 (D Nevada 2015) (police were unreasonable in believing that air fresheners hanging from rear view mirror violated law); *United States v Alvarado-Zarza*, 782 F.3d 246 (5th Cir. 2015) (finding officer mistake of law unreasonable because signaling for 100 feet was required before a turn, not before a lane change); *United States*

The Court might have affirmed Heien's conviction on a different ground. The remedy at issue was the exclusionary rule. Starting with *United States v. Leon*,[46] the Court has recognized a good faith exception to the exclusionary remedy, which it has recently expanded in several cases.[47] Of greatest relevance, *Davis v. United States* held that it was erroneous to exclude evidence when police were searching in reliance on binding precedent of the relevant United States Court of Appeals.[48] *Heien* presents something different because the police were relying not on binding precedent determining the meaning of a criminal statute, but on the absence of precedent interpreting an ambiguous criminal statute. If we translate the problem from police error to the analogous situation of criminal defendants, *Davis* is similar to a defendant claiming a mistake of criminal law based on reasonable reliance on an official interpretation of the law that is afterward determined to be erroneous, which frequently operates as a defense.[49] *Heien* is similar to a defendant claiming a mistake of criminal law based on his own reasonable misreading of the statute, which is usually not a defense.[50] Of

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v Flores, 798 F.3d 645 (7th Cir. 2015) (finding police mistake about obstructing license plate, when frame did not actually block any writing, was unreasonable).

[46] *United States v Leon*, 468 US 897 (1984).

[47] See *Davis v United States*, 131 S Ct 2419 (2011); *Herring v United States*, 555 US 135 (2009); *Hudson v Michigan*, 547 US 586 (2006); *Arizona v Evans*, 514 US 1 (1995); *Illinois v Krull*, 480 US 340 (1987).

[48] *Davis v United States*, 131 S Ct 2419 (2011). The case involved a broad car search incident to arrest that the Courts of Appeals had interpreted the Supreme Court case of *New York v. Belton* to permit, but which the Court later rejected in *Arizona v. Gant*. See *New York v Belton*, 453 US 454 (1981), limited by *Arizona v Gant*, 556 US 332 (2009).

[49] For the statutory and common law doctrine, see Paul H. Robinson, Matthew G. Kussmaula, Camber M. Stoddard, Ilya Rudyak, and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J Legal Analysis 37, 94 (2015) (stating that, even though "there is typically no general excuse for even a reasonable mistake of law," "a majority of American jurisdictions recognize an excuse for someone who reasonably relies upon an official misstatement of law. The arguments in support of such a rule are not just the blamelessness of the actor, but also -- and perhaps more importantly -- estoppel against a government that has brought about the offense by its own erroneous advice. A majority of thirty-six jurisdictions, following MPC § 2.04(3)(b), recognize" this defense).

There is also a constitutional doctrine, sometimes called entrapment by estoppel, that reads the Due Process Clause as mandating a criminal law defense when a government actor misled the defendant as to the meaning of the law. See *Raley v Ohio*, 360 US 423 (1959); *Cox v Louisiana*, 379 US 559, 572 (1965); *United States v Laub*, 385 US 475 (1967); *United States v. Pennsylvania Industrial Chemical Corp*, 411 US 655 (1973). For a discussion, see Gabriel J. Chin, Reid Griffith Fontaine, Nicholas Klingerman, and Melody Gilkey, *The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code*, 93 NC L Rev 139 (2014) (summarizing lower courts as interpreting *Raley*, *Cox*, *Laub*, and *PICCO* to provide a mistake of law defense when "(1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.").

[50] Robinson, et al, 7 J Legal Analysis at 93–94 (cited in note 34) ("As a general rule, ignorance or mistake of the law is no defense unless it negates a required offense element. That is, there is typically no general excuse for even a reasonable mistake of law. Only one state, New Jersey, provides such a general excuse.").

course, the Court might have extended the doctrine by saying that there is no need for the distinction in legal mistakes – between relying on official interpretations of the law and relying on one's own judgment – in the context of the exclusionary rule, so that evidence is always admissible if the legal mistake is reasonable.[51]

Yet the remedy issue had not been argued below or briefed for the Court. The case was decided on the substance of the Fourth Amendment because North Carolina is one of fourteen states that have rejected the good faith exception as a matter of state law, so that resolution would not necessarily leave the conviction intact. Of course, state courts might now avoid *Heien* as a matter of state constitutional law. This article suggests that state courts should take that path.[52]

II. The Rule of Law, *Heien*, and the Problem of Police Discretion

There are contested theories about what constitutes the rule of law,[53] but a common framing is the distinction from the "rule of men," or more appropriately, the rule of persons.[54] Criminal law is thought to be a particularly important domain for the rule of law, as criminal enforcement involves the most severe forms of government coercion. In American criminal law, the principle of "legality" includes several ideas relevant to the evaluation of *Heien*: first, that crime must be declared legislatively and in advance of the conduct to be criminal;[55] and second "to make these prescriptions material and not merely formal, the definitions of criminal conduct must be precisely enough stated to leave comparatively little room for arbitrary application."[56] The first point

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[51] There would also likely be qualified immunity in such a situation because the reasonableness of the mistake would mean that the police were not violating a well-established right (since the right, narrowly understood, cannot be well-established if the search would have been lawful had the crime extended as far as the police officer reasonably believed it did). See *Wilson v Layne*, 526 US 603 (1999); *Anderson v Creighton*, 483 US 635 (1987).
[52] Unfortunately, the Illinois and Wisconsin Supreme Courts have already rejected the argument that their state constitutions impose a rule different than *Heien*. See *People v Gaytan*, 32 NE 3d 641 (Ill 2015); *State v. Houghton*, 868 NW 2d 143 (Wisc 2015).
[53] See, for example, Albert Dicey, *The Law of the Constitution* 194 (MacMillan 9th ed, 1950); Joseph Raz, *The Authority of Law: Essays in Law and Morality* 210–32 (Clarendon 1979); Lon Fuller, *The Morality of Law* 46-90, 157–59 (Yale 2d ed 1969); Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum Law Rev 1 (1997); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law & Phil 137 (2002).
[54] See *Marbury v. Madison*, 5 US 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").
[55] Herbert L. Packer, *The Limits of the Criminal Sanction* at 79–80 (cited in note 9).
[56] Id at 73.

prohibits retroactivity in crime definition; the second point motivates the vagueness doctrine and the rule of lenity.[57]

Non-retroactivity appears modest enough in the prohibition of ex post facto legislation,[58] but it also rules out a judicial power that existed for centuries in England, the power to create new crimes.[59] Why do we take it for granted that a court can continue to create torts and rules of contract liability, retroactively applying the rules to the parties before it, but not create crimes? An intuitive explanation is the importance of fair notice: the state should prospectively articulate a line of criminal liability to inform the citizen how to stay on the proper side of it. Perhaps that rationale suffices, but one can question it, as we allow retroactive judicial law-making in civil law, and people do not generally learn the criminal law from reading statutes.[60]

Another theory is that advanced legislative definition of crime helps to control the discretionary power of police and prosecutors, to prevent arbitrary and discriminatory enforcement, which is also essential to the rule of law.[61] Police

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[57] The Supreme Court linked these three doctrines (with some redescription) in *United States v Lanier*, where it said:

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [citations omitted] Second, as a sort of "junior version of the vagueness doctrine," H. Packer, *The Limits of the Criminal Sanction* 95 (1968), the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. [citations omitted] Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, [citation omitted] due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, [citations omitted]. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

520 US 259, 266 (1997). The Court has characterized non-retroactivity as a limit on judicial re-interpretation of criminal statutes, for example, *Bouie v City of Columbia,* 378 US 347 (1964); as a potential limit on judicial change in common law rules, for example, *Rogers v Tennessee*, 532 US 451 (2001) (upholding judicial abandonment of the year-and-a-day limitation to criminal causation only because it was not "unexpected"); and as a constraint on easing of constitutional limits on criminal statutes, for example, *Marks v United States*, 430 US 188, 191–192 (1977). I focus in the text on the conceptually simpler limit on judicial crime creation.

[58] See US Const, Art I, § 9, cl 3; id at § 10, cl 1.

[59] Jeffries, 71 Va L Rev at 192 (cited in note 6).

[60] Packer, *The Limits of the Criminal Sanction* at 88 (cited in note 9); Jeffries, 71 Va L Rev at 79–80 (cited in note 6).

[61] Packer, *The Limits of the Criminal Sanction* at 88 (cited in note 9) ("the principle of legality . . . operates primarily to control the discretion of the police and of prosecutors rather than that of judges").

and prosecutors operate primarily in the enforcement of criminal law and thereby distinguish criminal from civil law. By limiting the court's power to create new crimes, the police and prosecutor are limited to enforcing crimes that already exist, rather than offering up citizens whose novel conduct might serve to induce the court to create new law. We limit courts, in other words, as an indirect way of limiting the power of those enforcers who bring people into court. As Herbert Packer puts the point: "*the most important single device*" for constraining the enormous inherent discretion of police and prosecutors "is the requirement . . . that the police and prosecutors confine their attention [towards citizens] to the catalogue of what has already been defined as criminal."[62] As John Jeffries elaborates:

> Where judges stand ready to create new crimes . . . police and prosecutors will bring them new crimes to create. . . . [T]he resort to common-law methodology broadcasts to the law-enforcement community a potent message: the limits of official coercion are not fixed; the suggestion box is always open. The result is that lawmaking devolves to law enforcement, and police and prosecutors are invited to play too large a role in deciding what to punish.[63]

The requirement that legislatures have the exclusive power to define crimes is so uncontroversial as to be barely noticed. But a second aspect of legality – sufficient precision in the law – is frequently litigated. The primary law that enforces this notion of legality is the vagueness doctrine, derived from the Due Process Clause, and applied with particular force to criminal statutes.[64] The Supreme Court has frequently identified the two rationales of the vagueness doctrine: vague laws "fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and "may authorize and even encourage arbitrary and discriminatory enforcement."[65] The defect of an excessively vague statute is the same as the defect in having no statute and relying on judicial crime creation.

The Supreme Court has linked these legality rationales to a third doctrine, the rule of lenity,[66] a canon of construction for criminal statutes that favors narrower meanings, i.e., those more "lenient" to the defendant.[67] Partly the idea

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[62] Id at 90.
[63] Jeffries, 71 Va L Rev at 223–24 (cited in note 6).
[64] See sources cited in notes 6 and 7.
[65] *City of Chicago v Morales*, 527 US 41, 56 (1999).
[66] See *Lanier*, 520 US at 266.
[67] See, for example, *Yates v United States*, 135 S Ct 1074, 1088 (2015) (invoking the "interpretive principle" that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (quoting *Cleveland v United States*, 531 US 12, 25 (2000) (quoting *Rewis v United States*, 401 US 808, 812 (1971)); *Liparota v United States*, 471 US 419, 427 (1985) ("Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate

is that the rule of law requires that we err on the side of liberty, which means on the side of interpreting criminal prohibitions too narrowly rather than too broadly.[68] In a more subtle way, lenity might constrain police and prosecutors by denying them the opportunity to augment their power by accidents of inartful legislative drafting.[69] The rule of lenity has been given less weight by the Supreme Court in recent decades,[70] but the doctrine still exists in the federal and state courts, sometimes proving important to particular interpretations of criminal statutes.

Heien is in tension with legality, by which I mean these particular three doctrines (no common law crime creation, the vagueness doctrine, and the rule of lenity) and especially their rationales – fair notice and constrained discretion. In this Part, I focus on the tension between *Heien* and the rule-of-law value of limiting arbitrary and discriminatory enforcement. In Part III, I explore *Heien*'s tension with the value of fair notice.

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balance between the legislature, the prosecutor, and the court in defining criminal liability."); *Adamo Wrecking Co v United States*, 434 US 275, 285 (1978)(noting that "'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant,'" quoting *United States v Bass*, 404 US 336, 348 (1971)); *United States v Universal C. I. T. Credit Corp*, 344 US 218, 221–22 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."); *United States v Gradwell*, 243 US 476, 485 (1917) (quoting *United States v Lacher*, 134 US 624, 628(1890)) (stating that "before a man can be punished as a criminal under the federal law his case must be 'plainly and unmistakably' within the provisions of some statute.").

[68] See Packer, *The Limits of the Criminal Sanction* at 93 (cited in note 9); *Ex parte Davis*, 7 F Cas 45, 49 (NDNY 1851) ("'It was,' says Professor Christian, 'one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted, in the construction of penal statutes; for whenever any ambiguity arises in a statute, introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy . . . .'").

[69] See, for example, *United States v Standard Oil Co*, 384 US 224, 236 (1966) (Harlan, J, dissenting) ("Moreover, this requirement of clear expression [in the doctrine of strict construction] is essential in a practical sense to confine the discretion of prosecuting authorities"); *United States v Gale*, (2d Cir 2015) [slip at 27] ("The rule of lenity ensures that criminal statutes will provide fair warning of what constitutes criminal conduct, minimizes the risk of selective or arbitrary enforcement, and strikes the appropriate balance between the legislature and the court in defining criminal liability."); Solan, 40 Wm & Mary L Rev at 135 (cited in note 10) ("The system of criminal justice, however, is not concerned only with notice to the defendant, but also with notice to all those empowered to punish people on behalf of the government, especially prosecutors and judges. The notion of limited government based on the rule of law crucially depends on there actually being law.").

[70] See, for example, *Johnson v United States*, 529 US 694, 713, n 13 (2000) ("Lenity applies only when the equipoise of competing reasons cannot otherwise be resolved"); *Muscarello v United States*, 524 US 125, 138-9 (1998).

