

Cutting Cops Too Much Slack

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Police officers can make mistakes, which, for better or worse, the U.S. Supreme Court has often seen fit to forgive. Police, for instance, can make mistakes of fact when assessing whether circumstances justify the seizure of an individual¹ or search of a residence;² they can even be mistaken about the identity of those they arrest.³ This essay examines yet another, arguably more significant context where police mistakes are forgiven: when they seize a person based on their misunderstanding of what a law prohibits.

Although such a seizure might seem the epitome of unreasonable behavior proscribed by the Fourth Amendment,⁴ the Supreme Court has disagreed. In 1979, in *Michigan v. DeFillippo*,⁵ the Court's thinking on the question started out modestly enough when a six-member majority concluded that police can arrest for violation of a law later deemed unconstitutional. "Society," the Court reasoned, "would be ill-served if its police took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."⁶ In 2004, in *Devenpeck v. Alford*,⁷ the Court went a step farther, unanimously holding that police can arrest an individual for conduct that is not prohibited by law, so long as facts known to the officer afford probable cause to believe that another lawful basis to arrest exists.⁸

DeFillippo and *Devenpeck*, while debatable on their doctrinal merits, at

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1. *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (arrest); *see also, e.g., United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006) (investigatory stop).

2. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (whether a third party has authority to consent to search of premises); *Maryland v. Garrison*, 480 U.S. 79, 88 (1987) (whether residence searched is that specified in warrant).

3. *Hill v. California*, 401 U.S. 797, 804 (1971).

4. U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .").

5. 443 U.S. 31 (1979).

6. *Id.* at 38.

7. 543 U.S. 146 (2004).

8. *Id.* at 153–55.

least shared a common virtue: in both cases the seizures were somehow legally justified when they occurred. This past Term, however, in *Heien v. North Carolina*,⁹ the Court took a quantum leap in the latitude it affords police, validating a traffic stop based on an officer's misunderstanding of law when no other legal basis justified the stop.

Writing for the Court, Chief Justice Roberts proclaimed that “[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes by government officials,”¹⁰ whether regarding fact or law.¹¹ Officers in the field, he reasoned, “deserve a margin of error” for the often “quick decision[s]” they must make.¹² Even though the officer in *Heien* wrongly believed that the law required two (not one) operable brake lights on a car, his mistake was a reasonable one given the law's purported uncertainty, justifying the seizure (and admission of contraband later discovered).¹³

Surprisingly, *Heien* was met with near silence by the nation's editorial pages¹⁴ and inspired only a single dissent, by Justice Sotomayor.¹⁵ Justice Sotomayor condemned her colleagues' blithe equating of factual determinations by police and their understanding of the laws that they enforce. Factual determinations, she noted, are probabilistic by their very nature, requiring officers to utilize their training and experience to make often quick deductions about possible criminal misconduct.¹⁶ “The same cannot be said about legal exegesis,” Justice Sotomayor observed. “[T]he notion that the law is definite and knowable sits at the foundation of our legal system. And

9. 135 S. Ct. 530 (2014).

10. *Id.* at 536.

11. *Id.*

12. *Id.* at 539.

13. *Id.* at 540.

14. Among the nation's leading newspapers, only the *Los Angeles Times* published an editorial critical of *Heien*. See Editorial, *Ignorance of the Law Isn't an Acceptable Defense, Even for Police*, L.A. TIMES, Dec. 16, 2014, <http://www.latimes.com/local/crime/la-ed-ignorance-of-the-law-supreme-court-20141216-story.html>.

15. *Heien*, 135 S. Ct. at 542 (Sotomayor, J., dissenting). Justice Kagan, joined by Justice Ginsburg, concurred “in full” in the result, noting that “[i]f the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake.” *Id.* at 541 (Kagan, J., concurring, joined by Ginsburg, J.). According to the concurrence, the statute at issue “pose[d] a quite difficult question of interpretation,” and the officer's “judgment, although overturned, had much to recommend it.” *Id.* at 542.

