

# CONNECTICUT LAW REVIEW

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VOLUME 47

MAY 2015

NUMBER 4

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## Note

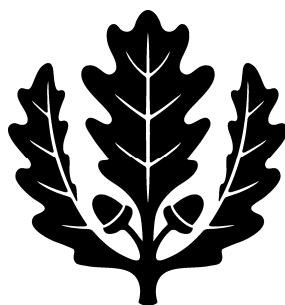
### DO YOU KNOW WHY I STOPPED YOU?: THE FUTURE OF TRAFFIC STOPS IN A POST-*HEIEN* WORLD

SARAH RICCIARDI

*Nearly twenty years after the U.S. Supreme Court's decision upholding pretextual traffic stops in Whren v. United States, racial animosity between white police officers and black civilians is as pervasive as ever. Reports of unarmed black men killed at the hands of white law enforcement officers are becoming disturbingly common. Despite the national outcry against racial discrimination by law enforcement, the U.S. Supreme Court recently handed down a decision that will broaden police discretion still further. On December 15, 2014, the Court in Heien v. North Carolina held that an officer's mistake of law can provide the reasonable suspicion necessary to justify a traffic stop. This Note argues that this expansion of police discretion will disproportionately affect minorities, exacerbating the deep mistrust between communities and their respective police departments.*

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# DO YOU KNOW WHY I STOPPED YOU?: THE FUTURE OF TRAFFIC STOPS IN A POST-*HEIEN* WORLD

SARAH RICCIARDI\*

## I. INTRODUCTION

Fifty years after the passing of the Civil Rights Act of 1964,<sup>1</sup> protests over racial discrimination are once again front-page news.<sup>2</sup> As evidenced by recent nationwide protests, allegations of racism continue to plague American streets and courtrooms.<sup>3</sup> While overt discrimination has drastically declined over the last few decades,<sup>4</sup> the tension between white law enforcement officers and minority, indigent civilians is still palpable. In the past year, there have been two widely publicized incidents in which an unarmed black man has tragically died at the hands of a white police officer.<sup>5</sup> The deaths of Michael Brown, in Ferguson, Missouri,<sup>6</sup> and Eric Garner, in Staten Island, New York,<sup>7</sup> have shaken much of the country. These deaths are especially jarring in the wake of the 2013 acquittal of

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<sup>1</sup> The Civil Rights Act of 1964 outlawed discrimination and segregation on the ground of race, color, religion, or national origin in places of public accommodation. Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>2</sup> See, e.g., J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1 (describing protests and demonstrations after a grand jury decided not to indict the police officer for Eric Garner's death); Rebecca Davis O'Brien et al., *Protests Erupt After Officer Not Indicted in New York Case*, WALL ST. J., Dec. 4, 2014, at A1 (reporting the "renew[al] . . . of protests that swept the country after another black man was fatally shot by an officer in Missouri").

<sup>3</sup> See Paula Mejia, *Ferguson, Eric Garner Protests Spread Worldwide*, NEWSWEEK (Dec. 6, 2014, 12:53 PM), <http://www.newsweek.com/ferguson-eric-garner-protests-sprawl-worldwide-289867> ("[P]rotests[] which demand a focus on civil rights and accountability for police brutality . . . went on in Oakland, Chicago, Boston, Las Vegas, Los Angeles, Washington D.C. and New Orleans.").

<sup>4</sup> See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2625–28 (2013) (declaring the Section 4 coverage formula of the Voting Rights Act unconstitutional in light of current conditions, specifically that the "Nation has made great strides" in ending racial discrimination in voting).

<sup>5</sup> See O'Brien et al., *supra* note 2, at A1 (noting that the New York grand jury's failure to indict the officer in the Eric Garner case was only "a little more than a week after a grand jury in Missouri declined to indict a white police officer, Darren Wilson, who shot an unarmed black 18-year old, Michael Brown, in August").

<sup>6</sup> *Id.*

<sup>7</sup> Deborah E. Bloom & Jareen Imam, *New York Man Dies After Chokehold By Police*, CNN (DEC. 8, 2014, 5:31 PM), <http://www.cnn.com/2014/07/20/justice/ny-chokehold-death/>.

George Zimmerman, a white neighborhood watch coordinator who shot and killed an unarmed black teenager in 2012.<sup>8</sup>

Since the Brown and Garner deaths, protests have erupted across the U.S.—many of which have escalated into violent riots.<sup>9</sup> While there were demonstrations immediately following the incidents, it was the reaction to the failed indictments of the officers involved that caused the most outcry.<sup>10</sup> The general sentiment of the protestors appears to be that the grand juries' denials are “yet another injustice for blacks.”<sup>11</sup> In response to the frustrations raised by many African Americans with respect to a legal system with a long history of discrimination against black people, President Obama acknowledged, “[w]hen anybody in this country is not being treated equally under the law, that is a problem . . . and it's my job as president to help solve it.”<sup>12</sup> While President Obama's promise is encouraging, it is the judiciary that may be to blame for the ongoing racial discrimination by police officers.

Just weeks after the failed indictments, the United States Supreme Court handed down a decision, *Heien v. North Carolina*,<sup>13</sup> that will potentially broaden police discretion in the context of investigatory traffic stops. As these types of stops already disproportionately affect minority drivers,<sup>14</sup> this decision will very likely add to the growing tension between minorities and law enforcement. While the issues facing the grand juries in

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<sup>8</sup> Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1. As George Zimmerman was a civilian at the time of the shooting, the Trayvon Martin case is not particularly relevant to this Note's discussion of actions taken by police officers. However, it does highlight issues that continue to face minority men when dealing with authority figures. See, e.g., Devlin Barrett, *Holder Criticizes Stand-Your-Ground Laws; Speech Drawing Link to Teen's Death Marks Attorney General's First Rebuke of Such Statutes; Gun-Rights Groups Rankled*, WALL ST. J. ONLINE (July 16, 2013), <http://www.wsj.com/articles/SB10001424127887324348504578610113097977142> (reporting that after Martin's death last year, Eric Holder, the nation's first black attorney general, “sat down with his 15-year-old son and discussed how to respond if he were stopped by police, just as his own father had done with him decades earlier,” and noting that “[t]his was a father-son tradition [he] hoped would not need to be handed down”).

<sup>9</sup> See Monica Davey & Julie Bosman, *Grand Jury Declines to Indict Police Officer in Ferguson Killing*, N.Y. TIMES, Nov. 25, 2014, at A1 (“Bottles and rocks were thrown at officers, and windows of businesses were smashed. Several police cars were burned; buildings . . . were on fire, and looting was reported in several businesses. Gunshots could be heard along the streets of Ferguson, and law enforcement authorities deployed smoke and gas to control the crowds.”).

<sup>10</sup> *Id.*; Goodman & Baker, *supra* note 2, at A1.

<sup>11</sup> Jack Healy, *Ferguson, Still Tense, Grows Calmer*, N.Y. TIMES, Nov. 27, 2014, at A24. Indeed, the slogan “black lives matter,” which was originally created in 2012 after the acquittal of George Zimmerman, has been revived as the motto against racial inequality. Mejia, *supra* note 3.

<sup>12</sup> Goodman & Baker, *supra* note 2, at A1.

<sup>13</sup> 135 S. Ct. 530 (2014).

<sup>14</sup> According to a 2011 survey published by the Justice Department, black drivers are 31 percent more likely to be pulled over than white drivers, and about 23 percent more likely than Hispanic drivers. See LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 1 (2013) (reporting that 13% of drivers who were pulled over in a traffic stop were black, 10% were white, and 10% were Hispanic).

the Brown and Garner incidents and the Supreme Court in *Heien* were factually and legally different,<sup>15</sup> the cases share common questions. What were the police officer's subjective intentions at the time? Does it matter? And should it matter?

The difficulty in answering these questions lies in the fact that courts have yet to achieve omniscience. What is truly on the minds of parties involved in lawsuits remains unknown. Did the supermarket owner know about the spill and choose not to clean it up?<sup>16</sup> Did the taxpayer really not know that his wages were considered income under the Tax Code?<sup>17</sup> Did the officer actually stop the car with discriminatory intent?<sup>18</sup> Did the defendant truly fear for his life?<sup>19</sup> In response, the legal system has done its best to create mechanisms to determine when and how the state of mind of an individual should be considered.

For example, negligence was created to "coordinate conduct within [a] community safely."<sup>20</sup> Communities adopt rules and practices that give members guidance as to how to act in certain situations.<sup>21</sup> With these pre-existing social conventions in place, it does not matter whether an individual actually knew he was committing a violation.<sup>22</sup> Under the law of

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<sup>15</sup> The Garner and Brown cases involved officers being charged with manslaughter, among other things. Rich Calder & Selim Algar, 'Reckless' Omission in Garner Case, N.Y. POST, Dec. 6, 2014, at 4; Julie Bosman et al., *Amid Conflicting Accounts, Trusting the Officer*, N.Y. TIMES, Nov. 26, 2014, at A1. Both were decided at the indictment stage. Bosman et al., *supra* note 15, at A1.; Calder & Algar, *supra* note 15, at 4. The *Heien* case dealt with the reasonable suspicion standard as it pertains to traffic stops. *Heien*, 135 S. Ct. at 534. The judgment up for appeal was over the suppression of evidence obtained from a search following the stop. *Id.* at 535.

