Making Mistakes about the Law: Police Mistakes of Law between Qualified Immunity and Lenity

Lael Weinberger†

INTRODUCTION

While patrolling one night in 2014, police officer Jeff Packard noticed a car with a hole in one of its red taillights.[1] The white light bulb inside was visible. Packard believed that Indiana law required a taillight to be red and not to show white light, so he stopped the vehicle. The driver, Kolyann Williams, had drugs with him.[2] Williams was charged and convicted with misdemeanor marijuana possession.[3] On appeal, Williams argued that, because Indiana law did not in fact prohibit other colors of light from being emitted so long as red light is visible from a certain distance away, the stop was unlawful.[4] After examining the statute,[5] the Indiana Court of Appeals agreed with Williams and held that the stop violated the Fourth Amendment.[6]

Shortly after the decision, the US Supreme Court announced in *Heien v North Carolina*[7] that police do not violate the Fourth Amendment when they conduct a search or seizure premised on a mistake of law, so long as the mistake was a reasonable one.[8] In light of the Supreme Court's decision, the state of Indiana

† BA 2009, Thomas Edison State University; MA 2013, Northern Illinois University; JD Candidate 2018, The University of Chicago Law School; PhD Candidate, Department of History, The University of Chicago.

1 *Williams v State*, 22 NE3d 730, 732 (Ind App 2014) ("Williams I").

2 Id at 733.

3 Id.

4 Id. The practical goal of this argument was to get all of the evidence collected pursuant to the stop suppressed under the exclusionary rule.

5 The statute allegedly violated was Ind Code § 9-19-6-4, which provides that "a motor vehicle . . . that is registered in Indiana and manufactured or assembled after January 1, 1956, must be equipped with at least two (2) tail lamps mounted on the rear that, when lighted, . . . emit[ ] a red light plainly visible from a distance of five hundred (500) feet to the rear."

6 *Williams I*, 22 NE3d at 734.

7 135 S Ct 530 (2014).

8 Id at 536.

asked for and received a rehearing of Williams's case, and the court reversed itself after applying *Heien*.[9] "A reasonable person unversed in statutory interpretation," the Indiana court stated, "would very likely" make the mistake of thinking that the statute required that only red light could be emitted by the taillights.[10] Officer Packard was mistaken but reasonable, and defendant Williams's conviction was affirmed.

For many years, the Supreme Court recognized that police officers can have probable cause (sufficient to support a search without violating the Fourth Amendment) even if their suspicion is based on a mistake of fact, so long as the mistake was reasonable.[11] Whether the same permissive rule should apply to mistakes of law was a question on which the courts of appeals were split, with the majority of courts nationwide holding that it should not.[12] The Supreme Court resolved that issue in 2014, unexpectedly adopting the minority rule when it announced in *Heien* that a search or seizure based on a reasonable mistake of law is not a Fourth Amendment violation.[13]

Lower courts have applied *Heien* inconsistently.[14] As it turns out, it is far from self-evident how a court is to recognize when a mistake of law is reasonable. The Court's opinion in *Heien* told readers more about what the standard is *not* than about what it *is*: the "reasonable mistake" standard is tougher than the standard for qualified immunity.[15] This is not very informative.

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9 *Williams v State*, 28 NE3d 293, 295 (Ind App 2015) ("Williams II").

10 Id.

11 See, for example, *Illinois v Rodriguez*, 497 US 177, 183–86 (1990) (reviewing Fourth Amendment cases on mistake of fact); *Brinegar v United States*, 338 US 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 . . . . But the mistakes must be those of reasonable men.").

12 Prior to the decision in *Heien*, the Eighth Circuit held that police mistakes of law could be reasonable. See, for example, *United States v Rodriguez-Lopez*, 444 F3d 1020, 1022–23 (8th Cir 2006); *United States v Martin*, 411 F3d 998, 1001 (8th Cir 2005); *United States v Smart*, 393 F3d 767, 770 (8th Cir 2005). The DC Circuit indicated in dicta that it agreed. See *United States v Southerland*, 486 F3d 1355, 1359 (DC Cir 2007). The other circuits that considered the issue rejected the argument that a police mistake of law could be reasonable. See *United States v Miller*, 146 F3d 274, 279 (5th Cir 1998); *United States v McDonald*, 453 F3d 958, 962 (7th Cir 2006); *United States v King*, 244 F3d 736, 741 (9th Cir 2001); *United States v Nicholson*, 721 F3d 1236, 1244 (10th Cir 2013); *United States v Chanthasouxat*, 342 F3d 1271, 1279–80 (11th Cir 2003). See also Wayne A. Logan, *Police Mistakes of Law*, 61 Emory L J 69, 74–82 (2011).

13 *Heien*, 135 S Ct at 534.

14 See Part I.C.

15 Id at 539 ("[T]he inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity."). Qualified

Some courts have taken a forgiving approach to police mistakes.[16] These courts reason more or less as follows: ordinary people make mistakes, and if the law is complex, arcane, or confusing, the police are reasonably likely to get the benefit of the reasonable-mistake rule.[17] In other areas of the law, ignorance is sometimes thought to be rational. For example, it might be a rational decision to not read contracts or licenses in full before signing (or clicking "I accept").[18] One might intuitively think that such ignorance is sometimes reasonable. The same intuition could apply in favor of a police officer trying to enforce a complex and confusing statute. Surely one does not expect the police officer to spend the time and effort of a lawyer (or a judge) to figure out what the law means.[19] But whatever its intuitive appeal, this approach is in fact quite troubling in the area of police mistakes. Critics of the *Heien* decision have suggested that the rule in *Heien* creates unseemly favoritism toward police, according them generosity not accorded to criminal defendants.[20] They have suggested that it is in tension with the principle applied in most areas of the law—ignorance of the law is no excuse.[21]

But not all of the lower courts applying *Heien* have been so forgiving. Some have held that, when police have made a mistake about the criminal law in deciding that there exists probable cause for a search or seizure, the court should look to that criminal law and decide whether that law is ambiguous.[22] For instance, one court suggested that there is "a condition precedent to

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immunity protects officials from civil liability when the official has acted without violating "clearly established" legal rights that a reasonable person would have known about. *Mullenix v Luna*, 136 S Ct 305, 308 (2015) (per curiam), quoting *Pearson v Callahan*, 555 US 223, 231 (2009).

16 See, for example, Karen McDonald Henning, *"Reasonable" Police Mistakes: Fourth Amendment Claims and the "Good Faith" Exception after* Heien, 90 St John's L Rev 271, 305–08 (2016) (discussing the various ways in which courts have treated police mistakes in a forgiving manner).

17 See, for example, *Williams II*, 28 NE3d at 295.

18 For rational ignorance in the contract context, see, for example, Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 Cal L Rev 943, 947–49 (2009).

19 This would, presumably, require spending substantial time studying the law, learning how to do legal research in a graduate school context, and then actually conducting research into the meaning of any relevant statute.

20 See, for example, John W. Whitehead, *Is Ignorance of the Law an Excuse for the Police to Violate the Fourth Amendment?*, 9 NYU J L & Liberty 108, 117–18 (2015).

21 Id.

22 See, for example, *Flint v City of Milwaukee*, 91 F Supp 3d 1032, 1057 (ED Wis 2015).

even asserting that a mistake of law is reasonable," and that condition is "that the statute be genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work."[23] Another court has likewise suggested "that in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous."[24]

This Comment argues that requiring statutory ambiguity as a precondition to a claim of reasonable mistake is the best way to implement the rule in *Heien*.[25] Further, it argues that the ambiguity analysis should draw on the cases applying the rule of lenity in substantive criminal law. The rule of lenity is a rule of construction that provides that an ambiguous criminal law should be construed in favor of the defendant.[26] Courts have applied the rule of lenity rather sparingly in favor of defendants in recent years. Generally, the courts have read a given criminal statute with all the tools of statutory construction at their disposal (including even legislative history as evidence of statutory purpose) in an attempt to resolve the ambiguity before finding that the rule of lenity applied in favor of the defendant.[27] This Comment argues that, in the application of the *Heien* rule, the courts should use the same tools of statutory construction in reading the criminal statute on which the police predicated their search or seizure. Some scholars have suggested that the "reasonable mistake" standard in *Heien* is in tension with lenity because lenity reads ambiguity in favor of defendants and *Heien* apparently reads ambiguity in favor of the police.[28] This Comment suggests that lenity can actually work in tandem with the *Heien* rule. By drawing on the rule of lenity, the courts can foster the symmetry between substantive criminal law and the law governing police search and seizure that the *Heien* majority sought. The rule proposed in this Comment is that *Heien* should apply

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23 Id (quotation marks omitted).

24 *State v Eldridge*, 790 SE2d 740, 743 (NC Ct App 2016).

25 This builds on a suggestion in Justice Elena Kagan's concurrence, *Heien*, 135 S Ct at 541 (Kagan concurring), and on an argument in Henning, 90 St John's L Rev at 307–08 (cited in note 16).

26 See *McNally v United States*, 483 US 350, 359–60 (1987). See also *Albernaz v United States*, 450 US 333, 342 (1981) ("[T]he rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.").

27 See Note, *The New Rule of Lenity*, 119 Harv L Rev 2420, 2428–31 (2006).

28 See, for example, Richard H. McAdams, *Close Enough for Government Work?* Heien*'s Less-Than-Reasonable Mistake of the Rule of Law*, 2015 S Ct Rev 147, 198–200 (arguing that *Heien* institutes a "rule of severity" that contrasts with the rule of lenity).

(in favor of the police) in any case in which the rule of lenity would be applied (in favor of the defendant) as to the statute on which the search or seizure was predicated. In this manner, the courts can develop the *Heien* doctrine so as to limit the police discretion about which the *Heien* decision's many critics have worried. Because the rule of lenity is applied only in a narrow set of cases, the police will be limited to a very small universe of cases in which they could claim to have reasonably misunderstood the law. Additionally, in order to argue that they reasonably misunderstood a given law, the government will then be put in the position of arguing that a law is so ambiguous that a criminal defendant charged under the law should be acquitted under the rule of lenity. This will presumably lead the state to be cautious about how often it claims the benefit of the *Heien* rule, lest they establish precedents about the rule of lenity's application to specific laws that will benefit defendants in future cases.

Part I describes the decision in *Heien* and the reaction to it from courts and commentators. Part II sketches the doctrines of qualified immunity and the rule of lenity. Part III argues that *Heien* should carry a statutory ambiguity requirement while Part IV contends that the rule of lenity should be used to guide the ambiguity analysis.

I. REASONABLE MISTAKES, THE FOURTH AMENDMENT, AND *HEIEN*

The Fourth Amendment to the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[29] Reasonableness is central to Fourth Amendment analysis.[30] Searches and seizures are permissible so long as they are reasonable.[31] The courts have long recognized that a search may be reasonable even though the police were mistaken about the facts on which they relied.[32] For instance, a police officer

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29 US Const Amend IV.

30 See *Brigham City v Stuart*, 547 US 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is reasonableness.") (quotation marks omitted).

