

VAGUENESS ATTACKS ON SEARCHES AND SEIZURES

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INTRODUCTION

The void-for-vagueness doctrine promises to promote the rule of law by ensuring that crimes are defined with sufficient definiteness to preclude indefensible and unpredictable applications. But the doctrine fails to fulfill that promise with respect to many low-level crimes. Those crimes are beyond the reach of the vagueness doctrine because they rarely, if ever, serve as the basis for charges in a criminal case that is seriously litigated.¹ It is not that these low-level crimes have no use. Police use them all the time to justify stops and arrests, which can lead to

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¹ See *infra* Part II.

searches that uncover evidence of more serious crimes. But when charges are brought for the more serious offenses, vagueness attacks have not been allowed when aimed at the low-level crimes on which the searches and seizures were predicated.²

The thinking has been that an officer does not violate the Fourth Amendment when making a good-faith search or seizure, supported by adequate individualized suspicion, for a suspected violation of a low-level crime not yet judicially invalidated at the time of arrest. The inquiry is primarily factual in the sense that it concerns only the information available to the officer at the time of arrest. That is, the arresting officer is not expected to speculate or anticipate that the law will be struck down in the future. If the fact of invalidation did not occur before the arrest, it cannot be used to undermine it.³

This rationale has obvious appeal. It makes sense not to expect officers to make legal determinations about the constitutional validity of a law before enforcing it; that task would seem better suited for judges. But application of the rule comes at a significant cost. Many of the low-level offenses used to justify stops and arrests perpetually evade judicial review.

Consider the following scenario: An officer arrests an individual pursuant to a city loitering ordinance that makes it unlawful for a person to refuse to identify himself at an officer's request. The officer conducts a search incident to arrest, which reveals a gun. The individual is later charged with being a felon in possession of a firearm. If the defendant were to move to suppress the gun on the ground that it was discovered during a search predicated on an ordinance that is unconstitutionally vague, the court would deny the motion without ever addressing the vagueness question; the court would conclude that it need not reach that question because the officer was entitled to rely on the ordinance, which had not been invalidated at the time of arrest. That conclusion leaves the low-level crime just as it was—unreviewed and available for future use by police. The same sequence can and does occur repeatedly, insulating low-level crimes from vagueness challenges.

This Article explores that problem and argues that a solution is hiding in plain sight. It challenges the notion that a defendant may not successfully lodge vagueness attacks on searches and seizures in light of

² See *Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979).

³ See *id.* at 37–38.

two Supreme Court decisions decided during the same Term—*Johnson v. United States*⁴ and *Heien v. North Carolina*.⁵ As I will explain, the two cases, especially *Heien*, lay the groundwork for solving the insulation problem just described.

The defect in many vague statutes is that they are so open-ended that they effectively allow the police to observe conduct, define the content of the crime to cover it, and then make an arrest based on probable cause that the arrestee committed the newly invented crime. That violates due process to the extent it permits officers to enforce a criminal statute in a way that is unexpected and indefensible in light of the text of the law being enforced and any relevant legal sources that bear on that text's interpretation.⁶

The Supreme Court's decision in *Heien* gives officers enforcing indefinite laws some leeway when applying them. Their interpretations of the laws may be mistaken so long as they are objectively reasonable. This inquiry is purely legal or analytical. The government must be able to point to something in the text of the law or other relevant sources that affirmatively supports the officer's interpretation; it may not simply note the absence of a judicial decision foreclosing the officer's view of the law. As Justice Kagan explained in her concurrence in *Heien*, the government must show that "a reasonable judge could [have] agree[d] with the officer's view" in light of the relevant legal sources.⁷

It follows that a mistaken interpretation is unreasonable—and therefore a Fourth Amendment violation—when no reasonable judge could have adopted it in light of the statutory text and available legal materials bearing on the meaning of that text. That is essentially the same claim made when a defendant argues that the law under which he was arrested is unconstitutionally vague—that the law was so open-ended that it permitted an officer to interpret and apply it in a way that was unpredictable and indefensible in light of the law that had been stated at the time. In this way, the framework of *Heien* opens the door to vagueness attacks on searches and seizures.

The Article proceeds in four Parts. Part I sets the table by describing the content of the vagueness doctrine, the proliferation of low-level crimes that followed the invalidation of vagrancy statutes on vagueness

⁴ 576 U.S. 591 (2015).

⁵ 574 U.S. 54 (2014).

⁶ See *infra* Section I.A.

⁷ *Heien*, 574 U.S. at 70 (Kagan, J., concurring).

grounds, and the longstanding rule that vagueness attacks may not be lodged successfully against laws serving merely as a basis for arrest. Part II explores the problem that longstanding rule has created, namely that countless low-level offenses are effectively insulated from judicial review on the vagueness question. Part III is the heart of the Article. It argues that *Johnson* and *Heien* provide the analytical architecture for successful vagueness attacks on searches and seizures in the context of a motion to suppress. Part IV then identifies potential obstacles to that theory—the prospect of narrowing constructions that cure otherwise vague statutes and the good-faith exception to the exclusionary rule—but argues that they can ultimately be overcome.

The result is a coherent and defensible theory for raising vagueness challenges in the context of a motion to suppress. Again, the primary benefit of this theory is to ensure that even low-level crimes are reviewed for constitutional vagueness. But the theory is broadly applicable. It can be used for vagueness attacks on any crime, low-level or not, on which a search or seizure is premised.

I. BACKGROUND

A. Vagueness Principles

The Supreme Court has repeatedly stated that a criminal law is unconstitutionally vague if it fails to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁸ Yet that standard, so stated, is of little help when determining whether a statute is in fact impermissibly vague.⁹

⁸ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393 (1926) (quoting *United States v. Capital Traction Co.*, 34 App. D.C. 592, 598 (1910)).

⁹ Most, if not all, statutes are indefinite in some manner. Ambiguity can afflict statutory terms in the sense that they are open to a discrete number of competing meanings. The term “blue,” for example, is ambiguous inasmuch as it refers sometimes to a color and sometimes to a mood. See Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 *Calif. L. Rev.* 509, 512 (1994). Statutory terms can also be vague in the sense that their boundaries are hard to define. Even when “blue” clearly refers to color, for instance, the term is still vague with respect to shades of color—that is, some shades of turquoise might be classified as blue or green, and some shades of lavender as blue or purple. *Id.* But that type of vagueness is typically permissible. Like ambiguity, it simply requires a court to set limits

Judges have long recognized that unconstitutional indefiniteness is “itself an indefinite concept.”¹⁰ And commentators have pointed out that the “fair notice” and “arbitrary enforcement” language of the vagueness doctrine furnishes “no yardstick of impermissible indeterminacy.”¹¹ It thus “does not provide a full and rational explanation of the case development in which it appears so prominently.”¹² More is needed to explain outcomes and guide future applications.

Anthony Amsterdam famously theorized that the vagueness doctrine is used in many cases in aid of substantive constitutional values—as “an insulating buffer zone” that protects “the peripheries of several of the Bill of Rights freedoms.”¹³ That theory was no doubt a great insight. But not all vagueness cases involve situations implicating Bill of Rights freedoms.¹⁴ In them, more is needed to explain the vagueness conclusions reached.

As Peter Low and I have explained,¹⁵ the application of the vagueness doctrine in these cases (and perhaps in the buffer-zone cases, too) is best understood as protecting two independent constitutional principles of criminal law: that “all crime must be based on conduct,” and that “there must be a defensible and predictable correlation between the established

through judicial construction. See *infra* Section IV.A. It is the statutes so vague that they cannot be—or have not been—construed in an acceptable manner that the vagueness doctrine addresses.

¹⁰ *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting); see also *Johnson v. United States*, 576 U.S. 591, 621 (2015) (Thomas, J., concurring in the judgment).

¹¹ John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 *Va. L. Rev.* 189, 196, 218 (1985). “The inquiry is evaluative rather than mechanistic; it calls for a judgment concerning not merely the degree of indeterminacy, but also the acceptability of indeterminacy in particular contexts.” *Id.* at 196.

¹² Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 *U. Pa. L. Rev.* 67, 74 (1960). Others have expressed a similar disappointment with the language of the vagueness doctrine. See, e.g., Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 *Am. J. Crim. L.* 279, 282 (2003); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 *Sup. Ct. Rev.* 141, 163; John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Law*, 80 *Denv. U. L. Rev.* 241, 243 (2002).

¹³ Amsterdam, *supra* note 12, at 75. The doctrine “was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation.” *Id.* at 74 n.38. In later years, the doctrine was used to protect free speech and other First Amendment values. *Id.* at 75 n.38.

¹⁴ Amsterdam himself acknowledged that some vagueness cases, such as *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), did not fit the buffer-zone theory, but he did not address this second category of vagueness cases in any detail. Amsterdam, *supra* note 12, at 85–86.

¹⁵ See generally Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 *Va. L. Rev.* 2051 (2015).

meaning of a criminal prohibition and the conduct to which it is applied.”¹⁶ The first principle, “the conduct requirement,” is a substantive limitation that prevents the definition of any crime from being “exclusively limited to the punishment of status, reputation, predilections, intentions, or predicted conduct.”¹⁷ The second principle, “the correlation requirement,” is a process limitation that concerns when and how the definition of a crime is implemented: it prevents courts from defining criminal conduct after the fact and prevents legislatures from delegating to police the power to define crimes.¹⁸

The Supreme Court has explicated both of these constitutional principles outside the context of the vagueness doctrine—the conduct requirement in *Robinson v. California*¹⁹ and the correlation requirement in *Bouie v. City of Columbia*.²⁰ The two principles nonetheless have immense explanatory power for modern vagueness cases. They in fact control—and should control—vagueness determinations.²¹

The correlation requirement warrants a bit more discussion because it is central to this Article’s thesis. It is rooted in the rule of law—i.e., the principle of legality²²—which ensures fair notice of what the law requires so people can organize their lives accordingly, and limits abuses of

¹⁶ *Id.* at 2053.

¹⁷ *Id.* at 2060. For a more elaborate discussion of the conduct requirement, see *id.* at 2060–64.

¹⁸ *Id.* at 2053–54.

¹⁹ 370 U.S. 660, 666–67 (1962).

²⁰ 378 U.S. 347, 352–54 (1964).

²¹ Low & Johnson, *supra* note 15, at 2053.

²² I use the terms “legality” and “rule of law” interchangeably in this Article, even though their meanings may technically differ. As Josh Bowers has observed, “the common convention” among scholars is “to conflate” the two terms. Josh Bowers, Annoy No Cop, 166 U. Pa. L. Rev. 129, 137 n.25 (2017); see, e.g., Jeffries, *supra* note 11, at 212 (linking the two concepts); Jeremy Waldron, The Concept and the Rule of Law, 43 Ga. L. Rev. 1, 10 (2008) (noting that “[s]ome theorists use the term *legality* or *principles of legality*” instead of the “*the Rule of Law*”). “If nothing else, the legality principle and the rule of law share the same liberal objectives.” Bowers, *supra*, at 137 n.25 (quoting Waldron, *supra*, at 6 (observing that the rule of law’s central premise is that “people in positions of authority” not be left to act upon “their own preferences, their own ideology, or their own individual sense of right and wrong”)); Ronald A. Cass, The Rule of Law in America 17 (2001) (explaining that the rule of law principally “helps assure that the processes of government, rather than the predilections of the individual decision maker, govern”); Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 668 (1984) (“[T]he rule of law is said to limit officials’ discretion and thereby to curb their potential arbitrariness. The rule of law reduces the danger that officials may indulge their self-interest or give vent in their decisions to personal animosities or prejudices.”).

official discretion.²³ As John Jeffries has explained, “[t]he rule of law signifies the constraint of arbitrariness in the exercise of government power” by guiding officials with precise rules, to the extent possible, for the sake of “regularity and evenhandedness in the administration of justice and accountability in the use of government power.”²⁴ The correlation requirement promotes the rule of law by preventing unfair surprise.²⁵ It requires that the definition of a crime be correlated to the facts of the situations to which it is applied, such that a particular application of the elements of the crime was predictable and defensible, *ex ante*, in light of the law’s text and any legal sources relevant to interpreting that text.²⁶

In most prosecutions, the correlation requirement is easily satisfied: statutory indeterminacy can generally be resolved by looking to the available legal sources, such as the law’s text, related laws, relevant precedent, legislative intent, any apparent legislative policy goals, and (depending on who you ask) legislative history. In light of these sources, it is usually easy to determine that the established facts predictably and defensibly fit the definition of the crime. But sometimes consulting the available legal sources reveals that the government seeks to enforce a law established after the defendant’s behavior occurred. That is, even a trained lawyer familiar with all of the relevant legal sources could not have predicted in advance that the definition of the relevant prohibition would encompass the defendant’s conduct.²⁷ It is these instances that are subject to a vagueness conclusion because they do not satisfy the correlation requirement.

²³ Herbert L. Packer, *The Limits of the Criminal Sanction* 84–85 (1968); see also H.L.A. Hart, *Punishment and Responsibility* 181–82 (1968) (explaining how a properly designed criminal law regime allows individuals “to predict and plan the future course of [their] lives within the coercive framework of the law . . . to foresee the times of the law’s interference”); Joseph Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law* 213–14 (2d ed. 2009) (“[T]he law must be capable of being obeyed . . . [I]t must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.” (emphasis omitted)).

²⁴ Jeffries, *supra* note 11, at 212; see also Packer, *supra* note 23, at 88–90 (describing how the principle of legality limits arbitrary state action).

