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

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This Article analyzes Heien v. North Carolina, in which the Supreme Court considered whether an officer's stop of a motorist could be considered a "reasonable" seizure under the Fourth Amendment even though it was based on a police officer's mistake of law regarding the state's traffic code. The Heien Court ruled that an officer's mistake of law could be objectively reasonable and therefore contribute to the reasonable suspicion needed to support a traffic stop. This work examines the concerns created by Heien's ruling. This Article asserts that, in allowing an officer to seize a person on the basis of that officer's mistaken belief that the individual violated the law, Heien could encourage stops and arrests based on unclear laws that could cause Fourteenth and Fourth Amendment problems. Further, Heien's conclusion that an officer's mistake of law can be reasonable is inconsistent with the Court's Fourth Amendment balancing analysis for assessing reasonableness. Heien's allowance of police mistakes of law could impair police professionalism and undermine public confidence in law enforcement. Finally, Heien's acceptance of officers' mistakes of law could cause serious negative consequences for motorists beyond the

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initial seizure.

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I. INTRODUCTION

Ignorance of the law is no excuse, unless you are a police officer. While motorists are expected to understand and comply with a "multitude" of "traffic and equipment regulations,"[1] the Supreme Court, in *Heien v. North Carolina*, ruled that an officer may properly seize a driver based on a "mistaken understanding" of the law.[2] Not only has

[1] Delaware v. Prouse, 440 U.S. 648, 661 (1979).

[2] Heien v. North Carolina, 135 S. Ct. 530, 536 (2014) (decided by an 8 to 1 majority).

Heien created a double standard, but it has applied it precisely backwards, mandating more from laypersons and less from officers, the very professionals who are supposed to enforce the law.

In allowing "reasonable"[3] ignorance of the law to empower officers to seize citizens, the *Heien* Court has weakened the Fourteenth and Fourth Amendment rights of every person who ventures out of the home.[4] *Heien's* analysis has also created a host of other concerns requiring consideration, which are explored in Part IV of this article. In Part II, this article will review the background of Fourth Amendment seizures of the person. This survey includes the Court's creation of a law enforcement right to seize people on less than probable cause, the Court's early recognition that such power created significant limits on personal security, and the factual justifications for these seizures. In Part III, this Article critically examines *Heien*, including the case's facts and analysis. Finally, Part IV considers the consequences of the Court's logic for future motorists. The Court's reasoning allows arrests on unclear laws, potentially creating problems under the Fourteenth and Fourth Amendments. *Heien's* determination that an officer's mistake of law can be reasonable impairs the Court's Fourth Amendment balancing test for reasonableness. Further, the Court's holding could impair police professionalism in the field. Finally, *Heien's* acceptance of law enforcement mistakes of law could result in a series of negative consequences, not only for motorists, but for all citizens accosted by police.[5]

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[3] *Id.*

[4] The Fourteenth Amendment provides in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. CONST. amend XIV.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

U.S. CONST. amend. IV.

[5] While *Heien's* facts were limited to an officer stopping a motorist for what was mistakenly thought to be a traffic violation, its reasoning could affect all citizens, whether in or out of a vehicle. Further, *Heien* is the latest among several cases in which the Court has restricted Fourth Amendment protections. For instance, in Navarette v. California, 134 S. Ct. 1683 (2014), the Court allowed police to stop a motorist based on a fellow driver's anonymous tip. *Navarette*, 134 S. Ct. at 1691. For the full implications of this ruling, *see* George M. Dery III & Kevin Meehan, *The Devil is in the Details: The*

II. BACKGROUND OF FOURTH AMENDMENT SEIZURES OF THE PERSON

A. The Court's Creation of a Law Enforcement Right to Seize Persons on Less than Probable Cause

In *Terry v. Ohio*, the Court allowed an officer to seize a person on the street on less than probable cause.[6] In *Terry*, Officer McFadden stopped two men, Chilton and Terry, who were standing on a street corner, because he suspected they were "casing a job, a stick-up."[7] The two men had each repeatedly peered into a store window, before conversing with each other at the corner.[8] Fearing they might be armed with a gun, the officer patted down Terry's overcoat and retrieved a pistol from his breast pocket.[9] Terry later moved to suppress the weapon.[10] After finding a lack of probable cause, the Court in faced two unpleasantly extreme options: 1) deem stops and frisks as conduct not rising "to the level of a 'search' or 'seizure,'" and therefore "outside the purview of the Fourth Amendment,"[11] or, 2) force an officer to "simply shrug his shoulders and allow a crime to occur or a criminal to escape."[12]

The Court avoided these extremes by plotting a middle path. First, the Court deemed that the Fourth Amendment covered a stop and frisk because, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[13] However, rather than mandating probable cause for this type of intrusion, the Court required that an officer point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[14] The Court did not leave this factual determination to the discretion of the officer. Instead, the Court found that the only way to maintain meaningful Fourth Amendment protection over these stops was to guarantee that, "at some point the conduct of those charged with enforcing the laws can be

Supreme Court Erodes the Fourth Amendment in Applying Reasonable Suspicion in Navarette v, California, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 275 (2015).

6 Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

7 *Id*. at 6.

8 *Id*.

9 *Id*. at 6-7.

10 *Id*. at 7.

11 *Id*. at 16.

12 Adams v. Williams, 407 U.S. 143, 146 (1972).

13 Terry v. Ohio, 392 U.S. 1, 16 (1968).

14 *Id*. at 21.

subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."[15] Any officer seizing a person under *Terry*, would thus know that his or her behavior could be subject to judicial scrutiny.

Moreover, the *Terry* Court was acutely aware of the dangers facing police performing such encounters, for it noted every officer's interest "in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him."[16] Here, the Court resolved the matter by steering a middle course, neither requiring police to justify a search with probable cause nor allowing officers to intrude upon privacy in every case. Instead, if an officer had "reason to believe" that he or she was dealing with "an armed and dangerous individual,"[17] the officer could perform a "carefully limited search of the outer clothing" to check for any weapons.[18]

The seizure of the person in *Terry* came to be referred to as a "stop"[19] while the pat down search was deemed a "frisk."[20] The level of certainty needed to justify the "*Terry* stop"[21] and the "*Terry* frisk" became "reasonable suspicion."[22] *Terry* stops have since occurred in a variety of settings, including traffic stops,[23] narcotics smuggling investigations,[24] seizures of persons at airports,[25] vehicle order-outs,[26] and undocumented immigrant investigations.[27]

B. The Court Recognized that *Terry* Stops Imposed a Significant Restriction on Personal Liberty and Security

While balancing the competing concerns of citizens and officers implicated by seizures on the street, *Terry* recognized, "No right is held

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15 *Id*.
16 *Id*. at 23.
17 *Id*. at 27.
18 *Id*. at 30.
19 Florida v. J. L., 529 U.S. 266, 268 (2000).
20 *Id*.
21 *Id*. at 270.
22 Navarette v. California, 134 S. Ct. 1683, 1687 (2014).
23 Arizona v. Johnson, 555 U.S. 323, 326 (2009).
24 United States v. Arvizu, 534 U.S. 266, 271, 273 (2002).
25 Florida v. Royer, 460 U.S. 491, 495 (1983).
26 Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).
27 United States v. Brignoni-Ponce, 422 U.S. 873, 874-75, 878 (1975).

more sacred, or is more carefully guarded, by the common law, than 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."[28] That Court deemed this "right of personal security" to be of "inestimable" importance.[29] Therefore, the Court interpreted the right against unreasonable seizures expansively, belonging "as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."[30]

As early as 1928, Justice Brandeis, in his dissent in *Olmstead v. United States*, declared that the rights of the Fourth Amendment were among those that "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[31] Later, in *Delaware v. Prouse*, the Court explicitly recognized that the right against unreasonable seizures applied to drivers, noting that people's interests do not disappear when "they step from the sidewalks into their automobiles."[32] *Prouse* understood the central role vehicles played in people's lives by noting:

> Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.[33]

The "physical and psychological intrusion" on a driver's sense of security was not a small matter, for vehicle stops entailed interference with freedom of movement, inconvenience, time consumption, and sometimes "substantial anxiety" due to an "unsettling show of authority."[34] Even if these detentions were "for a brief period and for a limited purpose," the Court still recognized them as a "'seizure' of

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[28] Terry v. Ohio, 392 U.S. 1, 9 (1968).
[29] *Id*. at 8, 9.
[30] *Id.* at 9.
[31] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
[32] Delaware v. Prouse, 440 U.S. 648, 663 (1979).
[33] *Id*. at 662-63.
[34] *Id*. at 657.