16. *Id.* at 543 (Sotomayor, J., dissenting).

it is courts, not officers, that are in the best position to interpret the laws.”¹⁷ “What matters . . . [is] the rule of law—not an officer’s conception of the rule of law, and not even an officer’s reasonable misunderstanding about the law, but the law.”¹⁸

Condoning reasonable mistakes of law by police, Justice Sotomayor further noted, undermines the critically important law-clarification function of courts. A court now need only determine whether an officer’s mistake was reasonable, avoiding the need to conclusively interpret the law in question.¹⁹ “This result is bad for citizens, who need to know their rights and responsibilities, and it is bad for police who would benefit from clearer direction.”²⁰ “One wonders,” Justice Sotomayor wrote, “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.”²¹

While the foregoing points are spot-on, Justice Sotomayor failed to fully catalog the difficulties presented by *Heien*. While it is certainly true that *Heien* obviates the need for courts to clarify uncertain laws, it also affects the work of legislatures. By imposing a standard-like rule of reasonableness, which functions only to expand (and never contract) the prohibitory scope of a law,²² *Heien* allocated law-making power to police.²³ Empowering police in this way not only raises separation of powers concerns;²⁴ it will also undermine the quality of laws actually codified by legislatures. Lawmakers, perhaps already predisposed to enact broad provisions to facilitate law enforcement,²⁵ will now have even less reason to avoid textual imprecision

17. *Id.* (internal citation omitted) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

18. *Id.* at 542.

19. *Id.* at 544.

20. *Id.*

21. *Id.*

22. As Anthony Amsterdam long ago noted, use of a reasonableness standard can be “splendid in its flexibility, [and] awful in its unintelligibility, unadministrability, unenforceability and general oozyiness.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 415 (1974).

23. See *United States v. Chanthasouxat*, 342 F.3d 1271, 1278 (11th Cir. 2003) (condoning police mistakes of law allows police to “sweep behavior into [a] statute which the authors of the statutes may have had in mind but failed to put into the plain language of the statute”).

24. See generally Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 456–61 (2010) (discussing institutional allocation of authority to legislatures to identify and codify criminal law norms).

25. See *Illinois v. Krull*, 480 U.S. 340, 365–66 (1987) (O’Connor, J., dissenting);

because *Heien* allows police to make interpretive mistakes in their application.²⁶

The resulting legal indeterminacy will be especially problematic with *malum prohibitum* offenses, such as that at issue in *Heien*. Before *Heien*, discretionary enforcement of laws regulating such offenses was marked by what Professor Bill Stuntz called a *de facto* “kind of lawlessness.”²⁷ So long as they had probable cause or reasonable suspicion that an offense occurred, police could (but need not) seize an alleged violator,²⁸ even if they did so as a pretext to investigate other criminal activity.²⁹ After *Heien*, this authority remains (as the circumstances in *Heien* itself highlight³⁰), but it has been complemented by a *de jure* kind of lawlessness. Whereas historically police had reason to narrowly interpret laws³¹ for fear that a mistake of law would trigger the exclusionary rule,³² they now have strategic reason to expan-

William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534–35 (2001).

26. And police trainers, mindful that reasonable mistakes are forgiven, will now have less incentive to elucidate perhaps unclear laws.

27. Stuntz, *supra* note 25, at 597.

28. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 391 (2009) (Thomas, J., concurring) (“[A] basic principle of the Fourth Amendment [is] that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules.”).

29. *Whren v. United States*, 517 U.S. 806, 813 (1996).

30. The officer in *Heien* admitted that he was looking for “criminal indicators” in passing cars, decided to pursue Heien’s vehicle because the driver had his “hands at a 10 and 2 position looking straight ahead,” and after following the vehicle used the alleged brake light violation to initiate a stop. Reply Brief of Petitioner at 18, *Heien v. North Carolina*, 135 S. Ct. 530 (2014) (No. 13-604), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-604_pet_reply_authcheckdam.pdf. The officer was thus not faced with what the *Heien* majority later called the need to make a “quick decision.” *Id.*

31. See, e.g., *Malcomson v. Scott*, 23 N.W. 166, 168 (Mich. 1885) (“An officer of justice is bound to know what the law is, and if the facts on which he proceeds, if true, would not justify action under the law, he is a wrong-doer.”); see also WAYNE R. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 86 (1965) (noting traditional view that police should “employ a very strict construction [of statutes], particularly in doubtful cases”); *United States v. Nicholson*, 721 F.3d 1236, 1243 (10th Cir. 2013) (expressing “hope that [an officer] would clarify his understanding of any unclear provision before bringing the full force of the law upon an unsuspecting citizen”).