<sup>16</sup> See, e.g., *Negri v. Stop & Shop, Inc.*, 480 N.E.2d 740, 741 (N.Y. 1985) (holding that a grocery store owner may be liable if he has constructive notice of a dangerous condition, regardless of whether he actually knew about it or not).

<sup>17</sup> See, e.g., *Cheek v. United States*, 498 U.S. 192, 201 (1991) (noting that criminal tax liability requires willfulness, i.e., that "the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").

<sup>18</sup> See *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that "the constitutional reasonableness of traffic stops [does not] depend[] on the actual motivations of the individual officers involved"); *infra* Part V (discussing police officer motivations during traffic stops).

<sup>19</sup> See, e.g., *United States v. Wagner*, 834 F.2d 1474, 1486 (9th Cir. 1987) (holding that defendant was not entitled to instruction on self-defense because the victim's "alleged attempt to grab the hot water pitcher did not justify [the defendant's act of] pulling a knife after all danger had passed"); see also Alvarez & Buckley, *supra* note 8, at A1 (reporting that the six-woman jury acquitted George Zimmerman of the killing of Trayvon Martin in Florida, where self-defense laws "allow someone with a reasonable fear of great bodily harm or death to use lethal force, even if retreating from danger is an option").

<sup>20</sup> Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1063 (2001).

<sup>21</sup> *Id.* at 1064.

<sup>22</sup> See *id.* (noting that cases are decided based on the "pre-existing social convention[s]" within the community).

negligence, he simply should have known.<sup>23</sup>

The rule against hearsay<sup>24</sup> (and its exceptions) is another mechanism employed to deal with the unreachable subjective mind of individuals. Generally, hearsay is inadmissible because of an inherent lack of trustworthiness.<sup>25</sup> But in certain situations, courts may overlook that untrustworthiness.<sup>26</sup> For example, Federal Rule of Evidence 803(1), the “present sense impression” exception, allows into evidence a “statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”<sup>27</sup> According to the Advisory Committee’s Note, the rationale for such an exception is that if a statement describing an event is made near the time of the event, it negates “the likelihood of deliberate or conscious misrepresentation.”<sup>28</sup> Even though it is entirely possible that the declarant was lying when he made the statement, because he made it near the time of the event, courts presume it was true.<sup>29</sup>

Naturally, society’s attempts to deal with subjectivity often create inconsistencies in its treatment by the law. Such inconsistencies are

<sup>23</sup> See, e.g., *Trimarco v. Klein*, 436 N.E.2d 502, 505 (N.Y. 1982) (noting “the well-recognized and pragmatic proposition that when ‘certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that [the one charged with the dereliction] has fallen below the required standard’”) (citation omitted).

<sup>24</sup> Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. FED. R. EVID. 801(c).

<sup>25</sup> See James Donald Moorehead, *Compromising the Hearsay Rule: The Fallacy of Res Gestae Reliability*, 29 LOY. L.A. L. REV. 203, 246 (1995) (“[The hearsay rule] protects against the errant or fabricated statements of remote declarants and in-court witnesses, and it helps to ensure that the jury does not base its decision on untested hearsay. Because the declarant is not subject to cross-examination, there must be additional guarantors of trustworthiness to take its place before hearsay should be admitted.”); see also *United States v. Boyce*, 742 F.3d 792, 800 (7th Cir. 2014) (Posner, J., concurring) (noting that hearsay is often “no better than rumor or gossip”).

<sup>26</sup> *Boyce*, 742 F.3d at 800 (Posner, J., concurring) (discussing exceptions to the rule against hearsay).

<sup>27</sup> FED. R. EVID. 803(1). Though codified by the Rules of Evidence, many of these exceptions are the result of “folk psychology.” See *Lust v. Sealy, Inc.*, 383 F.3d 580, 588 (7th Cir. 2004) (critiquing the rationale behind the present sense impression exception); see also *Boyce*, 742 F.3d at 801 (Posner, J., concurring) (noting that the present sense impression “has neither a theoretical nor an empirical basis; and it’s not even common sense—it’s not even good folk psychology”).

<sup>28</sup> FED. R. EVID. 801 advisory committee’s note.

<sup>29</sup> *Boyce*, 742 F.3d at 800 (Posner, J., concurring). Judge Posner strongly criticized this rationale in his concurring opinion in *Boyce*.

Even real immediacy is not a guarantor of truthfulness. It’s not true that people can’t make up a lie in a short period of time. Most lies in fact are spontaneous. . . . Suppose I run into an acquaintance on the street and he has a new dog with him—a little yappy thing—and he asks me, “Isn’t he beautiful?” I answer yes, though I’m a cat person and consider his dog hideous.

*Id.* Posner went on to similarly criticize the “excited utterance” exception, noting that “even if a person is so excited by something that he loses the capacity for reflection (which doubtless does happen), how can there be any confidence that his unreflective utterance, provoked by excitement, is reliable?” *Id.* at 801.

particularly glaring with respect to cases involving law enforcement. The arguments presented in *Heien* specifically contemplated the difference between how courts treat the state of mind of a civilian defendant and the state of mind of a law enforcement officer. The question before the *Heien* Court was whether an officer's mistake of law could provide reasonable suspicion to justify a traffic stop.<sup>30</sup> At first blush, the question seems easily answerable. Fourth Amendment precedent suggests that police officers may make mistakes as long as their actions are reasonable under the circumstances.<sup>31</sup> As Petitioner Nicholas Brady Heien contended, however, there is a strong argument that mistakes of law should be considered per se unreasonable and therefore a violation of the Fourth Amendment. Indeed, eight circuits have ruled that mistakes of law generally cannot provide the basis for reasonable suspicion.<sup>32</sup>

Using *Heien* as a guidepost, this Note will analyze the treatment of a police officer's state of mind in the context of Fourth Amendment violations. Part II will provide a factual context for the forthcoming legal analysis by describing the relevant facts of *Heien*. Part III will discuss various arguments posed by both parties. In particular, it will address Heien's contention that the "ignorance is no excuse" doctrine suggests that a police officer should be required to know the law as well as a civilian. It will also discuss the Court's previous treatment of a police officer's state of mind in the context of the Fourth Amendment, specifically addressing cases involving mistakes of fact. Part IV will discuss the Supreme Court's opinion and the potential implications of its ruling in light of the civil unrest surrounding the failed indictments in Ferguson and Staten Island. This Note will conclude by suggesting that the Supreme Court's sanction of an expansion of police discretion will disproportionately affect minorities and will likely fan the fire of public outrage.

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<sup>30</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

<sup>31</sup> *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) (noting that factual determinations made by law enforcement officers need only be reasonable, not correct).

<sup>32</sup> *See State v. Heien*, 737 S.E.2d 351, 360 (N.C. 2012) [hereinafter *Heien II*] (Hudson, J., dissenting) (accumulating circuit case law). Specifically:

The First, Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits all apply some form of the rule that an officer's mistake of law cannot be the basis for reasonable suspicion, though many allow that a stop based on a mistake of law may be constitutional if it can be justified objectively notwithstanding the mistake of law.

*Id.* (citing *United States v. Debruhl*, 38 A.3d 293, 299 (D.C. Cir. 2012); *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006); *United States v. Mosley*, 454 F.3d 249, 260 n.16 (3d Cir. 2006); *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005); *United States v. Chanthasouvat*, 342 F.3d 1271, 1279 (11th Cir. 2003); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Miller*, 146 F.3d 274, 279 (5th Cir. 1998)).

II. *HEIEN V. NORTH CAROLINA*A. *Factual Background*

On the morning of April 29, 2009, Petitioner Nicholas Brady Heien and Maynor Javier Vasquez were traveling along Interstate 77 through Surry County, North Carolina.<sup>33</sup> Vasquez was driving Heien's car, a Ford Escort, while Heien lay across the back seat.<sup>34</sup> At that time, Sergeant Matt Darisse of the Surry County Sheriff's Department was working criminal interdiction, observing traffic on the same interstate.<sup>35</sup> At the time of the traffic stop in question, Sergeant Darisse had worked in Surry County law enforcement for twenty years, the last two of which he spent doing criminal interdiction.<sup>36</sup>

When the Escort approached, it appeared to Sergeant Darisse that Vasquez was "stiff and nervous" so he decided to follow the vehicle.<sup>37</sup> As traffic slowed, Sergeant Darisse noticed that the vehicle's left rear brake light illuminated but the right rear brake light did not.<sup>38</sup> Sergeant Darisse activated his blue lights and stopped the vehicle.<sup>39</sup> Darisse informed Vasquez that he had stopped the vehicle due to a faulty brake light.<sup>40</sup> Unbeknownst to Sergeant Darisse, North Carolina law required vehicles to have only *one* functioning brake light.<sup>41</sup> At the time of the stop, no North Carolina appellate court had interpreted the statute one way or the other.<sup>42</sup> Sergeant Darisse simply assumed that the law required two functioning brake lights.<sup>43</sup>

After finding no problems with Vasquez's license and registration, Sergeant Darisse issued Vasquez a warning ticket for the malfunctioning brake light.<sup>44</sup> Sergeant Darisse then asked Vasquez some additional questions, including whether he could search the vehicle.<sup>45</sup> Vasquez

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<sup>33</sup> Joint Appendix at 4, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13–604) [hereinafter Joint Appendix].

