

## California Western Law Review

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Volume 52 | Number 1

Article 5

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10-1-2015

### Heien v. North Carolina and Police Mistakes of Law: The Supreme Court Adds Another Ingredient to Its “Freedom-Destroying Cocktail”

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#### Recommended Citation

Morales, Lorenzo G. (2015) "Heien v. North Carolina and Police Mistakes of Law: The Supreme Court Adds Another Ingredient to Its “Freedom-Destroying Cocktail”," *California Western Law Review*. Vol. 52 : No. 1 , Article 5.

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# HEINONLINE

Citation: 52 Cal. W. L. Rev. 79 2015



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NOTE

*HEIEN* v. *NORTH CAROLINA* AND POLICE MISTAKES OF LAW: THE  
SUPREME COURT ADDS ANOTHER INGREDIENT TO ITS  
“FREEDOM-DESTROYING COCKTAIL”<sup>1</sup>

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INTRODUCTION

Most people have a general sense of whether an activity is unlawful but are unfamiliar with the details of the particular law that

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1. *Navarette v. California*, 134 S. Ct 1683, 1697 (2014) (Scalia, J., dissenting).

makes it so. Take vehicle codes, for instance. If a motorist were to be pulled over for improperly displaying a license plate, that motorist would likely be unfamiliar with the vehicle code section detailing how licenses are supposed to be displayed and would, albeit begrudgingly, take the word of the officer that their license plate display was illegal. This reliance seems reasonable; after all, the police are the people we trust to know and enforce the law.

But what if the police officer is also unfamiliar with the law? What if the license plate display was legally sufficient and the officer wrote the motorist a ticket for what is not actually a violation? Or worse, what if while speaking to the unjustly stopped motorist, the officer spots illegal contraband in the backseat of the vehicle? Would it be unreasonable for the officer to then cite or arrest the motorist for the possession of illegal contraband? This might seem unfair, and some people might even think the motorist's rights were violated, but in a case with facts analogous to the preceding hypothetical, the Supreme Court recently held that an officer's legal mistakes do not necessarily violate a person's Fourth Amendment rights. In *Heien v. North Carolina*,<sup>2</sup> the Supreme Court rejected the former majority rule that a mistake of law cannot be the basis for an officer's reasonable suspicion.<sup>3</sup> Now, pursuant to the *Heien* decision, an objectively reasonable mistake of law does comport with the Fourth Amendment.<sup>4</sup>

Under the Fourth Amendment, a police officer needs at least "reasonable suspicion" to initiate traffic stops.<sup>5</sup> In determining whether a police officer possessed reasonable suspicion, "the totality of the circumstances—the whole picture—must be taken into account."<sup>6</sup> Courts ask two questions when determining whether an officer possessed reasonable suspicion.<sup>7</sup> "The first part of the analysis involves a determination of historical facts," which merely refers to an examination of the facts and circumstances known to a police officer

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

3. *Id.* at 536.

4. *Id.*

5. *Navarette*, 134 S. Ct. at 1687.

6. *U.S. v. Cortez*, 449 U.S. 411, 417 (1981).

7. *Ornelas v. U.S.*, 517 U.S. 690, 696–97 (1996).

at the time of a stop.<sup>8</sup> Courts have long held that police mistakes of fact do not run afoul of the Fourth Amendment as long as the mistakes are reasonable.<sup>9</sup> The second part of the analysis involves identifying “whether the rule of law as applied to the established facts is or is not violated.”<sup>10</sup> In *Heien*, the Supreme Court explained that reasonable mistakes of law made by police officers also do not run afoul of the Fourth Amendment.<sup>11</sup>

This note explains why the *Heien* Court erred in its holding. First, and most importantly, the *Heien* Court erred because the justifications for the former majority rule, which the court declined to follow, are stronger than the justifications for the former minority rule. Second, the *Heien* majority’s standard is overly vague, making it difficult for lower courts to apply the standard uniformly.

Section II provides a summary of the *Heien* facts, procedural history, and majority, concurring, and dissenting opinions. Section III argues for the adoption of the former majority rule based upon the two reasons stated above. Section IV critiques the nebulous standard announced by the majority, suggests that lower courts should instead follow the *Heien* concurrence, and discusses how lower courts have since applied *Heien*. Section V provides a conclusion and suggests how lower courts should interpret and apply *Heien*.

## II. *HEIEN v. NORTH CAROLINA*

### A. *Facts and Procedural History*

On April 29, 2009, Matt Darisse, a sergeant with a North Carolina sheriff’s department, observed Nicholas Heien’s car pass him on the interstate.<sup>12</sup> Sergeant Darisse began to follow the car because the driver, Maynor Vasquez, appeared “very stiff and nervous.”<sup>13</sup> After noticing the car’s right brake light was not functioning, Sergeant

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8. *Id.* at 696.

9. *Brinegar v. U.S.*, 338 U.S. 160, 176 (1949).

10. *Ornelas*, 517 U.S. at 696–97 (quoting *Pullman–Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)) (internal quotation marks omitted).

11. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014).

12. *Id.* at 534.

13. *Id.*

Darisse pulled the car over.<sup>14</sup> Heien was in the backseat, and Heien's friend, Vasquez, was in the driver's seat.<sup>15</sup> The officer initially issued Vasquez a warning, but suspicious of the two men's behavior and inconsistent answers to his questions regarding their destination, Sergeant Darisse prolonged the traffic stop.<sup>16</sup> Sergeant Darisse received Heien's consent to search the car and subsequently discovered a bag of cocaine hidden in the vehicle.<sup>17</sup>

Sergeant Darisse arrested both men, and Heien was charged with attempted trafficking in cocaine.<sup>18</sup> Heien unsuccessfully moved to suppress the cocaine — the trial court found that Sergeant Darisse had reasonable suspicion to stop the car and that the subsequent search was lawful.<sup>19</sup> Heien pled guilty, reserving his right to appeal.<sup>20</sup> On appeal, the appellate court interpreted the relevant state vehicle code statute<sup>21</sup> as requiring only one working taillight, and it reversed the denial of Heien's motion to suppress on the ground that the initial stop violated the Fourth Amendment.<sup>22</sup> The state accepted the appellate court's statutory interpretation and appealed only its finding of a Fourth Amendment violation.<sup>23</sup> Assuming the statute required only one working brake light, the North Carolina Supreme Court reversed the appellate court's decision on the ground that the officer's mistake of law was reasonable, and therefore, the stop did not violate the Fourth Amendment.<sup>24</sup> The case was remanded to the appellate court,

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 534–35.

19. *Id.* at 535.

20. *Id.*

21. N.C. GEN. STAT. ANN. § 20-129(d) (West 2015) (“Every motor vehicle . . . shall have all originally equipped rear lamps . . . which lamps shall exhibit a red light plainly visible . . . .”); *id.* § 20-129(g) (“[All motor vehicles] shall be equipped with a stop lamp on the rear of the vehicle . . . . The stop lamp may be incorporated into a unit with one or more other rear lamps.”).

