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ARTICLES

The Harms of *Heien*: Pulling Back the Curtain on the Court's Search and Seizure Doctrine

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In Heien v. North Carolina*, the Supreme Court held that individuals can be seized on the basis of reasonable police mistakes of law. In an opinion authored by Chief Justice Roberts, the eight-Justice majority held that the Fourth Amendment's prohibition of "unreasonable" seizures does not bar legally mistaken seizures because "[t]o be reasonable is not to be perfect." Concurring, Justice Kagan, joined by Justice Ginsburg, emphasized that judicial condonation of police mistakes of law should be "exceedingly rare." In a solo dissent, Justice Sotomayor fairly "wonder[ed] why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question."*

This Article provides the first empirical study of state and lower federal court cases applying Heien *(from the day it was decided in mid-December 2014 through mid-June 2023). Of the over 270 cases examined, a large majority (over two-thirds) deemed unlawful police seizures reasonable, belying Justice Kagan's expectation that such cases would be "exceedingly rare." Moreover, the*

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study makes clear that Heien *is being applied well beyond the context in which it arose—an auto stop for a suspected equipment violation. Courts regularly rely on* Heien *to justify unlawful stops for a broad array of other, often more serious offenses and to justify unlawful arrests of individuals, far more significant intrusions on physical liberty that allow officers to conduct searches. Courts also forgive police mistakes of law regarding Fourth Amendment doctrine, such as the contours of consent and the permissibility of warrantless blood draws. Finally, the study demonstrates that courts lack any consistent analytic rubric for assessing whether a police mistake of law is reasonable, including the critically important foundational question of who (judges, laypersons, or police) should serve as the benchmark "audience" when assessing whether a mistake of law is reasonable.*

In addition to exploring the study's results, the Article uses Heien *to assess the adverse real-world consequences of what would appear an uncontroversial decision by a near-unanimous Court.* Heien *not only augmented the already troublingly expansive police discretionary authority to seize individuals without warrants; it also significantly undermined the rule of law and undercut separation of powers. By condoning police mistakes of law, the Court at once weaponized statutory ambiguity for use against citizens and encouraged rational ignorance among police, lessening their incentive to learn the scope of the laws they enforce.*

INTRODUCTION

In *Heien v. North Carolina*, the Supreme Court held that individuals can be seized on the basis of reasonable police mistakes of law.[1] The Fourth Amendment's prohibition of "unreasonable" seizures, Chief Justice Roberts wrote in a brief opinion for the eight-Justice majority, affords officers leeway because "[t]o be reasonable is not to be perfect."[2] Justice Kagan, joined by Justice Ginsburg, concurred in full but emphasized that a law must be "genuinely ambiguous" and "so doubtful in construction" that reasonable judges would disagree on its meaning, such that condoning mistakes should be "exceedingly rare."[3] Justice Sotomayor, in her solo dissent, condemned the Court's holding in principle, expressed concern over its "murky" standard for determining when a mistake of law is reasonable,[4] and warned of the decision's negative "human consequences."[5] "One is left to wonder," she wrote, "why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question."[6]

While *Heien* has been widely condemned on its doctrinal merits,[7] this Article provides the first empirical study of state and lower federal court cases applying *Heien* since it was decided (an eight-year period from December 14, 2014, through June 14, 2023). Of the over 270 cases relying on *Heien* to resolve mistake of law challenges, a considerable majority (sixty-seven percent) deemed police mistakes of law reasonable, belying Justice Kagan's expectation that judicial findings of reasonable mistakes would be "exceedingly rare." Moreover, the study makes clear that *Heien* is being applied well beyond its factual context, an unlawful vehicle stop based on an alleged equipment violation, to a broad variety of other, often more serious offenses and to justify unlawful arrests of individuals, far more intrusive seizures that allow officers to conduct searches. *Heien* is also being applied to forgive police mistakes of law regarding Fourth Amendment doctrine, such as

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1. 574 U.S. 54 (2014).
2. *Id.* at 60.
3. *Id.* at 70 (Kagan, J., concurring) (internal quotation marks omitted).
4. *Id.* at 79 (Sotomayor, J., dissenting).
5. *Id.* at 74.
6. *Id.* at 79.
7. *See, e.g.*, George M. Dery III & Jacklyn R. Vasquez, *Why Should an "Innocent Citizen" Shoulder the Burden of an Officer's Mistake of Law?* Heien v. North Carolina *Tells Police to Detain First and Learn the Law Later*, 20 BERKELEY J. CRIM. L. 301, 310–32 (2015); Kit Kinports, Heien*'s Mistake of Law*, 68 ALA. L. REV. 121, 154 (2016); Richard H. McAdams, *Close Enough for Government Work?* Heien*'s Less-Than-Reasonable Mistake of the Rule of Law*, 2015 S. CT. REV. 147, 148.

the permissibility of consent and warrantless blood draws. Finally, the study demonstrates that courts lack any consistent analytic rubric for assessing whether a police mistake of law is reasonable, including the critically important foundational question of who (judges, laypersons, or police) should serve as the benchmark "audience" when assessing whether a mistake of law is reasonable.

Although *Heien* might be regarded as simply another manifestation of the Court's inclination to defer to the discretionary authority of police, forgiving police for their legal errors when exercising that discretion is playing out in many problematic ways. Most problematic, *Heien* has resulted in a significant augmentation of the already enormous discretionary authority police have to seize individuals without warrants. Before *Heien*, police had reason to refrain from seizing an individual when they were unsure of the scope of a law for fear that any evidence secured would be excluded. After *Heien*, they have strong strategic reason to proceed in the hope that a court will later condone their mistake and allow the evidence to be used, very often in support of a "bigger" case (such as one involving guns or drugs). Moreover, by empowering police to determine the coverage of laws, *Heien* significantly undermined the rule of law, effectively allowing statutory ambiguity to be weaponized against citizens and encouraging rational ignorance among police, who have less incentive to understand the laws they enforce. Finally, *Heien* undercut separation of powers, both by providing police (not legislatures) authority to determine the scope of laws and by condoning ambiguous laws, which removes the incentive for legislatures to clarify provisions and avoid statutory ambiguity in the first instance.

Heien, in short, serves as a compelling case study of the problematic consequences that can flow from a single decision within the Supreme Court's expansive Fourth Amendment jurisprudence. The Article proceeds as follows. Part I summarizes *Heien*. Part II discusses the results of the eight-and-a-half year study period, highlighting *Heien*'s problematic applications and the varied approaches taken by courts in applying its nebulous reasonableness standard. Part III explores the problematic broader effects of *Heien*, focusing in particular on its significant augmentation of the already expansive police authority to seize individuals without warrants, as well as its undermining of the rule of law and undercutting of separation of powers.

I. *HEIEN V. NORTH CAROLINA*

Heien grew out of a morning traffic stop in April 2009 when a county sheriff observed a Ford Escort with a driver who appeared "very stiff and nervous."[8] After the sheriff followed the car for a few miles, he observed that only one, not two, of the car's rear brake lights illuminated when it approached a slower traveling vehicle.[9] Believing that the car violated a state law requiring two operable brake lights, the sheriff pulled over the vehicle.[10] He then issued the driver a warning ticket and asked for consent to search after his suspicions were further aroused because the driver appeared nervous, a passenger (Heien) remained sprawled across the back seat, and the two men provided conflicting answers regarding their destination.[11] Heien, the owner of the vehicle, consented to the search, which revealed a sandwich bag containing cocaine.[12]

After the trial court rejected his motion to suppress, Heien pled guilty to attempted drug trafficking. The North Carolina Court of Appeals reversed his conviction, finding that the vehicle stop was "objectively unreasonable" under the Fourth Amendment because, contrary to the sheriff's belief, it read the law to require only one operable brake light.[13]

On appeal to the North Carolina Supreme Court, the government elected not to challenge the lower court's interpretation of the vehicle code, so the court assumed that no traffic violation had occurred.[14] Nevertheless, the court reversed by a vote of 4-3, finding that the sheriff's mistake of law was reasonable because while the relevant subsection of the vehicle code used a singular term in three places, another subsection required that "all 'originally equipped rear lamps' " must be operable.[15] The court concluded that the reasonable suspicion needed to justify a traffic stop does not require "omniscien[ce]" on the part of police; officers can make "a mistake of law, yet still act reasonably."[16]

By an 8-1 margin, the U.S. Supreme Court agreed. Writing for the majority, Chief Justice Roberts began with the proposition that "the

8. 574 U.S. at 57.
9. *Id.*
10. *Id.*
11. *Id.* at 58.
12. *Id.*
13. *Id.* at 59.
14. *Id.*
15. State v. Heien, 737 S.E.2d 351, 358–59 (N.C. 2012), *aff'd*, 574 U.S. 54 (2014).
16. *Id.* at 356, 358.

ultimate touchstone of the Fourth Amendment is 'reasonableness,' " averring that "[t]o be reasonable is not to be perfect."[17] Noting that the Court had previously condoned searches and seizures based on reasonable mistakes of fact,[18] the majority saw mistakes of law as "no less compatible with the concept of reasonable suspicion."[19] Officers in the field, the Chief Justice reasoned, deserve a margin of error for the often "quick decision[s]" they must make when they " 'suddenly confront' a situation in the field" where the "application of a statute is unclear—however clear it may later become."[20] With respect to how courts are to assess whether a mistake is objectively reasonable, the Court stated that the analysis should not "examine the subjective understanding of the particular officer involved."[21] Further, the Court explained that the standard is "not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation."[22] An officer, the Court proclaimed, "can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."[23]

Applying its framework, the Court had "little difficulty" in concluding the sheriff's mistake of law was reasonable.[24] This was because the vehicle code used both the singular and plural forms of the word "lamp" and state appellate judges in the *Heien* litigation disagreed on whether the law required one or two operable brake lamps.[25] Furthermore, Heien's case marked the first time state appellate courts had interpreted the provision.[26]

In a concurring opinion, Justice Kagan, joined by Justice Ginsburg, agreed that an objectively reasonable mistake of law can justify a traffic stop and that the sheriff's mistake was reasonable.[27] Justice Kagan wrote separately to "elaborate briefly on th[e] important limitations" in the Court's ruling,[28] emphasizing two points. First, echoing the majority, Justice Kagan stated that an officer's "subjective

17. *Heien*, 574 U.S. at 60 (quoting Riley v. California, 573 U.S. 373, 381 (2014)).

18. *Id.* at 61.

19. *Id.*

20. *Id.* at 66.

21. *Id.*

22. *Id.* at 67. Qualified immunity protects officials from civil liability when they have acted without violating "clearly established" legal rights that a reasonable person would have known about. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (per curiam) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

23. *Heien*, 574 U.S. at 67.

24. *Id.*

25. *Id.* at 68.

26. *Id.*

27. *Id.* at 68 (Kagan, J., concurring).

28. *Id.* at 69.

understanding" of a law is irrelevant: "[T]he government cannot defend an officer's mistaken legal interpretation on the ground that the officer was unaware of or untrained in the law."[29] Moreover, an officer cannot rely on "an incorrect memo or training program from the police department" because such "considerations pertain to the officer's subjective understanding of the law and thus cannot help to justify a seizure."[30] Second, like the majority, Justice Kagan emphasized that the objective reasonableness test is less generous than that used to determine qualified immunity; the law at issue must be " 'so doubtful in construction' that a reasonable judge could agree with the officer's view."[31] A statute must be "genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work,"[32] and judicial findings of objectively reasonable police mistakes of law "will be 'exceedingly rare.' "[33]

Justice Sotomayor alone dissented,[34] aligning herself with the view of the vast majority of state and lower federal courts before *Heien* finding police mistakes of law per se constitutionally unreasonable.[35] Justice Sotomayor wrote that the majority's "reasonableness as touchstone" maxim "simply sets the standard" for determining the constitutionality of police seizures—not for determining whether an officer's "understanding of the law" is a relevant "input into the reasonableness inquiry."[36] "What matters," Justice Sotomayor asserted, is "the rule of law—not an officer's conception of the rule of law, and not even an officer's reasonable misunderstanding about the law, but the law."[37] After noting what she saw as the untoward "human consequences" of forgiving police mistakes of law,[38] Justice Sotomayor warned that the Court's guidance on determining reasonableness would "prove murky in application."[39] As discussed in the next Part, her words were prescient.

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29. *Id.*

30. *Id.* (quoting State v. Heien, 737 S.E.2d 351, 360 (N.C. 2012) (Hudson, J., dissenting)).

31. *Id.* at 70 (quoting The Friendship, 9 F. Cas. 825, 826 (C.C.D. Mass. 1812) (No. 5125)).

32. *Id.*; *see also id.* (quoting oral argument of the U.S. Solicitor General that the statute must "pose a 'really difficult' or 'very hard question of statutory interpretation' "); *id.* at 71 (a statute must pose "a quite difficult question of interpretation").

33. *Id.* at 70 (quoting brief of Respondent North Carolina and oral argument of the U.S. Solicitor General).

34. *Id.* at 71 (Sotomayor, J., dissenting).

35. *See id.* at 74 n.1 (noting that "[e]very other Circuit to have squarely addressed the question has held that police mistakes of law are not a factor in the reasonableness inquiry" and five state supreme courts addressing the question were in accord).

36. *Id.* at 71.

37. *Id.* at 72.

38. *Id.* at 74.

39. *Id.* at 79.

II. STUDY RESULTS

Utilizing a common empirical research method, judicial content analysis,[40] the study first identified state and federal court cases citing *Heien* during the eight-and-a-half year period since it was decided on December 15, 2014. To gain a sense of the real-world impact of *Heien*, both published and unpublished Westlaw decisions were examined. The study excluded multiple cases not involving application of *Heien* to a mistake of law, such as those citing *Heien* to support a broader legal proposition (e.g., that an auto stop can be based on reasonable suspicion of a legal violation).[41] The study also excluded applications of *Heien* beyond its constitutional context (e.g., whether an officer misunderstood an aspect of substantive Fourth Amendment doctrine).[42]

Ultimately, 276 cases were identified and analyzed.[43] The data allow for the following findings.

A. General Findings

TABLE 1: FINDINGS

	Investigative Stops[44]	Arrests[45]	**Total**
Cases Finding a *Reasonable* Mistake of Law	159	25	**184** (67% of cases)
Cases Finding an *Unreasonable* Mistake of Law	82	10	**92** (33% of cases)

As the foregoing suggests, judicial findings of reasonable police mistakes of law are not, as Justice Kagan anticipated in her concurring opinion, "exceedingly rare"; they are more than twice as common as

40. *See, e.g.*, Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 64 (2008); Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051, 2070 (2007); David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1734–35 (2009).

41. *See, e.g.*, United States v. Miranda-Sotolongo, 827 F.3d 663, 666 (7th Cir. 2016) (citing *Heien* for the proposition that a traffic stop can be based on reasonable suspicion).

42. *See, e.g.*, United States v. Elliott, 522 F. Supp. 3d 1051, 1053 (E.D. Okla. 2021) (invoking *Heien* to address the constitutionality of a warrantless blood draw).

43. To avoid "double-counting," if a decision was appealed, only the final appellate result was included in the study.

44. Involving stops of motorists and nonmotorists.

45. Cases challenging searches incident to arrest revealing evidence or contraband, federal civil rights actions alleging wrongful arrest.

instances of unreasonable mistakes. Moreover, it is worth noting that the study's results likely significantly understate the actual impact of *Heien*. This is because the cases gathered do not reflect instances of guilty pleas not resulting in a judicial decision, where the government perhaps had a strong argument for an objectively reasonable mistake of law. At the same time, it is likely that multiple "invisible" police seizures occurred during the study period when police detained individuals based upon an objectively unreasonable mistake of law, yet no prosecution resulted (such as when an unlawful stop results in a consensual search that revealed no contraband or evidence and the detainee was released by police).[46] Finally, the category of courts finding an unreasonable mistake of law is inflated because in several instances courts deemed a mistake of law unreasonable, yet recognized an alternative, lawful basis to justify a police stop or arrest.[47]

Taken together, the results yield several notable findings. First, *Heien* is being applied by courts not only in challenges to stops (as in *Heien*) but also custodial arrests,[48] which are far more intrusive seizures with major short- and long-term negative consequences for

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46. As Justice Robert Jackson recognized in a case decided not long after he returned from his work as Chief Prosecutor in the Nuremberg Tribunals:

> Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Brinegar v. United States, 338 U.S. 160, 181–82 (1949) (Jackson, J., dissenting); *see also* Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 332 (2004) (providing results of study indicating that only three percent of unconstitutional searches produced evidence, obviating likelihood of a motion to suppress in the balance (ninety-seven percent) of cases).

47. *See* United States v. Wilson, 662 F. App'x 693, 694 (11th Cir. 2016); United States v. Phillips, 430 F. Supp. 3d 463, 475 (N.D. Ill. 2020); Baldwin v. Estherville, 218 F. Supp. 3d 987, 1001 (N.D. Iowa 2016); Flint v. City of Milwaukee, 91 F. Supp. 3d 1032, 1057, 1061–62 (E.D. Wis. 2015); J Mack LLC v. Leonard, No. 2:13-cv-808, 2015 WL 519412, at *9–11 (S.D. Ohio Feb. 9, 2015). *But see* People v. Lucynski, 983 N.W.2d 827, 847 n.22 (Mich. 2022):

> While we need not decide the issue today, we question whether an explanation for a warrantless stop or seizure of an individual that was never conveyed to the individual and was not raised until after prosecution of the individual commenced is entitled to deference as a reasonable mistake of law.