A. Legal Mistakes about Traffic Stops: *Heien* Gives Police More Discretion Where They Already Have Too Much

American commitment to the rule of law has never been translated into a free-floating constitutional doctrine about constraining enforcement discretion. Instead, the Court has crafted some particular doctrines, such as the one against vagueness. The vagueness doctrine addresses the part of excess discretion caused by statutory imprecision. But there is more to the problem. If enough people violate a criminal statute, its being precise rather than vague is irrelevant to the degree of police discretion. To take the most familiar example, if 90% of motorists drive above the precise posted speed limit on some road and the police stop and ticket only 0.2% of speeders, the police discretion is virtually unfettered by the clarity and precision of the statute. Or to put it differently, if the police are being consistent in selecting the 0.2%, it is because they are enforcing an unposted and unspecified speed limit (e.g., more than 12 m.p.h. above the posted limit), or stopping cars on the basis of some undefined and unpublished criteria (e.g., fitting the officer's idea of what a drug dealer looks like). So the "real law" is genuinely vague even though the formal law is perfectly clear and beyond the reach of the vagueness doctrine.

As a result, what Packer terms as "the most important single device" for constraining enforcement discretion – the limitation to "the catalogue of what has already been defined as criminal" – is, to some degree, merely formal. Bill Stuntz made this point by emphasizing the interaction of criminal procedure with substantive criminal law.[71] The Fourth Amendment requires probable cause for some searches and seizures such as an arrest -- probable cause that the person has committed a crime. But what is a crime? The Fourth Amendment leaves that decision to the legislature, which means the legislature can expand the situations where the police have probable cause by expanding the scope of substantive criminal law. In other words, the Fourth Amendment permits overcriminalization, which in turn allows the government broad scope to search and seize its citizens.

We need not be surprised that the Court's limited commitment to constraining discretion allows this "loophole." Many constitutional values receive only inconsistent support and it would be difficult to develop a constitutional doctrine that generally limited the quantity of criminalization. But we should acknowledge the tradeoff between this police discretion and the rule of law. A simple traffic stop is obviously toward the low end of search or seizure intensity, but traveling by car is a pervasive part of American life during which motorists expect to maintain some privacy and dignity.[72] Police stops are anxiety-

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[71] See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L J 1 (1997).

[72] See, for example, *Delaware v. Prouse*, 440 US 648, 662-63 (1979) ("Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual

provoking, given the potential for escalation, and sometimes humiliating. Stops that appear to be motivated by race cause serious resentment of law enforcement. So even for simple car stops, the degree to which we leave police unconstrained by law is a degree to which we fall short of the rule of law ideal.[73]

Heien is another incremental step away from that ideal. As I demonstrate below, the main effect of *Heien* is to expand police discretion in traffic stops. I am not aware of any legal commentators who believed that, before *Heien*, police possessed *too little* discretion to stop motorists. To the contrary, if we were ranking legal domains where government officials have the most discretion, and where discretion is so unbounded that it puts us near the reality of the "rule of persons" instead of the rule of law, the discretion of police to stop drivers is high on the list.[74]

Compared to other legal domains, traffic and vehicle laws stand out in familiar ways. First, traffic regulations are unusually dense and comprehensive, permeating nearly every moment of driving and every physical aspect of one's vehicle. Second, traffic rules regulate relatively innocuous misbehavior, among the most innocuous conduct in the criminal law (and sometimes not even criminal[75]). Because the offenses are so low level, many ordinarily law-abiding citizens routinely commit them. Third, because traffic violations are unusually public, committed as they are on open roads, the police find them easy to detect.

When the density of regulation for common misbehavior is high and the violations are easily observed, the result is enormous police discretion. There are so many violators that the police cannot plausibly stop more than a small

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subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.").

[73] See id at 661 (stating that, to allow random police stops to check for license and registration would produce the "kind of standardless and unconstrained discretion [that] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.").

[74] See William J. Stuntz, *The Collapse of American Criminal Justice* 3 (2013) ("In the United States, posted limits don't define the maximum speed of traffic; they define [as a practical matter] the *minimum* speed. So who or what determines the real speed limits, the velocity above which drivers risk traffic tickets or worse? The answer is: whatever police force patrols the relevant road. Law enforcers -- state troopers and local cops -- define the laws they enforce."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L J 1, 67 n 229 (1997)("*Whren* permits the police to use traffic offenses in precisely the same way that the police used old-style vagrancy and loitering law: as a grant of discretionary power to stop, question, and (in jurisdictions that classify traffic offenses as crime) search and arrest suspects based on unarticulated suspicion of other crimes, or worse, based on the officer's whim or prejudice. The result is Fourth Amendment doctrine that appears to limit traffic stops but in practice does not."); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 Harv L Rev 842, 843 (2001) ("The law governing traffic stops allows police to pull over anyone for any reason.").

[75] See Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L Rev 672 (2015).

fraction, leaving police legally free to choose which few to stop on any grounds or whim other than a few formally proscribed ones, mostly race. In fact, it is difficult for individuals to prove unconstitutional racial profiling, so even that limitation is more formal than real.[76] More than that, not only can the police select which few of the many observed violators to stop and ticket; the police can also choose to spend time observing a *non-violator* – what appears to be a law- abiding driver – to find a violation. Recall the *Heien* facts: the officer started to follow the car with Heien in it because he thought the driver, Vasquez, appeared "very stiff and nervous."[77] That was not an adequate basis for a stop but after a few minutes, the officer discovered a putative traffic offense – the non-functioning tail light. In general, as a result of the multiplicity of driving rules, the conventional understanding is that the police can usually develop reasonable suspicion of some crime if they follow a car for a few minutes.[78]

If one were unfamiliar with the dynamics of traffic stops, one might guess that police discretion is not so important because police focus their attention on the most egregious violators of the traffic laws, not bothering with technical violations. But stopping a car has the potential for much bigger payoffs for the officer than issuing a ticket. Once stopped, police can look carefully into the car,[79] order the occupants out,[80] frisk the person or conduct a cursory inspection of the car if they have reasonable suspicion to believe a firearm is present,[81] or ask for consent to search the car, which is frequently given.[82] If, at any point, the police develop probable cause to believe the car contains evidence of a crime, they can warrantlessly search the car for the evidence.[83] As a result, police do not limit themselves to stopping the most dangerous drivers, but play their hunches.

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[76] See, for example, Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 Vill L Rev 851 (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U Miami L Rev 425, 431–32 (1997).
[77] *Heien*, 135 S Ct at 534.
[78] See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup Ct Rev 271, 273 ("Since virtually everyone violates traffic laws at least occasionally, . . . police officers, if they are patient, can eventually pull over almost anyone they choose").
[79] *Texas v Brown*, 460 US 730, 739–40 (1983) (Rehnquist, J) (plurality) (ruling that the shining of a flashlight through car window and the bending over to see better inside are not searches).
[80] *Pennsylvania v Mimms*, 434 US 106 (1977) (holding it reasonable, during a lawful traffic stop, for officer to order driver out of car); *Maryland v Wilson*, 519 US 408 (1997) (holding it reasonable, during a lawful traffic stop, for officer to order passenger out of car).
[81] See *Terry v Ohio*, 392 US 1, 20 (1968); *Michigan v Long*, 463 US 1032, 1049–50 (1983).
[82] See *Schneckloth v Bustamonte*, 412 US 218 (1973); *Ohio v Robinette*, 519 US 33 (1996). It would not be necessary that the person giving consent has legal authority to give it if the person has apparent authority. See *Illinois v Rodriguez*, 497 US 177 (1990).
[83] *Pennsylvania v Labron*, 116 S Ct 2485, 2487 (1996); *California v Acevedo*, 500 US 565, 569–70 (1991); *Chambers v Maroney*, 399 US 42 (1970).

A recent study of Kansas City, Missouri traffic stops confirms this analysis.[84] The researchers found it useful to distinguish "safety" stops, aimed at motorists whose driving behavior poses a risk to other motorists, from "investigatory stops," which are motivated not by the trivial infractions that give police the power to make the stop but by the police hunch of some non-traffic crime, such as drug possession.[85] Minority drivers were disproportionately the target of these pretextual, investigatory stops.[86] In sum, the Fourth Amendment formally requires reasonable suspicion of a legal violation to justify a stop,[87] a fairly low bar,[88] but the breadth and intensity of traffic regulation threatens to make this limitation meaningless. That government can gin up an objective basis for a traffic stop contradicts the premises of legality.

One might say that none of this is the fault of the Supreme Court because it is difficult to create a doctrine that bars states from tightly regulating driving and motor vehicles. Yet the Supreme Court has made the problem worse in a series of cases that push us farther from the rule of law ideal. The consent standard, for example, is lax enough to avoid giving dispositive weight to the fact that someone who apparently "consented" did not know they had any choice in the matter.[89] In addition, the Court might have developed a pretext doctrine to bar the police from using traffic regulation to circumvent restrictions on their

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[84] See Charles Epp, Steven Maynard-Moody, and Donald P. Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* 59–64 (2014).
[85] Id at 59–64.
[86] Id.
[87] Not all traffic violations are crimes. See Woods, 62 UCLA L Rev 672 at 698 (cited in note 75) (stating that 22 states have decriminalized minor traffic offenses). One might read the Court's doctrine to provide that reasonable suspicion suffices for a routine traffic stop only if it pertains to a crime, where probable cause might be required when police suspect a non-criminal traffic violation. Compare *Navarette v California*, 134 S Ct 1683, 1687 (2014) ("The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of *criminal activity*.'") (emphasis added); and *United States v Arvizu*, 534 US 266 (2002) ("Because the 'balance between the public interest and the individual's right to personal security,' tilts in favor of a standard less than probable cause [for brief investigative stops of vehicles], the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that *criminal activity* 'may be afoot.'" (citations omitted; emphasis added)); with *Whren v United States*, 517 US 806, 810 (1996) (noting, in a case where the car stop was based on a civil traffic offense: "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). But in *Heien*, the Court cast doubt on this qualification when it said: "All parties agree that to justify this type of seizure [a traffic stop], officers need only 'reasonable suspicion'—that is, 'a particularized and objective basis for suspecting the particular person stopped' of *breaking the law*" (emphasis added). See also *Rodriguez v United States*, 135 S Ct 1609, 1615 (2015) ("A seizure for a traffic violation justifies a police investigation of that violation. '[A] relatively brief encounter,' a routine traffic stop is 'more analogous to a so-called "Terry stop" . . . than to a formal arrest." [citations omitted]).
[88] See id.
[89] *Schneckloth v Bustamonte,* 412 US 218 (1973).

power to play hunches, but the Court has instead rejected the relevance of the officer's subjective motivation.[90] Then, the Court compounded the problem by repeatedly making it easier to arrest the driver for the traffic offense,[91] which in turn triggers other powers to search the person and the car.[92] All of this gives police officers greater reason to use traffic offenses to play hunches or satisfy whim.

These points have been made before.[93] Indeed, the cynical response is to say that, because of these decisions, there is nothing at stake in *Heien*. If I am right that *Heien* is mostly about traffic stops and if police already have unfettered discretion to make traffic stops, then perhaps *Heien* cannot give police any more discretion. On this view, one would have commended the Court for candor had it overruled *Delaware v. Prouse*[94] and simply held that the Fourth Amendment permits police to stop any automobile without any individualized suspicion toward the driver or passengers (presumably justified as some kind of administrative or programmatic search[95]). Perhaps that acknowledgement of discretion would reconcile the law on the books with the law on the ground.

Yet the factual predicate is not quite true. Despite appearances, Fourth Amendment law does constrain traffic stops to some degree. The best evidence and perhaps the only good evidence for this point, however, *comes in cases that Heien effectively overruled*. *Heien* removed an important final limitation on police discretion, making it truer than ever that police possess the power to stop any and all motorists. Thus, there was something at stake for the rule of law in *Heien*.

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[90] See, for example, *Whren v United States*, 517 US 806, 813 (1996).

[91] In *Atwater v City of Lago Vista*, 532 US 318, 354 (2001), the Court rejected the claim that the police could not make a warrantless public arrest for a trivial, fine-only misdemeanor – the traffic offense of failing to wear a seat belt – committed in the officer's presence. In *Virginia v Moore*, 553 US 164 (2008), the Court said it was irrelevant to the Fourth Amendment that the police violated state statutory law when making an arrest because the state law did not authorize arrest for the particular crime.

[92] Under *United States v Robinson*, 414 US 218 (1973), given a valid arrest, the police can warrantlessly search the person of the arrestee, including any containers he possesses (except for a cell phone, which requires a warrant; see *Riley v California*, 134 S Ct 2473 (2014)). Under *Arizona v Gant*, 556 US 332 (2009), the police can search the vehicle of the arrestee if they have reason to believe it contains evidence of the crime of arrest. Moreover, in many cases, where there is a safety reason not to leave the car where it is, the police could impound the vehicle and expect some officer to conduct an inventory search of the car. See *Colorado v Bertine*, 479 US 367 (1987); *South Dakota v Opperman*, 428 US 364 (1976).

[93] See, for example, sources cited in notes 75, 76, and 78.

[94] 440 US 648 (1979).

[95] See, for example, Eve Brensike Primus, *Disentangling Administrative Searches*, 111 Colum L Rev 254 (2011).

