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The War Against Ourselves: *Heien v. North Carolina*, the War on Drugs, and Police Militarization

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The War Against Ourselves: *Heien v. North Carolina*, the War on Drugs, and Police Militarization

MALLORY MEADS*

Approximately fifty years ago, America declared a war against itself—the “War on Drugs.” Since then, our local and state police, armed with military weapons and federal funding, have fought tirelessly against “public enemy number one”—drugs. Not surprisingly, this war has created an atmosphere where it is now common to see police officers equipped with a mentality and armor that had previously only been seen in the dark-trenches of an international war zone. Worse yet, this battlefield mentality has leaked into almost every area of police-civilian encounters.

*As a “loyal foot soldier” in the Executive’s War on Drugs, however, the Supreme Court has played an important role in the current state of affairs between police officers and citizens, most recently in its decision in *Heien v. North Carolina*, which held that an officer’s mistake of law can provide reasonable suspicion necessary to justify police intrusion into countless more citizens’ lives. Consequently, this Note takes a closer look at the consequences of allowing police mistakes of law to give rise to reasonable suspicion in the background of the War on Drugs and police militarization. In particular, this Note explores how recent Supreme Court*

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decisions, the War on Drugs, and police militarization have shaped Fourth Amendment jurisprudence and impacted civilian-police relationships throughout the nation. It will explain how the Supreme Court's decision in Heien will only amplify these problems and their effects. Finally, this Note will conclude by explaining how the Supreme Court must begin to take responsibility for their role in exasperating these issues to the detriment of the Fourth Amendment if it is to retain its meaning.

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INTRODUCTION

Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . . [T]he human personality deteriorates

and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.¹

For approximately the last fifty years, the Supreme Court has expanded the language of the Fourth Amendment to allow police officers to conduct their job with minimal constitutional limitations. With the Supreme Court's blessing, police officers are now allowed to: stop people on less than probable cause;² frisk an individual's person even when there is no reason to believe the individual committed any crime other than a traffic violation;³ detain or search an individual without that person knowing of his right not to consent to the officer;⁴ search your garbage;⁵ use drug-sniffing dogs to determine if probable cause exists to search a vehicle during a routine traffic stop;⁶ use any evidence at trial so long as the police's behavior causing the Fourth Amendment violation is not a "flagrant or deliberate"⁷ violation of your rights;⁸ and conduct "confirmatory" searches so long as the evidence obtained as a consequence of the first unlawful search could be obtained by a later, legal search.⁹

Importantly, however, this expansion in favor of police practices and "community safety" has come at the expense and deterioration of our individual liberties—often in the name of the government's

¹ *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).

² *See Terry v. Ohio*, 392 U.S. 1 (1968).

³ *See United States v. Robinson*, 414 U.S. 218, 235 (1973).

⁴ *See Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973); *see also Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

⁵ *See California v. Greenwood*, 486 U.S. 35, 39–41 (1988).

⁶ *See Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005).

⁷ *See Herring v. United States*, 555 U.S. 135, 144 (2009).

⁸ These, of course, are not all the decisions that have constitutionally expanded the scope of the police's powers, but they do help illuminate the trend of eroding the Fourth Amendment's protection of civil liberties in the name of community safety.

⁹ *Murray v. United States*, 487 U.S. 533, 542–44 (1988). These, of course, are not all the decisions that have constitutionally expanded the scope of the police's powers, but they do help illuminate the trend of eroding the Fourth Amendment's protection of civil liberties in the name of community safety.

domestic “War on Drugs.” Yet, the “War on Drugs” is not without consequences. Thanks to federal funding and programs like 1033 that supply military gear to local police departments for use in counter-drug activities,¹⁰ the American war against ourselves has created a society where it is common to see police units equipped with the mentality, armor, and weaponry that has previously only been seen in the dark-trenches of an international war zone.

Consequently, when police officers are encouraged to treat suspected drug criminals as enemy combatants and not as citizens with rights, they are rarely held accountable for their actions, are rewarded for making copious amount of “busts,” the potential for abuse and disproportionate violence is high, and a clash between citizens and police officers is inevitable.¹¹ Worse still, the effects of a militarized police force are no longer limited to the government’s fight on the War on Drugs—police now use wartime weapons in everyday policing.¹² This summer, the clash received national attention as the events in Ferguson, Missouri, shed light on this frightening reality, causing many Americans to realize that the relationship between citizens and police is deteriorating at an alarming rate.¹³

Still, even if police officers are part of the problem, bad officers are typically the product of bad policy—policy that is ultimately

¹⁰ Taylor Wofford, *How America’s Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 13, 2014), <http://www.newsweek.com/how-americas-police-became-army-1033-program-264537>.

¹¹ See RADLEY BALKO, *RISE OF THE WARRIOR COP, THE MILITARIZATION OF AMERICA’S POLICE FORCES* 244–248 (PublicAffairs 1st ed. 2013) (discussing examples of “corruption scandals, botched raids, sloppy police work, and other allegations of misconduct against the federally funded task forces in Texas”).

¹² See Alex Kane, *Not Just Ferguson: 11 Eye-Opening Facts About America’s Militarized Police Forces*, MOYERS & CO. (Aug. 13, 2014), <http://billmoyers.com/2014/08/13/not-just-ferguson-11-eye-opening-facts-about-americas-militarized-police-forces/>.

¹³ See Paul Szoldra, *This is the Terrifying Result of the Militarization of Police*, BUSINESS INSIDER (Aug. 12, 2014), <http://www.businessinsider.com/police-militarization-ferguson-2014-8>.

made by politicians and upheld by justices.¹⁴ As a “loyal foot soldier”¹⁵ in the Executive’s War on Drugs, the Supreme Court has played an important role in this process—most recently contributing to the problem with the release of their 2014 opinion *Heien v. North Carolina*,¹⁶ a decision that only fuels an “us versus them” mentality by pitting an individual’s right to be free from unreasonable searches and seizures when they are engaging in legal behavior against an officer’s prerogative to fight the War on Drugs.

Accordingly, this Note takes a closer look at the consequences of allowing police mistakes of law to give rise to reasonable suspicion in the background of the War on Drugs and police militarization. Part I provides a general overview of police mistakes of law and the “reasonableness” requirement of the Fourth Amendment. It will also discuss how various circuit and state courts have handled these mistakes prior to the Supreme Court decision of *Heien*. Part II then focuses exclusively on the facts, procedural history, and decision of *Heien*. Next, Part III will focus on how recent Supreme Court decisions, the War on Drugs, and police militarization have shaped Fourth Amendment jurisprudence and impacted civilian-police relationships throughout the nation. In particular, it will explain how the Supreme Court’s decision in *Heien* will only amplify these problems and their effects. Finally, this Note will conclude by explaining how the Supreme Court must begin to take responsibility for their role in exasperating these issues to the detriment of the Fourth Amendment if we are ever to see positive change.

¹⁴ See BALKO, *supra* note 11, at xv (“A bad system loaded with bad incentives will unfailingly produce bad cops. The good ones will never enter the field in the first place, or they will become frustrated and leave police work, or they’ll simply turn bad. At best, they’ll have unrewarding, unfulfilling jobs.”).

¹⁵ *California v. Acevedo*, 500 U.S. 565, 601–02 (1991) (Stevens, J., dissenting).

¹⁶ No. 13-604, slip op. at 4–12 (Dec. 15, 2014).

I. BACKGROUND

A. *The Fourth Amendment: Reasonableness & Traffic Stops*

The Fourth Amendment of the United States Constitution provides “[t]he right of the person to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”¹⁷ The Supreme Court has held, however, that the “touchstone of the Fourth Amendment” is reasonableness.¹⁸ Accordingly, the Fourth Amendment does not “proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.”¹⁹

In the specific context of traffic stops, the Supreme Court has held that the search or seizure of a vehicle will be considered “reasonable” if police have probable cause—or a lesser standard of reasonable suspicion—to believe that a traffic violation has occurred.²⁰ Thus, when determining whether the Fourth Amendment’s “reasonableness” requirement has been met, courts must assess “whether the rule of law as applied to the established facts is or is not violated.”²¹ In particular, the court must decide whether the facts confronting the officer were “sufficient to warrant a man of reasonable prudence” to believe that there was a “particularized and objective basis for suspecting the person stopped of criminal activity.”²² Because “subjective intentions play no role in . . . Fourth Amendment analysis,” however, the determination of whether probable cause or

¹⁷ U.S. Const. amend. IV.