48. *See, e.g.*, United States v. Diaz, 854 F.3d 197, 203 (2d Cir. 2017); Mahone v. Georgia, No. 20-14752, 2022 WL 2388426, at *3 (11th Cir. July 1, 2022); Cahaly v. Larosa, 796 F.3d 399, 408 (4th Cir. 2015); Kinslow v. Duckins, 244 F. Supp. 3d 771, 778 (N.D. Ill. 2016); *Baldwin*, 218 F. Supp. 3d at 1001; Campbell v. United States, 224 A.3d 205, 211–12 (D.C. 2020); People v. Campuzano, 188 Cal. Rptr. 3d 587, 592 (Cal. Ct. App. 2015). *But see* Saint-Jean v. County of Bergen, 509 F. Supp. 3d 87, 108 (D.N.J. 2020) (applying *Heien* to arrest but noting that "when applied to an arrest or further pursuit of a criminal charge, as opposed to a brief, reasonable-suspicion *Terry* stop, [the *Heien*] standard may require even closer scrutiny").

individuals,[49] and afford police significant ancillary powers (including searches incident to arrest).[50] Moreover, *Heien* is being applied beyond the legal context in which it arose, a vehicular stop for a purported brake-light violation, to justify unlawful police seizures in a broad array of other contexts, including trespass,[51] public transport fare evasion,[52] terroristic threats,[53] anti-robocalls,[54] reckless endangerment,[55] obstruction,[56] excessive noise from a vehicle,[57] home invasion,[58] possession of endangered species,[59] violation of farmers' market rules for use of space,[60] drinking in public,[61] escape,[62] drug possession,[63] unlawful possession of a weapon,[64] and indecent exposure by public urination.[65]

The study also highlights *Heien*'s migration beyond the issue addressed by the Court—whether a seizure based on a mistake of law is reasonable for Fourth Amendment purposes—into other areas of Fourth Amendment doctrine.[66] Lower courts have invoked *Heien* in cases challenging the legal validity of search warrants,[67] weapons

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49. *See infra* note 192 and 197–103 and accompanying text.

50. *See infra* notes 193–196 and accompanying text.

51. *See, e.g.*, Adelman v. Branch, 784 F. App'x 261, 267 n.3 (5th Cir. 2019); State v. Stadler, No. 112,173, 2015 WL 4487059, at *4–5 (Kan. Ct. App. July 17, 2015); People v. Maggit, 903 N.W.2d 868, 875–76 (Mich. Ct. App. 2017).

52. *See, e.g.*, Whittaker v. Munoz, Civ. No. 17-1983, 2019 WL 4194499, at *4 (D.D.C. Sept. 4, 2019).

53. *See, e.g.*, Smith v. City of Fairburn, 679 F. App'x 916, 923 (11th Cir. 2017).

54. *See, e.g.*, *Cahaly*, 796 F.3d at 408.

55. *See, e.g.*, Lea v. Steinbronn, 671 F. App'x 488, 488 n.3 (9th Cir. 2016).

56. *See, e.g.*, Barrera v. City of Mount Pleasant, 12 F.4th 617, 621–25 (6th Cir. 2021); United States v. Green, No. 4:21-cr-159, 2022 WL 3010478, at *2 (S.D. Ga. July 29, 2022); Aristide v. City of New York, No. 17-cv-4422, 2017 WL 5905549, at *3 (E.D.N.Y. Nov. 30, 2017).

57. *See, e.g.*, Commonwealth v. Collins, No. 1160-15-2, 2015 WL 9304369, at *3 (Va. Ct. App. Dec. 22, 2015).

58. *See, e.g.*, Mahone v. Georgia, No. 20-14752, 2022 WL 2388426, at *4 (11th Cir. July 1, 2022).

59. *See, e.g.*, Flint v. City of Milwaukee, 91 F. Supp. 3d 1032, 1058–59 (E.D. Wis. 2015).

60. *See, e.g.*, Mahgerefteh v. City of Torrance, 324 F. Supp. 3d 1121, 1128 (C.D. Cal. 2018).

61 United States v. Diaz, 854 F.3d 197, 203 (2d Cir. 2017); Campbell v. United States, 224 A.3d 205, 212 (D.C. 2020).

62. *See, e.g.*, Sinclair v. Lauderdale County, 652 F. App'x 429, 435 (6th Cir. 2016).

63. *See, e.g.*, Kinslow v. Duckins, 244 F. Supp. 3d 771, 778–79 (N.D. Ill. 2016); J Mack LLC v. Leonard, No. 2:13-cv-808, 2015 WL 519412, at *9 (S.D. Ohio Feb. 9, 2015).

64. *See, e.g.*, Dunlap v. Anchorage Police Dep't, No 3:10-cv-00242, 2016 WL 900625, at *5–6 (D. Alaska Mar. 8, 2016); United States v. Severns, CR No. 15-119-M-PAS, 2016 WL 3227667, at *2 (D.R.I. June 9, 2016).

65. *See, e.g.*, United States v. Loyd, No. 19-CR-6186CJS, 2020 WL 2027003, at *7 n.10 (W.D.N.Y. Apr. 28, 2020).

66. *See* Heien v. North Carolina, 574 U.S. 54, 66 (2014).

67. *See, e.g.*, United States v. Wise, No. 3:19-CR-22, 2020 WL 1452727, at *2 (W.D. Ky. Mar. 25, 2020); People v. Marko, 434 P.3d 618, 650–51 (Colo. App. 2015), *aff'd on other grounds*, 364

frisks,[68] warrantless blood draws,[69] deportation,[70] what qualifies as consent for a search[71] or probable cause,[72] warrantless searches generally,[73] the duration of a stop,[74] the legality of a premises (*Buie*) sweep,[75] and jurisdiction to arrest.[76] Lower courts also apply *Heien* in their assessment of police assertions of qualified immunity in civil rights claims alleging false arrests,[77] despite the explicit insistence of eight justices (all save Justice Sotomayor, who dissented) that mistake of law and qualified immunity analyses are distinct.[78] Moreover, they treat *Heien* as an exception to the exclusionary rule rather than a

P.3d 199 (Colo. 2016); People v. Paulsen, No. B282025, 2018 WL 4613113, at *7 (Cal. Ct. App. Sept. 26, 2018); *see also* United States v. Lopez, 78 M.J. 799, 810 (A. Ct. Crim. App. 2019).

68. *See, e.g.*, United States v. Sanchez, 569 F. Supp. 3d 1129, 1139 (D.N.M. 2021).

69. *See, e.g.*, United States v. Elliott, 522 F. Supp. 3d 1051, 1059 (E.D. Okla. 2021); State v. Tercero, 467 S.W.3d 1, 11 (Tex. App. 2015); State v. Lindquist, 869 N.W.2d 863, 878 (Minn. 2015); State v. Estrada, No. 113,838, 2016 WL 2774321, at *8 (Kan. Ct. App. May 13, 2016); State v. Hoerle, 901 N.W.2d 327, 332 (Neb. 2017).

70. *See, e.g.*, Iracheta v. United States, No. B:14-135, 2015 WL 13559948, at *11 (S.D. Tex. June 19, 2015).

71. *See, e.g.*, White v. Commonwealth, 785 S.E.2d 239, 255 (Va. Ct. App. 2016), *rev'd on other grounds*, 799 S.E.2d 494 (Va. 2017).

72. *See, e.g.*, United States v. Hawkins, 830 F.3d 742, 746 (8th Cir. 2016).

73. *See, e.g.*, United States v. Fletcher, 978 F.3d 1009, 1018 (6th Cir. 2020); Williams v. Tooley, No. 4:20-CV-215, 2022 WL 1463965, at *2 (M.D. Ga. May 9, 2022); United States v. Coyne, 387 F. Supp. 3d 387, 402 (D. Vt. 2018); State v. Gies, 146 N.E.3d 1277, 1284 (Ohio Ct. App. 2019); *cf.* Pridemore v. State, 71 N.E.3d 70, 74 n.3 (Ind. Ct. App. 2017) (stating in dictum that *Heien* controls the permissibility of searches).

74. *See, e.g.*, State v. Schooler, 419 P.3d 1164, 1177 (Kan. 2018).

75. United States v. Keefauver, 74 M.J. 230, 235 (C.A.A.F. 2015).

76. United States v. Patterson, No. CR-20-71, 2021 WL 633022, at *4 (E.D. Okla. Feb. 18, 2021). In one case, *Heien* was applied to deem reasonable a *prosecutor's* legal mistake in charging an individual. Lininger v. Pfleger, No. 17-cv-03385, 2019 WL 8013879, at *8 (N.D. Cal. June 28, 2019). *Heien* has also been applied to assessing attorney competence in Sixth Amendment–based ineffective assistance of counsel claims. Campbell v. United States, 224 A.3d 205, 211 (D.C. 2020).

77. *See, e.g.*, Hart v. Hillsdale County, 973 F.3d 627, 637 (6th Cir. 2020) ("In [*Heien*,] a case involving an ambiguously worded statute that had never been construed by the state's higher courts, the Supreme Court instructed that an officer's reasonable mistake of law entitled him to qualified immunity."); *see also, e.g.*, Barrera v. City of Mount Pleasant, 12 F.4th 617, 621–22 (6th Cir. 2021); Mahone v. Georgia, No. 20-14752, 2022 WL 2388426, at *3 (11th Cir. July 1, 2022); Adelman v. Branch, 784 F. App'x 261, 267 n.3 (5th Cir. 2019); Cahaly v. Larosa, 796 F.3d 399, 408 (4th Cir. 2015); Northrup v. City of Toledo Police Dep't, 785 F.3d 1128, 1132 (6th Cir. 2015); Saint-Jean v. County of Bergen, 509 F. Supp. 3d 87, 107–08 (D.N.J. 2020); Williams v. United States, No. PX-15-3685, 2018 WL 3375109, at *3–4 (D. Md. July 11, 2018); Aristide v. City of New York, No. 17-cv-4422, 2017 WL 5905549, at *3 (E.D.N.Y. Nov. 30, 2017).

78. *See* Heien v. North Carolina, 574 U.S. 54, 67 (2014) (stating that the mistake of law inquiry "is not as forgiving as the one employed in the distinct context" of qualified immunity); *id.* at 69 (Kagan, J., concurring) (stating that *Heien*'s analytic framework is distinct from that of qualified immunity).

threshold doctrinal inquiry as to whether a police seizure is constitutionally reasonable.[79]

In short, unlike some instances where we see the scope of the Court's precedent being "narrowed" from below,[80] lower courts are expanding *Heien*'s reach into other areas and compounding its impact, substantiating Justice Benjamin Cardozo's admonition that a legal principle, once judicially pronounced, tends "to expand itself to the limit of its logic."[81]

B. Particular Findings

A deeper dig into the cases reveals that the mechanics of *Heien* claims remain troublingly uncertain. The uncertainty encompasses the basic questions of whether a statute must be deemed ambiguous for *Heien* to apply and, if so, how ambiguity is assessed; how courts are to determine whether a police mistake of law is objectively reasonable; the extent to which officers' subjective understanding of laws and their training and experience matter in *Heien* cases; and the applicability of *Heien* when a police mistake of law occurs absent a sudden need to interpret a law.

1. Requiring and Determining Legal Ambiguity

One unfortunate feature of the *Heien* majority opinion is that it failed to specifically require that the law in question be ambiguous.[82] The sole reference in the opinion is that "an officer may 'suddenly confront' a situation in the field as to which the application of a statute is unclear—however clear it may later become."[83] Justice Kagan, in her concurring opinion (which was not necessary to the majority), explicitly stated that a law must be "genuinely ambiguous."[84]

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79. *See* United States v. Gonzalez, No. 2:16-cr-00265, 2019 WL 2391607, at *7–8 (D. Nev. Apr. 25, 2019); State v. Harrison, 187 N.E.3d 510, 523 n.6 (Ohio 2021) (Brunner, J., concurring in the judgment only); Taylor v. Commonwealth, 826 S.E.2d 332, 336 (Va. Ct. App. 2019).

80. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 927–29 (2016) (explaining how "narrowing" differs from following, extending, and distinguishing Supreme Court rulings).

81. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

82. Under one conventional definition, an ambiguous term or phrase is one that is open to "a discrete number of possible meanings." LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 38 (2010); *see also* Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1473 (2020) (an ambiguity exists when "a statutory provision has more than one possible linguistic meaning").

83. *Heien*, 574 U.S. at 66.

84. *Id.* at 70 (Kagan, J., concurring).

In keeping with this uncertainty, many courts do not first ask whether a law is ambiguous but rather simply determine, assuming there was a mistake of law, if it was a reasonable one.[85] When they do so, as feared by Justice Sotomayor in her *Heien* dissent,[86] they often refrain from providing an authoritative interpretation of the law in question. This is usually,[87] but not always,[88] the case when federal courts are asked to address the lawfulness of police seizures based on state or local laws, a common occurrence in federal criminal litigation (often based on auto stops, like in *Heien*, resulting in the discovery of drugs).[89]

Many courts, however, do ask as a threshold matter whether a law is ambiguous,[90] yet when they do, they employ different approaches.

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85. *See, e.g.*, United States v. Rosian, 822 F. App'x 964, 967 (11th Cir. 2020); United States v. Burnside, 795 F. App'x 475, 476 (8th Cir. 2020); Lea v. Steinbronn, 671 F. App'x 488, 488 n.3 (9th Cir. 2016); United States v. Guerrero, 603 F. App'x 328, 329 (5th Cir. 2015); United States v. Green, No. 4:21-cr-159, 2022 WL 3010478, at *2 (S.D. Ga. July, 29, 2022); Whittaker v. Munoz, Civ. No. 17-1983, 2019 WL 4194499, at *4 (D.D.C. Sept. 4, 2019); State v. Patrick, 886 N.W.2d 681, 684 (N.D. 2016); People v. Burnett, 432 P.3d 617, 622 (Colo. 2019); Harris v. State, 810 S.E.2d 660, 663 (Ga. Ct. App. 2018).

86. *See Heien*, 574 U.S. at 74 (Sotomayor, J., dissenting) ("[P]ermitting mistakes of law to justify seizures has the perverse effect of preventing or delaying the clarification of the law. Under such an approach, courts need not interpret statutory language but can instead simply decide whether an officer's interpretation was reasonable.").

87. *See, e.g.*, United States v. Stevenson, 43 F.4th 641, 646 (6th Cir. 2022) ("[O]ur task is not to arrive at the correct interpretation of the state law but simply to decide whether the officer's interpretation of that law was objectively reasonable."); Barrera v. City of Mount Pleasant, 12 F.4th 617, 624 (6th Cir. 2021) ("[W]e need not resolve each mete and bound of Michigan's obstruction statute or its interaction with other statutes. We need only decide whether the officers' interpretation sinks to unreasonable."); United States v. Vance, 893 F.3d 763, 770 (10th Cir. 2018) (noting that under *Heien* the court "need not resolve the state law question, only whether the officer's interpretation was reasonable"); *see also, e.g.*, United States v. Diaz, 854 F.3d 197, 204 n.13 (2d Cir. 2017); United States v. Lawrence, 675 F. App'x 1, 4 (1st Cir. 2017); United States v. Cunningham, 630 F. App'x 873, 876 (10th Cir. 2015); United States v. Morales, 115 F. Supp. 3d 1291, 1295–96 (D. Kan. 2015).

88. *See, e.g.*, Knapp v. State, 346 So. 3d 1279, 1281 (Fla. Dist. Ct. App. 2022); People v. Theus, 64 N.E.3d 61, 67–68 (Ill. App. Ct. 2016); State v. Walker, No. 119,547, 2019 WL 1212370, at *3 (Kan. Ct. App. Mar. 15, 2019) (per curiam); People v. Pena, 163 N.E.3d 1, 1 (N.Y. 2020); City of Lincoln v. Schuler, 962 N.W.2d 413, 416 (N.D. 2021); *Burnett*, 432 P.3d at 622; *Harris*, 810 S.E.2d at 663.

89. *See* Wayne A. Logan, Erie *and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1247–48 (2010) (discussing state and local police stops for traffic offenses resulting in drug-related arrests that are channeled into federal court); *see also* United States v. Freeman, 209 F.3d 464, 467–69 (6th Cir. 2000) (Clay, J., concurring) (noting "troubling pattern or practice" of county sheriff's office use of traffic laws as "tool[s]" to illegally stop vehicles in order to conduct searches for drugs, citing cases in support).

90. *See, e.g.*, United States v. Scott, 693 F. App'x 835, 837 (11th Cir. 2017); United States v. Stanbridge, 813 F.3d 1032, 1037 (7th Cir. 2016); United States v. Alvarado-Zarza, 782 F.3d 246, 250 (5th Cir. 2015); Mahgerefteh v. City of Torrance, 324 F. Supp. 3d 1121, 1129 (C.D. Cal. 2018); People v. Gaytan, 32 N.E.3d 641, 651 (Ill. 2015); *Walker*, 2019 WL 1212370, at *2; People v. Maggit, 903 N.W.2d 868, 876–77 (Mich. Ct. App. 2017); State v. Eldridge, 790 S.E.2d 740, 744 (N.C. Ct. App. 2016); State v. Deacey, No. 27408, 2017 WL 4460984, at *8 (Ohio Ct. App. Oct. 6, 2017).

Some courts simply note that the parties disagreed on the meaning of statutory text and, attaching importance to the fact that there is no prior judicial interpretation of the text, deem a law ambiguous.[91] Other courts attach importance to the fact that one or more predecessor courts reached different conclusions on the meaning of a law.[92] In *State v. Hurley*, for instance, the Vermont Supreme Court held that even though the plain language of a statute supported the conclusion that there was no violation, the officer's mistake of law was reasonable because state lower courts differed on whether an air freshener affixed to a car rearview mirror unlawfully obstructed a driver's vision.[93]

Of course, we cannot know for certain why the *Heien* majority failed to be clear regarding ambiguity.[94] It could have been deliberate, an instance of what Professor Richard Re has described as a "message to lower courts, suggesting that the higher court deliberately postponed resolution of certain issues."[95] Or it could reflect a felt practical need by the majority opinion's author, Chief Justice Roberts, to retain the votes of his fellow justices in the majority opinion. Or, of course, it could be a simple instance of poor judicial craftmanship, destined to sow confusion in the lower courts.

2. Determining Objective Reasonableness

Another problematic aspect of *Heien* is that it failed to specify how courts are to address the fundamental question of whether a police mistake of law is objectively reasonable. The *Heien* majority reasoned that while the North Carolina traffic equipment law in question required only a single working "stop lamp," it also provided that the lamp could be "incorporated into a unit with one or more *other* rear lamps," and another subsection of the law provided that "all . . . rear lamps . . . [be] in good working order."[96] The use of "other," the majority

91. *See, e.g.*, United States v. Severns, CR No. 15-119-M-PAS, 2016 WL 3227667, at *2 (D.R.I. June 9, 2016).

92. *See, e.g.*, *Diaz*, 854 F.3d at 204–05; State v. Varley, 501 S.W.3d 273, 279–80 (Tex. App. 2016).

93. 117 A.3d 433, 441 (Vt. 2015).