<sup>34</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

<sup>35</sup> *Id.*

<sup>36</sup> Joint Appendix, *supra* note 33, at 14.

<sup>37</sup> Brief for Petitioner at 2, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13–604) [hereinafter Brief for Petitioner].

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *State v. Heien*, 714 S.E.2d 827, 829 (N.C. Ct. App. 2011) [hereinafter *Heien I*]; *see also* *Heien v. North Carolina*, 135 S. Ct. 530, 535 (2014) ("Noting that the State had chosen not to seek review of the Court of Appeals' interpretation of the vehicle code, the North Carolina Supreme Court assumed . . . that the faulty brake light was not a violation.").

<sup>42</sup> *Heien*, 135 S. Ct. at 540 (citing *Heien II*, 737 S.E.2d at 359).

<sup>43</sup> *Id.* at 534.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*



responded that he did not mind but that it was not his car.<sup>46</sup> Sergeant Darisse then asked Heien, who verbally consented to the search.<sup>47</sup> The search of the vehicle revealed a sandwich bag filled with cocaine.<sup>48</sup>

### B. *Procedural Posture*

On September 24, 2009, the State of North Carolina charged Heien with attempted cocaine trafficking.<sup>49</sup> Contending that the initial traffic stop violated the Fourth Amendment's prohibition on unreasonable searches and seizures, Heien moved to suppress the evidence obtained during the search of his vehicle.<sup>50</sup> On March 25, 2010, the trial court denied Heien's motion to suppress.<sup>51</sup> In making its ruling, the court assumed that North Carolina law required two functioning brake lights.<sup>52</sup> Heien pled guilty to attempted cocaine trafficking, but reserved the right to appeal the court's denial of his motion to suppress.<sup>53</sup> He was sentenced to two consecutive ten-to-twelve month prison terms.<sup>54</sup>

On August 16, 2011, the North Carolina Court of Appeals reversed the trial court's decision and vacated the conviction, holding that Sergeant Darisse "could not have had a reasonable, articulable suspicion that the malfunctioning brake light constituted a violation of [North Carolina law]" because North Carolina General Statute Section 20-129 required only one functioning brake light and no other statute applied.<sup>55</sup> The State appealed to the North Carolina Supreme Court, conceding the Court of Appeals' interpretation of Section 20-129 but arguing that the traffic stop still did not violate the Fourth Amendment because an objectively reasonable mistake of law can provide reasonable suspicion.<sup>56</sup>

Thus, the North Carolina Supreme Court reviewed the case under the assumption that the law required only one functioning brake light.<sup>57</sup> The North Carolina Supreme Court reversed, remanding the case back to the Court of Appeals to decide whether Heien's consent to search his car was invalid.<sup>58</sup> Both the North Carolina Court of Appeals and the North Carolina

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Joint Appendix, *supra* note 33, at 1.

<sup>50</sup> *Heien*, 135 S. Ct. at 535.

<sup>51</sup> Joint Appendix, *supra* note 33, at 1.

<sup>52</sup> *Heien*, 135 S. Ct. at 535 (noting that the trial court did not decide whether two lights were required).

<sup>53</sup> *Id.*

<sup>54</sup> *Heien I*, 714 S.E.2d 827, 827 (N.C. Ct. App. 2011).

<sup>55</sup> *Id.* at 831.

<sup>56</sup> *Heien II*, 737 S.E.2d 351, 354 (N.C. 2012).

<sup>57</sup> *Heien*, 135 S. Ct. at 535.

<sup>58</sup> *Id.*

Supreme Court held that Heien's consent was valid.<sup>59</sup> Heien abandoned the consent issue and petitioned the U.S. Supreme Court for certiorari. On April 21, 2014, the Supreme Court granted review of the question: "Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop."<sup>60</sup>

### C. *Relevant Law*

The Supreme Court has continually recognized that "[n]o right is held 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."<sup>61</sup> The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>62</sup> The Fourteenth Amendment makes this protection applicable to the states.<sup>63</sup>

To preserve these constitutional protections, the Supreme Court established standards by which police officers must abide. Ordinarily, an arrest requires both: (i) probable cause to believe that the person committed, is committing, or is about to commit a crime; and (ii) either a warrant or exigent circumstances requiring immediate action before a warrant could be obtained.<sup>64</sup> But for a brief investigatory stop, a police officer needs only a reasonable and articulable suspicion of criminal activity.<sup>65</sup> In those cases, "[a] police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."<sup>66</sup>

"Temporary detention of individuals during the stop of an automobile by the police . . . constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]."<sup>67</sup> As such, a traffic stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances"<sup>68</sup> and is valid only if the officers have an objectively reasonable suspicion to believe that a law is being violated.<sup>69</sup> Thus, a traffic stop without probable cause or reasonable suspicion is a violation of

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<sup>59</sup> *Id.*

<sup>60</sup> Brief for Petitioner, *supra* note 37, at i.

<sup>61</sup> *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted).

<sup>62</sup> U.S. CONST. amend. IV.

<sup>63</sup> U.S. CONST. amend. XIV, § 1; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>64</sup> *Terry*, 392 U.S. at 20.

<sup>65</sup> *Id.* at 20–21.

<sup>66</sup> *Id.* at 21.

<sup>67</sup> *Whren v. United States*, 517 U.S. 806, 809–10 (1996).

<sup>68</sup> *Id.* at 810.

<sup>69</sup> *Terry*, 392 U.S. at 20–21.

the Fourth Amendment.

Any evidence obtained thereafter is excluded as fruit of the poisonous tree unless it is sufficiently attenuated from that violation or subject to an exception.<sup>70</sup> The good-faith exception provides that suppression is not appropriate when police officers act with “an objectively reasonable good-faith belief that their conduct is lawful.”<sup>71</sup>

In North Carolina, motor vehicles must have at least one functioning rear brake light.<sup>72</sup> Section 20-129(d) of the North Carolina General Statutes provides in relevant part: “*Rear Lamps.*—Every motor vehicle . . . shall have all originally equipped rear lamps or the equivalent in good working order . . .”<sup>73</sup> Subsection (g) provides:

No person shall sell or operate on the highways of the State any motor vehicle, motorcycle or motor-driven cycle, manufactured after December 31, 1955, unless it shall be equipped with *a* stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and 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.*<sup>74</sup>

In addition, North Carolina General Statute Section 20-183.3(a) provides:

Safety.—A safety inspection of a motor vehicle consists of an inspection of the following equipment to determine if the vehicle has the equipment required by . . . this Chapter and if the equipment is in a safe operating condition: . . . (2) Lights, as required by [Section 20-129].<sup>75</sup>

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<sup>70</sup> See, e.g., *United States v. Chanthasouvat*, 342 F.3d 1271, 1280–81 (11th Cir. 2003) (holding that the trial court erred in admitting evidence obtained following an unlawful traffic stop).

<sup>71</sup> *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011) (internal quotation marks omitted).

<sup>72</sup> N.C. GEN. STAT. §§ 20-129(d), (g) (2009).

<sup>73</sup> *Id.* § 20-128(d) (emphasis added).

<sup>74</sup> *Id.* § 20-128(g) (emphasis added).

<sup>75</sup> *Id.* § 20-183.3(a).

## III. ARGUMENTS

Due to a divergence of state and federal law, Heien's position before the Supreme Court appears counterintuitive. Typically, the end goal of an appeal of a denial of a motion to suppress is for the higher court to hold that there was a reversible error—i.e., the case is remanded back to the trial court for proceedings consistent with the higher court's opinion.<sup>76</sup> In this case, however, Heien sought a clarification of federal law so that, when his case was remanded back to state court, he would receive a state remedy in light of the clarified federal law.<sup>77</sup>

Federal courts (and many state courts) apply a "good-faith exception" in cases where evidence was obtained in violation of the Fourth Amendment but there was no flagrant police misconduct.<sup>78</sup> Under the good-faith exception, wrongfully obtained evidence that would normally be suppressed is admitted.<sup>79</sup> In this particular case, there was no allegation of misconduct on the part of Officer Darisse.<sup>80</sup> Even if the Supreme Court were to find that there was a violation of the Fourth Amendment, the evidence would still be admitted under federal law.