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

23. *Id.*

24. *Id.*

which then affirmed the denial of Heien's motion to suppress.<sup>25</sup> After the North Carolina Supreme Court affirmed, Heien petitioned for and received a writ of certiorari.<sup>26</sup>

### B. Majority Opinion

The majority opinion, delivered by Chief Justice Roberts and joined by all except Justice Sotomayor, began its analysis by framing the central issue of the case as “whether reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition.”<sup>27</sup> The majority discussed the Fourth Amendment's tolerance for mistakes of fact, so long as “the mistakes [are] those of reasonable men.”<sup>28</sup> According to the majority, because nothing in the Fourth Amendment or the Court's precedent prohibited reasonable mistakes of law, these types of mistakes should be treated like reasonable mistakes of fact. An officer can therefore base reasonable suspicion on either a mistake of fact or a mistake of law.<sup>29</sup>

The majority cited founding-era cases as evidence that reasonable mistakes of law were always tolerated,<sup>30</sup> using *U.S. v. Riddle*<sup>31</sup> as its primary example. In *Riddle*, Chief Justice Marshall stated, with respect to probable cause, that “[a] doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact.”<sup>32</sup> Conceding that *Riddle*'s reasoning is more analogous to the modern qualified immunity doctrine,<sup>33</sup> and therefore not directly on point, the majority nonetheless reasoned that no subsequent decision of the Court has challenged its explanation that probable cause “encompass[es] suspicion based on reasonable mistakes of both fact and law.”<sup>34</sup>

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25. *Id.*

26. *Id.*

27. *Id.* at 536.

28. *Id.* (quoting *Brinegar v. U.S.*, 338 U.S. 160, 176 (1949)).

29. *Id.*

30. *Id.* at 536–37.

31. *U.S. v. Riddle*, 9 U.S. 311 (1809).

32. *Id.* at 313.

33. See Section IV(a), *infra*.

34. *Heien*, 135 S. Ct. at 537.

The majority further reasoned that its conclusion was supported by a more recent case, *Michigan v. DeFillippo*.<sup>35</sup> In *DeFillippo*, a police officer arrested the defendant for violating a statute that (1) authorized officers to stop and question individuals based on reasonable suspicion of criminal activity, and (2) made it illegal for individuals stopped under the statute to refuse to provide evidence of identity.<sup>36</sup> The officer searched the defendant and found him to be in possession of drugs.<sup>37</sup> A state appellate court found the statute to be unconstitutional and ordered the trial court to suppress the evidence.<sup>38</sup> The Supreme Court held that “[t]he subsequently determined invalidity of the Detroit ordinance . . . does not undermine the validity of the arrest made for violation of that ordinance, and the evidence discovered in the search of respondent should not have been suppressed.”<sup>39</sup> Specifically, the Court found that the officer had probable cause based on the facts, and that it would not have been reasonable for him to have anticipated the law’s unconstitutionality.<sup>40</sup> According to the *Heien* majority, its holding was consistent with *DeFillippo*, whereas a contrary holding would have been “hard to reconcile . . . .”<sup>41</sup>

In the next part of its analysis, the majority explained the contours of a “reasonable” mistake of law:

The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable. We do not examine the subjective understanding of the particular officer involved. Cf. *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). And the inquiry is not as forgiving as the one employed in the distinct context of

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35. *Id.* at 538 (citing *Michigan v. DeFillippo*, 443 U.S. 31 (1979)).

36. *DeFillippo*, 443 U.S. at 33–34.

37. *Id.* at 34.

38. *Id.* at 34–35.

39. *Id.* at 40.

40. *Id.* at 37–38. As noted in *Heien*, however, the Court did imply that it would be unreasonable for an officer to enforce an enacted statute that was “grossly and flagrantly unconstitutional . . . .” *Heien*, 135 S. Ct. at 538 (quoting *DeFillippo*, 443 U.S. at 38) (internal quotation marks omitted).

41. *Heien*, 135 S. Ct. at 538.



deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation.<sup>42</sup>

The majority then applied its standard to Sergeant Darisse's mistake and found the mistake to be objectively reasonable.<sup>43</sup> The majority found it notable that, prior to *Heien*, no state appellate court had interpreted the relevant statute.<sup>44</sup> And, considering the complex statutory interpretation in which the North Carolina appellate court had engaged, the majority had "little difficulty concluding that the officer's error of law was reasonable."<sup>45</sup> Since Sergeant Darisse's mistake was reasonable, he thus had reasonable suspicion sufficient to initiate the traffic stop.<sup>46</sup>

### C. Concurring Opinion

The concurring opinion, written by Justice Kagan and joined by Justice Ginsburg, expanded upon two points made by the majority. First, under the majority's standard, "an officer's 'subjective understanding' [of a statute] is irrelevant[,] and should not be examined by courts."<sup>47</sup> This rule precludes the government from defending an officer's mistake of law on the ground that the officer was poorly trained or unaware of the law.<sup>48</sup>

Second, the majority's standard is "more demanding" than the qualified immunity standard, the latter of which protects "all but the plainly incompetent or those who knowingly violate the law."<sup>49</sup> According to Justice Kagan, a mistake of law will only be reasonable when the statute at issue presents a difficult question of statutory interpretation, which, she emphasized, will rarely occur.<sup>50</sup> Justice

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42. *Id.* at 539.

43. *Id.* at 540.

44. *Id.*

45. *Id.*

46. *Id.*

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

48. *Id.*

49. *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)) (internal quotation marks omitted).

50. *Id.*

Kagan then explained the test for determining the reasonableness of a mistake of law in her own words: “If the statute is genuinely ambiguous, such that overturning the officer’s judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not.”<sup>51</sup> The concurrence then examined the vehicle code statute at issue in *Heien* and concluded it was sufficiently ambiguous such that Sergeant Darisse’s mistake of law was reasonable.<sup>52</sup>

#### *D. Dissenting Opinion*

Justice Sotomayor, the lone dissenter in *Heien*, concisely summed up her position:

In short, there is nothing in our case law requiring us to hold that a reasonable mistake of law can justify a seizure under the Fourth Amendment, and quite a bit suggesting just the opposite. I also see nothing to be gained from such a holding, and much to be lost.<sup>53</sup>

Justice Sotomayor argued that a police officer’s understanding of the law should not be one of the “inputs” in a Fourth Amendment “reasonableness” inquiry.<sup>54</sup> Rather, the reasonableness of a search or seizure should depend on “an officer’s understanding of the facts against the actual state of the law.”<sup>55</sup> In explaining the Fourth Amendment reasonableness inquiry in its cases, the Supreme Court has always emphasized the importance of taking an officer’s understanding of the facts into account but never an officer’s understanding of the law.<sup>56</sup> Justice Sotomayor criticized the majority for not addressing these cases but instead relying on “founding-era customs and statutes and cases applying those statutes” that the majority conceded were “not directly on point . . . .”<sup>57</sup>

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51. *Id.*

52. *Id.* at 541–42.

53. *Id.* at 545 (Sotomayor, J., dissenting).

54. *Id.* at 542.

55. *Id.*

56. *Id.* at 542–43.

57. *Id.* at 545.

Justice Sotomayor was also concerned the majority's holding would "further erod[e] the Fourth Amendment's protection of civil liberties in a context where that protection has already been worn down."<sup>58</sup> The Supreme Court has noted that investigative stops (including traffic stops) are often negative experiences for citizens.<sup>59</sup> Allowing police officers to stop motorists so long as the officers' misinterpretation of the law is reasonable will likely increase the number of negative experiences.<sup>60</sup> Another "perverse effect" of the majority's holding is that — by retroactively deciding whether an officer's action was reasonable instead of interpreting the statute's language — it may give police too great a role in defining ambiguous laws.<sup>61</sup>

Additionally, according to the dissent, following the majority rule would not hinder law enforcement efforts, as evidenced by the lack of any significant impact on law enforcement efforts in the federal circuits previously following the majority rule.<sup>62</sup> In addition, law enforcement would not be hindered in the many states that have a good-faith exception to the exclusionary rule.<sup>63</sup> Finally, the dissent criticized the majority's definition of a "reasonable mistake of law" as not being sufficiently detailed.<sup>64</sup> The majority's failure to sufficiently explain what makes a mistake of law reasonable will only create uncertainty in lower courts applying its holding.<sup>65</sup>

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58. *Id.* at 543.