94. The Court's failure to clarify the need for ambiguity, as well as its degree, contrasts with other doctrines concerning the application of criminal laws. Most obvious is the rule of lenity, which requires that a court first determine whether a penal law is ambiguous, which, if found, requires that it be construed against the state in assessing criminal guilt. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018). With lenity, however, a defendant shoulders a clear and very substantial burden—a statute must be "grievously ambiguous." Wooden v. United States, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring); *see also id.* ("[T]he rule of lenity does not apply when a law merely contains some ambiguity or is difficult to decipher.").

95. Re, *supra* note 80, at 947.

96. Heien v. North Carolina, 574 U.S. 54, 67–68 (2014).

reasoned, would "suggest[ ] to the everyday reader of English" that both "stop lamp[s]" must be in working order.[97] Furthermore, North Carolina appellate judges in the proceedings below thought the provisions reasonably admitted confusion,[98] and the provision had not been previously construed by North Carolina courts.[99] Concurring, Justice Kagan emphasized that a law must be "genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work."[100] The law in question must "pose a 'really difficult' or 'very hard question of statutory interpretation.' "[101]

Unfortunately, as Justice Sotomayor predicted in her dissent, the Court's "undefined" standard of objective reasonableness has "prove[n] murky in application."[102] Perhaps most problematic, many courts abstain from a reasonableness analysis altogether and summarily conclude that a mistake was objectively reasonable.[103] Those courts that do assess reasonableness employ a variety of approaches. Some rely upon unpublished decisions to inform whether a mistake was reasonable,[104] while others do not.[105] Furthermore, while most courts focus upon decisional law in their jurisdiction in deciding if a mistake was reasonable, not all do so. In *United States v. McCullough*, for example, the United States Court of Appeals for the Eleventh Circuit held that even if Alabama courts had construed the Alabama law in question and propounded a different view from that of the Alabama officer executing a vehicle stop, "the presence or absence of an appellate decision is not dispositive of whether an officer's interpretation is

97. *Id.* (second alteration in original).

98. *Id.* at 68.

99. *Id.*

100. *Id.* at 70 (Kagan, J., concurring).

101. *Id.* (quoting oral argument of the U.S. Solicitor General); *see also id.* at 71 (noting that a statute must pose "a quite difficult question of interpretation").

102. *Id.* at 79 (Sotomayor, J., dissenting).

103. *See, e.g.*, United States v. Pagoaga-Rios, 786 F. App'x 482, 483 (5th Cir. 2019); United States v. Neal, 777 F. App'x 776, 777 (5th Cir. 2019) (per curiam); Lea v. Steinbronn, 671 F. App'x 488, 488 (9th Cir. 2016); Whittaker v. Munoz, Civ. No. 17-1983, 2019 WL 4194499, at *4 (D.D.C. Sept. 4, 2019); Lopez v. County of Los Angeles, No. CV 14-060054, 2015 WL 13915253, at *3 (C.D. Cal. Nov. 16, 2015); Varner v. City of Mesa, No. CV-13-02562, 2015 WL 736268, at *7 n.6 (D. Ariz. Feb. 20, 2015). Of note, one federal trial court concluded that a mistake was unreasonable but stated without elaboration that it was not "irredeemably so." Guilford v. Frost, 269 F. Supp. 3d 816, 827 (W.D. Mich. 2017).

104. *See, e.g.*, United States v. Jones, Criminal No. 16-27, 2017 WL 1190501, at *5 (W.D. Pa. Mar. 31, 2017) (relying on prior, unpublished Third Circuit decision as "persuasive authority"); *cf.* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 623 n.88 (2021) (noting that the Ninth Circuit relies on unpublished decisions to some degree in determining whether a police practice violated "clearly established law" for qualified immunity purposes).

105. *See, e.g.*, United States v. Vance, 893 F.3d 763, 771 n.7 (10th Cir. 2018) (rejecting Defendant's "heav[y]" reliance on two unpublished decisions of the New Mexico Court of Appeals).

objectively reasonable."[106] And in *State v. Fickert*, the Ohio Court of Appeals disregarded the only state appellate case law available, a decision adopting a view contrary to that of the officer.[107]

Courts also often resort to quite aged case law to justify the reasonableness of an officer's mistake. In *State v. Houghton*, for instance, the Wisconsin Supreme Court invoked a fifty-year-old decision to "indirectly support[ ]" its finding that an officer's legal understanding was objectively reasonable.[108] In *United States v. Cunningham*, the Tenth Circuit invoked a thirty-year-old decision that was "not on all fours" but "roughly analogous."[109] In *State v. Petty*, the Ohio Court of Appeals found a law unambiguous but an officer's mistake reasonable because a state appellate court in dictum over twenty years before "arguably" supported the officer's mistaken view.[110] Even more questionable, in *United States v. Nisbett*, a federal trial court in the Virgin Islands (within the jurisdiction of the Third Circuit) deemed an auto stop reasonable—despite the government's inability to identify a specific law being violated—based on a factually distinct, fifteen-year-old Seventh Circuit decision.[111]

Whether and how prior decisional law should figure in reasonableness analysis is itself an important question. As Professor Kit Kinports has noted, "[T]he fact that one or more judges in the courts below agreed with the police should not automatically brand the officer's mistake as reasonable."[112] Moreover, as one commentator noted shortly after *Heien* was decided, relying on prior court precedent aligning with an officer's view can possibly exert undue institutional pressure in favor of finding a mistake reasonable, regardless of the merit of the prior ruling:

> A reviewing court may be [ ] less likely to overrule a police officer's mistaken legal interpretation after lower courts have accepted that reading of the law as "reasonable"—as they did in *Heien*. Overruling officer interpretations under these circumstances would suggest that a fellow jurist was not only incorrect, but also "unreasonable," implying a serious deficiency in the judge's legal competence and character. Indeed, in other contexts,

106. 851 F.3d 1194, 1201 (11th Cir. 2017) (citing *Heien*, 574 U.S. at 67–68).

107. No. 2018-CA-15, 2018 WL 5310267, at *5 (Ohio Ct. App. Oct. 26, 2018).

108. 868 N.W.2d 143, 157 (Wis. 2015).

109. 630 F. App'x 873, 877–78 (10th Cir. 2015) (applying Colorado law).

110. 134 N.E.3d 222, 229–30 (Ohio Ct. App. 2019).

111. No. 2016-0011, 2017 WL 125015, at *4 (D.V.I. Jan. 11, 2017) (citing Smith v. Ball State Univ., 295 F.3d 763, 768 (7th Cir. 2002)). An analytic approach to precedent, it is worth noting, that no court would utilize when a citizen would plead mistake of law. Thanks to Professor Chris Slobogin for the observation.

112. Kinports, *supra* note 7, at 163. To the extent courts count cases, on one side or another of a definitional divide, Justice Brennan's dissent in *Butler v. McKellar* comes to mind—multiple "egregiously wrong decisions can be no more reasonable than [one]." 494 U.S. 407, 421 n.2 (1990) (Brennan, J., dissenting).

> courts have shown a high level of comity to lower courts accused of making "unreasonable" legal interpretations.[113]

Another quite important finding from the study is that courts adopt a variety of views regarding who or what should serve as the relevant "audience" for deciding the contested meaning of a statutory term or phrase.[114] The *Heien* majority opinion at one point implied that a court should be the audience, identifying what it saw as an ambiguity in the North Carolina provisions in question and noting varied interpretive views among North Carolina jurists during the litigation.[115] But the opinion also attached importance to the fact that an "everyday reader of English" would understand that "a 'stop lamp' is a type of 'rear lamp.' "[116] In her concurrence, Justice Kagan was quite explicit: reasonableness turns on how a "reasonable judge" would interpret the provision in question.[117]

Some courts, such as the Wisconsin Supreme Court[118] and the Second Circuit,[119] employ a judicial frame of reference. Others use a layperson standard. One federal trial court, for instance, framed the question in terms of a "prudent person,"[120] while the Indiana Court of Appeals reasoned that an officer's mistake was reasonable because a "reasonable person unversed in statutory interpretation would very likely" believe the statute was violated.[121] Still other courts use a

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113. Leading Case, *Fourth Amendment—Search and Seizure—Reasonable Mistakes of Law—* Heien v. North Carolina, 129 HARV. L. REV. 251, 260 (2015) (footnotes omitted).

114. *See* David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 159 (2019) ("[M]ost statutes are directed at multiple audiences, so a central task for many statutory interpretation questions should be to identify the principal audience at issue, which will often clarify what the statute means, how it applies, and which normative concerns should prevail."); *id.* at 140 ("Different audiences have varied levels of legal fluency and background knowledge, and distinct audiences have very different modes of interacting with a given statutory scheme. It would be foolish to draft a playground ordinance in the same manner as a multinational corporate tax provision." (footnote omitted)); *see also* Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167 (2021) (emphasizing the importance of audience in statutory interpretation); *cf.* OFF. OF THE LEGIS. COUNS., U.S. H.R., 104th CONG., HOUSE LEGISLATIVE COUNSEL'S MANUAL ON DRAFTING STYLE § 102(f)(2), at 5 (1995) ("IDENTIFY THE AUDIENCE.—Decide who is supposed to get the message.").

115. Heien v. North Carolina, 574 U.S. 54, 66–68 (2014).

116. *Id.* at 67–68.

117. *Id.* at 70 (Kagan, J., concurring).

118. State v. Houghton, 868 N.W.2d 143 (Wis. 2015).

119. United States v. Diaz, 854 F.3d 197, 204 n.12 (2d Cir. 2017); *cf.* Mahone v. Georgia, No. 20-14752, 2022 WL 2388426, at *4 (11th Cir. July 1, 2022) (noting that an officer's "mistake of law is all the more reasonable because a judge reviewed the facts and law and reached the same conclusion that probable cause existed for an arrest").

120. Baldwin v. Estherville, 218 F. Supp. 3d 987, 1001 (N.D. Iowa 2016).

121. Williams v. State, 28 N.E.3d 293, 295 (Ind. Ct. App. 2015); *see also* State v. Rand, 209 So. 3d 660, 665–66 (Fla. Dist. Ct. App. 2017) (explaining that "an objectively reasonable person would not have" made the mistake). Such a view would align with that of then-professor Amy Coney Barrett. *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193,

"reasonable" police officer standard,[122] with the Tenth Circuit using as its benchmark "a prudent, cautious, trained police officer"[123] and the Kansas Court of Appeals using "an officer in the arresting officer's position, not an attorney or a judge."[124] Many other courts, however, do not specify any audience perspective.[125]

While failure to be clear on audience is a common judicial pitfall,[126] its impact is especially problematic with police mistakes of criminal law, given the very significant adverse personal consequences flowing from criminal law enforcement.[127] Contra the views of Justice Kagan and seemingly the *Heien* majority, the correct audience frame of

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2914 (2017) (stating that contemporary textualists "approach language from the perspective of an ordinary English speaker"); *cf.* Anita S. Krishnakumar, *Textualism in Practice* 11 (Georgetown Univ. L. Ctr., Rsch. Paper No. 06, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4441426 [https://perma.cc/BH4Z-4BUB] ("[M]odern textualism . . . has decisively embraced ordinary meaning, and the ordinary reader, as the focus of interpretive inquiry."). How to conceive of such a prototypical person, however, remains an open question. *See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 984 (2004) (recognizing that using an ordinary speaker as the benchmark raises the question of "how much background context we ought to provide to the average interpreter"). *See generally* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365 (2023) (disicssing results of empirical study demonstrating that ordinary people consider context and termingolgy (legal or ordinary) and regularly interpret phrases in laws to communicate technical legal meanings, not only ordinary ones).

122. *See, e.g.*, United States v. Gadson, 670 F. App'x 907 (8th Cir. 2016); Dunlap v. Anchorage Police Dep't, No. 3:10-cv-00242, 2016 WL 900625, at *4–6 (D. Alaska Mar. 8, 2016); United States v. Acuna, No. 21-10035-01,02, 2022 WL 3081419, at *4 (D. Kan. Aug. 3, 2022); State v. Brown, 342 P.3d 1, 8–9 (Kan. Ct. App. 2015); State v. Eldridge, 790 S.E.2d 740, 744 (N.C. Ct. App. 2016); State v. Ware, 145 N.E.3d 973, 982 (Ohio Ct. App. 2019); State v. Tenold, 937 N.W.2d 6, 11 (S.D. 2019).

123. United States v. Romero, 935 F.3d 1124, 1130 (10th Cir. 2019). In another Tenth Circuit case, however, a panel framed the question in terms of whether "reasonable minds could differ" on the statute's interpretation and if "it has never been previously construed by relevant courts." United States v. Cunningham, 630 F. App'x 873, 877 (10th Cir. 2015).

124. State v. Jensen, No. 117,388, 2018 WL 2271538, at *6 (Kan. Ct. App. May 18, 2018); *see also* United States v. Andrews, No. 3:17-cr-215-J-20, 2018 WL 1786996, at *7 (M.D. Fla. Mar. 16, 2018) ("[T]he relevant question is whether *an officer* in the arresting officer's position, not an attorney or a judge, could reasonably make the mistake.").

125. *See, e.g.*, Hart v. Hillsdale County, 973 F.3d 627 (6th Cir. 2020); Whittaker v. Munoz, Civ. No. 17-1983, 2019 WL 4194499 (D.D.C. Sept. 4, 2019); Mahgerefteh v. City of Torrance, 324 F. Supp. 3d 1121, 1128 (C.D. Cal. 2018); State v. Amator, 872 S.E.2d 589 (N.C. Ct. App. 2022); State v. Patrick, 886 N.W.2d 681 (N.D. 2016).

126. *See* Krishnakumar, *supra* note 114, at 174 (noting that courts, including the Supreme Court, "have been dancing around questions about the relevant audience or 'ordinary reader' of a particular statute for years, although they rarely confront the question squarely"); Louk, *supra* note 114, at 142 ("Too often, a drafters' imperative—to identify the audience(s) and provide an effective statutory scheme for the audience(s) to follow and implement—is lost in the judicial enterprise.").

127. *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 924–32 (2020) (discussing how and why the criminal sanction and the consequences of criminal convictions impose distinct harms).

reference should not be that of a legally trained judge.[128] This is so for several reasons. One is that judges today are expected to serve as "faithful agents" of the legislature,[129] utilizing a textualist approach in some form.[130] Agency, however, is both contrary to historic practice, which obliged that judges narrowly construe criminal provisions,[131] and especially inappropriate in modern times, when what Professor Bill

128. Louk, *supra* note 114, at 149 (noting that "no theory of statutory interpretation should exist only for judges").

129. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) (calling faithful agent theory the "conventional" approach to statutory interpretation); F. Andrew Hessick & Carissa Byrne Hessick, *Constraining Criminal Laws*, 106 MINN. L. REV. 2299, 2309 (2022) (observing that courts today regard their mission in interpreting criminal law statutes as serving as the faithful agents of legislatures).

130. *See* William Eskridge Jr., Brian Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616 (2023) ("Textualism is now clearly ascendant and will remain so for the foreseeable future."); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism,* 119 YALE L.J. 1750, 1758 (2010) (noting that among state courts, textualism "is the *controlling* interpretive approach—the consensus methodology chosen by the courts"). *But see* Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243, 258–61 (2023) (disputing empirical accuracy of recent public statement by Justice Kagan that "we're all textualists now," noting that a more accurate assessment is that judges begin their interpretative task with statutory text).

Despite its dominance, textualism has been the subject of widespread criticism. *See*, *e.g.*, Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 983–84 (2016) (providing a quantitative analysis undermining the claim of advocates that textualism leads jurists to a single correct result); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1440 (2022) ("Ironically, 'textualism' itself has an inexact and amorphous meaning."); *see also* Marco Basile, *Ordinary Meaning and Plain Meaning*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 7) (noting that the "ordinary meaning" canon and "plain meaning" rule are staples in textualism and are used interchangeably by courts and scholars, despite their "different definitions, functions, consequences, and justifications").

No court in the study, it is worth mentioning, resorted to corpus linguistics, which examines large numbers of text, such as newspapers and books, to determine the ordinary meaning of a statutory term. It too has been criticized as an interpretive method. *See, e.g.*, Donald L. Drakeman, *Is Corpus Linguistics Better than Flipping a Coin?*, 109 GEO. L.J. ONLINE 81, 99 (2020) (questioning the accuracy of corpus linguistics databases and its methodological reliability).

A few courts in the study looked to dictionaries. *See, e.g.*, United States v. Stevenson, 43 F.4th 641, 647 (6th. Cir. 2022); Guilford v. Frost, 269 F. Supp. 3d 816, 826 (W.D. Mich. 2017); State v. Houghton, 868 N.W.2d 143, 158 (Wis. 2015). On the problems with judicial resort to dictionaries, see James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 502–16 (2013); and Kevin Tobia, *Dueling Dictionaries and Clashing Corpora*, 71 DUKE L.J. ONLINE 146, 154 (2022). According to Brudney and Baum, dictionary use by the Supreme Court is significantly greater in criminal law cases than in commercial law cases. Brudney & Baum, *supra*, at 520.

131. Hessick & Hessick, *supra* note 129, at 2302. As Professors Andrew and Carissa Hessick note, courts in England, and later the United States, historically employed statutory construction rules that applied only to criminal laws. *Id.* at 2318–19. Those rules constrained the sweep of criminal statutes. *Id.* at 2302. They prevented not only criminal convictions that were not supported by the text of the statute but also some convictions that were supported by text. *Id.* A defendant could be convicted only if he violated both the letter and the spirt of the law. *Id.* at 2301; *see also id.* at 2303 ("[C]ourts routinely interpreted statutes to reach no further than the text or the purpose, and they treated broadly written laws as ambiguous and in need of narrowing constructions. Put simply, courts used their interpretive powers to deliberately favor criminal defendants and constrain the criminal law.").

Stuntz famously called "pathological politics" besets the criminal lawmaking, with legislators seeking to out-tough one another with expansive, open-ended criminal provisions.[132] As Professor Joshua Kleinfeld recently observed, "When judges apply criminal statutes' text as written against the backdrop of the kind of politics Stuntz identified, the effect is to unleash statutes that are unreasonable as written."[133]

Rather than judges, lay citizens and police officers should be the focus—individuals who researchers refer to as the "first-order" audiences for criminal laws,[134] who face mutual challenges in the interpretation of legal and statutory language more generally.[135] For laypersons, the criminal law serves as a guide for ordering their daily lives.[136] For police, arguably the (not a) prime audience for criminal laws,[137] the criminal code serves as a sort of job description.[138] The two

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132. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

133. Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791, 1796 (2021). Elaborating, Kleinfeld observes:

> [T]he pathological politics of criminal law bear on statutory text and therefore on the merits and demerits, in the criminal context, of textualism. Textualism might have many virtues in other areas of law . . . but it is an exceedingly problematic fit in criminal law. When the politics of criminal legislation leads to statutory text that is careless, judges have no means to correct the mistakes. When the text is unreasonably punitive, judges have no means to temper the punitiveness in application.