However, at the time the charges were filed against Heien, North Carolina did not recognize a good-faith exception.<sup>81</sup> Heien thus had to argue that the "reasonableness" of mistakes of law should be limited to the remedy issue in preparation for the case's remand to the North Carolina Supreme Court.<sup>82</sup> Rather than seek a judgment on the exclusion of the evidence, Heien asked the U.S. Supreme Court to limit its analysis to the issue of whether there was a Fourth Amendment violation in the first place.<sup>83</sup> Given that agenda, the main thrust behind Heien's argument was

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<sup>76</sup> See, e.g., *Florence v. State*, 670 So. 2d 135, 136 (Fla. Dist. Ct. App. 1996) (concluding that it was error to deny the motion to suppress, reversing and remanding).

<sup>77</sup> *Heien II*, 737 S.E.2d 351, 361 (N.C. 2012) (Hudson, J., dissenting).

<sup>78</sup> *United States v. Leon*, 468 U.S. 897, 911 (1984) (noting that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus").

<sup>79</sup> *Id.*

<sup>80</sup> Brief for the Respondent at 38, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604) [hereinafter Brief for the Respondent].

<sup>81</sup> See *State v. Carter*, 370 S.E.2d 553, 562 (N.C. 1988) ("We are not persuaded on the facts before us that we should engraft a good faith exception to the exclusionary rule under our state constitution."). In 2011, the General Assembly indicated that the North Carolina Supreme Court revisit *Carter* by enacting a statutory "good faith exception." N.C. GEN. STAT. § 15A-974 (2011).

<sup>82</sup> Brief for Petitioner, *supra* note 37, at 29–33.

<sup>83</sup> *Id.* During oral argument, Justice Scalia made it pretty clear that the Court was not buying the argument:

[W]e don't review opinions. We review judgments, we review results. What you're complaining about here is the admission of what was discovered in the search of the car, right? Now, what difference does it make whether that was lawfully admitted because it was a constitutional search or it was lawfully admitted because the remedy of excluding it would not be applied if there was a mistake of law . . . ? We don't review analyses. We review judgments. You're — you're urging that this

that all mistakes of law are per se violations of the Fourth Amendment.<sup>84</sup>

North Carolina countered with Justice Ginsburg's famous proposition that the "touchstone of the Fourth Amendment is reasonableness."<sup>85</sup> The State argued that bifurcating the analysis was unnecessary.<sup>86</sup> As long as police officers act reasonably, evidence obtained via a search or seizure should not be excluded.<sup>87</sup> While it seems as though Heien had an uphill battle, there are legitimate reasons as to why allowing mistakes of law would be unwise in light of the nation's current climate. The following sections discuss some of the issues the Court faced in *Heien*.

#### A. The "Ignorance Is No Excuse" Doctrine

One of the more facially attractive arguments raised by Heien was based on the premise that law enforcement officers should be required to know the law at least as well as civilians. Common law has long recognized that officers are responsible for knowing the correct interpretation of the law. Prior to the adoption of the exclusionary rule, Fourth Amendment violations were enforced under tort law.<sup>88</sup> At common law, officers were held liable for mistakes of law regardless of reasonableness.<sup>89</sup> Today, there is a presumption that law enforcement officers know the law. It is their *job* to identify infractions and to take proper action.

Our justice system holds civilians to that same standard. "[T]he background presumption [is] that every citizen knows the law . . . ."<sup>90</sup> Accordingly, the "traditional rule" is that "ignorance of the law is no excuse."<sup>91</sup> It is not only unfair but also illogical to hold civilians to a higher

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conviction has to be set aside. That's what we're reviewing, the conviction, not the opinion.

Transcript of Oral Argument at 12–13, 20–21, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604).

<sup>84</sup> Transcript of Oral Argument, *supra* note 83, at 12–23.

<sup>85</sup> Brief for the Respondent, *supra* note 80, at 11 (citing *United States v. Knights*, 534 U.S. 112, 118 (2001)).

<sup>86</sup> *Id.* at 26, 27–30. Further, Heien's focus on per se violations does little to simplify the analysis of mistakes of law. Rather than eliminate the reasonableness inquiry altogether, Heien simply imports the reasonableness inquiry into the remedial analysis. Moreover, Heien's approach adds an additional step of analysis to determine whether the mistake was indeed of law or fact. With no administrative benefit to justify it, Heien's approach is a poor substitute for the longstanding tradition of evaluating reasonableness in one succinct inquiry.

<sup>87</sup> *Id.* at 26–30.

<sup>88</sup> See *Mapp v. Ohio*, 367 U.S. 643, 670 (1961) (Douglas, J., concurring) (stating a tort cause of action may be applied in a Fourth Amendment situation).

<sup>89</sup> See RESTATEMENT (FIRST) OF TORTS § 121 cmt. i (2014) ("[A]n officer is not privileged to arrest another whom he reasonably suspects of having committed an act which the officer, through a mistake of law reasonable in one of his position, believes to be a common law felony.").

<sup>90</sup> *Bryan v. United States*, 524 U.S. 184, 193 (1998).

<sup>91</sup> *Id.* at 196.

standard than law enforcement officers.<sup>92</sup> To permit mistakes of law to justify traffic stops is to say that a police officer, when driving as a citizen, has a duty to know every nuance of the traffic code, but the instant he dons his badge he has no such responsibility.

While this argument has what the Supreme Court described as a “rhetorical appeal,”<sup>93</sup> the “ignorance is no excuse” doctrine does not reach as far as Heien suggests. The maxim “ignorance of the law is no excuse” is a legal doctrine that ensures uniformity in criminal prosecution.<sup>94</sup> However, as North Carolina pointed out, it is “subject to numerous exceptions and qualifications.”<sup>95</sup> Many crimes require some form of intent. For example, “willfulness,” which includes an element of knowledge, is often a requirement for tax convictions.<sup>96</sup>

Heien’s argument further ignores a fundamental distinction between determining reasonable suspicion in the field versus assessing criminal liability in a courtroom.<sup>97</sup> The ignorance-of-the-law doctrine serves as a litigation tool, aiding in the prosecution of criminals. There is no need for such a tool outside the courtroom. At the inception of a traffic stop, ultimate criminal liability is not the issue.

As the Supreme Court ultimately explained, “[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.”<sup>98</sup> Had the law required two functioning brake lights, Heien could not have been relieved of liability by claiming ignorance, and similarly, had the law required only one brake light, Officer Darisse could not have issued a ticket because he reasonably thought the law required two. The Court concluded that “[j]ust because mistakes of law cannot justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify

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<sup>92</sup> Brief for Petitioner, *supra* note 37, at 17–18 (“It takes little reflection to see the ‘fundamental unfairness’ of holding citizens to that maxim ‘while allowing those entrusted to enforce the law to be ignorant of it.’” (quoting *United States v. Chanthasouvat*, 342 F.3d 1271, 1280 (11th Cir. 2003))). Indeed, “failure to understand the law by the very person charged with enforcing it is *not* objectively reasonable.” *Id.* at 18 (quoting *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) (internal quotation marks omitted)).

<sup>93</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014).

<sup>94</sup> Arthur Leavens, *Beyond Blame—Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1, 21 (2007).

<sup>95</sup> Brief for the Respondent, *supra* note 80, at 23 (internal quotation marks omitted).

<sup>96</sup> *See, e.g., Cheek v. United States*, 498 U.S. 192, 201 (1991) (noting that criminal tax liability requires willfulness, i.e., that “the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating”).

<sup>97</sup> Brief for the Respondent, *supra* note 80, at 24 (noting that Heien “confuses the crime that prompted the initial stop and the crime of arrest”).

<sup>98</sup> *Heien*, 135 S. Ct. at 540; Brief for the Respondent, *supra* note 80, at 24.

an investigatory stop.”<sup>99</sup> However, this reasoning does not contribute much to answer the question of *why* mistakes of law should justify an investigatory stop at all.