59. *Id.* (first quoting *Terry v. Ohio*, 392 U.S. 1, 25 (1968); then citing *Delaware v. Prouse*, 440 U.S. 648, 657 (1979)).

60. *Id.* at 543–44, 546 ("One is left to wonder, however, why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question.").

61. *Id.* at 544.

62. *Id.* at 544–45.

63. *Id.*

64. *Id.* at 547.

65. *Id.*

### III. THE SUPREME COURT ERRED BY DECLINING TO FOLLOW THE FORMER MAJORITY RULE, WHICH HAS STRONGER JUSTIFICATIONS THAN THE FORMER MINORITY RULE

Prior to *Heien*, the majority rule provided that a police officer could not base reasonable suspicion on a mistake of law.<sup>66</sup> Federal circuits that had addressed the issue and subscribed to the majority rule included the First Circuit,<sup>67</sup> Fourth Circuit,<sup>68</sup> Fifth Circuit,<sup>69</sup> Seventh Circuit,<sup>70</sup> Ninth Circuit,<sup>71</sup> Tenth Circuit,<sup>72</sup> and Eleventh Circuit.<sup>73</sup> States that had addressed the issue and subscribed to the

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66. See *U.S. v. Nicholson*, 721 F.3d 1236, 1244 (10th Cir. 2013) (“Like most of our sister circuits, we judge the facts against the correct interpretation of the law, as opposed to any other interpretation, even if arguably a reasonable one.”); *State v. Brown*, 850 N.W.2d 66, 74 (Wis. 2014) (“[T]he rule that an officer’s mistake of law is not sufficient grounds for a stop is consistent with holdings from a substantial majority of the state courts that have addressed the issue.”).

67. See *U.S. v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) (“Stops premised on a mistake of law, even a reasonable, good-faith mistake, are generally held to be unconstitutional.”).

68. See *U.S. v. Williams*, 740 F.3d 308, 312 (4th Cir. 2014) (“Nor do we suggest that a police officer’s mistake of law can support probable cause to conduct a stop when the underlying conduct was not, in fact, illegal.”).

69. See *U.S. v. Raney*, 633 F.3d 385, 390 (5th Cir. 2011) (“If the alleged traffic violation forming the basis of the stop was not a violation of state law, there is no objective basis for justifying the stop.”).

70. See *U.S. v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006) (“We agree with the majority of circuits to have considered the issue that a police officer’s mistake of law cannot support probable cause to conduct a stop.”).

71. See *U.S. v. Morales*, 252 F.3d 1070, 1073 n.3 (9th Cir. 2001) (“[G]ood faith but mistaken belief that motorist violated traffic laws does not justify stop under the Fourth Amendment . . .”) (citing *U.S. v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000)).

72. See *U.S. v. Nicholson*, 721 F.3d 1236, 1238, 1242 (10th Cir. 2013) (holding officer’s mistake unreasonable where statute permitted left turns into the outermost lane).

73. See *U.S. v. Chanthasouvat*, 342 F.3d 1271, 1279–80 (11th Cir. 2003) (“Because Officer Carter’s mistake of law cannot provide the objective basis for reasonable suspicion or probable cause, we conclude that the traffic stop at issue violated the Fourth Amendment.”).

former majority rule included Kansas,<sup>74</sup> Maryland,<sup>75</sup> Minnesota,<sup>76</sup> Ohio,<sup>77</sup> and Wisconsin.<sup>78</sup> Federal circuits that had addressed the issue and held that the Fourth Amendment was not violated by a police officer's reasonable mistake of law (i.e., the former minority rule) included the D.C. Circuit,<sup>79</sup> Third Circuit,<sup>80</sup> and the Eighth Circuit.<sup>81</sup> States that had addressed the issue and followed the former minority rule included Arkansas,<sup>82</sup> Georgia,<sup>83</sup> Mississippi,<sup>84</sup> and North

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74. See *Martin v. Kan. Dept. of Revenue*, 176 P.3d 938, 948 (Kan. 2008) (“We . . . hold that an officer’s mistake of law alone can render a traffic stop violative of the Fourth Amendment . . .”).

75. See *Gilmore v. State*, 42 A.3d 123, 131 (Md. Ct. Spec. App. 2012) (“[O]ur review of cases from other jurisdictions persuades us that a mistake of law—unlike a mistake of fact—cannot support a detention for a purported traffic violation.”).

76. See *State v. Anderson*, 683 N.W.2d 818, 823–24 (Minn. 2004) (“[W]e hold that an officer’s mistaken interpretation of a statute may not form the particularized and objective basis for suspecting criminal activity necessary to justify a traffic stop.”).

77. See *State v. Babcock*, 992 N.E.2d 1215, 1219 (Ohio Ct. App. 2013) (“[T]o permit traffic stops founded upon an officer’s mistake of law would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.”) (internal citations and quotation marks omitted).

78. See *State v. Brown*, 850 N.W.2d 66, 74 (Wis. 2014) (“[I]f the officers’ interpretation of the law were incorrect th[en] the stop would be unconstitutional because a lawful stop cannot be predicated upon a mistake of law.”) (internal citation omitted).

79. See *U.S. v. Southerland*, 486 F.3d 1355, 1359 (D.C. Cir. 2007) (“[W]e think it objectively reasonable for the officers to suspect that Southerland’s dashboard plate was in violation of Maryland law, even assuming they were mistaken that the law required display of the front plate on the bumper.”).

80. See *U.S. v. Delfin-Colina*, 464 F.3d 392, 399–402 (3rd Cir. 2006) (holding traffic stop based on mistake of law to be objectively reasonable even though the officer’s subjective interpretation of the statute was unreasonable).

81. See *U.S. v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (“Any mistake of law that results in a search or seizure, therefore, must be *objectively* reasonable to avoid running afoul of the Fourth Amendment.”).

82. See *Travis v. State*, 959 S.W.2d 32, 34 (Ark. 1998) (“[A]ll that is required is that the officer had probable cause to believe that a traffic violation had occurred. Whether the defendant is actually guilty of the traffic violation is for a jury or a court to decide, and not an officer on the scene.”) (internal citation and quotation marks omitted).

Carolina.<sup>85</sup> Though blindly following a majority is generally not a good idea, “the overwhelming acceptance of the position directly opposite that taken by the [*Heien*] majority . . . should give us all pause.”<sup>86</sup>

The *Heien* Court should have applied the former majority rule for two reasons: (1) there was nothing to be gained from the Court’s decision to follow the former minority rule, and (2) the *Heien* decision undermines public confidence in the police and courts. First, as Justice Sotomayor pointed out, there was nothing to be gained by holding that reasonable mistakes of law comport with the Fourth Amendment.<sup>87</sup> The police will not gain any advantage from the *Heien* holding. Even before *Heien*, police possessed broad power to stop motorists. The legal justification for initiating a traffic stop (i.e., reasonable suspicion) requires “‘considerably less than proof of wrongdoing by a preponderance of the evidence,’ and ‘obviously less’ than is necessary for probable cause.”<sup>88</sup> The subjective intentions of a police officer initiating a traffic stop do not matter, so long as an actual offense is observed.<sup>89</sup> However, even where a motorist does not actually commit an offense, a stop is legally justified if the officer initiated the

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83. See *State v. Rheinlander*, 649 S.E.2d 828, 829–30 (Ga. Ct. App. 2007) (“If the officer acting in good faith believes that an unlawful act has been committed, his actions are not rendered improper by a later legal determination that the defendant’s actions were not a crime according to a technical legal definition or distinction determined to exist in the penal statute.”).

