VOID-FOR-VAGUENESS AS A LEGAL PROCESS CONTRADICTION

Andrew Jensen Kerr[*]

ABSTRACT

I argue that void-for-vagueness should be unmoored from its tenuous constitutional due process architecture and reconceptualized as a substantive principle, one rooted in the fundamental legal process value of separating legal framing from fact determination. In doing so, I challenge the recent Supreme Court decisions of *Johnson v. United States* (2015) and *United States v. Davis* (2019). Void-for-vagueness has been consistently criticized as a protean doctrine without form or scope. It is broadly about notice, but so are other criminal justice principles that remain un-constitutionalized, like retroactivity or legislativity. What makes void-for-vagueness unique from these principles is that it concerns published statutes that are thought to be layered or too capacious. Still, I point out that we live in a legal system that defers to triers of fact about how to make sense of broad, yet clear, legal instructions. As enjoined by Justice Holmes, all criminal defendants must guess as to how their conduct will be interpreted and taxonomized by a juror.

I reconcile void-for-vagueness on its own terms to show how it best functions. It is canonically described as resting on two independent jurisprudential bases: notice and arbitrary enforcement. I argue that these are instead integrated in a very specific way: a statute (or application of a statute) must be held vague when a defendant is unaware of how to conduct herself for a situational actor who can make an authoritative characterization about her supposed unlawful behavior. Situational actors have commonly been reduced to police, and this gives these situations the valence of a constitutional problem. But my argument shows–consistent with prior case law–that we are also concerned with victims as law-fact characterizers, and that this paired concern makes it more broadly about legal process. Finally, I build on the recent theorizing of Joel Johnson to integrate void-for-vagueness with mistake analysis in criminal law.

---

[*] Assistant Professor of Law, Peking University School of Transnational Law (S.J.D., Georgetown; J.D., Columbia). I thank Kate Duke, Abi McFarland and the staff of the *University of Louisville Law Review* for their superb editorial work. I also thank my colleagues at the Peking University School of Transnational Law for feedback received on a preliminary draft as part of the faculty workshop series.

I. INTRODUCTION

An individual interprets a criminal statute at his own peril. If he wrongly assumes that it does not apply to his conduct, he may be fairly punished. But if he finds himself in a vague criminal situation, he can challenge the relevant statute as unconstitutional. The statute—or its application to the individual[1]—is held void, and he goes home. So, what determines vagueness? This article offers a novel approach to this perennial question. Vagueness should not be thought of as a linguistic analysis based in notions of breadth or ambiguity, or as a constitutional analysis rooted in due process, however understood. Instead, vagueness is a legal process problem, one that integrates our basic moral intuitions about mistake and excuse. The hypotheticals that prompt this article are: Can an observer be mistaken about an individual's opaque conduct, like "hanging out," or "doing nothing." Can the individual himself mistake the identity of his own opaque *thing*—a curio like a dissembled weapon, one that is passed down as an heirloom for generations.

The Model Penal Code typifies the post-modern approach to mistake doctrine, which tells us that any distinctions between law and fact are a mirage, and that the core problem of notice underlies these twin analyses.[2] This article provides a more granular articulation of the problem of "mixed" mistake situations of law and fact.[3] Most authors equate the mixed mistake with the nested statute in which a separate law informs the legal-factual context of one's immediate situation, e.g., whether one's stuff is in fact their own property or whether one's fiancée is in fact unmarried. This article locates examples where there is inherent conceptual blurring, rather than nesting. In these examples, a situational actor must make a blended legal-factual characterization, one in which it is necessarily impossible for them to make a mistake of law.

This article thus re-conceptualizes void-for-vagueness doctrine around a subset of problematic criminal offenses that are supposed to delegate

---

[1] *See, e.g.*, Colten v. Ky., 407 U.S. 104, 108–10 (1972) (analyzing the language of "public inconvenience" as an as-applied vagueness challenge). *See also* Holder v. Humanitarian L. Project, 561 U.S. 1, 18–19 (2010) ("We consider whether a statute is vague as applied to the particular facts at issue …").

[2] *See, e.g.*, Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487, 487 (2012) ("The Model Penal Code seems to endorse the view that mistakes about noncriminal law norms should presumptively be treated as exculpatory in the same way as analogous mistakes about facts."); MARKUS D. DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 82 (2d. ed.) ("Under the Code, it makes no difference how a mistake is classified; the only thing that matters is whether or not it negatives an element of the offense.").

[3] *Cf.* Gerald Leonard, *Rape, Murder, and Formalism: What Happens if We Define Mistake of Law?*, 72 U. COLO. L. REV. 507, 508 (2001) (commenting on the lack of an adequate definition to distinguish mistake of law from mistake of fact).

questions of law to situational actors. This article is mostly descriptive.[4] Other courts and scholars are correct that there is something problematic with these sorts of criminal offenses. The ambition of this article is to provide a better explanation as to *why* they are problematic. In so doing, what have been considered independent prongs in vagueness doctrine (fair notice and arbitrary enforcement) can be reconciled, while articulating a more fundamental legal process rationale based in conflict of interest and the conflation of legal framing and fact determination. Consequently, this article expands on the usual list of offenses that trigger arbitrary enforcement analysis (vagrancy, loitering) to think about analogue cases in which a potential victim is authorized to characterize opaque conduct as criminal (bias crimes, true threats). To the extent that this article thinks about crimes that involve physical conduct as well as expressive conduct (threats), it aims to provide a unified theory for why we care about vagueness (conventionally regarded as a due process value) as well as overbreadth (a First Amendment concern). Void-for-vagueness doctrine and overbreadth doctrine have been paired as "constitutional cousins," as each is concerned with how imprecise statutes may chill or even criminalize conduct or speech that is otherwise regarded as lawful.[5] This article makes this connection more explicit. Each doctrine has been previously used to manage the problem of *opaque crimes*, or crimes where a situational actor is asked to probe the interiority of a defendant's mind.[6]

This imposes an unusual burden on the potential defendant. She must not only behave so that her conduct conforms with a legal standard, but she must also *perform* her conduct so as to satisfy audience expectations. This strange dialectic creates the possibility for communicative mismatch in our defendant/cop and defendant/victim dyads.[7] Commentators have suggested that mismatch (leading to arbitrary enforcement concerns) should erode as

---

[4] It is not unusual to aim for mere clarification in this area of scholarship. *See, e.g.*, Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2115–16 (2015) ("Thinking about vagueness in this manner may not change outcomes or make hard cases any easier, but it will assist deliberation and will provide a more convincing rationale once a conclusion is reached.").

[5] Richard Parker, *Overbreadth*, THE FREE SPEECH CENTER: THE FIRST AMENDMENT ENCYCLOPEDIA (Sept. 2017), https://www.mtsu.edu/first-amendment/article/1005/overbreadth. *See also* John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 265 (2002) ("The concepts of overbreadth and vagueness are, in some sense, distinct and yet, in other regards, inseparable.").

[6] *See* Leonard, *supra* note 3, at 520 ("But [Glanville] Williams immediately saw that the world of fact must include some things that he did not think of as objects of perception, such as someone else's state of mind, since such facts had to be inferred from other facts rather than simply sensed.")

[7] George Fletcher is known for his "communicative concept of action" that underlies the voluntary action requirement in criminal law. *See generally* GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL (2007). *See also* Francisco Munoz-Conde & Luis Ernesto Chiesa, *The Act Requirement as a Basic Concept of Criminal Law*, 28 CARDOZO L. REV. 2461 (2007).

police unit demographics begin to mirror that of the communities they serve.[8] But this article argues that because of the basic epistemological challenges that underlie these crimes, the emphasis should be on separating factual observations from legal characterizations to the extent possible. Unfortunately, this is very hard to do in these kinds of opaque situations.

Justice Frankfurter is regularly cited for his quip that "'indefiniteness' . . . is itself an indefinite concept."[9] Void-for-vagueness is a shape-shifting doctrine that has been marshaled by U.S. courts to achieve different sorts of goals over its lifespan.[10] It is assumed to derive from the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.[11] It remains unclear to what extent void-for-vagueness is a procedural claim for fair warning or instead a substantive protection against the criminalization of unarticulated constitutional rights (either because they are Ninth Amendment unenumerated rights or because they lie at the penumbral "buffer zone" of enumerated rights).[12] The common claim that void-for-vagueness reflects separation of powers concerns further blurs this distinction between procedure and substance.[13]

Justice Gorsuch in the recent case of *United States v. Davis* (2019) pointed to due process and separation of powers as the twin constitutional bases for void-for-vagueness, and then struck down the residual clause at issue that required jurors to determine what is a "crime of violence" per 18 U.S.C. § 924(c)(1)(A) (establishing heightened criminal penalties for possessing a firearm in a federal "crime of violence or drug trafficking crime").[14] The Court held—consistent with the prior residual clause cases of

---

[8] *See, e.g.*, Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153–54**,** 1169–70 (1998).

[9] Winters v. N.Y., 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting).

[10] Emily M. Snoddon, *Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2303 (2019) ("This uncertainty as to the doctrine's constitutional foundation has created ambiguity regarding the doctrine's scope that is emblematic of the Court's guidance on the doctrine generally. Cases such as *Humanitarian Law Project* and *Skilling* have led commentators to liken the doctrine to the 'I know it when I see it' test, a process that begins with a conclusion and works backward to find support. Given the lack of clear guidance from the Supreme Court, it is not surprising that lower courts struggle to apply the doctrine.").

[11] *Id.*

[12] Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1547 (2019) ("Vagueness is purportedly a procedural requirement for definiteness in penal statutes, but many believe it is used pretextually to protect substantive rights the Court is unwilling to promulgate openly, for fear of associating itself with substantive due process.").

[13] Kim Strosnider, *Anti-Gang Ordinances After* City of Chicago v. Morales*: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 119 (2002) ("It has long been recognized that the line between procedural and substantive due process blurs in vagueness doctrine.").

[14] U.S. v. Davis, 139 S. Ct. 2319, 2333 (2019). *See also* Arjun Ogale, *Vagueness and Nondelegation*, 108 VA. L. REV. 783, 785 (2022) (arguing that void-for-vagueness should be further bifurcated as "rights-based vagueness" and "structure-based" vagueness, as typified by recent cases like *Davis*).

Johnson v. United States (2015)[15] and *Sessions v. Dimaya* (2018)[16]—that § 924(c)(1)(A) requires the judge or jury to take a categorical analysis in which they idealize an ordinary case of the type of crime at issue (e.g., selling counterfeit handbags). This admittedly pushes on the ethical imagination of the factfinder. Indeed, Justice Gorsuch appears incredulous that jurors might be able to discern the quality or atmosphere of violence that surrounds a given crime, such as a transaction involving counterfeit handbags.[17] Gorsuch asks rhetorically: "How are jurors supposed to determine that?"[18] in response to his own handbag hypothetical.