Id.

134. Louk, *supra* note 114, at 143–44 (describing "first-order" audiences as those who "must be able to ascertain the statute's meaning and translate its plan into action"). Judges qualify as first-order audiences in certain matters, such as the admission of evidence. *Id.* at 195–96.

135. *See* Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401, 433 (2019) ("Legal language, including statutory language, has long been criticized as being unintelligible to those untrained in the law.").

136. *See, e.g.*, Johnson v. United States, 576 U.S. 591, 595 (2015) (stating that the criminal law must "give ordinary people fair notice of the conduct it punishes"); McBoyle v. United States, 283 U.S. 25, 27 (1931) (recognizing that even if it were unlikely that a potential criminal were to "consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed"); *see also infra* notes 236–244 and accompanying text (discussing the central rule of law expectation that members of the public should be able plan their daily lives without fear of being wrongfully detained).

137. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1871 (2000) ("Notice who criminal law's audience is: law enforcers, not ordinary citizens. Ordinary people do not have the time or training to learn the contents of criminal codes . . . . Criminal codes therefore do not and cannot speak to ordinary citizens directly."); *see also* Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105 (2003) (discussing ways in which legal texts have state actors, not the lay public, as their chief audience). *Heien* itself supports the position that police, not citizens or judges, should serve as the audience benchmark for determining reasonableness. Recall that the eight-Justice *Heien* majority parried Heien's argument that condoning police mistakes of law—with respect to seizures—was inconsistent with the traditional rejection of citizen mistakes of law regarding guilt/culpability determinations. *See supra* Part I. On this reasoning, police and citizen mistakes of law oblige different analyses and treatment.

138. *See* Wayne R. LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEX. L. REV. 434, 436 (1967) ("[T]he substantive criminal law is not merely a list of

audiences, however, differ in critically important respects,[139] a matter warranting extensive consideration that cannot be fully undertaken here.[140] Preliminarily, however, the standard should be guided by two basic precepts. One is that the knowledge and interpretive wherewithal reasonably expected of police—who take an oath to uphold and enforce the law[141]—is (or at least should be) greater than that of laypersons.[142]

'thou-shall-nots' directed to the citizenry; it is also in large measure a definition of the job of the several police agencies in the state."); *see also* Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1612 (2009) ("Without the substantive criminal law . . . policing would be unintelligible.").

139. To the extent police are considered "ordinary people," research suggests that the ordinary people understand and apply common statutory interpretive canons differently from judges and lawyers. This supports a rejection of ordinary meaning as being synonymous with literal meaning, in favor of nonliteral meanings, raising doubt over judicial reliance on dictionary definitions and increasing judicial sensitivity to context. *See generally* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213 (2022). Moreover, understanding of a law may be shaped "by the guidance and actions of public officials and even by the behaviors of other members of the regulated public." Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1119.

140. *See* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 85 (1965) ("It is obviously important to determine how criminal statutes should be interpreted by law enforcement personnel who must decide whether to arrest.").

141. One important question concerns how to conceive of a reasonably well-trained and knowledgeable police officer. For guidance, we might look to similar efforts undertaken regarding the application of the exclusionary rule and qualified immunity. *See* Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 668–71 (2014) (discussing how the Supreme Court's recent requirement of police "culpability" in deciding applicability of the exclusionary rule now requires baseline understanding of the reasonable legal knowledge of police); Stewart E. Sterk, *Accommodating Legal Ignorance*, 42 CARDOZO L. REV. 213, 244–49 (2020) (discussing standards used by courts to determine if a constitutional right allegedly violated by an officer is "clearly established"). For discussion of the challenges posed by the need to identify the characteristics of a reasonable police officer when assessing alleged police use of excessive force, see generally Jesse Chang, Note, *Who Is the Reasonable Police Officer? A Localized Solution to a Nationwide Problem*, 122 COLUM. L. REV. 87 (2022).

And still, a fundamental question will remain: whether the standard should be aspirational—based on what knowledge *should* be reasonably expected of police—or one reflective of actual police knowledge. If the latter, data does not support a demanding standard. *See* Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 26 (2018) (noting, inter alia, that approximately ten percent of police training is dedicated to legal learning). Illustrative of the deficit are instances where police continue to enforce laws previously declared unconstitutional or otherwise legally invalid. *See, e.g.*, J. David Goodman, *See Topless Woman? Just Move On, Police Are Told*, N.Y. TIMES (May 15, 2013), https://www.nytimes.com/2013/05/16/nyregion/a-police-roll-call-reminder-women-may-go-topless.html [https://perma.cc/TA8B-6W5V] (describing continued enforcement by New York City police of a law that was declared unconstitutional over fifteen years before); *cf.* Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT'L L. 423, 434 (2001) (discussing study of 450 officers finding that they performed "better than chance" on only one of six questions concerning search and seizure rules).

142. *See* State v. Lees, 432 P.3d 1020, 1025 (Kan. Ct. App. 2018) (stating in a police mistake of law case that a police officer "is a law enforcement officer, not an average citizen, and he is expected to understand the laws that he is duty bound to enforce."); State v. Petty, 134 N.E.3d 222, 231 (Ohio Ct. App. 2019) (Smith, J., concurring) ("Although I understand law enforcement officers are 'not taking the bar exam' every time they initiate a traffic stop, in my view they should be held

Another is that the assessment should be informed by the historic view that police should adopt a circumscribed view of the scope of the laws they enforce.[143] Whatever one's view on the question, the lack of an agreed-upon audience benchmark is unfortunate because it can significantly affect outcomes in mistake of law cases.[144]

Finally, contrary to Justice Kagan's expectation that a court must be faced with a statute that is "genuinely ambiguous," requiring "hard interpretive work" and "pos[ing] a 'really difficult' or 'very hard question of statutory interpretation,' "[145] it is not unusual for courts to actually find that a statute is unambiguous yet conclude that an officer's mistake was reasonable.[146] Examples of quite obvious legal mistakes officers have made that courts deemed reasonable include the following:

- *United States v. Simms*: condoning stop when officer mistakenly thought that a car's headlights must be activated thirty minutes *prior to* sunset (when the law in question clearly required headlights to be illuminated thirty minutes *after* sunset).[147]

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to a higher standard and should have an accurate understanding of the laws which they purport to enforce." (footnote omitted) (internal quotation marks omitted)); *see also* Screws v. United States, 325 U.S. 91, 129 (1945) (Rutledge, J., concurring) ("Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it."); *cf.* Saint-Jean v. County of Bergen, 509 F. Supp. 3d 87, 108–09 (D.N.J. 2020) (stating that while "[n]o one can be expected to memorize the entirety of the New Jersey traffic laws," New Jersey officers patrolling a traffic corridor used by out-of-state vehicles should know whether New Jersey law exempted out-of-state vehicles from window tint law, a recurring question of law); *id.* ("It is . . . not too much to expect that the police should inform themselves as to the technicalities of the laws pursuant to which they may [detain motorists].").

143. *See* LAFAVE, *supra* note 140, at 86 (noting the traditional view that police should "employ a very strict construction [of statutes], particularly in doubtful cases"); Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 171 (1953) ("In those cases [of legal uncertainty] the law that must be enforced is the narrow, strict interpretation of the relevant statues and decisions."); *cf.* Louk, *supra* note 114, at 199 ("Being attentive to statutory audience can help to clarify when a statutory term should be given its broadest permissible ordinary meaning, or a more specific and narrower meaning appropriate to the principal audience of the statute in question.").

144. Another question concerns the bearing of Professor Meir Dan-Cohen's distinction drawn between "conduct rules," designed and directed at citizens to regulate their conduct, and "decision rules," designed and directed at government officials (judges mainly) to guide the adjudication of disputes concerning the behavior of citizens. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627 (1984). Complicating matters is the fact that "a single statutory provision may simultaneously guide both conduct and decision and may thus function as both a conduct rule and a decision rule." *Id.* at 631; *see also id.* at 629 ("The proper relationship between decision rules and their corresponding conduct rules is not a logical or analytical matter. Rather, it is a normative issue that must be decided in accordance with the relevant policies and values." (footnote omitted)). And—complicating matters still more—should the standard differ for citizen arrests?

145. Heien v. North Carolina, 574 U.S. 54, 70 (2014) (Kagan, J., concurring) (citation omitted).

146. The Sixth Circuit, for instance, has squarely stated that police can commit an objectively reasonable mistake even if a law is unambiguous. Sinclair v. Lauderdale County, 652 F. App'x 429, 437 (6th Cir. 2016).

147. No. CR 20-9, 2020 WL 7769092, at *4–5 (E.D. Ky. Dec. 30, 2020).

- *State v. Fisher*: holding that an investigative stop for a trespass was objectively reasonable, even though no law prohibited the defendant from being in the park after hours.[148]
- *People v. Campuzano*: upholding arrest of a bicyclist for violating a law banning bicycle riding on "any sidewalk fronting any commercial business" when the sidewalk in question did not "front[ ]" any "commercial business" (it was situated across the street).[149] The court described the law as "clear and unambiguous" and found that its "plain meaning" applied "only on that portion of the sidewalk fronting commercial business establishments,"[150] yet it was "objectively reasonable for the officers to read the ordinance expansively."[151]
- *Knapp v. State*: condoning stop of a car based on mistaken belief that a law prohibiting an item "upon" a car window that obstructs or impairs the driver's vision applied when items were arrayed in front of (not "upon") driver's rear car window.[152]
- *United States v. Wilson*: upholding stop of bicyclist based on squad car computer display that omitted the portion of the statute that permitted the bicyclist's behavior.[153]
- *United States v. Nisbett*: upholding auto stop based on car being parked in passing lane when no state law prohibited doing so.[154]

In another case involving an officer mistake of law resulting in an arrest, the federal trial court found an officer's mistake objectively reasonable but expressed "grave concerns about the officers' lack of knowledge of the ordinances that they were authorized to enforce."[155]

Taken together, the foregoing cases, and others like them, cast significant doubt on the *Heien* majority and concurring opinions' insistence that mistake of law doctrine should not be as forgiving of police errors as qualified immunity.[156] They also highlight the troubling tendency of courts to effectively read new legal terms into statutes,

148. No. 2-17-03, 2017 WL 2729622, at *2 (Ohio Ct. App. June 26, 2017).

149. 188 Cal. Rptr. 3d 587, 588–89, 589 n.1 (Cal. Ct. App. 2015).

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

151. *Id.* at 592.

152. 346 So. 3d 1279, 1281 (Fla. Dist. Ct. App. 2022). *But cf.* United States v. Black, 104 F. Supp. 3d 997, 1004–08 (W.D. Mo. 2015) (holding that state law prohibiting items "upon" car windshield not violated by air fresheners hung from rear view mirror).

153. No. 14-CR-128, 2016 WL 1583860, at *2 (W.D.N.Y. Feb. 2, 2016). The statute provided that bicyclists must ride "near the right-hand curb or edge of the roadway . . . except when preparing for a left turn," but the officer's laptop computer display omitted the last part (when the defendant was preparing to make a left turn). *Id.* at *1 (quoting N.Y. VEH. & TRAF. LAW § 1234(a) (McKinney 2023)).

154. CR No. 2016-0011, 2017 WL 125015, at *1, *4 (D.V.I. Jan. 11, 2017).

155. Baldwin v. Estherville, 218 F. Supp. 3d 987, 1003 (N.D. Iowa 2016).

156. *See* Heien v. North Carolina, 574 U.S. 54, 67 (2014); *id.* at 69 (Kagan, J., concurring).

engaging in the kind of "sloppy study of the laws [police are] duty-bound to enforce" condemned by the *Heien* majority.[157] When courts do so, they effectively condone police mistakes regarding the *existence* of a legal prohibition, unlike *Heien*, which condoned an officer's "mistaken understanding of the *scope* of a legal prohibition" (one or two operable brake lights on a car).[158] Indeed, such cases can be said to involve police ignorance—not mistake[159]—of law.[160]

Examination of the minority of courts deeming police seizures objectively unreasonable suggests that they take one of three approaches. Some apply the more demanding standard specified by Justice Kagan in her *Heien* concurrence.[161] The Michigan Supreme Court's decision in *People v. Lucynski* is illustrative;[162] in deeming unreasonable an officer's mistake regarding a law prohibiting interference with the flow of traffic, the court considered the law unambiguous and reasoned that "[o]bjectively reasonable mistakes should be confined to the exceedingly rare instances of truly ambiguous statutes."[163] Not surprisingly, courts finding a law unambiguous

157. *Id.* at 67 (majority opinion).

158. *Id.* at 60 (emphasis added). The distinction was recognized in *White v. State*, 199 N.E.3d 1249, 1251 (Ind. Ct. App. 2022), where an officer detained a motorist based on his mistaken belief that state law prohibited driving with an "inactive" car registration, whereas the law actually prohibited an "expired" registration. The court reasoned that conflating inactive with expired was not really a mistake of law, "which is to say a misunderstanding as to the scope of the conduct covered by a statute—but a mistake as to *whether any law proscribing White's conduct even exists*." *Id.* at 1254. "[A] mistake about the scope of a prohibition," the court reasoned, "necessarily presupposes the existence of a prohibition. . . . [Here] there simply is no statute prohibiting an 'inactive' registration." *Id.* (citation omitted). The court could not "conclude that—as an objective matter—a reasonable officer would seek to enforce laws that do not exist. . . . The [U.S.] Supreme Court has *not* determined that reasonable suspicion can rest on whether a legal prohibition exists at all." *Id.* at 1255 (citation omitted); *see also* J Mack LLC. v. Leonard, No. 2:13-cv-808, 2015 WL 519412, at *9 (S.D. Ohio Feb. 9, 2015) ("[I]t is not unreasonable to expect police to have enough knowledge of the criminal laws they enforce to be aware of whether a specific criminal statute actually exists.").

159. For the seminal treatment of the distinction, see generally Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75 (1908).

160. *See* Flint v. City of Milwaukee, 91 F. Supp. 3d 1032, 1058–59 (E.D. Wis. 2015) (deeming a police mistake unreasonable because although "the officers *did not know the law* and thus could not make a reasonable mistake about it," police "[o]fficers cannot shore up their lack of knowledge by proposing that if they had properly reviewed the law they would have been nonetheless confused, thus justifying their mistake" "[e]specially when officers choose to *arrest* someone for a violation of that law").

161. *See, e.g.*, Scott v. City of Albuquerque, 711 F. App'x 871, 877 (10th Cir. 2017); United States v. Potter, 610 F. Supp. 3d 402, 418 (D.N.H. 2022); *Flint*, 91 F. Supp. 3d at 1057; People v. Gerberding, 263 Cal. Rptr. 3d 702, 709 (Cal. App. Dep't Super. Ct. 2020); Harris v. State, 810 S.E.2d 660, 663 (Ga. Ct. App. 2018); People v. Walker, 115 N.E.3d 1012, 1020 (Ill. App. Ct. 2018); State v. Gardner, 501 P.3d 925, 932 (Mont. 2022).

162. 983 N.W.2d 827 (Mich. 2022).

163. *Id.* at 846–847. The holding inspired a spirited dissent by Justice Zahra, joined by Justice Clement in part, concluding that the mistake was reasonable because in a prior unpublished

usually (but not always[164]) deem a mistake of law objectively unreasonable.[165] Finally, courts deem a seizure unreasonable when preexisting authoritative case law in the jurisdiction is clearly contrary to the legal understanding of an officer.[166]

3. Subjective Views of Officers and Their Training and Experience

Contrary to the *Heien* majority[167] and concurring opinions,[168] courts applying *Heien* attach importance to the subjective legal understandings of officers. In *United States v. Corona*, for instance, an Alabama federal trial court concluded that the stop met

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decision three state court of appeals judges agreed with the officer's view. *Id.* at 854 (Zahra, J., dissenting). Elaborating, Zahra wrote:

> Under the majority's ruling, to be reasonable, police officers must be so adept and assured in their own statutory interpretation that they would reject longstanding conclusions by Court of Appeals judges if they anticipate that this Court will one day disagree. This ruling flies in the face of *Heien* and requires perfection—if not omniscience—instead of reasonableness. While the standard of perfection is ideal, it is neither required by our Constitution nor realistic.

Id. at 855.

164. *See, e.g.*, State v. Hurley, 117 A.3d 433, 441 (Vt. 2015) (applying Kagan's standard and deeming the mistake of law reasonable); State v. Houghton, 868 N.W.2d 143, 158–59 (Wis. 2015) (same).

165. *See, e.g.*, Jones v. Commonwealth, 836 S.E.2d 710, 714–15 (Va. Ct. App. 2019):

> [The] mistake of law was not reasonable because the statute pertaining to the lane markings clearly and unambiguously did not prohibit crossing a single, solid white line. The statute was not new or recently amended. Thus, there is no explanation for the officer's mistake other than inadequate study of the laws;

see also, e.g., United States v. Stanbridge, 813 F.3d 1032, 1037 (7th Cir. 2016); Hart v. Hillsdale County, 973 F.3d 627, 637 (6th Cir. 2020); Adelman v. Branch, 784 F. App'x 261, 267 (5th Cir. 2019); United States v. Alvarado-Zarza, 782 F.3d 246, 250 (5th Cir. 2015); United States v. Labrador-Peraza, 563 F. Supp. 3d 563, 573 (W.D. La. 2021); United States v. Mota, 155 F. Supp. 3d 461, 474–75 (S.D.N.Y. 2016); State v. Stoll, 370 P.3d 1130, 1135 (Ariz. Ct. App. 2016); People v. Holiman, 291 Cal. Rptr. 3d 840, 848 (Cal. Ct. App. 2022); People v. Burnett, 432 P.3d 617, 623–24 (Colo. 2019); State v. Rand, 209 So. 3d 660, 662 (Fla. Dist. Ct. App. 2017); Abercrombie v. State, 808 S.E.2d 245, 253 (Ga. Ct. App. 2017); People v. Brown, 136 N.E.3d 68, 74 (Ill. App. Ct. 2019); State v. Jonas, 867 S.E.2d 563, 570, 571 (N.C. Ct. App. 2021); State v. Trout, 128 N.E.3d 900, 905 (Ohio Ct. App. 2019); State v. Lerdahl, No. 2014AP2119-CR, 2015 WL 4619946, at *4 (Wis. Ct. App. Aug. 4, 2015).