84. See *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008) (“[B]ased on the totality of the circumstances with which Officer Moulds was confronted, including a valid, reasonable belief that Moore was violating a traffic law, Officer Moulds had sufficient probable cause to pull Moore over, although, as it turns out, Officer Moulds based his belief of a traffic violation on a mistake of law.”).

85. See *State v. Barnard*, 658 S.E.2d 643, 645 (N.C. 2008) (“It is irrelevant that part of Officer Maltby’s motivation for stopping defendant may have been a perceived, though apparently non-existent, statutory violation of impeding traffic.”).

86. *State v. Heien*, 737 S.E.2d 351, 361 (Hudson, J., dissenting).

87. *Heien v. North Carolina*, 135 S. Ct. 530, 545 (2014) (Sotomayor, J., dissenting).

88. *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014) (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7 (1989)).

89. *Whren v. U.S.*, 517 U.S. 806, 813 (1996).

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stop based on a reasonable mistake of fact.<sup>90</sup> A simple internet search of a state's vehicle code will reveal a large number of traffic offenses and vehicle regulations of which the average motorist is probably unaware. Putting all of this together, one would be hard-pressed to deny that the police can legally stop virtually any motorist.

Incredibly, the *Heien* majority found it wise to give police officers a last-ditch defense in those instances where they exceed their already broad power. Since the police will not significantly benefit from this Supreme Court decision in their favor, it follows that society will also not benefit. Truly, "[o]ne wonders 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."<sup>91</sup>

The Court downplays the risk that officers will use its holding to purposely engage in "sloppy study of the laws [they are] duty-bound to enforce . . ."<sup>92</sup> Yet, it seems apparent that the risk still exists. Had the Court held that the Fourth Amendment does not tolerate police mistakes of law, not only would there have been a clear incentive for all police officers to better learn the law, but any incentive to exploit potential ambiguities would have been eliminated. Nonetheless under *Heien*, the possibility exists that some officers will interpret the decision as giving them free rein to initiate traffic stops so long as they can later attach a reasonable justification to it. However small that risk may be, the majority should have found it unacceptable.

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90. See *Heien*, 135 S. Ct. at 534 ("An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment."); see also *U.S. v. Cashman*, 216 F.3d 582 (7th Cir. 2000). The officer in *Cashman* pulled the defendant over for allegedly violating a statute prohibiting the windshield of a vehicle from being "excessively cracked." *Id.* at 586. The defendant argued the crack in defendant's windshield did not fall within the statutory definition of "excessive cracking," and thus the stop was unjustified. *Id.* at 587. The court disagreed, framing the issue not as "whether [defendant] was actually guilty of committing a traffic offense by driving a vehicle with an excessively cracked windshield," but as "whether it was reasonable for [the officer] to believe that the windshield was cracked to an impermissible degree." *Id.* (citing *U.S. v. Smith*, 80 F.3d 215, 219 (7th Cir. 1996)). The court held that the officer did have probable cause to justify the stop. *Id.*

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

92. *Heien*, 135 S. Ct. at 539–40.

Additionally, it is unclear why, between the government and the public, the public is the one that should have to shoulder the burden of the police's legal mistakes.<sup>93</sup>

The *Heien* decision not only serves no justifiable purpose, it also undermines public confidence in the judiciary and law enforcement. *Heien* likely conflicts with many citizens' understanding of the traditional rule that "ignorance of the law is no excuse . . ."<sup>94</sup> As one court has noted, it would be fundamentally unfair to hold citizens to this standard, yet allow police officers to be ignorant of the law.<sup>95</sup> The following asymmetry illustrates this point: An off-duty police officer (i.e., a regular citizen) can be ticketed for any vehicle code violation he or she commits, even if the off-duty officer makes an objectively reasonable mistake.<sup>96</sup> But when that same officer is on-duty and initiates a traffic stop based on an objectively reasonable mistake of law, the officer's ignorance of the law is a defense.<sup>97</sup>

The majority addressed this argument, stating that the "true symmetry" is that the government cannot impose liability based on a mistake of law, just as a citizen cannot escape liability based on a mistake of law.<sup>98</sup> In other words, the government would not have been able to write Nicholas Heien a valid traffic ticket for a broken taillight. While the Court's symmetry argument is logical, this explanation requires more thought to understand than does the common-sense maxim, which most people understand on its face. The Court's explanation would likely provide little comfort to a person in Nicholas Heien's position.

It is undeniable that police in America have been heavily criticized over the past year.<sup>99</sup> It is likely that public sentiment toward

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93. *Id.* at 546 (Sotomayor, J., dissenting).

94. *Bryan v. U.S.*, 524 U.S. 184, 196 (1998).

95. *U.S. v. Chanthasouvat*, 342 F.3d 1271, 1280 (11th Cir. 2003).

96. Brief for Petitioner at 18, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604), 2014 WL 2601475.

97. *Id.*

98. *Heien*, 135 S. Ct. at 540.

99. See, e.g., Tobias Salinger, *Justice Department to Accuse Ferguson Police Department of Making Discriminatory Stops of Blacks, Using Resulting Fines to Balance Budget*, N.Y. DAILY NEWS (Mar. 2, 2015), <http://www.nydailynews.com/news/national/feds-condemn-ferguson-mo-police->



law enforcement will worsen following a Supreme Court decision that appears to expand police power. The *Heien* decision has been characterized as giving police “one more ready excuse to routinely violate the laws of the land,”<sup>100</sup> contributing to the “steady erosion of the Fourth Amendment’s protection against unreasonable searches and seizures[.]”<sup>101</sup> and wrongly encouraging the police “to choose the broadest possible range of plausible readings of any traffic law. . . .”<sup>102</sup>

Besides furthering the disconnect between the general public and law enforcement, the *Heien* decision may also affect public opinion of the Supreme Court. A Gallup Poll suggests that public approval of the Supreme Court has been dropping since mid-2009.<sup>103</sup> Although it is unclear whether that trend still exists, it would not be surprising if it does given the recent line of decisions that has worn down Fourth Amendment protections in favor of the police. In *Plumhoff v. Rickard*,<sup>104</sup> the Court held that police did not use excessive force in violation of the Fourth Amendment when they fired their weapons fifteen times into a suspect’s fleeing vehicle, killing the driver and a seemingly innocent passenger.<sup>105</sup> Moreover, the Court noted that the

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racial-bias-report-article-1.2134001; Yamiche Alcindor, *Activists Protest Alleged Chicago Police ‘Black Sites’*, USA TODAY (Feb. 28, 2015), <http://www.usatoday.com/story/news/nation/2015/02/28/activists-protest-alleged-chicago-police-black-sites/24180197/>; Nolan Feeney, *L.A. Police Say Homeless Man Tried to Grab Gun Before Fatal Shooting*, TIME (Mar. 2, 2015), <http://time.com/3729146/los-angeles-homeless-man-shooting/>.