²⁵ See Packer, *supra* note 23, at 86 (observing that the principle of legality protects against “unfair surprise”); Jeffries, *supra* note 11, at 216 (same); see also Richard J. Bonnie, Anne M. Coughlin, John C. Jeffries, Jr. & Peter W. Low, *Criminal Law* 81 (3d ed. 2010) (observing that the legality principle provides a “prophylaxis against the arbitrary and abusive exercise of discretion in the enforcement of the penal law”).

²⁶ Low & Johnson, *supra* note 15, at 2064–79.

²⁷ *Id.* at 2065.

*Bouie v. City of Columbia*²⁸ is the Supreme Court's clearest articulation of the correlation requirement. It involved defendants convicted of trespass for refusing to leave without being served during a sit-in demonstration at a restaurant inside a South Carolina drug store. The law at issue punished those who entered another's property after notice prohibiting entry. The defendants had not received such notice; they had simply refused to leave the store when asked.²⁹ Yet the South Carolina Supreme Court affirmed the convictions, construing the law to apply to trespassers who refused to leave when asked. The United States Supreme Court reversed on the ground that the State had punished the defendants "for conduct that was not criminal at the time they committed it," in violation of the due process requirement "that a criminal statute give fair warning of the conduct which it prohibits."³⁰

The concept of "fair warning," as used in *Bouie*, does not refer to whether the particular defendants subjectively would have been surprised or misled by a trespass conviction, or what they would have learned had they read the relevant legal sources before engaging in their conduct. It refers instead to an objective rule-of-law constraint on the power of courts to apply expansive constructions of statutes to past conduct. To be sure, courts always apply law to facts that have already occurred. But sometimes they go too far. Sometimes they manufacture a new legal principle that could not have been reasonably predicted based on previously stated law.³¹

That is precisely what the state court had done in *Bouie*. The Supreme Court announced a standard for distinguishing such excesses from the ordinary application of law to fact: "[i]f a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."³² A construction that fails this test—the correlation requirement—cannot be applied in pending litigation (though it can be adopted prospectively).³³

²⁸ 378 U.S. 347 (1964).

²⁹ *Id.* at 348–49.

³⁰ *Id.* at 350.

³¹ Low & Johnson, *supra* note 15, at 2067.

³² *Bouie*, 378 U.S. at 354 (emphasis added) (citations omitted) (quoting Jerome Hall, *General Principles of Criminal Law* 61 (2d ed. 1960)).

³³ Although some predicted that *Bouie* would be a one-off decision limited to the civil rights situation in which it arose, see, e.g., Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 *Sup. Ct. Rev.* 137, 140–41, that proved wrong. Nearly forty

It is intuitive that the correlation requirement constraining courts should also constrain the police by preventing “[l]aw by cop”—i.e., on-the-street invention and enforcement of new crimes.³⁴ Unlike courts, police do not interpret and apply law in an authoritative manner; they enforce the law as written, in accordance with constitutional limitations such as the Fourth Amendment requirement of probable cause to believe that a suspect is guilty of a particular previously-defined crime. That limitation would collapse if police were permitted to observe conduct, craft a crime that covers it, and then make an arrest based on probable cause that the arrestee committed the newly-invented crime.³⁵

That is essentially what happened in *Shuttlesworth v. City of Birmingham*,³⁶ a case in which a civil rights activist was arrested during a boycott of Birmingham department stores for failing to obey a police order to move on.³⁷ The police officer had observed Shuttlesworth standing on a sidewalk outside a department store. The officer asked him to move three times. When Shuttlesworth refused, he was arrested and convicted for violating a municipal ordinance making it “unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on.”³⁸ The Supreme Court deemed the literal language of that ordinance unconstitutionally vague because “[i]t ‘d[id] not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.’”³⁹

years later, in *Rogers v. Tennessee*, the Supreme Court unanimously embraced the *Bouie* standard. See 532 U.S. 451, 461 (2001) (majority opinion); *id.* at 467 (Stevens, J., dissenting) (not discussing *Bouie*); *id.* at 470–71 (Scalia, J., dissenting) (citing *Bouie*); *id.* at 482 (Breyer, J., dissenting) (citing *Bouie*). More recently, the Court applied *Bouie* when upholding a Michigan conviction in a federal habeas corpus proceeding. See *Metrish v. Lancaster*, 569 U.S. 351, 358–66 (2013).

³⁴ Low & Johnson, *supra* note 15, at 2074.

³⁵ *Id.* at 2075.

³⁶ 382 U.S. 87 (1965).

³⁷ *Id.* at 100–01 (Fortas, J., concurring) (explaining that on the date of the arrest, “the Negroes of Birmingham were engaged in a ‘selective buying campaign’—an attempted boycott—of Birmingham’s stores for the purpose of protesting discrimination against them”).

³⁸ *Id.* at 88 (majority opinion) (quoting Birmingham, Ala., General City Code § 1142).

³⁹ *Id.* at 90 (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (Black, J., concurring)). The Court went on to note that such discretion had an “ever-present potential for arbitrarily suppressing First Amendment liberties.” *Id.* at 90–91. That is the type of “buffer-zone” reasoning described by Amsterdam. See Amsterdam, *supra* note 12, at 75, 85. “Shuttlesworth was not speaking on a street corner or actively engaged in picketing. But the ordinance was struck down on its face because of its potential application in such a context and . . . because there was no law

The ordinance was infirm not because of the lack of precision in its language but because of the excessive authority it granted to police. Because the ordinance did not instruct officers *when* to exercise their authority, it enabled them to make their own decisions about when loitering would and would not be allowed.⁴⁰ The Court's decision to deny police the authority to write crimes on the street was, in effect, an application of *Bouie* to police behavior: police may not enforce an interpretation of a criminal statute that is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."⁴¹

A final aspect of applying the vagueness doctrine deserves mention. A court's conclusion that a law is impermissibly vague necessarily implies that the law does not lend itself to any reasonable narrowing interpretations that would cure the vagueness problem. If it were otherwise, the court would simply adopt the narrowing construction and avoid the vagueness issue.⁴² In *Skilling v. United States*,⁴³ for example, the Supreme Court construed the federal mail fraud statute narrowly by limiting its application to bribes and kickbacks in order to avoid

enforcement need to arm police with such open-ended authority . . ." Low & Johnson, *supra* note 15, at 2077–78. At bottom, however, "[t]he Court's references to the First Amendment . . . did no real work here. Or, in the alternative, they do all of the work all of the time." *Id.* at 2078. The law at issue "of course *could* be used to suppress First Amendment activity, but the same is true of *any* law that open-endedly authorizes police to make their own rules on the streets." *Id.* at 2078–79.

⁴⁰ Low & Johnson, *supra* note 15, at 2078.

⁴¹ *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (quoting Jerome Hall, *General Principles of Criminal Law* 61 (2d ed. 1960)).

⁴² A court's ability to construe a law narrowly to avoid a vagueness conclusion largely depends on the relationship between the source of the law and the court interpreting it. When a federal court is asked to interpret a federal law—or a state court is asked to interpret a state law—narrowing constructions that avoid a vagueness conclusion are fairly common. See Low & Johnson, *supra* note 15, at 2087.

But when a federal court is presented with a vagueness challenge to a state law, its options are more limited because of federalism concerns. The federal court is bound by any pre-existing state-court constructions. If state courts have construed the law in a way that does not cure the vagueness problem, the federal court may not read the state law in a different manner in order to avoid the vagueness conclusion. In *City of Chicago v. Morales*, for example, the United States Supreme Court addressed a loitering ordinance that, in the words of the Illinois Supreme Court, provided "absolute discretion to police officers to decide what activities constitute loitering." 527 U.S. 41, 61 (1999) (quoting *City of Chicago v. Morales*, 687 N.E.2d 53, 63 (Ill. 1997)). The Court had "no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court." *Id.*

⁴³ 561 U.S. 358 (2010).

vagueness concerns.⁴⁴ Such a scenario requires the court to come to an understanding of what the law means before determining whether it is vague. And the prospect of a vagueness conclusion on the latter question motivates the court to construe the law narrowly in the first instance. Sometimes, however, it proves impossible to cure vagueness through statutory construction.⁴⁵ In those circumstances, the vagueness conclusion implies that no reasonable interpretations are available to narrow the law in a way that avoids the vagueness problem.

And sometimes, the narrowing construction comes too late. In *Shuttlesworth*, for example, the Supreme Court noted that, in a separate case involving the same loitering ordinance, the Alabama Court of Appeals had narrowly construed the ordinance in a manner that cured the vagueness problem.⁴⁶ But that narrowing construction did not affect Shuttlesworth's conviction, the Court explained, because it was not announced by the state appellate court until two years after Shuttlesworth had been convicted, meaning the trial court in *Shuttlesworth* "was without guidance from any state appellate court as to the meaning of the ordinance."⁴⁷ There was thus real risk that Shuttlesworth was found guilty under "the literal" and "unconstitutional" language of the ordinance.⁴⁸

B. Application of the Vagueness Doctrine to Vagrancy Laws

The modern vagueness doctrine largely developed in the context of constitutional challenges to convictions under vagrancy and loitering laws that the police used to maintain order. In the 1960s, such laws criminalized a swath of ordinary street behavior so wide that police had "near[] total" authority to arrest and search anyone.⁴⁹ And "anyone" often

⁴⁴ Id. at 404; see also Low & Johnson, *supra* note 15, at 2087–92 (describing the *Skilling* rationale in more detail).

⁴⁵ See, e.g., the discussion of *Johnson v. United States* *infra* text accompanying notes 150–154.

⁴⁶ *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965).

⁴⁷ Id. at 91–92.

⁴⁸ Id. at 92.

⁴⁹ William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv. L. Rev. 842, 854–55 (2001). For a description of the breadth of the authority that classical vagrancy and loitering laws gave the police, see William O. Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960); Caleb Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603 (1956).

meant those in disfavored groups.⁵⁰ But in a series of cases, the Supreme Court invalidated convictions based on these open-ended laws on the ground that they were unconstitutionally vague.⁵¹ *Shuttlesworth* was one such case.⁵²

Papachristou v. City of Jacksonville was another. It involved convictions of several defendants under a fairly typical vagrancy ordinance.⁵³ The Supreme Court struck down that ordinance as unconstitutionally vague, relying on the traditional “fair notice” and “arbitrary enforcement” language of the vagueness doctrine.⁵⁴ But the conduct requirement and correlation requirement—which were present though never explicitly on display in the Court’s opinion⁵⁵—do a better job of explaining the result.

⁵⁰ See Shon Hopwood, Clarity in Criminal Law, 54 Am. Crim. L. Rev. 695, 705 (2017) (explaining how vagrancy, loitering, and other similar laws were used against the poor, racial minorities, and the gay community).

⁵¹ See Bowers, *supra* note 22, at 146. For a history of the constitutional transformation of vagrancy laws, see Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016).

⁵² See *supra* text accompanying notes 35–39; see also *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (deeming an open-ended law unconstitutionally vague).

⁵³ The city ordinance read:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972) (quoting Jacksonville, Miss., Ordinance Code § 26-57 (1965)).

⁵⁴ *Id.* at 162–65, 170. For more on the Court’s analysis, see Low & Johnson, *supra* note 15, at 2085–86.

⁵⁵ Low & Johnson, *supra* note 15, at 2084–85.

Indeed, Justice Douglas’s opinion contained four instances of the phrase “rule of law,” *Papachristou*, 405 U.S. at 162, 171, quoting language from an earlier opinion by Justice Frankfurter that had criticized another statute as “designedly avoid[ing]” “[d]efiniteness,” thereby “enabl[ing] men to be caught who are vaguely undesirable in the eyes of the police and prosecution,” adding that the law was “not fenced in by the text of the statute or by the subject matter.” *Id.* at 166 (quoting *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting)). Douglas viewed the ordinance as placing “unfettered discretion . . . in the hands of the Jacksonville police,” comparing it to a “direction by a legislature to the police to arrest all ‘suspicious’ persons.” *Id.* at 168–69.

The convictions of some of the defendants clearly violated the conduct requirement. One was charged with being a common thief, a charge “selected” simply because he was “reputed to be a thief.”⁵⁶ A second was charged with “vagrancy—common thief,” and two others were charged with “vagrancy—vagabonds.”⁵⁷ One of the charged vagabonds was acquitted because he “had no previous arrest record,” while the other was convicted, following “a tongue lashing about his character, his ‘open adultery,’ his ‘bastard children,’ his [prior] arrests, and his general demeanor.”⁵⁸ Each of these convictions clearly failed to satisfy the conduct requirement because no evidence in the record identified any contemporaneous conduct on which the convictions were based.⁵⁹

The convictions of four other defendants (two Black men and two White women) for “vagrancy—prowling by auto”⁶⁰ met the conduct requirement, but clearly violated the correlation requirement. The foursome had been driving together from a restaurant to a nightclub on a main thoroughfare. They were arrested after stopping near a used car lot that had been broken into on several occasions. On the night of arrest, however, there was no evidence of a break-in or any other illegal activity.⁶¹ These convictions violated the correlation requirement inasmuch as the term “vagrancy” is not self-executing and the ordinance did not even mention “prowling by auto.” Nor was there any effort to show that words in the text of the ordinance or other available legal sources interpreting its words could reasonably and predictably have been construed to prohibit the conduct in which the defendants had engaged. As in *Shuttlesworth*, the law was defective because it enabled police to invent a crime on the streets and then arrest people for committing it.⁶²

⁵⁶ Brief for Petitioners at 9, *Papachristou*, 405 U.S. 156 (No. 70-5030).