166. *See, e.g.*, United States v. Flores, 798 F.3d 645, 649 (7th Cir. 2015); State v. Tenold, 937 N.W.2d 6, 11 (S.D. 2019); State v. Lees, 432 P.3d 1020, 1025 (Kan. Ct. App. 2018); *see also* United States v. Romero, 935 F.3d 1124, 1131 (10th Cir. 2019) (relying on Kagan's concurrence and finding law unambiguous under prior state case law); *cf. Burnett*, 432 P.3d at 623 ("While it is more likely that a mistake of law may be reasonable if there is no precedent contrary to an officer's reading of a statute, lack of precedent alone cannot rehabilitate a statutory interpretation that is unwarranted by the plain language and structure of the statute.").

167. *See* Heien v. North Carolina, 574 U.S. 54, 66 (2014) (noting that when assessing objective reasonableness, the Court "[does] not examine the subjective understanding of the particular officer involved").

168. *See id.* at 69 (Kagan, J., concurring) (citing majority opinion) ("[A]n officer's 'subjective understanding' is irrelevant . . . .").

"[c]onstitutional muster . . . inasmuch as [the officer] *believed* Alabama law" allowed the stop.[169] And in *Knapp v. State*, a Florida appellate court thought it important that the officer "believed in good faith that the harm the statute was intended to prevent was present" when he unlawfully detained a motorist.[170]

Moreover, at odds with at least Justice Kagan's view in *Heien*,[171] courts at times attach importance to an officer's training and experience.[172] They are particularly deferential when officers on street patrol are mistaken about the requirements of another state's vehicle equipment laws,[173] which they nevertheless invoke in their jurisdiction to seize individuals.

4. Quick Decisions

Finally, although the *Heien* majority predicated its holding on the need to provide leeway for officers who " 'suddenly confront' a situation in the field as to which the application of a statute is unclear," forcing them to make a "quick decision on the law,"[174] police often

169. No. 21-cr-62-B, 2021 WL 5826269, at *4–5 (S.D. Ala. Dec. 8, 2021).

170. 346 So. 3d 1279, 1282 (Fla. Dist. Ct. App. 2022).

171. *See Heien*, 574 U.S. at 69 (Kagan, J., concurring) ("[A]n officer's reliance on 'an incorrect memo or training program from the police department' makes no difference to the analysis [of reasonableness]." (quoting State v. Heien, 737 S.E.2d 351, 360 (N.C. 2012) (Hudson, J., dissenting))).

172. *See, e.g.*, Williams v. United States, No. PX-15-3685, 2018 WL 3375109, at *4 (D. Md. July 11, 2018); People v. Dunmire, 160 N.E.3d 113, 130 (Ill. App. Ct. 2019); State v. Stadler, No. 112,173, 2015 WL 4487059, at *5 (Kan. Ct. App. July 17, 2015). *But see* United States v. Perez-Madrigal, No. 16-CR-20044, 2017 WL 2225221, at *5 (D. Kan. May 19, 2017). In *Perez-Madrigal*, the court dismissed the importance of an officer's testimony that "he had performed several similar stops over the years and that these stops had never been challenged," explaining that

> the fact that previous similar encounters have gone unchallenged has no bearing on whether continued stops of the same variety are reasonable or legal. . . . To hold otherwise might encourage the use of unlawful law enforcement practices in the hope that a pattern of those stops would eventually lead to acceptance of the stops as reasonable.

Id. at *5.

173. *See, e.g.*, United States v. Morris, No. 20-cr-00167, 2021 WL 141799, at *4 (S.D. W. Va. Jan. 14, 2021); State v. Jensen, No. 117,388, 2018 WL 2271538, at *6 (Kan. Ct. App. May 18, 2018). *But see* Saint-Jean v. County of Bergen, 509 F. Supp. 3d 87, 109 (D.N.J. 2020):

> The officers were aware that they were applying New Jersey law to the equipment on an out-of-state car. Officers patrolling highways, like the Palisades Parkway, which are traveled by out-of-state vehicles should be trained in such issues, which recur. To the extent the law might be regarded as complicated or uncertain, all of the uncertainty falls on the side of suggesting that the windows were legal, not illegal. This situation should have at least triggered a duty to check before arresting and detaining a driver.

174. *Heien*, 574 U.S. at 66.

mistakenly apply laws in the absence of exigency.[175] Indeed, this appeared to be the case in *Heien* itself.[176]

III. THE BROADER HARMS OF *HEIEN*

Having discussed the many jurisprudential problems spawned by *Heien*, this Part examines the decision's several very significant broader ramifications. First, *Heien* significantly expanded the already substantial discretionary police authority to detain individuals, and the many significant negative consequences that flow from it. Second, by condoning reasonable mistakes of law, the Court condoned legal indeterminacy, which undermines the rule of law. Finally, *Heien*, as will be discussed, has undercut separation of powers. This is because courts often simply decide whether a police mistake is reasonable, without providing an authoritative interpretation of a law. When this occurs, courts effectively cede their institutional job of interpreting laws to executive branch actors (police), which undermines separation of powers and lessens the motivation of legislatures to craft laws with as much precision as possible.

A. Expansion of Discretionary Police Authority

Perhaps most problematic of *Heien*'s broader consequences is its very substantial expansion of discretionary police authority to seize individuals. As noted earlier, courts apply *Heien* to condone stops of not only motorists for suspected equipment violations but also of individuals engaging in myriad other behaviors that police mistakenly believe are unlawful.[177] Despite the *Heien* majority's downplaying of their significance,[178] investigative stops (whether of motorists or others) can be a major personal event for individuals.[179] They also afford police

175. *See, e.g.*, State v. Amator, 872 S.E.2d 589, 591 (N.C. Ct. App. 2022) (deeming a mistake reasonable because the officer "relied on his quick reference guide and the information from the [Motor Vehicles Department] Commissioner on the back of the registration card" in reaching the mistaken legal conclusion).

176. The officer in *Heien* admitted that he was looking for "criminal indicators" in passing cars, decided to pursue Heien's vehicle because its driver had his hands "at a 10 and 2 position, looking straight ahead," and followed the car for some time before initiating a stop. Reply Brief for Petitioner at 18, *Heien*, 574 U.S. 54 (No. 13-604), 2014 WL 4101230 (internal quotation marks omitted).

177. *See supra* notes 51–65 and accompanying text.

178. *See Heien*, 574 U.S. at 67 ("[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.").

179. *See id.* at 74 (Sotomayor, J., dissenting) (describing stops as often "invasive, frightening, and humiliating" experiences); *see also* Terry v. Ohio, 392 U.S. 1, 17 (1968) (acknowledging that

the opportunity to employ corollary investigative tools, such as requesting consent to search (as in *Heien*), which research shows individuals overwhelmingly provide.[180] Police can also demand identification to gain immediate access to interconnected databases that contain massive amounts of information—including bench arrest warrants,[181] which can be incorrect[182]—and sometimes contain quite sensitive personal information.[183] If police reasonably believe a detainee has a weapon, they can conduct a bodily frisk,[184] which the Court has described as "a severe, though brief, intrusion upon cherished personal security."[185] With vehicle stops, police can order the driver and any passengers to exit the vehicle,[186] walk a drug detection dog around the vehicle (without any basis to believe it contains drugs),[187] ask a barrage of unrelated questions designed to elicit incriminating information,[188]

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an investigative detention is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment").

180. *See* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1987 (2019) (noting empirical work showing that ninety-seven percent of participants facing a consent request "complied, mostly without hesitation or demurral").

181. *See* Wayne A. Logan, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 619, 640 (2019):

> An active arrest warrant entitles police to arrest an individual even when it is generated by another jurisdiction. The vast majority of such warrants concern low-level offenses, such as neglecting to show up for a court date or pay a fee or fine (very often for a traffic offense), or offenses of a quasi-criminal nature.

(footnotes omitted).

182. *See* Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 559–63 (2016) (discussing widespread errors in state, local, and federal databases, including invalid search and arrest warrants and inaccurate criminal histories).

183. *See* Logan, *supra* note 181, at 653. The National Crime Information Center, which provides a database available to police, contains personal information on individuals such as:

> [W]hether they have extra body parts (e.g., "EXTR BRST," "EXTR NIP"), missing body parts (e.g., "MISS BRSTS," "MISS PENIS," [ ]), implants ("ART BRSTS," "IMPL PENIS"), eating disorders ("MC EATDIS"), substance abuse problems (e.g., "DA GLUE") . . . , pierced body parts ("PRCD GNTLS"), and a history of anti-depressant use ("TD ADEPRES").

Id.

184. Arizona v. Johnson, 555 U.S 323, 327 (2009).

185. Terry v. Ohio, 392 U.S. 1, 24–25 (1968).

186. *E.g.*, Maryland v. Wilson, 519 U.S. 408, 414 (1997) (passengers); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (driver).

187. Illinois v. Caballes, 543 U.S. 405, 410 (2005).

188. *See* Jeannine Bell, *The Violence of Nosy Questions*, 100 B.U. L. REV. 935, 937 (2020) (criticizing broad discretion for officers to ask unrelated, "nosy" questions on fishing expeditions that embarrass and anger drivers stopped for minor traffic infractions).

and issue commands—all with or without legal basis[189] and sometimes with fatal results.[190]

Even more significant, as noted, courts applying *Heien* condone illegal arrests (not only stops),[191] which are considerably more intrusive physical and psychological experiences.[192] Arrests also permit police to conduct searches of arrestees and their "grab area,"[193] including their naked bodies,[194] and allow for the taking of a DNA sample.[195] If a "recent occupant" of a vehicle is arrested, police can likely search the passenger compartment and any containers inside it.[196] Also, unlike a stop, an arrest will result in a stay in a detention facility, perhaps for a lengthy period,[197] resulting in significant adverse personal consequences (e.g., loss of employment due to missing work, neglected family

189. *See generally* Rachel Harmon, *Law and Orders*, 123 COLUM. L. REV. 943 (2023) (discussing the lack of a clear legal basis for many commands issued by officers).

190. *See generally* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (discussing incidence of traffic stops resulting in fatalities).

191. *See supra* note 48 and accompanying text.

192. *See* United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (describing arrest as "a serious personal intrusion regardless of whether the person seized is guilty or innocent"); United States v. Marion, 404 U.S. 307, 320 (1971) ("Arrest is a public act that may seriously interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."). Importantly, affording police the authority to make mistakes in arrests based on probable cause presumably allows them to stop vehicles in jurisdictions requiring probable cause (not reasonable suspicion) to detain motorists. *See, e.g.*, Commonwealth v. Chase, 960 A.2d 108, 116 (Pa. 2008) (noting that Pennsylvania law requires probable cause to justify certain traffic stops); *cf.* United States v. Stevenson, 43 F.4th 641, 645, 647 (6th Cir. 2022) (noting the Sixth Circuit traditionally requires that probable cause support an alleged commitment of a civil traffic infraction and finding that the officer's legal mistake when making the stop was reasonable).

193. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a search incident to a lawful arrest is permissible under the Fourth Amendment); Chimel v. California, 395 U.S. 752, 763 (1969) (holding that it is reasonable for an officer to search "the area into which an arrestee might reach in order to grab a weapon or evidentiary items"); *see also* Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1535–36, 1543 (2017) (noting that searches by police "are harmful even if no damning information is found" in part because they "signal disrespect" and indicate "that the state does not respect the boundaries that define selfhood"); *id.* at 1536 ("[W]hen the state is the intruder, the intrusion can affect the way [the target] sees herself and her relationship with the state.").

194. *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 325, 330 (2012) (holding that correctional officials may conduct "strip searches" of inmates even absent reasonable suspicion of a concealed weapon or other contraband).

195. Maryland v. King, 569 U.S. 435, 465–66 (2013).

196. *See* Arizona v. Gant, 556 U.S. 332, 343–44 (2009).

197. *See, e.g.*, Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 503 (2019) ("On any given day in America, approximately half a million people sit in pretrial detention—imprisoned though not convicted of a crime. Those 500,000 people spend an average of one month in jail. Some spend years." (footnotes omitted)).

responsibilities)[198] and very possibly exposing the detainee to unhealthy[199] and dangerous environments.[200] Worse yet, an arrest record, regardless of whether a conviction results (which is often not the case[201]), has long-term, serious, negative consequences for individuals, such as jeopardizing future housing and employment prospects.[202] And arrests, no less than stops, can have dire (indeed fatal) consequences for individuals at the point of contact with police.[203]

Condoning police mistakes of law assumes even greater significance when contextualized in the broader seizure authority already afforded police. Before *Heien*, police could make reasonable

198. *See* MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 1:4 (4th ed. 2021) (listing a "litany of adverse consequences" that can result from an arrest, including adverse actions by employers and schools, threats to child custody, and more); *see also* Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201, 204–05 (2018) (noting high rate of pretrial detention in the United States and its negative effects on employment outcomes).

199. *See, e.g.*, Matt Pearce, *Missouri Cities, Including Ferguson, Sued over 'Grotesque' Jail Conditions*, L.A. TIMES (Feb. 9, 2015, 12:42 PM), http://www.latimes.com/nation/la-na-ferguson-lawsuit-20150209-story.html [https://perma.cc/LJ99-ZXPM] (describing bodily excretions smeared on cell walls, overcrowding and lack of hygiene and medical care).

200. *See, e.g.*, Shaila Dewan, *Jail Is a Death Sentence for a Growing Number of Americans*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/2022/11/22/us/jails-deaths.html [https://perma.cc/EUD9-QATL] (describing reasons for rising death rates in jails, including Covid-19, suicides, overdoses, quarantine-related strains on jail capacity, and lack of medical or psychiatric attention).

201. *See* Wendy R. Calaway, *Probable Cause Reform as Bail Reform*, 67 ST. LOUIS U. L.J. 295, 305–09 (2023) (discussing results of a study finding that arrests end in dismissal over fifty percent of the time); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1330 (2012) ("In some jurisdictions, prosecutors decline to prosecute as many as half of all misdemeanor arrests." (citing Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 41 (2000))).

202. *See* Logan, *supra* note 181, at 641–42:

> [Arrests] negatively affect later criminal justice system outcomes, impose a variety of immediate financial hardships, and jeopardize current and future employment. It can also adversely affect housing, occupational licensure, and student loan opportunities . . . . [A]n arrest can result in physical harm and even death, and public shaming by having one's "mugshot" posted on a website.

(footnotes omitted); *see also* Eisha Jain, *The Mark of Policing: Race and Criminal Records*, 73 STAN. L. REV. ONLINE 162, 172–74 (2021) (describing studies on employers' consideration of applicants' criminal records and noting that some housing providers similarly consider prospective tenants' criminal records).

203. *See* Carbado, *supra* note 190, at 149–50 (relating incidents where a stop or arrest led to the death of the person stopped); *see also* Finesse Moreno-Rivera, *Police Kill Far Too Many People During Traffic Stops. We Must Change Why Stops Are Made.*, USA TODAY (Nov. 20, 2022, 6:00 AM), https://www.usatoday.com/story/opinion/policing/2022/11/20/police-killings-no-decline-despite-reforms-george-floyd/10648861002/ [https://perma.cc/33XT-QKQJ] ("730 people have been killed in traffic stops since 2017.").

mistakes of fact when seizing individuals.[204] Moreover, as a result of *Michigan v. DeFillippo*, they could arrest on the basis of a law that is later deemed unconstitutional[205] and, after *Devenpeck v. Alford*, arrest for conduct that is not illegal, so long as facts known to the officer afforded probable cause to believe that another actually lawful basis for arrest existed.[206]

Furthermore, when seizing individuals, police need satisfy only modest burdens of proof: reasonable suspicion (for stops) and probable cause (for arrests),[207] which are known to be inherently amorphous.[208] Moreover, because of *Atwater v. City of Lago Vista*, police need not obtain a warrant to arrest an individual if they have probable cause of commission of even a "very minor criminal offense in [the officer's] presence."[209] And *Whren v. United States*[210] allows police to use any alleged legal misconduct as an avowed basis for a stop[211] or arrest[212] as

204. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990); Maryland v. Garrison, 480 U.S. 79, 80, 88 (1987); Hill v. California, 401 U.S. 797, 804–05 (1971); Brinegar v. United States, 338 U.S. 160, 176 (1949). Importantly, mistakes of fact are more ephemeral than those of law. For instance, if an officer initially mistakenly believes that a car's equipment is not in order, and if upon closer inspection the officer learns that this is not the case, the motorist must be permitted to proceed on her way. *See, e.g.*, United States v. Jenkins, 452 F.3d 207, 208 (2d Cir. 2006); State v. Erickson, 911 N.W.2d 913, 916 (N.D. 2018). A mistake of law, however, will likely persist, and provide the officer continued investigative latitude in the field (e.g., conducting a search), until the objective reasonableness issue is resolved.

205. 443 U.S. 31, 37 (1979).

206. 543 U.S. 146, 152–53 (2004). *DeFillippo* and *Devenpeck*, whatever their doctrinal merits, condoned seizures that were at least somehow legally justified when they occurred. *Heien* significantly augmented this constitutional largesse, condoning police seizures when no legal basis whatsoever exists. As noted below, in several instances in the study, courts deemed a mistake of law objectively unreasonable but ultimately upheld the seizure on another basis. *See infra* Section III.B.

207. *See* Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (stating that reasonable suspicion, justifying a stop, requires "a showing considerably less than preponderance of the evidence"); Illinois v. Gates, 462 U.S. 213, 238 (1983) (defining probable cause, justifying an arrest, as a "fair probability" of wrongdoing); Barrera v. City of Mount Pleasant, 12 F.4th 617, 620 (6th Cir. 2021) ("[P]robable cause does not establish 'a high bar.' " (quoting Kaley v. United States, 571 U.S. 320, 338 (2014))).

208. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."); *see also* Jeffrey Fagan, Terry's *Original Sin*, 2016 U. CHI. LEGAL F. 43, 54–56 (surveying the ways in which the Court has failed to "articulate clear standards of suspicion, defaulting [to] the professional 'experience' and judgment of the officer").

209. 532 U.S. 318, 354 (2001).