100. John W. Whitehead, *Ignorance Is No Excuse for Wrongdoing, Unless You’re a Cop*, RUTHERFORD INSTITUTE (Dec. 16, 2014), [https://www.rutherford.org/publications\\_resources/john\\_whiteheads\\_commentary/ignorance\\_is\\_no\\_excuse\\_for\\_wrongdoing\\_unless\\_youre\\_a\\_cop](https://www.rutherford.org/publications_resources/john_whiteheads_commentary/ignorance_is_no_excuse_for_wrongdoing_unless_youre_a_cop).

101. Marjorie Cohn, *Supreme Court Upholds Auto Stop With No Traffic Violation*, HUFFINGTON POST (Jan. 30, 2015), [http://www.huffingtonpost.com/marjorie-cohn/supreme-court-upholds-aut\\_b\\_6579916.html](http://www.huffingtonpost.com/marjorie-cohn/supreme-court-upholds-aut_b_6579916.html).

102. Dahlia Lithwick, *The Supreme Court Ignores the Lessons of Ferguson*, SLATE (Dec. 16, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/12/heien\\_v\\_north\\_carolina\\_as\\_the\\_rest\\_of\\_the\\_country\\_worries\\_about\\_police\\_overreach.2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/heien_v_north_carolina_as_the_rest_of_the_country_worries_about_police_overreach.2.html).

103. Rebecca Riffkin, *Americans’ Approval of the Supreme Court Remains Divided*, GALLUP (July 14, 2014), <http://www.gallup.com/poll/172526/americans-approval-supreme-court-remains-divided.aspx>.

104. *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

105. *Id.* at 2022–23.

officers would have been entitled to qualified immunity even had there been a violation.<sup>106</sup> In *Navarette v. California*,<sup>107</sup> the Court held that an anonymous tip that “bore adequate indicia of reliability” could produce the reasonable suspicion needed to initiate a traffic stop.<sup>108</sup> In *Fernandez v. California*,<sup>109</sup> the Court narrowed a consent-related restriction on police, holding that police did not violate the Fourth Amendment where the defendant objected to police searching his home, the police arrested and removed the defendant from the home, and the police returned an hour later and searched the home after receiving consent from the defendant’s cohabitant.<sup>110</sup> And in *Kentucky v. King*,<sup>111</sup> the Court held that police did not violate the Fourth Amendment when they knocked on the door of an apartment emanating the smell of marijuana, heard people begin to move inside, and kicked in the door because they believed that evidence was about to be destroyed.<sup>112</sup> People may group *Heien* with the preceding cases, casting an even more negative light on the Court as a result. Concededly, the United States federal court system is structured to prevent public pressures from influencing judicial decisions.<sup>113</sup> Under the Constitution, Supreme Court justices are appointed for life, rather than a term of years.<sup>114</sup> This constitutional mandate “promote[s] impartial adjudication by placing the judicial power of the United

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106. *Id.* The Court also noted that the presence of a passenger in the vehicle did not change the analysis because Fourth Amendment rights are personal. *Id.* at 2022.

107. *Navarette v. California*, 134 S. Ct. 1683 (2014).

108. *Id.* at 1688.

109. *Fernandez v. California*, 134 S. Ct. 1126 (2014).

110. *Id.* at 1130–31, 1137.

111. *Kentucky v. King*, 131 S. Ct. 1849 (2011).

112. *Id.* at 1854, 1863.

113. See THE FEDERALIST NO. 78 (Alexander Hamilton) (“If the power of making [judicial appointments] was committed . . . to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.”).

114. U.S. CONST. art. II, § 2, cl. 2 (“[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court[.]”); *id.*, art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

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States in a body of judges insulated from majoritarian pressures and thus able to enforce federal law without fear of reprisal or public rebuke.”<sup>115</sup>

Nonetheless, research indicates the Supreme Court may actually be influenced by public opinion.<sup>116</sup> This may be because “the Court requires public support to remain an efficacious branch of government,”<sup>117</sup> or because the justices are people themselves and “respond to the same events or forces that affect the opinion of other members of the public.”<sup>118</sup> Either way, if in practice the Court is influenced by public opinion, then the Court should have seized upon *Heien* as an opportunity to draw a line in favor of the public. Given the rise in anti-police sentiment following the high-profile police shootings of unarmed men in places like Ferguson, Missouri,<sup>119</sup> which left some questioning whether the United States was turning into a police-state,<sup>120</sup> a decision appearing to curtail police power would have been well-received by the public.

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115. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting) (quoting *U.S. v. Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting)) (internal quotation marks omitted).

116. See Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010) (discussing prior research concerning effect of public opinion on the Supreme Court and explaining the results of the authors’ own study).

117. *Id.* at 263–64.

118. *Id.* (“[A]s Cardozo once stated, ‘[t]he great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.’” (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (Yale Univ. Press 1921), [http://www.constitution.org/cmt/cardozo/jud\\_proc.htm](http://www.constitution.org/cmt/cardozo/jud_proc.htm))).

119. Jack Healy, *Ferguson, Still Tense, Grows Calmer*, NY TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/27/us/michael-brown-darren-wilson-ferguson-protests.html>.

120. See, e.g., John W. Whitehead, *From Boston to Ferguson: Have We Reached a Tipping Point in the American Police State?*, HUFFINGTON POST (Oct. 14, 2014), [http://www.huffingtonpost.com/john-w-whitehead/from-boston-to-ferguson-h\\_b\\_5679254.html](http://www.huffingtonpost.com/john-w-whitehead/from-boston-to-ferguson-h_b_5679254.html).

#### IV. THE SUPREME COURT DID NOT SUFFICIENTLY CLARIFY THE STANDARD

This section discusses the contours of a reasonable mistake of law as defined by the majority and concurring opinions in *Heien*. It then critiques the *Heien* majority for failing to sufficiently articulate a clear standard and suggests that lower courts instead follow Justice Kagan's more guiding concurrence. This section concludes by examining four lower court cases, rendered after *Heien*, that dealt with the issue of whether a mistake of law was reasonable.

##### *A. What Is Not a Reasonable Mistake of Law: Qualified Immunity and Mistakes Regarding the Fourth Amendment's Prohibitions*

The majority stated that the reasonable mistake of law 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."<sup>121</sup> This section examines the modern qualified immunity doctrine and analyzes the utility of comparing it to the reasonable mistake of law standard.

The qualified immunity doctrine serves to protect public officials "from harassment, distraction, and liability" when they act reasonably, and to hold them accountable "when they exercise power irresponsibly . . . ."<sup>122</sup> Officials are not liable for reasonable mistakes, "whether the mistake is one of fact or one of law."<sup>123</sup> As stated in *Heien*, this doctrine "protects all but the plainly incompetent or those who knowingly violate the law."<sup>124</sup>

In *Saucier v. Katz*,<sup>125</sup> the Supreme Court mandated a sequenced two-part inquiry for courts to use in qualified immunity cases.<sup>126</sup> Under *Katz*, courts had to first ask whether the alleged facts, viewed in the light most favorable to the injured party, showed that a

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

122. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

123. *Butz v. Economou*, 438 U.S. 478, 507 (1978).

124. *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)) (internal quotation marks omitted).

125. *Saucier v. Katz*, 533 U.S. 194 (2001).

126. *Id.* at 201.