'persons'" within the Fourth Amendment.[35] Thus, in creating the official power to stop and frisk, the Court was mindful of the significant impact these intrusions could have on individuals. It therefore took care to respect the integrity of the right against unreasonable searches and seizures.

C. The Court Has Consistently Focused on Law Enforcement's Factual Determinations When Assessing Justifications for Seizing Persons

Since the early twentieth century, the Court has viewed the battleground over seizures, whether considering reasonable suspicion to perform a stop or probable cause to justify an arrest, as an issue of whether the facts of the case supported the stop.[36] Unspoken in Fourth Amendment litigation, was the assumption that the officer would know the law he or she was enforcing. The only issue left open to consideration was knowledge of facts—the things that by their nature cannot be known in advance because of their continuously unpredictable occurrence.

The Court's focus on facts can be seen clearly in *Carroll v. United States*, which created the automobile exception to the warrant requirement.[37] In *Carroll*, federal prohibition agents stopped Carroll's Oldsmobile Roadster, finding sixty-eight bottles of alcohol within the vehicle.[38] Carroll claimed the recovery of the whiskey was in violation of the Fourth Amendment.[39] The *Carroll* Court ruled, "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."[40] This

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[35] Whren v. United States, 517 U.S. 806, 809-10 (1996).

[36] Carroll v. United States, 267 U.S. 132, 149 (1925) (addressing the issue of probable cause).

[37] *Carroll* ruled:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Id.

[38] *Id*. at 135-36.

[39] *Id*. at 136-37, 143.

[40] *Id*. at 154.

rule would come to be known as the "automobile exception."[41] In *Carroll*, the Court determined that probable case was based on "the facts and circumstances before the officer," and any probable cause decision needed to "be grounded on facts" within the officer's knowledge.[42]

Similarly, in *Brinegar v. United States*, a case decided twenty-five years after *Carroll*, the Court again assessed reasonableness by focusing on the facts of the case.[43] In *Brinegar*, also involving illegal transport of alcohol, the Court described probable cause as involving "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[44] The Court's definition of probable cause was therefore based on assessment of facts: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[45] The Court even conceded, "room must be allowed for some mistakes" to be made by officers, but such errors "must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."[46] In establishing its reasonableness standard, the Court clearly spoke only in terms of mistakes of fact, not law.

When discussing reasonable suspicion in *Terry*, the Court again spoke in terms of facts:

> [I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?[47]

The Court in *United States v. Cortez* framed reasonable suspicion as a factual question, noting, "the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account."[48] The case involved the meticulous tracking of a smuggler illegally entering from Mexico.[49] The Court identified two elements for

41 Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).
42 *Id*. at 161.
43 Brinegar v. United States, 338 U.S. 160 (1949).
44 *Id.* at 175.
45 *Id*. at 175-76.
46 *Id*. at 176.
47 Terry v. Ohio, 392 U.S. 1, 21-22 (1968).
48 United States v. Cortez, 449 U.S. 411, 417 (1981).
49 *Id*. at 413.

its "totality of the circumstances" analysis.[50] First, officers had to assess all "data," a process that did not "deal with hard certainties, but with probabilities."[51] To weigh all of this information, officers had to rely on "certain commonsense conclusions about human behavior" just as jurors do when acting "as factfinders."[52] Second, the whole picture "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing."[53]

The Court's continued focus on the "totality of circumstances" was particularly telling, for this analysis considered circumstances—facts—rather than the totality of laws. In *Alabama v. White*, the Court highlighted the fact-based nature of the "totality of circumstances" because it found "highly relevant" for reasonable suspicion "an informant's 'veracity,' 'reliability,' and 'basis of knowledge'"—all factual inquires.[54] For the Court, the "totality of the circumstances" involved assessment of "the facts known to the officers," whether by personal observation or by tipsters.[55]

In *Ornelas v. United States*, the Court once again identified reasonable suspicion as an assessment of facts:

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.[56]

Although the Court in *Ornelas* identified the second part of this analysis as involving "a mixed question of law and fact," it did not consider the interpretation of the criminal law as subject to mistake.[57] Instead, the Court in this context flatly declared, "the rule of law is undisputed." According to *Ornelas*, the only issue left for Fourth Amendment inquiry

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[50] *Id*. at 418; *see also* United States v. Sokolow, 490 U.S. 1, 8 (1989) (affirming that "[i]n evaluating the validity of a stop such as this, we must consider 'the totality of the circumstances—the whole picture'").

[51] *Cortez*, 449 U.S. at 418.

[52] *Id*.

[53] *Id*. (offering four relevant examples of illegal border activity as series of factual issues, including: "the characteristics of the area in which they (the officers) encounter a vehicle," the area's "proximity to the border," the "usual patterns of traffic on the particular road," and the officer's "previous experience with alien traffic").

[54] Alabama v. White, 496 U.S. 325, 328 (1990).

[55] *Id*. at 330.

[56] Ornelas v. United States, 517 U.S. 690, 696 (1996).

[57] *Id*. at 696.

was whether "the facts satisfy the [relevant] statutory [or constitutional] standard."[58]

The Court has therefore established a near-century long record of framing the assessment of police judgment in seizing a person as one involving the determination of fact. The officer, as "factfinder,"[59] needed to weigh the "totality of circumstances"[60] to decide the probabilities[61] of what was occurring. Never in these cases had the Court discussed the officer struggling in weighing all the rules to decide the probabilities of the law.

III. *HEIEN V. NORTH CAROLINA*

A. The Facts

On April 29, 2009, Sergeant Matt Darisse of the Surry County Sheriff's Department "sat in his patrol car near Dobson, North Carolina, observing northbound traffic on Interstate 77."[62] His search for "criminal indicators of drivers and passengers"[63] bore fruit just before 8:00 a.m., when he saw the driver of a Ford Escort, who looked "very stiff and nervous" pass by.[64] After Sergeant Darisse followed the Escort for a few miles, he saw the driver apply his brakes as he approached a slower moving vehicle.[65] At this time, Sergeant Darisse noticed that the right rear brake light of the Escort was broken.[66] A video from Sergeant Darisse's patrol car later verified the rear-right brake light as faulty.[67] Believing the Escort's faulty break light violated the vehicle code, Sergeant Darisse activated his blue lights,[68] and pulled over the Escort.[69]

During this time, North Carolina's Vehicle Code §20-129(g) provided that a car be "equipped with a stop lamp on the rear of the

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58 *Id*.

59 United States v. Cortez, 449 U.S. 411, 418 (1981).

60 *Id*. at 417.

61 Brinegar v. United States, 338 U.S. 160, 176 (1949).

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

63 Initial Brief of Petitioner-Appellant at 2, Heien v. North Carolina, 135 S. Ct. 530 (2014) (No. 13-604) [Hereinafter Petitioner's Brief].

64 *Heien*, 135 S. Ct. at 534; Petitioner's Brief, *supra* note 63, at 2 (Sergeant Darisse thought Vasquez appeared "stiff and nervous," insofar as he was "gripping the steering wheel at a 10 and 2 position, looking straight ahead").

65 *Heien*, 135 S. Ct. at 534.