¹⁸ *Riley v. California*, No. 13-132, slip op. at 5 (June 25, 2014).

¹⁹ *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

²⁰ *See Terry v. Ohio*, 392 U.S. 1, 26–27 (1968); *see also Whren v. United States*, 517 U.S. 806, 810 (1996).

²¹ *Ornelas v. United States*, 517 U.S. 690, 696–97 (1996).

²² *Id.* at 696. Because these standards are defined by equivocal terms such as “probabilities,” “reasonableness,” “practical nontechnical conception[s],” and “common-sense conclusions,” however, the determination of whether police officers had sufficient probable cause—or reasonable suspicion—to justify the search or seizure has rarely been predictable, even when fact patterns are similar. *See Erica Goldberg, Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 801 (2013) (noting that “scholars have reported ‘wildly different outcomes’ based on similar fact patterns when determining probable cause and reasonable suspicion”).

reasonable suspicion exists must be based on the facts confronting the officer at the time of the stop, not on his subjective beliefs.²³

B. *Mistake of Fact v. Mistake of Law*

Still, “because many situations which confront officers in the course of executing their duties are more or less ambiguous,” the Supreme Court has decided that “room must be allowed for some mistakes on their part.”²⁴ Until now, this has meant that mistakes of *fact* are considered “reasonable” so long as the officer’s mistakes are those of “reasonable men, acting on facts leading sensibly to their conclusions of probability.”²⁵ This is because “what is reasonable will be completely dependent on the specific and usually unique circumstances presented by each case.”²⁶

The recognition that an officer’s factual mistakes may be reasonable is rooted in the recognition that police officers must often make quick decisions and draw “conclusions about human behavior” much in the way that “jurors [do] as factfinders.”²⁷ In addition, factual mistakes “may provide the objective basis for reasonable suspicion . . . under the Fourth Amendment because of the intensely fact-sensitive nature of reasonable suspicion . . . determinations.”²⁸

Traditionally, however, courts have not treated mistakes of law so favorably. Mistakes of law can be classified into two broad categories: constitutional mistakes of law and substantive mistakes of law.²⁹ When an officer makes a constitutional mistake of law, he or she either enforces a statute that has yet to be deemed either consti-

²³ *Whren*, 517 U.S. at 812–14.

²⁴ *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

²⁵ *Id.*; see also *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (“[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government. . . is not that they always be correct, but that they always be reasonable”).

²⁶ *United States v. Chanthasouvat*, 342 F.3d 1271, 1277 (11th Cir. 2003).

²⁷ *United States v. Cortez*, 449 U.S. 411, 418 (1981).

²⁸ *Chanthasouvat*, 342 F.3d at 1276.

²⁹ See *id.* at 1277–80 (explaining substantive mistakes of law); *Michigan v. DeFillippo*, 443 U.S. 31, 37–38 (1979) (explaining constitutional mistakes of law).

tutional *or* unconstitutional, or he or she relies on court-made standards that are later reversed on constitutional grounds.³⁰ Because society “would be ill-served if its police officers took it upon themselves to determine which laws are, or are not, constitutionally entitled to enforcement,” these mistakes are often considered “reasonable” under the Fourth Amendment.³¹

Conversely, substantive mistakes of law—where officers misunderstand the statutes or ordinances relied upon as the grounds for an investigatory stop or arrest—have not been treated so favorably by a majority of state and federal courts for a multitude of reasons discussed below.³²

C. “Reasonable” Mistakes of Law

Prior to the release of *Heien v. North Carolina*,³³ the First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits³⁴—and a majority of state courts³⁵—reaffirmed or held that an officer’s “mistake of law cannot provide the objective basis for reasonable suspicion or probable cause,” even if that mistake is considered objectively reasonable.³⁶ These holdings were based on both policy and law enforcement concerns. Foremost, according to these courts, police

³⁰ See *DeFillippo*, 443 U.S. at 37–38.

³¹ *Id.* at 38.

³² See Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 78 (2011).

³³ No. 13-604, slip op. (Dec. 15, 2014).

³⁴ *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006); *United States v. Mosley*, 454 F.3d 249, 260 n.16 (3d Cir. 2006); *United States v. McDonald*, 453 F.3d 958, 961 (7th Cir. 2006); *United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005); *Chanthasouxat*, 342 F.3d at 1271; *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *United States v. Miller*, 146 F.3d 274, 278–79 (5th Cir. 1998).

³⁵ *People v. White*, 132 Cal. Rptr. 2d 371, 375–77 (Cal. Ct. App. 2003) (California); *McDonald v. State*, 947 A.2d 1073, 1079 (Del. 2008) (Delaware); *United States v. Debruhl*, 38 A.3d 293, 299 n.42 (D.C. 2012) (District of Columbia); *Gordon v. State*, 901 So. 2d 399, 405 (Fla. Dist. Ct. App. 2005) (Florida); *State v. Louwrens*, 792 N.W.2d 649, 654 (Iowa 2010) (Iowa); *State v. Anderson*, 683 N.W.2d 818, 824 (Minn. 2004) (en banc) (Minnesota); *People v. Rose*, 889 N.Y.S.2d 789, 791 (N.Y. App. Div. 2009) (New York).

³⁶ *Chanthasouxat*, 342 F.3d at 1279.

mistakes of law could never be “reasonable” because allowing police misinterpretations of ambiguous statutes would “violate the fundamental principle that a criminal statute that is so vague that it does not give reasonable notice of what it prohibits violates due process.”³⁷ Second, these courts feared that “the potential for abuse of traffic infractions as pretext for effecting stops [would be] boundless and the costs to privacy rights excessive,” if officers were allowed to make stops based on their subjective belief that traffic laws have been violated.³⁸ In addition, permitting such mistakes would also “remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.”³⁹

Standing alone and on the other side of the spectrum, however, the Eighth Circuit⁴⁰ and a few state courts,⁴¹ explained that a seizure *could* be considered reasonable under the Fourth Amendment if the court found that the officer’s mistake is “objectively reasonable.” According to *United States v. Martin*, officers only have an obligation to understand the laws on an objectively reasonable level because “[w]e should not expect state highway patrolmen to interpret the traffic laws with the subtlety and expertise of a criminal defense attorney,” especially when these laws are “counterintuitive and confusing.”⁴² According to these courts, mistakes of law are no different than mistakes of fact, and thus, police legal errors should be treated equally so long as they are reasonable.

II. HEIEN V. NORTH CAROLINA

In response to conflicting opinions, the Supreme Court recently granted certiorari to address the issue of whether police mistakes of

³⁷ *Id.* at 1278–79.

³⁸ *United States v. Lopez-Valdez*, 178 F.3d 282, 289 (5th Cir. 1999).

³⁹ *Lopez-Soto*, 205 F.3d at 1106.

⁴⁰ *United States v. Martin*, 411 F.3d 998, 1001 (8th Cir. 2005); *see also* *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006).

⁴¹ *McConnell v. State*, 374 S.E.2d 111, 113 (Ga. Ct. App. 1988) (Georgia); *Moore v. State*, 986 So. 2d 928, 935 (Miss. 2008) (Mississippi); *State v. Heien*, 737 S.E.2d 351, 357 (2012) (North Carolina); *City of Wilmington v. Conner*, 761 N.E.2d 663, 667 (Ohio Ct. App. 2001) (Ohio); *State v. Wright*, 791 N.W.2d 791, 799 (S.D. 2010) (South Dakota).