32. See, e.g., *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006); *United States v. McDonald*, 453 F.3d 958, 962 (7th Cir. 2006); *State v. Anderson*, 683 N.W.2d 818, 824 (Minn. 2004); *State v. Lacsella*, 60 P.3d 975, 981 (Mont. 2002).

sively interpret laws in the hope that their mistake will later be deemed reasonable, allowing for the “bigger” busts that they very often are after.³³

The impact of this shift will not be felt by individuals alone. Rather, as Justice Sotomayor recognized, *Heien* will have broader “human consequences—including . . . for communities and for their relationships with the police.”³⁴ Allowing police officers, the public face and embodiment of the law,³⁵ to flout the laws they enforce surely will do nothing to instill community confidence in the fairness and competence of police.³⁶ Nor will such confidence be served by the troubling asymmetry that *Heien* creates: going forward, reasonable mistakes of law by police will be excused, but those of citizens generally will not.³⁷ To the *Heien* majority, the asymmetry had only “rhetorical appeal,”³⁸ because mistake of law doctrine is all about criminal liability:

Just as an individual generally cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. . . . But just because mistakes of law cannot justify either the imposition or avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.³⁹

The petitioner in *Heien*, however, did not challenge a ticket or conviction for a brake-light violation. Rather, he challenged an investigatory

33. See, e.g., Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1248 (2010) (describing police use of traffic stops as bases for drug interdiction).

34. *Heien v. North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting).

35. See ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 175 (1971) (“The legal exercise of police authority reinforces the right of police to use it, while its illegal exercise undermines the broader acceptance of the authority as legitimate.”).

36. As the procedural justice literature attests, the public’s perception of the fairness and legitimacy of police can negatively affect community willingness to cooperate with and defer to police authority. See, e.g., Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCHOL., PUB. POL’Y & L. 78 (2014); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

37. See generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* §13.01 (6th ed., 2012).

38. *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014).

39. *Id.*

stop⁴⁰—a Fourth Amendment seizure that the Court somehow felt justified in treating as a safe harbor for mistakes of law. Why police should be allowed to err in favor of legal over-inclusiveness when stopping a vehicle, while motorists are not forgiven their mistakes of legal under-inclusiveness when they drive one, remains unclear. It would appear that the Court was motivated in part by the view that being detained by police is a trivial event. As Justice Sotomayor observed, however, a police seizure can be an “invasive, frightening, and humiliating” experience.⁴¹

Again, however, Justice Sotomayor failed to fully capture the significance of the majority’s decision to expand police authority to execute stops. When police execute a traffic stop, for instance, they can order the driver and any passengers to exit the vehicle⁴² and can ask a barrage of unrelated questions intended to elicit incriminating information.⁴³ If an officer believes a weapon is present, she can conduct a frisk,⁴⁴ which the Court has described as “a severe, though brief, intrusion upon cherished personal security.”⁴⁵ Or the officer can simply ask for consent to search, as occurred in *Heien*, which need not be accompanied by any advisement that the request can be refused.⁴⁶

The Court’s safe harbor, while bad enough in itself, has a troublesome capacity to expand in at least two important respects. First, even though *Heien* concerned a misdemeanor traffic offense, the principle it endorsed—as with Fourth Amendment doctrine more generally⁴⁷—applies to enforcement of laws concerning serious and non-serious offenses alike. For citizens, this means that the risk of being unlawfully seized will grow as already overstuffed state, local, and federal legal codes continue to expand. Second, *Heien*’s reasoning will likely be applied beyond the context of investigative stops. Already, at least one court has invoked *Heien* to validate an arrest

40. *Id.*

41. *Id.* at 544 (Sotomayor, J., dissenting).