31 See *Riley v California*, 134 S Ct 2473, 2482 (2014).

32 See, for example, *Illinois v Rodriguez*, 497 US 177, 185–86 (1990) (noting that the Court "ha[s] not held that the Fourth Amendment requires factual accuracy," and that "what is generally demanded of the many factual determinations that must regularly

may misidentify a suspect, arresting and searching the wrong person, and yet the Fourth Amendment is not violated if the police officer's belief was reasonable.[33] But what happens when police make mistakes about the law? The police officer may be right about all the facts, but still wrong to think that the conduct at issue is prohibited.

A few years ago, Professor Wayne Logan noted the increasing tendency of the courts of appeals to find that mistakes of law could be reasonable under the Fourth Amendment.[34] Logan predicted that this trend would only continue. He suggested that the trend created "an appealing symmetry with qualified immunity doctrine, which shields police from personal liability for their reasonable mistakes of substantive law."[35] In *Heien*, the Supreme Court addressed the issue of mistakes of law by law enforcement officers, holding that reasonable mistakes by police officers do not violate the Fourth Amendment. But it also held that the standard was not the same as the standard for qualified immunity. This Part summarizes the Supreme Court's decision in *Heien* in Part I.A, the criticism directed at the Court's decision in Part I.B, and the confusion in the lower courts in Part I.C.

A. The *Heien* Decision

On a spring morning in 2009, Sergeant Matt Darisse, a police officer in North Carolina, pulled over a vehicle belonging to Nicholas Heien on the grounds that the vehicle had a broken brake light.[36] The vehicle contained narcotics; Heien was arrested and charged with attempted cocaine trafficking.[37] Heien challenged the introduction of the cocaine as the fruit of an illegal stop.[38] As it turned out, under North Carolina law, it was legal to have a single working brake light. But on appeal to the North Carolina Supreme Court, that court "concluded that, for several reasons, Sergeant Darisse could have reasonably, even if

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be made by agents of the government . . . is not that they always be correct, but that they always be reasonable").

33 See *Hill v California*, 401 US 797, 804–05 (1971) (upholding a search incident to arrest, even though the arrest was made of the wrong person, because the "arrest and subsequent search were reasonable").

34 See Logan, 61 Emory L J at 74 (cited in note 12).

35 Id.

36 *Heien*, 135 S Ct at 534.

37 Id at 534–35.

38 Id at 535.

mistakenly, read the vehicle code to require that both brake lights be in good working order."[39]

The statutes at issue required that vehicles have "rear lamps . . . in good working order."[40] Another subsection prohibited the operation of a vehicle "on the highways of the State . . . unless it shall be equipped with a stop lamp on the rear of the vehicle."[41] That same subsection explained that the "stop lamps . . . shall be actuated upon application of the . . . brake. The stop lamps may be incorporated into a unit with one or more other rear lamps."[42] Another section required that "stop lamps" shall display red light.[43]

The North Carolina appellate court held that "rear lamps" are different from "stop lamps" (the former have to be lighted during periods of reduced visibility, while the latter need only be lighted upon application of the brake).[44] Thus, the requirement that all "rear lamps" work properly did not include "stop lamps"; it was sufficient that one stop lamp worked properly.[45] The court of appeals then concluded that the stop was unconstitutional because the police were wrong about whether a law was being broken.[46]

The North Carolina Supreme Court assumed for purposes of its review that the statutory interpretation was correct.[47] But it disagreed with the Fourth Amendment analysis. It reasoned that it was "reasonable to read these two provisions of" the relevant statute "to say that, because it may be 'incorporated into a unit with . . . other rear lamps,' a brake light is a rear lamp which, like all 'originally equipped rear lamps,' must be kept 'in good working order.'"[48] The court concluded that the stop was lawful, and the US Supreme Court affirmed.[49]

In the majority opinion authored by Chief Justice John Roberts, reasonableness was central. Invoking both text and precedent, the Court cited its earlier decisions that described reasonableness as the "ultimate touchstone of the Fourth

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39 Id.
40 NC Gen Stat § 20-129(d).
41 NC Gen Stat § 20-129(g).
42 NC Gen Stat § 20-129(g).
43 NC Gen Stat § 20-129.1(9).
44 *State v Heien*, 714 SE2d 827, 830–31 (NC App 2011).
45 Id at 829–31.
46 Id at 831.
47 *State v Heien*, 737 SE2d 351, 354 (NC 2012).
48 Id at 358–59 (citation omitted).
49 *Heien*, 135 S Ct at 535.

Amendment."[50] The majority noted that the Court had long recognized that searches and seizures can be reasonable even when suspicion is based on a mistake of fact, and then argued that there was no reason to treat mistakes of law differently: "[R]easonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion."[51]

Recent cases had talked only of mistakes of fact, but the majority found historical precedent for its holding in a line of nineteenth-century cases involving customs officials.[52] Construing federal statutes requiring "reasonable cause" (which the Court considered synonymous with the modern conception of probable cause)[53] rather than the Constitution, these cases found probable cause when suspicion was based on reasonable mistake of law.[54] The "construction of the law was liable to some question," Chief Justice John Marshall wrote in one case, and "[a] doubt as to the true construction of the *law* is as reasonable a cause for seizure as a doubt respecting the fact."[55] The *Heien* majority also relied on a more recent case, *Michigan v DeFillippo*,[56] in which a criminal arrest was made under a law later declared to be unconstitutionally vague.[57] The *Heien* majority read this decision as relying on the principle that a reasonable mistake of law could nonetheless support a Fourth Amendment search or seizure and rejected petitioner's argument that the case should be read as solely about whether to employ the exclusionary rule as the remedy.[58] The Supreme Court concluded that the Fourth Amendment is not violated when a police officer makes a search or seizure based on a reasonable mistake about the law.[59]

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50 Id at 536.

51 Id.

52 Id at 537.

53 *Heien*, 135 S Ct at 536–37, citing Act of Mar 2, 1799 § 89, 1 Stat 627, 695–96.

54 As noted by Roberts, Chief Justice John Marshall had presented these statutory cases as an exposition of the concept of probable cause, which, he noted elsewhere, "in all cases of seizure, has a fixed . . . meaning. It imports a seizure made under circumstances which warrant suspicion." *Heien*, 135 S Ct at 537, quoting *Locke v United States*, 11 US (7 Cranch) 339, 348 (1813) (quotation marks omitted).

55 *Heien*, 135 S Ct at 537, quoting *United States v Riddle*, 9 US (5 Cranch) 311, 313 (1809) (quotation marks omitted).

56 443 US 31 (1979).

57 *Heien*, 135 S Ct at 538, citing *DeFillippo*, 443 US at 37–38.

58 *Heien*, 135 S Ct at 538–39.

59 Id at 536.

B. Criticism of *Heien*

The holding and legal reasoning of the *Heien* majority have been widely criticized. "*Heien* is a riches of embarrassment," one scholar has said.[60] Critics faulted the majority's analysis at a number of points, from its depth of analysis to its use of authorities (drawing on old cases that were not even construing the Fourth Amendment).[61] Many warned that the holding in *Heien* poses substantial risks. Scholars have argued that it "substantially, and unjustifiably," expands the opportunities for law enforcement abuse[62] and legislative sloppiness,[63] and that it flipped the normal (sensible) view that ignorance of the law generally is not an excuse.[64] The commentators argue that, if one were to distinguish regular citizens and police, one should expect the standard to be more demanding of police—not less.[65] Commentators have argued that the decision hurts the legitimacy of the police,[66] and even of the Supreme Court.[67]

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60 McAdams, 2015 S Ct Rev at 148 (cited in note 28).

61 See *Heien*, 135 S Ct at 545 (Sotomayor dissenting); Kit Kinports, Heien*'s Mistake of Law*, 68 Ala L Rev 121, 154 (2016).

62 Kinports, 68 Ala L Rev at 124 (cited in note 61).

63 See McAdams, 2015 S Ct Rev at 150 (cited in note 28); George M. Dery III and Jacklyn R. Vasquez, *Why Should an "Innocent Citizen" Shoulder the Burden of an Officer's Mistake of Law?* Heien v. North Carolina *Tells Police to Detain First and Learn the Law Later*, 20 Berkeley J Crim L 301, 334 (2015).

64 See Madison Coburn, *The Supreme Court's Mistake on Law Enforcement Mistake of Law: Why States Should Not Adopt* Heien v. North Carolina, 6 Wake Forest J L & Pol 503, 525 (2016); Kinports, 68 Ala L Rev at 132–33 (cited in note 61); McAdams, 2015 S Ct Rev at 181–84 (cited in note 28); Dery and Vasquez, 20 Berkeley J Crim L at 302 (cited in note 63); Miguel A. Estrada and Ashley S. Boizelle, *Looking Ahead: October Term 2014*, 2013–2014 Cato S Ct Rev 337, 340–41. See also generally Whitehead, 9 NYU J L & Liberty 108 (cited in note 20).

It should be noted that ignorance of the law does count as an excuse sometimes, especially in the regulatory context. See generally Bruce R. Grace, Note, *Ignorance of the Law as an Excuse*, 86 Colum L Rev 1392 (1986) (arguing that the mistake-of-law defense should apply when criminal law targets "ordinary behavior"). See also generally Mark C. Winings, Comment, *Ignorance Is Bliss, Especially for the Tax Evader*, 84 J Crim L & Crimin 575 (1993) (describing how the Supreme Court decided that the Internal Revenue Code's use of the term "willfully" created an exception to the traditional rule that ignorance of the law is no defense). For a philosophical analysis of the traditional rule in criminal law, see generally Mark Greenberg, *Explaining the Asymmetry between Mistakes of Law and Mistakes of Fact*, 6 Juris 95 (2015).

65 McAdams, 2015 S Ct Rev at 148–49 (cited in note 28).

66 Henning, 90 St John's L Rev at 311–12 (cited in note 16); Vivian M. Rivera, Note, *When the Police Get the Law Wrong: How* Heien v. North Carolina *Further Erodes the Fourth Amendment*, 49 Loyola LA L Rev 297, 314 (2016).

67 Lorenzo G. Morales, Note, Heien v. North Carolina *and Police Mistakes of Law: The Supreme Court Adds Another Ingredient to Its "Freedom-Destroying Cocktail"*, 52 Cal W L Rev 79, 93–95 (2015).

Anticipating some of this pushback, the *Heien* majority expended some effort explaining that the basic principle (that mistake doctrine should be applied to mistakes of law as well as fact) was not an innovation but rather had a sound basis in precedent.[68] Still, the Court provided little exposition of what the standard for finding a reasonable mistake of law might look like until it considered another objection that might be made to the decision—namely, that it might have the effect of disincentivizing police officers from learning the law. It treated this objection briefly, simply explaining that the standard is an objective one, so the subjective knowledge of police officers should be unaffected.[69] The critics have not been convinced that this move is particularly effective at restraining police discretion, and they have pointed out that the objective test raises the possibility for different kinds of manipulation. For instance, Professor Richard McAdams has suggested that the objective test opens the door to after-the-fact justifications of a stop, on the theory that an objectively reasonable officer could have made mistakes to justify the stop even when the officer was totally lacking a (subjective) mistake of law.[70]

The point of this brief survey of the criticisms of *Heien* is not to engage this debate directly. For present purposes, there are two points to make about the criticism of *Heien*: First, *Heien* is caught up in a larger debate about police discretion. Second, the Court did not provide much direct guidance as to how the decision can or should navigate this controversial field. This Comment neither criticizes nor defends the Court's decision in *Heien*, but instead takes the decision as a given and considers how the case law can develop and apply the decision in a manner that is not only faithful to the rule established by the Court in *Heien* but is also sensitive to some of the concerns raised by the critics.