#### B. “Reasonableness” Standard

North Carolina’s position was essentially that a traffic stop is justified even if a police officer makes a mistake of law as long as it is a reasonable one. As previously noted, “[t]he touchstone of the Fourth Amendment is reasonableness . . . .”<sup>100</sup> The Fourth Amendment’s purpose “is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents in order ‘to safeguard the privacy and security of individuals against *arbitrary* invasions.’”<sup>101</sup> Courts recognize that the reasonableness standard is a “fluid concept” that applies to the analysis of all potential Fourth Amendment violations.<sup>102</sup> Rather than delineate bright line rules to distinguish between reasonable and unreasonable behavior, the Supreme Court has held that “[e]ach case is to be decided on its own facts and circumstances.”<sup>103</sup> Reasonable suspicion cannot be “reduced to a neat set of legal rules” for it is a “commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”<sup>104</sup> Thus, reasonable suspicion requires only “some minimal level of objective justification.”<sup>105</sup> Sergeant Darisse’s objective

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<sup>99</sup> *Heien*, 135 S. Ct. at 540. Importantly, Heien’s appeal was not a challenge of a traffic ticket – rather it was a challenge of the validity of the initial traffic stop. *Id.* Heien made a similar argument, in which he conflated criminal liability and reasonable suspicion, with respect to the rule of lenity. Brief for Petitioner, *supra* note 37, at 18. Essentially, he claimed that if any ambiguity existed with respect to the traffic code, it should have been construed in such a way as to limit the interference with personal liberty. *Id.* If the general rule is that legislatures cannot draft ambiguous criminal statutes and any ambiguity should be construed in favor of lenity, then charges resulting from an officer’s finding of reasonable suspicion based on an ambiguous law should also be resolved in favor of lenity. *Id.* However, like the ignorance-of-the-law doctrine, this particular legal mechanism applies to criminal liability *with respect to the crime charged*. See Brief for the Respondent, *supra* note 80, at 25 (“The rule of lenity and related canons could have affected how the North Carolina courts interpreted the state’s brake light provision. But that was not the offense for which petitioner was held criminally liable.”). Had Heien been tried for insufficient brake lights, the rule of lenity may have provided him a defense by arguing that the traffic law was unclear or ambiguous. *Id.* at 24–25. When an officer stops a vehicle based on his reasonable mistake in interpreting an ambiguous law, the driver is not subject to liability pursuant to the ambiguous law or the officer’s interpretation of it. *Id.* at 24. Here, Heien was charged with cocaine possession and trafficking under a clear statute—not a malfunctioning brake light under an ambiguous one.

<sup>100</sup> *United States v. Knights*, 534 U.S. 112, 118 (2001).

<sup>101</sup> *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (citing *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 312 (1978) (emphasis added)).

<sup>102</sup> *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

<sup>103</sup> *Id.* (citation omitted).

<sup>104</sup> *Id.* at 695–96 (citations omitted) (internal quotation marks omitted).

<sup>105</sup> *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citation omitted).

justification was a reasonable interpretation of an unclear traffic code.

However, as Heien points out, under the Fourth Amendment, an investigatory stop is permissible only if supported by reasonable suspicion of *criminal activity*.<sup>106</sup> By logical extension, a traffic stop based on suspicion of conduct that *is not actually criminal* is by its very nature unreasonable. Fourth Amendment jurisprudence requires that, when determining whether reasonable suspicion exists, the facts known to the officer must be measured against the *correct interpretation* of the law. The reasonable suspicion standard implicated by a law enforcement officer's investigatory stop represents a balance between "the need to search (or seize) [and] the invasion which the search (or seizure) entails."<sup>107</sup> The Supreme Court described reasonable suspicion as "a particularized and objective basis for suspecting the person stopped of *criminal activity*."<sup>108</sup> Without such criminal activity, reasonable suspicion cannot exist.

Whether reasonable suspicion exists turns on "whether the rule of law as applied to the established facts *is or is not violated*."<sup>109</sup> The determination is simple: "either the law was violated and the stop is reasonable, or the law was not violated and the stop is not reasonable."<sup>110</sup> Indeed, "[w]hat matters . . . are the facts as viewed by an objectively reasonable officer, and the rule of law—not an officer's conception of the rule of law, and not even an officer's reasonable misunderstanding about the law, but the law."<sup>111</sup> It is undisputed that North Carolina law only requires one functioning rear brake light and that Sergeant Darisse initiated the traffic stop upon observing "the right brake light of the vehicle not . . . function[ing]."<sup>112</sup> With no law broken, Sergeant Darisse had no legal authority to warrant an intrusion on Heien's constitutional rights.

### C. Practicalities

In addition to finding support in the text of the Fourth Amendment, North Carolina was also quick to point out the practical benefits of applying a fluid standard to evaluate police conduct. The reasonableness standard allows law enforcement officers to make determinations based on the circumstances in front of them without requiring them to be omniscient. As the North Carolina Supreme Court recognized, "[t]o require our law enforcement officers to accurately forecast how a reviewing court will interpret the substantive law at issue would transform this

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<sup>106</sup> *Ornelas*, 517 U.S. at 693, 696.

<sup>107</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (citation omitted).

<sup>108</sup> *Ornelas*, 517 U.S. at 696 (emphasis added) (citation omitted).

<sup>109</sup> *Id.* at 697 (emphasis added) (citation omitted).

<sup>110</sup> *Heien II*, 737 S.E.2d 351, 360 (N.C. 2012) (Hudson, J., dissenting).

<sup>111</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 542 (Sotomayor, J., dissenting).

<sup>112</sup> *Heien II*, 737 S.E.2d at 353.



commonsense, nontechnical conception into something that requires much more than some minimal level of objective justification.”<sup>113</sup>

Indeed, “[t]he Supreme Court of the United States does not demand factual accuracy from our police when determining whether reasonable suspicion exists.”<sup>114</sup> To satisfy this standard “what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”<sup>115</sup> Thus, courts universally uphold searches and seizures based on reasonable mistakes of fact.<sup>116</sup>

Similarly, courts have long refused to punish officers for reasonably relying on the flawed judgment of others. In the English case *Carratt v. Morley*,<sup>117</sup> the court held that an officer was liable for false imprisonment where he seized the plaintiff under a facially void warrant.<sup>118</sup> But the court observed that had the warrant been “even substantially good” in form, though still invalid, it would have provided the officer a defense.<sup>119</sup> Today, evidence obtained as a result of officers’ reasonable, but mistaken, reliance on third-party judgments is generally admissible.<sup>120</sup> Most recently, in *Michigan v. DeFillippo*,<sup>121</sup> the Court declined to suppress evidence that was obtained pursuant to a subsequently invalidated ordinance.<sup>122</sup> In that

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<sup>113</sup> *Id.* at 357 (internal quotation marks omitted). *See, e.g., Michigan v. DeFillippo*, 443 U.S. 31, 37–38 (1979) (“A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the [violated] ordinance unconstitutional.”); *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005) (“We should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney.” (citation omitted) (internal quotation marks omitted)).

<sup>114</sup> *Heien II*, 737 S.E.2d at 358.

<sup>115</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990); *see United States v. Chanthasouvat*, 342 F.3d 1271, 1276 (11th Cir. 2003) (“A traffic stop based on an officer’s incorrect but reasonable assessment of facts does not violate the Fourth Amendment.”).

<sup>116</sup> *See, e.g., United States v. Lang*, 81 F.3d 955, 966 (10th Cir. 1996) (holding that an officer’s mistake of identity was reasonable under the circumstances); *United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994) (holding that, for the purposes of the vehicle exception, it was reasonable for officers to believe that a particular car was mobile in light of the circumstances); *United States v. Gonzalez*, 969 F.2d 999, 1005 (11th Cir. 1992) (holding that an officer’s mistake of identity could be reasonable under the circumstance).

<sup>117</sup> 113 Eng. Rep. 1036 (1841).

<sup>118</sup> *Id.* at 1040.

<sup>119</sup> *Id.*

<sup>120</sup> *See, e.g., Davis v. United States*, 131 S. Ct. 2419, 2434 (2011) (affirming denial of a motion to suppress when an officer reasonably relied on subsequently overturned appellate precedent); *Illinois v. Krull*, 480 U.S. 340, 359–61 (1987) (refusing to apply the exclusionary rule where an officer reasonably relied on a statute that was subsequently held unconstitutional); *United States v. Leon*, 468 U.S. 897, 926 (1984) (declining exclusion where an officer reasonably relied on a magistrate’s incorrect determination of probable cause); *Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979) (declining exclusion where an officer reasonably relied on an ordinance later held unconstitutional).

<sup>121</sup> 443 U.S. 31 (1979).

<sup>122</sup> *Id.* at 40.

case, an officer searched an individual incident to an arrest.<sup>123</sup> However, the law that the individual allegedly violated (leading to the arrest) was later found to be unconstitutional.<sup>124</sup> Nonetheless, the Supreme Court concluded that the search was not unlawful because “the officer’s assumption that the law was valid was reasonable.”<sup>125</sup> The Court reasoned that “there was no controlling precedent that [the] ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance.”<sup>126</sup>

Police officers are faced with difficult conditions every day, many of which arise with little to no warning. Mistakes of fact are tolerated because of these ambiguous and often dangerous situations.<sup>127</sup> For officers to ensure the public’s safety and enforce the law, they must act quickly and decisively. They must assess unfolding situations in real-time, without the benefit of unlimited time and resources.

It is unrealistic to assume that an officer will be able to clarify his interpretation of a law while in the field. This is especially true when the particular law at issue is complicated, ambiguous, or unsettled. When considering whether to pull over a suspect who zooms by on the highway, an officer cannot be expected to first consult an attorney or other “legal technician”<sup>128</sup> to verify that the suspect did indeed commit a traffic violation.<sup>129</sup>

In light of the “rapidly unfolding and often dangerous situations on city streets,” officers need a certain amount of discretion to allow them to take “necessarily swift action predicated upon . . . on-the-spot observations.”<sup>130</sup> Thus, great deference is given to the judgment of trained law enforcement

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<sup>123</sup> *Id.* at 33–35.