To establish this point, the first step is to note that *virtually all the pre-existing cases raising the Heien issue were traffic cases.*[96] I found twenty-eight

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[96] These include eleven cases from the five federal circuits that had previously held against the rule that prevails in *Heien*, all involving traffic stops. See *United States v Miller,* 146 F 3d 274, 279 (5th Cir 1998) (non-existent offense of flashing a turn signal without turning or changing lanes); *United States v Lopez-Valdez*, 178 F 3d 282, 288–89 (5th Cir 1999) (non-existent offense of driving with a cracked tail light); *United States v McDonald,* 453 F 3d 958, 962 (7th Cir 2006) (non-existent offense of unnecessarily using a turn signal at a 90-degree curve of a continuous road); *United States v King,* 244 F 3d 736, 741 (9th Cir 2001) (non-existent offense of driving with a disability card hanging from rear view mirror); *United States v Lopez-Soto*, 205 F 3d 1101, 1106 (9th Cir 2000) (traffic stop based on the erroneous belief that the foreign jurisdiction licensing the car required an updated sticker on the license plate, which would then have made it an offense in Texas); *United States v Twilley*, 222 F 3d 1092 (9th Cir 2000) (traffic stop based on the erroneous belief that the foreign state licensing the car required two plates); *United States v Nicholson,* 721 F 3d 1236, 1244 (10th Cir 2013) (non-existent offense of turning left from one road into the rightmost side of the other road, when there were no road markers designating separate lanes); *United States v Valadez-Valadez*, 525 F 3d 987, 991 (10th Cir 2008) (non-existent offense of traveling a moderate amount below the speed limit without impeding traffic); *United States v Tibbetts*, 396 F 3d 1132 (10th Cir 2005) (traffic stop for possible violation of rules about size and position of mud flaps); *United States v DeGasso*, 369 F 3d 1139 (10th Cir 2004) (non-existent offense of using fog lights during a fog-less day and for an actual offense concerning the partial obscuring of the license plate); *United States v Chanthasouxat,* 342 F 3d 1271, 1279–80 (11th Cir 2003) (non-existent offense of having no inside rear view mirrors when there were side mirrors).

Another three cases from different circuits had occasion to endorse the holding of the above circuits – contrary to *Heien* – but found the search or seizure was not based on a mistake of law. These all involved traffic stops. See *United States v Coplin,* 463 F 3d 96, 101 (1st Cir 2006); *United States v Harrison,* 689 F 3d 301, 309 (3d Cir 2012); *United States v Booker,* 496 F 3d 717, 722, 724 (DC Cir 2007), *vacated on other grounds*, 556 US 1218 (2009).

Five state courts of last resort held that a mistake of law "*cannot* provide objective grounds for reasonable suspicion" and all were in the context of a traffic stop. See *Hilton v State,* 961 So 2d 284, 298 (Fla 2007) (non-existent offense of a cracked windshield that does not seem to impair safety); *State v Louwrens,* 792 NW 2d 649, 652 (Iowa 2010) (U-turn in the absence of a sign prohibiting them when the law required signage); *Martin v Kansas Department of Revenue,* 176 P 3d 938, 948 (Kan 2008) (non-existent offense of one of three brake lights not functioning when law required only two to work); *State v Anderson,* 683 NW 2d 818, 824 (Minn 2004) (non-existent offense not being two lanes away from a stopped emergency vehicle); *State v Lacasella,* 60 P 3d 975, 981–82 (Mont 2002) (non-existent offense of placing front license plate in windshield).

Of three Eighth Circuit cases and one D.C. Circuit case favoring the rule *Heien* later announced, all involved traffic stops. See *United States v Martin,* 411 F 3d 998, 1001 (8th Cir 2005) (non-existent offense of one of two brake lights being non-functional when the law only requires one); *United States v Washington,* 455 F 3d 824, 827 (8th Cir 2006) (non-existent offense of crack in windshield when law only required the absence of obstructions to one's view, which was not present); *United States v Smart*, 393 F 3d 767 (8th Cir 2005) (non-existent offense of not having a front plate when Iowa law allowed cars from other states to have only rear plates if the licensing state allowed only rear plates, as here); *United States v Southerland*, 486 F 3d 1355 (DC Cir 2007) (non-existent offense of displaying front license plate ion the front dashboard).

In addition to the North Carolina Supreme Court in *Heien*, five state cases favoring the rule that *Heien* later announced all involved traffic stops. See *Travis v State,* 959 SW 2d 32, 34 (Ark 1998) (Arkansas officer erroneously believed that Texas law

state and federal appellate cases that discussed the issue before *Heien* and twenty-seven of them concerned traffic offenses.[97] For example—remarkably—three of pre-*Heien* cases raising the issue involved the same kind of legal error that the police made in *Heien*, stopping someone for having one of multiple brake lights inoperative or cracked, when such trivial impairment violated no statute.[98] Other examples were where the police stopped someone for the putative infraction of signaling unnecessarily,[99] driving with a disability card hanging from the rear view mirror,[100] having only external rear view mirrors,[101] driving 10 miles below the speed limit without impeding traffic,[102] using fog lights during a fog-less day,[103] driving with a crack in the windshield that did not impair the driver's vision,[104] and for failing to dim one's lights at night immediately after being overtaken by another car traveling in the same direction.[105] In all of these cases, the officer had reasonable suspicion or probable cause for behaviors that violated no law. After *Heien*, the pattern persists; the many published cases applying its new rule are also overwhelmingly about traffic stops.[106]

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required a sticker showing an expiration date be placed on the license plate); *Moore v State,* 986 So 2d 928, 935 (Miss 2008) (officer erroneously believed that having only one operative tail light violated the law); *State v Wright*, 791 NW 2d 791, 798–99 (SD 2010) (officer erroneously believed that one must dim one's lights after being passed); *Stafford v State*, 671 SE 2d 484, 485 (Ga 2008) (parking in middle of street, where law was unclear); *City of Bowling Green v Godwin*, 850 NE 2d 698, 702 (Ohio 2006) (disobeying signs about what is not an exit, where signs might be invalid for not being approved by city council).

[97] The one non-traffic case I found involved a different highly discretionary crime – disorderly conduct – in the precise context where legality concerns are greatest – when the police officer was reacting to vocal criticism of his policing. See *In re T.L.,* 996 A 2d 805, 816 (DC App 2010) ("[A]n officer's mistake of *law*, however reasonable, 'cannot provide the objective basis for reasonable suspicion or probable cause' needed to justify a search or seizure.").

[98] See *United States v Lopez-Valdez*, 178 F 3d 282, 288–89 (5th Cir 1999); *Martin v Kansas Dep't of Revenue,* 176 P 3d 938, 948 (Kan 2008); *United States v Martin,* 411 F 3d 998, 1001 (8th Cir 2005); *Moore v State,* 986 So 2d 928, 935 (Miss 2008).

[99] See *United States v McDonald,* 453 F 3d 958, 962 (7th Cir 2006) (driver used a turn signal at a 90-degree curve of a continuous road).

[100] *United States v King,* 244 F 3d 736, 741 (9th Cir 2001).

[101] *Chanthasouxat,* 342 F 3d at 1279–80 (11th Cir 2003) (side mirrors were legally adequate).

[102] *United States v Valadez-Valadez*, 525 F 3d 987, 991 (10th Cir 2008).

[103] *United States v DeGasso*, 369 F 3d 1139 (10th Cir 2004) (also involving an actual offense concerning the partial obscuring of the license plate).

[104] *United States v Washington,* 455 F 3d 824, 827 (8th Cir 2006).

[105] *State v Wright*, 791 NW 2d 791, 798–99 (SD 2010).

[106] Of eighteen post-*Heien* published opinions I located that present a genuine *Heien* issue, fifteen involved mistakes of the law governing traffic: See *Williams v State*, 28 NE 3d 293 (Ind 2015) (non-existent offense of crack in brake light that let through some white light); *United States v Mota*, -- F Supp 3d --, 2016 WL 110527 (SD New York 2016) (non-existent offense of having the brake light in the middle of the rear window be inoperative, when the two rear lights were operative); *Darringer v State*, -- N.E.3d --, 2015 WL 7074714 (Ct App Ind 2015) (non-existent offense of placing interim license plate in rear window rather than rear bumper); *People v Gaytan*, 32 NE3d 641 (IL 2015) (non-

These cases, limited to federal and state appellate courts, are obviously only the tip of the iceberg; for every appellate court opinion involving police mistakes of criminal law, there must be scores or hundreds that do not produce an appellate opinion. And each of these cases represents an instance where the police stopped a motorist and, after the fact, prosecutors could assert no lawful basis for it, only a reasonable mistake of criminal law.

On reflection, this connection between police mistakes of law and traffic stops seems inevitable. First, the issue of police mistakes of law is most likely to arise with technical, *mala prohibita* offenses. Among regulatory offenses, police do not usually enforce those pertaining to food handling or the environment, but they do routinely enforce traffic regulations. And, as just explained, they have a powerful incentive to stop automobiles: to look inside the car for signs of criminality and to ask for consent to search. When police make mistakes of law, it is almost always about traffic rules. *Heien* facially stands for a general proposition – that reasonable suspicion can be grounded in a police mistake of law. In reality, *Heien* is yet another case about traffic regulation.

Where the state or lower federal courts had ruled that the error, even if reasonable, negated reasonable suspicion, the case served as an example in which

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existent offense of having trailer hitch partially obscure the license plate); *United States v Sanders*, 95 F Supp 3d 1274 (D Nevada 2015) (non-existent offense of having air fresheners hanging from rear view mirror); *State v Dopslaf*, 356 P.3d 559 (Ct App NM 2015) (non-existent U-turn violation); *People v Guthrie*, 30 NE 3d 880 (Ct App NY 2015) (stop sign violation where stop sign was not officially registered and therefore legally void; unclear if mistake of law or fact); *Freeman v Commonwealth*, 778 S.E.2d 519 (Ct App Va 2015) (non-existent violation of having an air freshener hanging from a rear view mirror); *State v Houghton*, 868 N.W.2d 143 (Wisc 2015) (non-existent violation of having air freshener and GPS device being visible in front windshield); *United States v Alvarado-Zarza*, 782 F3d 246 (5th Cir. 2015) (non-existent offense of failing to signal 100 feet before lane change; law required such signal only before turn); United States v Flores, 798 F3d 645 (7th Cir 2015) (non-existent violation of obstructing license plate when frame did not render any writing unreadable); *United States v Stanbridge*, 79 F Supp 3d 881 (C Dist Ill 2015) (traffic stop for not signaling at least 100 feet before pulling to a stop at the curb; court did not decide if law included such a requirement); *United States v Morales*, -- F Supp 3d --, 2015 WL 3869884 (D Kan 2015) (traffic stop for not signaling when merging from two lanes into one; court did not decide if law included such requirement); *State v Hurley*, 117 A3d 433 (Sup Ct Vermont 2015) (non-existent offense of windshield obstructions that do not impair driver's vision); *Village of Bayside v Olszewski*, 2016 WL 121398 (Ct App Wisc 2016) (traffic stop for crossing into pedestrian crosswalk at stop sign; in the alternative court found that any mistake was reasonable); *People v Campuzano*, 188 Cal Rptr 3d 587 (2015) (stop of bicyclist of non-existent offense of riding on sidewalk not in the vicinity of a business).

Just three post-*Heien* cases I located did not involve traffic stops. See *J Mack LLC v Leonard*, 2015 WL 519412 (S.D. Ohio, 2015), slip at 10 (mistake of law regarding legality of synthetic marijuana); *Flint v. City of Milwaukee*, 91 F Supp 3d 1032, 1058 (ED Wisc 2015) (mistake of law regarding state endangered species act); *United States v Diaz*, -- F Supp 3d --, 2015 WL 4879191 (SD NY 2015) (stop for violation of open-container law; court assumes without deciding that the law was not violated).

the Fourth Amendment was, in fact, offering some limit on police discretion to make traffic stops. Even though the police observed the car for some time, the government could offer no better reason for the stop than a reasonable mistake of law. We could infer from this failure that police actually had to incur some real cost to develop a legally sound basis for many pretextual stops they wished to make. The Fourth Amendment was serving rule-of-law values. Yet *Heien* now removes the constraint when the legal mistake is reasonable. The police are no longer limited by the scope of existing criminal statutes, however broad, but by the even broader boundaries of the aggregate set of all the reasonable interpretations of those statutes. The opinion is another incremental step toward the rule of persons.

B. Hypothetical Laws and Hypothetical Motives

Heien's expansion of discretion is even more damaging when we consider its interaction with *Whren v. United States*[107] and *Devenpeck v. Alford.*[108] *Whren* settled that the officer's motivation for a car stop was irrelevant under the Fourth Amendment because the stop is judged only on the facts that objectively appeared to the officer.[109] *Whren* also explains why the litigants and courts in *Heien* do not bother to discuss the possible racial profiling in the case – that would matter if Heien brought an Equal Protection claim, but not to the Fourth Amendment.[110]

Oddly, the *Heien* majority does not cite *Devenpeck*, which extends *Whren*, even though *Devenpeck* also involved a police error of law in the context of an automobile stop. The officer there arrested Alford for audio-taping his interactions with police, but a state appellate court had already "clearly established" that the privacy statute at issue did not apply to such taping.[111] So the police mistake of law was not reasonable. Yet the Supreme Court held that the arrest could be lawful because the officer was aware of *other facts* that provided probable cause that Alford had committed *a different crime* – impersonating a police officer – and it did not matter that the officer was not subjectively motivated to arrest on those grounds.[112] Indeed, given the Court's general emphasis on an objective perspective, it did not appear to matter whether the officer was even aware of the law prohibiting the impersonation of a police officer, merely knowledge of the facts.[113] Moreover, the Court explicitly held that

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[107] Whren v United States, 517 US 806 (1996).
[108] *Devenpeck v Alford*, 543 US 146 (2004).
[109] 517 US at 814.
[110] Id at 813.
[111] Id at 151 (citing *State v Flora*, 845 P 2d 1355 (Wash App 1992)).
[112] Id at 156 (remanding so that lower courts could consider whether there was probable cause, based on the facts known to the officer, to believe Devenpeck was guilty of impersonating a law-enforcement officer).
[113] See id at 152 ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest."). See

the crime that objectively justifies the arrest need not be "closely related" to the crime the officer invoked at the time of arrest (as the Ninth Circuit had required).[114]

What *Devenpeck* means is that the government lawyer assigned to defend an arrest is not limited by the officer's motivation for the arrest, but is free to examine the criminal code to find some crime the arrestee might have committed, as long as the facts known to the officer (or, as a practical matter, which the officer later claims to have known at the time) would constitute probable cause for that crime. The logic of *Devenpeck* applies to investigative stops as well as arrests, as several courts have held.[115]

Devenpeck and *Heien* have a troubling synergy. Suppose, for example, that a police officer parked on the side of the road watches a car approach with its fog lights on during a clear day and, once it passes, observes that one of the two brake lights is cracked. The officer stops the driver, issues the driver a ticket for the broken tail light, and asks for consent to search the vehicle for contraband. The driver consents, the officer finds cocaine, and the driver is arrested. The driver argues that the officer lacked reasonable suspicion for the stop because the law does not require more than one working brake light, an interpretation that is, let us assume, either obvious from the statute's unambiguous text or subsequent judicial interpretation. The officer's mistake of law is unreasonable and the government appears destined to lose.