But even if notions of violence are subjective and ethereal, e.g., the risk of violence that permeates certain criminal transactions, this does not mean that jurors are unable to give content to this concept ("violence"), as they might to any kind of working heuristic that is used to describe and evaluate the world. Jurors analyze these sorts of indefinite terms all the time. "Fraud" is an inherently irreducible concept, as noted by Kiel Brennan-Marquez in "Extremely Broad Laws."[19] We gladly defer to jurors to make sense of this "hard-to-formalize" crime.[20]

In *Johnson v. United States* and *Sessions v. Dimaya*, the Court struck down respective federal statutes that required defendants to wonder about how a juror might interpret if an idealized prior offense involved "serious risk of physical injury"[21] as part of a recidivist statute (*Johnson*) or if conduct could have been associated as a "crime of violence"[22] (*Dimaya*) as in *Davis*. It is certainly true that outsourcing these kinds of evaluative decisions about what constitutes risk or violence might create inconsistency in judgments, but these are also factual findings about the nature of crime that are grounded in practical morality. To this extent, they are eminently the stuff of jury considerations. It is also true that outsourcing these decisions to juries might produce sentencing disparities, but neither is this an uncommon, let alone constitutional, dilemma. If the Supreme Court does not like a broad, but clear, legal federal law, then it can use an interpretative canon to limit the scope of a contested statutory word, as it did in *Yates* regarding the language

---

[15] Johnson v. U.S., 576 U.S. 591 (2015).
[16] Sessions v. Dimaya, 138 S. Ct. 1204 (2018).
[17] *Davis*, 139 S. Ct. at 2332.
[18] *Id.*
[19] Kiel Brennan-Marquez, *Extremely Broad Laws*, 61 ARIZ. L. REV. 641, 658 (2019); *see also* City of Chi. v. Morales, 527 U.S. 41, 113 (1999) (Thomas, J., dissenting) ("The term 'loiter' is no different from terms such as 'fraud,' 'bribery,' and 'perjury.' We expect people of ordinary intelligence to grasp the meaning of such legal terms despite the fact that they are arguably imprecise.").
[20] Brennan-Marquez, *supra* note 19.
[21] Johnson v. U.S., 576 U.S. 591, 610–11 (2015).
[22] Sessions v. Dimaya, 138 S. Ct. 1204, 1207 (2018).

of "tangible object" in 18 U.S.C. § 1519,[23] or it can insert a mens rea requirement as it did in *Staples* regarding the possession of an automatic weapon.[24]

The Supreme Court's approach in these recent speculation-layering cases is flawed. It is true that the layered nature of these statutes requires a juror to make a factual judgment about the constitutive nature of crime. But important for this article's structural legal process analysis, the statute does not necessarily impose a police officer's or prosecutor's perspective on what counts as violence onto the juror. The juror can draw on her own lived experiences to form an independent factual conclusion. Also essential, a defendant is not simply existing, i.e., "being themselves," when involved in these kinds of crime-plus situations. There is already an underlying criminal element that removes these episodes from archetypal situations that void-for-vagueness (along with other legality principles) are concerned with, i.e., whether a defendant can distinguish everyday lawful behaviors from unlawful conduct.[25]

The Supreme Court's approach in this recent line of speculation-layering cases is also surprising, considering the Court has rarely relied on void-for-vagueness over the past half-century.[26] This makes sense. The kinds of opaque crimes (such as vagrancy or loitering) that void-for-vagueness is meant to surface are mostly gone from criminal codes, which is a very good thing. This article provides analytic clarity for these past cases, but also shows the structural prism at play here, how it relates to notions of opacity and performance, and how this legal-process based analytic continues to manifest in novel situations such as art threats.

---

[23] Yates v. U.S., 574 U.S. 528, 532 (2015).

[24] Staples v. U.S., 511 U.S. 600, 602 (1994).

[25] *See generally* Clark v. Ariz., 548 U.S. 735, 747 (2006) (discussing the M'Naghten insanity rule, which considers whether the defendant knew what he was doing was wrong).

[26] Jessica A. Lowe, *Analyzing the Void-for-Vagueness Doctrine as Applied to Statutory Defenses: Lessons from Iowa's Stand-Your-Ground Law*, 105 IOWA L. REV. 2359, 2370 (2019) ("Between 1960 and 2015, courts were hesitant to declare criminal statutes unconstitutionally vague. In fact, the Supreme Court only invalidated criminal statutes under the void-for-vagueness doctrine five times during this period."); s*ee also* Joseph E. Bauerschmidt, *"Mother of Mercy–Is This the End of RICO?"–Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern,"* 65 NOTRE DAME L. REV. 1106, 1118–19 (1990) (noting that between 1960 and 1990, the Court invalidated only three criminal statutes, outside the First Amendment, on vagueness grounds). *Cf.* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 660 (1981) ("The problem with viewing the vagueness doctrine as 'settling' the rule/standard tension is that the void-for-vagueness strictures are rarely used, though so many statutes are undeniably fuzzy.").

II. LINKING VAGUENESS AND MISTAKE

American judges have historically been wary of capacious statutes, even if they did not resort to the Due Process Clause to manage them. In *Sessions v. Dimaya*, Justice Gorsuch in concurrence provides an insightful revisionist account of early- to mid-Nineteenth Century laws that were struck or withheld by reference to lenity or strict construction.[27] He frames these within a vagueness lens, which makes intuitive sense.[28] His analysis coheres with an understanding of the overlapping nature of the principles of legality[29] (vagueness, legislativity, and retroactivity) as well as a pragmatic approach to statutory instruction in which judges should be mindful of how unscrupulous prosecutors might marshal capacious language to form leverage against defendants.[30] This broad ethic informs the thinking of Carissa Byrne Hessick in her noteworthy article on "Vagueness Principles,"[31] and manifests in recent cases like *Skilling* or *Yates* as well as the line of speculation-layering cases including *Sessions v. Dimaya*. Void-for-vagueness then essentially becomes a doctrinal touchpoint for problems related to judicial or prosecutorial discretion. But this also reinforces the critique that void-for-vagueness is an "I know it when I see it" dilemma.[32] Simply labeling the same generic problem as a myriad "due process" concern does not help to cabin in the doctrine or provide it an identity.

U.S. courts did not explicitly cite to the Due Process Clause to strike vague laws until the late Nineteenth Century.[33] By the early Twentieth Century, courts were making specific reference to the problem of "vague" laws; see, e.g., *United States v. L. Cohen Grocery Co.* (1921)[34] and *Connally v. General Construction Co.* (1926).[35] Indeed, Justice Thomas—a general skeptic of unwritten rights—is suspicious of void-for-vagueness doctrine in part because it evolved together with substantive due process during this *Lochner* era.[36] The catchy phrasing of "void-for-vagueness" gives the

---

[27] *Sessions*, 138 S. Ct. at 1225–26 (2018) (Gorsuch, J., concurring) ("This tradition of courts refusing to apply vague statutes finds parallels in early American practice as well. In *The Enterprise*, 8 F.Cas. 732 (No. 4499) (C.C.N.Y. 1810), for example, Justice Livingston found that a statute setting the circumstances in which a ship may enter a port during an embargo was too vague to be applied . . .").
[28] *See id.*
[29] *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).
[30] *Sessions*, 138 S. Ct. at 1224–25.
[31] *See generally* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137 (2016).
[32] *See* Decker, *supra* note 5, at 243.
[33] Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 720 (2017).
[34] U.S. v. L. Cohen Grocery Co., 255 U.S. 81, 86 (1921).
[35] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).
[36] *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1242–44 (2018) (Thomas, J., dissenting).

doctrine an alliterative appeal, but Justice Thomas's intuition is correct that void-for-vagueness is not simply about imprecision in statutes. Statutes are of course crafted so as to be generally applicable and to anticipate novel, unforeseen kinds of fact patterns that might be within the scope of their intended coverage. Again, Justice Holmes is quoted for the axiom that it is perfectly fine if a criminal defendant has to guess as to whether her conduct will be deemed as criminal by a future jury.[37] This is all to say that linguistic uncertainty might not be the best explanation for when courts choose to rely on void-for-vagueness doctrine.[38]

In his transformative[39] student note, Professor Anthony Amsterdam instead argued that void-for-vagueness is best regarded as a kind of "makeweight"[40] for when U.S. courts are concerned about statutes that infringe on the so-called "buffer zone"[41] of other substantive rights.[42] Amsterdam noted how void-for-vagueness was often used to strike economic legislation during the *Lochner* era.[43] That same doctrine was then used to protect First Amendment freedoms when speech rights became more vogue.[44] This pattern supports the dual claims that (1) void-for-vagueness is resorted to when courts feel uncomfortable with reifying the scope of a contested constitutional right and (2) void-for-vagueness is a tool that has been deployed instrumentally to serve substantive purposes.[45]

Others besides Professor Amsterdam have sought to clarify its identity and purpose. Justice Frankfurter thought it was about separation of powers.[46] John C. Jeffries, Jr. perceived it as integral to the principle of legality.[47] Peter W. Low and Joel Johnson think it is about the delegation of statutory construction to police.[48] (And Dean Risa Goluboff thinks the iconic

---

[37] Nash v. U.S., 229 U.S. 373, 377 (1913).
[38] *See, e.g.*, Low & Johnson, *supra* note 4, at 2096 ("Often, vagueness decisions, no matter what the theory, are not only about vagueness.").
[39] *Cf.* Kelman, *supra* note 26, at 660 ("A detailed account of the vagueness doctrine is unnecessary given Professor Amsterdam's seminal work.").
[40] Anthony Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 72 (1960) ("…it is apparent that the doctrine is frequently argued as a makeweight.").
[41] *Id.* at 75.
[42] Johnson v. Carson, 569 F. Supp. 974, 980 (1983) ("In *Grayned v. City of Rockford* (1972), the Supreme Court discussed the three reasons to hold a law void for vagueness. The Court stated . . . Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'") (internal citation omitted).
[43] Amsterdam, *supra* note 40, at 72, 77–80.
[44] *Id.* at 75.
[45] *E.g.*, *id.* (". . . that in the great majority of instances the concept of vagueness is an available instrument in the service of other more determinative judicially felt needs and pressures.").
[46] Winters v. N.Y., 333 U.S. 507, 525–33 (1948) (Frankfurter, J., dissenting).
[47] Jeffries, Jr., *supra* note 29 (though he doubted the continued relevance of the principle).
[48] Low & Johnson, *supra* note 4.

vagueness case of *Papachristou* is about *everything*.)[49] Michael Mannheimer thinks it is about the legal impossibility of conforming to unknowable facts or subjective normative standards.[50] John T. Parry connected it to reliance on an official statement of law.[51] Others think it is about directing legislatures to consider harm.[52] Many think it is about the fear of arbitrary enforcement,[53] and that void-for-vagueness is now employed as a stand-in for the Equal Protection Clause in discriminatory impact cases.[54]

Each of these descriptive theories captures a cluster of the constellation of the issues associated with individual conformance with a legal directive. But none of these—even the most broadly framed theories of separation of powers or the legality principle—identifies the structural dilemma at work in core cases. This paper offers a two-part corrective. First, the void-for-vagueness doctrine is reconciled on its own constitutional terms. Second, this article demonstrates that this is not a constitutional problem, but a legal process one.

Void-for-vagueness should not be regarded as simply a catchall tool that can be employed for the seemingly *independent* tasks of identifying statutes that either (1) possess fair notice problems *or* (2) can lead to arbitrary and discriminatory enforcement.[55] Justice Stevens's articulation in *City of Chicago v. Morales* reflects this disjunctive either/or framing. He writes: "Vagueness may invalidate a criminal law for *either* of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may

---

[49] *See, e.g.*, Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1363–71 (2010).

[50] Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1054 (2020) ("Statutes that require conformity with objective but unknowable facts have generally been deemed unconstitutional, while those that require conformity with known or knowable facts have generally been upheld. And statutes that require conformity with the entirely subjective impressions of others have generally been deemed unconstitutional, while those that require conformity with the standards of some community have generally been upheld.").

[51] John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 52–53, 56–61 (1997).

[52] *See* Binder & Fissell, *supra* note 12.

[53] *Cf.* Hopwood, *supra* note 33, at 696 ("States have employed vague and ambiguous criminal laws to target disfavored groups: vagrancy laws were used against the poor and homeless; loitering laws targeted African-Americans and Latinos; and masquerading laws were aimed at the gay community."). The U.S. Supreme Court has also held that "arbitrary enforcement" is more important than the fair notice prong. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974). *But see* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 292 (2003) (downgrading the significance of this prong).

