

9-1-2015

“U Can’t Touch This” Fog Line: The Improper Use of a Fog Line Violation as a Pretext for Initiating an Unlawful Fourth Amendment Search and Seizure

Harvey Gee

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

Suggested Citation

Harvey Gee, “U Can’t Touch This” Fog Line: The Improper Use of a Fog Line Violation as a Pretext for Initiating an Unlawful Fourth Amendment Search and Seizure, 36 N. Ill. U. L. Rev. 1 (2015).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact jschumacher@niu.edu.

“U Can’t Touch This” Fog Line: the Improper Use of a Fog Line Violation as a Pretext for Initiating an Unlawful Fourth Amendment Search and Seizure¹

BY HARVEY GEE²

Fog line litigation is happening all across the country. For years, law enforcement officers across the country have been initiating traffic stops of cars on our roadways, based on allegations that the drivers crossed onto a fog line in violation of a state ordinance prohibiting such conduct. A fog line is the white line that divides the shoulder from the road. While the legislative history and language of these fog line statutes reflect their public safety purpose, the police are relying on statutes as an excuse to pull over cars which may have only momentarily crossed the fog line and where the drivers have done nothing else unlawful. This common practice affords police tremendous leeway to conduct pretextual stops, unreasonably detain suspects, and unlawfully search vehicles. More often than not, in fog line cases, even if the court holds that the defendant did not violate a state traffic law, the government will nevertheless argue that the traffic stop was valid because the officer’s mistake of law was reasonable, and there was reasonable suspicion or probable cause to initiate the traffic stop. This Essay explores the mistakes of law committed by police officers during traffic stops, and argues that the police should not be allowed to use alleged fog line violations as a pretext for initiating a traffic stop if it cannot be supported by reasonable suspicion or probable cause. Such an unreasonable stop violates the Fourth Amendment to the U.S. Constitution.

I.	INTRODUCTION.....	2
II.	LEGAL BACKGROUND.....	5
III.	RECENT ACCOMPLISHMENTS.....	6
	A. HEIEN V. NORTH CAROLINA.....	6

1. MC Hammer, U Can’t Touch This, on PLEASE HAMMER DON’T HURT EM (Capitol/EDI Records 1990).

* The author previously served as an Attorney with the Office of the Federal Public Defender in Las Vegas and Pittsburgh, the Federal Defenders of the Middle District of Georgia, and the Office of the Colorado State Public Defender. In 2012, he served as a Policy and Research Fellow with Obama for America-Virginia and was a U.S. Supreme Court Fellows Program Finalist. LL.M., The George Washington Law School; J.D., St. Mary’s School of Law; B.A., Sonoma State University.

	1. FACTUAL BACKGROUND.....	7
	2. MAJORITY OPINION.....	8
	3. CONCURRING OPINION.....	10
	4. DISSENTING OPINION.....	10
	B. <i>RODRIGUEZ V. UNITED STATES</i>	12
IV.	FOG LINE LITIGATION.....	14
	A. NINTH CIRCUIT CASES.....	15
	1. <i>UNITED STATES V. COLIN</i>	16
	2. <i>UNITED STATES V. DELGADO-HERNANDEZ</i>	16
	3. <i>UNITED STATES V. WENDFELDT</i>	17
	4. <i>THE CURIOUS CASE OF UNITED STATES V. RAILEANU</i>	18
	B. OTHER CIRCUITS.....	25
V.	RACIAL AND IMMIGRATION IMPLICATIONS.....	26
VI.	CONCLUSION.....	31

I. INTRODUCTION

Unbeknownst to most people, fog line litigation is happening all across the country. For years, law enforcement officers across the country have been initiating traffic stops of cars on our roadways, based on allegations that the drivers crossed onto a fog line in violation of a state ordinance prohibiting such conduct. A fog line is “the white line that demarcates the shoulder from the road.”³ There can be foot long ruts created in the roadway within inches of the fog lines designed to alert wayward drivers who traverse beyond the fog line. While the legislative history and language of these statutes reflect their public safety purpose, the police are relying on statutes as an excuse to pull over cars which may have only momentarily crossed the fog line and where the drivers have done nothing else unlawful.

To be sure, this common practice affords police tremendous leeway to conduct pretextual stops, unreasonably detain suspects, and unlawfully search vehicles. These dubious practices are highlighted in Professor Melanie Wilson’s study of the practice in Kansas wherein the police continually relied upon professed fog lane violations as a pretext to target immigrant Hispanic drivers.⁴ She argues that “[b]ecause fog-line violations are easy to believe and difficult to refute, unscrupulous officers might be tempted to adopt them as a favorite explanation for traffic stops, particularly when they

3. *Riche v. Director of Revenue*, 987 S.W.2d 331, 333 (Mo. 1999) (en banc).

4. See Melanie D. Wilson, “*You Crossed the Fog Line!*”—*Kansas, Pretext, and the Fourth Amendment*, 58 U. KAN. L. REV. 1179, 1191 (2010).

do not have other reasonable grounds to believe that the car's occupants are committing a crime."⁵

Upon challenge at the judicial level, state and federal courts have taken divergent approaches in their analyses of fog line traffic stops. This is most evident in the Eighth Circuit where there has been a split in state and legal authority.⁶ Specifically, Missouri state court decisions have consistently ruled in favor of defendants who were stopped based on alleged fog lane violations, whereas the Eighth Circuit Court of Appeals has more often sided with law enforcement in finding that officers are allowed to make reasonable mistakes of law.⁷ The Ninth Circuit has for the most part uniformly and consistently held that a minor, isolated crossing of a lane line does not constitute a failure to maintain a travel lane. In *United States v. Colin*,⁸ the Ninth Circuit analyzed California's lane statute,⁹ which requires that drivers "drive as nearly as practical entirely within a single lane."¹⁰ Colin was accused of twice driving in the fog lane for a prolonged period of time.¹¹ The officers in *Colin* pulled the car over for a possible violation of driving under the influence and lane straddling, after seeing a car drift to the right, and its right tires follow the fog line for about ten seconds.¹² The Ninth Circuit held that the officers lacked justification for a traffic stop because the weaving was not pronounced and did not continue over a "substantial distance."¹³ Accordingly, the court found the officer did not have reasonable suspicion to effectuate a stop.¹⁴

Likewise, in *United States v. Delgado-Hernandez*,¹⁵ the Ninth Circuit held that defendant's crossing over of a fog line momentarily did not violate a Nevada statute governing driving on a highway having multiple marked lanes for traffic, as required to afford officers reasonable suspicion to effec-

5. *Id.*

6. See Charity Whitney, *Missouri's Foggy Fog Line Law*, 77 MO. L. REV. 303, 303-305 (2012).

7. *Id.*

8. *United States v. Colin*, 314 F.3d 439, 446 (9th Cir. 2002).

9.

Whenever any roadway has been divided into two or more clearly marked lanes for traffic in one direction, the following rules apply: (a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety.

CAL. VEH. CODE § 21658(a) (1976).

10. See *United States v. Colin*, 314 F.3d 439, 444 (9th Cir. 2002).

11. *Id.*

12. *Id.* at 441.

13. *Id.* at 445-46.

14. *Id.*

15. *United States v. Delgado-Hernandez*, No. 06-10572, 2008 WL 2485429 (9th Cir. June 19, 2008).

tuating traffic stops, as the purpose of the statute was to promote safety and defendant's conduct did not endanger anyone. But in *United States v. Raileanu*,¹⁶ the district court concluded that Raileanu violated Nevada Revised Statute 484.223 ("NRS 484.223") when he crossed over the fog lane three times in one-quarter of a mile. More recently, that same court in *United States v. Wendfeldt*¹⁷ granted a habeas petition based on the Nevada Highway Patrol's unconstitutional stop of a car traveling on Interstate 80 based on an alleged violation of NRS 484.305 (the predecessor statute to NRS 484.223).¹⁸

More often than not, in fog line cases, even if the court holds that the defendant did not violate a state traffic law, the government will nevertheless argue that the traffic stop was valid because the officer's mistake of law was reasonable, and there was reasonable suspicion or probable cause to initiate the traffic stop. Significantly, under the Supreme Court's ruling last term in *Heien v. North Carolina*,¹⁹ officers are allowed to make a reasonable mistake of law. But discretion remains with the lower courts because *Heien* involved an unusual and ambiguously worded North Carolina statute. Thus, *Heien* does not affect the analysis in this Essay because most of the state statutes governing fog lane infractions, such as the statutes in California and Nevada, are not at all ambiguous and can be reasonably understood by citizens and police alike.

As a counterweight to *Heien*, *Rodriguez v. United States*,²⁰ was the Court's second significant criminal decision last term. *Rodriguez* imposes a time limit on the traffic stop—they have to be reasonably short, unless there is reasonable suspicion of some other crime.²¹ Thus, officers cannot prolong a traffic stop just to perform a dog sniffing drug search.²²

Against this backdrop, this Essay explores the mistakes of law committed by police officers during traffic stops, and argues that the police should not be allowed to use alleged fog line violations as a pretext for initiating a traffic stop if it cannot be supported by reasonable suspicion or probable cause. Such an unreasonable stop violates the Fourth Amendment to the U.S. Constitution. This Essay is divided into five parts. Part two summarizes the relevant Fourth Amendment search and seizure case law as it applies to traffic stops. Part three analyzes *Heien*²³ and *Rodriguez*.²⁴ Part

16. *United States v. Raileanu*, No. 2:13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013).

17. *United States v. Wendfeldt*, 58 F. Supp. 3d 1124 (D. Nev. 2014).

18. *Id.* at 1136.

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

20. *Rodriguez v. United States*, No. 13-9972, 2015 WL 1780927 (April 21, 2015).

21. *Id.* at *3.