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government agent violated a constitutional right of the injured party.<sup>127</sup> If answered in the affirmative, courts would then ask whether the right violated was “clearly established” at the time of the agent’s alleged misconduct.<sup>128</sup> This mandatory sequence was abandoned eight years later when the Supreme Court held that courts could choose which question to address first.<sup>129</sup> Because the first inquiry involved difficult questions of constitutional law, many lower courts, and sometimes the Supreme Court, began to start their qualified immunity analyses with the second inquiry.<sup>130</sup> In fact, in the recent Supreme Court case of *Carroll v. Carman*,<sup>131</sup> the Court described the qualified immunity rule almost entirely in terms of the “clearly established” prong.<sup>132</sup>

The trend in Supreme Court qualified immunity cases is to find the officer immune from liability.<sup>133</sup> This is unsurprising, considering

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127. *Id.*

128. *Id.*

129. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

130. See Susan Bendlin, *Qualified Immunity: Protecting “All But the Plainly Incompetent” (and Maybe Some of Them, too)*, 45 J. MARSHALL L. REV. 1023, 1029 (2012).

131. *Carroll v. Carman*, 135 S. Ct. 348 (2014).

132. *Id.* at 350 (“A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. A right is clearly established only if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate. This doctrine gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.”) (internal quotation marks and citations omitted).

133. A Westlaw search of Supreme Court cases for the term “qualified immunity” revealed thirteen cases decided within the last three years. Of those, seven cases involved a determination by the Court of whether an official was qualifiedly immune. In five of those cases, the Court determined the official was immune, and in the other two cases the Court suggested that the official should be immune. See *Reichle v. Howards*, 132 S. Ct. 2088, 2096–97 (2012) (holding secret service agents entitled to qualified immunity); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022–24 (2014) (holding officer entitled to qualified immunity); *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013) (suggesting officer should receive qualified immunity upon remand); *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (2012) (suggesting private attorney retained by the government should receive qualified immunity); *Wood v.*

the doctrine protects officials against all but the most egregious constitutional violations. None of this discussion is meant to suggest that most officials are undeserving of qualified immunity. Rather, this discussion serves to illustrate that the *Heien* majority's statement regarding qualified immunity will not be helpful to lower courts.

Again, the Court stated that the reasonable mistake of law inquiry "is not as forgiving as" the qualified immunity inquiry,<sup>134</sup> but as the qualified immunity doctrine is almost entirely forgiving, it provides little comparative value. Asserting that the mistake of law standard is more difficult to meet than a standard that is almost always met is inherently a bad comparison. For instance, an inquiry only slightly more rigorous than the qualified immunity inquiry is technically "less forgiving." The majority left it wholly unclear how much more rigorous the analysis needs to be. For this reason, the Court's reference to qualified immunity will likely prove of little value to lower courts attempting to determine whether a mistake of law is reasonable.

The majority also suggested that an officer's mistake concerning the scope of the Fourth Amendment can never be reasonable: "An officer's mistaken view that the conduct at issue did not give rise to . . . a [Fourth Amendment] violation—no matter how reasonable—could not change that ultimate conclusion."<sup>135</sup> The Court was explaining why it has only examined mistakes of law in remedy (e.g., exclusionary rule and qualified immunity) cases. Justice Kagan stated this point more firmly in a footnote.<sup>136</sup>

### *B. What Is a Reasonable Mistake of Law: Sergeant Darisse's Mistake*

While the Court did not lay out the specific contours of the standard, *Heien* can be used by lower courts as an example of what constitutes a reasonable mistake of law. In *Heien*, the relevant North

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Moss, 134 S. Ct. 2056, 2070 (2014) (holding secret service agents entitled to qualified immunity); *Carroll*, 135 S. Ct. at 352 (2014) (holding officers entitled to qualified immunity); *Lane v. Franks*, 134 S. Ct. 2369, 2383 (2014) (holding president of community college entitled to qualified immunity).

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

135. *Id.*

136. *See id.* at 541 n.1 (Kagan, J., concurring).

Carolina vehicle code statute was not clear on its face.<sup>137</sup> Subsection (d), titled “Rear Lamps,” required all vehicles to have all of their “rear lamps” (plural) functioning.<sup>138</sup> Subsection (g) required all vehicles to be equipped with a “stop lamp” (singular).<sup>139</sup> Subsection (g) further stated that “[t]he stop lamp may be incorporated into a unit with one or more other rear lamps.”<sup>140</sup> As pointed out by the *Heien* majority, “[t]he use of ‘other’ suggests to the everyday reader of English that a ‘stop lamp’ is a type of ‘rear lamp[,]’” and thus, read in conjunction with Subsection (d), which required all rear lamps to be functioning, an officer could reasonably think that all stop lamps (i.e., brake lights) needed to be functioning as well.<sup>141</sup> Given this construction, the North Carolina appellate court was required to engage in relatively complicated statutory interpretation.<sup>142</sup>

In finding that Sergeant Darisse had made a reasonable mistake of law, the majority also relied on the fact that the vehicle code statute “had never been previously construed by North Carolina’s appellate courts.”<sup>143</sup> From the majority’s reasoning there appears to be at least two factors weighed when deciding whether a mistake of law is reasonable: (1) the complexity of the statute at issue, and (2) whether or not an appellate court has resolved the ambiguity in the statute.<sup>144</sup> These two considerations are characterized as “factors” because the majority stopped short of stating that their presence was required in order for a finding of objective reasonableness.

A large flaw in the majority’s opinion is not readily apparent. The majority found that Sergeant Darisse’s mistake of law was reasonable, in part, because the relevant North Carolina statute was unclear.<sup>145</sup> However, the majority did not state whether an ambiguous statute is

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137. See N.C. GEN. STAT. ANN. § 20-129 (West 2015).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Heien*, 135 S. Ct. at 540.

142. It is noteworthy that Justice Breyer and Justice Scalia did not think the statute was ambiguous. See Transcript of Oral Argument at 48–49, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604).

143. *Heien*, 135 S. Ct. at 540.

144. *Id.*

145. *Id.*

required to find a mistake of law reasonable. This leaves the door open for a court to find a mistake of law reasonable under a more general “totality of the circumstances” analysis.

A hypothetical similar to *Heien* is illustrative. Let’s assume that most people (civilians and police) think that driving with a broken taillight is illegal.<sup>146</sup> In this hypothetical, the relevant statute clearly provides that only one working taillight is required. If an officer who is not aware of this statute initiates a traffic stop because a motorist has one broken taillight, that officer’s mistake may still be considered objectively reasonable since most people assume that driving with a broken taillight is illegal. There is nothing in the *Heien* majority’s opinion to suggest otherwise, leaving a void that can be abused by police and construed by courts as permitting a “totality of the circumstances” analysis.

### C. Justice Kagan’s Attempt to Clarify the Standard

In her concurrence, Justice Kagan attempted to fill the gaps left by the majority. According to commentator Richard M. Re, the fact that the majority did not need Justice Kagan’s vote may suggest she wrote her concurrence to “put her own spin” on the majority opinion, a term Re calls “aspirational narrowing.”<sup>147</sup> Justice Kagan focused on one major question that the majority failed to adequately address: requirements for determining whether a mistake of law is reasonable.<sup>148</sup>

Under Justice Kagan’s approach, the test for determining whether a mistake of law is reasonable is straightforward: if the statute is genuinely ambiguous such that the court must engage in difficult interpretative work, then the officer’s mistake was reasonable.<sup>149</sup> Though Justice Kagan described her concurrence as elaborating on the

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146. Justice Hudson, the dissenter in the North Carolina Supreme Court, agreed that this is a safe assumption. *See State v. Heien*, 737 S.E.2d 351, 359 (N.C. 2012) (Hudson, J., dissenting).