[54] *E.g.*, Strosnider, *supra* note 13.

[55] Goldsmith, *supra* note 53, at 286 ("Today a statute can still be held unconstitutionally vague 'for either of two independent reasons.' But the second of those reasons has changed. A statute is now vague (1) 'if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'if it authorizes or even encourages arbitrary and discriminatory enforcement.'").

authorize and even encourage arbitrary and discriminatory enforcement."[56] This is a typical move. As observed by Emily Snoddon: "[t]he Court rarely explains how to apply the vagueness test. Instead, the Court cites the test's two prongs and then its conclusion without documenting how the two connect."[57]

I make the novel argument that these supposed separate prongs *are* in fact connected. The issue with opaque crimes is that a potential defendant is unsure of how to perform (a fair notice issue) so as to appease an audience who is authorized to make a legal characterization about it (an arbitrary enforcement concern). The concerning linkage in this subset of vagueness cases is that the defendant is tasked to perform her conduct in such a way that her audience does not view the defendant as having violated a criminal statute. In this subset of cases, the audience is referred to as a "situational actor," or a participant-observer in the defendant's dynamic setting who is making her own personal observations about the defendant's conduct. The situational actor makes at the same time an observational—or empirical or fact-based—claim about what the defendant is actually doing, as well as a legal claim in that the situational actor is characterizing or framing the defendant's behavior within the lens of a potentially relevant criminal statute. Other courts and commentators are wrong to worry so much about whether a judge or jury might arbitrarily enforce these vague laws.[58] The basic job description of a judge or jury is to simply pick a winner so the parties can go on with their lives. Juries are encouraged to rely on their own tacit knowledge to make fine distinctions about criminal guilt even if they cannot articulate or justify their reasons for doing so.

This article thus seeks to decouple void-for-vagueness from its constitutional mooring to instead show how the inner logic of void-for-vagueness is best conceptualized as a fundamental problem of legal process.[59] Identified with mid-Century thinkers like Henry Hart and Albert Sacks, the legal process school is associated with a focus on institutionalism and decision-making.[60] The questions posed by Hart and Sacks were not centered on aspirational notions of *what* is a normatively ideal legal rule or standard

---

[56] City of Chi. v. Morales, 527 U.S. 41, 56 (Stevens, J., plurality opinion) (emphasis added).
[57] Snoddon, *supra* note 10, at 2349.
[58] *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, *judges*, and *juries* for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.") (emphasis added).
[59] *Cf.* Parry, *supra* note 51, at 52–53, 59 ("The revitalization of the common law version of the reliance defense reduces the pressure on courts to use due process as the source of detailed regulations to cover any kind of reliance by a criminal defendant on a misleading official statement—a role that can be entrusted more easily to the common law.").
[60] *See, e.g.*, Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 29–32 (2013) (summarizing the concept of institutional settlement).

in a particular legal-factual context, but were instead articulated around structural analyses of *who* is the best decision-maker in a particular legal-factual context, given factors such as neutrality, efficiency, or relative expertise.[61] This article's legal process claim is a very straightforward one: that in certain deemed "vagueness" situations the institutional roles of factual investigator and legal authority are conflated. Loitering is an illustrative example. A situational actor like a police officer cannot, at the same time, factually determine that idle behavior resembles loitering and be permitted to make a legal characterization that such behavior violates a loitering ban. This is a foundational point, one that should be *res ipsa* seen as violating the kinds of "procedural natural justice" norms identified by Lon Fuller that are integral to *any* just legal system.[62]

This article uses mistake doctrine from substantive criminal law to make its logic more explicit. In the 2014 case of *Heien v. North Carolina*, the Supreme Court carved out a broad exception to the general axiom that one cannot benefit from their own mistake of law.[63] In *Heien*, the police officer's personal misreading of a brake light statute was thought to be "reasonable" given its inelegant construction.[64] Because it was a reasonable (and thus not an unreasonable) misreading, his traffic stop of the defendant—and subsequent seizure of cocaine—was deemed valid.[65] Since *Heien*, there has been scholarly debate as to whether this exception for reasonable mistakes made by police will, in fact, be as limited as the majority opinion predicted.[66] In the 2021 article, "Vagueness Attacks on Searches and Seizures," Joel S. Johnson made the optimistic argument that *Heien* can be used in conjunction with void-for-vagueness doctrine to strike down low-level crimes like loitering that are typically not bothered to be litigated.[67] His basic claim is that when interpreting a vague criminal statute, a police officer's personal construction of it must necessarily be unreasonable to a judge, because the police officer strains to qualify or apply the statute to idiosyncratic contexts that feel removed from the presumed scope of the statute.[68]

This article's claim is the paired opposite. The problem with statutes that should be declared void-for-vagueness is that an observer's construction of

---

[61] *See id.*
[62] *See generally* LON FULLER, THE MORALITY OF LAW (1964) (outlining minimal conditions for genuine laws, including that they are publicly promulgated and prospective).
[63] Heien v. N.C., 574 U.S. 54 (2014).
[64] *Id.* at 67–68.
[65] *Id.* at 68.
[66] Kit Kinports, Heien's *Mistake of Law*, 68 ALA. L. REV. 121, 168–74 (2016) (suggesting that *Heien* might be further expanded to excuse unreasonable mistakes).
[67] Joel S. Johnson, *Vagueness Attacks on Searches and Seizures*, 107 VA. L. REV. 347, 371–85 (2021).
[68] *Id.*

an applicable criminal statute would necessarily be viewed as *reasonable*. In brief, in such contexts it is *impossible* for a situational actor to mischaracterize the event, and this is itself inherently problematic. Vague statutes empower an observer to characterize a defendant's activity in a way that makes her judgment feel necessarily legitimate and authoritative to a factfinder like a juror. This occurs in opaque situations in which a defendant is unable to articulate what she herself is doing (or even possessing). There is a Camusian absurdity here, a Seinfeldian problem of "doing nothing." When an individual is unaware of automatic behaviors, then he cannot properly contest an observer's framing of his own conduct. He is simply being himself or acting out of habit.[69]

In the case of loitering, or being "annoying," an individual cannot evaluate her own actions by an internal compass or heuristic. Instead, she is forced to understand her own naturalized behavior—in short, her character—by some external standard. This standard might be subjective and unknowable, and thus impossible to comport with. It also criminalizes her for her attitude or disposition (perhaps being indifferent or apathetic, etc.[70]), and thus triggers concerns related to culpability and amenability to deterrence. In this way, void-for-vagueness connects to basic mens rea requirements in the criminal law. A person is punished for who she is, the most elemental kind of status crime.

Void-for-vagueness works best as a principle consistent with other basic ground norms in criminal law like the principles of legislativity and against retroactivity, neither of which have been constitutionalized.[71] This article makes a jurisprudential argument that valorizes the core of the doctrine while at the same time insulating it from jurists like Justice Thomas who question its constitutional legitimacy.[72] By tethering it to constitutional text (something that authors have struggled to do), void-for-vagueness suffers the reputational damage of a "I know it when I see it" doctrine, and this makes it

---

[69] *See, e.g.*, U.S. v. James, 952 F.3d 429, 433–34 (2020) ("By the late 1980s, loitering and vagrancy laws in the United States had changed significantly from those in force only three decades earlier. A commonly noted feature of the earlier laws, as we suggested in *Hines*, was that they criminalized a person's condition or status alone, eschewing the traditional requirements of a mens rea and an actus reus. As one commentator put it, the offenses were 'defined in terms of being rather than in terms of acting.'") (quoting Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1204 (1953)).

[70] *See, e.g.*, Stephen P. Garvey, *In General, Should Excuses be Broadly or Narrowly Construed?: When Should a Mistake of Fact Excuse?*, 42 TEX. TECH L. REV. 359, 368 (2009) ("Moral obtuseness and ignorance of prevailing social norms are two other causes that come quickly to mind. Should an actor be excused if his ignorance of the law traces its origin, not to a mistake of fact, but to these failings? I'm inclined to say yes.").

[71] *E.g.*, Rogers v. Tenn., 532 U.S. 451 (2001).

[72] City of Chi. v. Morales, 527 U.S. 41, 110 (1999) (Thomas, J., dissenting).

less desirable as a jurisprudential tool.[73] And in many ways, Justice Thomas's critique is valid. As it stands now, it is a doctrine without a limiting principle.[74] The lack of conceptual coherence in current void-for-vagueness doctrine is illustrated by the 2015 case of *Johnson v. United States*.[75] The Armed Career Criminal Act (ACCA) might be a poorly crafted statute, but the Supreme Court majority was wrong to frame it as a void-for-vagueness inquiry.[76] Justice Alito—who rejected the categorical approach of the majority—pointed out in his *Johnson* dissent that "[d]ue process does not require . . . that a 'prospective criminal' be able to calculate the precise penalty that a conviction would bring."[77] Other scholars agree.[78]

In *Johnson*, the Supreme Court held that, because of the layered provision of the ACCA, a defendant could not properly predict how a judge might evaluate whether a prior crime typically produces "serious potential risk of physical injury."[79] This is a problem, but not a fundamental legal process problem. This country's legal culture has consented to an institutional system of decision-making in which judges and jurors give content to capacious statutory language. Society tolerates the possibility that individuals must "guess" if marginally criminal behavior (or past crimes, in the case of recidivist statutes) will place them within the purview of a broad statute. If they guess wrong, they will be held strictly liable for their "mistake of law" and suffer punishment.[80] In this way, mistake of law and vagueness analysis are linked.

There are good reasons to think capaciousness or layering should not be tolerated as a policy matter (especially if there is no prior on-point authoritative opinion).[81] For one, they favor the state over the defendant in situations where the legislature crafts poorly drafted statutes. It feels unfair for the government to benefit from its own careless work.[82] But this does not

---

[73] *See* Snoddon, *supra* note 10, at 2308 ("The lack of coherent guidance results from the Supreme Court's misattribution of the constitutional purpose for the vagueness doctrine to due process alone.").
[74] Brennan-Marquez, *supra* note 19, at 664 (asking ". . . how broad is 'too broad'?").
[75] Johnson v. U.S., 576 U.S. 591 (2015).
[76] Mannheimer, *supra* note 50, at 1097.
[77] *Johnson*, 576 U.S. at 630 (Alito, J., dissenting).
[78] *E.g.*, Mannheimer, *supra* note 50, at 1112 (commenting that a sentencing provision is an "odd subject" of a void-for-vagueness challenge).
[79] *Johnson*, 576 U.S. at 602.
[80] Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 134 (1997) ("As Marrero himself discovered, even after a person takes reasonable steps to learn the law, there always remains some residual risk that a court will disagree with that person's conclusions.").
[81] Richard H. McAdams, *Close Enough for Government Work?* Heien*'s Less-than-Reasonable Mistake of the Rule of Law*, 2015 SUP. CT. REV. 147, 183 (2015) (citing Rollin M. Perkins, *Ignorance and Mistake in Criminal Law,* 88 U. PA. L. REV. 35, 45 (1939) ("'If the meaning of a statute is not clear, and has not been judicially determined, one who has acted 'in good faith' should not be held guilty of a crime if his conduct would have been proper had the statute meant what he 'reasonably believed' it to mean,' even if that turned out to be erroneous.").
[82] *Id.* at 189.

interfere with the core matrix in how the labor of fact and law characterization is distributed in the legal system.