210. 517 U.S. 806 (1996).

211. *See id.* at 813 (holding that "the constitutional reasonableness of traffic stops" does not "depend[ ] on the actual motivations of the individual officers involved").

212. Arkansas v. Sullivan, 532 U.S. 769, 771–72 (2001). Historically, police have also been known to arrest individuals on the basis of unconstitutional or otherwise legally invalid laws, with no intent to prosecute but "to advance some other goal," such as punishing an individual for being disrespectful to the officer or ending a potentially disruptive or uncomfortable situation. Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 881–82 (2014).

a pretext to camouflage their actual motivation to detain an individual (e.g., a "hunch" that they might possess illegal drugs).[213]

Finally, although *Heien* concerned the "antecedent" question of whether a stop was constitutionally reasonable under the Fourth Amendment,[214] the Court's decision significantly diminished the already modest likelihood that police wrongdoing will result in a remedy.[215] This is because, contrary to the view of commentators,[216] an officer's mistake of law might be deemed unreasonable yet, under *Herring v. United States*, not be "sufficiently culpable"[217] to warrant exclusion because of the "good faith" exception to the exclusionary rule.[218] Similarly, under *Utah v. Strieff*,[219] an unreasonable mistake of law might be attenuated from the securing of evidence, such as when police discover an arrest warrant postseizure[220] or when a new offense

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213. Justice Sotomayor in her *Heien* dissent noted:

> [W]e assumed in *Whren* that when an officer acts on pretext, at least that pretext would be the violation of an actual law. Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands this authority.

Heien v. North Carolina, 574 U.S. 54, 73–74 (2014) (Sotomayor, J., dissenting) (citations omitted); *see also* Andrews v. Slawinski, No. CV 10–05850, 2015 WL 3407912, at *6 (C.D. Cal. May 27, 2015) (noting that a racial profiling claim is "inherently an extremely difficult claim to bring successfully because of the police discretion granted by *Whren* and *Heien*").

214. *Heien*, 574 U.S. at 66.

215. Earlier it was noted that courts at times have erroneously categorized *Heien*'s mistake of law doctrine—a substantive Fourth Amendment question—as one of the several exceptions to the exclusionary rule. *See supra* note 79 and accompanying text.

216. *See, e.g.*, Karen McDonald Henning, *"Reasonable" Police Mistakes: Fourth Amendment Claims and the "Good Faith" Exception After* Heien, 90 ST. JOHN'S L. REV. 271, 315 (2016) ("[O]nce the determination is made that the officer's mistake of law was unreasonable, then the good faith exception is not—and should not be—available to the government."); Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 VA. L. REV. 347, 389 (2021) ("Courts applying *Heien* seem to think that the good-faith exception is not relevant in reasonable-mistake-of-law cases. . . . [N]o court has concluded that the good-faith exception to the exclusionary rule under federal law applied in a case involving an officer who made an unreasonable mistake of law.").

217. 555 U.S. 135, 144 (2009). *Heien*, it is worth noting, arrived at the Court in a curious posture because North Carolina did not recognize the good faith exception to the exclusionary rule. *Heien*, 574 U.S. at 75–76 (Sotomayor, J., dissenting). As a consequence, the Court was asked to address whether a mistake of law can render a seizure unreasonable as a substantive Fourth Amendment matter. *Id.* at 57 (majority opinion).

218. *See, e.g.*, United States v. McBroom, CR No. 21-79, 2021 WL 5240230, at *5 (W.D. Pa. Nov. 8, 2021) (assuming arguendo that mistake of law was unreasonable, exclusionary rule would not apply under *Herring* because "[s]uch conduct is unlikely to be deterred by the threat of sanctions"); People v. Lucynski, No. 353646, 2023 WL 3140008, at *4 (Mich. Ct. App. Apr. 27, 2023) (eschewing exclusionary rule because there was no evidence that officer demonstrated "any deliberate, reckless, or grossly negligent conduct" and no evidence that mistake was part of "systemic effort"). *But see* Jones v. Commonwealth, 836 S.E.2d 710, 714–15 (Va. Ct. App. 2019) (deeming mistake unreasonable and invoking the exclusionary rule because refusing to do so "would reward . . . a 'sloppy study of the law' ").

219. 579 U.S. 232 (2016).

220. *Id.* at 235.

is allegedly committed by an individual.[221] Finally, under *Illinois v. Krull*, an officer can enforce an unconstitutional law unless the statute relied upon "is clearly unconstitutional."[222]

As noted earlier, *Heien* has also impacted qualified immunity analysis, despite the insistence of the *Heien* majority and concurring opinions that mistake of law analysis is distinct.[223] The study revealed several cases where courts deemed a mistake unreasonable as a Fourth Amendment matter yet forgivable under qualified immunity analysis because an officer was not "plainly incompetent"[224] or "existing precedent . . . [did not place the legal] question beyond debate."[225] Courts also found a mistake reasonable yet, assuming arguendo it was not, applied qualified immunity because case law had not clarified the scope of the law serving as the basis for a stop.[226]

In sum, *Heien* significantly enlarged the already expansive discretionary police authority to seize individuals. In so doing, it altered the traditional incentive structure of policing, under which police mistakes of law were categorically condemned by courts first by tort

221. *See, e.g.*, State v. Huez, 380 P.3d 103, 111 (Ariz. Ct. App. 2016) (remanding for consideration of whether *Strieff* bars relief).

222. 480 U.S. 340, 349–40 (1987).

223. *See* Heien v. North Carolina, 574 U.S. 54, 67 (2014) (stating that the mistake of law analysis "is not as forgiving as the one employed in the distinct context" of qualified immunity); *id.* at 68–69 (Kagan, J., concurring) (stating that *Heien*'s analytic framework is distinct from that of qualified immunity).

224. Malley v. Briggs, 475 U.S. 335, 341 (1986).

225. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); *see, e.g.*, Barrera v. City of Mount Pleasant, 12 F.4th 617, 624 (6th Cir. 2021) ("[E]ven if the officers unreasonably misread state law, [plaintiff] still would come up short. He has not shown that they violated clearly established law that would pierce the officers' qualified immunity shield."); Scott v. City of Albuquerque, 711 F. App'x 871, 878–79 (10th Cir. 2017) (deeming arrest unreasonable under *Heien* but affording officer qualified immunity); United States v. Longoria, 183 F. Supp. 3d 1164, 1181 (N.D. Fla. 2016) ("So it is possible to say—and indeed this is what this Court *is* saying—that [the officer] . . . was not 'plainly incompetent' by any stretch of the imagination, and yet also made an 'unreasonable' mistake within the meaning of the Fourth Amendment.").

226. *See, e.g.*, Guilford v. Frost, 269 F. Supp. 3d 816, 827–28 (W.D. Mich. 2017). Although no instances were unearthed in the study, police also enjoy latitude in their application of facts to the law when making arrests. *See* District of Columbia v. Wesby, 583 U.S. 48, 65 (2018) (concluding that qualified immunity attaches when "they 'reasonably but mistakenly conclude[d] that probable cause [wa]s present.' " (alterations in original) (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987))). The standard is also known as "arguable" probable cause. Crosby v. Monroe County, 394 F.3d 1328, 1332–33 (11th Cir. 2004).

liability[227] and later by application of the exclusionary rule.[228] After *Heien*, officers have a strategic incentive to stop or arrest individuals in the hope that their mistake will later be deemed reasonable: an incentive that exists because they can possibly make "bigger" busts (often involving drugs),[229] with the added possible bonus of a revenue windfall when civil or criminal forfeiture laws apply.[230] Given the considerable body of research demonstrating explicit and implicit racial bias in policing,[231] as well as the substantial social costs of investigative stops,[232] this motivational dynamic becomes all the more problematic.

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227. *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 323 (2002) (noting common-law practice of imposing false arrest and trespass liability for illegal arrests); Malcomson v. Scott, 23 N.W. 166, 168 (Mich. 1885) ("An officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify action under the law, he is a wrong-doer."); *see also* LAFAVE, *supra* note 140, at 87 n.10 (recognizing, fifty years before *Heien*, that a "police officer must make no mistakes in statutory interpretation"); *id.* at 63–64 ("No one would assert that law enforcement agencies have a right to exercise discretion beyond the outer boundaries of the law defining criminal conduct, such as by arresting for conduct which the legislature has not declared to be a crime."); RESTATEMENT (SECOND) OF TORTS § 121 cmt. i (AM. L. INST. 1965) ("[N]o protection is given to a peace officer who, however reasonably, acts under a mistake of law . . . .").

228. For examples of pre-*Heien* cases excluding evidence secured on the basis of a mistake of law resulting in an unlawful stop, see United States v. Nicholson, 721 F.3d 1236, 1238, 1244 (10th Cir. 2013); United States v. McDonald, 453 F.3d 958, 962 (7th Cir. 2006); United States v. Chanthasouxat, 342 F.3d 1271, 1279–80 (11th Cir. 2003); United States v. King, 244 F.3d 736, 741 (9th Cir. 2001); Hilton v. State, 961 So. 2d 284, 298 (Fla. 2007); and State v. Anderson, 683 N.W.2d 818, 823–24 (Minn. 2004).

229. *See, e.g.*, Logan, *supra* note 89, at 1248 (describing police use of traffic stops as bases for drug interdiction).

230. *See* INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 38 (2020), https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf [https://perma.cc/PM9G-HLA8] (discussing forfeiture schemes that incentivize forfeiture without arrest or charge). One example is police focus on "forfeiture corridors" along interstate highways, where they use routine traffic stops as bases to seize vehicles and their contents, including cash, generating millions of dollars in forfeiture proceeds. Nick Sibilla, *Cops Use Traffic Stops to Seize Millions from Drivers Never Charged with a Crime*, FORBES (Mar. 12, 2014, 11:38 AM), https://www.forbes.com/sites/instituteforjustice/2014/03/12/cops-use-traffic-stops-to-seize-millions-from-drivers-never-charged-with-a-crime [https://perma.cc/HD6H-43P5]. For more on legal "predatory" policing entailing, inter alia, use of seizures for low-level offenses resulting in required fines, fees, and surcharges, see generally Beth A. Colgan, *Illegality in a World of Predation*, 98 N.Y.U. L. REV. ONLINE 246 (2023).

231. *See, e.g.*, JACK GLASER, SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING 22–41 (2014) (surveying evidence of racial profiling in policing); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1143, 1151 (2012) ("Powerful new research in the behavioral sciences indicates that implicit, nonconscious biases affect the perceptions and judgments that are integral to our understanding of core Fourth Amendment principles.").

232. *See generally* Thomas P. Crocker, *The Fourth Amendment and the Problem of Social Cost*, 117 NW. U. L. REV. 473 (2022).

B. Undermining the Rule of Law

By significantly expanding the seizure authority of police, *Heien* undermined the rule of law in several fundamental ways.

First, with *Heien*, policing has been unmoored from a core aspect of the duty police swear to perform: to enforce *the substantive law*, which effectively serves as their basic job description.[233] As Justice Sotomayor put it in her *Heien* dissent, "What matters . . . [is] the rule of law—not an officer's conception of the rule of law, and not even an officer's reasonable misunderstanding about the law, but the law."[234] By allowing police to make mistakes in enforcing the substantive law, *Heien* upset the long-accepted tenet that ours is "a government of laws, and not of men."[235] After *Heien*, "the limits of official coercion are not fixed; the suggestion box is always open,"[236] neutralizing the basic wherewithal of citizens to plan their public lives. Echoing concerns expressed by Professor Lon Fuller and others,[237] Justice Sotomayor in

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233. *See supra* note 138 and accompanying text; *see also* United States v. Di Re, 332 U.S. 581, 595 (1948) ("It is the officer's responsibility to know what he is arresting for, and why . . . .").

234. Heien v. North Carolina, 574 U.S. 54, 72 (2014) (Sotomayor, J., dissenting); *see also* People v. Guthrie, 30 N.E.3d 880, 890 (N.Y. 2015) (Rivera, J., dissenting):

> Society relies on police officers to enforce laws based on what the law says, not on an officer's mistaken belief. . . . While the realities of police work rightly justify tolerance of an officer's mistake of fact, there is no similar basis to accept or excuse an officer's error regarding what the law permits and forbids;

cf. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990) (expressing preference for system of democratic governance over "a system in which each [individual] conscience is a law unto itself").

235. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("The rule of law . . . is the great mucilage that holds society together."); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 138–39 (1997):

> A consistent strain of our constitutional politics asserts that legitimacy flows from the 'rule of law.' By that is meant a system of objective and accessible commands, law which can be seen to flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority.

236. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 223 (1985).

237. *See* LON L. FULLER, THE MORALITY OF LAW 40 (Yaakov Elman & Israel Gershoni eds., rev. ed. 2000) ("These are the rules we expect [the citizen] to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 181–82 (2d ed. 2008) (noting that a properly designed criminal law code permits individuals "to predict and plan the future course of [their] lives within the coercive framework of the law" and "to foresee the times of the law's interference"); 2 F.A. HAYEK, THE COLLECTED WORKS OF F.A. HAYEK: THE ROAD TO SERFDOM 112 (Bruce Caldwell ed., 2014):

> Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

her dissent justifiably wondered "how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so."[238]

Without the wherewithal to plan, the Fourth Amendment's basic guarantee of the "people to be secure" is imperiled,[239] along with the rights and expectations contingent upon its availability.[240] Without a sense of security, even the factually innocent—the "group for whom the Fourth Amendment's protections ought to be most jealously guarded"[241]—can be discouraged from public engagement.[242] For example, the factually innocent may refrain from going places, engaging in certain behaviors, and meeting with particular individuals.[243] Or they may simply avoid being in public out of fear of having unwanted contact with "the system."[244]

The legal indeterminacy allowed by *Heien* will be especially problematic with the myriad of malum prohibitum offenses contained

238. *Heien*, 574 U.S. at 74 (Sotomayor, J., dissenting); *see also* State v. Carter, 255 A.3d 1139, 1148 (N.J. 2021) (rejecting *Heien* under state constitution and stating that it is "not reasonable to restrict someone's liberty for behavior that no actual law condemns, even when an officer mistakenly, although reasonably, misinterprets the meaning of a statute").

239. U.S. CONST. amend. IV; *see* Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (noting that the Fourth Amendment's protection of the "inestimable right of personal security" is " 'the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law' " (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891))); People v. Arthur J. (*In re* Arthur J.), 238 Cal. Rptr. 523, 527 (Cal. Ct. App. 1987) ("One of our most cherished freedoms is the right to go about our lives without unjustified interference. We safeguard that right by requiring that the police know what the law is in order to arrest someone for a violation of it."); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 129 (2008) ("To have personal security is to have a justified belief that if we do not break the law, our personal lives will remain our own.").

240. *See* Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 412–13 (2018) (emphasizing the role Fourth Amendment protections play in allowing exercise of other constitutional rights).

241. Maryland v. King, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting).

242. What Professor Jane Bambauer called being subject to "hassle": "[T]he chance that the police will stop or search an innocent person against his will." Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 464 (2015); *see also id.* at 466 ("Hassle measures how much pain an investigatory program will impose on the innocent even when the program is moderately successful at detecting crime.").

243. *See* LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 104 (2006) (noting that minorities in particular engage in aversive behaviors "to *avoid* being detained becom[ing] a part of their daily routines"); L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1520 (2011) ("The limited nature of constitutional protections against government searches . . . deters law-abiding persons from engaging in behavior that is not barred under the criminal code.").

244. Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOCIO. REV. 367, 370 (2014); Jamie J. Fader, *"I Don't Have Time for the Drama": Managing Risk and Uncertainty Through Network Avoidance*, 59 CRIMINOLOGY 291, 292 (2021).

in legal codes,[245] including laws that are rarely applied[246] or antiquated (as in *Heien*),[247] creating potential traps for unsuspecting citizens. Before *Heien*, discretionary enforcement of laws regulating such offenses was marked by what Professor Bill Stuntz called a de facto "kind of lawlessness."[248] After *Heien*, this authority remains, but it has been complemented by a de jure kind of lawlessness.[249]

An officer need only raise the prospect of statutory ambiguity, which is often very easy to do (and, as noted, sometimes is not even required[250]), in keeping with Justice Story's recognition that "[t]here is scarcely any law, which does not admit of some ingenious doubt."[251] Exacerbating matters, determining whether ambiguity exists is itself shot through with ambiguity,[252] as evidenced in the cases where judges

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245. On the prevalence of such laws in the regulation of cars, see generally Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004). Auto stops and other low-level offenses comprise the lion's share of state and local court caseloads. *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 735, 739 (2018).

246. *See, e.g.*, Del Cid v. State, No. 2338, 2015 WL 5821625, at *8 (Md. Ct. Spec. App. June 8, 2015) (noting that the historic vehicle license tag law at issue was among the body of "uncommon statutes, that do not appear to have been subject to interpretation" by state courts).

247. At the time of the auto stop in *Heien*, the "stop lamp" law invoked by police was "several decades" old and contained "an antiquated definition of a stop lamp, not reflecting actual vehicle equipment now included in most automobiles." State v. Heien, 714 S.E.2d 827, 831 (N.C. Ct. App. 2011), *rev'd*, 737 S.E.2d 351 (N.C. 2012). For more on the problems associated with such laws remaining at the discretionary disposal of police and prosecutors, see Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95 (2022). Johnson cites among his examples a 2018 police stop of a Black bicyclist who was acting "suspiciously," based on a century-old, preautomobile state law requiring bells on bicycles, apparently motivated by the era's " 'animosity' between bicyclists and pedestrians." *Id.* at 99, 142.

248. Stuntz, *supra* note 132, at 597. So long as probable cause or reasonable suspicion exists that an individual violated any of the vast multitude of codified offenses (including "violations" of local ordinances), police can seize an individual. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 391 (2009) (Thomas, J., concurring in part, dissenting in part, and concurring in the judgment) ("[A] basic principle of the Fourth Amendment[ ] [is] that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules.").

249. In this sense, *Heien*'s holding that state criminal codes do not constrain the arrest authority of police can be seen as the constitutional twin of *Virginia v. Moore*, where the Court held that the Fourth Amendment allows police to violate a state law limiting the warrantless arrest (and search) authority of police. 553 U.S. 164, 176–78 (2008). Thanks to Professor Rachel Harmon for this insight.

250. *See supra* note 85 and accompanying text.

251. Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833).