⁴² *Martin*, 411 F.3d at 1001.

law could give rise to the reasonable suspicion necessary to uphold a search or seizure under the Fourth Amendment.⁴³ In a recently released opinion, the Supreme Court held that it could.⁴⁴

A. *Relevant Facts*

On the morning of April 29, 2009, Defendant Nicholas Brady Heien and a friend were driving through North Carolina when they were pulled over by police officer Sergeant Matt Darisse of the Surry County Sheriff's Office.⁴⁵ That morning, Sergeant Darisse was "conducting criminal interdiction"⁴⁶ on Interstate 77 ("I-77") when he noticed a Ford Escort pass by, driven by a man who appeared "very stiff and nervous."⁴⁷ Peaking his interest, Sergeant Darisse pulled onto I-77 to follow the vehicle when he noticed that the vehicle had only one working brake light.⁴⁸ Believing the law required two functioning brake lights, Sergeant Darisse put on his blue lights and pulled over Defendant Heien's vehicle.⁴⁹

Upon stopping the vehicle, Sergeant Darisse noticed two individuals: Maynor Javier Vasquez, the driver, and Defendant Heien, who was lying across the rear seat.⁵⁰ After informing Vasquez that he was being pulled over for a non-functioning brake light, Sergeant Darisse then asked Vasquez to produce his driver's license and registration.⁵¹ Because Mr. Vasquez "appeared nervous and was slow to produce the requested documents," however, Sergeant Darisse requested that Vasquez step out of his vehicle and wait between the

⁴³ Heien v. North Carolina, No. 13-604, slip op. at 1 (Dec. 15, 2014).

⁴⁴ *Id.*

⁴⁵ *Id.* at 2.

⁴⁶ *Id.*; State v. Heien, 714 S.E.2d 827, 828 (N.C. Ct. App. 2011) [hereinafter *Heien I*]. As noted by Lyman, the court did not define "criminal interdiction"; nevertheless, it is generally defined as "traffic enforcement with an emphasis on more serious criminal behavior that might be occurring during traffic stops." State v. Zetina-Torres, 400 S.W.3d 343, 346 (Mo. Ct. App. 2013); see also John B. Lyman, *Goldilocks and the Fourth Amendment: Why the Supreme Court of North Carolina Missed an Opportunity to Get Officer Mistakes of Law "Just Right" in State v. Heien*, 92 N.C. L. REV. 1012, 1018 n.41 (2014).

⁴⁷ *Heien I*, 714 S.E.2d at 828.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

two vehicles while Sergeant Darisse performed a background check on Vasquez's license and registration.⁵²

Around this time, another officer from the Surry County Sheriff's Office—Deputy Mark Ward—arrived to assist Sergeant Darisse with the simple traffic stop, further questioning Vasquez and Heien about their travel plans while Sergeant Darisse continued to perform a background check.⁵³ Although Vasquez had informed Sergeant Darisse that he and Heien were heading to West Virginia, Vasquez informed Deputy Ward that they were driving to Kentucky.⁵⁴

After a records check revealed no problems with Vasquez's documents, Sergeant Darisse returned with a warning ticket for a non-functioning brake light and Vasquez's other documents.⁵⁵ Still, Sergeant Darisse was suspicious of the defendants as "Vasquez appeared nervous, Heien remained lying down the entire time, and the two gave inconsistent answers about their destination," and thus requested that Vasquez consent to additional questions.⁵⁶ Upon receiving Vasquez's assent, Sergeant Darisse asked Vasquez if he had any contraband in the vehicle.⁵⁷ After Vasquez stated that he did not, Sergeant Darisse then asked Vasquez if he could search the vehicle.⁵⁸ Vasquez replied that, because the vehicle belonged to Defendant Heien, Sergeant Darisse would need to ask him.⁵⁹ Defendant Heien consented and Sergeant Darisse, along with Deputy Ward's assistance, performed a search of Defendant Heien's vehicle that revealed a sandwich bag containing cocaine.⁶⁰ Heien and Vasquez

⁵² *Id.* During this background check, Sergeant Darisse asked the defendants' about their ultimate destination. *See id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* Sergeant Darisse would later testify that Vasquez was "free to leave" at that point, although he did not inform Vasquez of this right. *Id.*

⁵⁶ *Heien v. North Carolina*, No. 13-604, slip op. at 2 (Dec. 15, 2014) [hereinafter *Heien III*].

⁵⁷ *See Heien I*, 714 S.E.2d at 828.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Heien III*, No. 13-604, slip op. at 2.

were subsequently arrested and charged with attempted trafficking of cocaine.⁶¹

B. *State v. Heien: Appellate History*

At trial, Heien moved to suppress the evidence seized from his vehicle, alleging that the stop and search violated his Fourth Amendment rights.⁶² According to Heien, the search and seizure was unconstitutional because the North Carolina law did not require that all vehicular brake lights be functioning properly, and thus Sergeant Darisse could not have had reasonable suspicion to initiate the investigatory stop.⁶³ After the trial court denied Heien's motion and concluded that Sergeant Darisse had a "reasonable and articulable suspicion" that Heien was illegally operating a vehicle without a properly functioning brake light,⁶⁴ however, Heien pled guilty and reserved the right to appeal the suppression decision.⁶⁵

On appeal, the North Carolina Court of Appeals reversed, disagreeing with the trial court that the North Carolina law⁶⁶ required that all vehicular brake lights function properly.⁶⁷ Focusing on "[t]he use of the articles 'a' and 'the' before the singular 'stop lamp'"⁶⁸ used throughout the text of the statute, the court determined that the statute at issue "clearly convey[ed] . . . that . . . only *one* stop lamp is required."⁶⁹ According to the Court of Appeals, "a vehicle having only one operable brake light is not a valid justification for a traffic stop" because a correct interpretation of the statute

⁶¹ See *State v. Heien*, 737 S.E.2d 351, 352–53 (N.C. 2012) [hereinafter *Heien II*].

⁶² *Id.* at 353.

⁶³ See *id.*

⁶⁴ *Id.*

⁶⁵ *Heien I*, 714 S.E.2d at 828.

⁶⁶ The relevant portion of the statute provides that a vehicle must be "equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps." N.C. Gen. Stat. § 20–129(g) (2009) [hereinafter "Stop Light" Statute].

⁶⁷ See *Heien I*, 714 S.E.2d at 831.

⁶⁸ *Id.* at 829. The Court of Appeals began their analysis first by noting that the term "stop lamp" used by the statute is synonymous with "brake light." *Id.*

⁶⁹ *Id.*

justifying Sergeant Darisse's detention of Heien requires the Defendant's vehicle to have only one operable brake light.⁷⁰

Following the Court of Appeals' decision, however, the State appealed and the North Carolina Supreme Court reversed.⁷¹ On appeal, the State did not challenge the Court of Appeals' interpretation of the "Stop Light" Statute, and thus the Supreme Court of North Carolina assumed for purposes of its decision that Heien's faulty brake light was not a traffic violation.⁷² Nevertheless, the North Carolina court concluded that the stop was valid because "the reasonable suspicion standard does not require an officer actually to witness a violation of the law before making a stop"—so long as the officer's mistake of law is objectively reasonable, "the Fourth Amendment would seem not to be violated."⁷³ To the court, a "routine traffic stop, based on what an officer reasonably perceives to be a violation, is not a substantial interference with the detained individual and is a minimal invasion of privacy."⁷⁴ In fact, the court concluded that most citizens would actually prefer this kind of police interference.⁷⁵

Following this decision, the North Carolina Supreme Court remanded the case back to the Court of Appeals to address Heien's other lesser arguments for suppression, which are not at issue here.⁷⁶ On remand, the Court of Appeals,⁷⁷ and the North Carolina Supreme Court,⁷⁸ affirmed the trial court's denial of Heien's motion to suppress. Heien appealed and the Supreme Court granted certiorari.⁷⁹

C. *Heien v. North Carolina: The Supreme Court*

Prior to releasing the opinion, the Court had three possible paths: it could hold that mistakes of law (1) do not violate the Fourth

⁷⁰ *Id.* at 831.

⁷¹ *See State v. Heien*, 737 S.E.2d 351, 359 (N.C. 2012).

⁷² *See id.* at 354.

⁷³ *Id.* at 356.

⁷⁴ *Id.* at 357.

⁷⁵ *See id.* (concluding that "most motorists would actually prefer" police interaction so that they may be informed that their vehicle is "not functioning properly").

⁷⁶ *See id.* at 359.

⁷⁷ *State v. Heien*, 741 S.E.2d 1, 7 (N.C. Ct. App. 2013).

⁷⁸ *State v. Heien*, 749 S.E.2d 279, 279 (N.C. 2013).

⁷⁹ *Heien v. North Carolina*, 134 S. Ct. 1872 (2014).