Instead, the 1999 case of *City of Chicago v. Morales* should be regarded as the proper lineage of Supreme Court jurisprudence.[83] In this case, a local ordinance made it illegal to hang out in Chicago "with no apparent purpose," an instruction that Justice Breyer derided as "standardless."[84] Under the Chicago ordinance, simply "doing nothing" triggered police intervention.[85] Importantly, "doing nothing" is passive conduct that can be characterized by a police officer, or even by a concerned neighbor, as criminal. A "victim" of loitering can easily call in to police that she feels intimidated by the indolence of neighbor youths.[86] The initial legal-factual characterization of loitering/ hanging out can made by parties other than law enforcement.

In this way, the legal process dimension of void-for-vagueness clarifies how this is not simply an "arbitrary enforcement" concern related to the delegation of lawmaking to police, as posited by Professor Low and Joel Johnson.[87] The policing dimension common to void-for-vagueness cases gives it a seemingly constitutional valence. But the actual dilemma here is that *any* situational actor (including a potential victim) can label a defendant's (non-)activity as criminal, something that is very difficult, if not impossible, to challenge the application of law as mistaken.

This article thus adds conceptual clarity to how we think about "mixed cases" of law and fact in mistake doctrine.[88] Many scholars have adopted a legal realist attitude on the topic of criminal mistakes.[89] Leading theorists including Mark Kelman and Paul Robinson are pessimistic that we can distinguish law and fact at the boundary cases, mirroring the Model Penal Code position.[90] George Fletcher posited the existence of a "middle category" of law-to-fact application without providing much additional clarification as to what it entails.[91] Kenneth Simons observed that the existence of a law is itself a "fact,"[92] which makes mistake of fact and mistake

---

[83] City of Chi. v. Morales, 527 U.S. 41 (1999).
[84] *Id.* at 70 (Breyer, J., concurring).
[85] *Id.*
[86] SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 196 (Wolters Kluwer, 10th ed. 2016) (posing the hypothetical of an elderly neighbor calling the police to intervene in a hangout of teenagers listening to loud music at a street corner).
[87] *E.g.*, Low & Johnson, *supra* note 4, at 2053.
[88] Kinports, *supra* note 66, at 143–44 ("Some academics advocate recognition of an intermediate category for the mixed questions of law and fact that arise in applying a criminal prohibition to the facts of a particular case.").
[89] Leonard, *supra* note 3, at 523.
[90] *Id.* at 525.
[91] *Id.* (citing Fletcher, *supra* note 7, at 684–86).
[92] Simons, *supra* note 2, at 495.

of law conceptually linked and any distinction illusory.[93] It is true that the existence of a law can be verified empirically; indeed, one can simply place a finger on a page from a tome of code or from a casebook for the existence of a prior or adjunct law. But the focus is not on the Kenneth Simons identification of the verifiable adjunct law. Instead, this article is concerned about a problem that has evaded articulation in part because it is so ineffable.

Consider the case of *United States v. Cashman*[94] in which a police officer pulled over a defendant whose windshield was excessively cracked, further defined by Wisconsin statute as over eight inches in length or covering the area of the windshield wipers.[95] Closer inspection "confirmed" that the crack was seven to ten inches.[96] The court thus decided that even if the police officer was factually wrong, it was a valid stop.[97] The relevant legal analysis was framed as a Fourth Amendment probable cause issue.[98] But if it was a post-*Heien* mistake of law problem, how would the court even conceptualize this? The *Cashman* court noted that "[c]areful measurement after the fact might reveal that the crack stopped just shy of the threshold for 'excessive' cracking."[99] But it also seems like a situation in which the crack itself defied measurement *at all*. How do we frame this gestalt judgment, especially where there are orthogonal values of excessiveness (a qualitative heuristic) and the measurement in inches (a quantitative metric)? This feels different from the law-to-fact application of either a nested bigamy statute or a case like *Heien*. In *Heien*, the police officer misread a statute that required only one (of two) brake lights to work.[100] This law-to-fact application was rote.

But *Cashman* is the rare case where the statute seems *impossible* to apply legibly if one is expectedly far away from the moving vehicle, and it seems just as impossible for the car owner herself to know with confidence if her crack is excessive. This is an "I *don't* know it when I see it" situation that cannot be confirmed by further investigation. This means that the situational actor's (in *Cashman*, the police officer's) initial judgment is sticky. It cannot be denied by a defendant or questioned by a juror.

In these opaque situations, a conceptual confusion is brought to light: here, a situational actor is empowered to make at the same time a factual and

---

[93] *Id.* at 525–26; *see also* Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Myke Bayles*, 12 LAW & PHIL. 33, 52 (1993).
[94] U.S. v. Cashman, 216 F.3d 582, 584 (7th Cir. 2000).
[95] Kinports, *supra* note 66, at 150 ("A more complicated case is *United States v. Cashman*, where the defendant was stopped for driving with an 'excessively cracked or damaged' windshield.").
[96] *Cashman*, 216 F.3d at 587.
[97] *Id.*
[98] *Id*.
[99] *Id*.
[100] Heien v. N.C., 574 U.S. 54 (2014).

a legal determination. This gestalt judgment is a "legal-factual characterization." In making this kind of blended characterization, the situational actor makes a layered observation for a court or juror in which the observation (of the underlying factual reality) colors the legal claim (as criminal). When the factual and legal judgments are necessarily linked, it becomes impossible for an agent like a law enforcement officer to make a mistake of law. This prism frames the outline of this paper.

In the next part of the article, loitering as an illustrative example of this fundamental legal process problem is examined in depth. Next, this same conflated prism of decision-making is shown to surface in other victim-oriented contexts like bias crimes or threats doctrine. Finally, a hypothetical based on the chestnut case of *Crain v. State* is unpacked to show how the kind of logic that motivates opaque conduct crimes like loitering also informs the odd manifestation of an opaque possession crime.[101] In doing so, this article suggests how a reconceptualized principle-based approach to vagueness doctrine integrates with mistake analysis. To some extent, this latter mixed category reflects the epistemological limits of human language, but some strategies are offered for how the question of culpability when opacity feels unavoidable could be resolved.

III. A CRIME ABOUT NOTHING

"Doing nothing" is an ubiquitous and essential part of human life. It can be done at home or in the world. It is parcel to both notions of play and relaxation. It is facilitative of social bonding. It is a space to improvise or to unwind. It can be done while standing or sitting or in the form of a meditative walk. It is a forum for public action to both peacock and people-watch. It is a breath of fresh air or an excuse to remove ourselves from the routines of domestic life. It's our tao. What is "doing nothing"? It is us hanging out, being without intention, and simply being ourselves. But alas! Some people might hang out in a way to intimidate or threaten, and for this reason, local governments might decide to criminalize this unusual form of "conduct" in which action resembles non-action. For example, in 1992, the Chicago City Council effectively outlawed being in public "with no apparent purpose" for those who lived in gang-saturated neighborhoods.[102] If you were hanging out "with no apparent purpose" near a suspected gang member, no matter how

---

[101] Crain v. State, 69 Tex. Crim. 55 (1913).
[102] City of Chi. v. Morales, 527 U.S. 41 (1999).

many people you were hanging out with or near, a police officer could then order you to disperse the scene.[103]

Imagine a community like that of Chicago that must manage the problem of people who like to hang out in public for nefarious reasons. A legislature in our community may fairly choose to criminalize "loitering" because some people may hang out in a way that is intimidating to other community members. The hypothetical miscreant might choose to associate with other persons who enjoy glaring or leering at neighbors to make them feel uncomfortable. Maybe he has the additional motivation to scare them off so he can do other sorts of illegal things with his friend circle. There is a clear sense of what the local legislature wants to do: it wants to prevent people like this antagonist from hanging out in such a way that frightens residents and makes them fearful of pursuing everyday activities like shopping or exercising. But it can be difficult to translate this intuition into language. Some "doing nothing" we like! Some "doing nothing" we don't like! To an extent, it all looks the same—the distinction is based on a feeling or attitude or a vibe that is conveyed.

Good news! Now consider that the antagonist has had a change of heart. Instead, he is now the protagonist. He looks the same as before. He seems to behave the same as he always did. But he is fundamentally different. He has self-actualized in the dialectics of this law review bildungsroman. The protagonist has chosen to defriend the perceived "bad loiterers" who hang out on local street corners and park benches. He has recognized they were a corrupting influence on him. He has moved on. He has found new friends.

But of course he still relishes the quotidian wonders of hanging out in public. This is core to his soul. He self-identifies as a *flaneur*[104] who finds inspiration in the panorama of street life. He can be contextualized within the philosophical tradition of Balzac and Walter Benjamin. He is the gentleman-stroller, the man of leisure. He and the *flaneuse* represent the best of idleness. But how does this new protagonist announce to a police officer that he is just standing around with the purpose of enjoying the everyday poetry of people going about their daily routines and that he doesn't have the odious purpose of standing around to emanate an aura of fear? It might not be so easy. Criminals are often clever people who are skilled at camouflaging their bad conduct (in this case, loitering in a threatening way). But the flaneur is now just a regular law-abiding person who wants to hang out in public and do nothing with a refined, elegant panache. What should he—or another "good" loiterer—do to announce their good intentions? Bad loitering and

---

[103] *Id.* at 60 (Stevens, J., plurality opinion).
[104] In other words, a "stroller" or "lounger."

good loitering are mirror images of one another. An observer must make the gestalt judgment of a Rorschach Test. This congruence problem is compounded in a diverse society. It is more difficult for a police officer to distinguish bad loitering from good loitering when she does not come from the same community or look like the people she serves, protects, and arrests.[105] This communicative mismatch exacerbates the problem of arbitrary and discriminatory enforcement that has become central to void-for-vagueness analysis.

Part of the reason that this example is particularly interesting is that "good loitering" might have special constitutional protections and "bad loitering" can be legitimately criminalized. The definition for bad loitering above ("with no apparent purpose") comes from *City of Chicago v. Morales* (1999), a case in which the U.S. Supreme Court declared the anti-loitering statute void-for-vagueness.[106] In the prior loitering-adjacent case of *Papachristou v. Jacksonville* (1972), the U.S. Supreme Court held that the local anti-vagrancy law was void-for-vagueness out of arbitrary enforcement concerns.[107] But Justice Douglas in *Papachristou* also made reference to the "unwritten [legal] amenities" of loafing and strolling, and he situated the American pastime of hanging out within the American literary canon of Walt Whitman and Henry David Thoreau.[108] When reading Justice Douglas's opinion, one wonders if he will make the argument that loitering is a Ninth Amendment unenumerated constitutional right. He doesn't do this, but Dean Goluboff's archival research confirms that he wanted to do just that. Early drafts of his *Papachristou* opinion made specific reference to the Ninth Amendment.[109] A decade later, Justice O'Connor made reference to the First Amendment and "freedom of movement" in striking the anti-loitering statute in *Kolender v. Lawson*.[110]

This creates a very fact-obscuring and law-saturated situation. An individual can either be doing (a) a good—perhaps even celebrated—form of loitering or (b) a bad form of loitering. But it is hard to announce this through conduct alone. If asked to articulate in purely descriptive language how the

---

[105] *See, e.g.*, Kahan & Meares, *supra* note 8, at 1153–54, 1169–70.
[106] *Morales,* 527 U.S. at 64.
[107] This was a relatively novel claim. Only in 1945, in *Screws v. U.S.*, did the (prior) Justice Roberts articulate the reason of arbitrary enforcement for the first time (without providing any citation). Papachristou v. Jacksonville, 405 U.S. 156 (1972); *see* Goldsmith, *supra* note 53, at 287.
[108] *Papachristou*, 405 U.S. at 164 ("The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity . . . They are embedded in Walt Whitman's writings, especially in his 'Song of the Open Road.' They are reflected too, in the spirit of Vachel Lindsay's 'I Want to Go Wandering,' and by Henry D. Thoreau.").
[109] Goluboff, *supra* note 49, at 1365.
[110] Kolender v. Lawson, 461 U.S. 352, 358 (1983).

hypothetical flaneur's previously bad loitering was different from his recent good loitering, this would be a very challenging academic exercise. But if a police officer (or perhaps a vulnerable community member who might be suspicious of people like him) observed this behavior, she might make both (1) the fact-based observation that he's just standing and looking around (i.e., doing nothing) and (2) the legal characterization that it feels like the bad kind of loitering to her.