252. *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("[J]udges often cannot make [the] initial clarity versus ambiguity decision in a settled, principled, or evenhanded way."); Louk, *supra* note 114, at 220 ("[T]he extent of textual ambiguity seems to emerge or recede depending on which sources a court chooses to prioritize and which sources it chooses to ignore."); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT. L. REV. 859, 883 (2004) (noting that there is ambiguity about ambiguity). Judges also disagree on the degree of uncertainty necessary to constitute legal ambiguity. *See* Lane Shadgett, Note, *A Unified Approach*

on the same court disagree over whether a law is ambiguous.[253] Worse yet, *Heien* requires that courts apply a standard-like rule of "objective reasonableness,"[254] which is also ambiguous and difficult to apply.[255]

The impact of this shift is not being felt by unlawfully seized individuals alone, whose experience is reminiscent of a Kafka short story.[256] Rather, as Justice Sotomayor recognized in her dissent, *Heien* has major "human consequences—including . . . for communities and for their relationships with police."[257] Allowing police to flout the laws they are expected to enforce will surely do nothing to instill community confidence in the fairness and competence of police.[258] When police behave in a manner thought unfair, citizens might justifiably become

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to Lenity: Reconnecting Strict Construction with Its Underlying Values, 110 GEO. L.J. 685, 700 (2022).

253. *See, e.g.*, State v. Lerma, 884 N.W.2d 749, 754 (S.D. 2016) (Wilbur, J., concurring in part and dissenting in part) (disagreeing with majority's view that state law was ambiguous, averring that "there is nothing confusing" about the law). Notably, in the *Heien* oral argument, Justices Breyer and Scalia seemingly did not believe that the North Carolina brake-light law was ambiguous. *See* Transcript of Oral Argument at 48–49, Heien v. North Carolina, 574 U.S. 54 (2014) (No. 13-604), 2014 WL 9866145. For other examples of disagreement, see People v. Burnett, 432 P.3d 617 (Colo. 2019); *Lerma*, 884 N.W.2d 749; and People v. Pena, 163 N.E.3d 1 (N.Y. 2020).

254. As Anthony Amsterdam long ago observed, use of a standard for enforcement can be "splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforceability and general ooziness." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 415 (1974).

255. *See supra* Subsection II.B.2*; see also* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974) ("[I]t is hard to determine what constitutes a reasonable mistake of law."). Furthermore, it bears mention that in *Heien*, the Court deviated from its commonly expressed preference for clear, "readily administered" rules to guide police in the exercise of their seizure authority, instead imposing an indeterminate standard of "objectively reasonable" mistakes of law. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (noting "essential interest in readily administrable rules" to guide police discretion).

256. *See* FRANZ KAFKA, THE TRIAL 1 (Willa Muir & Edwin Muir trans., Alfred A. Knopf 1992) (1925) (referring to protagonist Joseph K. who "without having done anything wrong . . . was arrested one fine morning").

257. *Heien*, 574 U.S. at 74 (Sotomayor, J., dissenting). On the negative personal impact of investigative stops, see generally Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of* Terry *Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. & L. 176 (2019).

258. As long ago noted by Professor Jerome Skolnick: "[P]olice in a democracy are not merely bureaucrats. They are also . . . legal officials, that is, people belonging to an institution charged with strengthening the rule of law in society." JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 233 (Macmillan Coll. Pub. Co. 3d ed. 1994) (1966); *see also* ALBERT J. REISS, JR., THE POLICE AND THE PUBLIC 175 (1971) ("The legal exercise of police authority reinforces the right of police to use it, while its illegal exercise undermines the broader acceptance of the authority as legitimate."). In some communities, officers can be the only governmental representatives with whom residents regularly interact. *See* AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 64 (2014).

distrustful,[259] exacerbating strains caused by reports of police fabrications about evidence,[260] racial bias,[261] excessive force,[262] and aggressive street patrol tactics.[263] This in turn can undermine the collective efficacy of communities in deterring crime[264] and reduce the inclination of individuals to assist police,[265] fueling withdrawal from civic life,[266] including voting.[267]

Ultimately, *Heien* creates a troubling asymmetry. Whereas citizens are expected to know and follow the law,[268] *Heien* allows police,

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259. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968) ("A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.").

260. *See, e.g.*, Samuel Dunkle, Note, *"The Air Was Blue with Perjury": Police Lies and the Case for Abolition*, 96 N.Y.U. L. REV. 2048, 2051–54 (2021); Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [https://perma.cc/U7WB-9U9A].

261. *See, e.g.*, Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 640–45 (2021) (finding pretextual stops increase racial profiling); *see also* People v. Pena, 163 N.E.3d 1, 9 (N.Y. 2020) (Wilson, J., dissenting) (noting racially disparate policing practices and stating that "[e]nlarging police discretion to stop automobiles on the ground that the stop is an excusable mistake . . . is fraught with untoward consequences").

262. Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 413–17 (2022).

263. *See, e.g.*, Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2431–40 (2017) (cataloging both short- and long-term harms).

264. Robert J. Sampson, *Neighborhood Effects, Causal Mechanisms, and the Social Structure of the City*, *in* ANALYTIC SOCIOLOGY AND SOCIAL MECHANISMS 227, 232 (Pierre Demeulenaere ed., 2011).

265. *See, e.g.*, Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 272–75 (2010) (finding that community perception of undue police behaviors negatively affects views of police legitimacy); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297 (2015) (finding that police departments exercising high levels of "procedural fairness" garner more popular legitimacy and, in turn, motivate public cooperation); s*ee also* Tracey L. Meares, *The Progressive Past*, *in* THE CONSTITUTION IN 2020, at 209, 216 (Jack M. Balkin & Reva B. Siegel eds., 2009) (noting the importance of "public-regarding justice" and stressing that the imperative of perceived justice and fairness "includes the interests of the *whole public*, not just defendants").

266. Amy E. Lerman & Vesla M. Weaver, *Staying Out of Sight? Concentrated Policing and Local Political Action*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 205–06 (2014); *see* Robert J. Sampson, *When Things Aren't What They Seem: Context and Cognition in Appearance-Based Regulation*, 125 HARV. L. REV. F. 97, 105 (2012).

267. Lerman & Weaver, *supra* note 266, at 222–23.

268. In his majority opinion for the Court, Chief Justice Roberts attempted, unconvincingly, to reconcile affording police but not citizens mistake of law leeway, stating:

> Just as an individual generally cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. . . . But just because mistakes of law cannot justify either the imposition or avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.

state actors the Court otherwise deems worthy of deference for their purported expertise,[269] to err in their most fundamental enterprise: enforcing the law. In doing so, the Court weaponizes statutory ambiguity for use against citizens and encourages rational ignorance among police,[270] lessening their incentive to understand the laws they enforce.[271] Worse yet, when courts fail to settle an interpretive question[272] or disagree on statutory meaning, [273] police have a window of opportunity to continue enforcing the contested law confident in the knowledge that a court will ultimately consider the law ambiguous.

Finally, *Heien* has created a more subtle, systemic problem worth noting. At this time, at least five states have rejected *Heien* based on their state constitutions.[274] When stops or arrests reveal criminal

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Heien v. North Carolina, 574 U.S. 54, 67 (2014). The petitioner in *Heien*, however, did not challenge a ticket or conviction for a brake-light violation. Rather, he challenged an auto stop—a Fourth Amendment seizure that the Court somehow felt justified in treating as a safe harbor for mistakes of law. *Id.* Why police should be allowed to err in favor of legal overinclusiveness when stopping a vehicle, while motorists are not forgiven their mistakes of legal underinclusiveness when they drive one, remains unclear. The Court was possibly motivated at least in part by the view that being detained by police is a trivial event, which, as noted, it is not.

269. *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2081 (2017) (noting that courts view police officers as the keepers of "rare and reliable 'expert' insight").

270. *See* United States v. Lawrence, 675 F. App'x 1, 6 n.8 (1st Cir. 2017) ("[E]ven if the rule of lenity may favor [the defendant] in the context of a marked lanes violation, *Heien* states that the ambiguity favors the Government in the context of a Fourth Amendment challenge."). For the seminal work on rational ignorance, see Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 139 (1957) (using the phrase "rational ignorance" in describing the weak incentives that voters have to become informed). *See also* Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 J. LEGAL STUD. 747, 767 (1990) ("Rational ignorance refers to the lack of incentives on the part of citizens to be fully informed about the policy positions a candidate advocates in an election campaign.").

271. To be sure, the *Heien* majority opinion stated that "an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce." 574 U.S. at 67. Use of the phrase "sloppy study," however, suggests that an officer is educated in the applicable law, which, given the current subpar state of officer legal training, is highly questionable. *See* Linetsky, *supra* note 141.

272. *See* People v. Pena, 163 N.E.3d 1, 7 (2020) (Wilson, J., dissenting) ("[I]f we approve potentially illegal vehicle stops on the basis of mistake-of-law jurisprudence *without determining whether a mistake of law actually occurred*, we prospectively sanction countless potential constitutional violations.").

273. *See, e.g.*, United States v. Atlas, No. 2:20-CR-49, 2020 WL 3777054, at *1–3 (S.D. Ohio July 7, 2020) (explaining that at the time of the traffic stop, the Sixth Circuit and three of four state intermediate appellate courts interpreted the law in favor of defendants, but the intermediate appellate court in the county where defendant was stopped had not interpreted the law, making it a "novel issue"; the intermediate court "split" was to be resolved by the Ohio Supreme Court).

274. State v. Plata, 526 P.3d 1003, 1011–13 (Idaho 2023); Mercado v. State, 200 N.E.3d 463, 470–71 (Ind. Ct. App. 2022); State v. Coleman, 890 N.W.2d 284, 298 n.2 (Iowa 2017); State v. Carter, 255 A.3d 1139, 1147–48 (N.J. 2021); State v. Carson, 404 P.3d 1017, 1019 n.2 (Or. Ct. App. 2017). In Texas, the court of appeals declined to adopt *Heien* as an exception to a state rule of procedure that prohibits admission of unconstitutionally obtained evidence. State v. Tercero, 467 S.W.3d 1, 10–11 (Tex. App. 2015); *see also* Commonwealth v. Jones, 180 N.E.3d 479, 484 n.9 (Mass.

wrongdoing that can be prosecuted in state or federal court (such as crimes involving drugs or guns), the jurisdictional filing decision can be outcome determinative. If a federal prosecution is pursued, *Heien* will apply, allowing the government to raise *Heien*, whereas if the case remains in state court, the defense can rely on the traditional exclusionary rule regarding police mistakes of law.[275] The variation raises the obvious risk that police and prosecutors will forum shop for strategic advantage,[276] resulting in a modern-day incarnation of the "silver platter" doctrine that the Court sought to extinguish over sixty years ago.[277]

The cases that do "go federal" have another unfortunate jurisprudential effect. As I have discussed elsewhere, the work of federal courts in interpreting state criminal laws is rife with difficulties.[278] Federal *Heien* cases are even more problematic because courts that feel obliged to interpret a state law must both predict how a

App. Ct. 2022); State v. Brown, 432 P.3d 1241, 1249 (Wash. Ct. App. 2019), *rev'd on other grounds*, 454 P.3d 870, 871 (Wash. 2019). *But see* People v. Gaytan, 32 N.E.3d 641, 654 (Ill. 2015) (adopting *Heien* as a matter of state constitutional law); Vincent v. Commonwealth, No. 2022-CA-0989-MR, 2023 WL 3906750, at *5 (Ky. Ct. App. June 9, 2023) (same).

275. For a discussion of the difficulties presented when state and federal courts within the same federal appellate court jurisdiction disagree on Fourth Amendment doctrine, see generally Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235 (2014).

276. *See* United States v. Coleman, 162 F. Supp. 2d 582, 589 (N.D. Tex. 2001) ("Forum shopping is not a myth."); Charles D. Bonner, Comment, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 930 (1998) (quoting Richmond, Virginia police captain explaining his jurisdictional choice as "like buying a car: we're going to the place we feel we can get the best deal" (internal quotation marks omitted)). In addition to varied approaches in *Heien* cases, state and federal courts can vary on other matters of constitutional importance, such as the warrantless arrest authority of police. *See, e.g.*, State v. Brown, 792 N.E.2d 175, 177–78 (Ohio 2003) (holding an arrest for the minor misdemeanor of jaywalking unconstitutional under the Ohio Constitution despite federal courts permitting such an arrest). The federal system also promises major prosecutorial benefits compared to state courts, including the possibility of harsher punishments and evidentiary and procedural advantages. *See* Logan, *supra* note 89, at 1270.

277. *See* Elkins v. United States, 364 U.S. 206, 208 (1960) (outlawing practice whereby state and local police, without involvement of federal agents, secured evidence in violation of the Fourth Amendment and provided it to federal authorities for use in federal criminal trials). For a discussion of this phenomenon, which took root in the Prohibition Era, and several other modern-day incarnations of silver platter doctrine, such as those involving federal avoidance of state constitutional constraints, see generally Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293 (2013).

278. *See* Logan, *supra* note 89, at 1267–77. As with *Heien*, the predicate state or local laws justifying stops or arrests, resulting in federal prosecutions for drugs and/or guns, extend well beyond the vehicle equipment context. *See, e.g.*, United States v. Struckman, 603 F.3d 731, 740–41 (9th Cir. 2010) (Oregon burglary law, a felony, and second degree criminal trespass, a misdemeanor); United States v. Brown, 550 F.3d 724, 727 (8th Cir. 2008) (Missouri law prohibiting minors from carrying a concealed weapon, a potential felony); United States v. Jones, 432 F.3d 34, 41–42 (1st Cir. 2005) (Massachusetts law prohibiting possession of a firearm without a license, a felony); United States v. Goines, 604 F. Supp. 2d 533, 542–43 (E.D.N.Y. 2009) (New York law on resisting arrest, a misdemeanor).

state court would interpret one or more of the law's terms and determine whether the law is ambiguous.[279] But in state *Heien* cases, a court need only undertake the latter analysis (if that, as noted). Also, federal courts need not, and do not, always adhere to the statutory interpretive preferences of the states enacting laws in question.[280] Finally, absent a later contrary interpretation by an authoritative state court,[281] the federal position can affect cases in state court[282] and future cases that have "gone federal."[283]

C. Undercutting Separation of Powers

A final problematic consequence of *Heien* concerns the several ways that it undercuts separation of powers.[284]

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279. *See, e.g.*, United States v. Cunningham, 630 F. App'x 873, 877 n.5 (10th Cir. 2015) ("When . . . the highest court in a state has not interpreted the relevant statute, 'federal courts must predict [how it would do so] in light of existing state court opinions, comparable statutes, and decisions from other jurisdictions.' " (alteration in original) (quoting United States v. Harmon, 742 F.3d 451, 456 (10th Cir. 2014))); Guilford v. Frost, 269 F. Supp. 3d 816, 826 (W.D. Mich. 2017) ("This court 'must predict how the state's highest court would interpret the statute.' " (quoting United States v. Simpson, 520 F.3d 531, 535 (6th Cir. 2008))).

280. This includes not only any decisions of pertinent state courts, but also " 'persuasive adjudications by other courts, scholarly works, and considerations touching upon public policy.' " United States v. Lawrence, 675 F. App'x 1, 4 n.6 (1st Cir. 2017) (citation omitted); *see, e.g.*, United States v. Hinton, 773 F. App'x 732, 734 (4th Cir. 2019) (holding that "differing state court decisions" in other states "compel[led]" the court to conclude that South Carolina law, not yet interpreted by its state courts, was ambiguous). *See generally* Nina Varsava, *Stare Decisis and Intersystemic Adjudication*, 97 NOTRE DAME L. REV. 1207 (2022) (exploring differential uses of stare decisis between jurisdictions).

281. *See, e.g.*, State v. Marx, 215 P.3d 601, 674 (Kan. 2009) (rejecting earlier Tenth Circuit constructions of Kansas law requiring that vehicles be driven "as nearly as practicable" within a lane); *cf.* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673–74, 1674 n.3 (2003) (noting high error rates of federal decisions regarding state law and the extended delays occurring before such errors are corrected).

282. *See, e.g.*, State v. Jensen, No. 117,388, 2018 WL 2271538, at *5 (Kan. Ct. App. May 18, 2019) (relying on prior Tenth Circuit and Kansas federal trial court interpretations in finding officer mistake reasonable).

283. *See, e.g.*, United States v. Monje-Contreras, 245 F. App'x 738, 742 (10th Cir. 2007) (deferring to its prior opinion in *United States v. Ledesma*, 447 F.3d 1307 (10th Cir. 2006), which "reviewed the applicable Tenth Circuit law on the general subject of 'obscured' license tags that were not 'clearly visible' "); *see also* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 310 (2005) ("Eventually, the state's high court will issue an interpretation, which will bind both state and federal courts, but a case presenting the opportunity for such definitive clarification may not arise for some time. In the meantime, uncertainty will result.").

284. Although a product of the "Vesting Clauses" in the U.S. Constitution, separation of powers is a structural constitutional expectation in many states. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1050–51, 1050 n.324 (2006) (citing Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999)) (noting that state separation of powers is often controlled by state norms). Localities, however, often do not operate under separation of powers constraints, allowing for executive (police) and legislative fusion. *See* Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. (forthcoming 2024) (manuscript at 15) (describing how law

One way *Heien* does so manifests when courts refuse to provide an authoritative interpretation of the law in question, instead simply addressing whether a police mistake was reasonable.[285] Institutionally, the abdication of authority marks an important shift in the role of the judiciary.[286] While the responsibility for articulating criminal law norms lies with the legislative branch,[287] courts are expected to provide authoritative interpretive input.[288]

When courts demur in *Heien* cases, they effectively afford interpretive power to executive branch actors (police), creating a regime similar to that in *Chevron* cases.[289] Under *Chevron* doctrine, federal courts defer to "reasonable" agency interpretations of ambiguous statutes by executive branch agencies, according them wide berth in their interpretations.[290] In *Chevron* cases, however, it is thought that

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enforcement works as "legislative sponsors"). In several localities, as Professor Fissell demonstrates in his article, police chiefs "sponsor" and play an active role in the creation of low-level offenses in localities, aggravating the substantive law police power aggrandizement discussed in the text. *Id.* For more on the authority of local governments in legislating low-level offenses, see generally Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

285. *See supra* notes 86–89 and accompanying text.