147. *See* Richard M. Re, *Can Justice Kagan Narrow Heien v. North Carolina?*, RE’S JUDICATA (Dec. 16, 2014), <https://richardresjudicata.wordpress.com/2014/12/16/can-justice-kagan-narrow-heien-v-north-carolina/>.

148. *Heien*, 135 S. Ct. at 541–42 (Kagan, J., concurring).

149. *Id.* at 541.



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majority's points, her requirement that there be an ambiguous statute is nowhere in the majority opinion. One can only surmise whether Justice Kagan actually believed she was "elaborating" or whether her concurrence was a clever attempt to salvage the majority's lack of direction. In any event, her concurrence provides more guidance than the majority opinion, and consequently, should be used by lower courts as the standard in mistake of law cases.

*D. Review of Decisions Made Subsequent to Heien*

To date, few lower courts have applied the standard announced in *Heien*. However, one Kansas appellate court decision applying *Heien* illustrates the lack of clarity in the majority's standard. In *State v. Wilson*,<sup>150</sup> the court examined the reasonableness of a traffic stop that was initiated when an officer saw a car "beat the red light."<sup>151</sup> The officer stated that the defendant's car was approximately halfway over the intersection line when the light turned red and continued through the intersection after the light turned.<sup>152</sup> The court found that the defendant's conduct was not prohibited by the vehicle code, but held that, under the totality of the circumstances and using common sense, it was objectively reasonable for the officer to stop the defendant, "even if [the officer] was mistaken about the law. . . ."<sup>153</sup> The dissenting justice took issue with the majority's application of the standard:

This case is distinguishable from *Helen* [*sic*]. While the mistake of law in *Helen* [*sic*] was due to a confusing statute, which gave the officer fair leeway for enforcing the law, the statute here was clear. The officer may well have believed he could stop the vehicle under these facts but the law here stated clearly the vehicle was not violating any law. Where the law is clear under these circumstances the officer's belief in his own interpretation of the law does not provide justification for the officer's action. Therefore, the stop was

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150. *State v. Wilson*, 342 P.3d 1 (Kan. Ct. App. 2015).

151. *Id.* at 1–3.

152. *Id.* at 1.

153. *Id.* at 4.

not justified and the subsequent search was inappropriate. The evidence should be suppressed.<sup>154</sup>

The dissenting justice appears to have either (1) placed significance on the *Heien* majority's discussion of the ambiguity of North Carolina's statute, or (2) followed Justice Kagan's concurrence, in which Justice Kagan stated that a mistake of law will only occur when a statute is sufficiently ambiguous.<sup>155</sup> While the basis for the dissent's reasoning is unclear, it does seem clear that the majority applied the standard loosely at best, and incorrectly at worst. The court found the officer's mistake reasonable despite never describing the statute as ambiguous. Further, the court concluded, without engaging the statute, that the defendant did not violate it. Notably, the *Wilson* majority appeared to have ignored the Supreme Court's explicit command not to examine the officer's subjective understanding of the law.<sup>156</sup>

An Indiana federal court recently noted, in dicta, that an officer's mistake of law was reasonable.<sup>157</sup> In *Williams v. Brooks*, an officer pulled over a motorist for violating a state statute mandating the use of turn signals before "turning or changing lanes."<sup>158</sup> The court found the officer had probable cause to stop the motorist because the officer reasonably believed the motorist did not activate his turn signal when entering a dedicated left turn lane, which split from the inside lane.<sup>159</sup> The motorist argued that his conduct did not violate the statute because he was not "changing" lanes; rather, he was entering an additional lane of travel.<sup>160</sup> In a footnote, the court addressed this argument: "[E]ven if [the motorist's] interpretation of the Indiana traffic statute is correct, and [the officer] was mistaken regarding whether [the motorist's] actions actually violated a law, there was still

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154. *Id.* (Pierron, J., dissenting).

155. *Heien v. North Carolina*, 135 S. Ct. 530, 541 (Kagan, J., concurring).

156. *See Wilson*, 342 P.3d at 3 (discussing the officer's belief that attempting to beat a light was in violation of the statute).

157. *Williams v. Brooks*, No. 1:13-cv-01592, 2015 WL 1013963 (S.D. Ind. Mar. 9, 2015).

158. *Id.* at \*10.

159. *Id.* at \*11.

160. *Id.* at \*9.

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probable cause to initiate the traffic stop because the Court finds that such a mistake would have been reasonable.”<sup>161</sup>

Although the *Williams* court made this statement in dicta, this case is noteworthy because the statute at issue does not appear to be ambiguous on its face.<sup>162</sup> The court did not explain why such a mistake would have been reasonable, likely because the court did not need to reach the issue; however, it is surprising that the court made this conclusion without analogizing the case to *Heien*.

The case of *State v. Hurley*<sup>163</sup> presented a situation analogous to a hypothetical Chief Justice Roberts posed during oral argument in *Heien*.<sup>164</sup> In *Hurley*, the officer stopped the defendant’s vehicle because there was an air freshener hanging from the rearview mirror.<sup>165</sup> The officer believed this violated a state statute titled “Obstructing windshields,”<sup>166</sup> despite the officer’s concession that the air freshener did not obstruct the defendant’s view.<sup>167</sup> The Vermont Supreme Court acknowledged that the state trial courts were split on the issue: some found the statute only prohibited hanging items that

161. *Id.* at \*11 n.4 (citing *Heien v. North Carolina*, 135 S. Ct. 530, 539–40).

162. See IND. CODE ANN. § 9-21-8-25 (West 2015) (“A signal of intention to turn right or left shall be given continuously during not less than the last two hundred (200) feet traveled by a vehicle before turning or changing lanes.”).

163. *State v. Hurley*, 2015 VT 46 (Vt. 2015)

164. See Transcript of Oral Argument at 34–35, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604) (“Let’s say you have two court of appeals decisions. One says you need two brake lights; the other says you need one. Is it reasonable for the officer to pull somebody over when one of their two brake lights is burned out?”). In response, the attorney representing North Carolina stated that “it would be reasonable then for the officer to decide which he thought was the better rule . . .” *Id.* at 35. In support of North Carolina, the assistant to the Solicitor General answered the hypothetical by stating an officer would be bound by the court of appeal in the officer’s jurisdiction, and that if the officer’s jurisdiction had not addressed the question, but other jurisdictions had, no one court decision would be dispositive. *Id.* at 50.

165. *Hurley*, 2015 VT 46, ¶ 3.

166. VT. STAT. ANN. tit. 23, § 1125 (West 2015) (“No person shall paste, stick, or paint advertising matter or other things on or over any transparent part of a motor vehicle windshield, vent windows, or side windows located immediately to the left and right of the operator, nor hang any object, other than a rear view mirror, in back of the windshield . . .”).