⁵⁷ *Id.* at 7, 9.

⁵⁸ *Id.* at 8.

⁵⁹ Low & Johnson, *supra* note 15, at 2083; see also Decker, *supra* note 12, at 340–41 (suggesting that the *Papachristou* Court’s vagueness ruling “reflected status criminality overtones”); Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 Rutgers L. Rev. 1289, 1308 (1999) (recognizing that the statute in *Papachristou* was problematic because it “criminalized status as such”); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 601 (1997) (noting that *Papachristou* could have been decided on the basis of the *Robinson* conduct requirement rather than the vagueness doctrine).

⁶⁰ Brief for Petitioners, *supra* note 56, at 5.

⁶¹ *Id.* at 6–7.

⁶² See Low & Johnson, *supra* note 15, at 2084.

One defendant from the first group was also charged with “vagrancy—loitering.” Brief for Petitioners, *supra* note 56, at 9. And the eighth defendant was charged with “vagrancy—

C. The Vagueness Doctrine and the Fourth Amendment

When the Supreme Court dismantled loitering and vagrancy laws in cases such as *Papachristou* and *Shuttlesworth*, police lost some of their “near[] total” authority to search and seize nearly anyone on the street.⁶³ Suddenly, order-maintenance policing became more costly in light of Fourth Amendment restrictions.⁶⁴ Those restrictions had always been present, but their costs had been offset by the indefinite vagrancy and loitering laws that made probable cause easy to establish. As Bill Stuntz explained, police authority vis-à-vis the Fourth Amendment expands and contracts along with the list of crimes on the books. Because “each new crime gives [police and prosecutors] another legally valid reason to search, arrest, and prosecute,”⁶⁵ legislatures have “ultimate control over the scope of police authority” insofar as they “define the list of crimes” that “answers the Fourth Amendment’s most important question: probable cause to believe what?”⁶⁶

In fact, the increased Fourth Amendment costs resulting from the loss of vagrancy and loitering laws appear to have spurred new legislation of low-level crimes.⁶⁷ In the decades following *Papachristou* and *Shuttlesworth*, state legislatures and city councils “recreate[d] the authority loitering and vagrancy laws once gave the police” by enacting a “wave of street disorder statutes—anti-cruising laws, anti-noise ordinances, curfews, loitering-with-intent statutes, anti-gang laws, and the like.”⁶⁸ These new low-level order-maintenance crimes do not tend to yield many prosecutions because that is not their goal. In general, they seek “not to define conduct that the state wishes to punish,” but to act as an expedient that gives officers “the same kind of authority” as the “old-style vagrancy and loitering laws.”⁶⁹ In short, these laws, coupled with

disorderly loitering on street” and “disorderly conduct—resisting arrest with violence.” *Id.* at 10. Each of those variations is subject to the same analysis because the ordinance does not mention any of these offenses, and there was no effort to construe any term in the ordinance to cover this behavior. See Low & Johnson, *supra* note 15, at 2084 n.133.

⁶³ Stuntz, *supra* note 49, at 854–55.

⁶⁴ *Id.* at 854.

⁶⁵ *Id.*; see also *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

⁶⁶ Stuntz, *supra* note 49, at 854.

⁶⁷ *Id.* at 854–55.

⁶⁸ *Id.* at 855.

⁶⁹ *Id.* at 853–55; see also Bowers, *supra* note 22, at 133, 157 n.126 (explaining that officers “have no shortage of public-order offenses from which to choose,” and that they now use these offenses in the same way they used vagrancy statutes—“to justify detention and interrogation of persons suspected of more serious crimes” (quoting Wayne R. LaFave, *Arrest: The*

Fourth Amendment precedents such as *Terry v. Ohio*,⁷⁰ effectively enable police officers to “search and seize whomever they wish.”⁷¹

Few prosecutions for these low-level crimes mean few opportunities for charged defendants to challenge them on vagueness grounds. The laws are used often as predicate offenses to justify stops and searches. But defendants have largely been unable to lodge vagueness challenges against them because such attacks on laws serving only as a basis for searches and seizures—and not for punishment—have generally been precluded by the Supreme Court’s decision in *Michigan v. DeFillippo* forty years ago.⁷²

In *DeFillippo*, the Supreme Court upheld an arrest made in good-faith reliance on an ordinance later declared unconstitutionally vague. Detroit police officers had received a call reporting two intoxicated persons in an alley. At the alley, the officers observed the defendant and a woman who was in the process of pulling down her pants. The officers asked what she was doing, and she stated that “she was about to relieve herself.”⁷³ The officers then asked the defendant for identification, and he asserted that he was a sergeant of the Detroit Police Department.⁷⁴ When asked a second time for identification, the defendant changed his answer, stating that he knew a sergeant in the department.⁷⁵ The officers arrested the defendant for failing to identify himself in accordance with a Detroit ordinance. That ordinance authorized police stops on the basis of “reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity” and made it unlawful for anyone so stopped “to refuse to identify himself, and to produce . . . evidence of such identification.”⁷⁶ The officers conducted a

Decision To Take a Suspect into Custody: The Report of the American Bar Foundation’s Survey of the Administration of Criminal Justice in the United States 87–88 (1965)).

⁷⁰ 392 U.S. 1 (1968). The stop-and-frisks authorized by *Terry* were originally intended to serve the needs of officer and public safety. *Id.* at 22–23. But officers now use stop-and-frisk authority as “a law-enforcement expedient” to “turn up evidence of crime,” something that is “quite useful in settings where conventional Fourth Amendment conduct rules would prohibit searches.” Bowers, *supra* note 22, at 177.

⁷¹ Stuntz, *supra* note 49, at 855.

⁷² 443 U.S. 31 (1979).

⁷³ *Id.* at 33.

⁷⁴ *Id.* The defendant also “purported to give his badge number, but the officer was unable to hear it.” *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 33 n.1 (quoting Detroit, Mich., Code of the City of Detroit § 39-1-52.3).

search incident to arrest and found marijuana and phencyclidine on his person.⁷⁷

The defendant was charged with drug possession. He moved to suppress the evidence on the ground that the ordinance under which he had been arrested was unconstitutionally vague. The trial court denied that motion, but on interlocutory appeal, the Michigan Court of Appeals remanded, holding that the arrest and subsequent search were invalid because the ordinance on which they were based was unconstitutionally vague.⁷⁸

The United States Supreme Court disagreed. The Court explained that the circumstances in the alley gave the officer “abundant probable cause” under the ordinance.⁷⁹ It then refused to walk back that conclusion on the ground that the officer “should have known the ordinance was invalid and would [later] be judicially declared unconstitutional.”⁸⁰ In doing so, the Court framed the issue solely as a factual question about the information available to the officer at the time of arrest.⁸¹ “A prudent officer,” the Court explained, should not be “required to anticipate that a court would later hold [an] ordinance unconstitutional” because “[p]olice are charged to enforce laws,” and “[t]he enactment of a law forecloses speculation by enforcement officers concerning its constitutionality” until it is judicially declared unconstitutional.⁸² In short, the Court reasoned that, from the officer’s perspective, the probable-cause question is a factual inquiry, and that a law’s status at the time of arrest is a data point like the sights and sounds at the scene of an investigation. If the fact of invalidation did not occur before the arrest, an officer’s good-faith reliance on the statute does not violate the Fourth Amendment.⁸³

⁷⁷ *Id.* at 34.

⁷⁸ *Id.*

⁷⁹ *Id.* at 37.

⁸⁰ *Id.*

⁸¹ *Id.* (“This Court repeatedly has explained that ‘probable cause’ to justify an arrest means facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”).

⁸² *Id.* at 37–38.

⁸³ The Court did, however, allude to a “possible exception” for laws “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” *Id.* at 38. But this appears to have been just a flipside articulation of the good-faith standard: officers who make searches or seizures in bad-faith reliance on statutes that are flagrantly unconstitutional violate the Fourth Amendment.

The Court equated its reasoning to that of *Pierson v. Ray*,⁸⁴ a decision concerning 42 U.S.C. § 1983. In that civil case, the plaintiffs sought damages from officers who had arrested them under a statute that was later declared unconstitutional. As described by the *DeFillippo* Court, the Supreme Court in *Pierson* held that “police action based on a presumptively valid law was subject to a valid defense of good faith,”⁸⁵ reasoning that a police officer should not be forced to “choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”⁸⁶

But as Justice Brennan noted in his dissent in *DeFillippo*,⁸⁷ the two cases differ in an important respect. Unlike in *Pierson*, the dispute in *DeFillippo* was “not between the arresting officers and [the defendant],” but “between [the defendant] and the State of Michigan.”⁸⁸ In Justice Brennan’s view, the State, unlike an officer defending himself against a civil action for damages, should not be allowed to absolve itself of unconstitutional conduct by pointing merely to an officer’s good faith, because the State is responsible not just “for the actions of its police,” but also “for the actions of its legislative bodies.”⁸⁹

The majority’s only apparent response to that point was that the sole purpose of the exclusionary rule is to deter “police” conduct, and that suppression of evidence discovered during a good-faith search premised on a law later declared unconstitutional would therefore provide no deterrent value.⁹⁰ That response might be persuasive if the *DeFillippo* Court had held that an arrest and search violated the Fourth Amendment when premised on an unconstitutionally vague statute but that the good-faith exception to the exclusionary rule prevented suppression of the evidence. But the Court did not say that. It clearly held that no Fourth Amendment violation had occurred in the first place, concluding that the

⁸⁴ 386 U.S. 547 (1967).

⁸⁵ *DeFillippo*, 443 U.S. at 38.

⁸⁶ *Id.* (quoting *Pierson*, 386 U.S. at 555).

⁸⁷ Justice Brennan’s dissent was joined by Justices Marshall and Stevens. *Id.* at 41 (Brennan, J., dissenting).

⁸⁸ *Id.* at 42.

⁸⁹ *Id.* at 43.

⁹⁰ *Id.* at 38 n.3 (majority opinion) (“The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the [defendant], was the product of a lawful arrest and a lawful search.”).

officer had probable cause in light of the facts available to him.⁹¹ In fact, at the time of *DeFillippo*, the Supreme Court had not yet articulated the good-faith exception to the exclusionary rule. The first good-faith-exception case, *United States v. Leon*,⁹² was not decided until five years later. And it was nearly a decade after *DeFillippo* when the Supreme Court held in *Illinois v. Krull* that the good-faith exception to the exclusionary rule applies when an officer relies in good faith on a statute later declared unconstitutional.⁹³

Four Justices—the three dissenting Justices and Justice Blackmun, in a concurrence—were attuned to another potential consequence of the Court’s holding. It could “allow States and municipalities to circumvent the probable-cause requirement of the Fourth Amendment” by using a low-level stop-and-identify law to make arrests and conducting searches incident to those arrests solely for the purpose of discovering contraband or other evidence of a crime.⁹⁴ If such evidence is discovered, the arrestee will be charged with a more serious offense; if not, the arrestee will be released. In these circumstances, Justice Blackmun explained, the law “could perpetually evade constitutional review” unless “the arrest for [its] violation” is “open to challenge.”⁹⁵ But Justice Blackmun dismissed this risk in the case before the Court because there was no evidence that the Detroit ordinance was being used in that way. And if in a future case evidence showed that such a law was being used in “a pretextual manner,” he explained, that “would suffice to rebut any claim that the police were acting in reasonable, good-faith reliance on the constitutionality of the ordinance,” and the arrestee then would be able to challenge the ordinance on a motion to suppress.⁹⁶

That analysis seems to assume that any pretextual use of low-level crimes in police investigations would be the product of only a few bad actors in a given locality. In fact, as already explained, it is a pervasive

⁹¹ In *Heien v. North Carolina*, the Supreme Court emphatically rejected a characterization of *DeFillippo* “as a case solely about the exclusionary rule, not the Fourth Amendment itself.” 564 U.S. 54, 64–65 (2014). It explained that *DeFillippo*’s “express holding” is “that the arrest was constitutionally valid because the officers had probable cause.” *Id.* at 65.

⁹² 468 U.S. 897 (1984).

⁹³ 480 U.S. 340, 349–50, 355 (1987).

⁹⁴ *DeFillippo*, 443 U.S. at 40–41 (Blackmun, J., concurring); see also *id.* at 45–46 (Brennan, J., dissenting).

⁹⁵ *Id.* at 40–41 (Blackmun, J., concurring).

⁹⁶ *Id.* at 41.

problem that has much more to do with the systemic incentives the Court's Fourth Amendment precedents have created.⁹⁷

II. VAGUE LAWS INSULATED FROM JUDICIAL REVIEW

Following *DeFillippo*, vagueness attacks on laws used to justify searches and seizures have generally failed.⁹⁸ And laws so challenged have generally evaded judicial review.

In *DeFillippo*, the Michigan Court of Appeals reached the substantive question concerning the constitutionality of the Detroit ordinance, and the Supreme Court seemed to assume that, going forward, the ordinance would be “regarded as null and void.”⁹⁹ But courts have not taken that approach in later cases. They generally have not addressed the constitutional vagueness question, often citing concerns about unnecessary “venture[s] into constitutional thickets.”¹⁰⁰ Instead, they have assumed, without deciding, that the law at issue is impermissibly vague, but then have denied the motion to suppress, relying on *DeFillippo*, *Krull*, or both.¹⁰¹ One state court of last resort has even

⁹⁷ See *supra* text accompanying notes 63–71.