C. The Unsettled Standard for Reasonable Mistake

How does one know if a police mistake about the law was reasonable? The *Heien* majority explained that the test is objective: "We do not examine the subjective understanding of the particular officer involved."[71] The standard was compared with that of qualified immunity: "[T]he inquiry is not as forgiving as the one employed in the distinct context of deciding whether an

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68 *Heien*, 135 S Ct at 536–38.

69 Id at 539–40.

70 McAdams, 2015 S Ct Rev at 175 (cited in note 28).

71 Id at 539, citing *Whren v United States*, 517 US 806, 813 (1996).

officer is entitled to qualified immunity for a constitutional or statutory violation."[72] The majority took this to mean that "an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."[73]

This was the only elaboration provided by the majority.[74] At oral argument, an assistant to the solicitor general proposed a way of distinguishing the qualified immunity standard from the reasonable-mistake standard. An officer, she said, should be required "to point to something in the statute that affirmatively supports his view" before it could be considered a reasonable mistake.[75] But the majority did nothing with this suggestion. Justice Elena Kagan attempted to provide further elaboration in her concurrence. She echoed the majority in arguing that "the inquiry the Court permits today is more demanding than the one courts undertake before awarding qualified immunity."[76] She argued that a mistake could be reasonable "when an officer takes a reasonable view of a 'vexata questio' on which different judges 'h[o]ld opposite opinions.'"[77] In other words, "the test is satisfied when the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view. . . . [T]he statute must pose a 'really difficult' or 'very hard question of statutory interpretation.'"[78] The majority and Kagan's concurrence both insisted that the court was establishing a fairly rigorous standard of evaluation in determining whether a police error was a reasonable mistake of law.

Lower-court cases have been all over the map in their application of *Heien*. The cases can be helpfully imagined on a continuum in terms of how willing the court is going to be in finding that a police mistake was reasonable (and hence in compliance with the Fourth Amendment under *Heien*). The courts that evaluate reasonableness skeptically and impose preconditions before finding that a police officer's mistake was reasonable can be thought of as more demanding of the police. The courts that find police mistakes to be reasonable with fewer preconditions

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72 *Heien*, 135 S Ct at 539.

73 Id at 539–40.

74 It is criticized as unhelpful in Morales, Note, 52 Cal W L Rev at 96–98 (cited in note 67).

75 Transcript of Oral Argument, *Heien v North Carolina*, Docket No 13-604, *51 (US filed Oct 6, 2014) (available on Westlaw at 2014 WL 5398228) ("*Heien* Transcript").

76 *Heien*, 135 S Ct at 541 (Kagan concurring).

77 Id (Kagan concurring).

78 Id (Kagan concurring).

can be thought of as liberal, relaxed, or generous, in terms of their treatment of the police.

At one extreme of this continuum are the cases that insist on a demanding statutory analysis before police can be allowed to claim that a mistake was reasonable. Several cases insist that a finding of statutory ambiguity is a necessary prerequisite for a finding that the police could make a reasonable mistake.[79] For instance, in one case, the prosecution argued that a police officer had made a reasonable mistake in thinking that a statute requiring a driver to signal 100 feet before making a turn applied to requiring a signal 100 feet before pulling up to a curb.[80] A court applying the strict analysis rejected this argument: the statute was unambiguous in its coverage and that was all that mattered in determining the police mistake was unreasonable.[81] When confronted with a statute misconstrued by a police officer, these courts first examine the statute itself to determine if it is ambiguous; if it is not ambiguous, the police officer cannot have been reasonably mistaken.

At the other extreme are cases that have found that a police officer could make a reasonable mistake when misreading even a "clear and unambiguous" ordinance.[82] The Indiana case described in the Introduction is far at this permissive end of the spectrum, with its finding that a mistake could be reasonable just because ordinary people might misunderstand the statute.[83] A tiny bit more restrictive—but not by too much—is a California case, *People v Campuzano*.[84] The defendant, Felipe Campuzano, was riding a bicycle at a "very slow, walking speed" alongside a friend who was walking.[85] A police officer stopped him for "riding on a bicycle in a business district" in violation of the municipal code.[86] In the course of the stop, the officer noticed that Campuzano seemed to be under the influence of narcotics and arrested him. Campuzano argued that the evidence of his intoxication should

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79 See, for example, *United States v Stanbridge*, 813 F3d 1032, 1037 (7th Cir 2016); *Flint v City of Milwaukee*, 91 F Supp 3d 1032, 1057 (ED Wis 2015).

80 See *Stanbridge*, 813 F3d at 1037–38.

81 See id.

82 *People v Campuzano*, 237 Cal App 4th Supp 14, 20 (2015). See also *Williams v State*, 28 NE3d 293, 295 (Ind App 2015) ("Williams II").

83 *Williams II*, 28 NE3d at 295. See also Henning, 90 St John's L Rev at 307–08 (cited in note 16) (citing permissive decisions that have effectively adopted the qualified immunity standard in the *Heien* context).

84 237 Cal App 4th Supp 14 (2015).

85 Id at 16.

86 Id.

be suppressed as the fruit of an illegal stop. The police officer claimed to have understood the municipal ordinance as prohibiting the riding of bicycles on any city block on which there was at least one business. In fact, the court concluded that the ordinance "limit[ed] the offense to operating a bicycle upon any portion of the sidewalk directly fronting a commercial business establishment."[87] "The words of the ordinance," the court concluded, "are clear and unambiguous [ ] when read in context."[88] But because the officers had "no prior guidance" for interpreting the ordinance, the court concluded that it was "objectively reasonable for the officers to read the ordinance expansively."[89] As a result, the court found that the stop was legal under *Heien*. To put it briefly, the *Campuzano* holding is that an officer can make a reasonable mistake about an unambiguous law as long as the officer did not have any prior precedents or guidance on how to interpret the law. This may not permit quite as many mistakes to be held reasonable as would the analysis of the Indiana court in *Williams*, but it is still quite permissive in its willingness to let police officers misread statutes.

These permissive cases have seemingly confirmed the fears of the critics of *Heien*. The law might be clear, but the police will still be allowed to misread it in order to conduct a stop or search.

II. QUALIFIED IMMUNITY AND LENITY: THE BACKGROUND FOR ANALYZING *HEIEN*

In the sections that follow, this Comment argues that the *Heien* standard should be interpreted in light of two other legal standards that involve mistakes about the law. The first and most obvious one is the qualified immunity standard, which is discussed here in Part II.A. This was referenced in the *Heien* opinion, when the majority said that the standard for the mistake of law should not be "as forgiving" as the standard in qualified immunity.[90] In order to understand the *Heien* standard properly, we must understand qualified immunity. The second, and less obvious, point of reference is the rule of lenity, summarized here in Part II.B. This canon of construction guides the interpretation of substantive criminal law. It provides that when a criminal statute is ambiguous, it should be interpreted in the

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87 Id at 20.

88 *Campuzano*, 237 Cal App 4th Supp at 20.

89 Id at 21.

90 *Heien*, 135 S Ct at 539.

manner most favorable to the defendant. This Part provides the doctrinal background for the arguments in subsequent parts.

A. A Brief Introduction to Qualified Immunity

Federal law provides for civil liability for anyone who, under color of law, causes the violation of another's federal rights.[91] The statute providing for this liability, 42 USC § 1983, has generated substantial amounts of litigation.[92] Its coverage is limited, however, by the doctrine of qualified immunity. As the Supreme Court has explained it, "The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[93]

The key element for present purposes is the requirement of a "clearly established" right. In this respect, the qualified immunity analysis and the *Heien* analysis converge. For qualified immunity, the Supreme Court has said that "[a] clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right."[94] The Court has not required that there be "a case directly on point," but it still insists that "existing precedent must have placed the statutory or constitutional question beyond debate."[95] "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law."[96]

Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful."[97] As a policy matter, qualified immunity has been said to "balance[ ] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability

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91 42 USC § 1983.

92 See Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J Empirical Legal Stud 4, 5 (2015) ("For the last four decades, [ ] litigation under Section 1983 and the employment statutes has constituted the largest fraction of the nonprisoner federal civil docket.").

93 *Mullenix v Luna*, 136 S Ct 305, 308 (2015) (per curiam) (quotation marks omitted).

94 Id (quotation marks omitted).

95 Id.

96 Id (quotation marks omitted).

97 *Saucier v Katz*, 533 US 194, 206 (2001).

when they perform their duties reasonably."[98] This immunity applies to mistakes of both law and fact.[99]

Qualified immunity is quite forgiving of police missteps. A brief digression into the recent development of the doctrine will give a sense of how lenient the standard is in practice. There are two steps of the analysis for qualified immunity,[100] though they need not be decided in order. The two steps, first set out in *Saucier v Katz*,[101] require a court to first "decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right"[102] or a statutory right.[103] "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[104] As to the second requirement, "[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate."[105]

This two-step analysis was generous to police and hard on plaintiffs, and subsequent developments have made it even easier for the police and harder for would-be plaintiffs. In the 2009 case of *Pearson v Callahan*,[106] the Supreme Court held that the sequence for analyzing these considerations was not mandatory.[107] The "first prong" was "intended to further the development of constitutional precedent," but on reconsideration, the Court came to believe that "opinions following that procedure often fail to make a meaningful contribution to such development"[108] and that it was an unnecessary burden to require courts to decide the constitutional issue even though it would not be dispositive.[109] This change to the order of analysis has been

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98 *Pearson v Callahan*, 555 US 223, 231 (2009).

99 See id. See also *Groh v Ramirez*, 540 US 551, 567 (2004) (Kennedy dissenting); *Butz v Economou*, 438 US 478, 507 (1978).

100 See *Ashcroft v al-Kidd*, 563 US 731, 735 (2011).

101 533 US 194 (2001).

102 *Pearson*, 555 US at 232 (citations omitted).

103 See *al-Kidd*, 563 US at 735 (noting that a "statutory or constitutional right" would suffice).

104 *Pearson*, 555 US at 232.

105 *Saucier*, 533 US at 202.

106 555 US 223 (2009).

107 Id at 236 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.").

108 Id at 237. Among other things, "there are cases in which the constitutional question is so factbound that the decision provides little guidance for future cases." Id.

109 See id.

criticized for preventing the development of substantive rights jurisprudence, which in turn makes it difficult to "clearly establish" a right,[110] though defenders of this approach think that it is justified because of its benefits for judicial economy.[111] *Pearson* has focused courts on the "clearly established" issue.