Amendment when they are objectively reasonable, (2) violate the Fourth Amendment but are not subject to suppression when they are objectively reasonable, or (3) violate the Fourth Amendment and are subject to the exclusionary rule.⁸⁰ In an 8-1 decision written by Chief Justice Roberts,⁸¹ however, the Supreme Court ended the debate and chose path number one: concluding that an officer's mistake of law *can* provide the reasonable suspicion necessary to justify a traffic stop and thus does not violate the Fourth Amendment.⁸²

Focusing on "reasonableness," the Court reiterated that because the Fourth Amendment does not require perfection, reasonable mistakes must be allowed to ensure that officers have fair leeway to enforce the law for the community's protection.⁸³ Despite the fact that little case-law supported his decision, Roberts analogized mistakes of law to mistakes of fact and concluded that mistakes of law may similarly be considered reasonable, and thus do not violate the Fourth Amendment, so long as the mistakes are those of "reasonable men."⁸⁴

⁸⁰ See Orin S. Kerr, *A Few Thoughts on Heien v. North Carolina*, THE VOLOKH CONSPIRACY (Sept. 29, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/29/a-few-thoughts-on-heien-v-north-carolina/> (discussing the possible Supreme Court holdings in *Heien v. North Carolina*). Still, option two may not be possible in this case as the North Carolina state constitution rejects the good faith exception to the exclusionary rule. *Id.*

⁸¹ See *Heien v. North Carolina*, No. 13-604 (Dec. 15, 2014). Justices Kagan and Ginsburg concurred, but only to reiterate that an officer's subjective intentions do not matter and that the test to determine whether the officer made an objectively reasonable mistake is much more demanding than the one to determine whether an officer is entitled to qualified immunity. See *id.* (Kagan, J., concurring).

⁸² See *Heien III*, No. 13-604, slip op. at 2.

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 6. Importantly, however, little case-law supported this conclusion. In the opinion, Roberts cites cases that discuss founding-era customs statutes that even he admits are "not directly on point." *Id.* at 7. As Justice Sotomayor points out in her dissent, these cases do not support the majority's departure from recent precedent because they "say nothing about the scope of Fourth Amendment" and instead are "equivalents of our modern-day qualified immunity jurisprudence for civil damages." *Id.* at 7 (Sotomayor, J., dissenting). Citing *Ornelas*, *Terry*, *Devenpeck*, and *Rodriguez*, Justice Sotomayor reminded the Court that *facts*, as viewed by an objectively reasonable officer, are the *only* things that have mattered

Most shocking, however, is the fact that Justice Roberts' opinion fails to adequately address any of the real issues lurking behind the majority's holding. In a few short paragraphs, Justice Roberts dismisses concerns that allowing police mistakes of law would create a double standard that would discourage officers from learning the law and instead encourage them to remain ignorant.⁸⁵ According to the Court, because the Fourth Amendment tolerates only *objectively reasonable* mistakes, an officer can "gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."⁸⁶ Moreover, Justice Roberts maintains that his opinion does not favor law enforcement because the maxim "ignorance of the law is no excuse" will still apply to police as the Court's holding does not justify the imposition of criminal liability based on an officer's mistake of law.⁸⁷

Still, the majority's opinion misses the point: even if only "objectively reasonable" police mistakes are allowed, the majority's opinion *does* allow the government to unjustifiably, and unnecessarily, interfere with individuals Fourth Amendment right to "be secure"⁸⁸ in their persons, houses, papers, and effects when they are engaging in completely lawful behavior. As seen in *Heien* and the cases cited above,⁸⁹ this unjustifiable interference often can—and does—lead to the imposition of criminal liability as police are often motivated to find some kind of evidence of criminal activity when they believe that the innocent person they are stopping is somehow breaking a law.

As Justice Sotomayor—the lone dissenter—points out, allowing police mistakes of law will have serious human consequences, "including those for communities and for their relationships with the police," who already have a strained relationship.⁹⁰ In the context of

in the determination of whether a Fourth Amendment standard has been met. *Id.* at 2.

⁸⁵ *See id.* at 11–12.

⁸⁶ *Id.*

⁸⁷ *Id.* at 12 ("Just as an individual generally cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law.")

⁸⁸ U.S. Const. amend. IV.

⁸⁹ *See supra* Part I.C.

⁹⁰ *Heien III*, No. 13-604, slip op. at 4 (Sotomayor, J., dissenting).

traffic stops, police officers are already allowed to stop individuals on pretext, so long as that pretext is a violation of an actual law.⁹¹ Now, police officers may stop any individual engaged in lawful activity and will only need to articulate a “reasonable” legal interpretation (or misinterpretation) that suggests a law has been violated to justify the stop.⁹² By deeming lawless seizures constitutionally permissible, however, the Court has again lessened the “confidence in the perceived fairness and legitimacy of police, already strained by reports of police fabrications and racial bias.”⁹³ Yet—surprisingly—this decision “barely even acknowledges that, by giving police officers license going forward to claim that they were confused about this law or that law, there will be even more distrust and error.”⁹⁴

Moreover, Justice Sotomayor also points out that allowing police mistakes of law will have “the perverse effect of preventing or delaying the clarification of the law.”⁹⁵ Under the Court’s ruling, courts will no longer be required to decide interpretive questions about statutory language; instead, courts will simply need to decide whether an officer’s interpretation of that statute was reasonable.⁹⁶ But failing to decide interpretive questions will have serious consequences: executive power will be augmented, legislative primacy will be undercut, and judicial authority will be abdicated.⁹⁷ In addition, this decision raises the question of why an innocent citizen

⁹¹ *Whren v. United States*, 517 U.S. 806, 810 (1996).

⁹² *Id.* at 4 (Sotomayor, J., dissenting).

⁹³ Logan, *supra* note 32, at 93. *See generally* Morgan Cloud, *Judges, “Testifying,” and the Constitution*, 69 S. CAL. L. REV. 1341 (1996) (discussing police fabrications); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997) (discussing police fabrications); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003) (discussing racial bias).

⁹⁴ Dahlia Lithwick, *The Supreme Court Ignores the Lessons of Ferguson*, SLATE (Dec. 16, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/heien_v_north_carolina_as_the_rest_of_the_country_worries_about_police_overreach.html.

⁹⁵ *Heien III*, No. 13-604, slip op. at 4 (Sotomayor, J., dissenting).

⁹⁶ *See id.* (Sotomayor, J., dissenting) (noting that the courts in the Eighth Circuit, the only circuit to allow reasonable mistakes of law, no longer needed to interpret statutory language under this approach).

⁹⁷ For an in depth discussion *see* Logan, *supra* note 32, at 95–103; *see also Heien III*, No. 13-604, slip op. at 5 (Sotomayor, J., dissenting) (noting that this

should ever be made to “shoulder the burden of being seized whenever the law may be susceptible to an interpretive question” in a society that was built on rule of law principles, separation of powers, and legislative accountability⁹⁸—especially considering there is nothing to be gained from allowing such mistakes, and much to be lost.⁹⁹

III. “US” VS. “THEM”

Importantly, however, *Heien v. North Carolina*¹⁰⁰ comes at a time where tensions between police and ordinary citizens are at an all-time high and the need for judicial interference is critical to keep the tensions at bay.¹⁰¹ Moreover, as one reporter has already stated so astutely:

[y]ou would think that we had not just lived through a summer in which we were painfully reminded of the realities of militarized police, civil asset forfeiture, racial profiling, relentless police harassment of citizens, and frivolous stops for trivial infractions.¹⁰²

But, we did—and citizens now live in a society where we cannot forget.

result is both bad for citizens, “who need to know their rights and responsibilities” and bad for police, “who would benefit from clearer direction”).

⁹⁸ See Lithwick, *supra* note 94.

⁹⁹ See *Heien III*, No. 13-604, slip op. at 7 (Sotomayor, J., dissenting).

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Jerry Markon & Sari Horwitz, *Cleveland Police Tactics Violated Rights of Citizens, Justice Department Probe Finds*, WASHINGTON POST (Dec. 4, 2014), http://www.washingtonpost.com/politics/cleveland-police-tactics-violated-rights-of-citizens-justice-department-probe-finds/2014/12/04/db93f0e0-7bfd-11e4-b821-503cc7efed9e_story.html (discussing an Obama administration report “accusing the Cleveland police department of using excessive and deadly force”); Dan Gainor, *Yes, There is a War on Police: Column*, USA TODAY (Dec. 29, 2014), <http://www.usatoday.com/story/opinion/2014/12/23/new-york-police-killing-protesters-war-rhetoric-pigs-al-sharpton-war-column/20821457/> (discussing the “war on police”).