286. As Justice Wilson of the New York Court of Appeals put it in a dissent in a case where the plurality failed to provide an authoritative interpretation of a state traffic law:

> No court other than ours has the power to determine conclusively how the statutes of New York are construed. Courts lacking that power and duty—whether a New York state trial court or a federal appellate court—may often have good reason to avoid construing a New York statute. We do not.

People v. Pena, 163 N.E.3d 1, 7 (N.Y. 2020) (Wilson, J., dissenting).

287. *See* Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 332 (2002) ("[C]onduct can only be criminalized by an elected, representative body."); *see also* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 337–53 (2005) (tracing the evolution from judge-made to statutorily codified laws).

288. *See* THE FEDERALIST NO. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be . . . ascertained by a series of particular discussions and adjudications."); *see also* TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 198 (2000) ("[Judges] resolv[e] unresolved disputes about the requirements of the law. . . . [They] have a duty to give (in fact, to *impose*) resolution. Resolution is a basic requirement of the rule of law."). As Justice Sotomayor noted in her *Heien* dissent, leaving laws unelucidated "is bad for citizens, who need to know their rights and responsibilities, and it is bad for police, who would benefit from clearer direction." Heien v. North Carolina, 574 U.S. 54, 74–75 (2014) (Sotomayor, J., dissenting).

289. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). Under *Chevron*, a court reviewing an agency's interpretation of a statute first asks whether the statutory language is clear. *Id.* at 842–43. If, in "employing traditional tools of statutory construction, [the court] ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. But "if the statute is silent or ambiguous," the analysis proceeds to Step Two, which asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

290. *See, e.g.*, M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 86 (John F. Duffy & Michael Herz eds., 2005) (finding *Chevron* invalidations to be "extremely rare").

Congress impliedly delegates to an agency the authority to interpret ambiguous statutes,[291] whereas no such implied delegation is at work with police officers and their departments,[292] nor would such a delegation be appropriate.[293] Moreover, the second *Chevron* rationale—agency interpretive expertise—is also absent. The laws applied by police on street patrol usually are not, as *Chevron* expects, especially "technical and complex,"[294] and the legal prohibitions (and, occasionally, requirements) they embody call for normative determinations of wrongfulness, not technical expertise.[295]

A second, related concern flows from judicial abdication: it augments the already problematic tendency of courts to defer to the purported expertise of police to gap fill "underspecified" statutory texts that serve to expand the reach of penal laws.[296] After *Heien*, when courts deem police mistakes of law objectively reasonable, the law expands (and never contracts)[297] at the expense of separation of powers.[298]

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291. *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 553 (2009) (discussing how under such circumstances "Congress does not always delegate expressly but often leaves interpretive questions for agencies to resolve"); Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008) ("Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration.").

292. *See* Leading Case, *supra* note 113, at 257 (noting the difference). For an argument that *Chevron* deference should extend to the substantive law interpretations of the Justice Department in Washington, D.C. (Main Justice), see generally Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

293. On why legislative delegations to the executive branch are especially problematic with criminal laws, see Wayne A. Logan, Gundy v. United States*: Gunning for the Administrative State*, 17 OHIO ST. J. CRIM. L. 185, 202–05 (2019). For a discussion of the inappropriateness of delegation in a criminal context because criminal laws deprive individuals of liberty, see F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 306–21 (2021).

294. *Chevron*, 467 U.S. at 865.

295. Fissell, *supra* note 284 (manuscript at 53–56).

296. Lvovsky, *supra* note 269, at 2069, 2072. As Professor Lvovksy elaborates:

> [U]nderspecified legal provisions vest officers with authority over questions of *policy*: which conduct falling under no more specific prohibition than the challenged law itself—sitting on the steps at a late hour, or knocking and looking through a residential window—is nevertheless sufficiently inimical to the public welfare to demand state intervention. Those decisions involve a complex weighing of interests surrounding the use of state power: the elimination of undesirable behaviors, on the one hand, against the expenditure of state resources and intrusion on individual rights, on the other.

Id. at 2073 (footnotes omitted).

297. *See supra* notes 167–170 and accompanying text (discussing United States v. Corona, No. 1:21-cr-62, 2021 WL 5826269, at *5 (S.D. Ala. Dec. 8, 2021), and State v. Knapp, 346 So. 3d 1279 (Fla. Dist. Ct. App. 2022)). As the Eleventh Circuit observed in a pre-*Heien* decision, courts condoning mistakes of flaw allow police to "sweep behavior into [a] statute which the authors of the statute may have had in mind but failed to put into the plain language of the statute." United States v. Chanthasouxat, 342 F.3d 1271, 1278 (11th Cir. 2003).

298. *Cf.* Lvovksy*, supra* note 269, at 2074 ("Underspecified statutes . . . vest[ ] the police with the authority to fill in significant gaps in statutory language and siphon[ ] away the legislature's rightful role in defining criminal policy.").

That police broadly interpret laws should come as no surprise: they are not neutral and detached arbiters of the law but rather, as Justice Jackson famously put it, engaged in the "competitive enterprise of ferreting out crime."[299] On the streets, this broadened authority is concerning given both the acknowledged low visibility of police discretionary behavior[300] and the relative lack of resource constraints on officers' power to stop and arrest.[301] In courtrooms, the authority allocated to police adds to the enormous discretionary authority possessed by prosecutors—fellow executive branch actors—who generously interpret and apply open-textured laws in their charging decisions,[302] which are largely unreviewable by other institutional actors.[303]

A third separation of powers concern relates to *Heien*'s more direct effect on legislatures. When courts fail to interpret laws, and when they condone police enforcement of ambiguous laws, they lessen the motivation of legislatures to craft laws with as much precision as possible. Emblematic of this latitude is the view expressed by the Second Circuit that police should make a "prediction" about the scope of a law they intend to enforce.[304] In a case involving the arrest, search incident, and federal drug prosecution of a defendant,

> it may be useful . . . to think of such an assessment instead as an inaccurate prediction of law. In this light, the question is whether the officer's prediction as to the scope of the ambiguous law at issue was objectively reasonable—even if ultimately mistaken—such

299. Johnson v. United States, 333 U.S. 10, 14 (1948); *cf.* Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.").

300. *See* SKOLNICK, *supra* note 258, at 13 ("Police work constitutes the most secluded part of an already secluded system [of criminal justice] and therefore offers the greatest opportunity for arbitrary behavior."); Caleb Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 20–21 (1957) (discussing the absence of meaningful factual information regarding police practices); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359–62 (1936) (noting the shrouded nature of day-to-day policing).

301. For police, stops and arrests for minor offenses are low-resource undertakings with major potential payoff in the form of discovery of information leading to more serious (and career-enhancing) criminal prosecutions. They can also help officers fulfill stop and arrest quotas imposed by departments. *See generally* Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529 (2021).

302. *See* Stuntz, *supra* note 132, at 519 (2001) ("Broad criminal law . . . means that the law as enforced will differ from the law on the books. And the former will be defined by law enforcers, by prosecutors' decisions to prosecute and police decisions to arrest.").

303. *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) (noting that prosecutors' charging decisions "are totally discretionary and virtually unreviewable").

304. United States v. Diaz, 854 F.3d 197, 204 n.12 (2d Cir. 2017).

> that a reasonable judge could have accepted it at the time it was made in light of the statutory text and the available judicial interpretations of that text.[305]

Ceding interpretive authority to executive branch actors and refusing to explicitly condemn legislatures for enacting ambiguous laws have broader implications given what we know of the political economy of criminal lawmaking. As Professor Bill Stuntz recognized, legislators and executive branch actors (police and prosecutors) enjoy a natural alliance, ensuring enactment of more imprecise laws and more opportunities to exercise executive discretion to seize and prosecute.[306] When courts indulge police mistakes of law, legislators have less incentive to resist institutional pressure to enact imprecise laws,[307] perform the difficult task of precise drafting,[308] and avoid textual imprecision (which is already troublingly common).[309] Nor will they feel pressure to provide definitions that can limit and guide enforcement of a law,[310] which is a core expectation of the void-for-vagueness

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305. *Id.* (emphasis omitted); *accord* United States v. Lawrence, 675 F. App'x 1, 4 n.6 (1st Cir. 2017) (stating that when assessing whether a state or local law was violated, a federal court must make an "informed prophecy" about how the highest state court in the jurisdiction would rule).

306. *See* Stuntz, *supra* note 132, at 510 (noting a "tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes" as well as the "growing marginalization of judges"). As Stuntz observed, the connection is especially evident with low-level offenses, such as those mainly at issue with mistakes of law, the enforcement of which "make policing cheaper, because they permit searches and arrests with less investigative work," constituting a "boon to police and legislators alike." *Id.* at 539.

307. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 360–61 (2019) (discussing legislative incentives and stating that "there is no real political pressure on legislatures to write carefully crafted laws"); Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 658 (2019) ("[O]urs is not a world where lawmakers tend to draft well-tailored, proportional statutes. Particularly in the realm of criminal law, the tendency is just the opposite . . . ." (emphasis omitted)).

308. *See* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 993 (2019) ("Carefully crafted laws require significant time and effort, and both are often in short supply when legislatures are in session.").

309. *See, e.g.*, United States v. Harris, 653 F. App'x 709, 712 (11th Cir. 2016) (deeming a mistake over coverage of Florida law regarding car license plate frame reasonable "in light of the statute's broad language and the lack of any settled state law" regarding statutory coverage at the time of the stop); Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 638–39 (2014) (reporting that in seventy-nine of all 110 federal appellate cases decided in 2011, the court deemed the statutory provision in question ambiguous); *cf.* Sykes v. United States, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting) (condemning "[f]uzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation"), *overruled by* Johnson v. United States, 576 U.S. 591 (2015).

310. *See, e.g.*, United States v. Hinton, 773 F. App'x 732, 733–34 (4th Cir. 2019) (describing the failure to define "oncoming vehicle" in a statute regarding use of car high beam lights); Campbell v. United States, 224 A.3d 205, 211 (D.C. 2020) (excusing the omission of "parking area" in a law prohibiting possession of open alcohol container); People v. Theus, 64 N.E.3d 61, 63–68 (Ill. App. Ct. 2016) (noting the failure to specify whether signal must be used when traffic lanes merge from two to one); State v. Amator, 872 S.E.2d 589, 590–91 (N.C. Ct. App. 2022) (relying on the legislature's failure to specify where on a car license plate a registration decal should be affixed). Even in the rare instance where a court has exhorted its home legislature to clarify a law, the request has not been acted upon. *See, e.g.*, People v. Gaytan, 32 N.E.3d 641, 647 (Ill. 2015);

doctrine.[311] Likewise, because courts cite the complicated interstatutory "structure" of laws when deeming mistakes reasonable,[312] legislatures will not feel obliged to resist their tendency to adopt laws containing cross-references requiring "interplay,"[313] which can be difficult to parse and understand.[314] Meanwhile, officers will continue to have at their disposal "extremely broad laws,"[315] as well as laws involving tort-like standards, such as requiring that a car be kept in "good mechanical condition"[316] and that it "shall not follow another vehicle more closely than is reasonable and prudent."[317]

Commonwealth v. Staples, No. 1945 EDA 2017, 2019 WL 1530238, at *3–4 (Pa. Super. Ct. Apr. 9, 2019).

311. *See* City of Chicago v. Morales, 527 U.S. 41, 60 (1999) (stating that a law must "establish minimal guidelines to govern law enforcement" and asserting that laws cannot be written in such a manner that they "entrust[ ] lawmaking to the moment-to-moment judgment of the policeman on his beat" (internal quotation marks omitted) (quoting Kolender v. Lawson, 461 U.S. 352, 358, 360 (1983))); *see also* United States v. Davis, 139 S. Ct. 2319, 2325 (2019) ("Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.").

312. *See, e.g.*, United States v. Andrews, No. 3:17-cr-215-J-20, 2018 WL 1786996, at *6 (M.D. Fla. Mar. 16, 2018) (deeming mistake reasonable "[g]iven the complicated structure of the statutes"); People v. Pena, 163 N.E.3d 1, 2 (N.Y. 2020) (attaching significance to the complicated structure of law when deeming mistake reasonable); State v. Hirschkorn, 881 N.W.2d 244, 248–49 (N.D. 2016) (same). *But see* Flint v. City of Milwaukee, 91 F. Supp. 3d 1032, 1059 (E.D. Wis. 2015) ("Statutes frequently cross-reference each other and require some effort to connect the dots. If reasonable mistakes of law were permitted on this basis alone (without showing concomitant ambiguity), virtually no mistakes of law would be unreasonable, given the often dense and inartful structure of such statutes, *writ large*."); People v. Guthrie, 30 N.E.3d 880, 891 n.1 (N.Y. 2015) (Rivera, J., dissenting):

> [T]he majority's [opinion is based on an] underlying flawed premise that objectively reasonable mistakes of law involve only complex matters which officers simply should not be expected to learn. Of course those are exactly the types of mistakes that we should incentivize officers to avoid by excluding evidence obtained as a result of such errors. Moreover, if a law is simply too difficult for an officer to understand or learn, why should we expect those without legal training to fare any better?

313. United States v. Outen, No. 3:22-948-MGL-1, 2023 WL 3737863, at *3 (D.S.C. May 31, 2023); *Hirschkorn*, 881 N.W.2d at 249.

314. This is an outcome that surely does nothing to rectify the acknowledged shortcomings of U.S. criminal codes more generally. *See* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 702–09 (2017); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–44 (2005).

315. *See* Brennan-Marquez, *supra* note 307, at 641 (using phrase when documenting instances); *see also* Marc A. Levin, *At the State Level, So-Called Crimes Are Here, There, Everywhere*, CRIM. JUST., Spring 2013, at 4, 6 (highlighting "the deluge of overly broad and vague criminal laws").

316. State v. Beauregard, 820 A.2d 183, 184 (Vt. 2003); *see also, e.g.*, Hilton v. State, 961 So. 2d 284, 295 (Fla. 2007) (upholding a stop based on a Florida law prohibiting a cracked automobile windshield when it is in "such unsafe condition as to endanger any person or property" (quoting FLA. STAT. ANN. § 316.610 (West 2001))).

317. United States v. Valdez, No. 02-5369, 2005 WL 2374227, at *3 (6th Cir. Sept. 26, 2005) (citation omitted) (internal quotation marks omitted) (discussing a Tennessee law); *see also* Eanes v. State, 569 A.2d 604, 615 (Md. 1990) (concluding that a statute is not invalid "simply because it requires conformity to an imprecise normative standard").

Finally, it is important to note that the lost opportunity in *Heien* to prod legislatures to be more precise is not counterbalanced by political pressures that might otherwise be brought to bear. This is because while the low-level offenses such as those invoked in *Heien* potentially affect a great many individuals, including those enjoying political influence, police often use such laws to target politically disempowered individuals.[318] Furthermore, even if politically empowered individuals are targeted, they will likely lack political motivation to complain because they cannot be convicted of the fictional offense (presuming no evidence is found justifying an unrelated prosecution).[319] Meanwhile, criminal defendants facing prison time based on evidence seized as a result of a police mistake of law[320] will likely have very modest (if any) influence on the political process.[321]

Ultimately, the upshot of this failure in accountability is being felt on the streets. With *Heien* affording police even greater discretionary authority in their enforcement of laws, there have been increases in the already alarmingly high number of legally invalid stops[322] and the many negative social consequences they carry.[323] Worse yet, there are more arrests—an unfortunate development in a nation where one in three individuals will be arrested by age twenty-three[324]—

318. *See, e.g.,* U.S. DEP'T OF JUSTICE, C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T (2014), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/5QNC-N3CD] (reporting widespread police use of low-level offenses to target poor African-Ameican community members and generate funds for local government); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual.").

319. *See supra* note 46 and accompanying text (noting "invisible" cases); *see also* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1482 (1996) ("The criminal defendant . . . functions as a private attorney general, ever-vigilant in preventing government misconduct that would otherwise . . . harm those the Fourth Amendment was intended to protect." (footnote omitted)).

320. Individuals suing civilly under civil rights laws for arrests based on police mistakes of law might constitute an exception.

321. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 173 (2011) ("Save for law enforcement lobbies, few organized, well-funded interest groups take an interest in criminal statutes . . . ."). *See generally* Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965 (2023) (discussing influence of the "law enforcement lobby" on the criminal justice system more generally).

322. *See, e.g.*, Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1490 n.161 (noting that only four percent of more than half a million individuals stopped, questioned, and frisked in 2006 by New York City Police were actually arrested).

323. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 133 n.8 (2000) (Stevens, J., concurring in part and dissenting in part) (asserting that high rates of stops not resulting in arrest "indicate that society as a whole is paying a significant cost in infringement on liberty").

324. Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25

fueling the nation's already chronically high conviction and incarceration rates.[325]

CONCLUSION

In 1774, Thomas Paine famously declared in *Common Sense* that "in America the law is king."[326] After *Heien*, this remains the case, but it is the law according to the nation's over 780,000 law enforcement officers,[327] who are allowed to be mistaken about the scope and meaning of the laws they enforce. As the results of the study reported here make clear, *Heien* has sowed confusion among lower courts regarding how mistake of law claims are to be assessed, significantly increased the already substantial discretionary police authority to seize individuals, undermined the rule of law, and undercut separation of powers.

Over time, various Justices have voiced a willingness to reconsider search and seizure doctrine should real-world experience suggest a need for reconsideration.[328] It is hoped that the discussion here makes the case for *Heien* being a very worthy candidate.

(2012). The rate is even higher (almost fifty percent) for Black and Hispanic males. Robert Brame, Shawn D. Bushway, Ray Paternoster & Michael G. Turner, *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

325. *See* WAYNE A. LOGAN, THE EX POST FACTO CLAUSE: ITS HISTORY AND ROLE IN A PUNITIVE SOCIETY 164–69 (2023).

326. THOMAS PAINE, COMMON SENSE (1776), *reprinted in* COMMON SENSE AND OTHER WRITINGS 3, 31 (Gordon S. Wood ed., Random House Publ'g Grp. 2003).

327. *National Police Week: May 14-20, 2023*, U.S. CENSUS BUREAU (May 14, 2023), https://www.census.gov/newsroom/stories/police-week.html [https://perma.cc/LR96-5KFX].

328. *See, e.g.*, Arkansas v. Sullivan, 532 U.S. 769, 773 (2001) (per curiam) (Ginsburg, J., concurring) (stating in cases allowing police to arrest on a pretextual basis that "if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests', I hope the Court will reconsider its recent precedent" (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 353 (2001))); United States v. Leon, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring):

> [A]ny empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results.