The net effect of this modern qualified immunity doctrine analysis is that it is quite hard for plaintiffs to prevail in civil rights suits. Suppose that a plaintiff is seeking to make out a novel constitutional claim; under the modified two-step analysis, a court can deny the plaintiff's case without even deciding whether a constitutional right has been violated. The plaintiff will lose if the right simply is not clearly established. The former system made it possible for plaintiff's suits to move the ball forward incrementally: a losing plaintiff in a given case might succeed in establishing that a novel constitutional right in fact existed, if the court has to decide that issue before considering whether the right was clearly established. In the next case, theoretically, another plaintiff could point to the preceding case as precedent for the existence of the right. Because courts do not have to decide the constitutional claim first, it is that much harder to get to the situation in which one could prove a violation.[112] The Court has recently added that the issue of whether a right is "clearly established" must be evaluated with specificity, which makes it even harder to show that a right was clearly established.[113] In that case, the Supreme Court faulted the lower court for describing excessive force principles at too high a level of generality.[114]

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[110] See, for example, Karen Blum, Erwin Chemerinsky, and Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 Touro L Rev 633, 647 (2013).

[111] Charles Alan Wright, et al, 13D *Federal Practice and Procedure* § 3573.3 (West 3d ed Jan 2017 Supp).

[112] See Blum, Chemerinsky, and Schwartz, 29 Touro L Rev at 647 (cited in note 110) (analyzing how this framework allowed the Supreme Court to avoid a merits question that it will likely be urged to revisit in the future).

[113] See, for example, *White v Pauly*, 137 S Ct 548, 552 (2017) (per curiam). This built on prior cases. See *City and County of San Francisco v Sheehan*, 135 S Ct 1765, 1777 (2015) (holding that it was not clearly established that police used excessive force when they pepper sprayed and then shot a disabled person who threatened them with a knife); *Carroll v Carman*, 135 S Ct 348, 351–52 (2014) (holding it not clearly established that a police decision to knock on the back door rather than the front was an unreasonable entry).

[114] See *White*, 137 S Ct at 552. The issue, the Court said, was not whether general use-of-force principles were clearly established but whether there were other cases that had considered a similar fact pattern and had established that conduct like the defendant's was a violation of clearly established law. In that case, the defendant police officer,

The qualified immunity standard has been controversial. It has been criticized for underdeterring wrongful police conduct,[115] excusing ignorance (very much in line with the standard criticism of *Heien*),[116] and silently making substantive judgments about the scope of civil rights protection.[117] Its lack of a statutory basis has also opened it up to criticism as improper, even unlawful, judicial innovation.[118]

Whatever its merits, at least the doctrine has been developed for quite some time, and its contours are fairly clear.[119] Readers of the Court's decisions know that the focus is on whether a reasonable person would find a right to be "clearly established."[120] They know that this requires neither case law directly on point[121] nor specific holdings providing "that the very conduct at issue in the case was wrongful."[122] They know that the law establishing a right must be clear enough that a "reasonable official would understand that what he is doing violates that right."[123] They might be troubled with the results, but at least the analysis is fairly clear.

B. A Brief Introduction to the Rule of Lenity

The rule of lenity is a rule of construction or interpretation. It requires courts interpreting an ambiguous criminal law to

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arriving late to the scene of a confrontation, used deadly force without ascertaining whether the earlier-arriving officers had behaved reasonably in precipitating the armed conflict. Id.

115 See, for example, Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Georgetown L J 1479, 1519–24 (2016).

116 See, for example, Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand L Rev 583, 584 (1998).

117 See, for example, Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo L Rev 123, 148–56 (1999).

118 See William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal L Rev *4 (forthcoming 2018), archived at http://perma.cc/4UN4-8XQB.

119 See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U Pa L Rev 23, 35–47 (1989) (describing the origins and development of modern qualified immunity doctrine).

120 See, for example, *Pearson*, 555 US at 231 ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'").

121 See *al-Kidd*, 563 US at 741.

122 Wright, et al, 13D *Federal Practice and Procedure* at § 3573.3 (cited in note 111).

123 *Anderson v Creighton*, 483 US 635, 640 (1987).

interpret it in the manner most favorable to the defendant.[124] For example, when a criminal statute was ambiguous about the required mens rea, the Supreme Court interpreted it to require knowledge.[125] The key question in applying the rule of lenity is whether a statute is ambiguous, which can be defined as occurring when a given law is susceptible to more than one (relevant) meaning.[126]

Two "classic"[127] policy rationales have been proffered in support of lenity.[128] First, it can be viewed as supported by the principle of legality or notice—people should be able to figure out what the law allows and what it prohibits.[129] If a criminal law is drafted in such a way that there is more than one possible meaning, then citizens are unable to tell what the law in fact permits and what it prohibits. The rule of lenity protects the citizen by providing that he cannot be convicted of violating such a statute. To put it another way, the rule of lenity puts the burden on the state to create laws that are understandable to people who read them. In Justice Oliver Wendell Holmes's words, "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[130]

Second, the rule of lenity can be viewed as a kind of separation-of-powers principle, in which courts avoid criminalizing conduct when there is doubt that the legislature criminalized it.[131] As the Court has put it, "criminal punishment usually represents the moral condemnation of the community," and this is a matter for which legislatures are better suited than

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[124] See *United States v Santos*, 553 US 507, 514 (2008) (Scalia) (plurality) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). See also *McNally v United States*, 483 US 350, 359–60 (1987).

[125] *Liparota v United States*, 471 US 419, 427–28 (1985).

[126] See Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 Cal L Rev 509, 512 (1994).

[127] See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L Rev 885, 886 (2004).

[128] See *Babbitt v Sweet Home Chapter of Communities for a Great Oregon*, 515 US 687, 704 n 18 (1995); Price, 72 Fordham L Rev at 886 (cited in note 127). These two rationales (notice and legislative supremacy) have been criticized. See, for example, John Calvin Jeffries Jr, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 198–201 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S Ct Rev 345, 396–98.

[129] See *United States v Bass*, 404 US 336, 348 (1971).

[130] *McBoyle v United States*, 283 US 25, 27 (1931).

[131] See *Bass*, 404 US at 348.

courts.[132] Criminalization of conduct has potentially severe consequences for a defendant. So the rule of lenity ensures that the court is refusing to extend a criminal law to cover conduct that the legislature has not clearly covered. This is in short a kind of prophylactic protection against the court going beyond that which the legislature has provided.[133] As one scholar has summarized it, the rule of lenity "prevents the unelected Judiciary from drafting criminal law in Congress's stead."[134]

A third proposed justification for the rule is one of democratic accountability. The rule of lenity serves to counter the tendency for the political branches to favor tough-on-crime laws[135] by imposing a judicial "one-way ratchet" in favor of defendants.[136] The legislature can still pass such laws if it is sufficiently clear about what it is doing, but it cannot get a harsh result when readers of the criminal law could be misled about the legislation's coverage. This is closely related to the legislative supremacy point that the Supreme Court has recognized in the criminal-law context.[137] The value protected is distinct, in that the separation of powers focuses on preserving distinct roles among coequal government branches, while the democratic accountability point emphasizes the importance of public knowledge of the laws. This could also be thought of as a rule of strict construction as a way of ensuring that the public are prosecuted only for those crimes that they should have known about.[138]

In an insightful article, Professor Zachary Price distinguished two judicial approaches to lenity based on lenity's position in an interpretive hierarchy.[139] When interpreting a law, courts have multiple tools: text is the most important place to look, while legislative history is consulted only (if at all) as a backup if other options fail. One version of the interpretive hierarchy, prevalent now, ranks lenity at the bottom; only if no other interpretive tools resolve the meaning of a statute does the rule

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132 Id.

133 See id.

134 Shon Hopwood, *Clarity in Criminal Law*, 54 Am Crim L Rev 695, 725 (2017).

135 See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 505 (2001).

136 Price, 72 Fordham L Rev at 894 (cited in note 127).

137 See *Bass*, 404 US at 348.

138 See John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 UC Davis L Rev 1955, 2029 (2015) (advocating a rule of "strict construction of penal statutes" that is more demanding than the current version of the rule of lenity).

139 See generally Price, 72 Fordham L Rev 885 (cited in note 127).

of lenity apply.[140] On this version, lenity is often invoked as a supplement to bolster a narrow reading selected on other grounds.[141] A second version, associated with Justice Antonin Scalia, ranks lenity second to text in the hierarchy. This version invokes the rule of lenity as an argument against resorting to legislative history or purposivism in order to interpret a statute.[142] Scalia contended that lenity should be applied if a statute was ambiguous when its text was analyzed and that it was inappropriate to separately consider legislative history or other extratextual evidence of purpose.[143]

Lenity has been employed inconsistently in the details, but it is a real enough check on the legislature that some legislatures have actually attempted to repeal the rule of lenity by statute.[144] Among the courts, the rule has retained considerable support.[145] Even in states that have statutorily abolished lenity, courts have often ignored or cabined these statutes.[146]

In sum, the legal values protected by lenity are important ones. The rule of lenity stands as a check on criminal prosecutions when the law is less than clear. This function should not be underestimated in a time of mass incarceration and high rates of criminalization.[147] The Supreme Court has in recent years preferred to construe statutes as clear enough to prevent the rule of

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[140] Id at 891, citing *Moskal v United States*, 498 US 103, 108 (1990). See also *Yates v United States*, 135 S Ct 1074, 1088 (2015) (Ginsburg) (plurality) (invoking lenity as a backup argument); *Chapman v United States*, 500 US 453, 463 (1991) ("The rule of lenity, however, is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act . . . . [It] comes into operation at the end of the process of construing what Congress has expressed.") (quotation marks omitted).

[141] See Price, 72 Fordham L Rev at 891 (cited in note 127) ("[L]enity tends to appear in opinions only as a supplemental rationale when narrow readings are chosen for other reasons.").

[142] Id at 891–92, citing *Moskal*, 498 US at 132 (Scalia dissenting). See also Zachary Price, *The Court after Scalia: The Rule of Lenity* (SCOTUSblog, Sept 2, 2016), archived at http://perma.cc/KA9P-BN23.

[143] See *United States v R.L.C.*, 503 US 291, 307–09 (1992) (Scalia concurring in part and concurring in the judgment); *Moskal*, 498 US at 131–32 (Scalia dissenting). See also Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv CR–CL L Rev 197, 213–19 (1994).

[144] See Lawrence M. Solan, *Law, Language, and Lenity*, 40 Wm & Mary L Rev 57, 58 (1998); Jeffrey A. Love, Comment, *Fair Notice about Fair Notice*, 121 Yale L J 2395, 2397–99 (2012).

[145] Solan, 40 Wm & Mary L Rev at 58, 122 (cited in note 144) (observing that when the courts do not have any "other basis for deciding what to do," they "resort to lenity even in jurisdictions that eliminated the doctrine legislatively more than one hundred years ago").

[146] Love, Comment, 121 Yale L J at 2398–99 (cited in note 144).

[147] Hopwood, 54 Am Crim L Rev at 699–709 (cited in note 134).

lenity from being applied.[148] Still, the rule has proven durable, and, at least at the margins, it continues to have the potential to make a difference in criminal prosecutions and in the drafting of legislation.