¹⁰² Lithwick, *supra* note 94.

To understand how we got to where we are today, however, it is first necessary to look at where we've been. Accordingly, the sections below will discuss how the War on Drugs, police militarization, and Fourth Amendment jurisprudence have shaped and affected the resulting citizen-police relationship unfolding in American streets and communities today.

A. *The Cycle: The War on Drugs, Militarization, & the Fourth Amendment*

In the early 1970s, President Nixon officially declared a “war on drugs.”¹⁰³ Since then, the prevailing attitude has been that cracking down on drugs—“public enemy number one”¹⁰⁴—is critical to ensuring the safety of our nation.¹⁰⁵ Over time, however, all three branches of government have “defer[red] very little to constitutional and nonconstitutional limits on the exercise of governmental power in the domain of drug enforcement.”¹⁰⁶ This, in turn, has created a cycle of Fourth Amendment abrogation.¹⁰⁷

The cycle is simple: first, the executive and legislative branches urge and incentivize police officers to become their enforcers of the War on Drugs;¹⁰⁸ second, police officers remain motivated to perform these tasks because they receive grants and “rewards” for apprehending criminals;¹⁰⁹ and finally, the Supreme Court authorizes questionable searches “for the cause of saving the country from

¹⁰³ Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on the Drugs*, 66 S. CAL. L. REV. 1389, 1396 (1993). Although there is no clear beginning on the war on drugs, Nixon’s Administration began to use the term in the 1970s. *Id.*

¹⁰⁴ Timeline: America’s War on Drugs, NPR (April 2, 2007), <http://www.npr.org/templates/story/story.php?storyId=9252490>.

¹⁰⁵ See Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 890 (1987).

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*

¹⁰⁸ See BALKO, *supra* note 11, at 139–47 (describing how President Reagan worked with the legislative branch to create a “drug-fighting army” comprised of federal, state, and local law enforcement officers).

¹⁰⁹ See *id.* at 321 (noting rewards such as Byrne grants, federal funding tied to drug enforcement, Pentagon giveaway program, and “the federal equitable sharing program that lets local police departments get around state asset forfeiture laws and makes drug warring more lucrative (and therefore a higher priority)”).

drugs,”¹¹⁰ and the War on Drugs—fought mostly against fellow American citizens—continues on with police officers given even more leeway to circumvent the requirements of the Fourth Amendment.

1. LEGISLATIVE AND EXECUTIVE BRANCH

Since the start of the “war,” the legislative and executive branches have worked together to implement policies to aggressively eliminate American citizen use and possession of drugs.¹¹¹ By the 1980s, Congress was rapidly introducing comprehensive drug laws and penalties, while President Reagan was simultaneously announcing a “nationwide campaign against the users and distributors of illicit drugs, making drug enforcement and control a national priority.”¹¹² Together, the branches armed police units with resources such as U.S. military forces and equipment,¹¹³ equitable sharing,¹¹⁴

¹¹⁰ See *id.* at 150.

¹¹¹ See *id.* at 139–47.

¹¹² Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court’s Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219, 221 (1992).

¹¹³ BALKO, *supra* note 11, at 157–158. The National Security Decision Directive 221, signed by President Reagan in 1986, “instructed the US military ‘to support counter-narcotics efforts more actively,’ including providing assistance to law enforcement agencies ‘in the planning and execution of large counter-narcotics operations,’ ‘participat[ing] in coordinated interdiction programs,’ engaging in combined exercises with civilian law enforcement agencies, and training and helping foreign militaries conduct antidrug operations.” *Id.* In addition, Congress established an office in the Pentagon that facilitated police-military transfers and required the secretary of Defense and the U.S. attorney to notify local law enforcement each year about the availability of surplus military equipment. *Id.*

¹¹⁴ Under the Controlled Substance Act, Congress allows the government to seize “all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical . . . all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.” 21 U.S.C. § 881(a)(6) (2015). Through equitable sharing, state and local law enforcement agencies may “keep up to 80% of the value of the assets they seize under federal law”—a potentially massive sum of money. Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 696 (2014).

federal funding,¹¹⁵ and the National Guard¹¹⁶ to aid in their local fight against America's greatest enemy—drugs.

2. THE POLICE

Motivated by federal grants and armed with military weapons,¹¹⁷ state and local police departments were ready and willing to fight in the battle—a battle that would take place on American soil, in American neighborhoods, and against American citizens. To the police units, however, none of this mattered: so long as drugs were the enemy and civilians were its users, police agencies were willing to do whatever it took to ensure that their police units stood a chance to

¹¹⁵ See BALKO, *supra* note 11, at 157. In addition to equitable sharing, President Reagan also implemented policies that designated a large sum of federal money to local police departments that were to be used solely for the purpose of drug policing. *Id.* Specifically, federal monies could be used to “start, fund, and maintain SWAT teams, to expand narcotics units, or to pay cops overtime for doing extra drug investigations.” *Id.* This, combined with “the potential bounty available in asset forfeiture,” incentivized police units to “devote more time, personnel, and aggression” to policing drugs instead of investigating murders, rapes, and robberies—crimes that promised no financial return. *Id.*

¹¹⁶ *Id.* The National Defense Appropriation Act for Fiscal Year 1987 “instructed the National Guard to provide full cooperation with local and federal law enforcement agencies in drug investigations.” *Id.* at 158. By the early 1990s, the National Guard's role in the drug war was completely established. *Id.* at 180. According to Balko, in the year 1992 alone, the National Guard troops assisted in nearly 20,000 arrests, searched 120,000 automobiles, entered 1,200 private buildings without a search warrant, and stepped onto private property to search for drugs (also without a warrant) 6,500 times. *Id.* Balko further explains: [s]ymbolically, the National Guard bridge[d] the gap between cop and soldier. Guard troops train like soldiers and dress like soldiers, and they are regularly called up to fight in wars overseas. But when they are acting under the authority of a state governor, Guard troops aren't subject to the restrictions of the Posse Comitatus Act. Giving the Guard a more prominent role in the drug war not only escalated the drug fight, it further conditioned the country to the idea of using forces that looked and acted quite a bit like soldiers for domestic law enforcement. *Id.*

¹¹⁷ See Rep. Hank Johnson, *The Failed 'War on Drugs' Is Militarizing Law Enforcement, Fueling Police Violence*, HUFFINGTON POST (Oct. 24, 2014), http://www.huffingtonpost.com/rep-hank-johnson/the-failed-war-on-drugs-i_b_6043558.html (estimating that the U.S. Department of Defense has provided over \$4 billion in surplus military equipment to local police for free).

receive a chunk of the federal monies earmarked for drug enforcement—even if this meant breaking down doors, raiding homes, stretching constitutional limitations,¹¹⁸ and using military weapons on fellow, and sometimes innocent, civilians to secure evidence for drug violations.¹¹⁹

Not surprisingly, however, these “incentives” have created a nation where the merging of cop and soldier is nearly complete and the consequences are ominous: officers now believe there is only “us [the police] and . . . the enemy” and are often “more concerned with

¹¹⁸ See BALKO, *supra* note 11, at 325. Former LAPD Deputy Chief Stephen Downing explains:

“‘The emphasis on statistics in the war on drugs is really what encourages the Fourth Amendment cheating’ . . . ‘Everyone wants to be successful at what they do. Police officers are no different. But we have this drug war. And in order to get the goods—the grants and such, which earn you good reviews and promotions—you have to meet your quotas. So you want to get in before the drugs are flushed down the toilet. So you lie about what goes on at the door. You take shortcuts to get your warrant before the drugs are moved. It’s the bad policy that forces that to happen. The big shots will say to the public, ‘We have all these rules and we enforce them. There are no quotas.’ But then internally they’ll say, ‘Why do you only have two arrests this month?’ It’s a system that creates cheaters. The quota system just doesn’t work without cheating.’”

Id. at 325.

Moreover, in a striking majority of cases dealing with an officer’s “mistake of law,” almost all resulted in drug charges and/or convictions. See, e.g., *United States v. Coplin*, 463 F.3d 96 (1st Cir. 2006) (marijuana); *United States v. Tibbetts*, 396 F.3d 1132 (10th Cir. 2005) (marijuana); *United States v. Chanthasouvat*, 342 F.3d 1271 (11th Cir. 2003) (cocaine); *United States v. King*, 244 F.3d 736 (9th Cir. 2001) (cocaine); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000) (marijuana); *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998) (marijuana); *but cf.* *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006) (possession of a firearm by a felon); *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006) (possession of a firearm by a felon).