66 *Id.*

67 State v. Heien, 366 N.C. 271, 273-74 (2012).

68 State v. Heien, 741 S.E.2d 1, 8 (2013).

69 *Heien*, 135 S. Ct. at 534.

vehicle. The stop lamp . . . shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps."[70] At the time of the stop, the statute was "several decades old" and retained "an antiquated definition of a stop lamp, not reflecting actual vehicle equipment now included in most automobiles."[71] Further, the traffic law had not been "authoritatively construed."[72]

When Sergeant Darisse activated his lights, he "observed a head 'pop up' out of the back seat of the subject vehicle and then disappear."[73] At the stop, he found Maynor Javier Vasquez sitting in the driver's seat, while the owner of the car, Nicholas Brady Heien,[74] was lying down with a blanket across the back seat.[75] Sergeant Darisse informed Vasquez that "he was being stopped for a non-functioning brake light" and that if his documentation proved valid, he would only receive a warning citation.[76] Although a "records check revealed no problems," Vasquez's nerves and Heien's choice to lie down during the entire stop raised Sergeant Darisse's suspicions.[77] Sergeant Darisse and Deputy Mark Ward, who had arrived to assist with the traffic stop,[78] conversed with Heien and Vasquez separately.[79] When asked about their destination, Heien and Vasquez provided conflicting information.[80]

After issuing a "warning ticket" to Vasquez,[81] Sergeant Darisse

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[70] *Id.* at 535; N.C. Gen. Stat. § 20-129(g) (2007).

[71] Initial Brief for Appellee-Respondent at 4, Heien v. North Carolina, 135 S. Ct. 530 (2014) (No. 13-604) [Hereinafter Respondent's Brief].

[72] Amicus Brief for the United States at 2, Heien v. North Carolina 135 S. Ct. 530 (2014) (No. 13-604) [Hereinafter United States' Amicus Brief] ("North Carolina's provisions bearing on brake lights had not been authoritatively construed when petitioner's car was stopped.").

[73] *Heien*, 741 S.E.2d at 8.

[74] *Heien*, 135 S. Ct. at 534.

[75] *Heien*, 741 S.E.2d at 8 (the driver stated that Heien was lying in the back seat underneath a blanket because he "was tired").

[76] State v. Heien, 366 N.C. 271, 272 (2012) (even though the right rear brake light initially failed to illuminate, when the Escort later rolled to a stop in being pulled over, "Sergeant Darisse noticed the right rear brake light 'flickered on'").

[77] *Heien*, 135 S. Ct. at 534; *Heien*, 741 S.E.2d at 8 (Sergeant Darisse noted that the driver "made poor eye contact and he was continuously placing his hair in a ponytail and then removing his hair from a ponytail").

[78] State v. Heien, 214 N.C. App. 515, 516 (2011).

[79] *Id.*

[80] *Id.* ("[Heien] told Deputy Ward they were driving to Kentucky. Mr. Vasquez had already told Sergeant Darisse that he and (Heien) were driving to West Virginia.").

[81] *Id.* (Sergeant Darisse later testified that "at that point (after issuing the citation),

requested permission to search the vehicle.[82] Both Vasquez and Heien had "no objections."[83] Sergeant Darisse asked Heien to step out of the vehicle while he and Deputy Ward performed a forty-five minute search.[84] The officers found "a cellophane wrapper with white powder residue" in the driver's side door panel, "burnt marijuana seeds in the ashtray," and cocaine in a side compartment of a blue duffle bag.[85] Sergeant Darisse and Deputy Ward arrested both men.[86]

Charged with cocaine trafficking, Heien moved to suppress the recovered evidence, arguing that the traffic stop amounted to an unlawful seizure under the Fourth Amendment.[87] The trial court denied his motion, reasoning that Sergeant Darisse had "reasonable and articulable suspicion" that North Carolina laws were being violated by "operating a motor-vehicle without a properly functioning brake light."[88] Heien pleaded guilty to "two counts of attempted trafficking in cocaine," reserving his right to appeal the denial of his motion.[89]

The North Carolina Court of Appeals reversed the trial court, finding "N.C.G.S. (North Carolina General Statute) §20-129(g) only requires a vehicle to have a single functioning brake light."[90] Since "driving with only one working brake light was not actually a violation of North Carolina law,"[91] Sergeant Darisse's "justification for the stop was objectively unreasonable, and the stop violated (Heien's) Fourth Amendment rights."[92]

Without reconsidering the Court of Appeals' interpretation of the traffic law,[93] the North Carolina Supreme Court reversed, reasoning

Vasquez was free to leave").

82 Petitioner's Brief, *supra* note 63, at 4 (Sergeant Darisse asked Heien, "mind if we made a quick check to make sure you don't have any drugs or guns or anything like that?").

83 Heien v. North Carolina, 135 S. Ct. 530, 534 (2014) (Vasquez responded to the consent request by telling Sergeant Darisse that since the vehicle belonged to Heien, he would have to check with him); Petitioner's Brief, *supra* note 63, at 4 (Heien responded to the request to search that he "d[id]n't really care").

84 Petitioner's Brief, *supra* note 63, at 4.

85 State v. Heien, 366 N.C. 271, 272-73 (2012).

86 *Heien*, 135 S. Ct. at 534.

87 *Id.* at 535.

88 Respondent's Brief, *supra* note 71, at 2.

89 *Id.* at 3.

90 State v. Heien, 214 N.C. App. 515, 521 (2011).

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

92 *Heien*, 214 N.C. App. at 521-22.

93 State v. Heien, 366 N.C. 271, 275 (2012); *Heien*, 135 S. Ct. at 535.

that "Sergeant Darisse could have reasonably—even if mistakenly—read the vehicle code to require that both brake lights be in good working order."[94] The North Carolina Supreme Court declared:

> An officer may make a mistake, including a mistake of law, yet still act reasonably under the circumstances . . . [W]hen an officer acts reasonably under the circumstances, he is not violating the Fourth Amendment. So long as the officer's mistake of law is objectively reasonable, then, the Fourth Amendment would seem not to be violated.[95]

Upon remand, the Court of Appeals considered remaining issues, such as the length of the stop and the scope of the search.[96] The Court of Appeals affirmed the trial court's denial of Heien's motion to suppress.[97] The North Carolina Supreme Court "affirmed in turn,"[98] and the United States Supreme Court granted certiorari.[99]

B. The Supreme Court's Opinion in *Heien v. North Carolina*

In an opinion written by Chief Justice Roberts, the Court framed *Heien's* issue as "whether reasonable suspicion" to support a traffic stop "can rest on a mistaken understanding of the scope of a legal prohibition."[100] Noting that it had repeatedly declared, "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness,'" The Court emphasized that Fourth Amendment reasonableness did not mandate perfection.[101] Instead, the Constitution gave officers "fair leeway for enforcing the law in the community's protection."[102] The Court, recognizing that it had long upheld searches and seizures based on "mistakes of *fact*," urged, "reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion."[103] Since "the result" of a mistake of fact or law was "the same," there was "no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of

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94 *Heien*, 135 S. Ct. at 535.
95 *Heien*, 366 N.C. at 279.
96 State v. Heien, 741 S.E.2d 1, 8, 15 (2013).
97 *Id.* at 16.
98 *Heien*, 135 S. Ct. at 535.
99 *Id.*
100 *Id*. at 536.
101 *Id*.
102 *Id*.
103 *Id.* (emphasis added).

a similarly reasonable mistake of law."[104]

To bolster its conclusion that the Fourth Amendment condoned "reasonable mistakes of both fact and law,"[105] the decision turned to cases "dating back two centuries" involving government seizure of goods on ships.[106] In *United States v. Riddle*, the propriety of a customs collector's seizure turned in part on whether an "American consignee," who dutifully "declared the true value" of goods, should lose these items because his "English shipper," intending to avoid paying the full tariff, "had violated the customs laws by preparing an invoice that undervalued the merchandise."[107] Although it found that the American consignee had not violated the customs law, the *Riddle* Court "affirmed the issuance of a certificate of probable cause" protecting the collector from suit because of the collector's reasonable "doubt as to the true construction of the *law*" existed.[108] Thereafter, the early Court continued to indemnify customs officials against damages for unlawful seizures based on "reasonable mistakes of law" in a series of cases involving federal customs statutes.[109] According to the Court in *Heien,* these earlier holdings demonstrated "that reasonable mistakes of law, like those of fact, would justify certificates of probable cause" for indemnification.[110] While conceding that these customs cases were "not directly on point" because the Court at the time had not been construing the Fourth Amendment, the Court contended these cases "nevertheless explain[ed] the concept of probable cause," the necessary level of suspicion needed to allow the courts to grant a certificate.[111]