III. QUALIFIED IMMUNITY AND REASONABLE MISTAKES: TOWARD A STATUTORY AMBIGUITY ANALYSIS

The *Heien* majority's comment about qualified immunity is the only concrete guidance that the Court provided as to how to identify reasonable mistakes. It provides a minimal requirement, to be sure: in the Fourth Amendment context, it invalidates some police conduct that would be protected under qualified immunity.[149] Some courts and commentators have gone a step further, looking for actual statutory ambiguity as a prerequisite for a claim of reasonable mistake.[150] This Part argues that this is the best approach to implementing *Heien* and that two other alternative approaches are unsatisfactory. Part III.A reviews the minimal requirements that can be deduced from the *Heien* Court's reference to qualified immunity. Part III.B argues that an ambiguity test is the best way of fleshing out the Court's instruction. Part III.C notes alternative ways of understanding the "reasonable mistake" standard but argues that they are not satisfactory.

A. "More Demanding" Than Qualified Immunity: *Heien*'s Minimal Requirement

The standards in *Heien* and in qualified immunity have parallels.[151] Both standards are objective.[152] The qualified immunity standard "shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged

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[148] See, for example, *Muscarello v United States*, 524 US 125, 139 (1998) (requiring a "grievous ambiguity" before applying lenity).

[149] *Heien*, 135 S Ct at 539 (noting that its test is "not as forgiving" as the qualified immunity test).

[150] See, for example, *Flint v City of Milwaukee*, 91 F Supp 3d 1032, 1057 (ED Wis 2015).

[151] See Logan, 61 Emory L J at 74 (cited in note 12) (suggesting, pre-*Heien*, that it could be argued that holding that reasonable mistakes of law are not violations of the Fourth Amendment creates "an appealing symmetry with qualified immunity doctrine, which shields police from personal liability for their reasonable mistakes of substantive law").

[152] *Heien*, 135 S Ct at 539; Wright, et al, 13D *Federal Practice and Procedure* at § 3573.3 (cited in note 111).

conduct."[153] *Heien* gives police the benefit of the doubt in the Fourth Amendment context.[154] *Heien* and qualified immunity can be seen as two approaches to the same end: providing police with more leeway.

But the differences are more important than the similarities. As noted already, the *Heien* majority said that the proper test would be an "inquiry [that] is not as forgiving" as the one employed in qualified immunity.[155] In concurrence, Justice Kagan likewise emphasized that the test under *Heien* is "more demanding" than the qualified immunity test.[156] The qualified immunity standard will protect the law enforcement officer so long as existing precedent did not place the statutory or constitutional question "beyond debate."[157] The *Heien* standard must allow the law to be a little less settled than this. Indeed, if *Heien* and qualified immunity were the same, then there would be no Fourth Amendment violation at all whenever a legal violation was not clearly established. Qualified immunity would essentially disappear in the context of Fourth Amendment mistakes of law. To put it differently, if it means anything to say (as do the *Heien* majority and concurrence) that *Heien* is more demanding than qualified immunity, it must at least mean that there are cases in which *Heien* does not apply but qualified immunity does.[158]

This does not tell us much, but it is enough to suggest that some of the most liberal cases applying *Heien* to protect police officers were wrongly analyzed. Consider the Indiana case discussed in the Introduction.[159] That court did not ask whether the law was clearly established but just whether a reasonable person unfamiliar with statutory interpretation might misunderstand it.[160] This can be understood as essentially the same as

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153 *Reichle v Howards*, 566 US 658, 664 (2012).

154 See Steven D. Schwinn, *Can an Officer Stop a Car Based on a Mistake of Law?* (Constitutional Law Prof Blog, Oct 3, 2014), archived at http://perma.cc/UD8P-GZ59.

155 *Heien*, 135 S Ct at 539.

156 Id at 541 (Kagan concurring).

157 *Mullenix v Luna*, 136 S Ct 305, 309 (2015).

158 See, for example, *United States v Longoria*, 183 F Supp 3d 1164, 1181 (ND Fla 2016) ("So it is possible to say—and indeed this is what this Court *is* saying—that [the officer] was acting in good faith, was not 'plainly incompetent' by any stretch of the imagination, and yet also made an 'unreasonable' mistake within the meaning of the Fourth Amendment.").

159 See generally *Williams v State*, 28 NE3d 293 (Ind App 2015) ("Williams II").

160 See id at 295. See also Henning, 90 St John's L Rev at 307–08 (cited in note 16) (analyzing decisions that have adopted something close to the qualified immunity standard in the *Heien* context).

qualified immunity—the officer gets the benefit of the doubt unless the law is something close to being clearly established, or so clear that there is really no possibility of mistake. Indeed, it might even end up more forgiving than qualified immunity because of the troublingly subjective reference to the "reasonable person unversed in statutory interpretation."[161] In these courts, the test is still formally an objective test, but it has essentially built into its definition the idea that the reasonable police officer does not know how to read statutes. One could imagine this line being elaborated in a future case to forgive a police mistake because the officer did not know of a judicial construction of a statute—even if that judicial construction would make the matter "clearly established" for purposes of qualified immunity. In other words, the analysis used by the Indiana court would (if applied as a general rule) probably lead to conflicts with the *Heien* Court's test.

B. Toward an Ambiguity Test

Aside from its reference to qualified immunity, the *Heien* majority opinion did not provide any guidance on the appropriate rigor of the standard for establishing reasonable mistakes of law. Kagan's concurrence included a one-sentence suggestion of an ambiguity standard: "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."[162] The test can be stated simply: in order for a mistake of law to qualify as reasonable under *Heien*, the court must find that the law on which the search or seizure was predicated was ambiguous.[163] While it is not clear that Kagan intended for this ambiguity test to be the definitive requirement for applying *Heien*, such a test brings helpful clarity to the field. In applying *Heien*, courts would do well to inquire whether the predicate

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161 *Williams II*, 28 NE3d at 295.

162 *Heien*, 135 S Ct at 541 (Kagan concurring). While Kagan also stated an alternative formulation (discussed in Part III.C), what this Comment is calling the "ambiguity analysis" is the clearest and, as this Part will argue, provides the most practical test for courts to apply.

163 Note that in *Heien* and in most subsequent cases involving its application, there are two criminal laws at issue: one, the offense (usually a traffic offense) that provided the basis for the stop; the other, the law under which the defendant was charged (in *Heien*, a narcotics law). This Comment will call the former the "predicate statute," and it is the statute about which the police officer was mistaken.

offense is ambiguous; only if it is could a police officer claim to be reasonably mistaken about its meaning.

Several courts have adopted this gloss on *Heien*, as have some commentators.[164] A district court in Wisconsin held that a determination that a statute is ambiguous is "a condition precedent to even asserting that a mistake of law is reasonable."[165] Without being quite so direct, several other courts also collapsed the reasonableness inquiry into an analysis of statutory ambiguity.[166] They were right to do so, but the rationale they offered was disappointingly thin. The Seventh, Second, and First Circuits all made findings about statutory ambiguity an important part of their analysis, but with very little effort to explain this move. The First and Second Circuits cited Kagan's concurrence,[167] the Second Circuit asserted without argument that the *Heien* majority found the North Carolina statute to be ambiguous (which it did not explicitly do),[168] and the Seventh Circuit cited one of its own prior cases that did not even discuss ambiguity.[169] But there are good reasons for making this turn toward an ambiguity test.

First, directing the focus toward the statute at issue rather than on the statute's reader is a practical way of implementing the *Heien* Court's insistence that the test is objective.[170] The ambiguity test directs the attention away from the officer and thus away from the subjective analysis which the Court explicitly rejected in *Heien*.[171] By focusing on the statute, this analysis would

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164 See, for example, Henning, 90 St John's L Rev at 312–20 (cited in note 16); *Flint*, 91 F Supp 3d at 1057. Note that the *Flint* court went on to hold that there was a subjective-reliance requirement as well. *Flint*, 91 F Supp 3d at 1059 ("Officers cannot shore up their lack of knowledge by proposing that if they had properly reviewed the law they would have been nonetheless confused, thus justifying their mistake."). The *Flint* case was referenced as a model for applying *Heien* in Morales, Note, 52 Cal W L Rev at 104–06 (cited in note 67).

165 *Flint*, 91 F Supp 3d at 1057.

166 See, for example, *United States v Lawrence*, 675 Fed Appx 1, 5–6 (1st Cir 2017); *United States v Stanbridge*, 813 F3d 1032, 1037 (7th Cir 2016) (glossing *Heien* as "concluding that police officer's mistaken belief that ambiguous vehicle code required more than one functional brake light was objectively reasonable," though without any detailed consideration of the *Heien* opinion itself); *Northrup v City of Toledo Police Department*, 785 F3d 1128, 1132 (6th Cir 2015); *State v Eldridge*, 790 SE2d 740, 743–44 (NC App 2016).

167 See *Lawrence*, 675 Fed Appx at 4; *United States v Diaz*, 854 F3d 197, 203–04 (2d Cir 2017).

168 See *Diaz*, 854 F3d at 204.

169 See *Stanbridge*, 813 F3d at 1037, citing *United States v Flores*, 798 F3d 645, 649–50 (7th Cir 2015).

170 See Henning, 90 St John's L Rev at 311–13 (cited in note 16).

171 See *Heien*, 135 S Ct at 539; Henning, 90 St John's L Rev at 308 (cited in note 16).

mirror qualified immunity, in which the focus is on how clear the relevant case law is at establishing the right in question. But it would set the standard at a more demanding level, also as per the *Heien* majority's instructions. In qualified immunity, a right is "clearly established" only when the precedent leaves no room for argument.[172] In the proposed ambiguity analysis, by contrast, the law must be so unclear that it is ambiguous even after being subjected to standard statutory interpretation. The judge in the qualified immunity context is one step removed, asking whether a reasonable person could make a contrary argument. But implementing the ambiguity test, the judge need not maintain this detachment. Instead, she should directly analyze the statute, asking whether it is possible to ascertain the meaning of the statute at issue. Only if the judge is unable to identify the meaning should the claim of reasonable mistake be allowed. This is in line with the *Heien* majority's insistence that the standard should be more rigorous than that for qualified immunity and with Kagan's concurring statement that "the statute must pose a 'really difficult' or 'very hard question of statutory interpretation.'"[173]

Second, the ambiguity approach will rein in the scope of police discretion in the aftermath of *Heien*. Professor Karen McDonald Henning fleshed out this point in her scholarship on *Heien*.[174] The basic point is that an ambiguity test ensures that police do not have unlimited scope for making mistakes. The police have the potential to make a reasonable mistake only about the limited universe of statutes that are in fact ambiguous. This eliminates the possibility of a police officer's rational ignorance of the law being excused as a reasonable mistake. Instead, to claim the benefits of *Heien* on behalf of the police, officers would have to rely on finding a statute that causes problems for a trained legal interpreter.

Third, the difference in analysis between the ambiguity test and the "clearly established" test highlights differing policy considerations that constitute the background for Fourth Amendment doctrine and qualified immunity doctrine, respectively. The Fourth Amendment directly protects individuals from government scrutiny and intrusion without cause.[175] Qualified

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[172] See *Pearson*, 555 US at 231.

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

[174] See Henning, 70 St John's L Rev at 307–13 (cited in note 16).