⁹⁸ There are, however, some outlier cases. See, e.g., *In re Frank O.*, 247 Cal. Rptr. 655, 662–63 (Ct. App. 1988) (holding that a city curfew ordinance was “so grossly and flagrantly unconstitutional” that the officer should have seen its flaws (quoting *DeFillippo*, 443 U.S. at 38)).

In *State v. White*, the Supreme Court of Washington affirmed the suppression of evidence discovered pursuant to a search premised on a stop-and-identify statute that it deemed unconstitutionally vague. 640 P.2d 1061, 1066, 1072 (Wash. 1982) (en banc). The court reasoned that the statute was effectively an “unwarranted extension of the *Terry* stop,” and that permitting “the use of evidence obtained incident to an arrest under this statute . . . would allow the legislature to make an ‘end run’ around the Fourth Amendment.” *Id.* at 1069. Suspicious that the legislature had tried to do just that, the court pointed to a pattern of similarly-worded laws that had been struck down. *Id.* at 1069–70. It stated that “[t]he need for deterrence of such legislative conduct in the future is as essential as deterring unlawful police action.” *Id.* at 1070.

⁹⁹ *DeFillippo*, 443 U.S. at 45 (Brennan, J., dissenting).

¹⁰⁰ *United States v. Cardenas-Alatorre*, 485 F.3d 1111, 1112 (10th Cir. 2007) (Gorsuch, J.); see also *id.* at 1115 n.9 (“Our path in this case is consistent with our general wish to avoid, when possible, deciding constitutional questions and thereby overturn legislative enactments and etch in stone rules of law beyond the reach of most democratic process.” (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring))).

¹⁰¹ See, e.g., *Cardenas-Alatorre*, 485 F.3d at 1114–16; *United States v. Gregory*, 302 F.3d 805, 809 (8th Cir. 2002); *Bulfer v. Dobbins*, No. 09–CV–1250 JLS (POR), 2011 WL 530039, at *9 (S.D. Cal. Feb. 7, 2011); *United States v. Stewart*, No. CR–00–0698 PHX ROS, 2001 WL 194917, at *3–6 (D. Ariz. Feb. 26, 2001); *State v. Patrick*, 886 N.W.2d 681, 683–84 (N.D. 2016); *State v. De La Cruz*, 969 A.2d 413, 416–18 (N.H. 2009); *Feland v. State*, 142 S.W.3d 631, 633–34 (Ark. 2004); *State v. Sankovich*, No. 97–2313-CR, 1997 WL 784351, at *3–4

chastised a lower court for reaching the constitutional question, calling that analysis “purely hypothetical.”¹⁰²

The upshot is that meaningful judicial review of many low-level crimes is delayed or never occurs at all. Police can rely on these crimes, even if only as a pretext,¹⁰³ to justify arrests¹⁰⁴ accompanied by searches¹⁰⁵ that turn up evidence of more serious crimes. When courts decline to address vagueness attacks on the low-level crimes on which the search was based, those crimes remain on the books without having been reviewed. The same sequence can occur repeatedly so that the crimes perpetually evade judicial review.

In theory, any defendants *charged* with these low-level offenses could bring vagueness challenges. But again, few are prosecuted under these low-level crimes.¹⁰⁶ And those that are have little incentive to litigate the issue because the costs of doing so are typically greater than those of simply accepting the modest penalties these low-level crimes generally impose.¹⁰⁷ As one commentator has put it, “[f]ew” people “will litigate

(Wis. Ct. App. Dec. 23, 1997) (unpublished); *City of Kent v. Fuster*, No. 2003-P-0070, 2004 WL 1713575, at *3-4 (Ohio Ct. App. July 30, 2004).

¹⁰² *State v. Duheart*, 120 So. 3d 239, 240 (La. 2013).

¹⁰³ See *Whren v. United States*, 517 U.S. 806, 814-16 (1996).

¹⁰⁴ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

¹⁰⁵ *Chimel v. California*, 395 U.S. 752, 763-64 (1969).

¹⁰⁶ See *supra* text accompanying notes 69-71.

¹⁰⁷ For low-level crimes, as Malcom Feeley famously observed, “the process itself is the primary punishment.” Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* 199 (1979). These significant “process costs” include “pecuniary loss and inconvenience from missing work, as well as psychological harm caused by the pending trial and the prospect of conviction . . . [F]or many defendants, these process costs are greater than the potential penalty that would accompany a conviction.” Joel S. Johnson, *Benefits of Error in Criminal Justice*, 102 Va. L. Rev. 237, 263 (2016) (citing a 2013 study of defendants facing misdemeanor charges in the Bronx, New York). As Josh Bowers has explained:

Postarrest, a defendant often waits twenty-four or more hours to see a judge. If this first appearance results in no disposition, the judge may either set bail, remand the defendant, or release her on her own recognizance. If the defendant is released or pays bail, she must return to court multiple times. She faces public embarrassment, anxiety, possible legal fees and lost wages; she is also forced to deal with the opportunity costs of meeting with attorneys, helping prepare defenses, and attending mandatory court appearances where little often happens. For each appearance, she leaves home in the early morning, waits in long lines to pass through courthouse security, waits for her lawyer’s arrival, waits for the prosecution to procure its file, waits for the case to be called, waits for court personnel to serve her with postappearance papers, and finally returns home—often in the late afternoon.

Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117, 1132-33 (2008). “[P]rocess costs dominate” in “low-stakes cases,” and plea bargaining presents “a potential way out.” *Id.* at 1134. Indeed, “[t]he costs of pleading guilty may prove so comparatively low in minor cases

about the meaning of a traffic offense if the only thing at stake is paying a minor fine.”¹⁰⁸

Because these low-level offenses are generally state laws, the prospect of injunctive or declaratory relief in federal court does not solve the problem either. It is well settled that someone cannot ask a federal court to enjoin enforcement of a state criminal law unless there is a genuine threat that the person will be prosecuted under that law—and even then only when irreparable injury can be shown.¹⁰⁹ And if someone were to obtain a declaratory judgment from a lower federal court that a low-level offense is unconstitutionally vague, it is far from guaranteed that state officials and courts would honor it. There is a long history of state courts declining to follow such rulings by federal district courts and federal courts of appeals, based on the notion that it is the state courts’ prerogative to determine whether the statute can be construed in a manner that avoids constitutional defects, and that state courts are bound only by a Supreme Court ruling that a particular state offense is unconstitutionally vague.¹¹⁰

Low-level crimes can thus be used for many years without ever coming under meaningful judicial scrutiny. That is a problem to the extent these crimes are impermissibly vague because they likely afford police the same unbridled discretion that the old vagrancy laws gave them.

It may be, though, that many of these low-level crimes are not impermissibly vague. Perhaps legislatures learned their lesson from the invalidation of vagrancy laws and enacted a new wave of laws that, for the most part, pass muster.¹¹¹ But it cannot be said that *none* of the laws in this new wave is defective. Indeed, in 1999, the Supreme Court struck down as unconstitutionally vague Chicago’s gang-loitering

that pleading becomes a reasonable option *even before* assessing the real danger of trial conviction and subsequent sentence.” *Id.*

¹⁰⁸ Richard H. McAdams, *Close Enough for Government Work? Heien’s Less-Than-Reasonable Mistake of the Rule of Law*, 2015 *Sup. Ct. Rev.* 147, 177.

¹⁰⁹ *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979).

¹¹⁰ See Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 *Utah L. Rev.* 381, 429–32 (collecting examples).

¹¹¹ For an argument that vagueness principles should be used to hold in check expanded criminal codes even if the laws are not impermissibly vague in the traditional sense, see Carissa Byrne Hessick, *Vagueness Principles*, 48 *Ariz. St. L.J.* 1137, 1162–67 (2016).

ordinance¹¹²—a law more carefully crafted than the old vagrancy and loitering laws, but nevertheless impermissibly vague.¹¹³

Legislatures are not perfect. They can get sloppy with the pen—especially when making last-minute changes in language to appease a voting bloc needed to pass the law. And even when courts remind them of the substantive limits on crimes, as in *Papachristou* and *Shuttlesworth*, memories are short and personnel changes. More significantly, politics of the day can pressure legislatures to enact overly broad and indefinite laws aimed at solving particularly pernicious societal problems.¹¹⁴ What is worse, when it comes to a group of laws concerning similar subject matter, one bad apple spoils the bunch.¹¹⁵

More to the point, the fact that we are left to speculate about the constitutional status of so many low-level offenses demonstrates the magnitude of the insulation problem that *DeFillippo* has created. Not only does insulation from judicial review preclude a determination as to whether such laws are unconstitutionally vague, it also creates perverse incentives for the legislative and executive branches. The near guarantee of insulation allows legislatures to enact new low-level crimes without giving much thought to vagueness concerns, and it allows police to use their discretion to exploit the outermost limits of indefinite low-level crimes without any real threat that their exercise of that discretion will be meaningfully challenged.

Two cases concerning a single ordinance illustrate how the *DeFillippo* regime works to insulate a law from a vagueness challenge. At issue in

¹¹² *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

¹¹³ The Chicago ordinance authorized police to move along groups “remain[ing] in any one place with no apparent purpose” whenever one person in the group was “reasonably believe[d] to be a criminal street gang member.” *Id.* at 47 n.2.

¹¹⁴ In *Morales*, for example, Chicago enacted the gang loitering statute in response to a real public safety concern. As the state supreme court stated:

[G]ang members cause[d problems] by loitering in public. Witnesses testified how gang members loiter as part of a strategy to claim territory, recruit new members, and intimidate rival gangs and ordinary community residents. Testimony revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism.

City of Chicago v. Morales, 687 N.E.2d 53, 57–58 (Ill. 1997).

¹¹⁵ If, for example, a city has nine precisely crafted ordinances about pedestrian conduct on public sidewalks, but a tenth is overly broad and indefinite, the defect in the tenth trumps the virtue of the other nine. Even scores of precisely drawn laws cannot limit police discretion when one grants discretion that lacks meaningful constraints.

both cases was an Arlington County, Virginia, ordinance¹¹⁶ similar to the stop-and-identify ordinance challenged in *DeFillippo*,¹¹⁷ and to one that the Supreme Court struck down as unconstitutionally vague in *Kolender v. Lawson* in 1983.¹¹⁸ The Arlington County ordinance was enacted in 1968, but apparently, no court had been presented with a vagueness challenge to it until *United States v. LeFevre*.¹¹⁹

That case arose out of a February 1981 arrest. An Arlington County police officer approached LeFevre after observing him lick two rolling papers together while sitting on a wall near a bowling alley, next to a pack of pre-rolled commercial cigarettes. She reasonably surmised that he was preparing to roll a marijuana cigarette.¹²⁰ The officer asked LeFevre who he was and what he was doing, but he gave no answer. She asked once more for his name and reason for being there. He replied “why,” got off the wall, and began backing away from the officer. He then stated that he was not doing anything and wanted to be left alone. The officer arrested him under the stop-and-identify ordinance and conducted a search of his

¹¹⁶ Section 17-13 of the Arlington County Code is entitled “Peace and Good Order; Loitering.” Subsection (c) provides:

It shall be unlawful for any person at a public place or place open to the public to refuse to identify himself by name and address at the request of a uniformed police officer or of a properly identified police officer not in uniform, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification.

United States v. LeFevre, 685 F.2d 897, 898 (4th Cir. 1982) (quoting Arlington County, Va., Code § 17-13(c) (2015)); *Jones v. Commonwealth*, 334 S.E.2d 536, 539 (Va. 1985) (same).

¹¹⁷ Recall that the ordinance in *DeFillippo* authorized police stops on the basis of “reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity” and made it unlawful for anyone so stopped “to refuse to identify himself, and to produce . . . evidence of such identification.” 443 U.S. 31, 33–34 n.1 (1979) (quoting Detroit, Mich., Code of the City of Detroit § 39-1-52.3 (1976)).

¹¹⁸ The ordinance in *Kolender* provided that:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

461 U.S. 352, 353 n.1 (1983) (quoting Cal. Penal Code § 647(e) (West 1970)).

¹¹⁹ 685 F.2d 897 (4th Cir. 1982).

¹²⁰ As the court explained, although it was possible that the defendant was licking the papers for a tobacco cigarette, the “presence of a pack of commercial pre-rolled cigarettes” next to defendant “made that conclusion less likely.” *Id.* at 900. The court reasoned that this conduct, “taken alone, . . . would not have justified probable cause to arrest for possession of marijuana,” but that it did warrant a *Terry* stop. *Id.*

person, which revealed a loaded gun. LeFevre was charged with being a felon in possession of a firearm.¹²¹

The defendant moved to suppress the gun on the basis that the stop-and-identify ordinance was unconstitutional, noting that the language of the ordinance resembled that of an ordinance that had been struck down as vague in another jurisdiction.¹²² The district court denied that motion, and the Fourth Circuit affirmed. Citing *DeFillippo*, the Fourth Circuit reasoned that “a determination of the constitutionality of [the ordinance] need not be reached” because the officer “acted in good faith in her reliance on [its] validity.”¹²³ As a result, the stop-and-identify ordinance was not judicially reviewed and remained on the books for future use by the Arlington County Police Department.