<sup>124</sup> *Id.*

<sup>125</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 538 (2014) (citing *DeFillippo*, 443 U.S. at 37).

<sup>126</sup> *DeFillippo*, 443 U.S. at 37. In the *Heien* decision, the Court compared the situation in *DeFillippo* with that of *Heien* by emphasizing the fact that “[t]he officers were wrong in concluding that *DeFillippo* was guilty of a criminal offense . . . [in that] *DeFillippo*’s conduct was lawful when the officers observed it”—since the law was eventually declared unconstitutional. *Heien*, 135 S. Ct. at 538. However, as the dissent points out, unlike in *DeFillippo*—where the police officer correctly applied the law that was then in existence, “police stopped *Heien* on suspicion of committing an offense that never actually existed.” *Id.* at 546 (Sotomayor, J., dissenting) (noting that “it would have been wrong for [the] officer [in *DeFillippo*] not to enforce the law in that situation); see *DeFillippo*, 443 U.S. at 38 (“Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.”).

<sup>127</sup> *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.”).

<sup>128</sup> *Ornelas v. United States*, 517 U.S. 690, 695–96 (1996).

<sup>129</sup> Consultations in any form take time, which officers may not always have, especially in situations that call for an immediate response. Further, officers may be unaware that a law is unsettled or ambiguous until the case is brought to court.

<sup>130</sup> *Terry v. Ohio*, 392 U.S. 1, 10, 20 (1968).

officers “on the scene.”<sup>131</sup> Contrary to Heien’s argument, police discretion plays a crucial role in our justice system. Society benefits from the humanization of law enforcement. When investigating potentially unlawful conduct, police officers can take into account circumstances that the legislature may not have considered when drafting the relevant statute.<sup>132</sup> Affording police greater discretion promotes fairness by allowing officers to make ad hoc decisions based on the actual situation in front of them.

While investigatory traffic stops may not present the same urgency as other police encounters, they are essential to law enforcement. Permitting officers to stop vehicles for minor traffic violations keeps the roadways safe and provides police with invaluable opportunities to thwart more serious criminal activity. For example, in July of this year, a serial bank robber was captured after a police officer stopped him for a broken tail light.<sup>133</sup> While the occasional reasonable mistake of law may lead to the inconvenience of a few innocent drivers, society benefits substantially from the reduction of crime in general.

But are traffic stops really just an “inconvenience?” As Justice Sotomayor noted in her dissent, traffic stops can be “annoying, frightening, and perhaps humiliating.”<sup>134</sup> Nonetheless, courts afford a certain amount of flexibility when it comes to fact assessments made by police officers because of the need for on-the-fly decisions.<sup>135</sup> Officers are better trained and better positioned than courts to make those quick, ad hoc judgments.<sup>136</sup> The reasonableness of factual determinations rests on the facts as they are known to the officers as well as inferences and deductions drawn by those officers.<sup>137</sup> However, there are fundamental doctrinal and practical differences between law and facts.<sup>138</sup> Unlike factual determinations, legal determinations need not—and should not—be made on an impromptu

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<sup>131</sup> *Saucier v. Katz*, 533 U.S. 194, 205 (2001); *cf.* *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (noting that public officials enjoy qualified immunity in suits seeking damages for deprivations of constitutional rights).

<sup>132</sup> See Harold E. Pepinsky, *Better Living Through Police Discretion*, 47 LAW & CONTEMP. PROBS. 249, 265 (1984) (“Application of rules requires (a) that inferences be drawn from information received (*e.g.*, as to whether complainants are telling the truth), and (b) that the rules be interpreted in light of unforeseeable ambiguities presented by idiosyncratic encounters.”).

<sup>133</sup> Neil Remiesiewicz, *Police Hunch Leads to Arrest in Pair of Bank Robberies*, WPRI EYEWITNESS NEWS (July 12, 2014, 12:37 PM), <http://wpri.com/2014/07/12/police-investigating-pair-of-bank-robberies/>.

<sup>134</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting) (quoting *Terry*, 392 U.S. at 25).

<sup>135</sup> *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

<sup>136</sup> *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (“When officers evaluate unfolding circumstances, they deploy that expertise to draw ‘conclusions about human behavior’ much in the way that ‘jurors [do] as factfinders.’”) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

<sup>137</sup> *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

<sup>138</sup> Brief for Petitioner, *supra* note 37, at 19–22.

basis.<sup>139</sup> As the dissenting judge in the North Carolina Supreme Court decision explained, “[i]t is the legislature’s job to write the law . . . . The job of the police is to *enforce* the law as it has been written by the legislature and interpreted by the courts.”<sup>140</sup> In any given encounter, the facts may change, but the law remains the same. In fact, “‘the notion that the law is definite and knowable’ sits at the foundation of our legal system.”<sup>141</sup>

The Supreme Court has held that the determination of reasonable suspicion is a combination of law and fact. Specifically, “[t]he historical facts are admitted or established, *the rule of law is undisputed*, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard.”<sup>142</sup> To gauge the reasonableness of a search or seizure, the facts surrounding the Fourth Amendment encounter must be measured against the relevant law. Practically speaking, it is impossible to weigh the facts ascertained by the police officer against the pertinent legal standard if the pertinent legal standard is not interpreted accurately. As such, the Court’s method of determining reasonable suspicion does not allow for mistakes of law.

Of course, distinguishing between mistakes of fact and mistakes of law is not always easy. What constitutes a mistake of fact versus a mistake of law is often difficult to identify, especially when the distinction must be made in the field. For instance, suppose a statute forbids “excessively cracked windshields” and an officer stops a vehicle with what he thinks is a seven-to-ten inch crack in the windshield.<sup>143</sup> If it is determined that the seven-to-ten inch crack did not violate the statute, did the officer make a mistake of fact or a mistake of law? Should the distinction (if one exists) matter—so long as the officer’s actions were reasonable? Based on the Supreme Court’s decision in *Heien*, the answer is “no.” But why?

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<sup>139</sup> The majority opinion, however, concluded otherwise.

[A]n officer may ‘suddenly confront’ a situation in the field as to which the application of a statute is unclear—however clear it may later become. A law prohibiting ‘vehicles’ in the park either covers Segways or not, . . . but an officer will nevertheless have to make a quick decision on the law the first time one whizzes by.

*Heien*, 135 S. Ct. at 539 (citation omitted).

<sup>140</sup> *Heien II*, 737 S.E.2d 351, 362 (N.C. 2012)(Hudson, J., dissenting); see *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (“[I]t is courts, not officers, that are in the best position to interpret the laws.”).

<sup>141</sup> *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)).

<sup>142</sup> *Ornelas*, 517 U.S. at 696 (emphasis added) (citation omitted) (internal quotation marks omitted).

<sup>143</sup> See *United States v. Cashman*, 216 F.3d 582, 586–87 (7th Cir. 2000) (discussing an officer’s interpretation of an excessively cracked windshield and whether it was correct).

## IV. THE DECISION

The question that faced the Supreme Court in *Heien v. North Carolina* was whether a mistake of law could provide the requisite reasonable suspicion to justify a traffic stop.<sup>144</sup> The majority opinion, however, recast the issue as “whether reasonable suspicion can rest on a mistaken understanding of *the scope of a legal prohibition*.”<sup>145</sup> While the Court’s wording may just be semantics, it does suggest that it was looking for a way to make the decision seem less ominous.<sup>146</sup>

Referencing the infamous Ginsburg quote,<sup>147</sup> the Court declared, “[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s protection.’”<sup>148</sup> It cited several situations where searches or seizures were found to be reasonable despite being based on mistakes of fact.<sup>149</sup> Recognizing that “reasonable men make mistakes of law, too,”<sup>150</sup> the Court determined that mistakes of law should be given the same treatment as those of fact.<sup>151</sup> Specifically, the Court reasoned that “[w]hether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law.”<sup>152</sup>

While that reasoning is sound, it ignores the fundamental concerns raised by *Heien* and the dissent. Even if the result of the two mistakes is the same, facts and law are not the same. While there is not much an innocent citizen can do about an officer’s mistaken interpretation of facts, he should be able to avoid a negative encounter with law enforcement by

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<sup>144</sup> *Heien*, 135 S. Ct. at 534.

<sup>145</sup> *Id.* at 536 (emphasis added).

<sup>146</sup> The Court seemed to be emphasizing that the officer merely got the “scope” of the law wrong rather than making up the law completely. While that is true in this case, it may not always be.

<sup>147</sup> “The ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Id.* (quoting *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (internal quotation marks omitted)).

<sup>148</sup> *Heien*, 135 S. Ct. at 536 (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

<sup>149</sup> *Id.* (“The warrantless search of a home . . . is reasonable if undertaken with the consent of a resident, and remains lawful when officers obtain the consent of someone who reasonably appears to be but is not in fact a resident. . . . By the same token, if officers with probable cause to arrest a suspect mistakenly arrest an individual matching the suspect’s description, neither the seizure nor an accompanying search of the arrestee would be unlawful.”) (citation omitted).