[175] See *Florida v Jardines*, 133 S Ct 1409, 1414 (2013).

immunity protects police officers from excessive liability and is a doctrinal tool for managing a trade-off that comes from the imposition of civil liability on public officers. On the one hand, the imposition of civil liability deters police from wrongdoing, but on the other hand, one might be concerned that police will be overdeterred and not enforce the law zealously enough if they have to worry too much about doing something wrong. Qualified immunity is an effort to avoid overdeterrence.[176] In qualified immunity cases, it is arguably appropriate to have a broader protection for the police than it is when simply defining the scope of the Fourth Amendment. For qualified immunity, protecting law enforcement is the primary objective; for the Fourth Amendment, restraining law enforcement is high on the list of values to be advanced.[177] Differentiating the standards for qualified immunity and the ambiguity test in *Heien* can be thought of as a way of directing the emphasis toward these different considerations in the different kinds of cases.

Finally, the ambiguity test has the virtue of directing the judicial focus off of the officer and toward the law and the legislature that framed it. It is the legislature that actually has control over whether the law is capable of being reasonably misunderstood. This Comment addresses this point in connection with the rule of lenity.

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[176] On this point, the Court has commented:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

Anderson v Creighton, 483 US 635, 638 (1987) (citations omitted). See also *Harlow v Fitzgerald*, 457 US 800, 814 (1982).

[177] To point out that the emphases of Fourth Amendment doctrine and of the doctrine of qualified immunity, respectively, are quite different is not to deny that there is occasional overlap. A legal realist recognizes that both affect the scope of policing. The Court has occasionally been willing to use a balancing analysis in the Fourth Amendment context, taking the state's interest in crime prevention into account. See, for example, *Maryland v King*, 133 S Ct 1958, 1973 (2013). For a critical analysis of the "free-form" balancing in *King*, see generally David H. Kaye, *Why So Contrived? Fourth Amendment Balancing, Per Se Rules, and DNA Databases after* Maryland v. King, 104 J Crim L & Crimin 535 (2014). Still, the considerations balanced in the qualified immunity context and the Fourth Amendment context are rather different.

C. Problems with Alternative Glosses on *Heien*'s Reasonableness Standard

Two alternatives to the ambiguity standard can be found in the *Heien* litigation. One alternative, suggested at oral argument, is that courts should look for an affirmative basis in the statute for the mistake.[178] The other alternative is a judge-focused analysis, which can be found in one part of Justice Kagan's concurrence. Neither is as clear as the ambiguity analysis.

1. An affirmative basis in the statute for the mistake.

At the *Heien* oral argument, Assistant to the Solicitor General Rachel Kovner proposed a standard that would differentiate the *Heien* reasonable-mistake standard from the qualified immunity "clearly established" standard: "We think that an officer, in order to have reasonable grounds for a stop, needs to be able to point to something in the statute that affirmatively supports his view."[179] Kovner suggested that this was "essentially the opposite" of the qualified immunity standard, which "seems to require that there's a precedent that forecloses what the officer does in order to protect only those who were acting—to protect everybody except for those who are clearly incompetent."[180]

The Court in *Heien* did not adopt the test proposed by the Assistant to the Solicitor General. *Heien* does not indicate that the government had to point to something in the statute that affirmatively supported the (mistaken) view of the officer. There is a good reason for that. It is hard to imagine what this would look like in practice. Any time someone misunderstands a statute, it is possible to point to some part of the statute that the individual read differently from the reviewing court. The officer may read line one of the statute as controlling over line two or read the first word in the statute more broadly than the court did; in either case, the mistake is based on something that is affirmatively in the statute. Another version of this test would be to require that the officer find something in the statute that specifically condoned the officer's behavior. But if the officer could find this—and still be mistaken about the law—then very likely the statute is in the zone of ambiguity, and thus redundant with the ambiguity test.

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[178] See *Heien* Transcript at *51 (cited in note 75).

[179] Id.

[180] Id.

2. A judge-centric test.

In her concurrence in *Heien*, Kagan articulated a test (or set of tests) that focuses on judges in order to determine when a mistake of law could be reasonable. Parsing her opinion carefully, it is possible to distinguish two different versions of the test. But each is subject to serious objections.

First, a police mistake of law could be reasonable when "different judges 'h[o]ld opposite opinions.'"[181] In other words, if a judge interprets the statute as meaning *X*, and the police officer had read the statute as meaning *Y*, the police officer's mistake would be found to be reasonable if the officer had agreed with some judges on the topic (imagine that the officer was reading the statute in light of a nonbinding district-court opinion). Read literally, this approach would be the reverse of the qualified immunity test: the government loses unless two or more judges have actually considered the issue and came to differing conclusions. Contrast this with the qualified immunity standard in which the police officer loses only if precedent actually makes the issue clear. This version of Kagan's test at first appears to be a tough standard—it would require a split among courts. But it could also apply if a case was decided by a multi-judge panel and a dissent was generated (showing that judges take opposite positions). This wouldn't work in practice because a case that generates an on-point dissent would generally decide the relevant issue in the majority—and it would be a very odd rule indeed that would allow the government to claim a reasonable mistake in the face of an on-point decision to the contrary, on the grounds that the police officer agreed with the dissenting judge. This of course would make the standard *more forgiving* to the officer than that for qualified immunity and thus has to be wrong.

The second version of the judge-centric test would inquire whether "a reasonable judge *could* agree with the officer's view";[182] if so, then it is possible for a police mistake of law to be reasonable. But this simply shifts the analytical problem elsewhere. Instead of asking whether a reasonable law enforcement official could have made a mistake, it asks whether a reasonable judge could do so.[183] This in turn invites endless debate about

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

[182] Id (emphasis added).

[183] One might object that the turn to lenity, proposed below, is actually just another form of shifting the problem because different judges will have different ideas about when a statute is ambiguous. But the judge-centric test obscures more than it clarifies

what kind of interpretive methods are appropriate and how much room any particular method leaves for reasonable judges to disagree. Would a textualist who reads a given statute as saying *A* be willing to say that a "reasonable judge" could rely on legislative history in order to read the same statute as saying *B*? Given that smart and respected judges take a wide range of approaches to statutory interpretation (compare, for example, Judges Richard Posner and Frank Easterbrook,[184] Seventh Circuit benchmates), it seems unlikely that many judges would end up concluding that their colleagues' methods of interpretation were unreasonable.[185] A generous estimation of colleagues' abilities would again lead to an extraordinarily lenient standard for the police. It would be very similar to a test employed in the context of habeas corpus (specifically, when there is federal postconviction review of state detention), which asks whether "fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents."[186] The habeas writ will issue only when "no fairminded jurist" could disagree.[187] This test has been widely criticized as mandating extreme deference,[188] if not condemned as totally unworkable.[189] With the majority and concurrence in *Heien* emphasizing that the standard is to be a rigorous one, it is hard to imagine that the Court would want to import the extremely deferential test from the

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because it requires judges to make this judgment one level removed. It is one thing for a judge to construe a statute strictly. It is quite another for that same judge to be required to guess whether other judges employing different methods would do the same. Arguing about whether a reasonable judge would read a given statute in a particular way is quite different from a judge actually concluding that a given statute is ambiguous.

184 See Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 Tax L Rev 677, 682 (1996) (characterizing Posner as a proponent of "updated intentionalism"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 62, 67–70 (1994) (criticizing the focus on purpose).

185 For a recent argument that judges should have the "epistemic humility" to respect their colleagues (even in disagreement), see Eric A. Posner and Adrian Vermeule, *The Votes of Other Judges*, 105 Georgetown L J 159, 166 (2016) ("All nine Justices should recognize that reasonable minds can disagree about the proper approach to interpretation, at least within conventional boundaries that comfortably include self-identified textualists, self-identified purposivists, self-identified intentionalists, and various hybrids.").

186 *Harrington v Richter*, 562 US 86, 102 (2011).

187 See id.

188 See, for example, Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 Fed Sent Rptr 110, 115 (2012).

189 See, for example, Ruth A. Moyer, *Disagreement about Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U Cin L Rev 831, 857 (2014).

habeas context. If the deferential habeas test were adopted, the tendency would be toward deference to police conduct that is very likely as great as that in the qualified immunity context.

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The *Heien* majority did not spell out exactly how to recognize a reasonable mistake of law. But it did offer a clue in its reference to qualified immunity as to how the reasonable mistake standard should be developed. Focusing the inquiry on whether the statute itself was ambiguous sets that standard in accord with the clues the Court has given. It also has analytical clarity that other potential glosses on *Heien* lack.

IV. DEFINING AMBIGUITY: THE CASE FOR LINKING *HEIEN* TO LENITY

If *Heien* requires an ambiguity test, the next question is how to identify ambiguity. This Part argues that the ambiguity test should be linked to the rule of lenity, as at least one court has done.[190] First, the rule of lenity already has a developed body of case law construing ambiguity. The courts should utilize this framework rather than reinvent the proverbial wheel. Second, drawing on the rule of lenity to establish the standard for police makes for the proper symmetry between the pro-defendant substantive rule and the pro-police *Heien* rule.

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[190] See *People v Gaytan*, 32 NE3d 641, 651 (Ill 2015). *Gaytan* invoked the rule of lenity when interpreting the statute on which a vehicle stop was predicated and concluded that the statute was sufficiently ambiguous to render the police officer's mistaken reading reasonable. The court in *Gaytan* did not address the issue of whether ambiguity was required or consider how lenity fit in the overall interpretive picture vis-à-vis *Heien*. Relatedly, the Vermont Supreme Court used the rule of lenity as an aid to statutory interpretation to support its narrow interpretation of a vehicle-equipment statute, and then invoked *Heien* to conclude that a stop based on an incorrect reading of the statute was not a Fourth Amendment violation. See *State v Hurley*, 117 A3d 433, 441 (Vt 2015). The court said that the statute in question was ambiguous like the statute in *Heien* and that "[t]he fact that our decision in this case resolves a split among several Vermont trial courts on this question is reflective of the difficulty of the question, and the reasonableness of the officer's mistaken interpretation of the statute." Id. It is not entirely clear whether the court viewed the statute as ambiguous for purposes of statutory interpretation. See id. See also *People v Wilmot*, 2013 WL 951109, *9 n 2 (Mich App) (Gleicher dissenting) (suggesting that the majority should have construed the statute in favor of the defendant under the rule of lenity).

A. Options for Defining Ambiguity in the *Heien* Context

Determining that a statute is ambiguous can be a challenging matter.[191] But this is not a problem unique to the *Heien* context. Courts regularly confront confusingly worded statutes in every field of law, and a significant body of case law and scholarship on statutory interpretation is devoted to the resolution of these issues.[192]

Consider two extremes as possible interpretations of ambiguity.[193] At the restrictive extreme, only those statutes that were impossible to understand using ordinary tools of interpretation would be considered ambiguous. On this account, very little would count as ambiguous.[194] At the inclusive extreme, any statute open to more than one reading is ambiguous. This would expand the universe of ambiguity to the point that almost all statutes are ambiguous.[195] Somewhere in between is a workable alternative, and it has to be defined in a way that makes sense in the criminal context. Professor Gregory Maggs suggested as a working definition that a statute should be considered "ambiguous with respect to an issue if a lawyer would litigate the issue in court."[196] But whatever its merits as a realist criterion for recognizing a certain kind of ambiguity, this definition is not likely to be helpful for a judge trying to decide whether an issue of statutory meaning actually litigated is ambiguous. Moreover, the calculus of when an issue will be litigated as opposed to when it will be settled might be different in the civil context and in the criminal context. The monetary calculations as to when settlement is justified in the civil context are largely inapplicable in the criminal context, in which the interest is in avoiding a

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[191] See Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 Harv J Legis 123, 125 (1992) (considering definitions of ambiguity); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 516 (noting two possible meanings of ambiguity in congressional statutes and in the administrative-law context).