Perhaps to address the weakness of the customs cases, the Court next sought support from *Michigan v. DeFillippo*, a case that "addressed the validity of an arrest made under a criminal law later declared unconstitutional."[112] In *DeFillippo,* police officers investigating Gary DeFillippo for public intoxication ultimately arrested him for violating a Detroit ordinance by failing "to identify himself and produce evidence of his identity."[113] The Michigan Court of Appeals found the ordinance

[104] *Heien*, 135 S. Ct. at 536.
[105] *Id*. at 537.
[106] *Id*. at 536.
[107] *Id*. at 537.
[108] *Id*. (emphasis in original).
[109] *Id*.
[110] *Heien*, 135 S. Ct. at 537.
[111] *Id*.
[112] *Id*. at 538.
[113] *Id*.

unconstitutionally vague and thus deemed the officer's arrest of DeFillippo invalid.[114] The Court in *DeFillippo* determined that the arrest of DeFillippo was reasonable because "there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance."[115] In *Heien*, the Court roughly equated the officers' error in *DeFillippo* with Sergeant Darisse's mistake about the broken brake light by describing *DeFillippo* as, "The officers were wrong in concluding that DeFillippo was guilty of a criminal offense when he declined to identify himself. That a court only *later* declared the ordinance unconstitutional does not change the fact that DeFillippo's conduct was lawful when the officers observed it."[116] The thrust of the argument in *Heien* was that even though the officers in both *Heien* and *DeFillippo* made reasonable assumptions about the law, their mistaken conclusions provided "abundant probable cause" at the time they acted to arrest.[117]

Applying its rule that a mistake of law can be reasonable and therefore support a Fourth Amendment seizure, the Court suffered "little difficulty" in finding that Sergeant Darisse's mistake of law was "reasonable" in *Heien*.[118] The "stop lamp" statutory provision had never previously been construed by courts and when it was finally litigated following Heien's arrest, judges disagreed on its meaning.[119] The Court therefore concluded, "there was reasonable suspicion justifying the stop."[120] The Court thus set precedent that an officer could lawfully intrude on the liberty of a person, even though no legal basis actually existed to support the seizure.

IV. THE IMPLICATIONS OF THE *HEIEN* COURT'S MISTAKEN LEGAL REASONING

A. *Heien's* Reasoning Promotes Arrests Based on Unclear Laws, Which Create Fundamental Fourteenth Amendment and Fourth Amendment Concerns

While *Terry* intoned, "[n]o right is held more sacred" than the right of a person to be free from seizures lacking the "*unquestionable*

[114] *Id*.
[115] *Id*.
[116] *Heien*, 135 S. Ct. at 538.
[117] *Id*.
[118] *Id*. at 540.
[119] *Id*.
[120] *Id*.

authority of law,"[121] *Heien* did not consider personal security so sacrosanct. After *Heien*, an individual can be seized with impunity, so long as the law in question was so poorly written a judge could find it reasonable for an officer to incorrectly interpret the law. Justice Kagan explained in her concurrence, "the appropriate standard for deciding when a legal error can support a seizure" was "when an officer takes a reasonable view of a 'vexata questio' on which different judges 'h[o]ld opposite opinions.'"[122] She determined that, "the test is satisfied when the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view."[123] Since judges do not consider laws until cases are brought to them,[124] Justice Kagan's logic would result in turning citizens into guinea pigs of the law. On the basis of *Heien*, officers could arrest an individual on an ambiguous law, leaving any clarification to the judge.

Just how ambiguous must a law be to deem an officer's mistake of law reasonable? Justice Kagan suggested, "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."[125] Ironically, the threshold of "hard interpretive work," or her alternative measures of "really difficult," or "very hard question of statutory interpretation," are themselves so unclear that they risk raising "vexata questio."[126]

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[121] Terry v. Ohio, 392 U.S. 1, 9 (1968) (emphasis added).

[122] *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring). A "vexata quaestio," or "vexed question," is defined as: 1. A question often argued about but seemingly never settled. 2. A question or point that has been decided differently by different tribunals and has therefore been left in doubt. *Vexata Quaestio*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[123] *Heien*, 135 S. Ct. at 541.

[124] Not only do courts not consider issues until brought to them in a case in accordance with the "case or controversy" requirement, federal courts cannot consider such cases unless there is an issue of federal question. *See* N. Am. Natural Res., Inc. v. Strand, 252 F.3d 808, 812 (2001) ("One of the fundamental axioms of American jurisprudence is that a federal court may consider only actual cases or controversies."); *North American Natural Resources* further explained:

> The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between the parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.

Id.

[125] *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring).

[126] *Id*.

The Court's focus on the officer's plight in interpreting ambiguous laws raises a fundamental question: Why make a citizen suffer the consequences when the government itself cannot figure out a poorly understood law? The *Heien* Court, in forgiving the officer any errors regarding the Fourth Amendment, seemingly forgot the lessons of the Fourteenth Amendment Due Process Clause. "It is axiomatic that a defendant has a due process right to notice of the laws with which he must comply."[127] The Court, declared, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[128] More specifically, the Court has long recognized:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[129]

While Justice Kagan upheld seizures based on laws so confusing that learned and experienced judges could hold "opposite opinions,"[130] Fourteenth Amendment due process mandates that laws be understandable by "men of common intelligence."[131]

Allowing officers who mistakenly interpret the law to seize citizens raises fundamental concerns about the nature of our government. "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.'"[132] In her dissent, Justice Sotomayor 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."[133] She concluded that the results of *Heien's* reasoning were "bad for citizens, who need to know their rights and

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[127] State v. Gamble, 137 Wash.App. 892, 904, 155 P.3d 962, 969 (2007).
[128] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).
[129] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).
[130] *Heien*, 135 S. Ct. at 541 (Kagan, J., concurring).
[131] *Connally*, 269 U.S. at 391.
[132] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Lanzetta*, 306 U.S. at 453.
[133] *Heien*, 135 S. Ct. at 544 (Sotomayor, J., dissenting).

responsibilities."[134]

Moreover, *Heien's* unique approach to vague laws is inconsistent with the principle of lenity. The Supreme Court "has stated that in accordance with the principles of lenity, an ambiguous criminal statute must be construed in favor of the defendant."[135] Six decades ago, when *Bell v. United States* declared that any genuine ambiguity ought to be resolved against the government which created it, the Court carefully explained that this lenity rule was not based on some misguided sentiment for the criminal or on a failure to sympathize with the legislative aim to forbid "evil or antisocial conduct."[136] Instead, as noted in *United States v. R. L. C.*, the Court simply wished to provide fair warning "to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."[137] Genuine justice requires making this line clear.[138] In *United States v. Universal C. I. T. Credit Corporation*, the Court warned against deriving "outlawry" from ambiguity.[139] That, however, is precisely what *Heien* allowed Sergeant Darisse to do when he cited Nicholas Heien for a faulty brake lamp.

The *Heien* Court sought support for its arrest-first-learn-later approach by turning to revenue cases, several of which occurred about the time of the War of 1812.[140] Rather than decisively answering questions, these customs cases highlighted the due process concerns implicated by *Heien's* reasoning. All but one of the cases the Court relied upon to determine a mistake of law could support a seizure involving the shipping industry.[141] Since it is a business necessity for

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[134] *Id.*

[135] State v. Stevens, 139 Ohio St.3d 247, 250, 11 N.E.3d 252, 255 (2013); Rewis v. United States, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

[136] Bell v. United States, 349 U.S. 81, 83 (1955).