<sup>150</sup> *Id.*

<sup>151</sup> The majority opinion actually did cite some older cases where courts found that mistakes of law could provide “reasonable cause” (a synonym for probable cause). Specifically, the Court relied on *United States v. Riddle*, 9 U.S. (5 Cranch) 311 (1809). In that case, goods were seized from an English shipper on the ground that it had violated the customs laws by undervaluing the merchandise on an invoice. *Id.* Chief Justice Marshall upheld the seizure even after concluding that there had been no violation of the customs law because “the construction of the law was liable to some question.” *Id.* at 313 (“A doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact.”).

<sup>152</sup> *Heien*, 135 S. Ct. at 536.

proactively following the law. As Justice Sotomayor recognized, under the majority's opinion, "[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>153</sup> Civilians would be left with the impossible task of predicting and abiding by every misinterpretation of every traffic law, which may or may not exist, to avoid being pulled over, which the Court has recognized is a substantial infringement on an individual's liberty.<sup>154</sup>

This reality presents a litany of questions. Is it reasonable for an officer to rely on a misprint of a statute? Or on a statute that was already declared unconstitutional? Does it matter how long it has been unconstitutional? A month? A year? Is it reasonable to assume a particular law exists when it in fact does not? What if a similar law exists? How similar must it be?<sup>155</sup>

"Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) that suggests a law has been violated significantly expands [their] authority"<sup>156</sup> and discourages officers from learning the law.<sup>157</sup> Without some retroactive check on police conduct, there is "little incentive to err on the side of constitutional behavior."<sup>158</sup> "Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question."<sup>159</sup>

If courts allow mistakes of law, officers will likely choose to stop drivers even in situations where they are unsure that a law actually prohibits the drivers' conduct, on the off chance that some statute can later be mistakenly construed to sanction the stop. While this may not seem outrageous in the instance of Sergeant Darisse's "reasonable" belief that the law required two functioning brake lights, it will set a precedent that will encourage officers to broadly interpret the traffic code to the extent

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<sup>153</sup> *Id.* at 544 (Sotomayor, J., dissenting).

<sup>154</sup> See *Whren v. United States*, 517 U.S. 806, 817 (1996) (noting that "even ordinary traffic stops entail a possibly unsettling show of authority; . . . interfere with freedom of movement, are inconvenient, and consume time[;] and . . . may create substantial anxiety" (citations omitted) (internal quotation marks omitted)).

<sup>155</sup> See *Heien II*, 737 S.E.2d 351, 360 (N.C. 2012) (Hudson, J., dissenting) (recognizing the danger in adopting this rule as it will extend to cases where "the officer acts based on a misreading of a less innocuous statute, or an innocent memo or training program from the police department, or his or her previous law enforcement experience in a different state, or his or her belief in a nonexistent law").

<sup>156</sup> *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).

<sup>157</sup> Brief for Petitioner, *supra* note 37, at 35–36.

<sup>158</sup> *Davis v. United States*, 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring) (citation omitted).

<sup>159</sup> *United States v. Johnson*, 457 U.S. 537, 561 (1982).

that any “reasonable” reading of any law—even if incorrect—could justify reasonable suspicion.<sup>160</sup>

The majority opinion claims that the decision “does not discourage officers from learning the law [because] . . . [t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable.”<sup>161</sup> Indeed, there is no question that it is unreasonable for officers to be completely ignorant of the laws that they enforce. However, when an officer reasonably interprets an unsettled law, the search or seizure may be lawful. In these cases, officers are aware of the law and believe that their enforcement is authorized. The complicated or ambiguous nature of the law is what makes the officer’s actions reasonable.<sup>162</sup> In cases where an officer is truly ignorant of a settled law, the search or seizure would be deemed unreasonable and therefore a violation of the Fourth Amendment.

Ultimately, the majority agreed with North Carolina, holding that reasonable “mistake[s] of law . . . can give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment.”<sup>163</sup> Thus, because Sergeant Darisse’s mistake was reasonable, the stop was lawful.<sup>164</sup>

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<sup>160</sup> See *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (Story, J.) (“There is scarcely any law which does not admit of some ingenious doubt. . .”).

<sup>161</sup> *Heien*, 135 S. Ct. at 539.

<sup>162</sup> *Id.* at 541 (Kagan, J., concurring) (“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>163</sup> *Id.* at 534 (majority opinion).

<sup>164</sup> *Id.* at 540. The Court concluded that the conflicting language of the North Carolina statute made it reasonable for Officer Darisse to conclude that the faulty brake light was a violation of North Carolina law. *Id.* Specifically, it explained:

Although the North Carolina statute at issue refers to “a stop lamp,” suggesting the need for only a single working brake light, it also provides that “[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps.” The use of “other” suggests to the everyday reader of English that a “stop lamp” is a type of “rear lamp.” And another subsection of the same provision requires that vehicles “have all originally equipped rear lamps or the equivalent in good working order,” arguably indicating that if a vehicle has multiple “stop lamp[s],” all must be functional. . . . [Since] the “rear lamps” discussed in subsection (d) do not include brake lights, but, given the “other,” it would at least have been reasonable to think they did.

*Id.* (internal citations omitted).

V. RENEWING *WHREN*: “DRIVING WHILE BLACK” AFTER *HEIEN*

While North Carolina conceded that cases in which a mistake could be excused (like Sergeant Darisse’s) would be “exceedingly rare,”<sup>165</sup> how often would a mistake even be presented for review? It is not the occasional individual injustice due to a mistake of law that is troubling. It is the overall effect of the outright expansion of police discretion. Justice Sotomayor voiced this concern in her dissent, contending that the majority’s decision “further erod[es] the Fourth Amendment’s protection of civil liberties in a context where that protection has already been worn down.”<sup>166</sup>

There is no dispute that minority drivers are more likely to be stopped on a roadway than Caucasian drivers.<sup>167</sup> Due to “the so-called war on drugs,” racial profiling has been a very real issue for decades.<sup>168</sup> A few years ago rapper Jay-Z memorialized this harsh reality in his song, “99 Problems.”<sup>169</sup> In the song, Jay-Z is pulled over on the New Jersey Turnpike and the officer asks “Son do you know why I’m stopping you for?”<sup>170</sup> To which Jay-Z answered, “Cause I’m young and I’m black and my hat’s real low.”<sup>171</sup> Truth be told, Jay-Z was probably right. According to a study of the New Jersey Turnpike during the 1990s (around the time that the stop in the song occurred), “African-American motorists made up 35% of all traffic stops and 73% of all arrests, even though they represented only an estimated 13% of drivers.”<sup>172</sup> Additionally, black drivers are searched

<sup>165</sup> *Id.* at 541 (Kagan, J., concurring) (citing Brief for the Respondent, *supra* note 80, at 17).

<sup>166</sup> *Id.* at 543 (Sotomayor, J., dissenting).

<sup>167</sup> Especially in North Carolina. See Jim Wise, *Durham Study Supports Traffic-Stop Disparity Claims*, DURHAM NEWS (Sept. 26, 2013), [www.thedurhamnews.com/2013/09/26/3230249\\_durham-numbers-support-traffic.html](http://www.thedurhamnews.com/2013/09/26/3230249_durham-numbers-support-traffic.html) (“[T]he numbers show that a black or Hispanic motorist is 77 percent more likely to be searched after a traffic stop than a white driver.”).

<sup>168</sup> See David A. Harris, *Driving While Black: Racial Profiling On Our Nation’s Highways*, ACLU: SPECIAL REPORT, June 7, 1999, available at <https://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways> (explaining that racial profiling became especially prevalent in the 1980s due to the so-called “war on drugs”).