22. *Id.*

23. *Heien*, 135 S. Ct. 530.

four discusses the Ninth Circuit's recent jurisprudence on this issue. This section especially focuses on *Raileanu*,²⁵ which I believe is an especially egregious example of the use of Nevada's fog lane statute as a pretext for an unlawful search of Raileanu's car by the police. His conviction eventually led to his deportation from this country. *Raileanu* is also a deviation from other fog lane cases in the Ninth Circuit. This section also argues for the exclusion of evidence that results from a police officer's mistake of law during a traffic stop. This section concludes with a survey of other opinions from other jurisdictions. Part five explores the racial and immigration implications of traffic stops, and suggests that racial minorities and immigrants are especially vulnerable when they are stopped for an alleged fog line violation. This section also provides a brief overview of racial profiling and the interplay between the deportations of undocumented immigrants.

II. LEGAL BACKGROUND

The Fourth Amendment proscribes violations of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"²⁶ In order to challenge a search or seizure as a violation of the Fourth Amendment, a person must have had a subjective expectation of privacy in the place or property to be searched which was objectively reasonable.²⁷

A search incident to a lawful arrest is one of the few exceptions to the general rule that "searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment"²⁸ The protections of the Fourth Amendment extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest.²⁹ Accordingly, the Fourth Amendment requires that such seizures be, at a minimum, "reasonable."³⁰ To satisfy the Fourth Amendment, an investigatory stop may be made only if the officer has "a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot'"³¹ "[A] Fourth Amendment violation occurs when the detention extends beyond the valid reason for the stop. . . . Once a computer check is

24. *Rodriguez*, 2015 WL 1780927.

25. *United States v. Raileanu*, No. 2:13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013)

26. U.S. CONST. amend. IV.

27. *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990).

28. *Katz v. United States*, 389 U.S. 347, 357 (1967).

29. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

30. *Brigoni-Ponce*, 422 U.S. at 878.

31. *Sokolow*, 490 U.S. at 7; *accord United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000).

completed and the officer either issues a citation or determines that no citation should be issued, the detention should end and the driver should be free to leave.”³² Evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure.³³ This includes the “fruit” of such illegal conduct.³⁴ If an individual can establish that the initial stop of a car violated the Fourth Amendment, then the evidence that was seized as a result of that stop would be subject to suppression as “fruit of the poisonous tree.”³⁵ The government has the burden to show that the evidence is not a “fruit of the poisonous tree.”³⁶

III. RECENT DEVELOPMENTS

A. *HEIEN V. NORTH CAROLINA*

Leading up to *Heien*, a generation of mistake of law litigation created a split between the circuits. Analyses of mistake of law for traffic stops have culminated in confusing and inconsistent judicial decisions. Lower courts are deeply divided on the question of, what if an officer pulls over a car based on his belief that a violation has occurred but it turns out that the officers erroneously interpreted the law? A majority of courts do not allow officers to make a mistake of law when executing a traffic stop, and instead hold that it is a violation of the Fourth Amendment, rendering inadmissible any evidence resulting from that stop.³⁷ Conversely, a minority of courts, led by the Eighth Circuit, hold the opposite as long as the mistake was reasonable under the circumstances.³⁸ The Court in *Heien* purportedly answered the issue. However, as detailed below, the case involved an unusually ambiguous statute, and provided little guidance to lower courts.

32. United States v. Santiago, 310 F.3d 336, 341-42 (5th Cir. 2002) (citations omitted).

33. Mapp v. Ohio, 367 U.S. 643, 654 (1961).

34. Wong Sun v. United States, 371 U.S. 471, 484-88 (1963) (Evidence obtained as fruit of an illegal search or seizure may not be used against defendant.).

35. United States v. Twilley, 222 F.3d 1092, 1095 (9th Cir. 2000).

36. *Id.* at 1097.

37. See United States v. Gross, 550 F.3d 578, 584 (6th Cir. 2008); United States v. McDonald, 453 F.3d 958 (7th Cir. 2008); United States v. Tibbetts, 396 F.3d 1132 (10th Cir. 2005); United States v. De Gasso, 369 F.3d, 1139, 1144 (10th Cir. 2004); United States v. Chanthasouvat, 342 F.3d 1271 (11th Cir. 2003); United States v. King, 224 F.3d 736, 741 (9th Cir. 2001); United States v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000); United States v. Miller, 146 F.3d 274 (5th Cir. 1998).

38. See United States v. Smart, 393 F.3d 767, 770 (8th Cir. 2005); Johnson v. Crooks, 326 F.3d 995, 998 (8th Cir. 2003).

1. Factual Background

A North Carolina officer observing northbound traffic on Interstate 77 noticed a Ford Escort with a driver who appeared "very stiff and nervous."³⁹ While following this "suspicious" car, the officer noticed that only one of the brake lights was functioning and pulled the driver over.⁴⁰ After clearing the driver's license and registration through dispatch, the officer was in the process of issuing a warning ticket when he became suspicious about the two occupants' answers to his questions.⁴¹ According to the officer, they appeared nervous and gave inconsistent answers about their destination.⁴² When the men were asked if they were transporting contraband, the men responded in the negative, but eventually gave consent to a search.⁴³ A sandwich bag containing cocaine was found in the side pocket of a duffle bag. Heien was charged with attempted trafficking in cocaine.⁴⁴ The trial court denied Heien's suppression motion and determined that the faulty brake light supported reasonable suspicion for the stop.⁴⁵ At the heart of the controversy was the North Carolina statute,⁴⁶ a confusingly written statute that had never been authoritatively construed by the legislature or the courts.

Upon appeal, the North Carolina Court of Appeals reversed holding that the relevant code provision, which requires that a car be "equipped with a stop lamp . . ."⁴⁷ and requires only a single lamp, which Heien's vehicle had, and thus the justification for the stop was objectively unreasonable.⁴⁸ However, the State Supreme Court reversed the lower court on the basis that even though no law was violated, the officer's mistaken understanding of the law was reasonable. The Supreme Court agreed and ruled eight to one that there was no Fourth Amendment violation because it was objectively reasonable for the officer to think that Heien's faulty right brake

39. Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Heien, 135 S. Ct. at 535.

45. *Id.*

46.

The statute provides in pertinent part that a car must be:
equipped with a stop lamp on the rear of the vehicle. The stop lamp shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop lamp may be incorporated into a unit with one or more other rear lamps.

N.C. GEN. STAT. ANN. § 20-129(g) (West 2007).

47. N.C. GEN. STAT. ANN. § 20-129(g) (West 2007).

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

light was a violation of North Carolina law, and therefore, reasonable suspicion existed to effectuate the traffic stop.⁴⁹

2. *Majority Opinion*

Writing for the majority, Chief Justice Roberts held that reasonable suspicion, as required for a traffic stop or an investigatory stop, can rest on a reasonable mistake of law in stopping a vehicle for which one of the brake lights was working.⁵⁰ Roberts reasoned that “[r]easonable men make mistakes of law . . .” and reasonable mistakes of fact, and mistake of law and mistakes of fact should be treated similarly under the law.⁵¹ In doing so, he rejected Heien’s broad arguments that (1) the court should focus solely on the question of mistake of law,⁵² and (2) if ignorance of the law is no excuse for average people, then it should not be an excuse for police either.⁵³ Instead, Justice Roberts gave deference to what he viewed as the challenge facing officers making quick judgments in the fields.⁵⁴

In neutralizing Heien’s argument about the fundamental unfairness of allowing police officers to escape liability based on mistakes when citizens are not afforded to do so under the mistake of fact, the majority relies on *Michigan v. DeFillippo*,⁵⁵ which involved the arrest of an apparently intoxicated DeFillippo when he failed to identify himself.⁵⁶ This contravened a Detroit ordinance that authorized the police to charge any individual who refused to identify himself and provide evidence of his identity.⁵⁷ Drugs were found incident to arrest. Later, the Michigan Court of Appeals held that the identification ordinance was constitutionally invalid.⁵⁸ Despite this fact, the Supreme Court held that DeFillippo’s arrest was valid because the search itself was constitutional given that the police had probable cause.⁵⁹

Roberts stressed “[j]ust as an individual generally cannot escape criminal liability based on a mistaken understanding of the law, so too the government cannot impose criminal liability based on a mistaken understanding of the law. . . .” and then argued that “just because mistakes of law can-

49. *Id.*

50. *Id.* at 534.

51. *Id.* at 536.

52. *Id.* at 539.

53. *Heien*, 135 S. Ct. at 539.

54. *Id.*

55. *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

56. *Heien*, 135 S. Ct. at 538-39.

57. *DeFillippo*, 443 U.S. at 33.

58. *Id.*

59. *Heien*, 135 S. Ct. at 538..

not justify either the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop."⁶⁰

Roberts further reasoned that mistakes of law can also be allowed for reasonable suspicion because reasonable suspicion stems from the officer's combined understanding of both the facts and the relevant law.⁶¹ Here, he acknowledged that reasonableness does not mean correctness all the time, yet the police should still be given some leeway to enforce the law in the name of public safety.⁶² Following up, Roberts provided examples of reasonable mistakes by law enforcement in executing searches and seizures and in erroneously arresting the wrong suspect based on a suspect's description alone.⁶³

While the majority opinion empowers law enforcement with greater authority, Roberts minimizes this fact by only mentioning how advantageous the Court's ruling is to the police when he writes, "our decision does not discourage officers from learning the law . . . an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce."⁶⁴

On the whole, the *Heien* analysis is centered on a doctrinal analysis of mistake of law that obscures the realities of law enforcement practices, including the common practices of the police in finding any excuse to follow and pull drivers over for alleged traffic violations, detecting "suspicious behavior" during the dialogue between the officer and driver about their vehicle registration, and other small talk about traveling destination. *Heien* is not as sweeping as *Whren v. United States*,⁶⁵ which allows a traffic violation alone to justify a stop. Still, the police may sometimes abuse the authority granted by *Whren* when they lack any legal justification for initiating a traffic stop.⁶⁶ In such cases, the Government may claim that the subjective intentions of the police are irrelevant in "ordinary, probable-cause Fourth Amendment analysis" under *Whren*.⁶⁷ While that is true, there must

60. *Id.* at 540.