As a fallback, however, suppose the state prosecutor elicits from the police officer the fact that he also noticed the fog light. If the fog light use violated the traffic code, *Devenpeck* already meant that the stop was valid. But now, under *Heien*, even if the fog light use did not violate the code, the stop is lawful if the police could reasonably have thought that it did. Given an ambiguously worded fog light regulation, *the stop is legal* even though the officer did not stop the motorist because of the fog light and the regulation did not forbid its use.

Indeed, under *Heien*, there is no reason to think that it matters whether the police officer actually believed the fog light statute prohibited the motorist's conduct, or even believed that a fog light regulation existed. One might mistake

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also id at 153 (An officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.").
[114] Id (finding the "closely related" limitation requires inquiry into officer's subjective motivation that is inconsistent with prior Supreme Court precedent).
[115] The Third Circuit cites *Devenpeck* for the proposition that "Reasonable suspicion and probable cause are determined with reference to the facts and circumstances within the officer's knowledge at the time of the *investigative stop* or arrest," and that "The arresting officer need not have contemplated the specific offense for which the defendant ultimately will be charged. The appropriate inquiry, rather, is whether the facts and circumstances within the officer's knowledge at the time of an *investigative stop* or arrest objectively justify that action." *United States v Laville*, 480 F 3d 187, 194 (3rd Cir 2007) (emphasis added). See also *United States v Wingle*, 565 Fed Appx 265, 268–69 & n 4 (4th Cir 2014) (unpublished).

the references in *Heien* to "the officer's mistake of law"[116] as implying that the officer must have had an actual belief that the law prohibited the suspect's conduct. But the majority rejects this view when it insists on the objective perspective that pervades Fourth Amendment doctrine, noting: "We do not examine the subjective understanding of the particular officer involved."[117] Justice Kagan concurs that "an officer's 'subjective understanding' is irrelevant."[118]

These statements were apparently made to fend off the concern that police reasonableness would be judged by what the individual officer knew of the law, in which case the government might gain power from an officer's unique ignorance. But the *Heien* opinions do not seem to realize that disregarding the officer's subjective beliefs also means that the holding applies even when the officer affirmatively believed that the law *permitted* the defendant's conduct. It is easy to miss the point if one ignores *Devenpeck*. But once *Devenpeck* permits government attorneys to defend searches and seizures for reasons other than those motivating the police officer, the question arises whether the officer's subjective belief about the law might constrain the government, allowing its lawyer to assert a reasonable mistake of law only when the police officer actually believed the law prohibited the defendant's conduct.[119] But no such limit exists.

To summarize, under *Devenpeck*, the objective factual and legal basis for reasonable suspicion is sufficient; the fact that the officer was not subjectively motivated to make the stop because of the fog light statute (the law ultimately used to justify the search) is irrelevant. Under *Heien*, its being reasonable to believe the statute prohibited the fog light used in this situation created reasonable suspicion for the stop; that the law did not actually forbid its use and that the officer did not actually believe that the fog light violated the law are irrelevant. *Devenpeck* already allowed a government lawyer defending a police action to roam creatively throughout the criminal code to find some crime for which there was probable cause or reasonable suspicion. *Heien* now adds the fact

[116] *Heien*, 135 S Ct at 536 (restating the holding as "Because the officer's mistake about the brake-light law was reasonable, the stop in this case was lawful under the Fourth Amendment.").
[117] Id at 539 (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).
[118] Id at 541. She goes one to say that, therefore, "the government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware . . . of the law." Id. But that just means that the government does not automatically win because the officer was unaware of the law, not that the government is limited to reasonable interpretations of statutes the officer of which the officer was actually aware.
[119] A similar issue arises in the exceptional cases where ignorance of law *is* a defense for those charged with criminal acts, such as reliance on official misstatements discussed in note 49. The Model Penal Code is clear that the defense requires an actual, subjective belief in the legality of one's conduct, in addition to the reasonableness of the belief. See MPC § 2.04(3)(b) (requiring "a belief"). Perhaps the Court could follow this approach in a future case, but the language from the opinion unequivocally disclaiming the relevance of the officer's "subjective understanding" rules out the approach for lower courts.

that the government lawyer is not limited to the crimes that the code actually creates.[120]

In practical terms, what would it be like to peruse a traffic code looking for plausible expansive meanings that retroactively justify stops? If the clever government lawyer knows the police officer stopped the car on a mere hunch, say, the racially loaded reason of "being in the wrong neighborhood," how hard will it be to use the *Devenpeck/Heien* stratagem of matching reasonable but non-motivating beliefs about facts to reasonable but erroneous interpretations of law?

Suppose, for example, police observed other vehicles ahead of the defendant's car before the stop and a statute commands that drivers shall not "follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."[121] One could use accident statistics to argue that the "reasonable and prudent" standard rejects the *customary* following-distance in favor of a far more generous distance, under which the vast majority of drivers are guilty of violating the statue. If a court has never previously ruled against this argument, its likely reasonableness would justify the stop, even if the court ultimately decides to read the "reasonable and prudent" standard as incorporating and affirming the customary following-distance.

Conversely, suppose there was traffic observed *behind* the defendant and a statute says that no one may "drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic."[122] Perhaps the prohibition means that a driver may not go *any* slower than the maximum speed limit if there are other drivers on the road behind her who are going the speed limit, and who will therefore need to slow down or pass. If a driver is obeying the speed limit, then the need to slow down or pass a slower moving vehicle does "impede" one's "normal and reasonable" movement. Even if this is wrong – and I assume that it is – *Heien* and *Devenpeck* let the prosecutor argue that the officer *would have been reasonable* for interpreting the somewhat ambiguous statute in this way. So the officer's observation that the driver was proceeding 5 miles under the speed limit could supply the reasonable suspicion for the stop, even though the officer had no concern over the speed and a court later decides that the speed does not violate the statute.

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[120] See *J Mack LLC v Leonard*, 2015 WL 519412 (S.D. Ohio, 2015), slip at 10 (combining *Heien* with *Devenpeck* to reason that a seizure of "synthetic marijuana" can be reasonable, even if based on a legal mistake that it was prohibited, if some statute could be reasonably understood to prohibit it, even if the seizing officer was not subjectively aware of the statute). But see *Flint v. City of Milwaukee*, 91 F.Supp.3d 1032, 1058 (E.D. Wisc. 2015) (rejecting a reasonable mistake of law claim, without considerable interpretive reasonableness, when the officer did not know the statute existed).
[121] The proposed example is inspired by the language of Illinois Vehicle Code, 625 ILCS 5/11-710 (2015).
[122] The language is from 625 ILCS 5/11-606.

In both examples, the prosecutor can successfully defend traffic stops without regard to either the actual motives of the police nor the actual legal rules. The government gets the benefit of hypothetical motives and hypothetical law.

C. Legal Development versus Legal Ossification

The extra discretion that *Heien* grants the government in traffic enforcement, as just described, might appear to be short term because, each time the prosecutor asserts some possible but erroneous statutory meaning, the courts will announce the meaning is erroneous. The prosecutor will win the case at hand if the possible meaning is reasonable, but lose the opportunity to use that interpretation again in the future. Once the court says that the interpretation is erroneous, it will never again be considered reasonable.

Yet there is no guarantee that the courts will ever rule that these reasonable interpretations are wrong. First, the criminal defendant may never litigate the statute's meaning. Second, the courts may never declare the statute's meaning.

Few, if any, criminal defendants will litigate about the meaning of a traffic offense if the only thing at stake is paying a minor fine. Before *Heien*, several courts reached the issue of whether probable cause or reasonable suspicion could be grounded in a reasonable legal mistake, and in these lower court opinions, the courts engaged in statutory interpretation and published an analysis of the meaning of a minor traffic offense. But in each of these cases, the police acquired evidence of more serious wrongdoing for which the motorist was now being prosecuted; the defendant's hope was to exclude the evidence the police obtained as the fruits of a Fourth Amendment violation and thereby avoid a serious penalty.[123]

Even in that situation, there was always some chance that a court might apply the good faith exception to the exclusionary rule, and refuse to exclude the evidence even if there was a constitutional violation.[124] But, pre-*Heien*, criminal defendants still sometimes won the exclusion remedy, which ensured an incentive to litigate. One reason is that fourteen states reject the good faith exception under state law.[125] Another reason is that the closest federal good faith

[123] See, for example, *United States v Miller,* 146 F 3d 274, 279 (5th Cir 1998) (traffic stop leading to prosecution of marijuana possession with intent to distribute); *United States v Lopez-Valdez*, 178 F 3d 282, 288–89 (5th Cir 1999) (traffic stop leading to prosecution for willfully transporting undocumented aliens); *United States v McDonald,* 453 F 3d 958, 962 (7th Cir 2006) (traffic stop leading to prosecution for felon in possession).
[124] *Davis v United States*, 131 S Ct 2419 (2011).
[125] This is done usually under the state constitution's equivalent to the Fourth Amendment. See *Heien*, 135 S Ct at 545 & n 2 (Sotomayor, J, dissenting) (listing state courts that do not recognize a good faith exception to the exclusionary rule as a matter of state law). North Carolina is one of the fourteen, so there was no good faith barrier to the exclusionary remedy, had the Court found a Fourth Amendment violation.

case -- *Davis*[126] -- is distinguishable, as previously suggested. In *Davis*, the police conducted a search in reliance on binding precedent of the relevant United States Court of Appeals. In cases like *Heien,* the police were not relying on binding precedent upholding a category of search, but on the objective reasonableness of the officer's legal belief, given the ambiguity in a statute that no court has previously interpreted. In *Davis*, the dissent worried about the disincentives the Court was creating for litigating Fourth Amendment claims, but the majority noted how limited the disincentive was – only to challenges arguing for the overruling of binding precedent. The stronger disincentive in cases like *Heien* offered a way of distinguishing *Davis.*[127]

After *Heien*, it no longer matters if *Davis* is distinguishable, and it no longer matters whether a state rejects a good faith exception to the exclusionary rule, because *Heien* has declared that there is no Fourth Amendment violation if the police were reasonable in believing the law reached the defendant's conduct, even if the courts ultimately say it did not. Where the statute is ambiguous, defendants expect to lose even if their interpretive view is vindicated. Of course, a mistake may be unreasonable. Yet often the statute is genuinely ambiguous – poorly drafted or drafted without any foresight of the current application – and any lawyer can see as much. This is the precise situation where judicial interpretation has the most value, yet here the attorney has no reason to expect a victory and therefore no reason to press the argument. When they clarify the law, appellate opinions are a public good, and public goods tend to be underproduced, so it is a particularly bad idea to undermine the incentives for their creation.[128]

As a result, it is entirely possible that the police could continue indefinitely to stop motorists based on an erroneous view of the law because no motorist has an incentive to litigate. The first to prove the police are wrong gets no remedial benefit other than to nullify a ticket, which is not sufficient to motivate appellate litigation. If the court ruled against the government's interpretation, subsequent motorists would benefit (because the interpretation is no longer reasonable once a court rejects it), but there will never be "subsequent" motorists because no one wants to go first. At the end of this Part, I document an example of this phenomena, where police ticketed motorists over a period of time for a non-existent traffic offense before a court finally ruled that the police were

[126] *Davis v United States*, 131 S Ct 2419 (2011).

[127] As explained above, if we translate the problem from police to the analogous situation of criminal defendants, *Davis* is similar to a defendant claiming a mistake of criminal law based on reasonable reliance on an official interpretation of the law afterward determined to be erroneous, which is frequently a defense. (See sources cited in note 49). *Heien* is similar to a defendant claiming a mistake of criminal law based on his reasonable misreading of the statute, which is usually not a defense.

[128] Other branches could clarify the law. But legislatures and state attorneys general are not likely to enact clarifying amendments or issue clarifying opinions, respectively, on a matter as mundane as the traffic code.

mistaken and the ruling occurred only because the defendant was trying to exclude evidence for a crime more serious than a traffic offense.

Even if a defendant does litigate about the meaning of the statute, the courts might not resolve the issue. When the statute is ambiguous, the court can always say that, *if* the police were wrong about the law, their interpretation is at least reasonable, which means the traffic stop was valid. This way of resolving the case – assuming without deciding that the police *are* wrong – does not resolve what the statute means, just what it plausibly could mean. Had *Heien* come out the other way, a court would have to decide whether the police were wrong on the law to determine the Fourth Amendment claim, but under *Heien*, courts can and will frequently simply say that, because the statute is ambiguous, the government wins. Since *Heien*, this has already happened several times.[129]

These issues about incentives to litigate have arisen many times in the Supreme Court. Whenever the Court cuts back on the remedy for a constitutional violation, the effect might be to stifle legal innovation as litigants will no longer have an incentive to advocate for a new legal rule. The Court addressed the point explicitly in *Davis*, discussed above, and *Pearson v. Callahan*, where it overruled the requirement created in *Saucier v. Katz* that courts decide the merits of a constitutional claim before deciding whether qualified immunity bars the remedy of damages.[130] But one could embrace *Pearson* and *Davis* and still find *Heien* wanting. In *Davis*, the Court rejected the argument that the good faith exception would "stunt" the development of the law of the Fourth Amendment, leaving it "ossified,"[131] partly on the ground that the purpose of the exclusionary rule was to

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[129] See, for example, the alternative reasoning employed in *United States v Stanbridge*, 79 F Supp 3d 881 (C Dist Ill 2015) ("In sum, if § 11–804 did apply and Stanbridge was required to signal at least 100 feet before pulling to a stop at the curb, his failure to do so was a violation of the Illinois Vehicle Code. If § 11–804 did not apply, Officer Bangert was reasonably mistaken in believing that it did. In either case, Officer Bangert had probable cause to initiate a valid traffic stop."); and *United States v Morales*, -- F Supp 3d --, 2015 WL 3869884 (D Kan 2015) (applying *Heien* without resolving whether ambiguous statute required signaling when two lanes merge into one: "this Court declines to decide whether Morales committed a traffic infraction. The result is the same whether the officer was right or wrong about the law;" court notes that officer testified he had "previously enforced" the law in these circumstances). See also *United States v Diaz*, -- F Supp 3d --, 2015 WL 4879191 (SD NY 2015) (applying *Heien* to uphold a search based on putative violation of open-container law by assuming without deciding that the law was not violated); *State v Dopslaf*, 356 P.3d 559 (Ct App NM 2015) (applying *Heien* to uphold search based on putative U-turn violation without deciding whether there was a violation).