This creates a fundamental legal process contradiction in the factual observation and the legal determination are conflated. Imagine the protagonist ("Flaneur") is charged with the crime of loitering and that he decides to challenge it in a courtroom trial. The police officer would take the witness stand and be positioned to both describe to the jury what she saw ("Flaneur was just standing and looking around") and at the same time make a legal claim ("it felt like Flaneur was hanging out without an apparent purpose"). From the perspective of a juror, the police officer's testimony feels not only like that of a factual eyewitness but also as an *authority* on the legal question of whether Flaneur is guilty of the crime of bad loitering. She is effectively empowered to make a legal characterization about Flaneur's behavior, which she encountered as a situational actor in the dynamic, fluid everyday event of Flaneur standing around in public. It is analogous to a psychologist organically happening upon the same scene and testifying in court as a participant-observer that it looked to her as if Flaneur was acting on an irresistible impulse to loiter and that it seemed like, at that moment, he was morally unable to distinguish whether his behavior was right or wrong. The court would probably not allow a psychologist to make such a legal-factual judgment. It would subvert the basic sense that the same person cannot make a factual observation and a legal claim as an authority on an issue.

Void-for-vagueness is integral to other core principles (legislativity, retroactivity) in criminal law, and so it is not surprising that there are other first-principle problems with the scenario described above. One such principle is that no one person can be her own judge. This is part of the reason mistakes of law are not generally allowed—no matter how reasonable—in U.S. criminal law. If individuals were permitted to rely on their own personal misreadings of a criminal statute, that would effectively delegate the task of judging to private citizens in society. Individuals could claim that their own conduct is covered by the law simply because they had a good reason to think it would be covered by the law. This violates a first principle of the American legal system in that it would create an anarchical "law-by-defendant" world where, in the words of Justice Scalia, "each

conscience is a law unto itself."[111] In a way, this would empower the potential defendant to make her own kind of legal-factual determination. She could contour her conduct to fit within her own understanding of a law. Individuals should not have the capacity to define their own legal reality.

The recent, and somewhat controversial[112], case of *Heien v. North Carolina* (2014) sheds light on this.[113] The question presented was whether a police officer conducted a constitutional seizure when he stopped a motorist after mistakenly thinking it was unlawful to drive with one non-working brake light.[114] The court held that the stop was a valid seizure even though the police officer made a straightforward mistake of law.[115] This was not a situation where the criminal law was nested in some other civil law (common to certain kinds of property crimes or bigamy). Rather, the police officer simply "read" the statute differently than the state appellate court majority ultimately would. The police officer made a reasonable guess, but reasonableness is typically immaterial here.[116] Unauthorized persons are not allowed to construct statutory meaning.

But in *Heien*, the Court offered an exception to the rule. Law enforcement may make reasonable mistakes of law in the course of a traffic stop.[117] To counter the argument that the *Heien* holding creates an asymmetry in which police are empowered to make mistakes of law but private individuals are not,[118] Chief Justice Roberts offered the nuanced position that a mistaken reason to investigate someone does not *in itself* impose criminal liability on a defendant.[119] The investigative stop of Mr. Heien was not properly authorized by the brake light statute.[120] But Mr. Heien was not arrested because of his brake light—he was arrested because cocaine was ultimately found in the vehicle.[121]

And so, post-*Heien*, a police officer can make a reasonable mistake about a law that is used as the basis for an investigation, but she cannot make an unreasonable mistake about a law that is used as the basis for an investigation.

---

[111] Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).
[112] *See, e.g.*, Kinports, *supra* note 66, at 141 ("*Heien* endorses a broader mistake of law exception than that recognized in any of these other contexts because it encompasses cases where officers rely, not on an ordinance on the books or a warrant issued by a judge, but instead on *their own* misinterpretation of the governing laws.").
[113] Heien v. N.C., 574 U.S. 54 (2014).
[114] *Id.* at 57.
[115] *Id.*
[116] *See* McAdams, *supra* note 81, at 158.
[117] *Heien*, 574 U.S. at 57.
[118] McAdams, *supra* note 81, at 196 ("The result is an ugly double standard: a statute can be sufficiently clear to give constitutionally adequate notice to citizens, but also sufficiently ambiguous to excuse police searches and seizures based on errors about its meaning.").
[119] *Heien*, 574 U.S. at 67.
[120] *Id.*
[121] *Id.*

A judgment-by-cop that someone looked suspicious at a given moment is not a decision that that person committed an actual crime or even a characterization of the conduct as criminal. It is only a basis upon which to conduct an investigatory search to confirm whether the individual is doing some other thing—beyond looking suspicious—that is criminal. This hedge might feel unsatisfying to other scholars and commentators, but it coheres with this article's analysis.

An investigatory stop is not congruent to making a legal characterization that someone committed a crime. Law enforcement officers are given the discretion to make judgment calls about whether they have "reasonable suspicion" to pull over drivers who might be doing something unlawful.[122] Unfortunately, this discretion can be unwieldy, as evidenced by the testimony of the police officer in *Heien*. When the arresting officer was asked to explain why he felt the *Heien* driver seemed nervous, the officer replied that "he was gripping the steering wheel at a 10 and 2 position, looking straight ahead."[123] If cautious driving can be reasonably suspicious, then seemingly anything can be reasonably suspicious. The *Heien* court makes a facile equation of a brake light statute with reasonable suspicion doctrine,[124] and it ignores the underlying reality that "reasonable suspicion" is already capaciously applied. As quipped by Orin Kerr, "as a practical matter, if an officer [couldn't] find a traffic violation to stop a car, he [wasn't] trying very hard."[125] Indeed, "[i]n the aggregate, the breadth and depth of traffic regulations probably give police as much discretion to stop drivers as some unconstitutionally vague loitering laws would have given police to stop pedestrians."[126] But this is a problem with the soundness of the legal doctrine, and not one that upsets the basic system of distributed decision-making.

This is not a case about the nebulous line that separates a mistake of fact from a mistake of law as in the *Cashman* windshield fact pattern, or a case about gestalt legal-factual characterizations as in archetypal loitering cases

---

[122] *See* Ornelas v. U.S., 517 U.S. 690, 695, 700 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . [O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists."

[123] McAdams, *supra* note 81, at 151.

[124] *See* Kinports, *supra* note 66, at 175 ("*Heien*'s ruling that the Fourth Amendment forgives reasonable police mistakes of law sparked little controversy either in the Court itself or in the media, perhaps because the opinion was so cursory and its overly simplistic analysis merely equated mistakes of fact and law.").

[125] *Id.* at 176 (*citing* Orin Kerr, *Can a Police Officer Lawfully Pull Over a Car for a Traffic Violation Based on an Erroneous Understanding of the Traffic Laws?*, VOLOKH CONSPIRACY (Dec. 21, 2012, 3:42 PM), http://volokh.com/2012/12/21/can-a-police-officer-lawfully-pull-over-a-car-for-a-traffic-violationbasedon-an-erroneous-understanding-of-the-traffic-laws/).

[126] McAdams, *supra* note 81, at 195.

like *Morales*. A working brake light is a clear law-to-fact application that involves little discretion. It is a binary conclusion (whether a vehicle has at least one working brake light) based on an intelligible law.[127] The misreading of the North Carolina brake light statute is still easily discerned as a "mistake of law" situation.

IV. STICKY IMPRESSIONS

But the problem with loitering (and other opaque laws) is that the audience of a performed action is making a *blended legal-factual characterization*, and not simply an application of law to fact. In the loitering example, the police officer is making both a factual observation and a legal characterization that the flaneur's behavior looks like bad loitering. This is not a tentative claim that needs to be investigated further to confirm if he is, in fact, loitering. It is itself a judgment with a degree of finality. In court, it would be perceived as a legal characterization by an authority on the issue.[128] The problem that other scholars have noted is that this creates a situation of "law-by-cop" in which a police officer is empowered to apply a vague statute ("don't loiter in a bad way") to individuals as she finds them while on the job.[129] There is arguably a kind of on-the-beat statutory construction being done to the extent that the police officer is observing conduct in real time and then marshaling a potentially broad statute so as to characterize this conduct as criminal.

United States v. Reese (1876)[130] is cited for the principle that "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who

---

[127] *Id.* at 189 ("There was nothing ineffable about prescribing the number of brake lights on a car that must be functioning. It would have been easy enough to have drafted a clear statute. So the legislature did a bad job, but *Helen* allocates the loss not on the legislature or any part of government, but on the citizen who is stopped for being suspected of something that is perfectly legal.").

[128] *See* Low & Johnson, *supra* note 4, at 2075 ("Police do not interpret and apply the law in the same authoritative manner as courts. They enforce the written law and, in doing so, are measured by a significant array of constitutional limitations. Police may arrest, for example, only if they have probable cause to believe the defendant guilty of a crime, a standard that is measured by the relationship of police information to prohibited conduct previously defined by the criminal law. This constitutional limitation would break down if police had the authority to observe behavior, make up a crime to cover it, and then make an arrest because they had probable cause that the invented crime occurred in their presence. This, in a nutshell, is exactly what happened in *Shuttlesworth v. City of Birmingham*.").

[129] *E.g.*, *id.* at 2078–79 ("This law 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. The whole point of such a law—or at least its effect—is to allow the police to do what they want when they want. The heart of the defect is the "law by cop" nature of the ordinance. If it sounds better to say that "law by cop" in this sense is intolerable because the authority it grants can be used to limit protected speech or religious activity, then so be it.").

[130] U.S. v. Reese, 92 U.S. 214 (1876).

could be rightfully detained, and who should be set at large."[131] When a legislature crafts a very broad conduct rule that threatens to chill or criminalize perfectly legal behavior, or to heavily punish those who commit relatively modest violations of the criminal code, it then delegates to other branches the challenging interpretive work of creating a decision rule that separates those who should be punished from those who should not.[132] This is not just a dereliction of duty, but creates accountability problems in which concerned citizens are unable to hold unctuous legislators responsible for lazy drafting.

But again, this law-by-cop problem is not only a potential separation of powers concern,[133] but also goes to a fundamental principle of legal process: in an opaque crime context, the police officer is effectively insulated from making a mistake of law. She is making a mixed legal-factual judgment that cannot even be challenged as wrong. In the loitering hypothetical, imagine that the police officer must defend her characterization of the flaneur doing a bad form of loitering on cross-examination from his defense attorney. The flaneur's attorney would not even be able to articulate an argument that when the police officer formed this legal-factual characterization of his behavior, she mistakenly applied the law of loitering. The non-argument would go something like: "the police officer mistakenly applied the law of loitering to the facts of my client standing around and doing nothing." The police officer's characterization is sticky in that there is little additional or novel evidence that defense counsel can present to challenge the initial legal-factual framing of the arresting officer. There is not an application of law to fact, but instead, a legal-factual characterization of his behavior as observed by the police officer. It is a gestalt, ineffable kind of logic that can't be unpacked into separate analyses of statutory construction and fact-finding.