61. *Id.*

62. *Id.*

63. *Id.* at 536.

64. *Heien*, 135 S. Ct. at 539-40.

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

66. See David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, in *THE FOURTH AMENDMENT SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* 166 (Cynthia Lee ed., 2011) (arguing that "police will use the immense discretionary power *Whren* gives them mostly to stop African-Americans and Hispanics. . . . [W]hatever their motivation, viewed as a whole, pretextual stops will be used against African-Americans and Hispanics in percentages wildly out of proportion to their numbers in the driving population.").

67. *Whren*, 517 U.S. at 813.

still be objective circumstances to justify the stop.⁶⁸ Interestingly, the majority opinion only mentions *Whren v. United States*⁶⁹ once, when Justice Roberts offers that the court “do[es] not examine the subjective understanding of the particular officer involved.”⁷⁰ Nevertheless, after *Heien*, if the officers rely on reasonable mistakes of law, then the courts will allow the stops.

3. Concurring Opinion

In a concurring opinion, Justice Kagan, joined by Justice Ginsburg, seemingly offered more explicit guidance to the lower courts than the majority opinion by acknowledging the ambiguity of the North Carolina law, and declared that an officer’s “subjective understanding” of the law is irrelevant.⁷¹ Justice Kagan stressed the difficulties of interpreting the North Carolina statute, which can be reasonably construed as defining a brake light as not a rear lamp (as the North Carolina Court of Appeals held), or it allows an officer to consider a brake light as a rear lamp.⁷² She noted that the statute was difficult to interpret and the officer acted reasonably in his interpretation.⁷³ Moreover, Kagan narrowly read the *Heien* standard, and forewarned that in future cases much will depend on the statute itself. She noted “[i]f the statute is genuinely ambiguous, such that overturning the officer’s judgment requires hard interpretive work, then the officer has made a reasonable mistake.”⁷⁴ Kagan also emphasized that the government cannot defend an officer’s mistaken legal interpretation on the ground that the officer was unaware or untrained in the law since such considerations involve merely the officer’s subjective understanding of the law.⁷⁵

4. Dissenting Opinion

Justice Sotomayor began her strong dissent with a discussion of reasonableness, and highlighted the deference given to officers who evaluate, often quickly, the significance of facts out in the field.⁷⁶ But unlike the view of the majority, Justice Sotomayor argued that this same amount of defer-

68. See *United States v. Wallace*, 213 F.3d 1216, 1219 (9th Cir. 2000) (“The fact that the alleged traffic violation is a pretext for the stop is irrelevant, so long as the objective circumstances justify the stop.”).

69. *Whren*, 517 U.S. at 813.

70. *Heien v. North Carolina*, 135 S. Ct. 530, 539 (2014).

71. *Id.* at 541.

72. *Id.* at 542.

73. *Id.*

74. *Id.* at 541.

75. *Heien v. North Carolina*, 135 S. Ct. 530, 541 (2014).

76. *Id.* at 543.

ence is not applicable to an officer’s interpretation of laws, which is better left to courts.⁷⁷ Compared to the majority opinion, *Whren* is given more attention by Justice Sotomayor in her dissent when she elaborates on the expanded authority given to the police by the majority to expand on the opinion when they are policing in the “real world.”⁷⁸ Justice Sotomayor is also much more sympathetic to situations where a citizen is arrested based on a legal ambiguity.⁷⁹ This is apparent in her remark decrying the majority’s “eroding [of] the Fourth Amendment’s protection of civil liberties . . .” and points out “the meaning of the law is not probabilistic in the same way that factual determinations are.”⁸⁰ Rather, “the notion that the law is definite and knowable sits at the foundation of our legal system.”⁸¹

From Sotomayor’s point of view, the police would not be “unduly hampered” in the majority circuits that have held that police mistakes of law are not a factor in the reasonableness inquiry.⁸² She highlighted the fundamental unfairness in holding that a reasonable mistake of law can justify a Fourth Amendment seizure.⁸³ “[T]here is nothing in our case law requiring us to hold that a reasonable mistake of law can justify a seizure under the Fourth Amendment.”⁸⁴ She argued this would result in too many stops, resulting in constitutional violations because innocent citizens would be made to shoulder the burden. Justice Sotomayor asserted that an officer should be held accountable because it is their job to make split-second decisions.⁸⁵ Justice Sotomayor argued “an officer’s mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment.”⁸⁶

Next, Sotomayor noted the “police stopped Heien on suspicion of committing an offense that never actually existed.”⁸⁷ This was not a reasonable mistake about the facts on the ground—it was a mistake of law made by the police, the very same government officials whose central duty is the proper enforcement of the law.⁸⁸

Further, Sotomayor discusses another practical problem with the majority opinion: that it will have “the perverse effect of preventing or delaying the clarification of the law” by lower courts, which in deciding motions

77. *Id.*

78. *Id.* at 539.

79. *Id.* at 546.

80. *Heien v. North Carolina*, 135 S. Ct. 530, 546 (2014).

81. *Id.*

82. *Id.* at 544.

83. *Id.* at 545.

84. *Id.*

85. *Heien v. North Carolina*, 135 S. Ct. 530, 546 (2014).

86. *Id.* at 547.

87. *Id.* at 546.

88. *Id.* at 547.

to suppress will no longer need to offer a definitive interpretation of the law, but rather will need only to decide whether the officer's interpretation of the law was a "reasonable" one.⁸⁹ Justice Sotomayor writes, "[t]his result is bad for citizens, who need to know their rights and responsibilities, and it is bad for police, who would benefit from clearer direction."⁹⁰

Here, Sotomayor's analysis is most persuasive since *Heien* flies in the face of the age-old principle that knowledge of the law is imputed to the general public and that "ignorance of the law is no excuse."⁹¹ As was echoed throughout the dissent, the making of decisions and taking action in the field by the police is part of their job. Given the great leeway that the police already had before *Heien* it would not be overly burdensome for them to be held to be accountable for their actions, just like the other citizens. Because reasonable mistake of facts by citizens is no defense,⁹² neither should mistake of law by officers be used to exonerate them from liability in an otherwise lawful traffic stop. In the end, though *Heien* is favorable to police conduct in regards to mistakes of law, the mistakes still need to be "objectively reasonable." As such, officers still need to understand the law and cannot rely on their subjective understanding of the law.

B. RODRIGUEZ V. UNITED STATES

Under *Rodriguez v. United States*,⁹³ officers cannot prolong a traffic stop just to perform a dog sniffing drug search.⁹⁴ As such, *Rodriguez* may deter officers inclined to use their authority to intimidate citizens out of exercising their constitutional rights.

Rodriguez's Mercury Mountaineer was spotted on a Nebraska highway veering slowly onto the shoulder for one or two seconds and then jerking back onto the road. Nebraska law prohibits driving on highway shoulders.⁹⁵ A K-9 officer questioned Rodriguez and checked his license, registration, and whether he had an outstanding arrest warrant. Everything checked out, but the officers also questioned the passenger traveling with Rodriguez and checked his documents as well.⁹⁶ Twenty minutes after the

89. *Id.*

90. *Heien v. North Carolina*, 135 S. Ct. 530, 547 (2014).

91. *Bryan v. United States*, 524 U.S. 184, 195 (1998) ("ignorance of the law is no excuse" for criminal conduct).

92. See Gabriel Chin et al., *The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code*, 93 N.C. L. REV. 139, 144 (2014) ("At [C]ommon [L]aw, both historically and today, a personal misunderstanding or ignorance of the law is generally not a defense to a criminal prosecution.").

93. *Rodriguez v. United States*, No. 13-9972, 2015 WL 1780927 (April 21, 2015).

94. *Id.* at *3.

95. See NEB. REV. STAT. § 60-6, 142 (2010).

96. *Rodriguez*, 2015 WL 1780927 at *3.

stop began, the officer issued a warning but did not let the men leave. Instead, the officer asked if the dog could conduct a walk around the car. Rodriguez said "no."⁹⁷ He was then detained eight minutes until another officer arrived. The dog sniff was then conducted; the dog alerted and police found a bag of methamphetamines.⁹⁸ Seven or eight minutes elapsed from the time the officer issued the written warning until the dog alerted.⁹⁹

Rodriguez was indicted on federal drug charges.¹⁰⁰ He moved to suppress the evidence seized from the vehicle. The Magistrate Judge recommended denial of the motion based on his conclusion that the "extension of the stop by 'seven to eight minutes' for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was therefore permissible," and the district court adopted that recommendation.¹⁰¹ Rodriguez was convicted upon his conditional guilty plea to one count of possession with intent to distribute fifty grams or more of methamphetamine, and appealed the denial of his motion to suppress on the ground that the officer had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.¹⁰² The Eighth Circuit affirmed.¹⁰³

Writing for a six justice majority, Justice Ruth Bader Ginsburg applied a safety-based rationale for traffic stops, and explained that the fundamental mission of a traffic stop is "ensuring that vehicles on the road are operated safely and responsibly."¹⁰⁴ This principle allows the officers to inquire into the traffic violation that justified the stop, as well as to make other safety-related checks. The police may check for a driver's license, ask for a registration and proof of insurance and check for outstanding warrants. But exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures.¹⁰⁵ The Court concluded that bringing out drug sniffing dogs is outside the mission and cannot support a delay absent reasonable suspicion. Ginsburg stressed that the traffic stop "'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket . . ."¹⁰⁶ Justice Ginsburg reasoned,

Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the

97. *Id.*

98. *Rodriguez*, 2015 WL 1780927 at *4.