167. *Hurley*, 2015 VT 46, ¶ 3.

obstructed the driver's view, while others found the statute prohibited the hanging of any object.<sup>168</sup> The Vermont Supreme Court adopted the former view, which meant the defendant had not committed a violation, and thus, the reasonableness of the officer's legal mistake became an issue.<sup>169</sup>

The Vermont Supreme Court principally cited Justice Kagan's concurrence for its statement of the law.<sup>170</sup> Analogizing its case to *Heien*, the court found the officer's mistake of law was reasonable, citing the split in state trial courts as evidence of the complexity of the statute.<sup>171</sup> Though the court did not engage in any meaningful analysis of the statute, this case indicates that lower courts may rely on Justice Kagan's concurrence rather than the much vaguer majority opinion, and Justice Kagan's "aspirational narrowing" may prove to be successful.<sup>172</sup>

Lastly, the reasoning in *Flint v. City of Milwaukee*<sup>173</sup> presents an ideal model for lower courts. The court stated the law in a manner consistent with Justice Kagan's concurrence. In the district court's view, an ambiguous statute is a "condition precedent" to asserting a reasonable mistake of law defense.<sup>174</sup> The court noted that instances in which an officer makes a reasonable mistake of law are supposed to be "exceedingly rare[,]" a point made by Justice Kagan but not the *Heien* majority.<sup>175</sup> In addition, the court made a point that was only alluded to by the *Heien* concurrence and ignored by the majority: An officer cannot make a reasonable mistake of law if the officer did not

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168. *Id.* ¶ 7. The defendant was pulled over in Bennington, Vermont. *Id.* ¶ 2. The Vermont Supreme Court cited cases from trial courts in Chittenden and Rutland as examples of the split of opinion on the statutory interpretation issue. *Id.* ¶ 7. It is unclear whether the Bennington trial courts had previously interpreted the statute in question.

169. *Id.* ¶¶ 19–20.

170. *Id.* ¶¶ 20–21.

171. *Id.* ¶¶ 20–21.

172. *See Re, supra* note 147.

173. *Flint v. City of Milwaukee*, No. 14–CV–333, 2015 WL 1261245 (E.D. Wis. Mar. 20, 2015).

174. *Id.* at \*23.

175. *Id.* (quoting *Heien v. North Carolina*, 135 S. Ct. 530, 541 (2014) (Kagan, J., concurring)).

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know the law in the first place.<sup>176</sup> This rule precludes officers from creating a post hoc justification for their mistakes. For instance, in *Flint*, officers executed a search warrant for the plaintiff's house because they received information that the plaintiff illegally possessed wild animals.<sup>177</sup> The officers had a Department of Natural Resources (DNR) official accompany them on the search because of the possible presence of dangerous animals.<sup>178</sup> During the search, the DNR official identified a turtle that was illegal to possess under a particular state statute of which the police officers were unaware.<sup>179</sup> The DNR official erroneously told the officers that possession of the turtle was a felony when it was actually a misdemeanor.<sup>180</sup> The plaintiff was charged with felony violation of the statute, resulting in more time spent in custody and a higher bail than had the plaintiff been properly charged.<sup>181</sup>

The officers argued that had they known about the law and analyzed it, they could have reasonably reached the same mistaken conclusion that possession of the animal was a felony.<sup>182</sup> Because determining whether the crime was a misdemeanor or felony required analysis of two other statutes, the officers argued the analysis was complex and analogous to the statutory analysis in *Heien*.<sup>183</sup> The court rejected this argument, stating “[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.”<sup>184</sup> The court also disagreed that the need to examine three statutes necessarily made the analysis “complex[,]” because “[s]tatutes frequently cross-reference each other and require some effort to connect the dots.”<sup>185</sup> Almost every mistake of law would be

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176. *Id.* at \*24.

177. *Id.* at \*3–\*6.

178. *Id.* at \*4.

179. *Id.* at \*16.

180. *Id.*

181. *Id.* at \*19. The plaintiff was also charged under a second statute for a felony when the officers admitted her conduct was likely a misdemeanor under the same statute. *Id.* at \*18.

182. *Id.* at \*24.

183. *Id.*

184. *Id.*

185. *Id.*

reasonable if statutory cross-referencing was a sufficient basis for finding objective reasonableness.<sup>186</sup> The *Flint* court ultimately found the officers' mistake to be unreasonable.<sup>187</sup> Moving forward, all courts should analyze officer mistakes of law with the same level of skepticism as did the *Flint* court.

## V. CONCLUSION

The Supreme Court erred in *Heien* when they held that police mistakes of law do not *per se* violate the Fourth Amendment. To worsen the matter, the majority failed to articulate a clear standard for determining whether a mistake of law is reasonable or not. The majority emphasized that a mistake of law must be objectively reasonable<sup>188</sup> and made clear that the ambiguity of a statute supports a finding of reasonableness,<sup>189</sup> but provided no further guidance. It is wholly unclear, for instance, whether an ambiguous statute is a prerequisite for a court to find a mistake "reasonable," or whether it is a mere factor for consideration. The lack of direction provided by the Court is puzzling given this decision directly affects the scope of police power.

Only time will reveal whether the majority has produced a workable standard, or whether, as Justice Sotomayor fears, the majority's "conception of reasonableness in this context — which remains undefined — will prove murky in application."<sup>190</sup> It is too early to definitively say how courts will apply the *Heien* standard. However, the probability of officer abuse may be lowered if lower courts base their analyses on Justice Kagan's concurrence, which provides more guidance than the majority opinion.

Lower courts should require "genuine[] ambigu[ity]"<sup>191</sup> as a "condition precedent to even asserting that a mistake of law is reasonable."<sup>192</sup> When deciding whether a statute is sufficiently ambiguous, courts should weigh factors such as the existence or lack of a binding interpretation of the statute, whether there is a

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186. *Id.*

187. *Id.* at \*25.

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

189. *Id.* at 540.

190. *Id.* at 547 (Sotomayor, J., dissenting).

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

192. *Flint*, 2015 WL 1261245, at \*23.

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jurisdictional split on the statute's interpretation, and the court's objective judgment about the complexity of the statutory language without regard to the officer's interpretation of the facts of the case. With regard to the last factor, statutory cross-references should not be given any weight because they are very common. Courts should then identify more factors as unique situations present themselves.

As stated by the *Heien* majority and concurrence, some mistakes of law, such as mistakes regarding the limits of the Fourth Amendment itself, should be *per se* unreasonable.<sup>193</sup> However, mistakes resulting from an officer's nescience of a particular law should also be *per se* unreasonable. This is appropriate because an officer needs to understand a law in order for the officer's interpretation of it to be reasonable.<sup>194</sup> This would decrease the number of traffic stops initiated when officers assume a law has been broken but do not actually know what the law is. It may also incentivize officers to become more familiar with their state's vehicle code.

Given that police possessed broad power to initiate stops prior to *Heien*, this decision may not have a large impact in practice, but it is still a symbolic blow in the fight to preserve constitutional freedoms. Even the most diligent citizen who spends the necessary time and energy learning the law, and then obeys it, cannot ensure complete avoidance of police contact due to an officer's mistake of law. While the Court is unlikely to revisit this issue in the near future, hopefully it will eventually overrule its decision in *Heien* and return to the former majority rule endorsed by Justice Sotomayor. Until then, hopefully law enforcement officials will not abuse *Heien's* implications and courts will only find mistakes of law to be "reasonable" in the rarest of circumstances.

*Lorenzo G. Morales\**

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193. *Heien*, 135 S. Ct. at 539, 541 n.1 (Kagan, J., concurring).

194. *Flint*, 2015 WL 1261245, at \*24 (“[T]he officers did not know the law and thus could not make a reasonable mistake about it.”) (emphasis removed).

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