[130] See *Pearson v Callahan*, 555 US 223 (2009), overruling *Saucier v Katz*, 533 US 194 (2001).

[131] See *Davis*, 131 S Ct at 2432 ("Davis also contends that applying the good-faith exception to searches conducted in reliance on binding precedent will stunt the development of Fourth Amendment law. With no possibility of suppression, criminal defendants will have no incentive, Davis maintains, to request that courts overrule precedent."); id at 2433 ("At most, Davis's argument might suggest that—to prevent Fourth Amendment law from becoming ossified—the petitioner in a case that results in

deter police from violating the Fourth Amendment, not to spur innovation in the law[132] – a point that does not apply in *Heien*, where the issue is not the remedy but the right. Given the reality of overcriminalization, the Fourth Amendment should strictly limit government to searches and seizures that are justified by the actual scope of broad or overreaching criminal statutes. And we should want to ensure innovation in the law, when it takes the form of clarifying and possibly narrowing the reach of those overly expansive statutes, thus advancing the rule-of-law value of constrained enforcement discretion.

The Court in *Davis* also said that any given judicial opinion rejecting a Fourth Amendment claim leaves the issue open for innovation in jurisdictions (such as another federal circuit, or another state) where the precedent is not binding. If innovation is valuable in a given context, one would expect some jurisdiction to condemn the search or seizure, creating a split in the circuits that the Supreme Court can resolve.[133] Here again, *Heien* presents a more serious problem. *Davis* will cause potential litigants to give up the legal argument only after someone in the same jurisdiction has lost the argument. *Heien* will cause potential litigants to give up *before the argument is ever made*. If the defense lawyer can see that the statute is ambiguous and there is a reasonable argument for the broader interpretation the prosecutor favors, there is no gain from proving that the prosecutor's interpretation is wrong. So courts never get the chance to say the prosecutor is wrong.

Pearson also presents a distinguishable concern. One reason the *Pearson* majority gave for disregarding *Saucier*'s concern with legal development is that qualified immunity is supposed to relieve governmental defendants of the burden not only of liability, but of expensive litigation. But *Saucier* had blocked what was often the simplest and cheapest way of resolving the suit: by ruling that qualified immunity would exist if there were a violation so that there is no need to decide if there is a violation.[134] *Pearson* also noted that *Saucier*'s rigid procedure violated the canon of constitutional avoidance, in which courts generally attempt to avoid reaching constitutional issues.[135]

Neither point applies in *Heien*. The point of the Fourth Amendment is not to relieve the state of litigation, but to protect the people's right to be secure against unreasonable searches and seizures. And the rule that *Heien* rejected – holding the government strictly accountable for mistakes of criminal law – would

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the overruling of one of this Court's Fourth Amendment precedents should be given the benefit of the victory by permitting the suppression of evidence in that one case.").

[132] Id at 2427 ("For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.").

[133] Id at 2433.

[134] *Pearson,* 555 US at 237.

[135] Id at 241.

require courts only to determine the meaning of state criminal statutes, which violates no canon of constitutional avoidance.

Thus, *Heien* uniquely erodes much of the incentive for litigants to contest the government's interpretation of criminal statutes and undermines the incentive for courts to resolve the correctness of that interpretation. In other words, *Heien* makes it likely that police officers can continue to enforce non-existent criminal prohibitions for a long time before any court declares their interpretation unreasonable.

D. The Analogy to the "Ignorance of Law" Maxim: The Court's Logical Error

For a final perspective on the tension between *Heien* and the legality value of constrained enforcement discretion, I turn to the ancient "ignorance of law" maxim of criminal law, a doctrine the Supreme Court has repeatedly embraced.[136] The Court recognized but rejected the analogy between citizen and police mistakes of criminal law. In the next section, I use the analogy to further illuminate *Heien*'s damage to governmental incentives to follow the rule of law. In this section, I simply address head-on the logical failures of the Court's efforts to avoid the analogy.

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[136] For the Court's adherence to the maxim, see *Bryan v United States*, 524 US 184, 193, 196 (1998) (applying "the background presumption that every citizen knows the law" and "the traditional rule that ignorance of the law is no excuse"); *United States v International Minerals & Chemical Corp*, 402 US 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."); *Reynolds v United States*, 98 US 145, 167 (1878) ("Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law."); *Barlow v United States*, 32 US 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."). Even when the Court recognizes an exception to the rule, it acknowledges the rule. See, for example, *Cheek v United States*, 498 US 192, 199 (1991) (noting that "[t]he general rule" – that "ignorance of the law or mistake of law is no defense to criminal prosecution" – "is deeply rooted in the American legal system").

For a sense of the age of the maxim, see Courtney Stanhope Kenny, *Outlines of Criminal Law* 68–69 (13th ed 1929); Ronald A. Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 Wm & Mary L Rev 671, 685 (1976). More generally, see 4 William Blackstone, *Commentaries on the Laws of England* at *26 (1765-1769); Matthew Hale, *Pleas of the Crown* at 42 (1680); Jerome Hall, *General Principles of Criminal Law* at 27–69 (Bobbs-Merrill Co 2d ed 1947); Oliver Wendell Holmes, Jr., *The Common Law* at 45–46 (Belknap Press, 2009); 2 James Fitzjames Stephen, *A History of the Criminal Law of England* at 94–95 (MacMillan 1883); Glanville Williams, *Criminal Law: The General Part* §§ 52-74 (Steven & Sons 2d ed 1961).

Criminal law is not the only area that treats legal mistakes as generally providing "no excuse." In torts, it is not generally a defense to say that one was reasonably mistaken about the law creating the tort the plaintiff is claiming. In property, there is no general defense to nuisance or trespass that one did not know the relevant law. The same is true in constitutional law and habeas litigation. See *Connecticut v Barrett*, 479 US 523, 531–32 (1987); *Bowles v Russell*, 551 US 205, 207–08 (2007).

For criminal law defendants, the mistake-of-law maxim survives even though it generates unfair results on occasion. For example, many criminal law courses teach the case of *People v. Marrero*, where a federal prison guard in Connecticut was convicted of a gun possession crime in New York.[137] "Peace officers" were exempt from the New York gun law and Marrero claimed that he was a "peace officer" under the statute. This position was strong enough to convince the trial judge and, on appeal, two more judges.[138] But three appellate judges ruled against him. So Marrero was not a peace officer.

Marrero then raised the fallback argument that he made a reasonable mistake of law in believing he was a peace officer and that he should be excused for it. This mistake was so reasonable as to meet the heightened standards of Justice Kagan, noted above, as it persuaded three of the six judges who heard the argument. Yet Marrero lost because the New York courts, including the Court of Appeals, read their statutes to follow the maxim, "ignorance of law is no excuse."[139] This was the general common law rule and is endorsed by the Model Penal Code.[140]

There has always been criticism of the maxim. In 1939, one commentator argued, against the maxim, that the law should recognize a defense in these circumstances: "If the meaning of a statute is not clear, and has not been judicially determined, one who has acted 'in good faith' should not be held guilty of a crime if his conduct would have been proper had the statute meant what he 'reasonably believed' it to mean," even if that turned out to be erroneous.[141] Notice how perfectly this proposal describes what the Court did in *Heien*, except that the context is not a defense against criminal liability but a limitation on the Fourth Amendment. The Court and courts generally continue to recognize the maxim, so why reach a different outcome in *Heien*?

The Court described and rejected the analogy in a passage I quote in its entirety:

> Finally, Heien and amici point to the well-known maxim, "Ignorance of the law is no excuse," and contend that it is fundamentally unfair to let police officers get away with mistakes of law when the citizenry is accorded no such leeway. Though this argument has a certain rhetorical appeal, it misconceives the implication of the maxim. The true symmetry is this: Just as an individual generally cannot escape criminal liability based on a

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[137] *People v Marrero,* 507 NE 2d 1068 (NY2d 1987).
[138] See *People v Marrero*, 94 Misc 2d 367 (NYS2d 1978), reversed by *People v Marrero*, 71 AD 2d 346 (NY2d 1979).
[139] *Marrero,* 507 NE 2d at 1069.
[140] See *Model Penal Code* § 2.02(9) (ALI 1962).
[141] Rollin M Perkins, *Ignorance and Mistake in Criminal Law*, 88 U Pa L Rev 35, 45 (1939).

> mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. If the law required two working brake lights, Heien could not escape a ticket by claiming he reasonably thought he needed only one; if the law required only one, Sergeant Darisse could not issue a valid ticket by claiming he reasonably thought drivers needed two. But just because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop. And Heien is not appealing a brake-light ticket; he is appealing a cocaine-trafficking conviction as to which there is no asserted mistake of fact or law.[142]

With due respect, this this analysis is facile and disappointing. Without saying anything about the rationales for the maxim, the Court merely identifies what it regards as the relevant counter-analogy: the requirement that an individual cannot be convicted of a crime based on the government's mistake of law. Heien could not be *convicted* just because the officer reasonably believed the law required two working brake lights, because the law actually does *not* require two working brake lights. So the officer's "ignorance of law" would be no "excuse" for convicting Heien. So far, so good. Then the Court says: "[J]ust because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop."[143]

Put aside the point that one cannot logically avoid an analogy between *A* and *B* merely by identifying an analogy between *A* and *C*.[144] The important matter is that the Court did not reject Heien's call for consistency; the opinion did not seek to justify treating the legal mistakes of government officials more indulgently than those of its citizens. Instead, the Court reasoned that the maxim applies only when the context is a criminal *prosecution*, whereas *Heien* concerned the distinct context of a criminal *investigation* (search and seizure).

Of course, this distinction simply raises rather than answers the question: If the government is not allowed to *convict* an individual based on a mistake of law, no matter how reasonable the mistake, why should it be allowed to *search and seize* the individual based on a reasonable mistake of law? And, here, the Court fails to follow through on its own logic. If, as the Court says, 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*. Figure

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[142] *Heien*, 135 S Ct at 540.
[143] Id.
[144] For example, just as ignorance of the law is generally no excuse to crime, the state cannot convict an individual of a crime (not even an attempt crime), merely because the individual mistakenly believes he is committing the crime. But that additional comparison does not rob the Court's own analogy of power, any more than the Court's analogy robs Heien's analogy of power. More than one analogy can be apt.

1 illustrates the four categories these distinctions create and – in the lower right – the new question they logically raise.

	Context of Criminal Liability	Context of Criminal Investigation
Govt Official Reasonable Mistake of Law	Irrelevant	Excusing (*Heien*)
Citizen Reasonable Mistake of Law	Irrelevant (the maxim)	*?*

Figure 1

Is the citizen's mistake of criminal law relevant in the investigation context? *Heien* didn't recognize the question, but surely the answer is no. No one thinks that a citizen's reasonable but erroneous belief that *X* was legal in any way affects the government's power to search or seize the citizen based on probable cause or reasonable suspicion that he did *X*. The government could deprive Marrero of liberty and property by imprisoning and fining him, despite his reasonable mistake of law; surely the government could search and seize based on probable cause (and if necessary a warrant) that he had committed a firearms offense, despite his reasonable mistake of law.

Thus, the Court's claim of consistency is false. After *Heien*, when the government searches and seizes, its reasonable legal mistakes excuse, while the citizen's mistakes *in the same investigatory context* do not. The government gains power from the reasonable legal mistakes of its agents, who can justify more searches than the actual law would justify, but citizens gain no power or immunity from government investigation from their reasonable mistake of law. In short, citizens get the actual law; government, a bit more. Figure 2 fills in the missing cell and highlights the one rule that is not like all the others – *Heien*.[145]

	Context of Criminal Liability	Context of Criminal Investigation
Govt Official Reasonable Mistake of Law	Irrelevant	*Excusing* (*Heien*)
Citizen Reasonable Mistake of Law	Irrelevant	Irrelevant

[145] We could add one more comparison. The *Heien* dicta discussed above says that police mistakes of Fourth Amendment law cannot justify a search or seizure, no matter how reasonable. Surely, the same is true of citizen mistakes of Fourth Amendment law – they could never invalidate a search or seizure no matter how reasonable. Again, the sole case in which parallelism breaks down is *Heien*.

Figure 2

E. The Analogy to the "Ignorance of Law" Maxim: The Court's Error in Practice

Moving from the logical to the practical, the real point of Heien's analogy to the mistake of law maxim was, surely, that the *rationale* in one domain might apply to the other. There is an area of law that has dealt with legal mistakes and has, for centuries, rejected claims of symmetry, treating legal mistakes as being fundamentally different from factual mistakes. So it is hasty for the Court to announce there is "no reason" to treat them differently in *Heien*, without pausing to consider *why* the criminal law, including the Court's own precedent,[146] treats them differently. Critics of the "ignorance of law" maxim would no doubt celebrate *Heien* if it could be read to reject the maxim. But *Heien* does not question the rule; it merely distinguishes its domain. The conceptual distinction *Heien* draws, however inadequate, makes it inevitable that lower courts will reject the claim that *Heien* is inconsistent with the maxim.