99. *Id.* at *4.

100. *Id.* at *1.

101. *Id.* at *4.

102. *Id.*

103. *Rodriguez*, 2015 WL 1780927 at *4.

104. *Id.* at *6.

105. *Id.* at *3.

106. *Id.* at *3 (citations omitted).

mission of the stop itself. . . . On-scene investigation into other crimes, however, detours from that mission. . . . So too do safety precautions taken in order to facilitate such detours. . . . Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis.¹⁰⁷

The Court remanded the case to the lower court to determine whether, despite the magistrate's finding to the contrary, there was some reasonable, independent justification for the search. Justice Kennedy filed a dissent. Justice Thomas filed a dissenting opinion, in which Justice Alito joined and Justice Kennedy joined in part.

Doctrinally, *Rodriguez* imposes limits by adopting a more limited framework for the duration of the stop and says that the criminal-related steps cannot extend the stop even a second beyond that. While the ruling does not completely erase *Heien* because officers can still stop cars even if they are mistaken about the law, once they do, they cannot detain cars without reasonable suspicion that a crime has been committed.

As analyzed in the next section, an alleged traffic infraction of crossing or touching a fog line is at best the sport of "sloppy study" referred to by Chief Justice Roberts in *Heien*. To hold otherwise ignores the observations by both the majority opinion and dissenting opinions in *Heien* that it would be a rare situation where the law is so confusing that it would be reasonable for a police officer to be unaware of it. Such a holding would also mean that ignorance of the plain language used in the law automatically excuses the police.

IV. FOG LINE LITIGATION

Remarkably, the practical problems of the majority opinion, especially its placing a reliance and trust on an officer, which concerned Justice Sotomayor, are realized in a generation of fog line litigation. Unfortunately, in many of these fog line cases, law enforcement seems to be relying on fog line violations as a pretext to effectuate traffic stops, irrespective of the officer's interpretation of law. Unlike the statute in *Heien* that involved a difficult issue of statutory interpretation well outside the ken of non-lawyer police officers, state fog line statutes are not difficult to learn about and understand. Thus, it is unlikely that an objectively reasonable officer could sensibly misinterpret, in good faith, these fog line statutes.

The majority of authority on this issue supports the supposition that nominally encroaching upon traffic control lines does not constitute a viola-

107. *Id.* at *7 (citations omitted).

tion of safely maintaining one’s travel lane. To begin, in *Rowe v. State*,¹⁰⁸ the unanimous court examined the plain language of Maryland’s lane-straddling statute and concluded that, “more than the integrity of the lane markings, the purpose of the statute is to promote safety on laned roadways.”¹⁰⁹ The court noted that “[t]his interpretation is also consistent with that given essentially identical statutes by courts that have considered this issue.”¹¹⁰

As interpreted by the vast majority of courts that have addressed the issue, lane straddling statutes “requir[e] more for violation than a momentary crossing or touching of an edge or lane line.”¹¹¹ The weight of authority suggests that nominal and brief incidents of encroaching upon a traffic control line does not constitute a violation of traffic laws. As one can imagine, without video or other tangible evidence available, alleged fog line infractions are difficult to defend. As Professor Wilson observes, “[a] defendant who contradicts an officer’s testimony with a claim that he or she did not cross the fog line does little more than generate images of a childhood dispute—‘Yes, you did. No, I did not. Yes, you did!’”¹¹² Yet more often than not, courts give police officers more deference.

A. NINTH CIRCUIT CASES

Fog line litigation has resulted in less than consistent rulings in the Ninth Circuit.

108. *Rowe v. State*, 769 A.2d 879 (Md. 2001).

109. *Id.* at 885.

110. *Id.* at 886.

111. *Id.* at 886; *accord* *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000) (isolated incident of car temporarily crossing the white line separating the emergency lane from the right-hand traffic lane insufficient to support a traffic stop); *United States v. Gregory*, 79 F.3d 973, 978 (10th Cir. 1996) (holding that an isolated incident of a vehicle crossing into the emergency lane of a roadway does not violate state statute’s requirement that vehicles remain entirely in a single lane “as nearly as practical”); *State v. Cerny*, 28 S.W. 3d 796, 800-01 (Tex. App. 2000) (holding a traffic stop invalid where the car drove on a portion of white shoulder stripe and was weaving somewhat within its own lane of traffic); *see also* *Hernandez v. State*, 983 S.W.2d 867, 870-71 (Tex. App.1998) (car briefly drifted into adjacent traffic lane and back); *State v. Tarvin*, 972 S.W. 2d 910, 912 (Tex. App. 1998) (car drifted over the solid white line at the right-hand side of the road on two or three occasions); *Crooks v. State*, 710 So. 2d 1041, 1042-43 (Fla. Dist. Ct. App. 1998) (car drove over the right-hand line on the edge of the road); *State v. Bello*, 871 P.2d 584, 587 (Utah Ct. App. 1994) (car temporarily drifted so that it straddled both eastbound lanes of traffic).

112. *See* Melanie D. Wilson, “You Crossed the Fog Line!”—*Kansas, Pretext, and the Fourth Amendment*, 58 U. KAN. L. REV. 1179, 1191 (2010).

1. *United States v. Colin*

In *United States v. Colin*,¹¹³ the Ninth Circuit analyzed California Vehicle Code § 21658(a) (“lane straddling”),¹¹⁴ which requires that drivers “drive as nearly as practical entirely within a single lane,” and held that police officers cannot pull over a driver for swerving unless it is pronounced and continues over a “substantial distance.”¹¹⁵ Defendants were accused of twice driving in the fog lane for a prolonged period of time.¹¹⁶ The officers in *Colin* saw a driver drift to the right, let his right tires follow the fog line for about ten seconds, and pulled the car over for possible violation of driving under the influence and lane straddling.¹¹⁷ The Ninth Circuit held that the officers lacked justification for a traffic stop because the weaving was not pronounced and did not continue over a “substantial distance.”¹¹⁸ Therefore, the court found the officers did not have reasonable suspicion to effectuate a stop.¹¹⁹ The *Colin* court found that a car spending multiple seconds in the fog lane did not constitute a violation of the statute.¹²⁰

2. *United States v. Delgado-Hernandez*

In *United States v. Delgado-Hernandez*,¹²¹ the Ninth Circuit held that Delgado-Hernandez’s crossing a fog line momentarily did not violate NRS 484.305(1) or provide officers with reasonable suspicion.¹²² Nevada Highway Patrol Officers spotted Delgado-Hernandez traveling within the posted speed limit northbound on Interstate 15 at night.¹²³ The troopers saw Delgado-Hernandez’s car wheel cross over the fog line by approximately

113. *United States v. Colin*, 314 F.3d 439, 446 (9th Cir. 2002).

114.

Whenever any roadway has been divided into two or more clearly marked lanes for traffic in one direction, the following rules apply: (a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from the lane until such movement can be made with reasonable safety.

CAL. VEH. CODE § 21658(a) (1976).

115. *See United States v. Colin*, 314 F.3d 439, 444 (9th Cir. 2002).

116. *Id.* at 441.

117. *Id.*

118. *Id.* at 445-46.

119. *Id.*

120. *United States v. Colin*, 314 F.3d 439, 445-46 (9th Cir. 2002).

121. *United States v. Delgado-Hernandez*, No. 06-10572, 2008 WL 2485429 (9th Cir. June 19, 2008).

122. *Id.* at *5.

123. *Id.*

twelve to fourteen inches for a few seconds.¹²⁴ Believing that he violated NRS 484.305(1), the troopers pulled over Delgado-Hernandez’s car.¹²⁵ Once the troopers explained the reason for the stop, Delgado-Hernandez was informed that he was free to go without being cited. But because one of the troopers suspected Delgado-Hernandez of transporting illegal narcotics, he asked and obtained Delgado-Hernandez’s permission to search his car, and subsequently, cocaine was found inside the trunk.¹²⁶

The Court of Appeals determined that there was no evidence that Delgado-Hernandez swerved in his lane, or otherwise drove erratically.¹²⁷ The court examined the legislative intent and statutory language of NRS 484.305(1), and interpreted its primary purpose is to promote safety of multi-lane roads, and that it calls for the court to determine whether, under the circumstances, the driver’s conduct threatened “the safety of other motorists, pedestrians or bystanders.”¹²⁸ With that in mind, the Ninth Circuit concluded that Delgado-Hernandez did not place anyone in danger by momentarily crossing the fog line and did not fail to drive “‘as nearly as practicable’ in a single lane” based on the court’s reading of the language of the statute requiring nothing more than staying in a single lane to the degree reasonably feasible.¹²⁹

3. *United States v. Wendfeldt*

More recently, the district court in *United States v. Wendfeldt*¹³⁰ granted a habeas petition based on the Nevada Highway Patrol’s unconstitutional stop of a car traveling on Interstate 80 based on an alleged violation of NRS 484.305.¹³¹ The court concluded that (1) the officer lacked reasonable suspicion to stop Wendfeldt and (2) the stop was unnecessarily prolonged without any reasonable suspicion after Wendfeldt refused consent.¹³² The trooper told Wendfeldt that he was stopped based on alleged concerns that Wendfeldt may have been drinking or possibly falling asleep.¹³³ Wendfeldt informed the trooper that he drove toward the right lane to make room for the trooper’s patrol car in the adjacent lane.¹³⁴

124. *Id.*

125. *Id.* at *1.

126. *Delgado-Hernandez*, 2008 WL 2485429 at *2.

127. *Id.* at *4.

128. *Id.* at *5.

129. *Id.*

130. *United States v. Wendfeldt*, 58 F. Supp. 3d 1124 (D. Nev. 2014).