[192] See Joseph A. Grundfest and A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 Stan L Rev 627, 628 (2002) (noting that "judges and scholars have developed an arsenal of interpretive techniques that are designed to extract functional meaning from ambiguous statutory text and conflicting legislative history"); id at 642–48 (describing judicial responses to ambiguity).

[193] See Maggs, 29 Harv J Legis at 125 (cited in note 191).

[194] Id.

[195] Id.

[196] Id.

criminal record.[197] As a judicial standard, it seems unlikely that an analysis that fluctuates with the rates of how many cases go to trial is going to be manageable (or to create appropriate incentives for attorneys).

The typical definition of an ambiguous law is a law open to more than one relevant meaning.[198] Some would further distinguish ambiguity from "conceptual" problems, when it is unclear what a given term in the law means,[199] a situation sometimes treated with the vagueness doctrine.[200] But often, courts have treated such ambiguity in criminal law under the rule of lenity, using lenity to choose the narrower of several possible meanings and thereby avoiding the determination that a given ordinance was unconstitutionally vague.[201]

The key points for present purposes are twofold. First, ambiguity is not self-defining. There are multiple possible approaches to identifying ambiguity, and so there are choices to be made. Second, lenity is not the only version of ambiguity to come up in the criminal-law context, but it is the best one to consider in relation to *Heien*. Vagueness is the other obvious approach to dealing with ambiguous statutes in the criminal-law context.[202] But vagueness is an extreme diagnosis (leading to the invalidation of the statute).[203] Lenity's consequences are less drastic (it acquits a criminal defendant but does not invalidate the criminal law under which that defendant was charged), and so serves as a more logical default for considering ambiguity in the criminal-law context.

Lenity also addresses the interpretation of criminal statutes, the same statutes that the police are to be enforcing in the *Heien* context. Today, the rule of lenity in federal courts has

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197 See, for example, Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan L Rev 589, 605–06 (1985) (suggesting a distinction between a lawyer's role as their client's advocate in a criminal trial versus a civil suit). Model Rules of Professional Conduct 3.1 (ABA 1983) allows criminal defense lawyers more leeway to litigate issues than it permits to lawyers outside the criminal context.

198 See Waldron, 82 Cal L Rev at 512 (cited in note 126).

199 See Solan, 40 Wm & Mary L Rev at 58, 62–86 (cited in note 144).

200 See generally, for example, *Papachristou v City of Jacksonville*, 405 US 156 (1972).

201 See Solan, 40 Wm & Mary L Rev at 58, 62–86 (cited in note 144).

202 See, for example, Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 Va J Soc Pol & L 1, 9–16 (1997); Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 Am Crim L Rev 391, 392 (1994) ("Ambiguity is not, however, a new topic to criminal law as vague terms exist throughout our statutes.").

203 See, for example, *Papachristou*, 405 US at 162.

typically been employed with a restrictive understanding of ambiguity: a statute is ambiguous only when none of the ordinary tools of statutory interpretation can resolve its meaning, leaving only lenity to break the tie.[204] This restrictive version of lenity makes it difficult for criminal defendants to succeed in arguments based on lenity. But if the rule of lenity in its current form is imported to the *Heien* context, it will also have little tolerance for a police officer's mistakes. One could imagine that this would still work even if the courts were to change their view of lenity. Suppose that courts rejected the currently dominant narrow view of lenity, which puts lenity at the bottom of the hierarchy (and is thus hard on defendants), in exchange for a Justice Scalia–style rule of lenity that is more generous to defendants.[205] This more generous (to defendants) view of lenity invokes the principle whenever there are multiple possible readings of a statute—on this strong form of lenity, the court should simply look at the interpretive options and pick the most defendant-friendly version. If *Heien* draws on this version of lenity, police would have a wider scope for making reasonable mistakes, even as defendants have more protection when charged under certain ambiguous laws.

B. A Basis in *Heien* for Linking Lenity and Reasonableness

The *Heien* case did not rely on lenity for its analysis.[206] Still, it is possible to find a logical connection between the *Heien* Court's proffered "symmetry" rationale and lenity. In responding to the argument that *Heien* contradicts the principle that "ignorance of the law is no excuse," Chief Justice Roberts argued that the principle was being misapplied.[207] The "true symmetry," he argued, is that an "individual generally cannot escape criminal

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[204] See Price, 72 Fordham L Rev at 891 (cited in note 127).

[205] See Hopwood, 54 Am Crim L Rev at 717–20 (cited in note 134).

[206] Note that North Carolina courts have repeatedly held that any ambiguity in a criminal statute should be resolved under the rule of lenity. See, for example, *State v Smith*, 373 SE2d 435, 437 (NC 1988); *State v Heavner*, 741 SE2d 897, 901–02 (NC App 2013). So the fact that the lower courts in *Heien* did not invoke the rule of lenity does not necessarily mean that the lenity test proposed in this Comment is incompatible with, or would have led to a different outcome in, *Heien*. A skeptic could make an argument that the problem in *Heien* is that the lower court did not even hold the statute at issue to be ambiguous, which undercuts Justice Kagan's concurrence and the various courts that have already employed an ambiguity analysis in their application of *Heien*. See, for example, *United States v Diaz*, 854 F3d 197, 204 (2d Cir 2017) (stating that the *Heien* majority characterized the North Carolina taillight law as ambiguous).

[207] See *Heien*, 135 S Ct at 540.

liability based on a mistaken understanding of the law," and likewise "the government cannot impose criminal liability based on a mistaken understanding of the law."[208] In other words, *Heien* limits the Fourth Amendment's application to those situations in which the police are unreasonably mistaken about the law, but it does not undo the essential symmetry between the defendant and the government when it comes to criminal convictions. Ignorance of the law is not a defense, and on the other hand the government cannot convict someone when the government is mistaken about the law under which the defendant is charged.

This passage in the majority opinion may not mandate the joining of *Heien* and lenity, but it fits nicely with the lenity principle. Linking *Heien* and lenity maintains and promotes the symmetry sought by the *Heien* majority. The focus is on the statute on which the police activity was predicated. If a statute is ambiguous, the police may be able to search. But the defendant could not be convicted if charged with violating the predicate statute because the rule of lenity would mandate that the most defendant-friendly version of the statute be adopted. Recall that in *Heien*, the defendant was not charged with violating the predicate statute (the vehicle regulation), but instead was charged with violating the narcotics law. This is the usual application of *Heien*, justifying a stop based on an ambiguous traffic law that then leads to the discovery of fruits or instrumentalities of crime, and it is then only the latter that is charged.

The importance of symmetry also suggests that the court should apply the version of the rule of lenity that would be applicable in a prosecution under the statute. If the predicate crime would be prosecutable only in federal court, then the federal rule of lenity would apply; if the predicate crime would be prosecuted in state court, then the state version of the rule should be applied. This would matter when state and federal articulations of the rule of lenity differed.[209] The alternative would be to apply a federal rule of lenity to interpret the federal Fourth Amendment. While this has the appeal of federal uniformity, it comes at a cost to the value of symmetry. If the rule of lenity applied in the *Heien* context was different than the rule of lenity applied in a local prosecution for the predicate offense, then a

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[208] Id.

[209] For state approaches to lenity, see Love, Comment, 121 Yale L J at 2397–99 (cited in note 144).

police officer could get the benefit of *Heien* even though a defendant does not get the benefit of lenity as a defense to the substantive predicate offense. Meanwhile, the importance of federal uniformity here is probably not all that great; it adds a bit of interpretive predictability across states but only at the cost of greater interpretive dissonance between state and federal courts. And requiring a federal interpretation of a state law would arguably violate established federalism principles.[210] This consideration in itself tips the balance in favor of using the state's rule of lenity.

C. The Structural Case for Focusing on the Statute

It is appropriate to focus the *Heien* test more closely on the state of the law rather than on the acts of the police. The lenity standard appropriately focuses the inquiry on the condition of the statute. To the extent one worries about police being deterred from doing their job by concerns about enforcing ambiguities in the law, the expansion of reasonable mistake to include mistakes of law was itself responsive to that concern. To the extent that one worries about police expending resources trying to understand the law under the objective test, the legislature can fix that.[211] This process respects the legislature's control over substantive criminal law. The lenity analysis proposed here puts the burden on the legislature to ensure that the police's job is clear.[212]

The same point can be made in terms of notice. The rule of lenity traditionally emphasizes notice to defendants, and it makes sense to also consider notice to the police officer. If the defendant was not on notice that his conduct was unlawful, then

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[210] See *United States v DeGasso*, 369 F3d 1139, 1145 (10th Cir 2004) ("If the state supreme court has not interpreted a provision of the state's statutory code, the federal court 'must predict how the court would interpret the code in light of [state] appellate court opinions, decisions from other jurisdictions, statutes, and treatises.'"), quoting *United States v Colin*, 314 F3d 439, 443 (9th Cir 2002).

[211] See generally Stephen F. Smith, *Overcoming Overcriminalization*, 102 J Crim L & Crimin 537 (2012).

[212] It is entirely possible that the legislature pays no attention to whether the police's job is clear or not. Still, so long as the Court is interested in preserving symmetry between treatment of police and treatment of criminal defendants under the law, then it makes as much sense to trust the legislature here as it does in the lenity context. For support that there is a general preference for legislative, rather than judicial handling, of criminal definitions, see *United States v Bass*, 404 US 336, 348 (1971). If the legislature is troubled by the treatment of either the criminal defendant or the erring police officer, then it can (but of course does not have to) respond by clarifying the law.

it would contravene the legality principle to punish him for engaging in it.[213] Similarly, the police officer is charged with enforcing laws,[214] but if the officer did not have notice that particular conduct was outside the scope of the law because the law itself was ambiguous, then it makes little sense to penalize the officer.

It is possible that focusing on the state of the statute could have perverse incentive effects: if the legislature is ambiguous, the police have more rather than less power.[215] But in applying the rule of lenity, the courts have the resources to check a legislature that gets careless in drafting or that even attempts to put some strategic ambiguity into a law to help out the police—the legislature does so only at the expense of not being able to get convictions on the substantive law. Indeed, this might be a feature, rather than a bug, of the Supreme Court's approach. It is not the fault of the police if the legislature is unclear. If the legislature wants to ensure that police have extensive investigative authority, the legislature can provide for this by enacting lots of regulations. If voters do not like these regulations, they can make them into a political issue. The courts will help to narrow the substantive laws, while still being generous to the police in the procedural context through rules like the one in *Heien*.