In his recent April 2021 article in the *Virginia Law Review*, "Vagueness Attacks on Searches and Seizures," Joel S. Johnson analyzes the historic U.S. Supreme Court case of *Shuttlesworth v. Birmingham* (1969), which involved an ordinance that made it unlawful to loiter after being requested by a police officer to disperse.[134] He poses a hypothetical in which a police officer asks

---

[131] Papachristou v. Jacksonville, 405 U.S. 156, 165 (1972) (citing *Reese*, 92 U.S. at 221); *see also* Hopwood, *supra* note 33, at 720 (providing a functional account for why this delegation is unworkable).

[132] *See, e.g.*, Hessick, *supra* note 31, at 1145 ("Those commenters who have distinguished the delegation concern from the arbitrary and discriminatory enforcement concern have also focused on the transfer of policy power from the legislature to the executive. For example, in explaining how vague statutes delegate lawmaking authority to the executive, Nathan Chapman and Michael McConnell have expressed the concern that the executive will interpret the vague statute in light of the executive's unstated policy goals rather than in light of the legislature's policy directives.").

[133] *See, e.g.*, *id.* at 1144 ("Delegation, as used in this context, refers to the transfer of power over policy from the legislature to another body.").

[134] *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 158–59 (1969).

a loiterer to move "because he is in the way of a parade route" (echoing the original facts of *Shuttlesworth v. City of Birmingham*).[135] Johnson suggests the police officer might argue that his narrow reading of this ordinance cures its broadness problem as it "grant[s] him the authority to ask an individual to move *only when an individual is blocking the street or sidewalk when such spaces are being used for a community event, such as a parade*."[136] Johnson's argument is that this kind of on-the-beat statutory construction is unreasonable because "[i]t is totally divorced from the text of the ordinance, which never mentions community events or parades."[137] The implication is that making particularized applications of a vague standard feels ad hoc, and that this goes to the unintelligibility of the statute. The gap between stated law and fact application is so severe that a judge must view the police's tailored reading as problematic. Within a *Heien* logic, the unreasonableness of this mistake of law (the misreading by the police officer of the loitering statute) goes to the loitering statute's fundamental vagueness. Void-for-vagueness is the corollary to the unreasonableness of *any* police officer's reading and application of this statute.

This article's argument is the paired opposite. The loitering statute in *Shuttlesworth* is problematic, but it is problematic because the police officer is unable to be wrong. In an opaque-crime situation like loitering, *any* legal-factual characterization of a defendant "doing nothing in public" would be necessarily *reasonable*. An unreasonable mistake of law (or fact) is impossible for the police officer in a situation like the *Shuttlesworth* hypothetical. The police officer is effectively immunized from the possibility of making a wrong decision because his description of the legal-factual reality facing the defendant is superficially accurate. This is what Justice Breyer was trying to articulate in *Morales* when he argued that the Chicago loitering ordinance was "standardless."[138] It created a law-by-cop regime, one in which each police officer's conscience—or her gestalt sense of a potential defendant's interiority—is a law unto itself.

V. VAGUENESS, CONFORMANCE, AND PERFORMANCE

In "Reconceptualizing Vagueness: Legal Rules and Social Orders," Robert C. Post showed how conduct rules can be reframed so that a defendant is forced to conform to an unknowable—and thus irreducibly vague—

---

[135] Johnson, *supra* note 67, at 386.
[136] *Id.*
[137] *Id.*
[138] City of Chi. v. Morales, 527 U.S. 41, 70 (1999) (Breyer, J., concurring).

standard.[139] Dean Post first suggested how decision rules addressed to traffic police might be translated as conduct rules addressed to the general public.[140] For example, a broad decision rule for police could be crafted that states: "Regulate traffic as you see fit." Or a broad conduct rule could be crafted for the general public: "Cross the intersection whenever you see fit." The decision rule might be problematic in its broad grant of discretion to police, but the conduct rule for the general public "poses no issue at all of unconstitutional vagueness."[141] Dean Post then offered a revised version of the conduct rule: "Do not cross the intersection unless the closest policeman is feeling benevolent toward you."[142] This is now a paradigmatic vagueness case in that it "subjects citizens to the constraints of an uncertain and unknowable legal standard."[143] The defendant is forced to probe the interiority of the nearest police officer.

The defendant in my bad loitering example faces a similar conduct rule: "Do not loiter unless the closest police officer thinks you are loitering with a lawful purpose." The dialectical logic of the rule makes it feel like a riddle or a koan. It also requires the defendant to perform his conduct in such a way that an audience member is likely to perceive his own motivations as lawful.

A typical conduct rule only asks the general public to not do something unlawful; but a "performance rule," like this one, requires the defendant to do something in a specific kind of way (a way that pleases the audience).[144] Professor Mannheimer argues that a problem with vague statutes is that the defendant is forced to conform to an unknowable standard.[145] This article identifies a slight wrinkle: that in the case of opaque crimes, the defendant is forced to do something in a way that satisfies a situational actor. In this way, mistake and vagueness directly capture core notions of mens rea and culpability. The individual who is "doing nothing," or just being himself, is forced to reframe his own perception of his habitual conduct around the perspective of an outside observer. The interior world of hanging out is transmogrified into a performance to be viewed by an audience. This mental

---

[139] Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491 (1994).
[140] *Id.* at 492–93.
[141] *Id.* at 493.
[142] *Id.*
[143] *Id.*
[144] *Cf.* Mannheimer, *supra* note 50, at 1097 ("There is something intuitively unjust about even a democratically enacted statute whose language is so impenetrable that reasonable people must act at their peril and face years in prison if they guess incorrectly. It turns out that there is a justification for a due process constraint on such statutes, but it focuses on the impossibility of performing, not the impossibility of discerning, what the statute requires. Framing the doctrine this way, as a problem of impossibility rather than one of vagueness, helps us justify a constitutional constraint on some indefinite statutes but not ambiguous ones, and also helps to interpret what the Court has said in this area and to apply the constraint in future cases.").
[145] *Id.* at 1053–54.

recalibration from intent, or rather non-intent, into an awareness of someone else's imposed characterization of non-conduct challenges the conventional understandings of culpability and the distinction between bad acts and bad character. This is part of the reason the drafters of the Model Penal Code resisted the inclusion of a recklessness or negligence mens rea as to the conduct element of a general offense.[146] It is difficult to square with requirements of voluntariness as per actus reus.[147]

To escape the loaded conceptual language of the criminal law, the individual has to guess how another potential audience will probe his own mind. This is an epistemological issue that is informed by social context: the white police officer could be less able to probe the mind of the Black flaneur because she may lack the same background knowledge of what hanging out looks like or means in the community she polices. In these opaque situations, we cannot fairly expect a law-abiding individual to shift among competing social paradigms. It is difficult to foresee what someone from another social reality counts as doing nothing, or counts as being oneself, or counts as art or as an heirloom.

VI. OTHER IMPOSITIONS OF LEGAL-FACTUAL REALITY

Loitering is a paradigmatic example of where a situational actor can impose their initial legal-fact characterization onto a trier of fact. But this same structural dilemma surfaces in other presumed void-for-vagueness situations in which a potential defendant is tasked with performing for a situational actor.

A. Highway Police as Situational Actors

In *State v. Stanko* (1998),[148] the Montana Supreme Court held that the state's once-iconic Basic Rule[149] that required highway motorists to simply "drive reasonably" was void-for-vagueness. At the time of the court challenge, there was no maximum speed limit. Rather, state statute § 61–8–303(1), MCA, made it an offense to drive at a speed "greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, . . . grade and width

---

[146] DUBBER, *supra* note 2, at 55–56.
[147] *Id.*
[148] State v. Stanko, 974 P.2d 1132, 1135 (1998).
[149] *See, e.g.*, Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 YALE J.L. & HUMAN. 35, 52 (2001).

of highway, . . . and freedom of obstruction to the view ahead."[150] The statute was explicitly cast from the perspective of the (defendant) driver facing the open road ahead.

The Montana Supreme Court was right to strike it, but it took the wrong tack in framing the problem as the legislature impermissibly delegating the public policy choice of how fast to drive to "policemen, judges, and juries."[151] Again, it is perfectly fine to require a motorist to guess if their driving will be problematic for a jury member. We have juries precisely because they reflect community morality and have a fine discernment about how people are expected to drive on local roads. Rather, the problem here is that a traffic cop is empowered to make both a factual observation and a legal characterization of the defendant's conduct, and to do this, the traffic cop must transport herself psychologically into the mind of the defendant. In the particular facts of *Stanko*, the officer was trailing the defendant.[152] But we can easily abstract a category of cases in which a traffic cop is resting at the side of the road at an oblique angle, at which point the officer and driver have separate perspectives of the "view ahead."

A "drive reasonably" conduct rule is different from the other kinds of conduct rules about which traffic cops are empowered to make legal characterizations. Traffic police can identify common traffic violations like lane changes or speeding by relying on objective visual cues or technologies like radar guns. Even the seemingly subjective traffic crime of "reckless driving" is often tethered to objective criteria such as going a certain speed over the speed limit or endangering other drivers. In these situations, the police officer is able to cite to objective observational criteria and then fairly issue a ticket for having violated a traffic law.

But a conduct rule to "drive reasonably from the perspective of the driver" necessarily translates as a decision rule for the on-the-beat traffic cop: "issue a speeding ticket if the defendant—from the defendant's perspective—was not driving reasonably." The problem is an epistemological one in that it requires a police officer to perceive the open road from the same perspective of the driver. But the two drivers (motorist and cop) may enjoy competing realities, as described by Professor Naomi Mezey in her article on visual literacy in the car chase at issue in *Scott v. Harris*.[153] By imposing a reasonableness requirement on the driver, it forces him to adopt a so-called objective perspective on the situation, one that is framed to the jury by a

---

[150] *Stanko*, 974 P.2d at 1135.
[151] *Id.*
[152] *Id.* at 1134.
[153] Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 VAL. U.L. REV. 1, 25–29 (2013) (discussing Scott v. Harris, 550 U.S. 372 (2007)).

traffic cop who speaks as an authority on driving conditions at that time. This initial framing move (as driving that is factually unreasonable, as framed by the legal lens of unreasonability) is sticky for a jury, and in a post-*Heien* world, it is very difficult to challenge as mistaken. It echoes the legal process contradiction seen in *Morales* of the street cop who is able to marshal a criminal law (bad loitering) to frame the factual event they encountered as an authoritative observer.

B. Victims as Situational Actors

The legal process framing of this analysis delimits judges and juries from a void-for-vagueness inquiry. But it also surfaces another entity who may complicate the distribution of law and fact analysis in the legal system—the perceived victim. Thus, this article briefly comments on crimes in which a defendant must perform her conduct for such a victim. One peculiar case is *Coates v. City of Cincinnati* (1971),[154] in which a local Ohio ordinance made it illegal for a group of three or more people to "annoy" someone else. The U.S. Supreme Court declared it unconstitutionally vague.[155] Here, the qualification of how an act must be performed is explicit—the individual must do something in a *non-annoying* way.

At the Ohio Supreme Court it was held that this "annoyance" statute was lawful, as this legal-factual judgment was not based on the idiosyncratic judgment of a neighbor, but instead on an objective standard.[156] It is true that certain perceptions of annoyance—such as dressing in a certain way—can be contested as frivolous by a jury. For example, Professor Mannheimer offers the avant-garde fashion choice of "wearing argyle socks with sandals" as being too gauche for some eggshell audiences.[157]

But other transient, experiential perceptions—like *acting* in an annoying way—prompt the same legal-factual characterizations that occur in a loitering statute like *Morales*. In this way, either a law enforcement officer or the "victim" of annoying behavior can recollect her feelings of annoyance for a factfinder as an authority on the topic (she was an eyewitness who was also annoyed by the scene).[158] The victim's emotional reaction to an experienced event—the defendant who behaves or conducts themselves annoyingly—frames the juror around a legal standard (annoyance) and felt matrix of facts (annoyance due to the behavior or conduct of the defendant).