131. *Id.* at 1127.

132. *Id.* at 1134.

133. *Id.* at 1126.

134. *Id.* at 1127.

After noticing the “lived in” look of Wendfeldt’s car, the trooper conducted a weapons frisk.¹³⁵ When asked about any criminal history, Wendfeldt informed the trooper that he had a prior driving under the influence charge.¹³⁶ After reviewing Wendfeldt driver’s license and registration, and running the information through dispatch, the trooper told Wendfeldt that he was free to leave.¹³⁷ But then he reinitiated questioning by asking if he had anything illegal in the car.¹³⁸ After Wendfeldt refused the trooper’s request to search the car, the trooper was alerted to the areas of the passenger door.¹³⁹ Ultimately, a search warrant was obtained and a subsequent search found methamphetamine, drug paraphernalia, and three guns.¹⁴⁰

Referring to the NRS 484.305 violation, the court cited to *Delgado-Hernandez* for analytical support, and reasoned that “Wendfeldt merely touched the line, and never crossed it. . . . [His] right tires touched the fog line several times, . . . [but not] erratically in any way, and his driving posed no danger to any other motorists.”¹⁴¹

With regard to Wendfeldt’s claim that his detention was prolonged, the court concluded that when the trooper initially stopped the car, it was not an unreasonably lengthy traffic stop based on prior Ninth Circuit precedent. However, the stop was unreasonably prolonged once the trooper began asking additional targeted questions regarding possible contraband after informing Wendfeldt that he was free to leave because the trooper lacked consent, and was unsupported by additional reasonable suspicion.¹⁴²

4. *The Curious Case of United States v. Raileanu*

In *United States v. Raileanu*,¹⁴³ Raileanu was pulled over for an alleged violation of NRS 484B.223¹⁴⁴ when he crossed over the fog line three

135. *United States v. Wendfeldt*, 58 F. Supp. 3d 1124, 1127 (D. Nev. 2014).

136. *Id.*

137. *Id.*

138. *Id.*

139. *United States v. Wendfeldt*, 58 F. Supp. 3d 1124, 1127 (D. Nev. 2014).

140. *Id.* at 1127.

141. *Id.* at 1130.

142. *Id.* at 1135.

143. *United States v. Raileanu*, No. 2:13-CR-038-APG-PAL, 2013 WL 6913252 at *2 (D. Nev. Dec. 30, 2013).

144. NRS 484B.223 (previously NRS 484.305) states in pertinent part:

1. If a highway has two or more clearly marked lanes for traffic traveling in one direction, vehicles must:

(a) Be driven as nearly as practicable entirely within a single lane; and

(b) Not be moved from that lane until the driver has given the appropriate turn signal and ascertained that such movement can be made with safety.

NEV. REV. STAT. ANN. § 484B.233(1)(a)(b) (West 2009) (originally enacted as NEV. REV. STAT. ANN. 484.305).

times in one-quarter of a mile.¹⁴⁵ The court held that the officer possessed reasonable suspicion to justify stopping Raileanu's car. The court relied on *Whren*, and reasoned that based on the totality of the circumstances, there was an objectively reasonable basis to perform a traffic stop.¹⁴⁶ The court also concluded that Raileanu was not unreasonably detained because the arresting officer asked a "reasonable number of questions designed to dispel or confirm his suspicions about Raileanu's conduct . . ." and the purpose of his travel.¹⁴⁷ Finally, the court held that Raileanu's consent to allow a search of his car was voluntarily, intelligently, and knowingly given, and Raileanu, a native of Moldova, had no difficulties understanding English.¹⁴⁸ Consequently, the court adopted the magistrate judge's report and recommendation to deny Raileanu's motion to suppress.¹⁴⁹

Curiously, the court declined to address the alleged violation of NRS 484B.223 itself because it already concluded that Officer Bundy's traffic stop of Raileanu was supported by reasonable suspicion. In the eyes of the court, it was unnecessary to decide whether there was a violation of NRS 484B.223. However, the issue of lack of reasonable suspicion necessarily implicates the alleged violation of NRS 484B.223. As such, the court's decision begs the question: if Raileanu was pulled over for violating NRS 484B.223, why was the judicial determination of that charge avoided? Regardless of the answer, I argue below that there was no reasonable suspicion to stop Raileanu because Officer Bundy was mistaken in his belief that encroaching upon the fog line constituted a traffic infraction or evidence of unsafe operation in violation of NRS 484B.223.¹⁵⁰

Apparently, the entire prosecution was predicated on Officer Bundy's mistaken impression of law and an erroneous impression of the facts.¹⁵¹ Specifically, there was no reasonable suspicion to stop Raileanu because

145. *Id.* While the Nevada Supreme Court has not ruled on NRS 484B.223, the Ninth Circuit explored it in *United States v. Garcia*, 205 F.3d 1182 (9th Cir. 2000), when deciding whether an officer had probable cause to stop a driver. In *Garcia*, the officer saw the vehicle cross into one lane and then cross back into another lane. *Id.* at 1184. Then, the driver changed lanes to pass a semi-truck. As the vehicle passed the truck, the officer saw it swerve over the center yellow line into the paved shoulder throwing dirt and debris up. *Id.* The vehicle then jerked back into the previous lane. *Id.* Under, these circumstances the Court found the officer had probable cause. *Id.* at 1187.

146. *Raileanu*, 2013 WL 6913252 at *22.

147. *Id.* at *24-26.

148. *Id.* at *26.

149. *Id.*

150. NRS 484B.223 is virtually identical to California Vehicle Code § 21658(a) at issue in *Colin*.

151. This section discusses only the issue related to alleged violation of NRS 484B.223.

Officer Bundy was mistaken in his belief that encroaching upon the fog line constituted a traffic infraction or evidence of unsafe operation.

The facts are compelling. On January 13, 2013, Andrei Raileanu and his pregnant girlfriend, Mila Dopca, were on their way to Utah for a winter ski getaway when they had the misfortune of being seen by an eager Mesquite police Officer Bundy who was looking for anything to investigate.¹⁵² Officer Bundy spotted Raileanu's 2002 Mercedes cruising eastbound on Mesquite Boulevard, and chose to follow it as it turned into the Terrible's gas station parking lot.¹⁵³ Based on a hunch, Officer Bundy drove around the block and hid in a nearby trailer park to watch Raileanu and Dopca.¹⁵⁴

Soon after, Officer Bundy followed Raileanu from Terrible's onto the Interstate 15 northbound ramp with the hope of finding a reason to pull him over. But Raileanu was not speeding or driving erratically.¹⁵⁵ Still unswayed, the determined Officer Bundy followed Raileanu for an additional quarter of a mile before pulling over Raileanu for slightly passing over the fog line three times, which he believed was in violation of NRS 484B.223.¹⁵⁶ Even after Officer Bundy verified Raileanu's and Dopca's Nevada state identification, and having determined that Raileanu was not driving under the influence, he remained convinced that some unlawful activity existed. Eventually, Officer Bundy gained entry into Raileanu's car and found 112 debit and/or credit cards during a subsequent search.¹⁵⁷

In Raileanu's motion, he argued the officer stopped him based on a mistaken belief that crossing the fog line was a violation of NRS 484B.223. However the court was persuaded by Officer Bundy's testimony that criminal activity was afoot because Raileanu "quickly" turned into the gas station after the officer made "a u-turn and pulled his patrol car" outside of the convenience store.¹⁵⁸

Even before the unlawful traffic stop, Officer Bundy could not offer any particularized facts to warrant an articulable, objective, and reasonable suspicion that Raileanu or Dopca committed or were about to commit a crime. At the evidentiary hearing, Officer Bundy testified that he observed Raileanu's car "touch" the fog line three times.¹⁵⁹ His momentary and marginal touching of a fog line did not continue over a substantial distance.

152. *Raileanu*, 2013 WL 6913252, at *2.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Raileanu*, 2013 WL 66913252, at *2.

158. *Id.* at *22.

159. Transcript of Evidentiary Hearing at Vol. 1, 19-20, *United States v. Raileanu*, No. 2:13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (on file with the author).

This alleged traffic infraction was so incidental that no citation was even issued.

In short, Officer Bundy merely relied on his hunch. However, an officer's hunch, even one that later turns out to be correct, does not equal reasonable suspicion.¹⁶⁰ As the Ninth Circuit has stated in an en banc opinion, police hunches are insufficient to establish reasonable suspicion for a stop.¹⁶¹ Oftentimes, it is just a matter of law enforcement claiming that there was reasonable suspicion for the traffic stop, involving facts likely to be connected with criminal activity.¹⁶² But in this case, Officer Bundy had significantly fewer factors to rely on in making his self-professed claim that reasonable suspicion existed: (1) Raileanu made a u-turn; (2) he drove into the Terrible's gas station; and (3) Raileanu and Dopca explained to him that they were going on a ski trip.¹⁶³ Officer Bundy was not entitled to turn an alleged routine traffic stop into a criminal investigation just because he had a hunch or was otherwise unsatisfied with Raileanu's answers to his battery

160. United States v. Mattarolo, 209 F.3d 1153 (9th Cir. 2000).

161. United States v. Gill, 280 F.3d 923 (9th Cir. 2002); *see also* Brown v. Texas, 443 U.S. 47 (1979) (holding that a vehicle that looks suspicious in a high crime area does not establish reasonably articulable facts that support a vehicle stop).

162. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 268-71 (2002) (defendant's van was driven on an unpaved remote road causing an alarm to be tripped nearby, the passengers waved at the officers in an abnormal pattern, and the defendant stiffened up and avoided looking at the officer before making a quick turn); Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (defendant was stopped in an area known for heavy drug trafficking and expected criminal activity); United States v. Valdes-Vega, 738 F.3d 1074, 1077 (9th Cir. 2013) (border patrol agents stopped defendant's truck which displayed Baja California license plates, and was speeding "well over" 90 miles per hour and making "at least ten" erratic lane changes without signaling); United States v. Pack, 612 F.3d 341, 345, 355 (5th Cir. 2010) (officer detained defendant who was speeding on Interstate 30, a drug corridor, in car with out of state license plates, who appeared nervous, and a drug-sniff dog was alerted to the trunk); United States v. Aitoro, 446 F.3d 246, 253 n.8 (1st Cir. 2006) (defendant who made abrupt about-face turn around on the street when police arrived and grabbed for what look like a gun in his waistband); United States v. Miranda-Guerena, 445 F.3d 1233, 1236 (9th Cir. 2006) (officer preformed pretextual stop based on information that defendant was involved in the sale of cocaine from his home and he was witnessed briefly visiting other locations, and receiving short duration visits at his home); United States v. Del Vizo, 918 F.2d 821, 822 (9th Cir. 1990) (officer gained information from a tip from a confidential informant, observed defendant quickly pull over to the curb and allowed cars to pass, made u-turns, and circled the neighborhood, all in a "counter-surveillance" manner); United States v. Sokolow, 490 U.S. 1, 10-11 (1989) (defendant was arriving from a source city for illicit drugs, defendant traveled under an alias, and paid cash for two airplane tickets, he appeared nervous, and he did not check his luggage).

163. Transcript of Suppression Hearing at Vol. 1, 20-22, United States v. Raileanu, No. 2-13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (on file with author).

of questions.¹⁶⁴ The speculative nature of Bundy's beliefs became evident at the evidentiary hearing when he offered conjecture about Raileanu's behavior. He testified that when Raileanu was at the gas station, he was "possibly looking out for me . . ."¹⁶⁵ Officer Bundy also testified that "[a]t this time I didn't see whether the defendant went inside the gas station or what was going on."¹⁶⁶ Officer Bundy further testified that as he was following Raileanu onto the interstate, "[Raileanu] was possibly looking in his rear-view mirror, knowing that I was following him."¹⁶⁷ Therefore, the stop and

164. Other courts have found Fourth Amendment violations where the police unreasonably extended the traffic stop to embark on a full criminal investigation. First, in *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011), the defendant, traveling in a rental car, was pulled over by a trooper for following too closely to a car in front of him. The defendant exited the car and he provided his driver's license and rental contract. *Id.* at 501. The trooper noticed what he believed to be suggestions of drug trafficking activity: two shirts hanging in the rear passenger compartment and a hygiene bag on the back seat, and that the interior of the car was clean. *Id.* at 502. The trooper asked numerous questions concerning the defendant's travel history and travel plans, and then turned to questioning about drug trafficking activity. *Id.* at 502. The trooper asked the defendant if there was any cocaine, heroin, or methamphetamine in the car, and received a negative response. *Id.* at 503. Reacting to the trooper's request to search the car, the defendant replied, "[i]f you want to, that's not a problem." *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011). When the defendant was unsuccessful in opening the trunk of the car, the trooper resumed questioning concerning drug trafficking activity, even as dispatch was informing the trooper that the defendant was not wanted on any outstanding warrants. *Id.* at 503. The trooper cited to these facts in deciding to prolong the traffic stop to allow for an investigation into drug trafficking activity. *Id.* at 512. Eventually, the trooper obtained a written consent form and during a subsequent search, 34,091 pills of Oxycodone and \$1,450 was discovered. *Id.* at 504. In finding a Fourth Amendment violation, the court held that the trooper lacked reasonable suspicion to turn the traffic stop into a drug investigation and the defendant's consent to search of the rental vehicle was involuntary. Second, in *United States v. Beck*, 140 F.3d 1129 (8th Cir. 1998), the defendant's rental car was pulled over because he was following another vehicle too closely. During the traffic stop, the defendant appeared nervous since his hands were shaking and he was looking around. *Id.* at 1132. The officer extended the stop even after determining that the defendant's driver's license was valid and that he had no criminal history. *Id.* at 1132. Eventually, a search of the defendant's briefcase revealed baggies containing methamphetamine residue. *Id.* at 1133. In holding that the trooper lacked reasonable suspicion to detain the defendant, the Court of Appeals rejected the discrete factors the government offered to establish that reasonable suspicion for the defendant's renewed detention and its contention that the trooper was entitled to abandon the traffic infraction purpose of the stop because of reasonable suspicion that criminal activity was afoot. *Id.* at 1137.

165. Transcript of Evidentiary Hearing at vol. 2, 68, *United States v. Raileanu*, No. 2-13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (emphasis added) (on file with the author).

166. Transcript of Evidentiary Hearing at vol. 2, 73, *United States v. Raileanu*, No. 2-13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (emphasis added) (on file with the author).

167. Transcript of Evidentiary Hearing at vol. 2, 75-76, *United States v. Raileanu*, No. 2-13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (emphasis added) (on file with the author).

detention of Raileanu and Dopca was unreasonable because it was based solely upon Officer Bundy's hunch that Raileanu had contraband in his car.

Next, Raileanu did not give consent to search his car. Whether consent to search was voluntarily given or not is "to be determined from the totality of all the circumstances."¹⁶⁸ As the record showed, Officer Bundy unreasonably detained Raileanu longer than necessary after he verified his identity. Officer Bundy admitted that after he verified Raileanu's identification, he had no further reason or basis to detain him. Conveniently, Officer Bundy failed to inform Raileanu of this fact.¹⁶⁹ Raileanu was not given an option to approve or disapprove of the search because of Officer Bundy's unrelenting and purposeful investigation.¹⁷⁰ As a result, any consent given to search was not an independent act of free will.

Similarly, Bundy's extension of Raileanu's detention was unreasonable because there were no objective facts showing Raileanu was involved in any unlawful activity, thus no subsequent detention was warranted.¹⁷¹ Concerning what Officer Bundy perceived as Raileanu's "strange behavior," other than Officer Bundy's account of what transpired between he and Raileanu, there is no evidence in the record showing that Raileanu acted "strangely." Raileanu acted normal. He was cooperative and answered all of Officer Bundy's questions, and provided consistent details about his travels.

While in *United States v. Mendez*,¹⁷² the Ninth Circuit held the Fourth Amendment does not require that police conducting a routine traffic stop have independent reasonable suspicion to ask questions that are unrelated to the purpose of the stop or request consent to search the vehicle, provided the interrogation does not prolong the length of the stop. It does not affect Raileanu's Fourth Amendment claim because the facts of this case are distinguishable.

In *Mendez*, two Phoenix gang enforcement officers stopped Mendez because his car did not have a license plate or temporary registration tag.¹⁷³ While one officer conducted a records check in the car, the other officer waited on the curb with Mendez.¹⁷⁴ While waiting, Mendez responded to

168. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

169. Transcript of Suppression Hearing at vol. 1, 91, *United States v. Raileanu*, No. 2-13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (on file with author).

170. Transcript of Suppression Hearing at vol. 1, 81-82, *United States v. Raileanu*, No. 2-13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (on file with author).

171. See *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (holding police must have reasonable suspicion criminal activity is afoot to continue a traffic stop beyond the purpose of issuing a warning or citation for the traffic violation).

172. *United States v. Mendez*, 476 F.3d 1077, 1081 (9th Cir. 2007).

173. *Id.* at 1078.

174. *Id.* at 1078-79.

questions that were prompted by officers seeing his gang tattoo, and volunteered a monologue about his gang life experience, his efforts to distance himself from his former gang life, and his time spent in an Illinois prison based on a weapons violation.¹⁷⁵ When asked if he had any weapons in the car, Mendez voluntarily admitted to having a firearm in the driver's door handle.¹⁷⁶

Unlike Mendez, Raileanu did offer information that was beyond the scope of the traffic stop, and in particular, he did not make any references to any criminal conduct or admit that he had any contraband in his car. Both officers in *Mendez* testified that the sole purpose of the stop was for "no registration."¹⁷⁷ In this case, Officer Bundy watched Raileanu at the gas station and followed him onto the interstate based solely on his hunch of suspicious activity. While the Ninth Circuit found no prolonged delay in *Mendez*, Officer Bundy unreasonably extended the traffic stop in this case. After initiating the traffic stop and speaking to Raileanu for two minutes and having verified his identification, he unnecessarily required Raileanu to step out of the car into the twenty-degree weather. Raileanu was also required to submit to a pat down search even though there were no indications that he was dangerous.¹⁷⁸ Once an officer has legitimately stopped an individual, the officer can frisk the individual, so long as "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."¹⁷⁹

Despite all of these things, the district court did not agree with such an assessment, and after the magistrate judge denied Raileanu's motion to suppress, he entered a plea agreement. The court imposed a sentence of time served (ten months), and as a result of the revocation of Raileanu's J Visa student status, he was deported as result of his conviction.

The Ninth Circuit affirmed Raileanu's conviction.¹⁸⁰ In finding that Officer Bundy had reasonable suspicion to stop Raileanu's car based on Raileanu's "counter-surveillance behavior" combined with touching the fog line, the court noted that Raileanu's "contrary arguments are not without force"¹⁸¹ Nonetheless, in the court's view, "the scope and duration of the traffic stop fell within constitutional limits."¹⁸² *Raileanu*, and other cas-

175. *Id.* at 1079.

176. *Id.*

177. *Mendez*, 476 F.3d at 1078-79.

178. Transcript of Suppression Hearing at vol. 1, 81-82, *United States v. Raileanu*, No. 2-13-CR-038-APG-PAL, 2013 WL 6913252, at *2 (D. Nev. Dec. 30, 2013) (on file with author).

179. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

180. *United States v. Raileanu*, No. 14-10127, 2015 WL 1787587 (9th Cir. Apr. 21, 2015).

181. *Id.* at *1.