[137] United States v. R. L. C., 503 U.S. 291, 308 (1992).

[138] *Id.* at 308-09 ("To make the warning fair, so far as possible the line should be clear.").

[139] United States v. Universal C. I. T. Credit Corporation, 344 U.S. 218, 222 (1952).

[140] United States v. Riddle, 9 U.S. 311 (1809); The Friendship, 9 F. Cas. 825 (1812); Locke v. United States, 11 U.S. 339 (1813).

[141] *Riddle*, 9 U.S. at 311 (seizure involving undervaluing of merchandise by an "English shipper"); *The Friendship*, 9 F. Cas. at 825 (involving "schooner" carrying cargo); *Locke*, 11 U.S. at 344 (involving condemned cargo" from a vessel, Wendell); The Apollon, 22 U.S. 362, 363 (1824) (involving the seizure of a French ship, The Apollon, and its cargo); United States v. Reindeer, 27 F. Cas. 758, 758 (1848) (involving a "license for codfishery"); United States v. The Recorder, 27 F. Cas. 723,

those in shipping to know the laws that regulate their trade, the requirement of "fair notice of the offending conduct" need not be as strict in these cases because those subject to these laws are knowledgeable business people.[142] As early as 1972, in *Papachristou v. City of Jacksonville*, the Court noted, "In the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed."[143] In *Papachristou*, a vagrancy case, the Court declared, "The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws."[144] It is, therefore, one thing to give law enforcement leeway when a particular law handles the intricacies of a specialized business that affects a relative few. It is something else entirely to allow police to make mistakes of law that expose the public to "invasive, frightening, and humiliating encounters" amid the ubiquity of traffic laws.[145]

Allowing police to force drivers to follow the letter of the law, while letting those same officers make mistakes about the law, is particularly galling in the context of rules of the road. A motorist could not offer a mistake of law defense, or any other excuse based on lack of wrongful intent, for most traffic laws are "strict liability offenses", which are impervious to just about any defense.[146] One commentator, Paul J. Larkin Jr., has offered a glimpse of the vast array of behavior that is controlled by a strict liability standard: "Illegal or overtime parking, not signaling for a turn, not coming to a full stop, crossing the double line, not having a local tax sticker on the bumper or windshield."[147] Larkin noted that people could not avoid strict liability, even if they abandoned their cars, for, "Strict liability traffic laws also technically

723 (1849) (involving a "seizure of a vessel"); The La Manche, 14 F. Cas. 965, 965 (1863) (involving a ship containing "286 hogsheads of tobacco and 20,000 staves" that was "taken on the high seas"). The one seizure case that did not involve shipping instead dealt with taxation of whiskey, a product known to be the basis of taxation at least as far back as the Whiskey Rebellion. Stacey v. Emery, 97 U.S. 642, 643 (1878).

[142] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

[143] *Id*.

[144] *Id*. at 162-63.

[145] *Heien*, 135 S. Ct. at 544 (Sotomayor, J., dissenting).

[146] Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 427-28 (2002) (noting that "there are no real defenses to a traffic ticket").

[147] Paul J. Larkin Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL'Y 1065, 1069 (2014).

apply to bicyclists, so pedaling is not an escape. For those who prefer to walk, jaywalking is another strict liability crime."[148]

To its credit, the *Heien* Court did respond to the concern that "it is fundamentally unfair to let police officers get away with mistakes of law when the citizenry is accorded no such leeway."[149] The Court noted that the "true symmetry" was "[j]ust 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."[150] Therefore, if the traffic law here mandated "two working brake lights, *Heien* could not escape a ticket by claiming he reasonably thought he needed only one." [151]Likewise, "if the law required only one, Sergeant Darisse could not issue a valid ticket by claiming he reasonably thought drivers needed two."[152] Allowing an officer's mistake of law to support a stop of the vehicle, in the first place, would not mar this symmetry.[153]

In making this argument, the *Heien* Court turned a blind eye to the practical consequences of seizing motorists. The traffic ticket might not be the primary concern of either the officer or the driver. For instance, in *Ohio v. Robinette*, an officer stopped a motorist for speeding, and finding no outstanding warrants, chose to forgo writing any traffic citation.[154] He also chose, however, to seek consent to search the driver's car.[155] The officer later testified that he asked for consent because of "the fact that I need the practice, to be quite honest."[156] Since the resulting search revealed marijuana and methylenedioxymethamphetamine (MDMA), an argument could be made that neither the officer nor the motorist had as his top priority the speeding offense for which the motorist was initially stopped.[157] The legal commentator, Lichtenberg, has noted:

> Many persons who are stopped by police for a traffic violation do not even receive a ticket because the police choose to deal with the offense informally or ignore it altogether. Other studies

[148] *Id*. at 1069 n.12.
[149] *Heien*, 135 S. Ct. at 540.
[150] *Id*.
[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] Ohio v. Robinette, 519 U.S. 33, 36 (1996).
[155] *Id*.
[156] Brief for Respondent at 18, Ohio v. Robinette, 519 U.S. 33 (1996) (No. 95-891).
[157] *Robinette*, 519 U.S. at 36.

> on police traffic enforcement have found similar results. One study found the police issued a summons in thirty-three percent of traffic stops; another found that forty-three percent of stops resulted in a ticket; while another national study estimated that 54.2% of stops result in a summons.[158]

The actions of the officer in *Robinette*, as well as of those in the studies cited by Lichtenberg demonstrate that *Heien's* "true symmetry" argument, fails to address the point that a traffic ticket might be only one of several outcomes of a seizure.[159]

The *Heien* Court missed the purpose of the Fourth Amendment by demanding strict adherence to the law for citizens while excusing police error as reasonable for the same law. The Bill of Rights, which specifically includes the Fourth Amendment, was not crafted to show deference to the government or to mandate perfection from the citizen, but to guard the individual against government intrusion.[160] The Framers designed the Bill of Rights to "provide a direct limit to government power."[161] James Madison in particular saw the Bill of Rights as "a means to bring more effective checks on [central] government power."[162] The "makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."[163] The founders therefore "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[164] Under the Fourth Amendment, it is not the individual, but the government who "must justify its intrusions according to the Fourth Amendment."[165] The *Terry* Court understood that the Constitution and the courts interpreting it were supposed to protect persons from government wrongdoing.[166] *Terry* declared, "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such

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[158] Lichtenberg, *supra* note 147, at 438.

[159] *Heien* thus allows police to use vague statutes to punish motorists through the intermediary of the discovered incriminating evidence.

[160] Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. REV. 1745, 1761 (2009).

[161] *Id*.

[162] *Id*.

[163] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[164] *Id*.

[165] United States v. Packer, 15 F.3d 654, 659 (1994).

[166] Terry v. Ohio, 392 U.S. 1, 13 (1968).

invasions."[167]

The *Terry* Court understood its role was to employ the Fourth Amendment to protect individuals from government overreach, not excuse officials for mistakes that would cause inconvenient evidence suppression.

In contrast, the *Heien* Court seemed oblivious to its role of preserving Constitutional rights, going so far as to invite law enforcement to engage in experiments by arresting people when the meaning of a statute was unclear so the courts could sort out ambiguities.[168] The Court offered this arrest-first-learn-the-law-later formula in pondering the hypothetical situation where an officer "suddenly confront(ed)" a Segway in a park.[169] The Court wondered what an officer seeing a Segway should do to enforce an ambiguous law "prohibiting 'vehicles' in the park."[170] The logic of *Heien*, which saw its Segway quandary as providing a reasonable question about interpreting a law, would suggest the officer arrest its operator as it "whizzes by" before it is out of range.[171] The burden of the ambiguity of the law—itself a creation of the government—places the burden on the individual, despite the fact that the Fourth Amendment places the burden of justification on the government.[172]

When it comes to violating the Constitution—the supreme law of the land—the *Heien* Court took on a philosophical and forgiving attitude, declaring, "To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials."[173] In contrast, when it came to the motorist, harried by

many and varied traffic laws,[174] the Court simply offered no haven for those who might pursue an experiment or make a mistake.