¹¹⁹ See Thomas Regnier, *The “Loyal Foot Soldier”*: *Can the Fourth Amendment Survive the Supreme Court’s War on Drugs?*, 72 UMKC L. Rev. 631, 649 (2004). The use of these tactics is, in part, due to the consensual nature of drug crimes—where all parties to the transaction are involved in the crime by their own consent. *Id.* Investigating drug activity usually requires police to take proactive steps as drugs are easily concealed in pockets, backpacks, car trunks, etc., and are usually not reported due to their consensual nature. *Id.* Consequently, “[d]iscovering them may require more snooping and more frequent stopping and frisking of suspicious persons and automobiles.” *Id.*

the drugs than they are with innocent bystanders.”¹²⁰ Even the name itself—“War” On Drugs—blurs the distinction between cop and soldier and creates a battlefield mentality that has “isolated and alienated American police officers and put them on a collision course with the values of a free society.”¹²¹

As to be expected, however, the ramifications of the government’s War on Drugs and the excessive militarization of police officers are far and wide. Today, we live in a world where it is common to see countless police units consisting of “drug warriors”¹²² armed with SWAT gear and military weapons, and virtually immune to accountability if they get out of line.¹²³

Moreover, the “us versus them” mentality is not always overtly manifested through the use of brute force or guns—it can also be seen in dangerous police abuses such as: racial profiling,¹²⁴ psychological intimidation,¹²⁵ harassment of citizens, pretextual stops for trivial infractions, and selective enforcement of the law¹²⁶—to name

¹²⁰ BALKO, *supra* note 11, at 241.

¹²¹ BALKO, *supra* note 11, book description.

¹²² BALKO, *supra* note 11, at 167–168 (noting the “careless mixing of cops and soldiers” and that “[b]y the late 1980s, the policies, rhetoric, and mind-set of the Regan-Bush all-out antidrug blitzkrieg had fully set in at police departments across the country”).

¹²³ See also ACLU FOUNDATION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2, 34 (June 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rell1.pdf> (noting that today it is not surprising to see twenty heavily armed SWAT officers and armored personnel carriers raid homes where no contraband was found, where there was no clear reason for thinking that the people inside would be armed or awake, and where children and the elderly were present).

¹²⁴ See Gary Webb, *Driving While Black*, ESQUIRE (Jan. 29, 2007), <http://www.esquire.com/features/driving-while-black-0499> (discussing “Operation Pipeline,” a well-known highway drug interdiction program that has been used to target people of color); see also Dennis Parker, *A Taxicab Confession for a Post-Ferguson America*, ACLU (Sept. 4, 2014), <https://www.aclu.org/blog/criminal-law-reform-racial-justice/taxicab-confession-post-ferguson-america> (discussing racial discrimination in law enforcement).

¹²⁵ Some police tactics include verbal threats, humiliation and harassment. See ACLU FOUNDATION, *supra* note 123, at 2.

¹²⁶ See generally Christopher Hall, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States*,

a few. Yet, regardless of how this mentality manifests, the result is the same: the more police exercise their discretion to the detriment of civilians, the more civilians increasingly fear and no longer trust the police.¹²⁷

But—as enforcers of the law—police officers are entrusted with public security, crime prevention, and keeping the community safe—not waging a war against the people they have promised to protect. By equipping police units with military weapons and training them to have a soldier-like mentality, however, police departments are essentially encouraging their officers to view the people they are supposed to serve as enemies, no matter what the citizen may be guilty of.

Worse yet, the battlefield mentality and pronounced militarization of police forces have crept into areas even outside of drug policing.¹²⁸ Today’s news evidences that this mentality has leaked into almost every area of police–civilian encounters.¹²⁹

United States v. Armstrong, *and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083, 1087 (1998) (discussing selective law enforcement); *see also* Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 436–50 (2003) (discussing how police consider various factors such as conduct, demeanor, age, race, sex, and place of residence when deciding whether to make stops, conduct searches, and issue summonses).

¹²⁷ *See, e.g.*, Wesley Lowery, *Holder Addresses Distrust of Police*, WASH. POST., Jan. 16, 2015, at A16; Christopher Moraff, *Police Unions Must Take Their Place on the Road to Reform or Risk Obsolescence*, PENNLIVE (Jan. 12, 2015), http://www.pennlive.com/opinion/2015/01/police_unions_must_take_their.html; Darlene Superville, *Obama: Mistrust of Police Corroding American Society*, HUFFINGTON POST (Sept. 28, 2014), http://www.huffingtonpost.com/2014/09/28/obama-police-mistrust_n_5895670.html.

¹²⁸ *See* BALKO, *supra* note 11, at 242 (discussing the militarization of police in the name of terrorism, and even for “mundane crimes” like regulatory violations); *see also* David A. Love, *The Militarization of the Police Is a Threat to Democracy*, THE PROGRESSIVE (Aug. 19, 2014), <http://www.progressive.org/news/2014/08/187826/militarization-police-threat-democracy>; Shirley Li, *The Evolution of Police Militarization in Ferguson and Beyond*, THE WIRE (Aug. 15, 2014), <http://www.thewire.com/national/2014/08/the-evolution-of-police-militarization-in-ferguson-and-beyond/376107/>.

¹²⁹ *See e.g.*, The Times Editorial Board, *Police Departments Should Reduce Their Military Supplies*, L.A. TIMES (Dec. 8, 2014), <http://www.latimes.com/opinion/editorials/lad-ed-militarizing-the-police-20141208-story.html>; Paul D. Shinkman, *Ferguson*

Most recently, this mentality has received national attention as the protests in Ferguson, Missouri, shockingly revealed to the nation just how prevalent and extreme police use of force against citizens has become.¹³⁰ In August 2014, protestors gathered on the streets of Ferguson in response to the death of Michael Brown, an unarmed 18-year-old black male who was killed by a police officer in the line of duty.¹³¹ During the protests, citizens were met with tanks, tear gas, rubber bullets, and a militarized police force.¹³² To the nation, this was shocking; to individuals familiar with programs such as 1033, this response was simply another demonstration of how the War on Drugs has only amplified the “us versus them” mentality seen in almost any kind of citizen-police interaction.¹³³ Consequently, events like Ferguson help substantiate the assertion that the

and the Militarization of Police, U.S. NEWS (Aug. 14, 2014), <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization>; Ilya Somin, *We Should Condemn Both Crimes Against Police and Crimes Committed by the Police Themselves*, WASH. POST (Dec. 23, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/23/we-should-condemn-both-crimes-against-police-and-crimes-committed-by-the-police-themselves/>; Dave Hodges, *Shoot First, Ask Questions Later! America's Growing Problem with Police Brutality*, THE COMMON SENSE SHOW (Dec. 6, 2014), <http://www.thecommonsenseshow.com/2014/12/06/shoot-first-ask-questions-later-americas-growing-problem-with-police-brutality/> (noting various examples throughout the United States).

¹³⁰ See Michael Shank & Hank Johnson, *Stop Treating America Like a War Zone*, U.S. NEWS (Aug. 22, 2014), <http://www.usnews.com/opinion/blogs/world-report/2014/08/22/ferguson-missouri-shows-police-militarization-in-america-must-end>; see also John Levs, *Ferguson Violence: Critics Rip Police Tactics, Use of Military Equipment*, CNN (Aug. 15, 2014), <http://www.cnn.com/2014/08/14/us/missouri-ferguson-police-tactics/>.

¹³¹ *Police Fire Tear Gas to Quell Protests of Michael Brown's Death*, NBC NEWS (Aug. 12, 2014), <http://www.nbcnews.com/storyline/michael-brown-shooting/police-fire-tear-gas- quell-protests-over-michael-browns-death-n178606> (providing a description and photos of the protests).

¹³² See *id.*

¹³³ See Howard Meitner, *Ferguson's Overlooked Ties to the War on Drugs*, HUFFINGTON POST (Aug. 23, 2014), http://www.huffingtonpost.com/howard-meitner/fergusons-overlooked-ties_b_5699334.html.

more police officers are trained to view citizens as the enemy, instead of as communities that they are expected to serve, the greater the tension will remain between the police and citizens.