One subsequent use led to the Supreme Court of Virginia’s decision in *Jones v. Commonwealth*.¹²⁴ Again, an Arlington County police officer made an arrest for a violation of the stop-and-identify ordinance. While searching the defendant incident to that arrest, the officer discovered heroin. The defendant was charged with possession of heroin with intent to distribute; he was convicted and sentenced to twenty years’ imprisonment for that offense.¹²⁵ On appeal, the defendant challenged the conviction on the ground that the heroin should have been suppressed because the stop-and-identify statute was unconstitutional. He apparently made several constitutional arguments about the validity of the ordinance, but the only one he properly preserved on appeal was that the ordinance violated the Fourth Amendment.¹²⁶ The Supreme Court of Virginia rejected that argument but left open the possibility that its conclusion about the validity of the ordinance may have been different if the defendant had brought a vagueness challenge rather than a Fourth Amendment challenge.¹²⁷

¹²¹ *Id.* at 898–99.

¹²² *Id.* at 901 (citing *Spring v. Caldwell*, 516 F. Supp. 1223 (S.D. Tex. 1981)).

¹²³ *Id.* at 901.

¹²⁴ 334 S.E.2d 536 (Va. 1985).

¹²⁵ *Id.* at 538–39. The defendant was also convicted of a misdemeanor for violating the stop-and-identify ordinance and was sentenced to thirty days’ confinement for that offense. *Id.*

¹²⁶ See *id.* at 538, 539 n.1.

¹²⁷ See *id.* at 540–41. The *Jones* court acknowledged that the United States Supreme Court had recently struck down a stop-and-identify statute in *Kolender*, but that it did so solely on “due process grounds” (i.e., vagueness) while rejecting a Fourth Amendment challenge. *Id.*

In any event, the court explained, the search would still have been valid under *DeFillippo*.¹²⁸ The court recognized that a constitutional challenge to the stop-and-identify ordinance had previously been brought in *LeFevre*.¹²⁹ But because the Fourth Circuit never decided that issue, the *Jones* court had no trouble finding it “abundantly clear” that the officer had acted in good-faith reliance upon the validity of the ordinance.¹³⁰ And so once again, the stop-and-identify ordinance remained unreviewed and available for future use by the Arlington County Police Department.

The sequence of cases involving the Arlington County stop-and-identify ordinance shows the serious problem created by the *DeFillippo* framework. Laws defining low-level crimes evade judicial review when challenged only in the context of a suppression motion. That leaves them just as they were before the vagueness attack—not reviewed and available for future use by police. The same sequence can and does occur repeatedly, thereby insulating these crimes from vagueness challenges. Indeed, the Arlington County stop-and-identify ordinance is still on the books.¹³¹ And it appears that no court has ever addressed its constitutionality.

III. A NEW PATH FOR ATTACKING SEARCHES AND SEIZURES ON VAGUENESS GROUNDS

The last Part described the insulation problem caused by the *DeFillippo* regime. This Part argues that a solution to that problem is hiding in plain sight. It challenges the notion that defendants may not successfully lodge vagueness attacks on searches and seizures in light of two recent Supreme Court decisions decided the same Term—*Johnson v. United States*¹³² and *Heien v. North Carolina*.¹³³ *Johnson* is significant because it makes clear that the vagueness doctrine may sometimes be used to invalidate statutes that are collateral to the question of the guilty conduct in the pending case—so long as the inquiry concerning such statutes is strictly legal or analytical.¹³⁴ *Heien*—a decision widely criticized for permitting Fourth

¹²⁸ *Id.* at 541–42.

¹²⁹ *Id.* at 542.

¹³⁰ *Id.*

¹³¹ Arlington County, Va., Code § 17-13(c) (2015).

¹³² 576 U.S. 591 (2015).

¹³³ 574 U.S. 54 (2014).

¹³⁴ See *Johnson*, 576 U.S. at 595. *Johnson* was not the first case in which the Court invalidated a law collateral to the question of guilty conduct in the pending case. See *Giaccio*

Amendment searches based on reasonable mistakes of law¹³⁵—is even more significant because it changes the nature of the suppression inquiry, opening the door to strictly legal challenges to an officer’s grounds for a search or seizure. Taken together, *Johnson* and *Heien* lay the groundwork for solving the insulation problem that *DeFillippo* created.

A. The Significance of Johnson

*Johnson*¹³⁶ concerned whether a prior state conviction for possession of a short-barreled shotgun,¹³⁷ along with two other prior convictions, required a heightened sentence for a subsequent federal conviction for possessing a firearm as a felon.¹³⁸ The normal sentence for a felon-in-possession conviction is ten years.¹³⁹ But because the trial judge concluded that Johnson had three prior convictions for a “violent felony” under Section 924(e)(2)(B) of the Armed Career Criminal Act (“ACCA”), he was sentenced to a mandatory minimum of fifteen years.¹⁴⁰ The ACCA defined a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that (i) “has as an element the use, attempted use, or threatened use of physical force against the person of another”; or (ii) “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹⁴¹ Two of Johnson’s prior convictions clearly met this definition, but his short-barreled shotgun conviction could qualify as a “violent felony” only if it fit the so-called “residual clause” of subsection (ii)—i.e., only if the offense for which he was convicted “otherwise involve[d] conduct that presents a serious potential risk of physical injury to another.”¹⁴²

v. Pennsylvania, 382 U.S. 399 (1966) (involving the standardless allocation of costs following misdemeanor acquittals). But the analysis in *Giaccio* left much to be desired. And *Johnson* is more significant in any event for the simple reason that it is much more recent.

¹³⁵ See *infra* text accompanying notes 179–196.

¹³⁶ The following summary of *Johnson* relies heavily on the fuller discussion of the case found in *Low & Johnson*, *supra* note 15, at 2102–15.

¹³⁷ See *United States v. Johnson*, 526 F. App’x 708, 709–10 (8th Cir. 2013).

¹³⁸ *Id.* at 709. Johnson pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). *Johnson*, 576 U.S. at 595.

¹³⁹ See 18 U.S.C. § 924(a)(2) (2018).

¹⁴⁰ *Johnson*, 526 F. App’x at 708–10. The ACCA raises the penalty for a violation of 18 U.S.C. § 922(g) to a minimum of 15 years and a maximum of life. 18 U.S.C. § 924(e)(1); see *Johnson*, 576 U.S. at 593.

¹⁴¹ 18 U.S.C. § 924(e)(2)(B) (2012).

¹⁴² 18 U.S.C. § 924(e)(2)(B) (2012); *Johnson*, 576 U.S. at 594–95.

The facts giving rise to Johnson’s conviction would seem to suggest that the circumstances of his shotgun possession created a serious potential risk of physical injury to another person.¹⁴³ But those facts could not be considered because of a prior precedent. In *Taylor v. United States*,¹⁴⁴ the Supreme Court had instructed courts to take a “categorical approach” in determining whether a crime counts as a “violent felony” under Subsection (B)(ii).¹⁴⁵ Under the categorical approach, a court may “look only to . . . the statutory definition of the prior offense” for which the defendant was convicted.¹⁴⁶ It may not “delv[e] into particular facts disclosed by the record of conviction.”¹⁴⁷ As the *Johnson* Court put it, a court must “assess[] whether a crime qualifies as a violent felony ‘in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.’”¹⁴⁸

¹⁴³ He possessed the weapon during a drug sale in a public parking lot, where innocent bystanders easily could have been harmed. As Justice Alito argued in his *Johnson* dissent, “[d]rugs and guns are never a safe combination,” the nature of the gun “elevated the risk of collateral damage,” and the location of the crime in a public parking lot “significantly increased the chance that innocent bystanders” would be harmed. *Johnson*, 576 U.S. at 642 (Alito, J., dissenting).

¹⁴⁴ 495 U.S. 575 (1990).

¹⁴⁵ See *id.* at 599–602. At issue in *Taylor* was how to define the term “burglary” as used in Subsection (B)(ii). The Supreme Court held unanimously that the term must be defined in the “generic sense in which [it] is now used in the criminal codes of most States.” *Id.* at 598. The Court then listed the elements that state burglary offenses must contain to qualify for an ACCA sentencing enhancement. *Id.* at 598–99.

¹⁴⁶ *Id.* at 602.

¹⁴⁷ *Shepard v. United States*, 544 U.S. 13, 17 (2005) (citing *Taylor*, 495 U.S. at 602).

¹⁴⁸ 576 U.S. at 596 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)).

In some circumstances, sentencing courts may apply a “modified categorical approach” to crimes that are “divisible” insofar as they set out elements in the alternative and thus create multiple versions of the crime, and under this approach, courts may look beyond the statutory text and consult a limited set of documents in the record in order to determine the crime charged. See *Descamps v. United States*, 570 U.S. 254, 260–61 (2013). Relevant documents include the “charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.” *Johnson v. United States*, 559 U.S. 133, 144 (2010) (citations omitted).

The categorical approach is a judicially devised mode of analysis that ensures that defendants are not punished for facts not found beyond a reasonable doubt by a jury. See *Descamps*, 570 U.S. at 269. The *Taylor* Court justified the approach on the basis of statutory text, legislative history, and the practical difficulty of re-trying the factual basis for a prior conviction in subsequent sentencing proceedings—particularly if the prior conviction resulted from a guilty plea. 495 U.S. at 600–02. The Court has more recently explained that the categorical approach ensures compliance with *Apprendi v. New Jersey*. *Shepard*, 544 U.S. at 24–26. *Apprendi* held that “[o]ther than the fact of a prior conviction, any fact that increases

Application of the categorical approach meant that the circumstances of Johnson's possession of the short-barreled shotgun were irrelevant in determining whether his prior conviction for that offense constituted a "violent felony" under the residual clause. The inquiry was purely legal. It asked whether the elements of the state offense for simple possession necessarily describe conduct "that presents a serious potential risk of physical injury to another."¹⁴⁹ Johnson argued that this legal question could not fairly be answered because the "residual clause" was unconstitutionally vague.

The Court agreed. Justice Scalia's opinion for the Court explained why the residual clause posed a problem within the framework of the categorical approach.¹⁵⁰ Justice Alito argued in his dissent the vagueness problem could be cured simply by abandoning the categorical approach for residual clause issues.¹⁵¹ Regardless of the merits of his argument, Justice Alito was surely correct that the categorical approach was the lynchpin for a successful vagueness challenge. Without it, the problems

the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000).

¹⁴⁹ 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

¹⁵⁰ *Johnson*, 576 U.S. at 596–98.

¹⁵¹ In Justice Alito's view, "the reasons that persuaded the Court to adopt the categorical approach in *Taylor* either do not apply or have much less force in residual clause cases." *Id.* at 633 (Alito, J., dissenting). He observed that the text of the residual clause refers to "conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii) (2012) (emphasis added), and argued that "conduct" should be understood to mean "things done during the commission of an offense that are not part of the elements needed for conviction." *Id.* at 632. And "[b]ecause those extra actions vary from case to case," Justice Alito thought it "natural" to construe "conduct" as referring to "real-world conduct, not the conduct involved in some Platonic ideal of the offense." *Id.*

Justice Alito also noted that standards like the one contained in the residual clause "almost always appear in laws" calling for decisions by triers of fact and that the difficulty in applying the categorical approach suggests that it may not be what Congress intended. *Id.* at 632–33. And to the extent practical considerations justify the categorical approach, Justice Alito argued that the difficulty of recreating at sentencing the factual context of a crime committed years before would burden the prosecutor, not the defendant, and therefore would not increase the unfairness of the situation. *Id.* at 634–35. Finally, he acknowledged that a fact-specific approach may involve *Apprendi* concerns, but argued that those concerns could be addressed by other means. See *id.* at 635.

The majority defended the categorical approach on three grounds. First, the government had not asked the Court to abandon it. Second, the ACCA referred to three prior "convictions," not three prior felonies—suggesting that Congress meant to refer only to the fact of a conviction, not the facts underlying it. Third, it is impractical to require a sentencing court to recreate the facts that led to a prior conviction long after the event, particularly when the conviction resulted from a guilty plea. *Id.* at 604–05 (majority opinion).

of articulating a predictable and defensible standard vanish: the *Johnson* majority would have upheld the residual clause if it had involved a fact-specific inquiry.¹⁵²

The centrality of the categorical approach to the vagueness conclusion in *Johnson* is significant here for two reasons. First, it means that the residual clause's demise was a function not just of the statutory language Congress enacted, but also of the Supreme Court's interpretation of that language. The Court's own "handiwork"¹⁵³ in its prior categorical-approach decisions backed it into a corner. Those decisions may be correct as a matter of statutory interpretation, but they amount to judicial handiwork nonetheless. And they had the effect of taking options off the table when it came time for the Court to construe the residual clause. That made it significantly harder—indeed, impossible—for the Court to adopt a viable narrowing construction of the residual clause to avoid striking it down as unconstitutionally vague.¹⁵⁴

Second, the categorical approach changed the nature of determinations under the ACCA. Most questions about prior crimes are posed in the context of sentencing, and they are questions of fact that seek to determine the appropriate degree of punishment a particular defendant should receive: What is the defendant's character and background? What did the defendant do before, during, and after the commission of the crime? What length of sentence is necessary for adequate specific and general deterrence? Answering these questions generally requires testimonial and other evidence during a sentencing hearing. Sentencing judges necessarily "exercise broad discretion" when assessing that evidence and "imposing a sentence within a statutory range."¹⁵⁵ Sentencing decisions thus have not traditionally been subject to the same rule-of-law requirements that apply to the elements of a crime.¹⁵⁶ But that is not so when it comes to the ACCA. In a post-*Apprendi*¹⁵⁷ world, the ACCA

¹⁵² See id. at 631 (Alito, J., dissenting).

¹⁵³ Id.