182. *Id.*

es factually similar to it, underscore the uses and abuses of officers in relying on a lane statute to pull over a car. In fact, it is a common practice across the nation.

B. OTHER CIRCUITS

In other circuits, depending on the facts of the case, there have been equally divergent opinions. The Tenth Circuit interpreted Utah’s traffic statute in *United States v. Tang*,¹⁸³ and held that an officer was justified in stopping Tang based on reasonable suspicion of violating Utah’s traffic statute.¹⁸⁴ The officer witnessed the dual tires on the back of his U-Haul truck cross the right side fog line several times and the wheels rode the fog line for 200 to 300 yards. The officer found more than one hundred marijuana plants in the truck.¹⁸⁵ The court determined that the officer acted reasonably in believing that Tang could have been drowsy or impaired given the considerable distance that Tang’s U-Haul crossed the fog line, and thus concluded that the reasonable suspicion existed to support the vehicle stop to investigate the driver’s condition.¹⁸⁶ Likewise, in *United States v. Demilia*,¹⁸⁷ the Eighth Circuit held that Arkansas’s law prohibiting the crossing over of the fog line justified the making of a traffic stop by an Arkansas state trooper who witnessed Demilia cross over a fog lane twice and onto the highway shoulder.¹⁸⁸

However, in *State v. Nguyen*,¹⁸⁹ the Iowa Court of Appeals reversed Nguyen’s conviction for operating while intoxicated because it held that that the trooper who stopped Nguyen’s car because he came near the fog line twice within a period of ninety seconds did not constitute sufficient probable cause or reasonable suspicion based on Iowa’s traffic law.¹⁹⁰ The Court of Appeals opined, “there was no aggravated, continual, or pronounced weaving, only a ‘little bit’ of weaving Such minimal move-

183. *United States v. Tang*, No. 08-4179, 2009 WL 1353755, at *4-6 (10th Cir. May 15, 2009).

184. UTAH CODE ANN. § 41-6-61 requires drivers keep their vehicle as nearly as practical within a single lane. UTAH CODE ANN. § 41-6-61 (West 2015) (renumbered as UTAH CODE ANN. § 41-6a-710).

185. *Tang*, 2009 WL 1353755, at *4-6.

186. *Id.*

187. *United States v. Demilia*, 771 F.3d 1051 (8th Cir. 2014).

188. See ARK. CODE ANN. § 27-53-302 (2015) and/or ARK. CODE ANN. § 27-51-302 (2015) (effective Aug. 1, 2001).

189. *State v. Nguyen*, No. 13-0045, 2013 WL 5498072 (Iowa Ct. App. Oct. 2, 2013).

190. *Id.* at *3. Under Iowa law, “[a] vehicle shall be driven as nearly as practical entirely within a single lane and shall not moved from such lane until the driver has first ascertained that such movement can be made with safety.” IOWA CODE § 321.306 (2015).

ment in the lane and a momentary touching of the fog line is insufficient.”¹⁹¹

Further, in *United States v. Alvarado-Zarza*,¹⁹² the Fifth Circuit relied on *Heien*’s analysis in reversing and remanding a conviction based on the district court’s denial of a motion to suppress drugs found during a stop for a traffic violation. The court ruled that a Texas Highway Patrol officer’s error in initiating a traffic stop based on a Texas law requiring drivers to signal 100 feet before turning¹⁹³ was not objectively unreasonable in violation of the Fourth Amendment. After questioning Alvarado-Zarza and obtaining his consent, the patrol officer discovered cocaine in his car.¹⁹⁴ The court reasoned that unlike the North Carolina statute in *Heien*, the Texas statute is not ambiguous, and concluded that the officer was mistaken about the application of the 100-foot requirement because the actual distance between the signal and the turn was approximately 300 feet. The officer had no explanation as to why he thought the distance was less than 100 feet, and his “testimony did not provide the sort of specific, articulable facts which would allow a court to determine that he possessed a reasonable suspicion that Alvarado-Zarza had committed a traffic violation.”¹⁹⁵

V. RACIAL AND IMMIGRATION IMPLICATIONS

Because the reality of modern policing illustrates that racial minorities and immigrants are especially vulnerable for an alleged fog line violation, I discuss several interrelated points that move beyond a strict doctrinal Fourth Amendment analysis in this section. First, the continuing issue of racial profiling is inextricably intertwined with immigration enforcement.¹⁹⁶ Too often, Latinos and other non-whites are the targets of racial profiling by the police on the roadways.¹⁹⁷ They are stopped based solely on their

191. *Nguyen*, 2013 WL 5490872 at *4.

192. *United States v. Alvrdo-Zarza*, 782 F.3d 246, 248 (5th Cir. 2015).

193. *See id.* at 249. TEX. TRANSP. CODE ANN. § 545.104(b) (2015) (“An operator intending to turn a vehicle right or left shall signal continuously for not less than the last 100 feet of movement of the vehicle before the turn.”).

194. *Alvarado-Zarza*, 782 F.3d 246, 248 (5th Cir. 2015).

195. *Id.* at 250.

196. *See* ROGER G. DUNHAM & GEORGE WILSON, PREJUDICE AND RACIAL PROFILING IN CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 246 (Gregory S. Parks et al. eds., 2008) (explaining the practice of police officers relying on race inappropriately as a criterion in professional decision-making).

197. *See* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1009 (2010); Sharon L. Davies, *Profiling Terror*, in *THE FOURTH AMENDMENT SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* 189 (Cynthia Lee ed., 2011) (“[R]acial profiling occurs when an officer’s decision of whom to stop and question for suspected criminal activity proceeds

race and subjected to differential treatment, contravening the Fourteenth Amendment.¹⁹⁸ Certainly, racial profiling is not a black/white phenomenon, since Latina/os have been profiled along with African Americans in traffic stops and other investigatory stops in the belief that they are more likely to be involved in criminal or illicit drug related activity.¹⁹⁹ Since September 11th, racial profiling has been broadened to include those of Middle Eastern background,²⁰⁰ as well as Asians and others considered "foreign."²⁰¹

Second, the racial profiling of immigrants underscores the historical and contemporary relationship between criminal and immigration law, and an ever-expanding intersection between the criminal justice system and the immigration court system. For example, many previously handled immigration violations and civil matters are increasingly addressed as criminal matters.²⁰² Misdemeanors may result in mandatory deportation.²⁰³ The civil immigration process and criminal process now mirror one another.²⁰⁴ This phenomenon was examined in *Padilla v. Kentucky*,²⁰⁵ wherein the Court held that constitutionally competent counsel must advise his/her client of the potential for deportation when the immigration consequences are clear. The plight of immigrants facing criminal prosecution was emphasized in Justice Stevens' majority opinion.²⁰⁶ Counsel cannot remain silent, and cannot merely refer a defendant to seek advice from an immigration attor-

from the individual's race or ethnicity itself It is the individual's race or ethnicity that attracts the officer's interest or suspicion.").

198. See Reginald T. Shuford, *Any Way You Slice It: Why Racial Profiling is Wrong*, 18 ST. LOUIS U. PUB. L. REV. 371, 376 (1999).

199. See STEVEN BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 52 (2003); LISA MARIE CACHO, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED 30 (2012); see also Carol S. Steiker, *Second Thoughts About First Principles*, in THE FOURTH AMENDMENT SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 49 (Cynthia Lee ed., 2011) (observing that "blacks found walking in white neighborhoods, traveling on interstate buses, or committing minor traffic offenses are much more likely to be stopped, searched, and subjected to brutal treatment than similarly situated white people").

200. See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 116-18 (2007); Sharon L. Davies, *Profiling Terror*, in THE FOURTH AMENDMENT SEARCHES AND SEIZURES: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 185 (Cynthia Lee ed., 2011).

201. See Harvey Gee, *The Racial and Cultural Profiling of Asian Americans*, 11 SETON HALL CONST. L. J. 78-782 (2001) (reviewing MIN ZHOU & JAMES V. GATEWOOD, CONTEMPORARY ASIAN AMERICA: A MULTIDISCIPLINARY READER (2000)).

202. Jennifer M. Chacon, *The Security Myth: Punishing Immigrants in the Name of National Security*, in GOVERNING IMMIGRATION THROUGH CRIME: A READER (Julie A. Dowling and Jonathan Xavier Inda eds., 77 (2013)).

203. *Id.* at 80.

204. *Id.* at 80.

205. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

206. *Id.*

ney; rather, when the immigration consequences are clear, counsel must advise his client of those consequences.²⁰⁷

Third, the likelihood of deportation of undocumented immigrants after being stopped for a traffic infraction is a real possibility. There has been a historical high of two million deportations under the Obama Administration.²⁰⁸ Of those deported, 97% were Latino,²⁰⁹ and more than 250,000 were Asian American.²¹⁰ Since Asians, just like Latinos, have been the targets of aggressive immigration policies such as the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)²¹¹ and the Antiterrorism and Effective Death Penalty Act (AEDPA) which make it mandatory for immigrants with lawful permanent resident status to be removed from the United States because of a criminal conviction.²¹²

In addition, there has been a rise in deportations of Asian immigrants and refugees. Since 1998, approximately 13,000 deportation orders have been served against residents from Cambodia, Laos, and Vietnam. Many of these people migrated to the U.S. as refugees after the Vietnam War without access to social services, medical care, and employment opportunities.²¹³

Fourth, in the context of fog line stops, undocumented immigrants in Arizona are especially susceptible to be at risk because of its large immi-

207. *Id.*

208. See Sahra Vang Nguyen, *5 Terrifying Facts About Undocumented Asian Americans*, HUFFINGTON POST, Aug. 15, 2014, perma.cc/C9P9-WWAW; see also Adina B. Appelbaum, Note, *Challenging Crimmigration: Applying Padilla Negotiation Strategies Outside the Criminal Courtroom*, 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 217, 219 (2014) (“The Obama Administration has deported more immigrants than any previous presidential administration, with a rate double the annual average of President George W. Bush’s first term.”).