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

43. *Muehler v. Mena*, 544 U.S. 93, 100–01 (2005).

44. *Arizona v. Johnson*, 555 U.S. 323, 334 (2009).

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

46. *United States v. Drayton*, 536 U.S. 194, 206 (2002).

47. See William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 875 (2001).

based on an officer's mistake of law.⁴⁸ When this occurs, individuals experience an even greater degree of physical coercion⁴⁹ and a complete search,⁵⁰ possibly of their naked bodies.⁵¹

In the final analysis, the result in *Heien* perhaps should not come as a surprise given the Court's view of the burdens citizens can be rightfully expected to bear when assessing Fourth Amendment reasonableness. The calculus was on notable display in *Atwater v. City of Lago Vista*,⁵² when the Court upheld the arrest of a motorist for failing to wear a seatbelt, which the majority acknowledged to be a "pointless indignity" and "gratuitous humiliation[]" imposed by a police officer who was (at best) exercising extremely poor judgment."⁵³ In so deciding, the Court refused to draw a constitutional distinction between jailable and non-jailable offenses, stating that "we cannot expect every police officer to know the details of frequently complex penalty schemes."⁵⁴ It also rejected adoption of a "simple tie breaker for the police to follow in the field: if in doubt, do not arrest."⁵⁵

Heien likewise deferred to the enforcement challenges faced by police, prompting Justice Sotomayor to wonder "why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question."⁵⁶ By sacrificing legality concerns on the altar of Fourth Amendment reasonableness, the Court has sent a powerful message: that government can now enact imprecise laws and then enforce them "against a defendant."⁵⁷ Being seized by police when you have done nothing wrong is now simply something that must be tolerated, much like the "pointless indignity" and "gratuitous humiliation[]" suffered by the

48. See *People v. Campuzano*, 188 Cal. Rptr. 3d 587, 592 (Cal. App. Dep't Super. Ct. 2015) (upholding arrest based on officer's misinterpretation of ordinance prohibiting operation of a bicycle on a sidewalk "fronting" a business).

49. See, e.g., *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (describing arrest as "a serious personal intrusion regardless of whether the person seized is guilty or innocent").

50. *United States v. Robinson*, 414 U.S. 218, 235 (1973). In the auto context, an arrest can allow police to search the arrestee's car, *Arizona v. Gant*, 556 U.S. 332, 343 (2009), and impound and inventory its contents, *Colorado v. Bertine*, 479 U.S. 367, 374 (1987).

51. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012).

52. 532 U.S. 318 (2001).

53. *Id.* at 346–47.

54. *Id.* at 348.

55. *Id.* at 350.

56. *Heien v. North Carolina*, 135 S. Ct. 530, 546 (2014) (Sotomayor, J., dissenting).

57. *United States v. Chanthasouvat*, 342 F.3d 1271, 1278 (11th Cir. 2003).

motorist in *Atwater*.⁵⁸

Fifty years ago, Professor Wayne LaFave wrote that “[i]t is obviously important to determine how . . . criminal statutes should be interpreted by law enforcement personnel who must decide whether to arrest.”⁵⁹ Until *Heien*, the baseline was clear enough: police mistakes of law, even those based on reasonable misunderstanding, were condemned.⁶⁰ With *Heien*, the Supreme Court has taken us on a different path, one far more deferential to police than the citizens that they take an oath to protect and serve. Amid troubling reports of police overreach in Ferguson, Missouri and elsewhere,⁶¹ allowing police to seize individuals when they have done nothing wrong is a very regrettable development indeed. For citizens like Sandra Bland in Texas, already uncertain about what a “lawful order” from police might mean, life on the streets will now be even more unpredictable and problematic.⁶²

58. *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001).

59. LAFAVE, *supra* note 31, at 85.

60. *See supra* notes 31–32 and accompanying text.

61. *See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

62. Orin Kerr, *Sandra Bland and the ‘Lawful Order’ Problem*, WASH. POST, July 23, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/23/sandra-bland-and-the-lawful-order-problem>.