<sup>169</sup> JAY-Z, 99 PROBLEMS (Roc-A-Fella/Def Jam 2004).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* While Jay-Z’s words may be true, they are also part of the problem because they reinforce the stigma. Racial profiling is the result of self-perpetuating racial inequality. Glenn Loury, an economist and author of *The Anatomy of Racial Inequality*, puts the problem in the context of taxi drivers. Loury proposes a hypothetical in which taxi drivers do not stop for blacks because blacks are robbers. GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 30–31 (2002). Blacks know that drivers are unlikely to stop for them. *Id.* So only black robbers (who do not mind waiting since they plan on robbing whoever stops anyway) take taxis. *Id.* This reinforces the driver’s belief since it is now more likely that a black rider is a robber. *Id.* Ironically, Chris Rock’s latest movie includes a scene where the main character, a black man, tries to prove to his friend that cabs never stop for black men. TOP FIVE (Paramount Pictures 2014). But as soon as he raises his hand, a cab immediately pulls up next to him. *Id.*

<sup>172</sup> Kimberly D. Dodson & Randal Sluss, *Police Practices of the North Carolina Highway Patrol: Do Police Target Minorities?*, 10 L. ENFORCEMENT EXECUTIVE F. 55, 56 (2010), available at



twice as often as white drivers after being stopped.<sup>173</sup>

This disparity in traffic stop statistics among races is unsurprising, especially in light of the Supreme Court's holding in *Whren v. United States*.<sup>174</sup> In *Whren*, the Court explicitly sanctioned pretextual traffic stops, holding that an officer's discriminatory motivations for pulling over a vehicle are irrelevant for the purposes of the Fourth Amendment.<sup>175</sup> Specifically, the Court made it clear that "[s]ubjective intentions play no role" in the evaluation of the legality of a traffic stop.<sup>176</sup> It held that, despite the potentially unconstitutional intentions of the officer, there was no Fourth Amendment violation because the officer had probable cause to believe that the driver had violated the traffic code.<sup>177</sup>

However, the Court assumed in *Whren* that "when an officer acts on pretext, at least that pretext would be *the violation of an actual law*."<sup>178</sup> In *United States v. Chanthasouxat*,<sup>179</sup> the Eleventh Circuit explained the effect of the *Whren* Court's decision on Fourth Amendment jurisprudence: "The rule [set out] in *Whren* provides law enforcement officers broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions. But the flip side of that leeway is that the *legal justifications* must be objectively grounded."<sup>180</sup> Thus—after *Whren*—police discretion to stop and search was at least limited to situations where an actual violation of the law occurred. Now—after *Heien*—the Supreme Court has essentially given police officers permission to hide their impermissible motives behind artificial legal justifications in addition to false factual determinations.

Undeniably, individuals who believe they have been discriminated against have the right to sue under the Equal Protection Clause.<sup>181</sup> However, having the right to bring an equal protection claim and the ability to bring one are not the same. In order to bring an equal protection claim against a police officer, the individual must prove that the officer

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[http://www.academia.edu/4022380/Police\\_Practices\\_of\\_the\\_North\\_Carolina\\_Highway\\_Patrol\\_Do\\_Police\\_Target\\_Minorities](http://www.academia.edu/4022380/Police_Practices_of_the_North_Carolina_Highway_Patrol_Do_Police_Target_Minorities) (last visited Jan. 17, 2015).

<sup>173</sup> Wise, *supra* note 167.

<sup>174</sup> 517 U.S. 806 (1996).

<sup>175</sup> *Id.* at 818–19.

<sup>176</sup> *Id.* at 813.

<sup>177</sup> *Id.* at 818; *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) ("[A] stop or search that is objectively reasonable is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason." (emphasis omitted)).

<sup>178</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting) (emphasis added); see *Whren*, 517 U.S. at 818 (noting that the "infraction itself [is] . . . the ordinary measure of the lawfulness of enforcement").

<sup>179</sup> 342 F.3d 1271 (11th Cir. 2003).

<sup>180</sup> *Id.* at 1279 (emphasis added).

<sup>181</sup> *Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause.").

intentionally discriminated against him based on race, or some other protected status.<sup>182</sup> In other words, the claimant must prove that a similarly situated individual (of a different race, etc.) would have been stopped for the same traffic offense but was not.<sup>183</sup> This is particularly difficult considering officers tend to keep records only of drivers they stopped, not of those they chose not to.<sup>184</sup> Without the ability to look inside the mind of the officer involved, it is nearly impossible to prove discriminatory intent.<sup>185</sup> Even if the claimant is able to establish a constitutional violation, the officer may be entitled to qualified immunity.<sup>186</sup>

Ironically, the majority opinion in *Heien* emphasized that the inquiry into whether an officer's mistake of law is objectively reasonable "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>187</sup> Apparently, an innocent individual, who is mistakenly stopped and wants to allege discrimination by the officer, is faced with a higher burden of proof than a criminal who merely wants evidence suppressed. Given the higher burden of proof and the time and money it takes to bring a civil action, the only individuals who could fight back against racial discrimination by police officers are arguably "bad guys." And because the defendants are "bad guys" and police officers are now (thanks to *Heien*) permitted to stop vehicles for any (reasonable) reason, judges will more than likely absolve the officer from blame, perpetuating the problem.<sup>188</sup>

The *Heien* court's decision to allow mistakes of law to justify

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<sup>182</sup> Kenneth Gavsie, *Making the Best of "Whren": The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 393 (1998).

<sup>183</sup> *Id.* ("[A]n African-American motorist would have to show that a white motorist was observed by an officer committing the same violation under similar circumstances, yet was not stopped.").

<sup>184</sup> *Id.*; see Wise, *supra* note 167 (noting that North Carolina was one of the first states to enact legislation that requires law enforcement agencies to collect and report racial and ethnic data for traffic stops).

<sup>185</sup> See Gavsie, *supra* note 182, at 393–94 (noting that "short of an officer admitting he stopped a driver because of race, raising a successful equal protection challenge will be a near impossibility").

<sup>186</sup> Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 600–01 (1989).

<sup>187</sup> *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014); see *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions.").

<sup>188</sup> With the help of the judiciary, racial profiling has become "a self-fulfilling prophecy." Harris, *supra* note 168.

Because police look for drugs primarily among African Americans and Latinos, they find a disproportionate number of them with contraband. Therefore, more minorities are arrested, prosecuted, convicted, and jailed, thus reinforcing the perception that drug trafficking is primarily a minority activity. This perception creates the profile that results in more stops of minority drivers. . . . And so the cycle continues.

*Id.*

reasonable suspicion essentially gives officers carte blanche to stop individuals based on whatever subjective criteria they see fit, promoting racial profiling and further increasing the distrust of law enforcement officers among minorities. In “99 Problems,” Jay-Z was describing the conditions on the New Jersey Turnpike in 1994 (two years before the *Whren* decision).<sup>189</sup> Nearly twenty years later, the Supreme Court seems to be moving in the wrong direction.

Racial profiling has arguably escalated from being an inconvenience for black drivers to a death sentence. Indeed, according to a report issued by the Justice Department investigating law enforcement practices in Ferguson, Missouri, racial bias and stereotyping “severely damaged the relationship between African Americans and the Ferguson Police Department long before Michael Brown’s shooting death in August 2014.”<sup>190</sup> The report “give[s] the context for the shooting, describing the mounting sense of frustration and anger in a predominantly black city where the police department and local government are mostly white.”<sup>191</sup> Specifically, the Justice Department accused the Ferguson Police Department of engaging in a pattern of discriminatory stops and arrests of African Americans without reasonable suspicion or probable cause and then relying on fines for missed court appearances and traffic tickets to balance the city’s budget.<sup>192</sup> The report concluded that these unlawful practices “are directly shaped and perpetuated by racial bias.”<sup>193</sup> According to the New York Times, the Ferguson report is “the last in a long string of civil rights investigations into police departments” since 2009.<sup>194</sup> In light of this climate, it is a bit disheartening that the Court made no effort to address the racial implications of its decision in *Heien*.<sup>195</sup>

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<sup>189</sup> JAY-Z, *DECODED* 207 (2010).

<sup>190</sup> U.S. DEP’T OF JUSTICE, *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* 79 (2015) [hereinafter *FERGUSON REPORT*].

<sup>191</sup> Matt Apuzzo, *Justice Report to Fault Bias by Ferguson*, N.Y. TIMES, Mar. 2, 2015, at A1 (citing to “several officials who have been briefed on the report’s conclusions.”).

<sup>192</sup> *FERGUSON REPORT*, *supra* note 190, at 2–4. For example, from 2012 to 2014 “African Americans account for 85% of vehicle stops, 90% of citations and 93% of arrests made by [Ferguson Police Department] officers, despite comprising only 67% of Ferguson’s population.” *Id.* at 4.

<sup>193</sup> *Id.* 4–5 (“Our investigation indicates that this disproportionate burden on African Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather, our investigation has revealed that these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans.”).

<sup>194</sup> Apuzzo, *supra* note 191.

<sup>195</sup> However, Justice Sotomayor in her dissent did mention the “human consequences—including those for communities and for their relationships with the police.” *Heien v. North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting).

## VI. CONCLUSION

There is no question that the failed indictments of the officers in Ferguson and Staten Island have revived the debate over racial discrimination by law enforcement. Handed down just weeks later, the *Heien* decision will add fuel to the fire. After *Heien*, officers will be permitted to conduct searches and seizures so long as they can cite some reasonable legal interpretation (or misinterpretation) that suggests that a law has been broken. This expansion of police authority will disproportionately affect minorities, who are already singled out by law enforcement. While the Court is confident that very few mistakes of law will ultimately be upheld, “the Court’s unwillingness to sketch a fuller view of what makes a mistake of law reasonable only presages the likely difficulty that courts will have applying the Court’s decision.”<sup>196</sup> For the time being, it seems as if we are left with no answer to the ominous question, “do you know why I stopped you?”

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<sup>196</sup> *Id.* at 547.