¹⁵⁴ For a discussion of how courts often adopt narrow constructions to avoid a vagueness conclusion, see supra note 42.

¹⁵⁵ *United States v. Booker*, 543 U.S. 220, 233 (2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000)); *Williams v. New York*, 337 U.S. 241, 246 (1949).

¹⁵⁶ See Low & Johnson, supra note 15, at 2112–14.

¹⁵⁷ As already noted, see supra note 148, *Apprendi v. New Jersey* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000).

provision functions as an element of the crime; the categorical approach mandates that the inquiry as to that element be purely legal. In doing so, the categorical approach creates the conditions necessary for a defendant to bring a rule-of-law challenge, such as a facial vagueness attack against a statutory provision that has nothing to do with the conduct serving as the basis for the charges.¹⁵⁸

B. Heien-Based Vagueness Attacks on Searches and Seizures

The Supreme Court's decision in *Heien* can serve a similar function in the context of suppression motions. Just as *Taylor* did with the categorical approach, *Heien* ushered in a new framework for evaluating searches and seizures that is purely legal, rather than factual. It requires that any "mistake of law" made by an officer be reasonable by reference to text of the relevant statute in light of any judicial interpretations of that text. That framework opens the door to legal challenges based on the vagueness doctrine in the context of motions to suppress,¹⁵⁹ because pure questions of law must be answered in accordance with the rule of law whether or not they concern the conduct on which the charges are based.

1. The Supreme Court's Decision in *Heien*

Heien arose from a traffic stop. A North Carolina police officer pulled over a vehicle with one broken brake light, which the officer believed to be a violation of a state statute providing that a vehicle must be "equipped with a stop lamp on the rear of the vehicle. The stop lamp . . . shall be actuated upon application of the service (foot) brake. The stop lamp may

¹⁵⁸ Another aspect of *Johnson* deserves mention. The Court rejected language from prior vagueness cases that had suggested that "a vague provision is constitutional" so long as "there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602. In doing so, the Court made clear that a statute need not be impermissibly vague "in all applications" to be struck down. *Id.* at 603. That is significant because it likely "make[s] it easier for [all] criminal defendants"—not just those attacking searches and seizures—"to prevail on vagueness challenges in future cases." Carissa Byrne Hessick, *Johnson v. United States* and the Future of the Void-for-Vagueness Doctrine, 10 N.Y.U. J.L. & Liberty 152, 159–60 (2016).

¹⁵⁹ Cf. Lael Weinberger, Comment, Making Mistakes About the Law: Police Mistakes of Law Between Qualified Immunity and Lenity, 84 U. Chi. L. Rev. 1561, 1599 (2017) ("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.").

be incorporated into a unit with one or more other rear lamps.”¹⁶⁰ At the time of the stop, the statute was “several decades” old and retained “an antiquated definition of a stop lamp, not reflecting actual vehicle equipment now included in most automobiles.”¹⁶¹ Despite its age, the traffic law “had not been authoritatively construed” at the time of the stop¹⁶² (likely because it had never been seriously litigated).¹⁶³

Heien owned the vehicle but was not driving it. He was lying down with a blanket across the back seat.¹⁶⁴ That oddity and the fact that the driver seemed nervous prompted the officer to ask further questions of the two individuals separately. After they provided conflicting information about their destination, the officer obtained their consent to search the vehicle and found cocaine.¹⁶⁵

Heien was arrested and charged with attempted cocaine trafficking. He moved to suppress the evidence found in the car on the ground that it was the fruit of unlawful stop and search. The trial court concluded that the faulty brake light had given the officer reasonable suspicion to initiate the stop and that Heien’s subsequent consent to the search was valid. The North Carolina Court of Appeals reversed, holding that the initial stop for a single broken brake light was not valid because the state statute, properly construed, required only one working brake light inasmuch as it repeatedly referred to “a stop lamp” and “[t]he stop lamp” in the singular. On that basis, the court concluded that the stop violated the Fourth Amendment.¹⁶⁶

A divided North Carolina Supreme Court reversed. Because the State did not seek review of the Court of Appeals’ construction of the brake-light statute, the North Carolina Supreme Court assumed it to be correct. It nonetheless found no Fourth Amendment violation, on the ground that the officer could reasonably have read the statute to require two working stop lamps—especially in light of a nearby statutory provision requiring

¹⁶⁰ *Heien v. North Carolina*, 574 U.S. 54, 59 (2014) (quoting N.C. Gen. Stat. § 20-129(g) (2007)).

¹⁶¹ *State v. Heien* 714 S.E.2d 827, 831 (N.C. Ct. App. 2011).

¹⁶² Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Heien*, 574 U.S. 54 (No. 13-604) [hereinafter United States’ Amicus Brief].

¹⁶³ See *supra* Part II.

¹⁶⁴ *State v. Heien*, 741 S.E.2d 1, 4–5 (N.C. Ct. App. 2013).

¹⁶⁵ *Heien*, 574 U.S. at 58.

¹⁶⁶ *Heien*, 714 S.E.2d at 829–831; *Heien*, 574 U.S. at 58.

that “all originally equipped rear lamps” be functional.¹⁶⁷ The dissent raised concerns that the decision opened the door to “less innocuous” police misinterpretations of law and effectively created “the functional equivalent” of a good-faith exception to the exclusionary rule, which the North Carolina Supreme Court had previously rejected.¹⁶⁸

The United States Supreme Court affirmed. Writing for an overwhelming majority, Chief Justice Roberts began the opinion with the familiar refrain that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’”¹⁶⁹ and that “[t]o be reasonable is not to be perfect.”¹⁷⁰ For that reason, he explained, searches and seizures premised on reasonable mistakes of fact had long been upheld.¹⁷¹ The Court reasoned that “reasonable men make mistakes of law, too,” and that “such mistakes are no less compatible” with the Fourth Amendment.¹⁷² Because the individualized suspicion¹⁷³ needed for a search or seizure “arises from the combination of an officer’s understanding of the facts and his understanding of the relevant law,” he “may be reasonably mistaken on either ground.”¹⁷⁴ Either way, “the result is the same: The facts are outside the scope of the law.”¹⁷⁵

The Court had “little difficulty” concluding that the North Carolina officer’s mistake of law was reasonable.¹⁷⁶ It noted that the relevant statutory provisions used both singular and plural forms of the word “lamp,”¹⁷⁷ that the appellate court’s construction of the statute was “surprising” even to the dissent in the North Carolina Supreme Court,¹⁷⁸

¹⁶⁷ *State v. Heien*, 737 S.E.2d 351, 354, 358–59 (N.C. 2012) (quoting N.C. Gen. Stat. § 20-129(d)).

¹⁶⁸ *Id.* at 360–61 (Hudson, J., dissenting).

¹⁶⁹ *Heien*, 574 U.S. at 60 (quoting *Riley v. California*, 573 U.S. 373, 381 (2014)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 61 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 183–86 (1990); *Hill v. California*, 401 U.S. 797, 802–05 (1971)).

¹⁷² *Id.*

¹⁷³ The Court focused on reasonable mistakes of law in the context of a reasonable-suspicion determination because that was the issue before it. See *id.* at 60. There is little reason to think that the result would have been any different if a probable-cause determination had been at issue.

¹⁷⁴ *Id.* at 61.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 67.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 68 (quoting *State v. Heien*, 737 S.E.2d 351, 359 (N.C. 2012) (Hudson, J., dissenting)).

and that the stop-lamp provision had not previously been construed by a North Carolina appellate court.¹⁷⁹

The Court grounded its reasonable-mistake-of-law rule in a line of nineteenth-century cases involving federal customs statutes requiring “reasonable cause” (which the Court deemed synonymous with probable cause).¹⁸⁰ Chief Justice John Marshall wrote in one of those cases that “[a] doubt as to the true construction of” the substantive law on which a seizure was based “is as reasonable a cause for seizure as a doubt respecting the fact.”¹⁸¹

The Court also addressed *DeFillippo*. After summarizing the case, the Court characterized its conclusion as follows: “the officers’ assumption that the [Detroit ordinance] was valid was reasonable, and their observations gave them ‘abundant probable cause’ to arrest DeFillippo.”¹⁸² It then made clear that *DeFillippo*—like *Heien*—was not “an exclusionary rule decision” applying a good-faith exception to that rule, but was instead about the “antecedent question” whether there was a Fourth Amendment violation in the first place.¹⁸³

Justice Kagan wrote a concurring opinion, joined by Justice Ginsburg. Although Justice Kagan agreed with the result, she made clear that this

¹⁷⁹ *Id.* (citing *Heien*, 737 S.E.2d at 359 (majority opinion)). Some criminal law scholars argue that any distinction between mistakes of fact and mistakes of law is “illusory.” I.H.E. Patient, *Mistake of Law—A Mistake?*, 51 J. Crim. L. 326, 326 (1987); see also Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591, 631 (1981) (describing the distinction as “nonsensical without considerable interpretive construction”). But others maintain that there is an “important and coherent” difference between the two, Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 Ohio St. J. Crim. L. 487, 494 (2012), because, although what the law provides is, in a certain sense, itself a question of fact, Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles*, 12 Law & Phil. 33, 37 (1993), “nonlegal ‘facts’” differ from “legal ‘facts,’” Kenneth W. Simons, *Mistake of Fact or Mistake of Criminal Law? Explaining and Defending the Distinction*, 3 Crim. L. & Phil. 213, 221 (2009). Mistakes concerning nonlegal facts involve “misperceptions of the world”; mistakes of legal facts arise from “false belief[s] about the enactment or abolition of a legal norm.” George P. Fletcher, *Rethinking Criminal Law* § 9.1.1, at 686 (1978).

¹⁸⁰ *Heien*, 574 U.S. at 62–63 (quoting Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695–96) (citing *Stacey v. Emery*, 97 U.S. 642, 646 (1878); *United States v. Riddle*, 9 U.S. (5 Cranch) 311 (1809); *The Friendship*, 9 F. Cas. 825, 826 (C.C.D. Mass. 1812) (No. 5,125); *United States v. The Reindeer*, 27 F. Cas. 758, 768 (C.C.D.R.I. 1848) (No. 16,145); *United States v. The Recorder*, 27 F. Cas. 723 (C.C.S.D.N.Y. 1849) (No. 16,130); *The La Manche*, 14 F. Cas. 965, 972 (D. Mass. 1863) (No. 8,004)).

¹⁸¹ *Heien*, 574 U.S. at 62 (quoting *Riddle*, 9 U.S. (5 Cranch) at 313).

¹⁸² *Id.* at 64 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)).

¹⁸³ *Id.* at 64–66.

was an “exceedingly rare” case¹⁸⁴ in which a “genuinely ambiguous” statutory provision could support a conclusion that a mistake of law was reasonable.¹⁸⁵ She also explicated the contours of the reasonable-mistake-of-law rule for future applications.¹⁸⁶

Justice Sotomayor argued in a dissenting opinion that forgiving police mistakes of law “[d]epart[ed] from . . . tradition” and “significantly expand[ed] [police] authority” to subject innocent persons to intrusive and pretextual stops.¹⁸⁷ In her view, the majority’s “reasonableness as touchstone” maxim “simply sets the standard” for assessing the constitutionality of police intrusion—not for determining whether an officer’s “understanding of the law” is a relevant “input into the reasonableness inquiry.”¹⁸⁸ It “requires evaluating an officer’s understanding of the facts against the *actual* state of the law.”¹⁸⁹

Like Justice Sotomayor, commentators have criticized the decision in *Heien* on a number of fronts. They have faulted the Court for relying primarily on nineteenth-century cases that did not even involve the Fourth Amendment,¹⁹⁰ and for reaching an “asymmetrical[]” result that allows police leeway in interpreting statutes while leaving citizens subject to the longstanding maxim that ignorance of the law is no excuse.¹⁹¹ They have warned that the decision expands opportunities for law enforcement

¹⁸⁴ *Id.* at 70 (Kagan, J., concurring) (quoting Brief for Respondent at 17, *Heien*, 574 U.S. 54 (No. 13-604)); Transcript of Oral Argument at 48, *Heien*, 574 U.S. 54 (No. 13-604).

¹⁸⁵ *Heien*, 574 U.S. at 70 (Kagan, J., concurring).

¹⁸⁶ See *infra* text accompanying notes 203–204.

¹⁸⁷ *Heien*, 574 U.S. at 73–74 (Sotomayor, J., dissenting).

¹⁸⁸ *Id.* at 71.

¹⁸⁹ *Id.* (emphasis added).

¹⁹⁰ Kit Kinports, *Heien’s Mistake of Law*, 68 Ala. L. Rev. 121, 154 (2016).

¹⁹¹ Bowers, *supra* note 22, at 135–38, 166–67; see also 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, 524–25 (2016) (arguing that the Supreme Court drew the wrong conclusion in *Heien* by allowing a reasonable mistake of law by an officer to constitute reasonable suspicion); Kinports, *supra* note 190, at 132–33 (showing the asymmetry between “what police and ordinary citizens are expected to know about the criminal laws”); McAdams, *supra* note 108, at 181–84 (observing that *Heien* creates an asymmetry in applying the maxim, “ignorance of the law is no excuse,” only in the context of a criminal prosecution, and not a criminal investigation); George M. Dery III & 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, 302 (2015) (arguing that *Heien’s* rule, leaving motorists with the duty to understand the criminal laws, but allowing officers to have a mistaken understanding, is harmful both to law enforcement and motorists).

abuse,¹⁹² including after-the-fact justifications for stops,¹⁹³ and encourages legislatures to write indefinite laws.¹⁹⁴ And they have argued that *Heien* harms the legitimacy of the police¹⁹⁵ and undermines the rule of law by “obscur[ing]” individuals’ legal obligations.¹⁹⁶

These may be fair critiques. But my aim here is not to assess the merits of *Heien*. It is to take that decision as a given and consider one potential implication that would promote, rather than undermine, the rule of law—that the Court’s reasonable-mistake-of-law rule might open the door to vagueness attacks on searches and seizures.