B. *Heien's* Conclusion That an Officer's Mistake of Law Can Be Reasonable Is Irreconcilable with the Court's Fourth Amendment Balancing Analysis for Assessing Reasonableness

Heien reiterated that the Fourth Amendment's "ultimate

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[167] *Id*.
[168] Heien v. North Carolina, 135 S. Ct. 530, 539 (2014).
[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] United States v. Packer, 15 F.3d 654, 659 (1994).
[173] *Heien*, 135 S. Ct. at 536.
[174] *Prouse*, 440 U.S. at 661.

touchstone" is "reasonableness."[175] The reasonableness standard itself, however, requires some particular kind of criterion so that officers in the field can apply it.[176] One test the Court has offered to measure the reasonableness of seizures, is a balancing of government interests in a seizure against those of the individual in being free of such a constraint. In *Terry*, the Court assessed its officer's stop and frisk by first focusing "upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."[177] The Court borrowed the balancing approach from *Camara v. Municipal Court*, a case in which the Court considered the Fourth Amendment implications of a San Francisco housing inspector's demand to make a warrantless entry into a home.[178] Seemingly aware of the lack of precision offered by a balancing approach, *Camara* lamented, "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[179]

Precise or not, the Court has repeatedly resorted to balancing for cases involving the seizure of motorists. In *United States v. Brignoni-Ponce*, a case in which border patrol officers pulled over a car because "its three occupants appeared to be of Mexican descent,"[180] the Court explained, "As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[181] That Court held, due to such factors as "the governmental interest at stake" and "the minimal intrusion of a brief stop," an officer having reasonable suspicion that a vehicle's occupants were illegally in the country had a sufficient basis for a stop.[182] Government interests,

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[175] Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006).

[176] The Court, in *Chimel v. California*, explained:

> To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an 'unreasonable search' is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable?

Chimel v. California, 395 U.S. 752, 765 (1968).

[177] *Terry*, 392 U.S. at 20-21.

[178] Camara v. Municipal Court, 387 U.S. 523, 525-27 (1967).

[179] *Id*. at 536-37.

[180] United States v. Brignoni-Ponce, 422 U.S. 873, 875 (1975).

[181] *Id*. at 878.

[182] *Id*. at 881.

however, would not outweigh an individual driver's right to security from seizure if the stops were done "on a random basis."[183] The Court also balanced the interests in *Prouse*, a case involving random stops of drivers for license and registration checks.[184] Again, the Court in *United States v. Maritnez-Fuerte* performed balancing in assessing the reasonableness of stopping vehicles at permanent immigration checkpoints.[185]

Moreover, the Court has expanded its use of balancing to cover a wide variety of cases. The Court has balanced interests in cases involving a seizure of a person at an airport during a canine sniff of his luggage,[186] police entry into a home when the occupants disagree over providing consent to search,[187] an assistant vice principal's search of a student's purse,[188] an officer's observation of a VIN (vehicle identification number) on the dashboard of a stopped vehicle,[189] and collection of biological samples from railroad employees.[190]

The balancing test can only be used when competing interests actually exist, for the very process of balancing requires there be something to weigh on each side of the scale. In *Terry*, the Court recognized that the government, "of course," had an interest in "effective crime prevention and detection."[191] It was this interest that allowed "a police officer . . . in appropriate circumstances and in an appropriate manner" to "approach a person for purposes of investigating possibly criminal behavior even though there (was) no probable cause to make an arrest."[192] In *Michigan v. Summers*, the Court held that even seizures posing only "limited intrusions on the personal security of those detained" must be justified by "substantial law enforcement interests."[193]

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[183] *Id.* at 883.

[184] Delaware v. Prouse, 440 U.S. 648, 650, 654 (1979) (noting "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

[185] United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976).

[186] United States v. Place, 462 U.S. 696, 703 (1983).

[187] Georgia v. Randolph, 547 U.S. 103, 155 (2006).

[188] New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

[189] New York v. Class, 475 U.S. 106, 118 (1986).

[190] Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619 (1989).

[191] Terry v. Ohio, 392 U.S. 1, 22 (1968).

[192] *Id.*

[193] Michigan v. Summers, 452 U.S. 692, 699 (1981). *See also* United States v. Place, 462 U.S. 696, 704 (1983) (mandating that "[t]he test is whether those [government] interests are sufficiently 'substantial'").

Summers reiterated that one of these seizures could only occur when police suspect "criminal activity."[194] The Court has repeatedly ruled against police who perform seizures while lacking a factual basis to believe the person detained has committed a crime. In *Prouse*, the Court held that police could not make random stops of vehicles in order to check drivers' licenses and vehicle registrations in the absence of "articulable and reasonable suspicion" that the motorist was "unlicensed or the car unregistered."[195] Similarly, in *Brown v. Texas*, the Court held "that a statute requiring individuals to identify themselves was unconstitutional as applied because the police did not have any reasonable suspicion that the petitioner had committed or was committing a crime."[196] As the majority noted, "[i]n the absence of any basis for suspecting (an individual) of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference."[197]

In *Heien*, any balancing of interests between government and individual devolved into farce. While Nicholas Heien retained his full Fourth Amendment rights to unreasonable searches and seizures as he rode down the road, Sergeant Darisse and Deputy Ward could offer no legitimate government interest in seizing him. The highest court in the state determined that driving with a single faulty brake light was "not a violation" of the law.[198] *Terry* requires that police be able to "reasonably to conclude" that "criminal activity may be afoot."[199] There must exist a "manifestation that the person stopped is, or is about to be, engaged in criminal activity."[200] According to the North Carolina Supreme Court, seeing one faulty brake light does not meet this standard. [201] Quite simply, when it came time to balance the interests, the police had nothing to offer the *Heien* Court to place on the government's side of the scales.

C. *Heien* Could Impair Police Professionalism and Undermine Public Confidence in Law Enforcement

When assessing facts to determine reasonable suspicion, the

[194] *Id*.
[195] *Id*. at 699 n.9; Delaware v. Prouse, 440 U.S. 648, 663 (1979).
[196] *Id*.; Brown v. Texas, 443 U.S. 47, 52 (1979).
[197] *Brown*, 442 U.S. at 52.
[198] *Heien*, 135 S. Ct. at 535.
[199] Terry v. Ohio, 392 U.S. 1, 30 (1968).
[200] United States v. Cortez, 449 U.S. 411, 417 (1981).
[201] *Heien*, 135 S. Ct. at 535.

Court has long given officers the benefit of their experience and expertise. In *Terry*, the Court measured the reasonableness of the officer's inferences in "light of his experience."[202] The Court went so far as to assert that, "for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood," failure to investigate would have amounted to "poor police work."[203] In *Brignoni-Ponce*, the Court listed "previous experience with alien traffic" as one of the facts the Border Patrol agents could legitimately rely upon in weighing the circumstances for reasonable suspicion.[204] In *United States v. Ortiz*, a case decided on the same day as *Brignoni-Ponce*, the Court was even more explicit, declaring, "the officers are entitled to draw reasonable inferences from . . . facts in light of their knowledge of the area and their prior experience with aliens and smugglers."[205] In *United States v. Cortez*, the Court deferred to the judgment of the officer in the field, because evidence had to be "seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[206] The Court even explicitly distinguished between a layperson and a "trained officer," who could make "inferences and deductions that might elude an untrained person."[207]

As early as 1983, Justice Rehnquist spoke of the Court's distinction between the expert officer and the untrained layperson as a well-established truth by noting that the Court had "*repeatedly* emphasized" that a trained police officer may be able to detect what a civilian cannot see.[208] Nearly twenty years later, the Court provided its most expansive statement regarding the impact official expertise has on assessing reasonable suspicion, "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"[209] In *United States v. Montoya de Hernandez*, a case involving a smuggler who had swallowed eighty-eight cocaine-filled balloons,[210] the Court deferred to official expertise