D. Lenity and the Tempering of the Substance/Procedure Divide

At a more conceptual level, the lenity standard might address a concern that has motivated at least part of the criticism of the *Heien* decision. The Supreme Court's approach to criminal procedure has been criticized—especially in the critical reactions to *Heien*—for separating substance from procedure and for being out of touch with the substantive criminal-law issues of overcriminalization and excessive police discretion.[216]

For some critics of *Heien*, a cardinal sin of that decision is that it facilitated expanded police discretion at a time when police discretion is already enormous, thanks to the vast number of

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[213] See, for example, *United States v R.L.C.*, 503 US 291, 309 (1992) (Scalia concurring in part and concurring in the judgment).

[214] See *DeFillippo*, 443 US at 38 ("Police are charged to enforce laws until and unless they are declared unconstitutional.").

[215] See Henning, 90 St John's L Rev at 313 n 232 (cited in note 16).

[216] See, for example, Kinports, 68 Ala L Rev at 124 (cited in note 61).

laws on the books.[217] There is, for example, already an enormous body of law and regulation governing vehicles and driving, and if a police officer wants to stop a driver, he can almost always find a reason.[218] *Heien* appears almost gratuitous, giving police officers virtual carte blanche. Crucial here is the interplay between the substantive law (extensive traffic regulation) and procedural law (in this case, the Fourth Amendment rules governing investigations).

There are two issues that provide a backdrop to the case. One is that the Court has for quite some time worried about the social costs that might come any time it institutes a rule that deters police searches. The Court has suggested that there are significant social costs (in terms of reducing the effectiveness of policing) every time it imposes further restrictions or liabilities on the police.[219] One might reasonably suspect some of these concerns are in the background in *Heien*, despite the fact that the case on its face simply determines what constitutes a violation of the Fourth Amendment without addressing the remedy. If this is true, then *Heien* is simply another way of making law enforcement's job easier.[220] An alternative perspective is that the greater social costs arise when police have too much discretion

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[217] See, for example, McAdams, 2015 Sup Ct Rev at 165 (cited in note 28); Henning, 90 St John's L Rev at 310 (cited in note 16); Kinports, 68 Ala L Rev at 124 (cited in note 61).

[218] See William J. Stuntz, *The Collapse of American Criminal Justice* 3–4 (Harvard 2011). See also *Whren v United States*, 517 US 806, 818–19 (1996).

[219] See, for example, *Anderson v Creighton*, 483 US 635, 638 (1987) (describing costs in the qualified immunity context); *Utah v Strieff*, 136 S Ct 2056, 2061 (2016) (referencing social costs in the exclusionary rule context).

[220] Other areas of Fourth Amendment doctrine have been more transparent about this motivation. For instance, the "good faith" exception to the exclusionary rule provides that evidence acquired in violation of the Fourth Amendment is admissible when the Fourth Amendment violation was committed by an officer relying in good faith on a defective search warrant. See generally *United States v Leon*, 468 US 897 (1984); *Massachusetts v Sheppard*, 468 US 981 (1984). Similarly, in the habeas corpus context, the Supreme Court has developed a set of doctrines that require a showing of "clear error" and "objectively unreasonable" conduct before granting relief, which critics have accused of being excessively hard on defendants. See *Williams v Taylor*, 529 US 362, 405 (2000) (holding that a lower-court opinion, to be contrary to federal law, has to be not just wrong, but directly contrary to a Supreme Court precedent on a rule of law or on "facts that are materially indistinguishable from a relevant Supreme Court precedent"); *Lockyer v Andrade*, 538 US 63, 75–76 (2003) (holding that the lower court's application of legal principle must be objectively unreasonable, which is more than merely "incorrect or erroneous"). For an example of criticism of this approach, see Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich L Rev 1219, 1227 (2015).

and policing can be done in a discriminatory manner.[221] The issue is in the background of much of Fourth Amendment law, though it has been most thoroughly analyzed and debated in the context of the exclusionary rule,[222] generating a substantial scholarly literature but still no consensus about the rule's ultimate value.[223]

This Comment does not attempt to resolve the debate about the social costs of deterring police searches. But it does have something to say about the second background consideration involved in discussions of *Heien*; namely, that the Court could take into account the high rates of criminalization and accordingly tighten the Fourth Amendment rules so as to reduce the scope of police discretion. The Court has not generally been interested in trying to think about the Fourth Amendment in relation to the amount of substantive criminal law on the books. Instead, the Court crafts its rules of criminal procedure to be transsubstantive.[224] That is, the Court decides rules of procedure without regard to the kind of substantive criminal law at issue in the background.[225] There are costs to this approach: Fourth Amendment jurisprudence is sometimes complicated or distorted when it is applied in a one-size-fits-all manner across different

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[221] See generally, for example, Hassel, 64 Mo L Rev 123 (cited in note 117).

[222] The exclusionary rule is a remedy for violation of the Fourth Amendment, not a personal claim against the individual officer. It has been the subject of much discussion because its objective is often said to be the deterrence of police misconduct under the Fourth Amendment. The Court has often talked about the exclusionary rule in terms of a cost-benefit tradeoff between deterring police misconduct versus overdeterring good policing. See, for example, *Strieff*, 136 S Ct at 2061. For a discussion on the Supreme Court's analysis of deterrence, see generally Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 Wm & Mary Bill Rts J 821 (2013).

[223] For representative studies, see generally Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am Bar Found Rsrch J 585 (arguing that the social cost has been minimal); Myron W. Orfield Jr, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U Colo L Rev 75 (1992) (suggesting that the rule actually does deter police misconduct and incentivizes better institutional compliance with the Fourth Amendment); Kenworthey Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J Empirical Legal Stud 149 (2012) (arguing that exclusionary rule has little deterrent effect). See also generally Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 Creighton L Rev 565 (1983) (arguing that empirical studies will never be able to provide a stable answer to the question whether the exclusionary rule is cost-justified).

[224] See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 Harv L Rev 842, 847 (2001).

[225] See id. See also *Whren*, 517 US at 818–19.

legal contexts.[226] One good justification for this approach is structural.[227] If there is a problem with overregulation (of vehicles on the roads, for example), that is not a problem to be dealt with by a court setting rules of constitutional criminal procedure. It should be dealt with by the democratic legislature. Courts would speak to the issue only insofar as the courts have the opportunity to construe the statutes. The Fourth Amendment is a limitation on the ways that police enforce the criminal law, not on the scope of coverage of the law itself.

What is interesting about *Heien* is that it opens the door for the Court to consider the coverage of the substantive criminal law, because the Court has to construe that substantive criminal law before deciding whether the search at issue was reasonable under the Fourth Amendment. This is when lenity comes in. For realists who are troubled by the Court's tendency to treat substance and procedure as separate, linking *Heien* to lenity would help by building a link between the two into the rule itself. As noted above, it would mean that the currently dominant version of lenity that is harder on defendants would also be harder on law enforcement.

The practical relevance of linking Heien and lenity can be seen more clearly from the perspective of a litigator trying to reduce the range of police discretion. Putting together *Heien* and lenity offers a couple of practical strategic options. On those occasions when the traffic violations on which the stop was predicated are charged, they can of course be challenged on lenity grounds. More often, though, these predicate violations will not be charged. But public interest groups would still have options. When the substantive offense is not charged in a particular case, litigators interested in reducing the ambiguity of the law would then be alerted to the possibility of bringing lenity defenses in other cases in which the offense is charged. Most of these predicate laws will doubtless remain in the traffic and vehicle context, an area in which we might doubt that the "one-way ratchet" in favor of harsher and more expansive criminal law applies.[228]

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[226] See Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U Chi L Rev 139, 140 (2016).

[227] This argument builds on Price, 72 Fordham L Rev at 894 (cited in note 127).

[228] It is worth noting that traffic and vehicle regulations are areas of law in which people who otherwise consider themselves "law-abiding" are most likely to disregard the law, see, for example, Stuntz, *Collapse of American Criminal Justice* at 3 (cited in note 218), and correspondingly likely to imagine themselves as potential lawbreakers. It is far

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Imagine how the Indiana case from the Introduction[229] could have been analyzed under an ambiguity-lenity gloss on *Heien*. First, the court could have considered the statute on which the stop was predicated, requiring the vehicle to have a red taillight. The court would then invoke the rule of lenity, which the state's supreme court has said "requires that penal statutes be construed strictly against the State," with "ambiguities resolved in favor of the accused."[230] The court had already interpreted the statutory text; the statute was not exactly pellucid, but there was certainly no indication it was ambiguous.[231] As a result, the court would have had to conclude that the police mistake was not reasonable. The analysis would be clear and the standard for reasonable mistake demanding—just as the *Heien* court indicated it should be.[232]

CONCLUSION

The *Heien* case has left the lower courts with a range of options for developing the reasonable-mistake-of-law standard. This Comment has argued that a reasonable mistake of law is best identified only when the criminal statute, on which the police relied in deciding to execute a search or seizure, is ambiguous. Moreover, this Comment has proposed that ambiguity should be defined in the same manner here as it is in the lenity cases. On this approach, a court confronted with an alleged instance of a reasonable mistake of law should ask, first, whether the predicate criminal statute (on which the police officer mistakenly relied) would be held ambiguous for purposes of lenity. Only if the statute would be ambiguous in that context should the police officer be able to get the benefit of *Heien*'s reasonable-mistake rule.

Linking *Heien* to the rule of lenity provides a way to draw on an already-developed jurisprudence about ambiguity in the criminal law. It is a rigorous requirement for the police, compatible with the *Heien* majority's requirement that the standard be

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from a direct strategy to roll back police discretion, but it is a possible route for grassroots work coupled with impact litigation that might have an impact on the traffic laws.

229 *Williams v State*, 28 NE3d 293, 295 (Ind App 2015) ("Williams II").

230 *Meredith v State*, 906 NE2d 867, 872 (Ind 2009).

231 See *Williams v State*, 22 NE3d 730, 734 (Ind App 2014) ("Williams I").

232 See *Heien*, 135 S Ct at 539–40.

tougher than the qualified immunity standard.[233] It is the best means to foster the symmetry between the substantive criminal law and the Fourth Amendment rule that the *Heien* majority purported to seek.[234] And it means that each case that finds that the police made a reasonable mistake will also provide litigants with a roadmap to ambiguous laws for which the courts would be receptive to lenity arguments in the appropriate case. A search for statutory ambiguity cabins police discretion to some extent, and it also has the virtue of focusing attention on the role of the legislature in drafting the law rather than on the police in construing the law. This is appropriate when the legislature is the real cause of the mistakes (because it has drafted unclear laws).

One can imagine a doctrinal spectrum, from permissive to severe in its attitude toward the government. Qualified immunity would be fairly far on one end (permissive to police) while the rule of lenity, applied in the *Heien* context to limit the occasions when police are protected, would be equally far on the other (stringent on prosecution). Critics have assumed that the *Heien* rule belongs closer to the permissive end of the spectrum. This Comment has suggested, however, that it would be entirely logical, and consistent with the *Heien* opinion, to link *Heien* to lenity and thus put the *Heien* standard closer to the stringent end of the spectrum. Using lenity to define ambiguity can clarify the courts' analysis and, in the process, reduce the scope of unfettered police discretion that has troubled many observers in the aftermath of *Heien*.

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[233] Id at 539.

[234] Id at 540.