3. THE SUPREME COURT

No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime. Even if [a Fourth Amendment] requirement does inconvenience the police to some extent. . . . It is merely a part of the price that our society must pay in order to preserve its freedom. . . . It is too early to know how much freedom America has lost today.¹³⁴

Over the last decade, the Court has consistently given police officers "fair leeway" to enforce the law for "the community's protection."¹³⁵ Still, these interests were often seen clashing with our Fourth Amendment right to remain free from "rash and unreasonable interferences with privacy and from unfounded charges of crimes,"¹³⁶ and thus the Supreme Court was tasked with ensuring an appropriate balance would be made between the two.

Unfortunately, however, the scale has weighed heavily in favor of law enforcement and the War on Drugs more often than not.¹³⁷

¹³⁴ California v. Acevedo, 500 U.S. 565, 601–02 (1991) (Stevens, J., dissenting).

¹³⁵ Brinegar v. United States, 338 U.S. 160, 176 (1949).

¹³⁶ *Id.*

¹³⁷ Although not all of the Court's decisions against Fourth Amendment rights have occurred as a result of the Court being a "loyal foot soldier in the Executive's fight against crime," most of them have. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419 (2011) (holding that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule because excluding such evidence imposes substantial social costs and fails to deter police misconduct); Herring v. United States, 555 U.S. 135 (2009) (holding that the exclusionary rule does not apply when police mistakes leading to unlawful searches result from isolated negligence attenuated from the search); Illinois v.

Caballes, 543 U.S. 405 (2005) (holding that a dog sniff performed during a traffic stop does not violate the Fourth Amendment because any interest in contraband cannot be deemed legitimate) (marijuana); *Ohio v. Robinette*, 519 U.S. 33 (1996) (finding that the Fourth Amendment does not require that a lawfully seized person know that he is “free to go” before a consent to search will be considered “voluntary”) (marijuana); *Whren v. United States*, 517 U.S. 806 (1993) (holding that temporarily detaining motorists when there is probable cause to believe that they violated the traffic laws does not violate the Fourth Amendment) (crack cocaine); *Florida v. Bostick*, 501 U.S. 429 (1991) (holding that the appropriate test in determining whether a police encounter with a civilian on a bus is a seizure is whether, under the totality of the circumstances surrounding the encounter, “a reasonable passenger would feel free to decline the officers’ requests or otherwise terminate the encounter”) (cocaine); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (concluding that a search premised on mistaken factual determinations of who possesses authority over the premises is “reasonable,” and thus does not implicate the Fourth Amendment) (cocaine); *Murray v. United States*, 487 U.S. 533 (1988) (holding that the exclusionary rule does not apply to evidence discovered during police officers’ initial illegal entry of a private property if the evidence is discovered during a later search pursuant to a valid warrant independent of the initial entry) (marijuana); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that a warrantless aerial search of a backyard within the curtilage of a home is not unreasonable under the Fourth Amendment) (marijuana); *California v. Carney*, 471 U.S. 386 (1985) (finding that a warrantless search of a defendant’s motor home does not violate the Fourth Amendment) (marijuana); *Oliver v. United States*, 466 U.S. 170 (1984) (holding that open fields are not “effects” within the meaning of the Fourth Amendment) (marijuana); *United States v. Leon*, 468 U.S. 897 (1984) (creating a “good faith exception” to the exclusionary rule because there is no deterrent value in preventing negligent mistakes); *Illinois v. Gates*, 462 U.S. 213 (1983) (adopting the “totality of the circumstances” approach for determining whether an informant’s tip establishes a fair probability that contraband or evidence of a crime will be found justifying the issuance of a warrant) (marijuana); *United States v. Place*, 462 U.S. 696 (1983) (holding that a “sniff test” by a well-trained narcotics detection dog does not constitute a search for purposes of the Fourth Amendment because it discloses only the presence or absence of drugs) (cocaine); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (concluding that the determination of whether a search was voluntary does not require that a person know of his right not to consent to a search); *United States v. Robinson*, 414 U.S. 218 (1973) (holding that the search of an arrestee’s person beyond frisking for weapons is reasonable, even where there is no reason to believe the arrestee committed any crime other than the traffic violation) (heroin); *see also* Finkelman, *supra* note 103, at 1411 (noting that “[b]ecause the war on drugs is primarily waged within the United States, the homefront and the battlefield are increasingly one and the same,” leading to dramatic changes in the law of search and seizure).

To reach these results, the Supreme Court will often perform a self-created “balancing” test—first introduced in *Terry v. Ohio*¹³⁸—that weighs an individual’s interest to remain free from unreasonable intrusions against law enforcement’s interest in not being unfairly constrained in their efforts to detect and help prosecute criminal activity. Tasked with making a judgment call about the interests at stake, the Court has often found that the government’s interest in fighting the War on Drugs weighs heavier than an individual’s right to privacy.¹³⁹ As a result, the Supreme Court’s War on Drugs has dealt one of the most significant blows on the Fourth Amendment.¹⁴⁰

Subsequently, these Supreme Court decisions have expanded police discretion and broadened the scope of tactics police departments can use to infringe on citizens. By approving constitutionally suspect police practices at a rapid rate for the last forty years or so, the Court has eroded the Fourth Amendment and placed individual liberties on a collision course with police, magnifying the effects of

¹³⁸ 392 U.S. 1, 20–21 (1968). The case cited by *Terry* in support of its balancing test, *Camara v. Municipal Court*, 387 U.S. 523, 534–35 (1967), was a “special needs” case (although not explicitly called such at the time) that allowed deviation from Fourth Amendment requirements because of a need (to inspect homes) that was distinct from ordinary law enforcement. *Terry*, however, was the first decision to apply the balancing test to allow for a deviation from the usual Fourth Amendment requirements merely for law enforcement “need.” See *Terry*, 392 U.S. at 20–21.

¹³⁹ See *supra* note 137 and accompanying text.

¹⁴⁰ See Finkelman, *supra* note 103, at 1410–11 (“As we might instinctively guess, the war on drugs has led to new interpretations of the Fourth Amendment and the rules for search and seizure.”); *Supreme Court’s Term*, 52 U.S.L.W. 3151 (Sept. 13, 1983) (noting that the Supreme Court’s term in 1982–1983 was distinguished “by the overwhelming importance of the Fourth Amendment in drug cases.”); Wisotsky, *supra* note 105, at 909–10; Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 23 (1986); Regnier, *supra* note 119 (discussing the effect the war on drugs has had on the Fourth Amendment).

an already tense relationship between citizens and a militarized police force.¹⁴¹ Worse yet, with each decision, the Supreme Court appears to remain blissfully ignorant of the consequences that their words will have on millions of citizens.¹⁴²

B. *From Heien and Beyond*

Heien v. North Carolina,¹⁴³ another case dealing with the War on Drugs,¹⁴⁴ is a perfect example of the expansion of police discretion at the expense of privacy rights, as this recent Supreme Court decision forfeited individuals' right to be free from unreasonable searches or seizures when they are engaged in completely legal behavior in the name of law enforcement efficiency.¹⁴⁵

In the specific context of traffic stops, however, the Supreme Court had already given police officers seemingly limitless discretion to detain "suspicious" or "nervous" travelers using any of the thousands of "lawful" pretextual reasons found in their local traffic

¹⁴¹ In addition to sanctioning countless police searches and seizures, the Supreme Court has also furnished police officers with flexible standards that help ensure police will always have the upper hand when questioned about the validity of a stop. *See supra* note 137. Additionally, because the Court has also failed to articulate clear boundaries and allowed police officers to draw inferences based on their own experiences when deciding whether a particular standard is satisfied, reviewing courts are often reluctant to second-guess police determinations. *See Goldberg, supra* note 22, at 805 (explaining that the inability to articulate a clear or precise standard seems to "contravene[] the purpose of the Fourth Amendment, which is to limit police discretion" and that "[a]lthough reasonableness is part of the standard, an undefined legal hurdle leads to variability in how much suspicion is deemed 'reasonable,' allowing for perhaps unjustified amounts of police discretion" to assess whether criminal activity is afoot); *see also* Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 *MISS. L.J.* 279, 318–20 (2004) (discussing the problems with the imprecise rules adopted by the Court in Fourth Amendment jurisprudence).