---

[154] Coates v. City of Cincinnati, 402 U.S. 611 (1971).
[155] *Id.* at 614.
[156] *Id.* at 612.
[157] Mannheimer, *supra* note 50, at 1106.
[158] *See, e.g.*, Decker, *supra* note 5, at 276.

How can a defendant defend against such a legal-factual characterization, especially when they are just being themselves? It's impossible to escape the sticky framing lens of the victim in this kind of case. In this way, *Coates* can be regarded as a legal process contradiction in which a defendant is unable to challenge an imposed reality.

Another such case is *State v. Pomianek* (2015),[159] in which the New Jersey Supreme Court struck down the state's bias intimidation statute as void-for-vagueness. The New Jersey statute was unique in that it allowed a defendant to be convicted of the crime of bias intimidation if an underlying offense was reasonably perceived by the *victim* to be motivated based on race, even if the defendant was not motivated—or at least consciously motivated—by race.[160] The New Jersey Supreme Court declared it void-for-vagueness given that "whether a victim reasonably believes he was targeted for a bias crime will necessarily be informed by the victim's individual experiences and distinctive cultural, historical, and familial heritage—all of which may be *unknown or unknowable* to the defendant."[161] The defendant is asked to perform a crime in such a way that the victim does not perceive it as motivated by prejudice. At the same time, this delegates the task of legal characterization to a victim who is then empowered to speak on the topic as an authority in the courtroom.

A very similar case decided at the Kansas Supreme Court, *State v. Bryan* (1996),[162] concerned the state's anti-stalking statute. The court struck the statute as unconstitutionally vague as it made liability depend on the personal sensibilities of the victim.[163] A revised statute that inserted a "reasonable person" standard would later be upheld.[164] One does not have to agree with the reasoning of either case to recognize that what these courts were struggling with was not a policing issue, per se, but a victim characterization problem that subverts legal process expectations for how we separate legal framing and fact determination. When a victim can determine the legal-factual reality of an event based on her own subjective perception, this makes

---

[159] State v. Pomianek, 110 A.3d 841 (N.J. 2015).
[160] *Id.* at 843 ("Unlike any other bias-crime statute in the country, N.J.S.A. 2C:16-1(a)(3) focuses on the victim's, not the defendant's, state of mind.").
[161] *Id.*
[162] State v. Bryan, 910 P.2d 212, 217 (1996) ("The main concern expressed in the above case with using words such as "alarms" or "annoys" is that the words are subject to a wide variety of interpretations, and unless an objective standard is incorporated into the governing statute, the words are entirely dependent upon the subjective feelings of the victim."); *see also* M. Katherine Boychuk, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 788–89 (1994) (suggesting that an objective standard cures potential vagueness in common articulations of criminal stalking).
[163] *Bryan*, 910 P.2d at 216.
[164] State v. Rucker, 987 P.2d 1080 (Kan. 1999).

it too difficult for a defendant to un-stick this perspective and for a juror to form an independent conclusion.

Perhaps on-the-ground legal-factual characterizations would be tolerable if there were other objective cues to rely on or if the police officer or victim could psychologically transport herself or himself to the mind of the defendant in these above situations. That can't be done in these opaque, epistemologically challenging situations. It is encouraging that this mismatch/ psychological difference has begun to erode as police unit demographics shift to mirror those they serve. But essential to the very nature of a bias crime is that there will always be a gap or tension here—the structural matrix of a bias crime (in which the defendant and victim are from different social groups) creates the kind of epistemic mismatch that makes a "performance crime" especially problematic.

C. Authority and Expertise

This article abstracts from these cases to offer an expertise-based distinction that expands on the logic of the above cases. In *Kolender v. Lawson* (1983),[165] the Supreme Court held void-for-vagueness a California law that required "wanderers" to provide credible and reliable identification. This is distinguished from the previously discussed cases in that the recollection of the arresting officer was not simply imposed on a juror. There is physical evidence (an identification card of some kind) that can be reviewed independently by a juror to form a factual judgment about the case. Still, it can be posited that discerning the credibility of a form of identification is something within the bailiwick of law enforcement and only a few other social actors (e.g., bartenders, store clerks), and that a juror might give undue deference to the opinion of an arresting officer on a topic. A police officer's or prosecutor's factual description of an identification card is framed within the valence of a legal authority on the same subject. This is unlike the hermeneutics of applying more ethereal language like "violence" or "seriousness" in the recent line of speculation-layering cases such as *Sessions v. Dimaya* (2018), in which a juror can rely on their own experience and values to give content to this admittedly indefinite language.[166]

A similar logic can be traced to the vanguard modern vagueness case of *United States v. L. Cohen Grocery Co.* (1921),[167] in which the U.S. Supreme Court held void-for-vagueness Section 4 of the Lever Act, which proscribed

---

[165] Kolender v. Lawson, 461 U.S. 352 (1983).
[166] Sessions v. Dimaya, 138 S. Ct. 1204 (2018).
[167] U.S. v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

making "any unjust or unreasonable rate or charge in handling . . . any necessaries."[168] It makes sense why a vendor wouldn't like this overbearing statute, but as pointed out by Professor Amsterdam, it is also unclear how to distinguish it from the case of *Edgar A. Levy Leasing Co. v. Siegel* (1922),[169] in which an "unjust and unreasonable" rent law was upheld. Jurors seem well-positioned to offer an independent judgment on both the prices of staple consumer goods as well as rent. Although a prosecutor might frame the price of a commodity as unreasonable, a juror can look to the price of the good itself (separate from its legal characterization as unjust) to make their own determination. This is different from a situation like that of *Kolender*, in which a police officer or prosecutor can marshal their own authority on matters related to personal identification to impose their legal-factual reality on a juror.[170]

D. Overbreadth – Art Threats

This section concludes with a comparison to First Amendment threats doctrine. A true threat is one in which a speaker communicates an intent to commit an act of violence. But communication is of course dialogic, and meaning is constructed by a listener or viewer, etc. The struggle for courts is how much deference to give to an audience who reasonably feels threatened by an arguably innocuous speech act.[171] The recent case of *Elonis v. United States* (2015)[172] prompts the issue of audience reception. In *Elonis*, the defendant uploaded violent rap lyrics to Facebook that made direct reference to actual events in his personal life as he seemed to articulate violent threats toward his soon-to-be ex-wife and a federal investigator.[173] Government prosecutors argued that Elonis's motivations were irrelevant to the actual effect of the Facebook posts, and that Elonis may be fairly convicted under 18 U.S.C. § 875(c) despite his insistence that his thoughts were merely diaristic forms of artistic parody.[174] Here, the Court's analysis was complicated by the fact that Elonis inserted disclaimers in his self-styled raps that characterized his own posts as "fictitious" and that they bore no

---

[168] *Id.* at 86.
[169] Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).
[170] *Kolender*, 461 U.S. at 360.
[171] *See, e.g.*, Renee Griffin, *Searching for Truth in True Threat Doctrine*, 120 MICH. L. REV. 721, 730–31 (2022); *see also* Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUM. J.L. & ARTS 1, 20 (2014) ("In summary, then, rap is a complex genre. Its very nature compounds the difficulties with the already muddled true threats doctrine . . .").
[172] Elonis v. U.S., 575 U.S. 723 (2015).
[173] *Id.* at 727–30.
[174] *Id.* at 732.

"intentional resemblance to real persons."[175] For Chief Justice Roberts, these declaimers negated the subjective intent to threaten, and thus Elonis did not meet the "scienter" requirement that the Court majority wrote into 18 U.S.C. § 875(c).[176]

Chief Justice Roberts is right to include a mens rea component into threats doctrine, especially in an art threats context where the surface meaning of a vocalized or written word (such as a song lyric) might be inconsistent with the deeper meaning intended to be conveyed by the speaker. This problem is compounded in a novel art form like rap music, in which an unintended audience member *from a different aesthetic community* may encounter an amateur artwork and assume it to be a personal threat based on the superficial quality of the song or music video.[177] This has become commonplace with the advent of the Internet, in which a user may passively encounter a de-contextualized artwork that feels especially immediate and targeted to the viewer.[178]

Here, the "mismatch" problem echoes the prior conduct-oriented examples in which a police officer from a different community or racial background is tasked to discern opaque criminal behavior like loitering or being annoying. The victim may genuinely believe in the rightness of her own perceptions about a potential threat. But she can still be wrong about the underlying fact of what the meaning of the communicated statement is intended to be. Since *Elonis*, at least one state supreme court has held that a recklessness mens rea for true threats doctrine is constitutionally overbroad.[179] This holding is especially important in an art threats context, in which a recklessness standard could authorize an unintended audience to ascribe a literal meaning to a speaker who is merely using language for aesthetic or slang-like effect.

A synthetic framework unifies vagueness and overbreadth concerns.[180] There is some degree of abstraction in this article to clarify the conceptual argument. In general, statutes that simply punish "loitering" without qualification have been held to be unconstitutionally vague, but statutes that condition the punishment of "loitering" with place or manner restrictions have been upheld.[181] In *Morales*, the local ordinance contained a dispersal

---

[175] *Id.* at 727.
[176] *Id.* at 740–42.
[177] Andrew J. Kerr, *Aesthetic Play and Bad Intent*, 103 MINN. L. REV. HEADNOTES 83, 86–87 (2018).
[178] *Id.* at 102.
[179] *See* State v. Boettger, 450 P.3d 805 (Kan. 2019).
[180] Amsterdam, *supra* note 40, at 99 n.174 (suggesting that void-for-vagueness and overbreadth analysis are linked).
[181] *E.g.*, U.S. v. James, 952 F.3d 429, 432–33 (2020) (commenting on the distinction in New Jersey courts between "loitering *simpliciter*" and "loitering plus").

notice in addition to initial loitering characterization.[182] But the *Morales* precedent still serves as a model for identifying other sorts of opaque criminal situations, whether because the statute is fundamentally vague as in *Coates* or because there is a dyadic mismatch in the application of an otherwise intelligible statute, as in the case of arguably threatening speech that is stylized as art or slang.

VII. AN OPAQUE POSSESSION

In this final section of this article, the chestnut case of *Crain v. State* (1913)[183] is used to discern the fulcrum point that turns a mistake of fact problem to a mixed one of law and fact, and to explain how this connects to the proposed legal process-based approach to vagueness. The facts of *Crain v. State* are elusive. In this 1913 case from the Court of Criminal Appeals of Texas, defendant Crain was charged and convicted under a Texas statute that made it illegal to bring a gun inside of another person's residence.[184] It was contested as to whether Crain was responsible for any shots fired at or near a friend's party, or if he had brandished his gun at a local church beforehand, but a deputy sheriff called to the scene of the party would locate this "gun" on defendant's person.[185] Mr. Crain, however, had dissembled his gun and placed "the cylinder . . . in his jumper pocket while the remainder of it was in his pantaloons pocket."[186] He claimed he only brought it to the party to pawn it off for thirty cents to another attendee.[187] The question for the Court of Criminal Appeals was whether this *thing* placed in separate pockets was a gun at all.[188]

The case lives on in the iconic Kadish textbook, *Criminal Law and its Processes*.[189] It is excerpted as a squib case in the mistake of law section of the text. It appears that the editors include *Crain* to poke at the fulcrum point when mistake of law blurs into mistake of fact. The drafters of the Model Penal Code absconded from the task of distinguishing mistakes of law from mistakes of fact. Rather, MPC Section 2.04 conflates the two, and merely asks if the mental state required of a criminal offense (purpose, knowledge, recklessness, negligence) is negated by the defendant's "ignorance or mistake

---

[182] City of Chi. v. Morales, 527 U.S. 41 (1999).
[183] Crain v. State, 153 S.W. 155 (1913).
[184] *Id.* at 155–56.
[185] *Id.*
[186] *Id.* at 155.
[187] *Id.*
[188] *Id.*
[189] KADISH ET AL., *supra* note 88, at 333.

as to a matter of fact or law" (Section 2.04(1)).[190] Of course, at common law, this threshold decision of how to categorize a mistake was formative. Mistakes of fact might excuse a defendant if they were reasonable. Mistakes of law almost never excused, the rare exceptions being when a defendant relied on official advice or if there was some "other law" that was nested within the criminal law at issue, for example, some "other" property law that defined whether an item was either abandoned or landlord property, etc.[191] In these cases, the prior existence of a legal holding[192] or some other law functioned as something observational or empirical—it is a law-to-fact application that can be located by diligent research. In this way, a court can investigate law in the same way it investigates fact.