[202] *Terry*, 392 U.S. at 30.
[203] *Id*. at 23.
[204] United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975).
[205] United States v. Ortiz, 422 U.S. 891, 897 (1975).
[206] United States v. Cortez, 449 U.S. 411, 418 (1981).
[207] *Id*.
[208] Florida v. Royer, 460 U.S. 491, 525 n.5 (1983) (Rehnquist, J., dissenting) (emphasis added).
[209] U.S. v. Arvizu 534 U.S. 266, 273 (2002).
[210] U.S. v. Montoya de Hernandez, 473 U.S. 531, 532 (1985).

in noting that the "trained customs inspectors" in its case "had encountered many alimentary canal smugglers and certainly had more than an 'inchoate and unparticularized suspicion' or 'hunch,' that respondent was smuggling narcotics in her alimentary canal."[211] As late as 2008, the Court maintained, "[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists, including inferences 'that might well elude an untrained person.'"[212]

For over four decades, the Court has thus allowed police to draw upon their experience and expertise to justify intrusions. Conduct that might seem innocuous or even innocent to the naïve or oblivious layperson could clearly signal to the officer, expert in and alert to the subtleties of crime, the onset of evil. Such deference to official capabilities has necessarily resulted in a diminution of Fourth Amendment rights, for the Court has justified seizures on facts innocent in themselves. With *Heien*, the government can now justify an intrusion not only on the unique abilities of trained police, but also on their fallibilities, because said officers are forgiven as ordinary people. Perversely, both official expertise and error now provide justification to erode Fourth Amendment freedoms. In *Heien*'s wake, the officer who is most able to commit a seizure is the one who is expert in knowing criminal behavior, but is reasonably hazy in understanding the outlines of the law he or she enforces.

Although the Court, in Fourth Amendment cases spanning from *Carroll* in 1925 to *Ornelas* in 1996,[213] has consistently and explicitly deferred to officers' expert factual determinations, it has not found law enforcements' views on the law to be similarly relevant. Justice Sotomayor, was uniquely alert to this focus on facts when she declared, "There is scarcely a peep in these cases to suggest that an officer's understanding or conception of anything other than the facts is relevant."[214] The *Heien* Court responded that any such mention would

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[211] *Id.* at 542.

[212] Expertise can aid police in establishing various levels of suspicion, whether reasonable suspicion or probable cause. Pennsylvania v. Dunlap, 555 U.S. 964, 965 (2008). In *Ornelas v. United States*, the Court recognized that "a police officer may draw inferences based on his own experience in deciding whether probable cause exists." Ornelas v. United States, 517 U.S. 690, 700 (1996). Also, in *Florida v. J.L.*, the Court viewed the facts "in light of" the officer's "experience." Florida v. J.L., 529 U.S. 266, 270 (2000).

[213] *See supra* Part II.C.

[214] *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting). Justice Sotomayor was the sole dissenting justice in *Heien*.

have been "surprising" because "none of those cases involved a mistake of law."[215] The lack of a case before the Court involving a mistake of law could be due to the reasonable assumption by litigants that no such argument would ever be accepted by the Court. Any excuse based on law enforcement being ignorant of the very law it is trusted to enforce, would be an embarrassing admission of incompetence that would seemingly fall far short of reasonableness.

The one exception the *Heien* Court identified where the Court previously upheld official action based on an officer's mistake of law was *Michigan v. DeFillippo*.[216] The *Heien* Court noted that officers in *DeFillippo* made a mistake of law in determining DeFillippo "was guilty of a criminal offense when he declined to identify himself."[217] The Court sought to equate the *DeFillippo* officers' mistake of law with that of Sergeant Darisse in *Heien* by noting that, as with Heien's driving with a single brake light, "DeFillippo's conduct was lawful when the officers observed it."[218] The Court's reach for cover from *DeFillippo,* however, glossed over the importance of the fact that the mistake of law in *DeFillippo* was caused by a court's later determination that the ordinance at issue was unconstitutional.[219]

In likening these two cases, *Heien* fundamentally misconstrued the police officer's role in the criminal justice system. While police are expected to know the law they are enforcing, no one presumes that an officer will stand in for the courts as a judge of the constitutionality of statutes passed by the state legislature. While the police in *DeFillippo* were not expected to perform judicial review of the law they were meant to enforce, they were expected to know the law upon which they arrested DeFillippo. The Court itself has noted the fact that officers are not expected to take on the role of judges. In *United States v. Leon*, the case that created the good-faith exception to the Fourth Amendment exclusionary rule,[220] the Court declared that, in the context of seeking issuance of a warrant, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient."[221] In even stronger language, the

[215] *Id*. at 536.
[216] *Id*. at 538.
[217] *Id*.
[218] *Id*.
[219] *Id*.
[220] United States v. Leon, 468 U.S. 897, 926 (1984).
[221] *Id*. at 921.

Leon opinion continued, "[Once] the warrant issues, there is literally nothing more that policeman can do in seeking to comply with the law."[222] Similarly, when it came to the *DeFillippo* officers, who were dutifully carrying out a law they knew, there was "literally nothing more" they could do as police to properly perform their duties.

Heien, in giving officers a break in allowing mistakes of law, is doing the police no favors. Justice Brandeis noted, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[223] Similarly, in signaling that it is reasonable for police officers—the government officials entrusted to carry out the law on every street in the nation—to be mistaken about certain laws they are supposed to enforce, *Heien* is teaching troubling lessons to our citizenry. Persons discovering that police need not know the law might wonder why they themselves must follow the rules. At the very minimum, *Heien* undermines public confidence in law enforcement, which is no longer held to the highest standards. The perceived loss of police professionalism and the consequent erosion of respect could ultimately endanger officers in their daily interactions with citizens.

D. *Heien's* Acceptance of Police Mistakes of Law Could Cause a Series of Negative Consequences for Motorists

The mistake of law that Sergeant Darisse made in *Heien* hardly involved a grievous error about a serious crime. The entire battle in *Heien* centered on whether a car needed one or two functioning brake lights; the offense at issue was a mere equipment violation.[224] One could rightly wonder, "Just how much trouble could come from mistakenly stopping a person for a burned-out lamp?" The answer to this question might be surprising. The impact of *Heien* could go far beyond police stopping drivers who have committed no violations of the law.

A cascade of intrusions on personal security and privacy could be triggered by an officer's mistake of law. Pulling a car over and inconveniencing the driver, who might be in a hurry to get to work to complete an important task or to arrive home to be with family, could be just the first step in a series of official intrusions. The Court has given

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[222] *Id.*

[223] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[224] *Heien*, 135 S. Ct. at 535.

officers a per se right to order the driver[225] and any passengers[226] out of a lawfully stopped vehicle. Although such orders to have persons exit the vehicle could be seen as "minimal," Justice Stevens noted that, "countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant."[227] Justice Stevens recognized that "the aggregation of thousands upon thousands of petty indignities has an impact on freedom."[228] The liberties offended by forced exits of the vehicle could take on even greater aggravation for those having to step out into rain or snow.

Further, vehicle stops have often been the setting for officers' requests for consent to search the car.[229] A deputy in one case testified that he had asked consent of drivers to search their vehicles in "786 traffic stops" in one year.[230] The Court has held that officers may ask for consent to search even though they completely lack any basis for suspecting a person of wrongdoing.[231] The Court has also acknowledged, albeit in the context of a Fifth Amendment issue, the "the aura of authority surrounding an armed, uniformed officer."[232] The force exerted by such a presence, and "the knowledge that the officer has some discretion in deciding whether to issue a citation," could exert "some pressure on the detainee to respond to questions."[233] That same pressure could cause a driver to pause before refusing an armed police officer the opportunity to search a car.