2. *Heien*-Based Vagueness Attacks

The significance of *Heien* for vagueness attacks on searches and seizures can be seen by comparing it with *DeFillippo*. Although the majority opinion in *Heien* tried to leave the impression that the two cases share a rationale,¹⁹⁷ they diverge in an important way.

Recall that the *DeFillippo* Court operated within a factual framework. It deemed the probable-cause question to be an inquiry about the information available at the time of the arrest,¹⁹⁸ reasoning that an officer about to make an arrest is not required to “speculat[e]” or “anticipate” that the substantive law at issue will someday be struck down.¹⁹⁹ That framework conceptualizes judicial review of a law only as a historical fact to be taken into account by an officer on the beat. If that fact did not occur before the arrest, it cannot be used to undermine his probable cause to make the arrest pursuant to the law. If it did, then a reasonable officer should have been aware of the fact.

¹⁹² Kinports, *supra* note 190, at 124.

¹⁹³ McAdams, *supra* note 108, at 175–76.

¹⁹⁴ *Id.* at 189; Dery & Vasquez, *supra* note 191, at 334.

¹⁹⁵ Karen McDonald Henning, “Reasonable” Police Mistakes: Fourth Amendment Claims and the “Good Faith” Exception after *Heien*, 90 St. John’s L. Rev. 271, 311–12 (2016); Vivian M. Rivera, Note, When the Police Get the Law Wrong: How *Heien v. North Carolina* Further Erodes the Fourth Amendment, 49 Loy. L.A. L. Rev. 297, 314 (2016).

¹⁹⁶ Bowers, *supra* note 22, at 167; see also Wayne A. Logan, Police Mistakes of Law, 61 Emory L.J. 69, 91–92, 95 (2011) (“When courts forgive mistaken police constructions of laws, a problem akin to that attending judicial approval of vague laws arises; a ‘potent message’ is broadcast to law enforcement that ‘the limits of official coercion are not fixed; the suggestion box is always open.’” (quoting Jeffries, *supra* note 11, at 223)).

¹⁹⁷ See *Heien v. North Carolina*, 574 U.S. 54, 64–65 (2014).

¹⁹⁸ See *supra* text accompanying notes 79–83.

¹⁹⁹ See *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979).

The *Heien* Court operated from a different premise. It introduced a purely legal framework for assessing an officer's interpretation of the law at the time of arrest. The question is analytical, not historical. A mistaken interpretation does not undermine the arrest or seizure so long as it is an "objectively reasonable" interpretation of law.²⁰⁰ Any existing judicial interpretations of the law are no doubt relevant to that assessment, but the absence of one at the time of arrest is not dispositive as it is under the *DeFillippo* framework. There still must be some basis to conclude that the officer's interpretation was objectively reasonable; the government must be able to point to something in the statute that affirmatively supports the officer's interpretation. That is why the *Heien* majority identified various features of the statutory text to justify the officer's interpretation of the stop-lamp law.²⁰¹

The majority in *Heien* offered little guidance as to what constitutes a reasonable interpretation of law, besides noting that the test "is not as forgiving" to the officer "as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity."²⁰² But Justice Kagan's concurrence elaborated that the test "is satisfied" only "when the law at issue is 'so doubtful in construction' that a reasonable judge could agree with the officer's view."²⁰³ In other words, she continued, a court "faces a straightforward question of statutory construction" when assessing whether an officer's mistake of law was reasonable: "If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not."²⁰⁴ This makes all the more

²⁰⁰ *Heien*, 574 U.S. at 66 (emphasis omitted).

²⁰¹ *Id.* at 67–68. The State made this point in oral argument. See Transcript of Oral Argument, *supra* note 184, at 51.

²⁰² *Heien*, 574 U.S. at 67. Indeed, the reasonable-mistake-of-law test and the qualified-immunity test "require essentially the opposite" showing. Transcript of Oral Argument, *supra* note 184, at 51 (State lawyer). The reasonable-mistake-of-law test asks the officer to point to something in the statute that affirmatively supports his interpretation; the qualified-immunity test "seems to require . . . a precedent that forecloses what the officer does in order . . . to protect everybody except for those who are clearly incompetent." *Id.*; see also *Heien*, 574 U.S. at 69 (Kagan, J., concurring) ("Our modern qualified immunity doctrine protects 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011))); *Mullenix v. Luna*, 577 U.S. 7, 14 (2015) (explaining that the qualified-immunity standard protects officers unless the statutory or constitutional question is "beyond debate" (quoting *al-Kidd*, 563 U.S. at 741)).

²⁰³ *Heien*, 574 U.S. at 70 (Kagan, J., concurring) (quoting *The Friendship*, 9 F. Cas. 825, 826 (C.C.D. Mass. 1812) (No. 5,125)).

²⁰⁴ *Id.*

clear that the *Heien* framework—“a straightforward question of statutory construction”²⁰⁵—is a purely legal, rather than factual, inquiry. Indeed, several lower courts have understood *Heien* to mean that unresolved statutory ambiguity is an important, if not necessary, component of a reasonable mistake of law.²⁰⁶

Justice Kagan’s concurrence also reveals the relationship of the reasonable-mistake-of-law test to the correlation requirement set forth in *Bouie v. City of Columbia* and *Shuttlesworth v. City of Birmingham*. Recall that the correlation requirement prevents the police from enforcing a criminal statute in a way that is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.”²⁰⁷ Similarly, the reasonable-mistake-of-law rule prevents an officer from justifying a search or seizure on the basis of an interpretation with which no reasonable judge could agree in light of the statutory text and any prior judicial interpretations of that text.

At least one federal court of appeals has made this connection. In *United States v. Diaz*,²⁰⁸ the Second Circuit formulated the *Heien* question as whether the officer’s mistaken interpretation of an ambiguous law was “such that a reasonable judge could have accepted it at the time it was made in light of the statutory text and the available judicial interpretations of that text.”²⁰⁹ Then, citing *Bouie*, the Second Circuit observed that the *Heien* principle “has echoes of a defendant’s due-process right to fair warning of the crime for which he or she is punished.”²¹⁰

It is *Heien*’s connection to *Bouie* and the correlation requirement that lays the groundwork for vagueness attacks on searches and seizures. In the typical reasonable-mistake-of-law case, the statute on which an arrest is premised is merely ambiguous, in the sense that it is open to a discrete number of reasonable competing interpretations. If an officer adopts one

²⁰⁵ *Id.*

²⁰⁶ See *United States v. Lawrence*, 675 F. App’x 1, 5–6 (1st Cir. 2017); *United States v. Diaz*, 854 F.3d 197, 203–04 (2d Cir. 2017); *United States v. Stanbridge*, 813 F.3d 1032, 1037 (7th Cir. 2016); *Northrup v. City of Toledo Police Dep’t*, 785 F.3d 1128, 1132 (6th Cir. 2015); *Flint v. City of Milwaukee*, 91 F. Supp. 3d 1032, 1057 (E.D. Wis. 2015); *State v. Eldridge*, 790 S.E.2d 740, 743–44 (N.C. Ct. App. 2016). For an argument that statutory ambiguity should be an explicit prerequisite to finding a reasonable mistake of law, see Weinberger, *supra* note 159, at 1583–90.

²⁰⁷ *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1963) (citations and internal quotations omitted); see also *supra* text accompanying notes 36–41 (discussion of *Shuttlesworth*).

²⁰⁸ 854 F.3d at 204 n.12.

²⁰⁹ *Id.*

²¹⁰ *Id.* (citing *Bouie*, 378 U.S. at 354).

of those competing interpretations, the officer's arrest will not be invalidated. But statutes that are impermissibly vague pose a different problem altogether. They do not simply invite a reasonably discrete number of fair interpretations; they are so open-textured that they effectively delegate to the officer the task of defining a crime in the first place. That violates the correlation requirement because it means that the crime for which the individual was arrested was, in effect, defined on the spot, after the individual engaged in conduct, such that the law was not applied in a way that was predictable and defensible *ex ante*.²¹¹ And it fails the reasonable-mistake-of-law test because, when the task of defining a crime has been delegated to the police, it cannot be said that "a reasonable judge could agree with the officer's view" of the law;²¹² even a judge familiar with all of the relevant legal sources could not have guessed in advance that the law at issue would encompass the behavior for which the individual was searched or seized.

Consider again the text of the ordinance at issue in *Shuttlesworth*. It made it "unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on."²¹³ Suppose no court ever had occasion to deem the literal language of that ordinance unconstitutionally vague. And suppose an officer arrested an individual under it because he had refused to "move on" after being asked, and that the officer conducted a search incident to that arrest that revealed evidence of a more serious crime. If charged only with the more serious offense, the defendant could, following *Heien*, move to suppress the evidence discovered on the ground that the arrest was premised on an officer's mistaken and unreasonable interpretation of law. That argument should prevail because *any* officer interpretation of the ordinance would be mistaken and unreasonable insofar as the ordinance is unconstitutionally vague. Recall that a conclusion that a statute is impermissibly vague necessarily implies that no reasonable interpretations of the statute are available to cure that vagueness.²¹⁴

Indeed, as the Court in *Shuttlesworth* explained, the very problem with the ordinance is that it allowed for "government by the moment-to-

²¹¹ See *supra* text accompanying notes 22–41.

²¹² *Heien v. North Carolina*, 574 U.S. 54, 70 (2014) (Kagan, J., concurring).

²¹³ *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 88 (1965).

²¹⁴ See *supra* text accompanying notes 42–45.

moment opinions of a policemen on his beat.”²¹⁵ An officer’s interpretation of the ordinance does not cure that infirmity, but exploits it.²¹⁶ And for that reason, no “reasonable judge could agree with the officer’s view” of the law,²¹⁷ because it was “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.”²¹⁸

In this way, *Heien* creates the conditions necessary for vagueness attacks on searches and seizures in the context of motions to suppress by introducing a purely legal framework into an aspect of the suppression stage that has historically focused on facts. Because that legal framework concerns the coverage of the substantive criminal law on which searches and seizures are premised, it opens the door to vagueness attacks on those laws.

It is important to note, however, that these *Heien*-based challenges are *indirect* vagueness challenges. That is, as a technical matter, a court adopting this theory would hold only that the search or seizure at issue violated the Fourth Amendment because it was based on an unreasonable mistake of law; but in reaching that conclusion, the court would necessarily deem the law at issue to be unconstitutionally vague—and therefore not open to a reasonable interpretation.²¹⁹ As a functional matter, that would yield the same result as if the law had been struck down as the result of a direct vagueness challenge: the law would not be available for future use by officers.

IV. POTENTIAL OBSTACLES TO *HEIEN*-BASED VAGUENESS ATTACKS

At least two obstacles may stand in the way of successful vagueness challenges based on *Heien*. This Part identifies them, but argues that each can ultimately be overcome.

²¹⁵ *Shuttlesworth*, 382 U.S. at 90 (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J., concurring in part)).

²¹⁶ See *infra* Section IV.A.

²¹⁷ *Heien*, 574 U.S. at 70 (Kagan, J., concurring).

²¹⁸ *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1963) (citations and internal quotations omitted).

²¹⁹ For this reason, the label “vagueness attacks on searches and seizures” is somewhat imprecise. But the alternative—a Fourth Amendment challenge based on a lack of probable cause insofar the officer’s conduct was premised on a mistaken interpretation of law that is *per se* unreasonable because the underlying statute is unconstitutionally vague—is quite a mouthful.

A. Narrowing Constructions

A typical vagueness challenge will fail if a court can reasonably construe the law narrowly to avoid a vagueness conclusion.²²⁰ In light of that reality, one might think it possible to defeat seemingly viable *Heien*-based vagueness attacks on the ground that the officer's interpretation amounted to a narrowing construction of an otherwise vague law.²²¹ The argument would be that the officer, like a court, can interpret the law narrowly to avoid the vagueness problem, and that such an interpretation, even if mistaken, is reasonable under *Heien*.

Consider a twist on the *Shuttlesworth*-based hypothetical described earlier, this time arising in the context of a parade.²²² Suppose a state officer arrested an individual standing in the center of the street blocking the parade route because he had refused to "move on" after being asked and that a search incident to arrest revealed evidence of a more serious crime. If charged with the more serious offense, the defendant could move to suppress the evidence by way of a *Heien*-based vagueness challenge. Even if the government were to concede that the plain text of the ordinance presents a vagueness problem, it might nonetheless argue that the officer interpreted the ordinance in a way that cured the problem (albeit, mistakenly²²³) by reading the ordinance to grant him the authority to ask an individual to move on *only when an individual is blocking the street or sidewalk when such spaces are being used for a community event, such as a parade*. Is that a reasonable mistake of law for the officer to have made under *Heien*?

The answer must be no. The officer's limiting interpretation of the ordinance is entirely arbitrary. It is totally divorced from the text of the ordinance, which never mentions community events or parades. In the language of *Heien*, no "reasonable judge could agree with the officer's" interpretation based on the text of the ordinance.²²⁴ And in the language of *Bouie*, the interpretation was "unexpected and indefensible by

²²⁰ See supra text accompanying notes 42–45.