The *Crain* case encourages the reader to question the discrete categories of mistake of fact and mistake of law. The hypothetical in this article adds context to limn how the opacity problem can even inform possession crimes—not just what the individual is passively doing, but what he is passively holding. Here, a hypothetical is justified as there is only "sparse case law" on the topic.[193] Other scholars have also resorted to hypothetical "problems [to discern] the borderline between M Fact and M Law."[194] Gerald Leonard posed a gun-inflected hypothetical. He considered "an object that can fire bullets at high velocity but that does not let the bullets leave its sealed barrel."[195] The drawback of Professor Leonard's construct is that it still resembles a firearm.

This article's *Crain*-derived hypothetical is closer to the opaque situation of "doing (or holding) nothing." Indeed, it is useful to continue the story of Mr. Crain. Suppose that after serving time for his possession conviction he decided to keep the gun dissembled into the two separate pieces to remind him of the values of non-violence and neighborly behavior. Over time, the pieces of the gun corroded, and they were unable to be joined together, regardless of intent. Upon Mr. Crain's passing, the gun pieces were bequeathed to consecutive generations. Over time, they became viewed by family members as heirlooms, things altogether different from their original purpose. Indeed, the heirlooms were kept in a framed case, each ossified piece placed apart from one another. Mr. Crain's great-great-granddaughter, Ms. Sally Crain, has recently inherited them. But she no longer thinks of the

---

[190] MODEL PENAL CODE § 2.04(1) (AM. LAW INST., Proposed Official Draft 2007).
[191] *See, e.g.*, State v. Varszegi, 635 A.2d 816, 818–19 (Conn. App. Ct. 1993).
[192] *See, e.g.*, U.S. v. Albertini, 830 F.2d 985, 986–87 (1987); *see generally* Parry, *supra* note 50, at 52–53, 56–61 (1997) (discussing reliance defense).
[193] Simons, *supra* note 2, at 492.
[194] *Id.* at 525–43.
[195] Leonard, *supra* note 3, at 530.

pieces as a "gun" per se. She doesn't really think of them as *anything*. They have transmogrified into a curio. They are simply an heirloom. If anything, they are not-a-gun,[196] things that can only be referred to as distinct and unique from another familiar item that they once functioned as.

Now consider that Sally Crain brings this same heirloom to a friend's house to show it off as an unusual artifact with accreted family meaning and that a statute like the 1913 Texas statute remains on the books. Can she be properly charged for possessing a gun?

The concern in mistake of law analysis is preventing opportunistic behavior. That can't be allowed in a world where someone like the ancestor Crain can literally "take the law into his own hands" by dissembling a gun and stepping outside the boundaries of a relevant criminal statute. It cannot be this easy for an individual to simply remove themselves from the scope of a law. When making a guess about the boundary case of a contested or vague statutory word, the individual acts at his own peril. If a judge agrees that the statutory use of the word "gun" does not apply to Mr. Crain, he may go home. But if a judge decides—whether because of textual or purposive approaches to construction—that the word "gun" does apply to the items in Mr. Crain's pockets, then he may be fairly convicted, no matter how reasonable Mr. Crain's reading. Individuals who attempt to limit the scope of broad statutory language are not immunized. A court might include a toy gun or a dissembled gun as part of a statute like that in *Crain* because it is concerned about how other people might respond to something that resembles a gun.[197] The curio might trigger fear or panic.

But when it comes to mistake of fact, what matters is whether an individual has the opportunity to confirm what he is in fact doing. According to Peter Westen, these are situations in which an actor is "in need of the services of a good private investigator."[198] The problem with a case like Ms. Crain is that even with unlimited time or resources, she might not be able to discern the identity of the thing she possesses. If she removed the corroded, dissembled pieces from their casing and placed them in each pocket on her way to her friend's home, how would you describe what she is holding? It's the old koan of what happens to our lap when we stand up.

---

[196] *Cf.* ANTOINETTE PORTIS, NOT A BOX (2011) (concerning reconstituted objects and how they are *not* what they are derived from).

[197] *See, e.g.*, *Toy Guns and Weapons*, TRANSPORTATION SECURITY ADMINISTRATION, https://www.tsa.gov/travel/security-screening/whatcanibring/items/toy-guns-and-weapons (last visited July 30, 2022).

[198] Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 535 (2008).

Sally Crain's thing can only be described either as a counter-factual of what it is not[199] (a not-a-gun), or by reference to an abstracted category (as an heirloom).[200] Sally is not engaged in strategic behavior, like those whom we convict for making a mistake of law, nor did she fail to pursue available opportunities to confirm what she was doing or holding like those whom we convict for mistake of fact. She is in the opaque place of not possessing anything in particular (it's sui generis) but also possessing something that others might be veritably fearful of if Sally were to bring this to a public place. This is a contradictory mental space in which Sally believes she doesn't have a gun, but under a possession statute we might expect her to know she has a gun (epistemic akrasia).[201] A more likely situation regarding a statute criminalizing having a gun or gun-like thing in a public setting would be where the offense is strict liability, negating the capacity for mistake. She would not be able to negate the mens rea for "bringing a gun" no matter how reasonable her understanding of her own (not-a) thing.

VIII. CONCLUSION

Void-for-vagueness and mistake of law are historically viewed as orthogonal in that void-for-vagueness is commonly marshaled as a facial challenge and mistake of law is inherently an application challenge. The rare void-for-vagueness win is about statutory language that is standardless. The rare mistake of law win is when a defendant has a definite understanding of a perhaps broad term, and she has a valid claim as to why her definite understanding is the one that applies to her own conduct. But this article's analysis shows how these doctrines are linked once mistake of law is reframed as the "mixed case of mistake of fact and law." First, there is no reason to delimit vagueness inquiries to facial challenges. As recent as 2010, the Supreme Court recognized an as-applied challenge in *Holder v. Humanitarian Law Project*.[202] Second, in either the canonic vagueness or blended mixed mistake case, the defendant is subject to a legal-factual characterization of his own everyday conduct by an authoritative audience.

---

[199] *See* Garvey, *supra* note 70, at 376–82 (using counter-factual to analyze mistake of facts).

[200] The conceptual question of when a material thing transcends itself and becomes something like "art" (as in rap music) or an "heirloom" (in the Sally Crain hypothetical) is a heady one, and it also seems to rely on the mixed legal-factual question of when an item has become abstracted. For art, this might depend on quality and institutional/critical trends in the Art World. For heirlooms, this might depend on time and family tradition. The law has traditionally avoided the impenetrable question of "what is art?" but at times it has had to face it. *See generally* Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (2005).

[201] *See* Garvey, *supra* note 70, at 374.

[202] Holder v. Humanitarian L. Project, 561 U.S. 1, 18–20 (2010).

In the *Crain* hypothetical, this article edges up against the problem of mixed law and fact in which the conduct or thing at issue can only be given factual identity by reference to an adjunct legal term. Just as the hanging out ("doing nothing") in *Morales* is given identity by the legal framing of loitering, the "not-a-thing" possessed by Sally Crain is given identity by the legal framing of a gun statute.

So what should happen to Sally Crain? This article echos the reasoning of Professor Garvey that how mistake analysis is framed should be considered. It is not simply a mens rea negation, but more broadly fits into how society thinks about excuse and why people get to go home even after they do something assumed to be usually criminal.[203] In this way, mistake analysis can be viewed as an underlying principle-based analysis: was the defendant acting strategically, as in mistake of law analysis? Did the defendant ignore an opportunity to investigate, as in mistake of fact analysis? If the answer to each question is "no," then the court should consider excusing them.

The *Crain* hypothetical is not simply a thought experiment. This same logic surfaces in other difficult-to-articulate things that might be within the compass of criminal statutes. Consider void-for-vagueness challenges to statutes that criminalize designer drugs[204] and 3D guns.[205] What is a designer drug? It is not the same thing as a scheduled drug with which it shares chemical properties. Can it be described by anything other than its molecular structure (a somewhat ineffable prism)? And what is the code for a 3D gun? Is it something that can be articulated? Designer drug and 3D gun criminal charges should survive void-for-vagueness challenges. But perhaps this is not because of the linguistic certainty or narrowness of the relevant statutes. Indeed, it is very difficult to express how these statutes apply to the concerned items at issue. But these outcomes make sense when considering the first principles of mistake analysis. Those who manufacture designer drugs or make use of gun coding are aware of what they possess and that they are possessing it precisely to avoid the scope of a relevant drug or gun law.

This article surfaces the rare moments when a defendant might be criminally charged for behavior she cannot explain or describe. This same ineffability problem relates to that of "art threats" increasingly pressing on U.S. courts, as the Internet allows amateur artists to bypass institutional

---

[203] *Cf.* Garvey, *supra* note 70, at 360 ("In other words, we have stopped asking why a mistake of fact might, if at all, constitute a genuine excuse.").

[204] *See, e.g.*, Commonwealth v. Herman, 161 A.3d 194 (Pa. 2017) (upholding designer drug criminal statute in response to vagueness challenge).

[205] *See, e.g.*, Gun Owners of America v. City of Phila., No. 21-2630, 2021 U.S. Dist. LEXIS 193662 (E.D. Pa. Oct. 7, 2021) (pending litigation on 3D guns and vagueness).

gatekeepers and share their aesthetic product with the world, including audiences who might not share the same discursive or social background as the artist.[206] In this way, the question of "what is doing nothing?" connects to the questions of "what is art?" or "what is an heirloom?" Each of these questions integrate analyses of material fact and concept, and each may be characterized by an everyday observer.

This article argues for de-linking vagueness analysis from the language centricity of the Due Process Clause and instead thinking structurally about when individual defendants find themselves in situations in which they cannot challenge the legal-factual characterizations of situational actors. This opacity problem is surely rare, but so are problems related to other roving substantive principles of criminal law. They also are applied at the case-specific level—like *Holder v. Humanitarian Law Project*. Textbook authors must quest after cases like *Keeler v. Superior Court*[207] for retroactivity analysis or *Commonwealth v. Mochan*[208] for legislativity. And so, it is not surprising that academics are forced to hypothesize the ways that vagueness and mistake might still interact in a post-*Morales* world.

---

[206] Andrew Kerr, *Art Threats and First Amendment Disruption*, 16 DUKE J. CONST. L. & PUB. POL'Y 173, 177 (2021).
[207] Keeler v. Superior Court, 470 P.2d 617, 634–35 (Cal. 1970).
[208] Commonwealth v. Mochan, 110 A.2d 788, 791 (Pa. 1955) (Woodside, J., dissenting).