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[225] In *Mimms*, the Court declared:

> We hold only that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.

Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977).

[226] Maryland v. Wilson, 519 U.S. 408, 410 (1997). As noted in *Knowles v. Iowa*, police officers "may order out of a vehicle both the driver . . . and any passengers." Knowles v. Iowa, 525 U.S. 113, 118 (1998).

[227] *Id*. at 419.

[228] *Id*.

[229] Ohio v. Robinette, 519 U.S. 33 (1996).

[230] Robinette, 519 U.S. at 40 (Ginsburg, J., concurring).

[231] Florida v. Bostick, 501 U.S. 429, 434-35 (1991) ("We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage.")

[232] Berkemer v. McCarty, 468 U.S. 420, 438 (1984).

[233] *Id*.

An officer's mistake of law could extend beyond the search of a driver's vehicle to his or her person. Since *Terry* allowed an officer to pat down a person for weapons whenever "he has reason to believe that he is dealing with an armed and dangerous individual," an officer who labored under a mistake of law about a violent crime such as robbery or assault could place hands on an innocent individual.[234] If the officer's mistake of law provided probable cause for arrest, this mistaken arrest could provide the sole basis for a search incident to arrest.[235]

The intrusions suffered by a motorist under the power of an officer ignorant of the law might not stop at the arrest. In *Maryland v. King*, the Court deemed that "DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure."[236] The Court considered analysis of "a cheek swab of the arrestee's DNA" at the station to be akin to fingerprinting.[237] Still, other invasions could occur in custody. One of the most severe intrusions, occurring from a factual mistake, happened in *Florence v. Board of Chosen Freeholders*, where officers arrested a person and held him for six days in jail based on an erroneous computer report that "he had failed to pay a minor civil fine."[238] In that case, Florence was subjected to a strip search of a kind described by Justice Breyer as follows:

> a visual inspection of the inmate's naked body. This should include the inmate opening his mouth and moving his tongue up and down and from side to side, removing any dentures, running his hands through his hair, allowing his ears to be visually examined, lifting his arms to expose his arm pits, lifting his feet to examine the sole, spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus. For females, the procedures are similar except females must in addition, squat to expose the vagina.[239]

Sadly, traffic stops for the most minor of offenses, such as changing lanes without signaling, can result in the ultimate loss—

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[234] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[235] United States v. Robinson, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

[236] Maryland v. King, 133 S. Ct. 1958, 1980 (2013).

[237] *Id*.

[238] Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1527 (2012) (Breyer, J., dissenting).

[239] *Id*. at 1525.

death.[240] On July 10, 2015, Brian Encinia, a Texas state trooper, stopped Sandra Bland, a twenty-eight year-old African-American motorist, for failing to signal during a lane change.[241] When Bland refused Trooper Encinia's request that she put out her cigarette, matters escalated.[242] The officer opened the driver's door and the two struggled as Trooper Encinia tried to physically remove Bland from the car.[243] The officer's dashboard camera filmed Trooper Encinia pointing a Taser at Bland while threatening, "I will light you up!"[244] The trooper arrested Bland for assault on a police officer.[245] Bland was "found dead in her cell three days later, hanged with a trash bag."[246] While officials "ruled her death a suicide," Bland's family took issue with the conclusion that she was suffering from depression.[247] Regardless of the reason for Bland's tragic demise, the fact remains that the end result of an officer's decision to stop a motorist was a loss of life.

An officer's mistake of law could certainly result in nothing more than an annoying and undeserved traffic ticket. It could also, however, be the start of a long and ugly ordeal. Since police seize millions of motorists in traffic stops, the chance that a mistake of law could result in a severe privacy intrusion is not insignificant.[248] In focusing on the officer's travails in wading through confusing codes, the *Heien* Court failed to adequately consider the true cost mistakes of law could have on individuals unlucky enough to be confronted by such a confused official.

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[240] Abby Ohlheiser & Abby Phillip, *"I will light you up!": Texas officer threatened Sandra Bland with Taser during traffic stop*, WASH. POST (July 7, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/07/21/much-too-early-to-call-jail-cell-hanging-death-of-sandra-bland-suicide-da-says.

[241] *Id*.

[242] *Id*.

[243] *Id*.

[244] *Id*.

[245] Molly Hennessy-Fiske, *Sandra Bland: Texas records show racial breakdown of those stopped by same trooper*, L.A. TIMES (Aug. 10, 2015), http://www.latimes.com/nation/la-na-sandra-bland-trooper-encinia-20150810-story.html.

[246] *Id*.

[247] Hennessy-Fiske, *supra* note 245; Ohlheiser & Phillip, *supra* note 240.

[248] *Traffic Stops*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=tp&tid=702 (last visited Nov. 14, 2015) ("An estimated 17.7 million persons age 16 or older indicated that their most recent contact with the police in 2008 was as a driver pulled over in a traffic stop. These drivers represented 8.4% of the nation's 209 million drivers.").

V. CONCLUSION

The *Heien* case has taught us that Fourth Amendment reasonableness is not what it used to be. Since the mid-twentieth century, the Court has recognized that "room must be allowed" for police to make "some mistakes."[249] The rationale for such reasonable errors, however, has always been that officers inevitably found themselves confronted with a host of facts that were "more or less ambiguous."[250] In *Hill v. California*, police were reasonably mistaken when, having "neither an arrest nor a search warrant," they arrested the wrong man for robbery in an apartment, even after he had told them of their error and produced identification indicating he was not the person police were seeking.[251] The officers made the mistake because the arrestee opened the door of the apartment where the suspected robber lived and "fit [the robber's] description exactly."[252] In *Illinois v. Rodriguez*, the Court found officers' warrantless entry into a home and subsequent seizure of drugs to be reasonable, even though they relied upon consent from a person who "did not in fact have authority to give consent."[253] The error was based on the facts that the person who had provided police the faulty consent had a key to the home, had once lived at the apartment, and had just suffered domestic violence at the location.[254] As previously noted, the Court in *Florence* has even found reasonable a strip search of a person arrested on a mistake based on a computer error.[255]

All of the searches, no matter how disturbing the consequences, involved reasonable mistakes of fact. The reasonableness the Court "generally demanded" for the decisions "that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement," always regarded "factual determinations."[256]

The Court, in *Heien*, opened up an entirely new area where official blunders can intrude on the lives of innocent citizens. Now,

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[249] Brinegar v. United States, 338 U.S. 160, 176 (1949).
[250] *Id*.
[251] Hill v. California, 401 U.S. 797, 799, 802 (1971).
[252] *Id*. at 799.
[253] Illinois v. Rodriguez, 497 U.S. 177, 180, 182 (1990).
[254] *Id*. at 179, 180.
[255] Florence v. Bd. of Chosen Freeholders, 132 S. Ct. at 1523.
[256] *Rodriguez*, 497 U.S. at 185.

police may err not only in the facts, but also in the law. *Heien* has limited its holding by offering the oxymoronic phrase, "reasonable mistakes of law."[257] In inventing this concept for police facing Fourth Amendment mandates, the Court painted a picture of a dedicated officer, doing his or her best to wade through a thicket of confusing legislative language to pursue daily justice. This depiction, however, glosses over the fact that police work for the same entity for which legislators and judges labor—the government. If one part of the government, here the legislature, fails in informing another part of the government, the executive, it is the State that should suffer the negative consequences rather than the blameless individual. Further, should evidence of illegality be discovered due to an officer's misinterpretation of law, the government should not enjoy the boon of presenting evidence in court that it could not have obtained were the law applied correctly.

When a law vexes a judge or reasonably confuses an officer, the fault resides somewhere in the government, in all likelihood with a legislator who drafted an ambiguity. The negative consequences of such a mistake of law should remain in the halls of government with those who created it. Unfortunately, the Court in *Heien* committed its own error by instead burdening the only party not complicit in the mistake—the innocent citizen who dared drive down the road.

[257] Heien v. North Carolina, 135 S. Ct. 530, 537 (2014).