What are the reasons for the criminal law maxim? There is no simple agreement on the rationale, or even whether the maxim is justified in a modern society with a complex criminal code.[147] When criminal law was much simpler, it might be said that people already knew the law, so that claims of mistake were not credible, or that it was not worth sorting the tiny few that were credible from all the others that were not.[148] But that idea has become implausible. Because *mala prohibita* offenses densely regulate various realms, mistakes of criminal law are common and inevitable.[149] A second possibility is that that the system cannot afford the costs of determining what law the defendant knew.[150] That point, however, is not convincing, given that the *mens rea* requirement

[146] See sources cited in note 136.
[147] For recent critiques of conventional doctrine, see Douglas Husak, *Mistake of Law and Culpability*, 4 Crim Law and Philos 135 (2010); Edwin Meese III and Paul J. Larkin, Jr, *Reconsidering the Mistake of Law Defense*, 102 J Crim L & Criminology 725 (2012).
[148] See, for example, *Cheek*, 498 US at 199 (stating that the maxim regarding ignorance of criminal law is "[b]ased on the notion that the law is definite and knowable"); 4 Blackstone, *Commentaries* at *27 (cited in note 136. Hall and Seligman tie this point to the vagueness doctrine, saying that it invalidates the only statutes that would fail to give fair notice and justify a mistake of law. See Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U Chi L Rev 641, 667 (1941).
[149] See Meese & Larkin, 102 J Crim L & Criminology at 738–748 (cited in note 147).
[150] See, for example, *Barlow v United States*, 32 US 404, 411 (1833) (explaining that the principle that mistake of law is not an excuse "results from the extreme difficulty of ascertaining what is, bonâ fide, the interpretation of the party"); 4 Blackstone, *Commentaries* at *46 (cited in note 136); 1 John Austin, *Lectures on Jurisprudence* 480–83 (Robert Campbell 5th ed 1885).

frequently requires the determination of very complex questions about what facts the defendant knew.[151]

A third possibility is simple deterrence, that citizens are more likely to learn the law, which would make them more likely to obey the law, if they have no hope for a mistake of criminal law defense.[152] There is a lot one could say to against this rationale, from general arguments against deterrence to arguments that strict liability deters no better than negligence liability, under which we would recognize a reasonable mistake of criminal law defense. Especially because there are exceptions of the "ignorance is no excuse" maxim, it seems strange to expect the maxim to motivate citizens to know the law when they might not even know of the maxim.

Nonetheless, the rationale of deterrence makes much more sense for police than it does for criminal defendants. The Court claims that its decision "does not discourage officers from learning the law" because it "tolerates only reasonable mistakes" and does not depend on "the subjective understanding of the particular officer involved."[153] Yet police mistakes of law seem far more deterrable that citizen mistakes because police are part of a professional organization that must, by necessity, train its personnel to know the law. Police departments are part of a municipal government that may be liable for constitutional violations caused by its failure to train its operatives.[154] Viewed from this professional and institutional framework, rather than naïvely focusing on the failures of the individual officer, the less forgiving the law is for mistakes of law, plausibly the more these institutions will invest in training to avoid mistakes.[155] If a legal instructor for a metropolitan police force discovers that the

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[151] See Oliver Wendell Holmes, *The Common Law* 47–48 (cited in note 136); Meese & Larkin, 102 J Crim L & Criminology at 749–55 (cited in note 147). Yet another possibility is that one can be blamed for not knowing the law, so it cannot provide a defense. Yet even if it is a sufficient basis for criminal liability, it seems unlikely that ignorance of law deserves being treated as blameworthy a crime as committing the criminal conduct knowing it is against the law. See Meese & Larkin, 102 J Crim L & Criminology at 759 (cited in note 147).

[152] See Holmes, *The Common Law* at 47–49 (cited in note 136). See *Barlow v United States*, 32 US 404, 411 (1833) (referring to "the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public. There is scarcely any law, which does not admit of some ingenious doubt; and there would be perpetual temptations to violations of the laws, if men were not put upon extreme vigilance to avoid them.").

[153] *Heien*, 135 S Ct at 539.

[154] See *Monell v New York Department of Social Services,* 436 US 658 (1978); *City of Canton v Harris*, 489 US 378, 390 (1989).

[155] Law and economics identifies a different advantage of the strict liability rule that *Heien* rejects in favor of a negligence rule for police mistakes of law. Unlike negligence, strict liability creates optimal incentives for "activity levels." See Steven Shavell, *Strict Liability versus Negligence*, 9 J Legal Stud 1, 2 (1980). As a standard example goes, optimal driving requires not only the optimal care in the *manner* of driving, but also the optimal *amount* of driving; given that even careful driving carries a risk of accident, it is inefficient for an individual to drive at all, even carefully, when the social risks exceed the

ambiguous language of a criminal statute does not support the nonetheless reasonable interpretation common to officers in the force, on the basis of which they make stops and searches, there was an incentive before *Heien* to tell the officers of the legal constraint.[156] After *Heien*, it would be malpractice of a sort for the instructor to voice his or her concern, given that the police will not violate the Fourth Amendment by relying on their interpretation until some court rejects it.

Nor is there any reason to focus exclusively on police departments. One of the most blatant errors in *Heien* is the failure to note this simple point: a police mistake of law is jointly caused by the conduct of two branches of government: the executive officials – police – who misinterpret the criminal law and the legislature that creates the law that is misinterpreted. If the police misinterpretation is reasonable, then it is nearly inevitable that the legislature did a poor job of drafting the statute, i.e., that the legislature made a drafting mistake that was not reasonable. One branch or the other was sloppy; *the government* as a whole is almost by definition "unreasonable" in stopping or arresting an individual based on a mistake of law. A reasonable legislature writes criminal statutes clearly enough to allow reasonable police officers to know what the law is.

One of the common arguments for textualism, as a method of statutory interpretation, is "its ability to stimulate legislators to perform their functions better, as by drafting statutes more precisely."[157] The idea is that the more attention the courts pay to legislative text, refusing to rescue the legislature from the plain meaning of its poor drafting, the more attention the legislature will pay

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driver's private benefits. Negligence liability is generally insensitive to activity levels, but strict liability gives an individual the incentive to minimize the activity to optimal levels. Applying this logic to the Fourth Amendment, strict liability would prod government to minimize the quantity of searches to the optimal point where the ex ante benefits of the search exceed the risk of searching the innocent (the equivalent to an accident). This is another reason to favor holding government strictly liable for its agents' mistakes of law.

[156] Admittedly, with qualified immunity to damages and good faith exceptions to the exclusionary rule, the instructor's incentive before *Heien* was weak. But if the Court meant to say that *Heien* did not undermine the incentive for police to learn the law because its prior decisions had already reduced that incentive to zero, it should have said so. To the contrary, a general concern for exclusion of evidence can motivate accuracy in the legal instruction of police officers.

[157] William N. Eskridge, Jr, *The New Textualism*, 37 UCLA L Rev 621, 677 (1990) ("Hence, Justice Scalia seems to argue, if Congress is aware that its statutes will be read with a strict literalism and with reference to well-established canons of statutory construction, it will be more diligent and precise in its drafting of statutes."). See also Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 333 (Harvard 2008), Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 Harv L Rev 4, 47 (2009) ("Increasing the number of textualist votes by one percent would then increase legislative incentives to draft responsibly by one percent.").

to legislative text, aligning the plain meaning with its intent. Justice Scalia is famously associated with this view.[158]

The argument for courts holding legislature's "feet to the fire" when interpreting statutes applies with at least equal force to the context of *Heien*. The Court's decision rescued the North Carolina legislature from the effect of its drafting sloppiness. There was nothing ineffable about prescribing the number of brakes lights on a car that must be functioning. It would have been easy enough to have drafted a clear statute. So the legislature did a bad job, but *Heien* allocates the loss not on the legislature or any part of government, but on the citizen who is stopped for being suspected of something that is perfectly legal. Borrowing a simple idea from economics, if we want to avoid governmental errors, the Court should have assigned the "loss" from such errors to the government.

Presumably, the response to this argument is, again, to point back to the Court's good faith analysis in the exclusionary rule context. The Court said in *Illinois v. Krull* that the purpose of the remedy it to deter police violations of the Fourth Amendment, not to deter legislative violations.[159] But that reasoning was always limited to the particular remedy of exclusion, not to the content of the Fourth Amendment rights themselves. When we decide whether a search or seizure is reasonable, the question is whether the government's action, *taken as a whole*, is reasonable. In this analysis, there is no reason to ignore the unreasonableness of the legislative authorization of the police to search and seize under a statute that is so badly drafted that professional enforcers can't be expected to ascertain its meaning. As much as textualism wants to encourage clear legislative drafting, we should want the Fourth Amendment not to reward poor drafting by excusing searches and seizures based on an avoidable mistakes of law.

Now consider a final (non-standard) rationale for the ignorance of law maxim: to maintain the incentives for the development and clarification of law. In particular, if the criminal law statute is ambiguous, there is significant social value in using litigation to clarify the law. But if the criminal defendant can raise

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[158] See, for example, *United States v Taylor*, 108 S Ct 2413, 2424 (1988) (Scalia, J, concurring in part) (stating that statutory interpretation should be conducted "in a fashion which fosters that democratic process"); *Finley v United States*, 109 S Ct 2003, 2010 (1989) (Scalia, J) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 51 (West 2012) ("The [textual] canons . . . promote better drafting. When it is widely understood in the legal community that, for example, a word used repeatedly in a document will be taken to have the same meaning throughout . . . you can expect those who prepare legal documents competently to draft accordingly.").
[159] 480 US 340, 350 (1987).

a mistake of criminal law defense to avoid conviction, then the courts need not decide what the statute actually means.

In *Marrero*, for example, the defendant lost his legal argument that he did not commit the offense because he was a "peace officer" entitled to carry a firearm. But if it had been established beforehand that reasonable mistakes of criminal law were a defense, it would have been easier for the court to avoid deciding the substantive legal issue. A judge could instead reason that the statutory definition of peace officer was ambiguous and that no prior precedent clearly established that a federal corrections officer from out of state was not a peace officer. Thus, Marrero would be entitled to prevail without deciding whether he was a peace officer. The court could, of course, reach the merits if it wished, but it would not need to.

Where the court renders a decision without reaching the merits, the rest of society loses the clarification of the law. Indeed, the expectation of losing to the reasonable mistake argument may deter a prosecutor from ever bringing the charge that could clarify the law. If the right answer is that Marrero was not a peace officer, the only way to be certain that issue is decided is to prosecute him in a regime where ignorance of law is no defense.

There is more going for this law development rationale than is immediately apparent. Consider that the ignorance of law maxim has always exempted mistakes of civil law.[160] The issue arises most commonly in connection with the meaning of "property of another" in theft prosecutions. [161] A criminal defendant who mistakenly believed the property he took was not the property of another has a defense, even if the source of his error is not a fact, but the legal rule of property, such as when the law recognizes personal property as being abandoned or as becoming part of the real property. The fact that the ignorance of law maxim does not apply to these mistakes suggests that there is a distinction between the mistake of criminal and civil law.

The law development rationale explains why. A defense of mistake of criminal law will interfere with legal clarification in a way that a defense of mistake of civil law will not. If, for example, the term "peace officer" in New York's statute is not clarified in a prosecution brought under that statute, then it will not be clarified (unless by coincidence it occurs, and has the same meaning in, some other statute). By contrast, if a criminal statute refers to "property of

[160] Although I term this exception one for "mistakes of civil law," others have described it differently. See Gerald Leonard, *Rape, Murder, and Formalism: What Happens if we Define Mistake of Law?,* 72 U Colo L Rev 507, 537 n 88 (2001) (citing secondary literature using terms such as "different-law mistake," mistake of "non-penal law," mistake of "private law," etc.). See also Model Penal Code § 2.04(1) (ALI 1962).
[161] See, for example, *R v Smith (David Raymond)* 1 All E R 632 (1974). See generally Glanville Williams, *Criminal Law* at 320–27 (cited in note 136) (reviewing cases finding a "claim of right" defense to larceny where the claim is based on a misunderstanding of the law of property).

another," it is clearly borrowing from another area of law; the law of property will decide the meaning of that term. We do not need criminal litigation to clarify its meaning; civil disputes over property will be sufficient.

The law development rationale can also explain the *Heien* dictum, discussed above. The Court distinguished between different kinds of legal mistakes the police can make, a mistake of criminal statutory law, like the one in *Heien*, and a mistake of Fourth Amendment law, saying that reasonable mistakes of the latter sort are never a valid basis for a search or seizure.[162] Neither the majority nor concurrence explained this distinction.[163] One might suppose that we should more readily attribute to police the knowledge of their state's criminal law, *the law it is their job to enforce*, than knowledge of federal constitutional law.

Yet the law development gives a simple justification. If the police were excused for making a mistake of Fourth Amendment law, so long as the mistake was reasonable, then litigants would have little incentive to raise a Fourth Amendment argument in any unresolved area. Consider, for example, the Court's recent innovation in *California v. Riley*,[164] holding that a search incident to arrest of a cell phone found in the possession of the arrestee required a warrant (or warrant exception other than search incident doctrine). Before *Riley*, police officers were plainly reasonable in thinking that the standard search-incident doctrine, allowing warrantless searches of containers found on arrestees, applied to cell phones.[165] If, accordingly, there was no Fourth Amendment violation in that case, a litigant would have no incentive to raise the issue – even if the Court were prepared to say that, in future cases, it would apply a new and contrary rule requiring a warrant. In general, courts would have less incentive to resolve close issues when they could just resolve the case by holding that, because the police view of the Fourth Amendment law was reasonable, there was no Fourth Amendment violation.