¹⁴² All except maybe Justice Sotomayor, who acknowledged that permitting mistakes of law to justify seizures would have inevitable "human consequences—including those for communities and for their relationships with the police." *Heien v. North Carolina*, No. 13-604, slip op. at 4 (Dec. 15, 2014) (Sotomayor, J., dissenting).

¹⁴³ *Id.* at 2.

¹⁴⁴ *Heien* was arrested and charged with attempted trafficking in cocaine. *Id.*

¹⁴⁵ *Id.*

code.¹⁴⁶ Most often, police officers used this discretion to search and seize individuals for violating a traffic law as a means of investigating other, more serious, criminal activities (often involving drugs), as to which no individual probable cause or even articulable suspicion existed.¹⁴⁷

Even before *Heien*,¹⁴⁸ however, this boundless police officer discretion came with “human consequences”¹⁴⁹ and the potential for

¹⁴⁶ See *Whren v. United States*, 517 U.S. 806, 818 (1996) (finding that although the “multitude of applicable traffic and equipment regulations” may in fact be “so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop,” the Court was “aware of no principle that would allow [them] to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.”); see also Transcript of Oral Argument at 33–34, *Heien v. North Carolina*, No. 13-604 (Oct. 6, 2014) (Justice Sotomayor noting that police officer in *Heien*’s case was not “stopping him because of the brake light.” Instead, the “police officer was involved in criminal interdictions and admitted that this was a pretext, a lawful pretext, he thought.”); Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001) (noting that “[e]very day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn the ignition key, you have subjected yourself to intense police scrutiny. So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.”); see also Brian J. O’Donnell, *Whren v. United States: An Abrupt End to the Debate over Pretextual Stops*, 49 ME. L. REV. 207, 231 (1997) (“When the traffic laws sweep so broadly that practically every driver can be stopped on any given day, and when the majority of citizens are subject to physical seizure by the police, more or less at the whim of every officer, something is wrong. . . . It seems fundamentally inconsistent with our notions of constitutional liberty that the state should have so much power over the individual. The problem is especially acute because this power is often used to target racial minorities.”).

¹⁴⁷ See Wayne R. LaFave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1852 (2004) (discussing this common police practice while noting that there is a “well-established police practice of using traffic stops to seek out drugs”).

¹⁴⁸ *Heien III*, No. 13-604, slip op. (Dec. 15, 2014).

¹⁴⁹ *Id.* at 4 (Sotomayor, J., dissenting).

abuse.¹⁵⁰ Specifically, police officers were given the power and discretion to selectively stop motorists unabatedly, provided that they observed a suspect committing one of the “multitude of applicable traffic and equipment regulations.”¹⁵¹

Heien asked the Court to further expand this police discretion by permitting police to search and seize individuals for completely legal behavior—a territory that most lower courts refused to traverse as they were already aware of the host of consequences that this would bring.¹⁵² Still, without so much of an acknowledgment that they were about to further erode the “Fourth Amendment’s protection of civil liberties in a context where that protection has already been worn down,” the *Heien* Court rejected the rationales raised by other courts and again weakened the Fourth Amendment’s protection of civil liberties by extending police discretion even further by allowing officers to search and seize individuals based on the officer’s subjective beliefs about the law.¹⁵³

To the Court, these unwarrantable interactions may be a small price to pay in the name of community safety. Unfortunately, however, the Court’s decision ignores the consequences of increasing the number of involuntary police-civilian interactions that allow police to use their power and discretion to treat the innocent people they are supposed to serve as suspect criminals—or rather, as the

¹⁵⁰ See, e.g., Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 332 (1994) (“The indeterminate nature of the standard makes it easy for police officers who stop someone for discriminatory reasons, or for no reason at all, to later justify the stop by articulating other benign reasons. Because courts are routinely deferential to law enforcement officers, an officer can point to many aspects of the suspect’s conduct and claim that in the totality of circumstances, he or she was justifiably suspicious.”).

¹⁵¹ *Whren v. United States*, 517 U.S. 806, 818 (1996).

¹⁵² See *supra* Section II.C (discussing cases holding that reasonable mistakes of law could not provide probable cause or reasonable suspicion).

¹⁵³ *Heien III*, No. 13-604, slip op. at 3 (Sotomayor, J., dissenting); see also *United States v. Lopez Valdez*, 178 F.3d 282, 289 (5th Cir. 1999) (“But if officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.”).

“enemy.”¹⁵⁴ *Heien* itself is particularly troubling as it now allows officers—guided by their own discretion—to lawlessly implant themselves in countless more citizens’ lives, most of whom are likely to be engaging in legal behavior. Worst of all, “[o]ne wonders how a citizen seeking to be law-abiding and to structure his or her behavior to avoid these invasive, frightening, and humiliating encounters could do so” as citizens can now be searched and seized for engaging in completely legal behavior.¹⁵⁵

When *Heien* is considered in the backdrop of years of Supreme Court cases expanding police power at the expense of individual rights,¹⁵⁶ one cannot help but consider whether Fourth Amendment jurisprudence has helped contribute to the current dichotomy between police officers and citizens by helping foster an “us versus them” mentality by tolerating, and perhaps encouraging, constitutionally suspect police behavior, often in the name of the War on Drugs. Importantly, however, we live in a society where we can no longer tolerate Supreme Court inaction—or rather, Supreme Court action favoring questionable and unrestricted police tactics. If the Fourth Amendment is to retain its meaning, and if the relationship between police and civilians is ever to be mended, it is vital that the Supreme Court recognize the dangers decisions such as *Heien* pose,

¹⁵⁴ See Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 548 (2001) (discussing how police encounters can undermine civility and trust between the government and citizens); see also *supra* Section IV.A.ii. (discussing how these involuntary interactions can be troubling for citizens as police interactions are often plagued by dangerous police abuses such as racial profiling, psychological intimidation, and selective enforcement of the law).

¹⁵⁵ *Heien III*, No. 13-604, slip op. at 4 (Sotomayor, J., dissenting); see also Logan, *supra* note 32, at 91–92 (“When the wrongfulness of behavior is not self-evident, the only recourse for citizens is to generally familiarize themselves with the broad array of laws contained in codes to avoid being ensnared by justice system insiders. Allowing police to use such laws to stop and arrest when the behavior in question does not actually come within their prohibitory scope, however, neutralizes even this basic planning possibility.”).

¹⁵⁶ See *supra* Section III.A.ii. (discussing backdrop of cases).

and also understand their constitutional role in protecting citizens from unnecessary and unreasonable government intrusions.¹⁵⁷

Accordingly, this will mean that the Court must actually honor the text of the Fourth Amendment and begin protecting innocent and peaceful citizens from violent, unforgiving, and unreasonable government interferences—even if this means that the Fourth Amendment requires the Court to limit the police in their fight on the War on Drugs to some extent. As Justice Stevens so pointedly observed, adherence to constitutional principles is imperative, and thus is “merely a part of the price that our society must pay in order to preserve its freedom.”¹⁵⁸

CONCLUSION

As events like Ferguson demonstrate, the “use of paramilitary weapons and tactics to conduct ordinary law enforcement—especially to wage the failed War on Drugs and most aggressively in communities of color—has no place in contemporary society.”¹⁵⁹ Nevertheless, as this Note discusses, the War on Drugs and subsequent militarization of the American police force is a widespread problem that is unlikely to subside any time soon without official interference. While change is necessary on every level, this Note aims to show why it is time for the Supreme Court to recognize and take responsibility for their role in creating a system of governmental abuse of fellow citizens, if we are ever to return to a society where constitutional rights are respected and police and citizens are ever to

¹⁵⁷ See Clifton B. Parker, *Militarized Policing is Counterproductive*, *Stanford Expert Says*, STANFORD REPORT (Aug. 27, 2014), <http://news.stanford.edu/news/2014/august/police-militarization-sklansky.html> (reiterating that the Fourth Amendment was meant to place a restriction on when the government can stop and question someone and when the government can invade privacy by searching a person, a vehicle, or a home).

¹⁵⁸ *California v. Acevedo*, 500 U.S. 565, 601–02 (1991) (Stevens, J., dissenting).

¹⁵⁹ ACLU FOUNDATION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* 45 (June 2014), <https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rell.pdf>.

work in harmony. By simply reading the Fourth Amendment without anti-drug-colored glasses, however, this does not seem inconceivable.