209. See Erica Person, *Latinos Are Deported Disproportionately More Than Any Other Minority: Report*, N. Y. DAILY NEWS, May 6, 2014, <http://www.nydailynews.com/news/politics/latinos-deported-report-article-1.1782202>.

210. See Nguyen, *supra* note 208.

211. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIA”), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). In doing so, Congress created several new terms of art, one of which was “removal.” See Rojas-Reyes v. INS, 235 F.3d 115, 120 (2d Cir. 2000). The creation of the term “removal” eliminated the previous legal distinction between deportation and exclusion proceedings and merged them into one unified procedure. See *United States v. Lopez-Gonzalez*, 183 F.3d 933, 934 (9th Cir. 1999).

212. Elizabeth R. OuYang, *Immigrants with Prior Criminal Record Risk Removal from the United States--Impact on Asian Immigrants*, 18 ASIAN AM. L.J. 157, 157-58 (2011).

213. See Kenneth Quineell, *Shattering the Model Minority Myth: Mass Incarceration and Asian and Pacific Islanders*, AM. FED’N OF LABOR & CONG. OF INDUS. ORG. (May 21, 2014), perma.cc/7Q88-MA4N.

grant population, and proximity to the Mexican border.²¹⁴ As was the situation in *Arizona v. Livingston*,²¹⁵ an officer could stop a car based on alleged violation of Arizona's lane law, which, like California and Nevada, requires a driver to remain exclusively in a single lane "as nearly as practicable" under the circumstances.²¹⁶ The facts of *Livingston* are straightforward. Livingston was not weaving or engaging in any erratic driving when the arresting officer testified that he saw Livingston's right side tires cross the white shoulder line one time. After the stop, during the interactions, the officer smelled the odor of marijuana, and eventually after obtaining Livingston's consent, he further found over one hundred pounds of marijuana and a large amount of cash.²¹⁷ The court held that Livingston's isolated and minor crossing of the shoulder line of the highway was not a violation of Arizona's statute.²¹⁸

If an undocumented immigrant or non U.S. citizen is pulled over, like Raileanu was, they can eventually be deported if convicted of an underlying criminal violation. Arizona's SB 1070 heightens the risk even further. SB 1070 was signed by Governor Jan Brewer on April 23, 2010, as an attempt to get the state to cooperate with federal immigration agencies in enforcing federal law.²¹⁹ As originally drafted, the law made it unlawful to transport an "alien" in Arizona, and the means of transportation is subjected to immobilization or impounding.²²⁰ Law enforcement agents were also empowered "to verify a person's immigration status in the course of 'lawful contact' when 'practicable,' if there is 'reasonable suspicion' that the person is an undocumented immigrant."²²¹ Litigation followed, and the case reached the Supreme Court which invalidated most of SB 1070, but left intact parts of the law, including a provision allowing law enforcement to arrest and hold anyone they believe has committed a crime and they think is in the country illegally, and hold them until their immigration status clears.²²²

214. See KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 110 (2007) (discussing efforts in Arizona in rounding up suspected undocumented immigrants found on the streets and work place).

215. *Arizona v. Livingston*, 75 P.3d 1103 (Ariz. Ct. App. 2003).

216. *Id.* ARIZ. REV. STAT. ANN. § 28-729(1) states in pertinent part: "[a] person shall drive a vehicle as nearly as practicable entirely within a single lane and shall not move the vehicle from the lane until the driver has first ascertained that the movement can be made with safety." ARIZ. REV. STAT. ANN. § 28-729(1) (West 2015).

217. See *Livingston*, 75 P.3d at 1105.

218. *Id.*

219. See Rogelio Saenz, *Arizona's SB 1070: Setting Conditions for Violations of Human Rights Here and Beyond*, in *CRIMMIGRATION: GOVERNING IMMIGRATION THROUGH CRIME: A READER* (Julie A. Dowling and Jonathan Xavier Inda eds., 165 (2013)).

220. *Id.*

221. *Id.* at 169.

222. An individual may be held indefinitely if they cannot prove their U.S. citizenship without a birth certificate, and no other country is willing to accept them. See generally

Further, the Secure Communities program run by U.S. Immigration and Customs Enforcement (ICE), which requires the fingerprints of all individuals booked into local jails to be sent to the Federal Bureau of Investigation and the Department of Homeland Security, may not be moot depending on the outcome of the inevitable battle between the White House and Congress over immigration reform. In 2001, President Obama called for comprehensive immigration reform for the 21st century,²²³ and the Senate passed a bill for immigration reform, but pro-immigration reform efforts came to a halt in Congress.²²⁴ After the Republicans gained majority after the 2014 mid-term elections, President Obama signed an Executive Order on immigration seeking to shield up to five million people from deportation, end the Secure Communities program run by U.S. Immigration and Customs Enforcement (ICE), and refocus enforcement on criminals and foreigners who pose security threats.²²⁵ However, the Executive Order will likely meet heavy Congressional opposition.²²⁶ As a result, the future of immigration reform remains unclear.²²⁷

Harvey Gee, *Placing Limitations on the Government's Indefinite Detention of Immigration Detainees after Rodriguez*, 17 GONZ. J. OF INT'L LAW 20 (2014). Along these same lines, an individual may be deported if they cannot prove their U.S. citizenship derivatively. Oftentimes, the government attempts to preclude defendants from addressing the issue of derivative citizenship until the court ruled as a matter of law whether or not his claim of derivative citizenship may be presented to the jury. Courts have ruled that the issue of derivative citizenship is certainly relevant to a §1326 prosecution. *See United States v. Sandoval-Gonzalez*, 642 F. 3d 717, 724 (9th Cir. 2011) ("If he has evidence that has a tendency to make derivative citizenship more likely, it is relevant to the issue of alienage."); *United States v. Smith-Baltiher*, 424 F.3d 913, 920-22 (9th Cir. 2005) (reversed conviction where defendant was denied right to represent evidence of derivative citizenship); *United States v. Gracidias-Ulibary*, 231 F.3d 1188, 1196-97 (9th Cir. 2000) (en banc) (holding defendant's alienage is an essential element of the §1326 offense and the that government must prove its burden with respect to that element just as it does with all others); *United States v. Castro-Cabrera*, 534 F. Supp.2d 1156, 1162 (C.D.Cal. 2008) (evidence that defendant sought to return because his mother was dying or his cultural assimilation in the U.S. are irrelevant to the charges and a motion in limine was granted but evidence that he may be a derivative citizen is relevant and admissible).

223. THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM 3 (2011), perma.cc/7WHB-WYS4.

224. *See* Laura Myers, *Immigration Reform Chances Slim, Heck Says*, LAS VEGAS REV. J., June 28-29, 2014 at B1.

225. *See* Michael D. Shear, *Obama Moves Ahead on Immigration Overhaul*, N.Y. TIMES, Nov. 21, 2014, at A1; A18. The Mexican American Legal Defense Fund and the Asian American Legal Defense Education Fund support the President's Executive Order. *See* MALDEF Press Release, Nov. 20, 2014, perma.cc/H9ZM-M2QT; *AALDEF Statement on Immigration Executive Action*, ASIAN AM. LEGAL DEF. & EDU. FUND (Nov. 20, 2014), perma.cc/VN3J-ZET4.

226. *See* Michael D. Shear, *Obama Moves Ahead on Immigration Overhaul*, N.Y. TIMES, Nov. 21, 2014, at A18. Michael D. Shepard et al., *Obama Plan May Allow Millions of Immigrants to Stay and Work in U.S.*, N. Y. TIMES, Nov. 13, 2014,

VI. CONCLUSION

In sum, allowing officers to use the fog line law as a means to pull over citizens who have done nothing illegal would be fundamentally unfair and unjust. At any given time, ordinary drivers may be momentarily distracted by a cell phone ringing, adjusting a rearview mirror or the exterior mirror controls, reaching for a drink or an article in the car, assisting an infant in the back seat, or for any one of a myriad of other reasons which could cause one of the driver's wheels to momentarily touch a fog lane. Yet as discussed in the previous sections, even the slightest touching allows officers with a pretext to pull over cars, initiate contact with the driver, and unreasonably detain the driver and ask probing questions based on what the officer subjectively considers to be "suspicious behavior." During this fishing expedition, the officer can then intimidate drivers further and ask as many questions as he wants until he is satisfied. Added to this problematic situation is the Court's early Christmas gift to law enforcement last December in the form of *Heien*. The ruling is just the latest case that gives law enforcement further leeway and practices in the context of investigations and arrest. As a result, the already lean Fourth Amendment continues to be cut and trimmed.²²⁸

<http://www.nytimes.com/2014/11/14/us/obama-immigration.html>; Joe Klein, *Tackling Immigration Alone*, TIME, Dec. 1, 2014 at 28.

227. See David Nakamura, *Immigration Reform Effectively Dead Until After Obama Leaves Office, Both Aides Say*, WASH. POST, June 26, 2014, perma.cc/Q9XK-4LK9; Zachary A. Goldfarb & David Nakamura, *Obama Pledges to Redirect Immigration Enforcement, Conceding Defeat On Overhaul*, WASH. POST, June 30, 2014, perma.cc/375M-96JN; David Nakamura, *Obama Meets With Immigration Advocates*, WASH. POST, Mar. 14, 2014, perma.cc/RVN8-3TEW.

228. See, e.g., *Fernandez v. California*, 134 S. Ct. 1126 (2014); *Navarette v. California*, 134 S. Ct. 1683 (2013); *Maryland v. King*, 133 S. Ct. 1958 (2013); *Florence v. Bd. Of Chosen Freeholders*, 132 S. Ct. 1510 (2012).