Similarly, the law development rationale can explain one distinct category of legal mistakes that deserved the Court's indulgent treatment. In quite a few pre-*Heien* cases, the officer in one jurisdiction made a mistake of criminal law

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[162] *Heien*, 135 S Ct at 539; id at 541, n 1 (Kagan, J, concurring).

[163] There is a precedent for an analogous distinction in *Cheek v United States*, 498 US 192 (1991). In *Cheek*, the Court recognized an exception to the ignorance of law maxim when the defendant's mistake concerned tax law, id at 204–05, but then refused to extend the exception to Cheek's mistakes of constitutional law, id at 205, where he claimed to believe that the tax laws were unconstitutional. The Court said that the constitutional claims were "of a different order" than the statutory ones. Id. Like *Heien*, however, *Cheek* did not offer much reason for treating mistakes of constitutional law more harshly than mistakes of statutory law.

[164] *Riley v California*, 134 S Ct 2473, 2485 (2014).

[165] See *United States v Robinson*, 414 US 218, 235 (1973).

from another jurisdiction[166] – and those mistakes, unlike the one in *Heien*, *should* have been excused. For example, many states make relevant the law of other states by requiring the vehicle to display the license plate(s) as is required in the jurisdiction that issued the plate. So state *A* excuses a vehicle from state *B* from complying with the license plate requirements of state *A*, but does require, as a matter of the law of state *A*, that the driver from state *B* comply with the license plate requirements of state *B*. In a number of cases involving this scenario, the officer from state *A* made a mistake about the law of state *B*, stopping a car for, say, not having a front plate, when the other jurisdiction's law did not require a front plate.

Under either plausible rationale for the ignorance of law maxim -- deterrence and law development -- the officer's error should be excused in this situation. It is less important to motivate the police to know the law of another jurisdiction, and there is no good reason for one jurisdiction to worry about the law development in another jurisdiction. The courts of state *B* will resolve ambiguities in the statutes of state *B* when their own drivers contest tickets or stops. There is no great need for the courts of state *A* to contribute to this development, nor would the rulings of state *A* courts be authoritative.

To return to the legal issue in *Heien*, this analysis actually reveals a new argument for the Court's result, one unrecognized in the opinion. One could simply say that the judicial cases that will resolve the meaning of the brake light rule in North Carolina are the cases where someone disputes the ticket received for having only one working brake light. Traffic courts can clarify traffic rules. By contrast, Heien was prosecuted for possessing cocaine, and seeks to suppress the cocaine under the Fourth Amendment exclusionary rule. Arguably, we do not need cocaine cases to hone the meaning of the brake light rule. Yes, they are both criminal law, but the meaning of the brake light rule is "collateral" to the law determining the cocaine offense. So we could excuse the officer's mistake of traffic law in all cases except those directly litigating the traffic offense, and get the clarification we need.

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[166] See *United States v Lopez-Soto*, 205 F 3d 1101, 1106 (9th Cir 2000) (traffic stop based on the erroneous belief that the foreign jurisdiction licensing the car required an updated sticker on the license plate, which would then have made it an offense in Texas); *United States v Twilley*, 222 F 3d 1092 (9th Cir 2000) (traffic stop based on the erroneous belief that the foreign state licensing the car required two plates); *United States v Smart*, 393 F 3d 767 (8th Cir 2005) (traffic stop based on uncertainty what foreign jurisdiction licensed the car and whether it required a front as well as rear license plate); *United States v Southerland*, 486 F 3d 1355 (DC Cir) (traffic stop based on mistake about whether the foreign licensing the car permitted the front license plate to be displayed on the front dashboard); *Travis v State*, 959 SW 2d 32, 34 (Ark 1998) (traffic stop because Arkansas officer erroneously believed that Texas law required a sticker showing an expiration date be placed on the license plate).

The contrary argument is obvious and, I think, more compelling. The law development argument should be grounded in reality, not formalism. Drivers rarely hire a lawyer to contest a simple traffic ticket into the appellate courts. It is much cheaper to pay the ticket, and while people will sometimes litigate for principle over money, traffic tickets are not usually the place for grand gestures. That is the reason that nearly all these police mistake of law cases involve criminal defendants facing more serious charges litigating the statutory issue. If we want the courts to clarify traffic offenses and thereby limit police discretion, we will need to rely on cases where something larger is at stake, as a criminal defendant seeking to exclude evidence of a more serious crime obtained in a stop that was unjustified under the correct reading of the traffic law.

The point is empirical and contestable. As some evidence for my view, however, consider the Eleventh Circuit's decision in *United States v. Chanthasouxat*, where a traffic stop for "for failure to have an inside rearview mirror" resulted in the discovery of a large amount of cocaine.[167] The traffic code did not actually require an interior rear-view mirror, so the van's side mirrors were sufficient. The government argued, however, that the officer's belief that the van was in violation of the law was reasonable because he had relied on advice from a city magistrate and his police training.[168] Amazingly, the government also contended the belief was reasonable because the officer had previously written "more than 100 tickets for this 'violation.'"[169]

In other words, a single officer had written over a hundred tickets for a non-existent offense and those drivers had apparently paid the tickets or suffered the consequences for not paying tickets, before this case occurred. I previously noted how American courts have abandoned common law crime creation, but here is evidence that, for a recent span of time, there existed in the State of Alabama *executive crime creation*. And the incentive for the litigant who finally put an end to it was not the desire to avoid a traffic ticket; it was the exclusion of evidence of a drug charge. The Eleventh Circuit agreed that the officer's "mistake of law was reasonable under the circumstances," but held that no mistake of law, "no matter how reasonable or understandable," can "provide reasonable suspicion or probable cause to justify a stop."[170] If, instead, *Heien* had been the law before 2003, it is likely that no one would have ever challenged the police officer's interpretation (and possible courts would have avoided the issue when they did) and those officers would today still be stopping motorists and writing tickets today for a non-existent offense. What would we conclude about

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[167] *Chanthasouxat,* 342 F 3d at 1272. There is another example in the same state. In JDI v State, 77 So 3d 610 (Ala Crim App 2011) the Court held that "Alabama state law does not prohibit driving a vehicle with a cracked windshield," id at 616, but the officer testified that "he routinely stopped cars with cracked windshields." Id at 612.
[168] Id at 1279.
[169] Id.
[170] Id.

adherence to the rule of law in another nation in which police routinely stopped motorists and issued tickets for non-existent offenses?

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In the aggregate, the breadth and depth of traffic regulations probably give police as much discretion to stop drivers as some unconstitutionally vague loitering laws would have given police to stop pedestrians. There is no easy constitutional solution to the problem of excess discretion, but one should at least avoid crafting other legal doctrines in a manner to make the problem worse. Unfortunately, *Heien* does make matters worse, granting police more traffic enforcement discretion when they already have too much. *Heien* empowers government attorneys to defend traffic stops by scanning the criminal code for hypothetical interpretations of traffic regulations that would justify the stop, undermines the incentives of municipalities and police forces to train individual officers in the strict limits of the traffic laws, damages the incentives of criminal defendants to challenge expansive and erroneous interpretations of the traffic laws, diminishes the incentives of courts to decide the issue when it is raised, and weakens the incentives of legislatures to avoid statutory ambiguity in the first place. Having law enforcement stop people and ticket them for non-existent offenses is an embarrassment to the rule of law. That the stops are constitutional is even worse.

III. The Rule of Law, *Heien*, and the Problem of Fair Notice

The other rationale for the vagueness doctrine, also an important matter for the rule of law, is that citizens are entitled to fair notice of what the law prohibits. The Supreme Court has repeatedly stated the constitutional importance of fair notice to Due Process. Indeed, one might say that the "ignorance of law" maxim makes it all the more important that statutory language is sufficiently clear to provide notice, given that we take the statutory notice as being fully sufficient per se.[171] Fair notice has survived as a formulation of constitutional value despite being somewhat formalistic, in that the notice required is satisfied by the mere publication of a criminal statute and most

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[171] Hall and Seligman say that the vagueness doctrine invalidates statutes that would fail to give fair notice and justify a mistake of law. See Hall and Seligman, *Mistake of Law and Mens Rea*, 8 U Chi L Rev 641, 667 (1941). Packer, *The Limits of the Criminal Sanction*, at 85 (cited in note 9) and Jeffries, 71 Va L Rev at 207-8 (cited in note 6) articulate how the discussion of fair notice feels fictional because citizens do not check statute books before deciding to commit crimes, which is why each emphasizes the other legality rationale – constraining enforcement discretion. Nonetheless, notice is a useful value both because government should avoid criminal liability that is genuinely surprising (see, for example, *Lambert v People of the State of California*, 355 US 225 (1957)) and because notice is a good proxy for whether the statute sufficiently limits enforcement discretion.

citizens (including most criminals) do not spend time parsing such texts. And, of course, even if they do, reasonable misinterpretations of the text are generally no excuse for violating the law. But the idea of fair notice still makes sense as a minimal kind of procedural formalism, a regularity of process that imposes a restraint on government power, partly as a protection against genuinely surprising government coercion, partly as a proxy for when the legislature has reasonably constrained enforcement discretion.

That fair notice is a constitutional value does not mean it always prevails. But *Heien* is, however implicitly, a surprising repudiation of its importance. Section *A* describes the basic inconsistency between notice and *Heien*. Section *B* illustrates that inconsistency by focusing on another case from last term.

A. The Rule of Lenity and a New Rule of Severity

Nothing in the vagueness doctrine, nor in *Heien*, implies that North Carolina's poorly drafted brake light statute is unconstitutionally vague. One of the few black letter principles of the vagueness doctrine is that vagueness is evaluated based, not just on statutory text, but on subsequent judicial interpretation, including narrowing construction to save the statute.[172] Once the North Carolina appellate decision held that the state brake light statute required only one working brake light, no ambiguity remained. Moreover, if a simple dichotomous uncertainty about whether the statute required one or two functioning brake lights were sufficient to render the statute unconstitutional, then a large fraction of all criminal statutes would be unconstitutional, which is surely not the case.

The result is an ugly double standard: 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. One expects the Court to work at strengthening the rule of law by creating at least the appearance of equal treatment for the government and the governed, but *Heien* expresses greater solicitude of government agents. If we are to distinguish the issues – citizen and police notice of law – one would more sensibly expect it to work in the opposite direction. Knowledge of the criminal law falls within the employment responsibilities of police officers; they need to know the law in order to enforce it. Citizens generally do not have jobs requiring them to acquire comprehensive knowledge of the parameters of criminal law. So how can the legislature be providing citizens with sufficient "fair notice" of its criminal prohibitions if the meaning of a statute is so ambiguous that we cannot even expect law enforcement officers to get the law right?

Here, we reach another one of the most important but overlooked features of the *Heien* reasoning. Legality and the vagueness doctrine are not just about

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[172] See, for example, *Boos v Barry*, 485 US 312, 329–30 (1988); *Village of Hoffman Estates v Flipside, Hoffman Estates*, 455 US 489, 494, n 5 (1982).

whether a statute is sufficiently clear to permit conviction and punishment. They also require that individuals have fair notice for how to avoid giving government enforcers cause to subject them to techniques of coercive *investigation* – searches and seizures. This is why Packer ties legality to limiting the power, not just to punish crime, but "to call conduct *into question* as criminal, with all the destruction of human autonomy that this power necessarily imports."[173] Even if a criminal code were fair and clear and the courts employed a fair and accurate process, citizens would still face a nightmarish police state if the police were insufficiently constrained, i.e., if the stated law did not affect the circumstances of an arrest or search, which depended instead on the whim of an officer.[174] However imperfectly we achieve the goal, the standard account of legality is that citizens should have fair notice of how not to be treated by the state as a criminal, which includes how not to be stopped, arrested, and searched, as well as how to avoid conviction and punishment. This goal is all the more important when the criminal codes contains a multitude of fine-only offenses, where the arrest and search are far worse than the actual criminal punishment.[175]

Of course, there is no way to live one's life without risking a police encounter that may involve a search or seizure. One might look like the description of a recent perpetrator. Or one might need to "break into" one's own car or house and give the appearance of being a car thief or burglar. But one cannot even begin to take into account what actions may *appear* suspicious if one does not have fair notice of what the law prohibits. To the extent practical, the citizen wants fair notice of the criteria for arrest and search. A driver wants to know how to drive in such a lawful way that police have no grounds for a stop. *Heien* moves us further away from that goal.

One way to measure the failure of *Heien* on this score is to contrast the opinion with the rule of lenity: the rule that, in the interpretation of criminal statutes, courts should resolve ambiguity in favor of the defendant.[176] The Supreme Court appears to give less weight to lenity than in the past, but the Court still recognizes lenity as relevant at least where the text has more than one plausible meaning and the other canons of construction do not clearly resolve which one is best.[177] State courts continue to give lenity more weight.

The origin of the doctrine is in a very particular context of English criminal law, where courts sought doctrines to ameliorate the harshness of criminal sanctions.[178] The modern rationale is that we ensure notice by erring on

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[173] Packer, *The Limits of the Criminal Sanction* at 94 (emphasis added) (cited in note 9).
[174] Compare id at 93 ("A good definition of a police state would be a system in which the law enforcers were allowed to be the judges of their own cases").
[175] See, for example, Malcom M. Feeley, *The Process is the Punishment* (1992).
[176] See id; see also Solan, 40 Wm & Mary L 57 (cited in note 10).
[177] See, for example, *Yates v United States*, 135 S Ct at 1091 (relying on lenity to give narrow interpretation to meaning of "tangible thing").
[178] See Jeffries, 71 Va L Rev at 189 (cited in note 6).

the side of construing the statute too narrowly rather than too broadly.[179] Lenity creates a kind of clear statement rule: if the legislature wants to prohibit something, it should say so clearly in the statute,[180] thereby giving the citizen fair notice.