²²¹ This argument will be stronger in circumstances in which a state officer was applying state law, or a federal officer was applying federal law. See supra note 42.

²²² Again, the *Shuttlesworth* ordinance made it "unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 88 (1965).

²²³ If the interpretation were not mistaken, then the vagueness challenge would fail for the simple reason that *Heien* permits only attacks on *mistakes* of law. It would also mean that the law was not in fact unconstitutionally vague. See supra text accompanying notes 42–45.

²²⁴ *Heien v. North Carolina*, 574 U.S. 54, 70 (2014) (Kagan, J., concurring).

reference to the law which had been expressed prior to the conduct in issue.”²²⁵ Otherwise, an officer could adopt that limiting, though mistaken, interpretation of the ordinance on the day of a parade, and an entirely different, but equally mistaken and arbitrary, limiting interpretation when useful in a different set of circumstances. It was that possibility for unfettered police discretion that led to the result in *Shuttlesworth*.²²⁶

Think about the issue from the perspective of a reasonable judge, for this is what the *Heien* test entails.²²⁷ A state judge asked to decide whether the ordinance was unconstitutionally vague would first have to determine the meaning of the ordinance. If the judge could reasonably construe the ordinance, based on the relevant legal sources, to cure the vagueness problem, the judge would do that. But if not, then the judge would proceed to conclude that the ordinance was unconstitutionally vague.

In other words, if the law is unconstitutionally vague, then there are no reasonable limiting interpretations. Thus, asking whether an officer’s mistaken limiting interpretation of an arguably vague law is reasonable is functionally equivalent to asking whether the statute is impermissibly vague. For that reason, *Heien*-based vagueness challenges should survive officers’ purported limiting interpretations so long as the text of the challenged law is indeed impermissibly vague.

But suppose a state appellate court had interpreted the ordinance in same the manner as the officer. Would that change the result in federal court? It depends. If the state court had adopted that interpretation *before* the officer made the arrest, then that judicial decision would have been relevant legal material that informs the assessment of whether the officer’s interpretation was reasonable. And it would almost certainly lead to the conclusion that the interpretation was reasonable—even if the federal court ultimately thought it was mistaken. But if the state court had adopted the interpretation *after* the arrest had occurred, then that would present the same posture as *Shuttlesworth* itself. The Supreme Court reasoned there that the ordinance was unconstitutionally vague because the trial court “was without guidance from any state appellate court as to

²²⁵ *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1963) (citations and internal quotations omitted).

²²⁶ *Shuttlesworth*, 382 U.S. at 90 (striking down the ordinance as unconstitutionally vague because it allowed for “government by the moment-to-moment opinions of a policeman on his beat” (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J., concurring in part))).

²²⁷ See *Heien*, 574 U.S. at 70 (Kagan, J., concurring).

the meaning of the ordinance.”²²⁸ Likewise, here, the arresting officer would have been without any guidance from a state appellate court as to the meaning of the impermissibly vague ordinance.

B. Good-Faith Exception to the Exclusionary Rule

The good-faith exception to the exclusionary rule looms as another potential impediment to *Heien*-based vagueness challenges. In theory, a court could decline to reach the merits of the *Heien*-based vagueness question and instead conclude that, even assuming a Fourth Amendment violation, the good-faith exception to the exclusionary rule precludes the suppression of evidence. That outcome would effectively reinstate the insulation problem created by the *DeFillippo* regime.

The *Heien* Court made clear that the reasonable-mistake-of-law inquiry concerns whether a Fourth Amendment violation occurred, a question “antecedent” to the remedial question of whether the exclusionary rule should be applied to suppress evidence discovered.²²⁹ But courts do not necessarily answer the analytically “antecedent” question first. *United States v. Leon*,²³⁰ which first articulated the good-faith exception, makes clear that “courts have considerable discretion” in determining whether to decide the substantive Fourth Amendment question before deciding whether the good-faith exception applies.²³¹ And in the qualified immunity context, the Supreme Court no longer requires courts to make an initial determination whether a constitutional right has been violated if the plaintiff would not, in any event, be entitled to a remedy because the purported right was not “clearly established.”²³² These principles would

²²⁸ *Shuttlesworth*, 382 U.S. at 92.

²²⁹ *Heien*, 574 U.S. at 65–66.

²³⁰ 468 U.S. 897 (1984).

²³¹ *Id.* at 924–25.

²³² See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Court’s decision in *Pearson* overturned *Saucier v. Katz*, which had mandated that courts must address whether a constitutional violation occurred before turning to “the next, sequential step”—addressing “whether the right was clearly established.” 533 U.S. 194, 201 (2001). The two-step procedure mandated by *Saucier* prevented constitutional stagnation by ensuring the “elaboration” of constitutional rights “from case to case.” *Id.* Despite that benefit, the *Pearson* Court held that, going forward, courts could “exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” 555 U.S. at 236; see also Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275, 1277 (2006) (questioning the *Saucier* rule as a “mischievous rule” and a “puzzling misadventure in constitutional dictum”).

seem to permit courts to bypass *Heien*-based vagueness attacks using the good-faith exception to the exclusionary rule.

But that is possible only if an officer's unreasonable mistake of law can qualify for the good-faith exception. There is good reason to think it cannot. Courts applying *Heien* seem to think that the good-faith exception is not relevant in reasonable-mistake-of-law cases. In the six years following *Heien*, no court has concluded that the good-faith exception to the exclusionary rule under federal law applied in a case involving an officer who made an unreasonable mistake of law.²³³ Indeed, only a handful of the roughly 800 cases citing *Heien* during the same period even acknowledged that the government made an argument that the good-faith exception applied.²³⁴

The implicit consensus seems to be that the good-faith exception is not available when an officer has made an unreasonable mistake of law. That makes sense. Unreasonable legal errors generally result, as the *Heien* court quipped, from “a sloppy study of the laws” by officers.²³⁵ As such, they are exactly the sort of culpable conduct the exclusionary rule is meant to deter.²³⁶ The good-faith exception applies in cases in which the law enforcement officer responsible for the Fourth Amendment violation was unknowingly relying on errors *made by others*, such as warrants obtained using erroneous information.²³⁷ Evidence should thus be

²³³ See, e.g., *United States v. Flores*, 798 F.3d 645, 650 (7th Cir. 2015); *United States v. Alvarado-Zarza*, 782 F.3d 246, 250 (5th Cir. 2015); *United States v. Mota*, 155 F. Supp. 3d 461, 475 (S.D.N.Y. 2016); *United States v. Black*, 104 F. Supp. 3d 997, 1006 (W.D. Mo. 2015); *United States v. Sanders*, 95 F. Supp. 3d 1274, 1286 (D. Nev. 2015); *Darringer v. State*, 46 N.E.3d 464, 472 (Ind. Ct. App. 2015); *State v. Nelson*, 356 P.3d 1113, 1125 (Okla. Crim. App. 2015); *State v. Brown*, No. 13-2054, 2015 WL 4468841, at *3 (Iowa Ct. App. July 22, 2015); *People v. Jones*, B255728, 2015 WL 1873269, at *3 (Cal. Ct. App. Apr. 23, 2015).

²³⁴ I have personally reviewed each of the roughly 800 cases citing *Heien*. The following cases are the only ones that acknowledged that the government made an argument that the good-faith exception applied. *United States v. Perez-Madriral*, No. 16-CR-20044, 2017 WL 2225221, at *5–6 (D. Kan. May 19, 2017) (appeal pending); *State v. Lees*, 432 P.3d 1020, 1025 (Kan. Ct. App. 2018); *State v. Spellacy*, 132 N.E.3d 1244, 1249 (Ohio Ct. App. 2019); *People v. Walker*, 115 N.E.3d 1012, 1021 (Ill. App. Ct. 2018); *Moreno v. State*, No. 08-16-00003, 2019 WL 698091, at *6–7 (Tex. Ct. App. Feb. 20, 2019); *State v. Tercero*, 467 S.W.3d 1, 10 (Tex. Ct. App. 2015); *State v. Miller*, No. 9-14-50, 2015 WL 5095890, at *1 (Ohio Ct. App. Aug. 31, 2015); *State v. Heilman*, 342 P.3d 1102, 1106 n.5 (Or. Ct. App. 2015).

²³⁵ *Heien v. North Carolina*, 574 U.S. 54, 67 (2014).

²³⁶ See *Davis v. United States*, 564 U.S. 229, 236–37 (2011) (noting that deterrence of police misconduct is the “sole purpose” of the exclusionary rule).

²³⁷ *Id.* at 238–39 (collecting cases applying good-faith exception); see also *Mota*, 155 F. Supp. 3d at 475 (“The common thread uniting these exceptions is that it was not the officer conducting the search who erred, but another actor, such as the legislature.”).

suppressed when an officer conducts a search or seizure predicated on the officer's erroneous and unreasonable understanding of the law.²³⁸

This comports with the Supreme Court's opinion in *Illinois v. Krull*,²³⁹ which held that the good-faith exception to the exclusionary rule applies when an officer relies in good faith on a statute later declared unconstitutional.²⁴⁰ At first blush, that holding may seem to apply to unreasonable mistakes of law—so long as they are made in good faith. But in a footnote, the *Krull* Court strongly hinted that the exception would not apply to “an officer who erroneously, but in good faith, believes he is acting within the scope of a statute.”²⁴¹ On that basis, courts relying on *Krull* have taken the view that the good-faith exception does not apply to officers' mistaken interpretations of law,²⁴² reasoning that to do so “would essentially eviscerate the exclusionary rule” by encouraging officers “to defy the plain language of statutes as written in favor of their own interpretations in conducting searches and seizures.”²⁴³

The good-faith exception to the exclusionary rule, then, does not appear to be a real impediment to *Heien*-based vagueness challenges. True, an officer's mistake of law is not always a Fourth Amendment violation, but it is never a basis for applying the good-faith exception to the exclusionary rule. It is officer conduct that ought to be deterred.

CONCLUSION

For the last four decades, vagueness attacks have been precluded when aimed at crimes serving only as a basis for a search or seizure. Many low-level crimes used primarily in that way have therefore remained insulated from judicial review. Some of them are likely impermissibly vague in a

²³⁸ For a similar argument, see Henning, *supra* note 195, at 317.

²³⁹ 480 U.S. 340 (1987).

²⁴⁰ *Id.* at 349–50. The officer cannot “be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.” *Id.* at 355 (citation omitted).

²⁴¹ *Id.* at 360 n.17.

²⁴² *People v. Madison*, 520 N.E.2d 374, 380 (Ill. 1988); see also *United States v. Wallace*, 885 F.3d 806, 811 n.3 (5th Cir. 2018) (noting that the “holding of *Krull* does not extend to scenarios in which an officer ‘erroneously, but in good faith, believes he is acting within the scope of the statute’” (citation omitted)); *United States v. Warshak*, 631 F.3d 266, 289 (6th Cir. 2010) (similar).

²⁴³ *Madison*, 520 N.E.2d at 380 (“Such a proposal, giving the police unlimited authority to conduct searches and seizures until specifically restricted by the legislature or the courts, is fundamentally at odds with the central purpose of deterring police misconduct which underlies the exclusionary rule.”).

manner that effectively delegates the task of defining crimes to officers on the beat. That is precisely the defect that led to the invalidation of broad and indefinite vagrancy and loitering laws in the middle of the last century. The similar low-level crimes now on the books have avoided that same fate simply because they remain untested.

That should change. Two recent Supreme Court decisions have created the conditions necessary for a vagueness attack on a search or seizure. First, *Johnson* makes clear that the vagueness doctrine can be used to invalidate statutes other than those under which charges are brought so long as the relevant inquiry concerning such statutes presents a legal question. Second, *Heien* changes the nature of the suppression inquiry insofar as it opens the door to strictly legal, rather than factual, challenges to an officer's basis for a search or seizure—namely, a claim that the officer made an unreasonable and mistaken interpretation of the law at issue when conducting the search or seizure. The argument made in this Article completes the syllogism: a defendant can move to suppress evidence obtained during a search or seizure on the purely legal ground that an officer's interpretation of the law used to justify the search or seizure was necessarily mistaken and unreasonable because the law was impermissibly vague.

There are some potential legal obstacles to this theory, such as narrowing interpretations that cure vagueness and the good-faith exception to the exclusionary rule. But they can likely ultimately be overcome. The greater obstacle relates to policy preferences. Courts—particularly the Supreme Court—may be loath to suppress evidence. Doing so, they may reason, would effectively penalize the police for legislative drafting errors and cause officers to second-guess their in-the-moment judgments.

On the first point, it is important to bear in mind that the reasonable-mistake-of-law inquiry is not, as the *Heien* Court made clear, about whether the exclusionary rule should be applied. It concerns whether the government—not just law enforcement—has violated the Fourth Amendment. The question, in other words, is not merely whether the police engaged in conduct that should be deterred (as it is with respect to the exclusionary rule), but also whether the government—including the legislature—has acted in an unconstitutional manner.

On the second point, whether allowing vagueness attacks on searches and seizures would cause law enforcement to second-guess their moment-to-moment decisions is ultimately an empirical question. But I strongly

suspect that it would not. Meritorious vagueness attacks are rare. And they would become rarer over time as *Heien*-based vagueness attacks cleansed the criminal codes of the vague low-level crimes that have for so long evaded judicial review. The only material incentive that would follow, in my view, is for legislatures—not police—to use a bit more care when crafting language for new crimes. That is plainly a desirable outcome that promotes the rule of law.