Heien implicitly repudiates the rule of lenity in favor of a *rule of severity.*[181] Under *Heien*, if a criminal statute reasonably bears two meanings, the police are free to search and seize based on the broader interpretation, the one that disfavors the defendant. If the statute can be read as requiring merely one working brake light or requiring two, then the police can lawfully stop the car on the broader assumption that it requires two until a court interprets the statute to

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[179] See *McBoyle v United States*, 283 US 25, 27 (1931) (Holmes, J). Another possibility is that the rule serves "a libertarian purpose of limiting the reach of criminal statutes . . . as well as the structural purposes of ensuring legislative primacy in the drafting of criminal statutes." See Michael Coenen, *Spillover Across Remedies*, 98 Minn L Rev 1211, 1233 n 77 (2014). Regarding the latter, see Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L Rev 885, 887 (2004) (arguing that lenity "compels legislatures to detail the breadth of prohibitions in advance of their enforcement, and . . . compels prosecutors to charge crimes with enough specificity to indicate to voters -- and juries -- what conduct has been treated as criminal.").

[180] See William N. Eskridge, Jr, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale LJ 331, 413–14 (1991) ("[F]ew of the clear statement rules are as sensible as the rule of lenity.").

[181] Justice Scalia used this term to make a parallel point when administrative agencies claim *Chevron* deference for their interpretations of penal statutes. See *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984). In *Crandon v United States*, 494 US 152 (1990), he wrote an opinion concurring in the judgment (and joined by Justices O'Connor and Kennedy) in which he stated that "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to [*Chevron*] deference." Id at 177. Justice Scalia noted that the context – giving advice to governmental employees – was one in which the Justice Department naturally erred on the side of being overinclusive. As a result, "to give persuasive effect to the Government's expansive advice-giving interpretation of [the statute] would turn the normal construction of criminal statutes upside-down, *replacing the doctrine of lenity with a doctrine of severity.*" Id at 178 (emphasis added).

More recently, in a statement respecting a denial of certiorari in *Whitman v United States*, 135 S Ct 352 (2014), Justice Scalia (joined by Justice Thomas) reiterated his opposition to judicial deference to administrative interpretations of penal statutes. Such deference, he said, "collide[s] with the norm that legislatures, not executive officers, define crimes." Id at 353. He continued:

> The Government's theory that was accepted here would . . . upend ordinary principles of interpretation. The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants. Deferring to the prosecuting branch's expansive views of these statutes "would turn [their] normal construction ... upside-down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v United States*, 494 US 152, 178 (1990) (Scalia, J, concurring).
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> [The provision of] "fair warning" to would-be violators . . . is not the only function performed by the rule of lenity; equally important, it vindicates the principle that only the legislature may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy.

Id at 353–54.

say otherwise. Since *Heien*, the Illinois Supreme Court has explicitly embraced this reasoning[182]: having found an ambiguity in the statute defining a license plate obstruction, it choose to apply the rule of lenity to adopt the narrower interpretation (that did not apply to an object, like a trailer hitch, that is not directly attached to the license plate). But the Illinois court nonetheless upheld under *Heien* a car stop based on the broader and erroneous view of the statute *because* its need to resort to the canon of lenity supported the reasonableness of the officer's legal mistake.[183] Putting aside the fact that the police might be expected to know, in a general sense, even the rule of lenity, the *Heien* Court never explains why the lenity regime governs convictions but the severity regime governs searches and seizures. The Court does not even seem to recognize it is creating a disparate rule of severity and offers "no reason" that leniency should not apply to both settings.

One might try to distinguish between the interpretation of the statute for purposes of conviction and the interpretation for purposes of searches and seizures, but it is difficult to see what the argument would be. One might say that searching and seizing is not as serious a power as that of convicting and punishing, but certainly sometimes the reverse is true, when the authorized punishment is trivial (a fine only) but the search or seizure is very intrusive (arrest and temporary detention). In any event, the rule of law is general: if government powers should be limited by the law government creates, the limit should apply to all of its coercive powers, or at least to the seriously coercive ones, which searches and seizures certainly are. That is why they appear in the Bill of Rights.

B. The Puzzling Combination of *Heien* and *Johnson*

In the usual run of cases, vagueness challenges fail except in two instances: where the law regulates or arguably regulates speech and when the law involves vagrancy, loitering, or similar crimes of "being suspicious." In all other contexts, the inevitability of ambiguity means that the Court will ignore it. We might explain this rule of thumb by noting (1) the special importance of free speech,[184] and the dangers of chilling speech through the uncertain application of

[182] See *People v Gaytan*, 32 NE3d 641 (2015). See also US v Flaven, 2015 WL 2219779 (D. Nev.) ("Although the ambiguity in the statute might favor Defendant in the context of a citation for an illegal lane change due to the rule of lenity, the ambiguity favors the Government in the context of a Fourth Amendment challenge.") (citing *Heien*).
[183] Id. at 652-52.
[184] See *Goguen*, 415 US at 573 ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); *Grayned v Rockford*, 408 US 104, 109 & n 5 (1972) (explaining the special import of the vagueness doctrine in a First Amendment context); see also Ronald D.

law, and (2) that statutes that prohibit loitering create a particularly intense problem of arbitrary and discriminatory enforcement.[185] The rest of the criminal law has ambiguity, but doesn't present one of these special problems.

In this last term, however, the Court decided a case that departed from the ordinary pattern. *Johnson v. United States*[186] struck down, as unconstitutionally vague, the residual clause of the Armed Career Criminal Act, a law that provides a sentence enhancement for the commission of certain crimes, with an ambiguous catch-all provision.[187] Six justices voted for the vagueness holding, while Justices Kennedy and Thomas concurred in the judgment on statutory grounds; Justice Alito dissented. Justice Scalia's majority opinion dutifully cited the twin rationales of the vagueness doctrine, that excessively vague statutes deny fair notice and invite arbitrary and discriminatory enforcement.[188]

Yet the opinion never attempts to connect the faults it found in the statute – the difficulty of interpretation – to the vagueness rationales. There is no attempt to describe any defendant, past or future, being unfairly surprised under the statute, nor any arbitrary or discriminatory enforcement that might arise, much less any innocuous behavior that would be chilled by this statutory ambiguity. The ordinary source of arbitrary enforcement – police – is not present here because prosecutors, not police, control the use of sentencing statutes. Prosecutors have unchallenged discretion to decline prosecutions, to accept plea bargains, and to make sentencing recommendations[189]—discretion that surely swamps what the ACCA gave them. And it is not clear why the ACCA, however confusing, provides less notice than other poorly drafted or technically convoluted statutes, such as the law of the federal sentencing guidelines. The

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Rotunda and John E. Nowak, 5 *Treatise on Constitutional Law* § 20.8–.9 (West 4th ed 2009).

[185] See Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Law*, 83 Cal L Rev 379, 393–94 (1995) ("Vagueness and overbreadth challenges to loitering laws have received this special treatment. Although loitering is not expressly protected by the First Amendment, it is conduct affecting free speech and free movement, and, when engaged in by two or more persons, borders on the rights of association and assembly.").

[186] 135 S Ct 2551 (2015).

[187] The ACCA raises the penalty for a violation of 18 U.S.C. § 922(g) to a minimum of 15 years and a maximum of life. 18 U.S.C. § 924(e)(1); see *Johnson*, 135 S. Ct. at 2555.

[188] Id at 2556–57 (citations omitted).

[189] When the Supreme Court upheld the trial-penalty sentence (a higher sentence for refusing to plea bargain) in *Bordenkircher v Hayes*, 434 US 357 (1978), for example, it was not troubled by the fact that the prosecutor had the discretion whether to charge Hayes under the Kentucky Habitual Criminal Act, which carried a life term for an offense that, without the Act, carried a maximum of ten years. See also *Ewing v California*, 538 US 11 (2003) (upholding life term under three-strikes law where prosecutor had discretion over whether "wobbler" crime was treated as felony triggering the life term or misdemeanor that did not).

opinion simply ignores these difficulties. Justice Scalia's opinion contents itself to describe how confused its ACCA law had become.

Large pockets of law are, for a time, confused and unpredictable, but we cannot generally live with a standard that declares such law unconstitutional. Consider the felony murder rule. State law often treats a killing that would otherwise be manslaughter or no crime as a murder, which dramatically affects the sentence, because the killing occurs in the course of an independent and "inherently dangerous" felony.[190] Courts struggle over whether to judge inherent dangerousness from the perspective of the statute alone or the facts of the particular case, or something in between.[191] Courts also struggle over whether the felony is "independent" of the killing or "merges" with it, especially killings from assaultive behavior.[192] The resulting cases are famously tangled, confused, and counter-intuitive, as much as the prior ACCA cases. But before *Johnson*, the idea that a felon could claim that the felony murder rule was void for vagueness would be treated as laughable. We would have assumed that it was fully sufficient to give the individual fair notice of the definition of the underlying felony and fair notice of the general parameters of the felony murder rule.

Within the law of vagueness, *Johnson* is therefore a surprising victory.[193] The result may be defensible, but it is a deep puzzle to me how the five Justices who joined both the vagueness holding in *Johnson* and the majority in *Heien*[194] were able to detect concerns about fair notice and arbitrary enforcement in the former case, where they were subtle at best, and not in the latter case, where they were substantial and serious. *Johnson* was explicitly a vagueness challenge, while *Heien* was not. Yet the vagueness doctrine has always been justified by the need for fair notice and constrained enforcement discretion, both of which were surely relevant in *Heien*. A cynic might observe that the decision in *Johnson* will save the federal courts further struggle to make sense out of the badly drafted ACCA, while *Heien* will make it easier for federal courts to avoid the trouble of

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[190] See Guyora Binder, *Felony Murder* 254 (Stanford 2012).
[191] See Evan Tsen Lee, *Why California's Second-Degree Felony Murder is Now Void for Vagueness*, 43 Hastings Const LQ 1 (2015).
[192] See, for example, *People v Robertson*, 95 P 2d 873 (2004).
[193] See Peter W. Low and Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 Va L Rev 2051, 2109 (2015) (offering a novel account of the vagueness doctrine, one that supports *Johnson*, but noting that "*Johnson* remains an unusual decision. It is rare that federal statutes are declared void for vagueness rather than construed . . . in a manner that will save them from that fate.").
[194] Justice Sotomayor dissented in *Heien* and Justice Alito dissented in *Johnson*. Justices Kennedy and Thomas joined both decisions but concurred in the judgment in *Johnson* on statutory grounds, not joining the vagueness holding. The remaining five justices held both that the ACCA was unconstitutionally vague for failing to give notice and/or failing to constrain discretion, but that the Fourth Amendment does not limit police to searches and seizures based on the actual criminal law.

interpreting ambiguous traffic statutes.[195] There is certainly some symmetry in that.

Conclusion

Heien is a setback for the rule of law. Conceptually, *Heien* errs by focusing its analysis entirely on police officers. A search or seizure based on a mistake of law is the joint result of executive and legislative action, and the reasonableness of the police implies the unreasonableness of the legislature. Viewing 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.

Doctrinally, *Heien* is in tension with the Court's precedent concerning the ignorance of law maxim, the rationales of the vagueness doctrine, and the rule of lenity. One cannot avoid the analogy to the maxim merely by noting that individuals may not be convicted based on a reasonable police (or prosecutorial) mistake of law. The correct parallel to a police mistake of criminal law in the context of searches and seizures is a suspect's mistake of criminal law in the same context. We would never say that police have violated the Fourth Amendment based on the suspect's reasonable but erroneous view of the criminal law; by the same logic, we should not say that police have complied with the Amendment because of their own reasonable but erroneous view of the criminal law. If this analogy is imperfect, it is only because there is a weaker case for excusing police mistakes of law when it is the very law they are tasked with enforcing.

Heien is inconsistent with the principle of legality, the most important component being that the discretion of law enforcers is limited by the law; the police may enforce only previously declared prohibitions. Legality is not just about limiting government power to convict and punish individuals for crime, but also about limiting government coercion for the purpose of investigating crime, i.e., searches and seizures. In vagueness cases, the Court has proclaimed the constitutional value of controlling law enforcement discretion, but *Heien*'s nearly exclusive effect is to grant extra discretion to police in a domain, traffic enforcement, where they already have too much. *Devenpeck* previously established that police are not judged by the motives they actually have for using coercive power; *Heien* adds that police are not judged by the limit of actual law, but by the broader set of possible reasonable interpretations of the law. The Court's vagueness doctrine also proclaims the importance of fair notice to criminal prohibitions, yet *Heien* implies that a criminal statute can provide citizens with constitutionally sufficient notice even though it is so ambiguous that we cannot expect law enforcement officers to get the law right.

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[195] Compare with Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 Duke L J 1 (2015).

Finally, *Heien* creates incentives for a variety of actors, all of them bad. By excusing the legal errors of the government but not the governed, *Heien* diminishes the incentives of legislatures to draft traffic laws precisely enough to avoid error. Even if the limitation of *Heien* to "reasonable" police errors does not give municipalities the incentive to make their police wholly ignorant of the law, the decision nevertheless undermines the incentives to carefully train officers in the limits of the traffic laws. Combined with *Devenpeck*, *Heien* encourages police to give free range to their inarticulable hunches when making car stops, because government lawyers have wide latitude to find, ex post, a reasonable basis for the stop, should it be litigated. And, yet, because the law is no longer dispositive of the Fourth Amendment issue, *Heien* damages the incentives of litigants and lower court judges to challenge and resolve, respectively, the statutory ambiguities that create error.

One might have predicted that the *Heien* case would have unified conservatives and liberals, traditionalists and libertarians, originalists and common law constitutionalists, to produce a lopsided win for the simple proposition that government, being the creator of law, is limited in power by the law it creates. If one accepts the simple principle that government coercion, including the power to search and seize its population, is limited by the actual law, one would never regard governmental mistakes of law as symmetrical to governmental mistakes of fact. Instead, the Court recognized as reasonable under the Fourth Amendment a category of searches and seizures aimed at enforcing non-existent criminal prohibitions. I suspect this is less because the Justices reject the rule-of-law principles I have articulated than that they somehow failed to notice that they were squarely at stake in the case. The rule of law demands better.